parties' procurators on the pursuer's appeal, and reviewed the whole precess—Finds that the premises, from which decree of removal is concluded for, now form *ex facie* a portion of the building known as the Royal Hotel, George Square, Glasgow: Finds that the said Royal Hotel is one of the subjects *in medio* in the multiplepoinding referred to in the interlocutor appealed against, presently pending in the Court of Session: Finds that the pursuer is admittedly a claimant in said multiplepoinding, and has not yet obtained any deliverance therein to the effect that the premises here in question are not a part of the subject *in medio*, or any deliverance preferring him to said premises: Finds that the other claimants in the multiplepoinding, who are no parties to this action, are entitled to be heard before the pursuer obtains any such deliverance: Finds that it is inexpedient to proceed further with this process until the way has been cleared as above indicated, else there might be a clashing between the procedure here and in the said multiplepoinding, or the same matter might be made the subject of investigation simultaneously in both Courts: Therefore adheres to the interlocutor appealed against, with this modification, that it shall be competent for the pursuer to move for the recall of the sist as soon as he has obtained a deliverance in the Court of Session which either withdraws the premises referred to in the summons from the multiplepoinding or prefers the pursuer thereto."

The pursuer appealed.

LEE and SOLICITOR-GENERAL for him.

BALFOUR in answer.

At advising—

LORD JUSTICE-CLERK—I am of opinion that there exists no ground whatever for sisting this action of removing, and therefore that we should alter the interlocutors appealed against, and remit the cause to the Sheriff to be proceeded with.

It is admitted that nothing can be done in the multiplepoinding which can affect the subjects dealt with in this action. The history and merits of these actions regarding the succession of William and Alexander Dunn are so familiar to your Lordships in this Division that I have no doubt your Lordships will agree with me that this action, which relates to a subject which belonged to Alexander Dunn only, cannot depend on the result of the multiplepoinding brought by his trustees. In that multiplepoinding the fund *in medio* can include only the heritable subjects which formerly belonged to William Dunn, Alexander's deathbed deed having been reduced as regards subjects acquired by him otherwise than by succession to his brother William. The pursuer, in whose name his curator has raised the present summons, is infeft in the subjects as heir-at-law of Alexander, and the only interest which the trustees can legitimately have in the action is to see that a proper division is made between their property and that of the pursuer, and that cannot be a matter of difficulty; but, whether it be difficult or not, it cannot be so well decided as by the Judge Ordinary in the present process.

LORD COWAN—I concur. No doubt the multiplepoinding embraced the subjects from which it is now sought to remove Carrick, but the multiplepoinding was raised before the decree of reduction, which had the effect of removing the subjects, which belonged to Alexander Dunn alone, from the control of his trustees. There is no competition in the multiplepoinding regarding this part of the hotel. The relative interests of the heir-at-law and the trustees in these buildings ought to be determined as speedily as possible, and cannot be better extricated than in this very process.

LORD BENHOLME—I cannot doubt that your Lordships are correct. These trustees, after a final judgment, in which it was settled that the subjects in dispute did not belong to them, took upon themselves to grant a lease of them—a proceeding as illegal as it was unwarrantable. Hence they wish for delay. They granted a lease which they cannot defend, and they support it in every way they can.

LORD NEAVES—I cannot say that I am one of those who view with satisfaction a rich man's inheritance contributing so largely as the property of these gentlemen has to the support of the judicial institutions of the country.

While I cannot say that it is surprising that the Sheriff should have been misled by the ingenuity of the arguments for the respondent, if the case was pleaded before him with the same ability as it has been stated to-day; nevertheless he has gone wrong, and I cannot but think that the attempt to sist this action is unreasonable. I think the questions in dispute do not depend in any way on the issue of the multiplepoinding, and that they ought to be at once and in this action disposed of.

Agents for Pursuer—Murray, Beith, & Murray, W.S.

Agent for Defenders—William Ellis, W.S.

Tuesday, December 6.

FIRST DIVISION.

FALCONER *v.* DALRYMPLE.

Loan—Agent—Implied Trust. Circumstances in which—the loan being admitted,—a borrower was *held* bound to pay £7000 to the lender, although he had conveyed his whole estate to his agent, who was also agent for the lender in the transaction, and in return had got a discharge of all his debts and liabilities; and the said agent had credited the lender in his books—but without his knowledge, and without any special authority from him to uplift funds—with the £7000, the agent subsequently becoming bankrupt.

This was an action at the instance of the Hon. C. J. Keith Falconer, late of the 4th Light Dragoons, against G. A. F. Elphinstone Dalrymple, late of Westhall, in Aberdeenshire, for repayment of a sum of £7000 lent by the pursuer to the defender through Messrs J. & A. Blaikie of Aberdeen, with the interest on the same so far as not paid. The loan took place under the following circumstances:—In 1853, Messrs Blaikie, who were then acting as the agents of both the pursuer and defender, advised the pursuer to lend the defender on heritable security over the estate of Westhall (which the defender had just purchased, and to meet the price of which he was obliged to borrow large sums of money), the sum of £7000, which had previously stood in another heritable security, but which was called up at Martinmas that year. After some correspondence, in which Messrs Blaikie explained the nature of the security proposed, the pursuer agreed to this arrangement, and instructed Mr John Blaikie to advance the money to the defender as suggested by him. This was accordingly done, and Mr John Blaikie, instead of a bond and disposition in security in the pursuer's favour, took an absolute disposition of the estate of Westhall

by the defender in his own favour, granting however a back letter in the defender's favour; the transaction was completed by the defender granting a promissory-note for £7000 in favour of the pursuer, which note was also signed by Mr John Blaikie as co-obligant. The interest on the loan was duly paid by Messrs Blaikie to the pursuer up to 20th December 1859, after which date they became insolvent, and their estates were sequestrated on 30th April 1860. In 1857, the defender having become involved, and finding that he could no longer carry on certain flax-works in which he was engaged, nor retain the estate of Westhall, entered into an arrangement with certain relatives of his own, who were also creditors, and Messrs Blaikie, to whom he was largely indebted. This arrangement was, on 30th June 1857, embodied in a deed called a mutual discharge, to which the defender, his relatives as above, and the Blaikies, became parties. This deed proceeds on a narrative to the effect that the defender, in consequence of the purchase of the estate of Westhall, and of erecting and carrying on flax-works, had become so deeply involved that the said estate and flax-works were not sufficient to meet his debts in full. It then contains the following clauses:—"And considering that by disposition of date the 28th day of November 1853, I conveyed the said estate of Westhall to the said John Blaikie, subject to a back letter granted by him to me of even date with the said disposition . . . ; and considering that the said John Blaikie lately entered into an arrangement with me, by which he agreed to discharge me in full, not only of his personal claims, but to take upon him the settlement of all debts and obligations incurred by me in the purchase of the said estate, and in relation to the said Westhall flax-works, on the following conditions, viz.,—*First*, That I should execute all such farther deeds as may be required by him, if any, to and in favour of the said John Blaikie, to place him in the uncontrolled possession of the whole property and effects, heritable and moveable, belonging to me, the said George Augustus Frderick Elphinstone Dalrymple, at and connected with the said estate and flax-works of Westhall; *Second*, That I, the said George Augustus Frederick Elphinstone Dalrymple, should obtain the consent of the parties hereto of the second part to forego any claim or ranking on the said property and effects so conveyed, or to be conveyed by me to the said John Blaikie. . . . . Therefore I, the said George Augustus Frederick Elphinstone Dalrymple, do hereby dispone, convey, and make over to the said John Blaikie all my right and interest in the said lands and estate of Westhall, as described in the title-deeds thereof; whole furnishings belonging to me in the house of Westhall, as per inventory in the hands of the said John Blaikie, with the said flax-works, and whole pertinents of the said lands; . . . and generally the whole heritable and moveable property on and connected with the said lands of Westhall and flax-works; . . . and I further bind and oblige myself not to interfere in any way in the settlement of the debts due by me; and further I, the said George Elphinstone Dalrymple, have renounced, discharged, and overgiven, as I do by this present discharge, renounce, upgive, and overgive to and in favour of the said John Blaikie and his foresaids, all right, title, and interest which I have in and to the said estate of Westhall and flax-works thereon, in virtue of the back letter granted to me by the said John Blaikie, which I have delivered up to him; . . . And we . . . the parties hereto of the second part, do hereby respectively, and each for himself and herself, relinquish and give up in favour of the said John Blaikie all right and interest which we respectively have in the said property and effects of the said George Augustus Frederick Elphinstone Dalrymple, hereby conveyed by him, relieving and discharging, as we do hereby free, relieve, acquit, and discharge, the said John Blaikie and his foresaids of all claim, right, share, or interest which we had, have, or might claim, or in or out of the said lands, property, and effects hereby conveyed by the said George Augustus Frederick Elphinstone Dalrymple to him, in consequence of advances made by us, or of cautionary obligations undertaken by us, or otherwise in any manner of way; And we, the said John and Anthony Blaikie, and John Blaikie and Anthony Adrian Blaikie, the individual partners of that firm, parties hereto of the third part, seeing that the parties hereto of the first and second parts have respectively fulfilled their parts of the said arrangement; . . . and in consideration of receiving the uncontrolled possession of the estate of Westhall, and other property at and connected therewith, belonging to the said George Augustus Frederick Elphinstone Dalrymple, have therefore exonered and discharged, as we do hereby exoner, acquit, and *simpliciter* discharge, the said George Augustus Frederick Elphinstone Dalrymple, his heirs, executors, and successors, not only of all claims, debts, and demands of whatever nature, which we have or could make against him at the date hereof, but also of all other debts, demands, and obligations of whatever nature and however constituted, by bond, bill, or open account, due and owing by him at the date hereof for or in relation to the said estate of Westhall, and in relation to the said flax-works, excepting always the debts due and owing by him to the said parties hereto of the second part, and all personal bills and accounts due by him unconnected with the said business of the flax-works, of all which debts we bind and oblige us and our foresaids to free and relieve the said George Augustus Frederick Elphinstone Dalrymple and his foresaids; and particularly, without prejudice to the foresaid generality, we hereby bind and oblige us and our foresaids to free and relieve the said George Augustus Frederick Elphinstone Dalrymple and his foresaids of the whole debts specified in the schedule hereunto annexed, and signed as relative hereunto, but always reserving to us and our foresaids the power of settling the said debts, or any of them, either by compromise or otherwise." The pursuer was not made a party to this deed, nor was he informed that it had been executed. In consequence of the conveyance herein contained, Messrs Blaikie sold the estate of Westhall, and on 20th December 1857 credited the pursuer in their books with the sum of £7000, but they never informed the pursuer that the said sum had been repaid into their hands, nor did they reinvest it for him or in his name, but still continued to pay the half-yearly interests thereon till the date of their bankruptcy.

The Lord Ordinary (MURE), on the ground that the loan was admitted to have been made, and that there was no evidence of repayment by the defender to the pursuer, or to any one authorised by him to receive it; and also, as the pursuer was not a party to the deed by which the defender was discharged of his debts and obligations by the

Blaikies, decerned against the defender in terms of the conclusions of the summons. The defender reclaimed.

The SOLICITOR-GENERAL and MARSHALL, for him, maintained that the Blaikies, being the money agents for the pursuer, the defender was entitled to rely upon their discharge to relieve him of his liability for the sum of £7000 here claimed. Moreover, that the Blaikies really did receive the £7000 and paid it to the pursuer, as was proved by the entry in their books, and the pursuer was therefore responsible for any loss he may have suffered through their bankruptcy.

WATSON and BALFOUR, for the pursuer, contended that the Lord Ordinary was right; the pursuer, never having authorised the Blaikies to uplift money or discharge debts for him, could not be held to be bound by his discharge.

At advising—

The LORD PRESIDENT—This is an action for repetition of a sum of £7000 advanced in loan by the pursuer, Mr Keith Falconer, to the defender, Mr Dalrymple, in 1853. The question whether there was a heritable security granted for this loan has been debated, but it does not appear to me that, in the result, that question is of much importance. A promissory-note was granted for the money, and that note has undergone the sexennial limitation. This, however, is of no importance, as the advance of the money is admitted, and the action is not laid on the note but on the debt. The sole question is therefore, whether the money was repaid by Mr Dalrymple or by some one entitled to act for him. The peculiarity consists in the fact that Mr Blaikie, or his firm of John and Anthony Blaikie, acted as agents for both parties in the transaction. Mr Keith Falconer had been in the habit of investing money through his agents Messrs Blaikie, and in August 1853 he had some verbal communication with Mr John Blaikie as to the reinvestment of some funds which were then standing in heritable security on the estate of Fingask. He was apparently dissatisfied with the investment, and wanted a higher rate of interest. In consequence of this verbal communication, Mr Blaikie wrote the pursuer on 28th September 1853 as follows: "You are aware that Westhall has been purchased in the name of Mr G. Dalrymple, by the help of a family arrangement, and £5000 I can place there. I shall be responsible personally for the safety of the money, as Mr Dalrymple gives me a security in relief over the estate. The other £2000 I can place in the Skene trust, which is altogether unexceptionable. The tightness in the money market enables me to secure a better rate. . . . At your leisure I shall be happy to hear from you, and to give effect to these suggestions if you approve of them." Now it is quite obvious from this letter, and the tone of the whole communcations between Mr Blaikie and the pursuer, that Mr Blaikie was not entitled to do anything in the way of uplifting or reinvesting funds without special authority. The pursuer wrote a very short letter on 4th October 1853 in reply to this, giving Mr Blaikie a general authority to carry out the transactions proposed. From this date no important letter passed between the parties until 11th January 1854, when Mr Blaikie wrote referring back to the previous correspondence; and after alluding to the uplifting of the investment on Fingask, and stating that he enclosed assignations for signature, he added, "I have arranged the reinvestment in the way you sanctioned." Mr Falconer, the pursuer, seems in some degree to have forgotten the explanations which he had received in the end of the year as to the nature of the investment proposed, and he therefore wrote Mr Blaikie on 18th January, saying, "Will you kindly explain to me what you are going to do with all the £7000 realised by the assignations you have sent me to sign, that is to say, I want to know how you are going to invest it." This again shows that Mr Falconer himself judged of what kind of investment he would accept for his money, and did not give his agents unlimited discretion in the matter. Mr John Blaikie was from home when this letter arrived, but his brother Anthony replied to Mr Falconer:—"The £7000 has been transferred to Westhall, with the view of a rather larger rate of interest being obtained. The security in your favour over that estate has now been completed, and the parties in whose favour the assignations are to be granted have been making inquiry about them several times." That letter was dated on 3d February, and on the 6th Mr John Blaikie himself wrote: "In regard to the deeds I sent you for signature, they were prepared in consequence of an arrangement as to the small rate of interest which the money was carrying, and I have supplied their place by the new security already in my hands for your behoof, so when you can conveniently sign them be so good as do so, and return them to us." Up to this time it is plain that Mr Blaikie, as the pursuer's agent, had not invested the £7000 which had stood in the Fingask security, and could not do so until he got the assignations back from his client, for, until he got them, he could not transfer to Westhall the money invested in that security. Up to this date, then, nothing had been completed. Mr Falconer does not seem, however, to have received these letters, for he writes somewhat impatiently from Paris on 15th February: "In answer to my letter you have written twice to say you would write to me in a day or two *apropos* of what I asked you about. You have not done so. Will you be good enough to let one of your clerks answer my letter about the assignations." After this he seems to have got the other letters, for, on 3d March, he wrote from London: "I enlose you the papers signed, etc. Please let me know exactly how you are going to invest this money, for I almost forget at present, and also tell me what difference that will make in my yearly income." In answer to this letter Mr Blaikie wrote a long letter on 9th March, in the course of which he says, "The £7000 paid up from Fingask I reinvested on Westhall, taking an absolute conveyance to the estate in security, and I guaranteeing the punctual payment of the interest, so all the rents will pass through my hands. I spoke at the time of putting £2000 of the sum in the Skene trust, but there was a difficulty at the time in procuring a proper voucher, and I did not therefore adopt what otherwise would have been a satisfactory opening." Here the correspondence closes, excepting for a letter from the pursuer, in which he apologises for any hasty expressions which he may have used, and expresses his approval of the investment. The money was therefore put in the hands of Mr Blaikie in March 1854 for re-investment, and it is not denied that it was devoted for the benefit of the defender by going to pay a portion of the price of Westhall. Concerning the loan there can be no doubt, but the nature of the security on which it was made must be considered before we can

decide whether the loan has been repaid. The only security granted consists of a disposition by the defender in favour of Mr Blaikie, which is called an absolute disposition, and which proceeds on the following narrative:—"I, George Augustus Frederick Elphinstone Dalrymple of Westhall, in the county of Aberdeen, heritable proprietor of the lands and others after disponed, considering that John Blaikie, advocate in Aberdeen, has interponed his security to enable me to borrow certain sums of money, and has bound himself in payment of the same; and more particularly that the said John Blaikie has, of the date hereof, subscribed, as joint debtor with me, two promissory-notes, payable six months after their date, one thereof for the sum of £7000 sterling, in favour of the Hon. Charles James Keith. . . . . And further, considering that as the whole of the foresaid sums of money were for my accommodation, and no part thereof for the use and advantage of the said John Blaikie, and that he interponed his security and became bound with me in payment of the same solely on my binding myself to grant the absolute disposition afterwritten, Therefore I, the said George Augustus Frederick Elphinstone Dalrymple, have alienated and disponed, as I hereby alienate, dispone, assign, and convey from me, my heirs and successors, to and in favour of the said John Blaikie, his heirs and assignees whomsoever, heritably and irredeemably, all and whole," &c. Now this narrative shows that this disposition, though *ex facie* absolute, was evidently meant to be a security. And it is in favour of Mr Blaikie in consequence of his interposing his credit in the note. Sasine was taken on the disposition, and there is a back letter of even date with this disposition, in which Mr Blaikie acknowledges "that the said disposition is granted to me in security and for payment of the sums which I have interponed my security, to enable you to borrow." Now this is apparently and in terms a security in favour of Mr Blaikie and for his relief, and so far as this case is concerned, for his relief for becoming bound along with the defender for the £7000 borrowed from the pursuer. It is needless to enquire whether this was a security in favour of the pursuer, because, whether it was so or not, it was rendered nugatory by subsequent proceedings. The loan remained on this security for a long period of time, but eventually the defender, who was engaged in speculations in flax, became seriously involved, and it at last became apparent that he could not go on with his works and could not retain the estate. It seems that the estate had been purchased by a family arrangement and with borrowed money, and when the defender became embarrassed he found he could no longer hold the estate. He accordingly consulted Mr Blaikie as to what was to be done, and the result of their consultation is that they enter into a deed which is called a mutual discharge. The pursuer had no communication with either the defender or the Messrs Blaikie at this time, and in point of fact was kept completely in the dark concerning what was being done. This mutual discharge is a most peculiar deed. There are three parties to it,—*first*, the defender; *second*, certain relatives of his who are also creditors; and *third*, the Messrs Blaikie; and it proceeds on the narrative, that in consequence of the purchase of the estate of Westhall, and of erecting flax-works, &c., the defender Mr Dalrymple became largely indebted to the Messrs Blaikie, and to his relatives mentioned of the second part, and that the said estate and flax-works are not considered to be sufficient for the payment and discharge of his debts in full. It then goes on as follows: "And considering, &c. (*reads excerpts from deed, quoted above*). Now the result of this somewhat complicated deed seems to be that the second parties to the deed come in only to postpone their claims to those of the Messrs Blaikie, and other creditors mentioned in a schedule at the end of the deed, and consequently we need not notice them any more. The arrangement between the Messrs Blaikie and the defender is, that the Blaikies take the whole of the defender's property in Aberdeenshire, the estate of Westhall, the flax-works and the plant, and in return they give him a discharge, not only of all debts owing by him to them, but also of all which he owed to any one else except to the parties of the second part. The defender in consequence gives up all interest even in the manner in which these debts are to be paid. Now, could this deed alter the position of debtor and creditor between the defender and the pursuer? I think not. The pursuer is not only not a party to this deed, but he knows nothing of it. There is also no evidence of his having given the Messrs Blaikie power to deal with his £7000 in an exceptional way, or to uplift it. Then if he had had a heritable security under the former deeds, this deed took that way. But the fact of his having a security is not the question; it is whether the loan was paid back. After this the defender left this country, and the affair is left in the hands of the Messrs Blaikie, who, in virtue of their powers, sold the estate. They ought then, as they were bound both in law and honour, to have paid the defender's debts out of the price. How they fulfilled this duty as regards the other creditors we cannot say, but they certainly did not pay the pursuer his £7000. What they did was to enter £7000 in their books at his credit, but they did not separate £7000 from the price and retain it in their hands, or reinvest it in any way for the pursuer. All they did was to make themselves debtors to the pursuer, which they were already under the note. Now this is not payment of the loan, unless they were specially authorised to uplift money and discharge debts on behalf of the pursuer. But they had no such authority. The defender seems to have made a disposition *omnium bonorum* in favour of his own agent, but no creditors were parties to this disposition, nor were any of them told of it. Then the agent is guilty of a breach of trust, and afterwards becomes bankrupt. But on that account the creditors of the defender cannot be exposed to loss through such a transaction as this, of which they were entirely ignorant. I am of the same opinion with the Lord Ordinary, and think that his interlocutor should be adhered to.

Lord Deas—After the careful narrative by your Lordship of the circumstances of the case, I need not go over them again. I have only to say that I concur generally, not only in the narrative, but in the conclusions at which your Lordship has arrived. I think that there is a good deal of evidence to show that Mr Falconer was made aware by Mr Blaikie that the security had been taken in Mr Blaikie's name, and was to be held by him for Mr Falconer's behoof. There is also pretty good evidence that Mr Falconer acquiesced in that arrangement, and if nothing more had taken place there

would be good grounds for holding that Mr Blaikie, with Mr Falconer's consent, had become trustee for Mr Falconer, and Mr Falconer would consequently be liable for any loss incurred by himself through Mr Blaikie. But, however that may be, I am of opinion that the mutual discharge narrated by your Lordship had the effect of making Mr Dalrymple responsible for the manner in which Mr Blaikie transacted the settlement of his debts; and accordingly, in a question between the pursuer and defender, both being innocent parties, as to which of them is to be held responsible for Mr Blaikie's shortcoming, the law makes the loss fall on Mr Dalrymple. I would not have been sorry if the law made it possible for the loss to fall equally on them both, but this cannot be done, and therefore the defender must be held liable to the pursuer for the £7000 which he borrowed.

Lord Ardmillan—I share Lord Deas' feeling, that it is a pity that the loss here cannot be divided between the parties. I have come to the same conclusion as your Lordship in the chair, that Mr Falconer merely meant to invest his money on a heritable security over Westhall; and I differ from Lord Deas. I do not think that he ever thought of Mr Blaikie as a trustee for his behoof. He thought that he himself was to be the person in whose favour the security was to be taken. But be that as it may, the question arises after all that is over. The mutual discharge between the defender and Mr Blaikie cannot be held as a payment of the £7000 to the pursuer. It may have many meanings —it may mean that Mr Blaikie thereby became a trustee for the defender to pay his debts, but such questions arise only between the defender and Mr Blaikie, and the pursuer has nothing to do with them. Mr Blaikie had no authority in writing from Mr Falconer; and he had no necessary authority to uplift money and discharge debts on Mr Falconer's behalf; and therefore the mere entry of £7000 in Mr Blaikie's books at the credit of Mr Falconer cannot be held to be a discharge of the debt. The result is, unfortunately, that the loss falls on an innocent party, but that cannot be helped.

Lord Kinloch—The present is an action at the instance of Mr Keith Falconer to enforce payment of the balance remaining due of a loan of £7000 made by him to the defender, Mr Dalrymple.

The Lord Ordinary has decerned in favour of the pursuer. I am of opinion that he has arrived at a right conclusion, though all the difficulties of the case were not in his view, and must now be considered by the Court.

There is no dispute that a loan of £7000 was made by the pursuer directly to the defender, and must be repaid by the defender, unless payment is already made, or what is equivalent can be established. The true question in the case is, whether anything having the legal effect of payment has occurred.

The point which seems for the most part to have occupied the attention of the Lord Ordinary was the fact that Mr John Blaikie, who negociated the loan, and managed the transactions connected with it, was the agent of both borrower and lender. But this fact has by itself no importance. The mere circumstance that the same law agent acted for both borrower and lender in making the loan, will never give that agent authority to uplift the money, and effectually to discharge the borrower. Any doctrine like this is wholly unauthorised, and would be most perilous. Special authority to uplift and discharge, either directly conferred or implied from the nature of the case, is indispensable. This accordingly was not the plea substantially pressed on us by the defender.

What was maintained was that the heritable security over the estate of Westhall, granted by the defender for the loan, was granted, with the pursuer's assent, in favour of Mr Blaikie, as substantially trustee for the pursuer; that Mr Blaikie, as such trustee, sold the estate of Westhall, and realised out of the price a sum sufficient to pay the debt due to the pursuer; and that having done so, any claim at the pursuer's instance lies exclusively against his own trustee, Mr Blaikie; and the defender is effectually discharged.

There cannot be any doubt of the relevancy of this ground of defence. If it was made out in point of fact, the defender would be effectually discharged. But I think that in matter of fact the defender has failed to make out his allegations.

The loan was transacted towards the end of 1853. The pursuer, the lender, unquestionably intended that it should be a loan on heritable security. He was uplifting his money from such a security, and his view was to obtain a higher rate of interest, and a security over the estate of Woodhall. It was undoubtedly in this view that he engaged in the transaction. But as to the precise form of the deed which should constitute the security, the pursuer was not in a position to know much himself. He had very recently attained majority, was a subaltern in a dragoon regiment; and was not a man of business in the practical sense of the term.

The usual form of security was an heritable bond taken directly in Mr Falconer's favour. If with his consent the heritable bond had been granted in Mr Blaikie's favour, for his, Mr Falconer's behalf, this would have been the same thing, and Blaikie would have been his trustee. But I think it clearly proved that no such heritable security was ever granted by the defender. What was done in truth towards the pursuer by the defender, and Mr Blaikie as his agent, was to give the pursuer no heritable security at all, but to make the loan simply rest on personal obligation. A joint-promissory note for £7000 at six months' date from 28th Nov. 1853, was granted by the defender and Blaikie in favour of the pursuer, and deposited amongst the pursuer's papers in Mr Blaikie's hands. As regards security, a deed was, of the same date of 28th Nov. 1853, executed by the defender in favour of Mr Blaikie personally, in the form of an absolute disposition of the estate of Westhall, and proceeded on the narrative that Blaikie had interposed his security for the defender for various sums, particularly for this sum of £7000 lent by the pursuer, and for another sum of £3000 lent by Miss Henrietta Dalrymple, and that this was done on the condition of this disposition to Westhall being granted to him. The same day a back letter was granted by Blaikie to the defender, acknowledging that this disposition was "granted to me in security, and for payment of the sums which I have interponed my security to enable you to borrow, and for which I have bound myself along with you in payment;" and binding himself to re-convey the estate to the defender so soon as he should be relieved of his obligation.

I think it plain that this deed of disposition can in no sound sense be regarded as an heritable secu-

rity granted to Blaikie as trustee for the pursuer. It is a security to Blaikie personally in relief of his personal obligations undertaken for the defender. It was not a security enuring either in form or substance to the pursuer. It was a security which it was entirely in Blaikie's power to keep up or discharge as he might think fit, without the pursuer being entitled in any way to interfere with or control him. It was a security which never came into operation unless Blaikie actually paid money on his obligations; and which, if no money was paid, fell *eo ipso* to the ground. If Blaikie became bankrupt without fulfilling his obligations, there was no ground on which the pursuer could step in to vindicate the security for himself. Either the right under the absolute disposition would pass to Blaikie's general creditors, or, supposing that the terms of the transaction were such as to preclude this result, the right would revert to the defender, who expressly made it a deed of relief to Blaikie personally, and not a deed of any other sort whatsoever.

Without going further than this transaction, I think there is enough to show that no such thing occurred, in point of fact, as the constitution of an heritable security in Mr Blaikie's favour, as trustee for the pursuer, in respect of this debt of £7000.

But matters do not rest here. In the year 1857, and of date 30th June in that year, another deed was executed between Blaikie and the defender, —putting it, as I think, altogether out of the question to consider Blaikie as trustee for the pursuer in this matter. By this deed the defender made over the estate of Westhall to Mr Blaikie absolutely, and as his unqualified property thereafter, and renounced and discharged in Mr Blaikie's favour the reserved right remaining to him under the back letter granted by Blaikie in 1853. On the other hand, Mr Blaikie bound himself to undertake personally the discharge of all the defender's debts connected with that estate; and both he and his firm exonered and discharged the defender "not only of all claims, debts, and demands of whatever nature, which we have or could make against him at the date hereof, but also of all other debts, demands, and obligations of whatever nature, and however constituted, by bond, bill, or open account, due and owing by him at the date hereof for or in relation to the said estate of Westhall, &c., of all which debts we bind and oblige us and our foresaids to free and relieve the said George Augustus Frederick Elphinstone Dalrymple and his foresaids." In this way Mr Blaikie engaged in a private and personal speculation, by which he obtained for himself the estate of Westhall; and, on the other hand, took on himself the defender's obligations so far as that estate was concerned. The transaction might be a profitable one if land rose in price, and Westhall yielded on a sale more than the amount of the debts. On the other hand, it might be a very losing speculation, as it is said it turned out in point of fact.

When this transaction, to which it is not pretended the pursuer was any party, is considered, I think it utterly impossible to hold that Westhall was held and realised by Mr Blaikie as trustee for the pursuer. The very conception of a security was put an end to by this deed; for Mr Blaikie acquired Westhall as his individual property. He could sell or dispose of it at pleasure, and was not bound to dispose of the money otherwise than as he chose. If he became bankrupt, his general creditors clearly took the property. The transaction only confirms what I think sufficiently established by the previous proceedings. No such thing occurred in point of fact as a conveyance of Westhall to Mr Blaikie in the character of trustee for the pursuer. The pursuer was left with nothing from the first downwards, except the joint promissory-note granted in his favour by the defender and Blaikie. This gave him a personal claim against the defender, and a personal claim against Blaikie, but no other right whatever.

The result is, that when Westhall was afterwards sold by Blaikie, it was not sold by him as trustee for the pursuer; nor was any part of the price received by him in that character. The price was received by Blaikie for his own behoof, and went into his own coffers. Admittedly, no part of it was received in point of fact by the pursuer. And this being so, it is of no sort of moment that Blaikie entered £7000 in his books to the pursuer's credit. The pursuer did not sanction, did not even know, of this entry; and it is scarcely necessary to say that for any one to enter in his books a sum to the credit of another without that other's assent, does not infer payment to that other, nor a receipt by him of the money in a question with any third party. Such an entry is just the device by which an act of appropriation is at times apparently justified even to the conscience of the man by whom the act of appropriation is performed. No entry to the pursuer's credit in the books of Blaikie, made without authority or assent from the pursuer, will infer payment by the defender to the pursuer. Unquestionably this result would have been operated had the money been uplifted by Blaikie in the character of trustee for the pursuer. But the facts, as these are clearly established, appear to me to exclude this supposition.

There was much discussion before us as to the terms of the correspondence between the pursuer and Blackie, when the loan was negotiating in the end of 1853; and the defender maintained that this correspondence showed the pursuer's acquiescence in Blaikie holding the security as his trustee. The correspondence appears to me rather to show that the pursuer possessed no definite idea as to the precise form of the security, which is just the thing likely to happen with a young officer situated as he then was. In more than one of the letters the deed is pretty distinctly set forth as a security to be held by Blaikie for his own individual relief. In others it is apparently mentioned as an heritable security to the pursuer; and undoubtedly the pursuer could have no other conception than that, in some way or other, his money was heritably secured. But of what avail is it to inquire what the pursuer may have thought was intended, when the fact remains unquestionable that the defender never did grant a security to Blaikie to be held by him as trustee for the pursuer? The question is not so much what the pursuer thought, as what the defender did. Suppose that the pursuer was willing, as no doubt he would have been had it been proposed to him, that the security should be vested in Blaikie as trustee for his behoof, the undoubted matter of fact is that the defender never so vested the security. This simple fact seems to me conclusive of the whole case. The defender admittedly received this money from the pursuer. The question is, whether, to the extent pursued for, it was repaid to the pursuer by the defender? The only mode in which it can be said to have been repaid is that the defender granted a security to Blaikie as the pursuer's trus-

tee, by the disposal of which the money was realised. So soon as it is discovered that no such security was ever granted by the defender, his whole case falls to the ground. The alleged repayment never was made, and must still be made by the defender.

On these grounds, I think the judgment of the Lord Ordinary should be affirmed, so far as it decerns against the defender in terms of the conclusions of the action. But I rather think that the findings of the Lord Ordinary do not represent with sufficient accuracy the process of reasoning by which this conclusion is reached.

Lord Ordinary's interlocutor substantially adhered to.

Agents for Defender and Reclaimer—Mackenzie, Innes & Logan, W.S.

Agents for Pursuer and Respondent—M'Ewen & Carment, W.S.

Tuesday, December 6.

SECOND DIVISION.

HILL *v.* ARTHUR.

Deed—Testing Clause—Omission of Name of Writer—Judicial Production—Act 1681, *c.* 5. A testamentary writing was written by the doctor of an infirmary for a man on his deathbed, who subscribed it before witnesses. It was probative in every respect, except that the writer was not designated.

Thereafter the widow of the deceased was confirmed executrix *qua* relict, and produced the deed before the Commissary in that process. Ten years afterwards, a conditional legatee under the said testamentary writing brought an action against the widow founding on the deed, which was produced in process. The writer was still alive. *Held*, that the judicial production of the deed terminated the implied mandate in the person to whom the deed had been delivered by the granter to fill up the testing clause, and that the deed must be held null, under the Act 1681, cap. 5.

This was an appeal from the Sheriff-court of Lanarkshire in an action at the instance of Hill and his mandatory against Mrs Arthur, as executrix of her deceased husband Thomas Hill, for a conditional legacy left to the pursuer by a testamentary writing executed by the deceased Thomas Hill. Thomas Hill, on the day of his death, 17th September 1856, executed the testamentary writing in question in the Royal Infirmary of Glasgow. It contained the following clause:—"In the case of my son Edward Hill not arriving at his majority the £75 sterling which I leave to him are to be equally divided between my wife Alice Ann Hill or M'Can and Thomas Hill, son of James Hill, and now residing in County Down, Ireland." It concluded:—"I sign these presents on this seventeenth day of September, One thousand eight hundred and fifty-six, in the presence of George Rainy, doctor of medicine, Glasgow Royal Infirmary, and William Taylor, porter, Glasgow Royal Infirmary." It did not, however, contain the name of the writer, but was in point of fact written by Dr Rainy. The defender Mrs Arthur was thereafter confirmed executrix-dative *qua* relict of the deceased, and the testamentary writing in question was signed as relative to her oath to the inventory of the moveable estate, and recorded in the Commissary-court books. Edward, the son of the deceased, died on the 4th December 1858 before reaching majority, and on 3d July 1868 the pursuer brought the present action for the half of the sum of £75 due to him under the testamentary writing on the death of Edward.

The defender pleaded—(1) That the testamentary writing was invalid, in respect that it was neither holograph nor tested; and (2) that even if it were, the deceased had left no funds out of which, after payment of debts and preferable claims, the legacy could be paid.

On 11th November 1868 the Sheriff-Substitute (DICKSON), on the motion of the pursuer, and on his statement that he had not previously had access to the testament of Thomas Hill, and that the person who wrote it was still alive, allowed him to have the testing clause completed, reserving all objections competent to the defender.

Thereafter, on 19th March 1869, he pronounced another interlocutor, finding that the testamentary writing being now filled up in the testing clause, repelled the defence that the writing was neither holograph nor tested. He observed in his note:—"The judgment sustaining the validity of the document in question, although the testing clause has been completed *ex intervallo*, proceeds on the principle that a party executing a deed with a blank in the testing clause, gives a mandate to the party in whose hands he places the deed to complete it according to law. That principle has been applied in numerous cases—viz., *Drury* v. *Drury*, 1753, M. 16,936; *Bank of Scotland* v. *Telfair's Creditors*, 1790, M. 16,909; *Dick's Trustees* v. *Dick*, 1798, Hume's Decs., 908; *Blair* v. *Earl of Galloway and Others*, 15th November 1827, 6, S. D. 51; *Leith Banking Company* v. *Walker's Trustees*, 22d January 1836, 14, S. D. 332; *M'Leod* v. *Cunningham*, 1841, 3, D. B. M. 1288, affirmed 5 Bell's App. Ca., 210; *Shaw* v. *Shaw*, 1851, 13 D. B. M. 877; *M'Pherson* v. *M'Pherson*, 1855, 17 D. B. M. 357; *Rait* v. *Primrose*, 1859, 21 D. B. M. 965. The defender urged that the cases in which the testing clause has been sustained, when completed *ex intervallo*, were cases of onerous deeds, whereas the document in question is not so, but is testamentary. The Sheriff-Substitute, however, has not found anything in the decisions to indicate that a distinction in this respect exists between onerous and gratuitous deeds. On the other hand, the tendency of the law is to support, and even to favour, testamentary writings, Stair, 3, 8, 34; Erskine, 3, 2, 23; *Buchanan* v. *M'Artey*, M. 16,955; *Bog* v. *Hepburn*, M. 16,960; *Stewart* v. *Ashley*, 16,857; *Hardie* v. *Hardie*, 6th December 1810; *Rintoul* v. *Boyter*, 1833, 5 Deas and Anderson, Rep. 215, affirmed 6 W. and S. 394. It is true that the authority of these cases as to testing clauses completed *ex intervallo* has been somewhat shaken by *M'Neille* v. *Cowie*, 1858, 20 D. B. M. 1229; but as there is no judgment of the Court overruling them, the Sheriff-Substitute has deemed it his duty to follow them in this case. He has been the more disposed to do so on account of the circumstances that the document was produced by the defenders, because this circumstance indicates at least *prima facie* that it was placed in the hands of the female defender, as custodier, and with the view of its being completed, and made a valid deed, and also because there is nothing on record to indicate that the deceased, either when he subscribed the document or afterwards, intended that