9th of February that any decree for expenses was pronounced, and that by the interlocutor upon which the charge under suspension proceeds. There would therefore, as the Lord Ordinary reads the interlocutor of the 22d of November, have been no incompetency, notwithstanding the terms of it, in the Dean of Guild, upon the mistake being discovered, rectifying the matter by allowing the respondent to lodge an account of his expenses, upon a motion made to that effect, and thereafter proceeding to dispose of the question of expenses, upon the accounts being taxed. But this, in the view the Lord Ordinary takes of the matter, was substantially what occurred in the present case. For although no other interlocutor was pronounced between the 22d of November and the 9th of February 1871, the respondents' account of expenses was submitted to the auditor for taxation, due notice having been given to the complainer's agent of that having been done; and it was not until after three diets for taxation had been fixed, of all which due notice was sent to the complainer, but at none of which he appeared, that the account was taxed, and a decree pronounced on the 9th of February 1871 for expenses in favour of the respondents.

"Now, this interlocutor contains an *ex facie* good decree for expenses, pronounced after taxation of the account by the proper officer of Court. It is proved that it is framed in conformity with the opinion which was formed by the Judge at the time he heard parties on the question of expenses, and that it carries out the instructions relative to expenses, on which the clerk proceeded in drafting the interlocutor of the 22d of November. It is therefore an interlocutor which is calculated to carry out the substantial justice of the case; and as it bears no express reference to, and is not necessarily dependent upon, the interlocutor of the 22d of November, the Lord Ordinary has come to the conclusion, though not without hesitation, that he would not be warranted in suspending the charge proceeding upon it simply because of the irregularity which occurred in dealing with the interlocutor of the 22d of November."

The complainer reclaimed.

Authorities cited—16 and 17 Vict. c. 8, sec. 20; A.S. 1839, sec. 63; *Miller*, 12 D. 964; *Fell*, 8 S. 543; *Palmer*, 10 S. 252; *Ker*, 14 S. 180: *Drew*, 1 D. 467; *Gray*, 2 D. 128.

The Court unanimously adhered, and found the respondents liable in expenses, subject to modification.

Counsel for Reclaimer—Scott. Agents—Rhind & Lindsay, W.S.

Counsel for Respondents—Watson and Balfour. Agents—Graham & Johnston, W.S.

Tuesday, May 13.

SECOND DIVISION.

MAGISTRATES AND MINISTER OF KINTORE *v.* TAIT'S EXECUTORS.

Trustee—Liability — Legacy — Discharge — Mutual Agent.

A, as trustee for a sum of money left to the minister and corporation of a burgh for charitable purposes, to meet the legacy uplifted an heritable bond through his agents (who also acted for the minister and corporation). A discharge was granted, signed only by the minister. The money remained in the agents' hands, and on their bankruptcy a question arose between A's executors and the corporation and minister. *Held* that the former were not liable, in respect that the latter had by their action acquiesced in the intromissions (1) of the mutual agent, (2) of the minister.

This case came up on appeal against the interlocutor of the Sheriff-Depute (J. Guthrie Smith) confirming that of the Sheriff-Substitute (Comrie Thomson). By trust disposition and settlement executed by George Mackay, formerly merchant in the burgh of Kintore, dated 8th February 1831, he gave, granted, and disponed to and in favour of John Smith, merchant in Aberdeen, his nephew James Blaikie, advocate in Aberdeen, and Thomas Tait, farmer in Crichie, and the survivors and survivor of them accepting, as trustees for the purposes therein mentioned, his whole estate and effects of every kind; and he declared the said trust to have been granted, *inter alia*, "in the fourth place, in payment to the Magistrates and Town Council of the burgh of Kintore, and the Minister of the parish of Kintore, all for the time being, of the sum of £400 sterling, which sum the said Magistrates and Minister shall lay out on good security, and divide the yearly interest thereof amongst the poor of the said burgh and parish, one half being paid to the poor of the burgh, and the other half to the poor of the parish." It is thereby also declared that the legacy should be payable on the first 20th day of June or December after the death of Mrs Nicholas Mackay or Smith, the truster's sister, "with interest thereon after, during the non-payment." This lady died on the 7th September 1853, and consequently the legacy became payable on the 20th day of December 1853. Thomas Tait was at the time of Mrs Smith's death in possession, and had the control of the funds set apart for the legacy as the sole surviving acting trustee of George Mackay, and he uplifted a heritable bond of £700 belonging to him as trustee, for the purpose, *inter alia*, of paying the legacy.

On the death of Mrs Smith, a claim to the legacy having been made by the Parochial Board of the parish of Kintore, a submission was entered into, and George Moir, Esq., advocate, by his decree arbitral of 25th July 1854, found as follows:—"I find that the foresaid legacy of £400, left by the said George Mackay to the Magistrates and Town Council of the burgh of Kintore, and Minister of the parish of Kintore, for behoof of the poor of the said burgh and parish, one half being paid to the poor of the burgh, and the other half to the poor of the parish, is not transferred to the Parochial Board of Kintore by the operation of the 'Poor-Law Amendment Act" of 8 and 9 Vict. cap. 83, but that the same remains with, and falls to be administered and applied by, the said Magistrates and Town Council and Minister of Kintore, in terms of the trust disposition and settlement of the said George Mackay: I find that they, as the parties entitled to uplift and administer the said fund, are bound, on payment, to grant a regular and valid discharge to the said Thomas Tait, as sole surviving trustee of the said George Mackay, of the said sum of £400, with any interest which may have accrued, or may accrue, thereon; I find

that the expense of the said discharge ought to be paid out of the said fund itself: I find, also, that the expenses of all parties in this submission ought also to be paid out of the said fund, these expenses having been reasonably and properly incurred in ascertaining to whom the said fund belonged, and by whom it fell to be administered; and I decern accordingly: And I decern and ordain implement by all parties of this decree-arbitral, under the penalty contained in the said submission, over and above performance: And, further, ordain the said submission, with my acceptance thereof, and the foresaid decree-arbitral, to be registered in the terms and for the purposes specified in said submission."

Certain transactions, fully narrated in the opinion of the Court as read by Lord Benholme, subsequently took place, but from the bankruptcy of Messrs Blaikie, on April 30, 1860, no steps had been taken to enforce any payment until after the death of Mr Tait on 11th Sept. 1870.

The defenders (appellants) were Thomas Tait's only surviving and accepting trustees and executors, and they pleaded—"(1) The legacy sued for having been paid to the pursuers, or to their duly authorised agents, with their full authority and approval, and said payment having been confirmed, recognised, and adopted by the pursuers and their predecessors in office, the defenders are entitled to be absolved. (3) The author of the defenders not having been guilty of gross and culpable negligence in the discharge of his duty as trustee, was not personally liable for the loss of the fund in question, which arose from the bankruptcy of Messrs Blaikie. (4) The pursuers having received payment of the legacy, and entrusted the same to Messrs Blaikie, must suffer the loss arising from their bankruptcy. (6) *Separatim.* The pursuers having dealt with Messrs J. & A. Blaikie as custodiers of said sum of £400 for their behoof, and as their agents, are barred from now averring that the said J. & A. Blaikie held the said sum as agents for the defenders' author."

On the other hand the pursuers (respondents) pleaded (1) "The pursuers are entitled to payment of the legacy in question from the defenders, as trustees and executors of the deceased Mr Tait, who was the last surviving trustee and executor of the said George Mackay. (2) The right of receiving payment of, and discharging the legacy in question, and undertaking the duty thereby imposed, was in the trustees jointly, and not in any of the individual members; and, before the corporation could be bound, an Act of Council must have been previously made in that behalf. Such an Act is not even alleged. (3) The trustee (Tait) having received payment of a heritable bond belonging to the trust estate, and having thus taken possession of £400 of trust funds for payment of the legacy of that amount, cannot plead the bankruptcy of his agents, in whose hands he had placed the amount, as an excuse for non-payment of the legacy. (4) It was the duty of the defenders' author to see that he got a regular and valid discharge for said legacy. (6) *Separately.* Supposing payment of the legacy in question had been made by the defenders' author to Messrs Blaikie, and that they had been agents for both parties, that would not have discharged the pursuers' claim for the legacy."

The Sheriff-Substitute, after probation and hearing of parties, pronounced an interlocutor decerning against the defenders, and finding the pursuers entitled to expenses; and in his note *inter alia* he adds—"There can be no doubt that Mr Tait acted *in optima fide*, and with a desire to do what was strictly fair and honest to the beneficiaries under the trust which it fell to him to administer. But the Sheriff-Substitute is unable to find any legal ground on which it can be successfully maintained that liability for payment of the legacy in question does not attach to Mr Tait's estate." On appeal the Sheriff-Depute affirmed this judgment by the following interlocutor of 5th July 1872:—"The Sheriff having considered the reclaiming petition for the defenders against the interlocutor of 3d May 1872, with the answers thereto for the pursuer, and having also considered the record, proof, productions, and whole process, dismisses the appeal, affirms the interlocutor appealed against, and decerns.

"*Note.*—That a trustee is liable for the loss of a trust fund caused by the fraudulent act of his solicitor, although in employing such solicitor he may have exercised ordinary care and discretion, is a principle of familiar application, of which the case of *Bostock* v. *Floyer*, 21st November 1865 (L. R., 1 Eq. 26), is a recent and instructive illustration. Of the two innocent persons, one of whom must suffer by the wrongful acts of the solicitor, it is better that the loss should fall on him who trusted the deceiver rather than a stranger. If, therefore, Messrs Blaikie, in whose hands this fund was lying at the time of their bankruptcy in 1860, were only the agents of Mr Tait the trustee, there can be no doubt whatever that the defenders are bound to make good the loss.

"The question then is, Were the Messrs Blaikie agents of the pursuers to receive this money?

"A trustee paying a legacy to an agent of the person named in the will is bound to satisfy himself as to the genuineness of the agent's authority; although this authority need not be in writing, as Mr Lewin observes, 'No trustee would act prudently if he parted with the fund to an agent without some document producible any moment, by which he could establish the facts of the agency.'—(*Lewin on Trusts*, 285.)

"It is not enough for the defenders to show that the Messrs Blaikie were the pursuers' agents for some purposes. A man may be so without having any authority to uplift money; of which a case recently decided, arising out of the same failure, is an example,—*Falconer* v. *Dalrymple* (6th December 1870, 9 M'P. 212.) The question is, Did the Blaikies ever receive any authority from the Magistrates of Kintore to uplift this money from the trust estate for their behoof? Of this there is literally no evidence whatever. A difficulty having arisen soon after the passing of the Poor Law Amendment Act as to the persons who, under the terms of the will, were *in titulo* to receive the legacy, a deed of submission was entered into to the late Mr Moir; and as Mr Blaikie had hitherto managed the affairs of the trust for Mr Tait, the trustee, all parties appear to have acquiesced in his carrying through the proceedings before the arbiter. But when Mr Moir decided, in July 1854, that the fund did not fall to be paid to the Parochial Board of Kintore, but to the parish minister and the Magistrates and the Town Council of the Burgh, nothing whatever was done by these parties to constitute the Messrs Blaikie their agents *to receive the money.* The Sheriff is there-

fore driven to the conclusion, that although the case is another instance of the risks attending the office of a trustee, the interlocutor of the Sheriff-Substitute, holding the defenders liable, must be affirmed."

The defenders appealed to the Court of Session, and were allowed on 30th Jan. 1873 an amendment of their statement, setting forth that Mr Ross, the minister, assumed the right, and held himself out as being entitled to act, and as acting in the matters above mentioned, on behalf of the Magistrates and Town Council of Kintore, as well as for himself; and the terms of the arrangement entered into with Messrs Blaikie were brought to the knowledge of the said Magistrates and Town Council, and were acquiesced in and acted upon by the whole trustees of the legacy. On the faith of the arrangement, Mr Tait took no further steps for getting himself, as Mackay's trustee, discharged of the said legacy. Throughout these transactions, and down to the date of their bankruptcy, Messrs Blaikie were not only in good credit, but were of the highest standing in their profession, and were believed to be possessed of large means. By the delay of the pursuers in bringing this action, the defenders and their author suffered great prejudice, not only through the loss of most important evidence, but also through their being deprived of any successful recourse against the Messrs Blaikie. Likewise this additional plea was appended—"The legacy in question having been left in the hands of the Messrs Blaikie, under an arrangement made or sanctioned by the pursuers as aforesaid, the defenders are not liable for any loss incurred through the insolvency of the Messrs Blaikie."

At advising—

Lord Benholme—The late George Mackay, a bailie of Kintore, left a trust-settlement, dated in 1851, in favour of certain trustees (of whom the late Thomas Tait, farmer in Crichie, came to be the sole survivor) by which he left three charitable legacies, one of £200 to the Aberdeen Infirmary; another of £100 to the Kirk-session of the parish of Premnay; and a third, the subject of the present action, —(*His Lordship here read the clause in the trust-disposition and settlement as narrated above*).

These legacies did not become payable till the death of the testator's sister, which happened in the year 1853, by which time Thomas Tait had become the sole surviving trustee. Tait instructed his agents, Messrs John and Anthony Blaikie of Aberdeen, to discharge these legacies; and put them in funds to do so by empowering them to call up an heritable debt due to the trust-estate of £700. No difficulty occurred as to the two smaller legacies, which were accordingly discharged. But the Parochial Board of Kintore having claimed right to the £400 legacy, a submission was entered into by all the competing parties to the late George Moir, Esquire, Advocate, in the conduct of which the Blaikies acted as agents for all the parties concerned. This submission was signed by William Fraser and William Catto, two of the bailies of Kintore, on behalf of the Magistrates of Kintore.

On 25th July 1854 Mr Moir pronounced his decree-arbitral, by which he repelled the claim of the Parochial Board, and found that the Magistrates and Town Council, and the Minister, on payment, were bound to grant to Mr Tait a regular and valid discharge of the legacy of £400, with any interest that might have accrued upon it, and that the expenses of the submission and discharge ought to be paid out of the fund itself.

The parties forthwith proceeded to obtemper Mr Moir's award. A draft discharge of the legacy was made out by the Blaikies, and sent to Mr Tait for revisal. On 28th August 1854 the draft was returned by Mr Tait, with a letter in which he said he saw nothing to alter. The draft was extended, and the discharge was actually signed by Mr Ross, the then minister, in presence of witnesses. The term of payment being arranged as the 20th September 1854, the interest up to that date, was specified in a statement subjoined to the discharge, as 2½ per cent up to 15th May 1854, and thereafter till the term of payment as 3 per cent.

From this time till 1860, when the bankruptcy of the Blaikies occurred, Tait heard no more of the matter. He was undoubtedly under the belief that the legacy had been actually paid to the legatees by the Messrs Blaikie, and he remained under this belief till 1860, when he ascertained that in the interval an understanding had been come to by which, with the concurrence of the legatees, the fund was to be left in Mr Blaikie's hands till it should accumulate to the original sum of £400 of principal, after paying the expenses of the submission and the discharge. Why the discharge was never signed by the Magistrates and Town Council of Kintore does not appear. Anthony Blaikie, who took the management of the matter, is dead. He also was the party with whom Mr Ross made the arrangement by which the Blaikies undertook to hold the money at an increased rate of interest; 4½ per cent. at first, and afterwards 4 per cent.

That such an arrangement took place is positively deponed to by John Blaikie, and by Alexander Stronach, the confidential clerk, both of whom had their information from Anthony Blaikie. Mr Ross never during his life denied the fact of the arrangement, and by his correspondence with the Blaikies' firm it is proved in the most satisfactory manner.

The Blaikies, in their letter of 24th December 1856, advert to and detail the matter of interest; and Mr Ross, in his letter of 25th July 1859, refers to the Blaikies' letter of 24th December 1856, from which he infers "there was a balance at last term after making up the £400 in your hands." He goes on to say, "Will you be so good as get a good minute book, or rather one ruled for cash, and enter in it a statement of the fund from the time it was paid till last June term, showing the state then."

The time here referred to, as that at which the money was paid, plainly was the time when it became an investment in the Blaikies' hands, at the higher rate of interest.

Mr Ross' letter concludes as follows, "I see the interest mentioned in your letter referred to is 4½ per cent.; but this I consider rather high to be continued in future; however, we can arrange this at the meeting for distribution."

On 22d December 1859 the Blaikies wrote to Mr Ross as follows: "You will find our account brought down to 20th current, showing that after making up the principal sum to £400, we had to pay you over for distribution, £5, 11s. 7d. We have hitherto been able to allow 4½ per cent. per annum; but interest being generally lower now, we do not mean to allow more than 4 per cent. per annum, and you will be kind enough to make this intimation to your first meeting."

The intimation here required was made at the important meeting of the Magistrates, Town Council and Minister of Kintore (to which I mean afterwards to refer), and was acquiesced in by all the parties.

That Mr Ross, the Minister, did take upon himself the active and personal management of the joint legacy, and did invest it in the hands of the Blaikies, so far as he had authority to do so, is thus perfectly ascertained. But it has been argued that the Magistrates of Kintore did not authorise his actings in this respect; and to that question it is proper specially to attend.

I may notice, in the first place, the intimate connection which the Blaikie family had from the beginning with the legacy of £400; and more especially with the Magistrates' share of that bequest.

James Blaikie, the father of John and Anthony, was one of the original trustees of George Mackay the testator, along with Tait and Smith, and as long as he lived administered this legacy in respect of the liferentrix. John Blaikie, his son, was Town Clerk of Kintore down to the time of the bankruptcy of the firm; and Anthony Blaikie, the other son, was a councillor of the burgh.

At the time when the Blaikies undertook to hold the legacy at a high rate of interest, they were in undoubted general credit; and it may well be contended that the Magistrates, in concurring in that arrangement, were not violating the duty imposed upon them by the legacy itself (as well as by the decree arbitral), of laying out the money on good security.

A succession of their minutes shows that they communicated with the minister about it, and looked to him for its active administration.

In his letter to the Blaikies of 25th July 1859, Mr Ross accuses himself of fault in neglecting to attend to George Mackay's bequest, and adds that the Bailies and the Dean of Guild (who were the Magistrates' Committee) had brought this against him. Further, he says, "There were, so far as I remember, several minutes of the Magistrates and Minister on the subject, at least I remember a resolution to let the money accumulate till it reached the £400, the original sum left by Bailie Mackay."

If Mr Ross' memory in inditing this letter (which was written before any suspicion of the bankruptcy had transpired) is not altogether at fault, there once must have existed a joint minute of the two parties, creditors of the legacy, now apparently lost by the lapse of time, which would have set at rest the question of authority in regard to the investment in the hands of the Blaikies.

But there still remains a document which brings the Magistrates and Council into actual contact with the Minister in respect of this investment, and proves their concurrence and acquiesence in his actings. This is the minute of 2d January 1860; which bears: "The Magistrates, Town Council and Minister having met, the Minute Book of Bailie George Mackay's bequest was produced, showing that the bequest was now made up to the original amount of £400, with a balance of £5, 11s. 7d. which was laid on the table." The letter of the Blaikies to Mr Ross was then read to the meeting, in which the facts of the investing of the money in the Blaikies' hands—of their having allowed 4½ per cent in time past, but of their intention only to allow 4 per cent in future—were distinctly detailed.

In all this the meeting acquiesced, and the balance, which was the result of the investment in the Blaikies' hands, was received by the meeting, and was divided among the poor, as is detailed in the subsequent part of the minute.

Had Anthony Blaikie survived, the precise circumstances of this investment would have been ascertained, as well as the special nature and shape of the authority given to Ross, the minister, by the Magistrates. The combined testimony of the survivors, John Blaikie and Mr Stronach, goes to establish the conviction of the firm and of the confidential clerk, that Ross was acting with the concurrence and authority of the Magistrates and Town Council.

Such was the conduct of the parties before the bankruptcy of the Blaikies was announced, which was towards the commencement of 1860. An attempt was then made by the Magistrates at that time to recover from Mr Tait the money which had been lost through the investment in the Blaikies' hands. A correspondence took place, the result of which was that the attempt was abandoned as untenable. At a full meeting of the Magistrates and Town Council, on 24th October 1860, this correspondence was duly considered; and after full deliberation, the meeting were of opinion "that they were not called upon to take any further steps in the matter."

Although this was the opinion and resolution of the Magistrates, the trustee did not allow the matter to rest here. For the information of the Parochial Board, he, in 1862, printed and circulated a full statement of the facts connected with the investment of the money in the hands of the Blaikies, to which, during his life, no denial or reply was ever given.

After the resolution of the Magistrates in 1860, in so far as they were concerned the matter rested for nearly eleven years, till the present summons was raised in August 1871. The pursuers are a totally different set of individuals from those who in 1860 had come to the deliberate resolution of desisting from all demand against Mr Tait. That gentleman is himself dead, and the action is now raised against his personal representatives. Mr Anthony Blaikie, who was the partner that dealt with the parties, debtor and creditors in the legacy, and who alone could explain these details in a satisfactory manner, is dead. Bailies Catto and Fraser, to whom, as a committee, the management of their share of the legacy was entrusted by the rest of the Magistrates and Council, are also dead. Mr Ross, the minister of the parish, has died since the commencement of this action. Every individual who could give authentic and distinct information on the subject of the suit has gone off the field. One fact alone remains as the exclusive basis of the action, viz., that the formal discharge of the legacy was never legally completed between the testator's executor and the Magistrates of Kintore. What was the cause of this defect in the procedure remains unexplained; and the present defenders, the representatives of Tait, the original trustee of the testator George Mackay, are placed in as great a disadvantage as they could have been if the action had been delayed for any time short of the prescriptive period of forty years.

The present pursuers attempt to get rid of the legal effect of what their predecessors, the original official trustees, have done; whereas the defenders

are fully entitled to plead against them that they cannot be in a better position than that in which their predecessors — the Magistrates and Town Council and the Minister in 1860—must have been, had they then thought themselves entitled to raise action against Mr Tait. If Mr Tait could in 1860 have effectually pleaded as against the then Magistrates and Minister that they were responsible for the investment of the money in the hands of the Blaikies, and the consequent loss of the money by the bankruptcy of the latter, it is too clear to require any serious argument that the present pursuers have no better right than their predecessors. For the lapse of ten or twelve years, so far from improving the position of the pursuers, plainly suggests the strongest reasons for visiting against them the consequences of their undue and unaccountable delay in raising their action. Surely the death of all the parties who were cognisant of the original transaction, and from whom the present defenders might have looked for satisfactory explanations, and a complete justification of the forbearing conduct of the original legatees, ought to tell with irresistible force against the demands of the present pursuers.

Towards the close of the debate before your Lordships it was strongly contended for the pursuers that the want of a regularly executed discharge of the legacy must, independently of all other considerations, render Mr Tait and his representatives in all time coming (short of the prescriptive period of forty years) liable to pay over again the legacy of £400. It was urged that, for want of such document the present Magistrates and Minister have no means of calling to account their predecessors in 1860. The fallacy of this argument is transparent. If the conduct of the latter parties in 1860 was such as to entitle Mr Tait to absolvitor had action then been brought against him, no lapse of time, no succession of new magistrates and of a new minister, could ever deprive Mr Tait of his well-founded defence, although the lapse of time might place his representatives in a very disadvantageous position in stating and in proving that defence. If ever there was an action which involved what in the English practice is stigmatised as a *stale demand*, it is the present. For here the suit has not only been unreasonably delayed, but it involves the plainest hardship and disadvantage on the part of the present defenders, in regard to the proof of their defence.

Although, then, as against Mr Tait's representatives the pursuers have no good action, it is still conceivable that they might have a good action against their predecessors, as responsible for having invested and thereby lost the money in the hands of the Blaikies. Such action might depend upon the question whether such investment in the whole circumstances was justifiable in terms of the bequest and the decree arbitral of Mr Moir, as a *good investment.*

But Tait's representatives could evidently have no concern with that question. And as against the representatives of the original trust legatees, the demand, from the lapse of time, would labour under all the disadvantages on the part of the pursuers under which, in the present action, the defenders necessarily labour.

It is proper to observe that the present action has undergone a considerable change since it came into this Court. An addition to the defenders' record, and an additional plea in law were permitted by your Lordships, which pointed more directly at the special ground of defence upon which the defenders' case has ultimately been argued. An additional proof was thereafter allowed, by which that defence has been brought out in a strong light.

These circumstances may in some measure account for the unfavourable view which the two Sheriffs have taken of the case in the Inferior Court.

At all events, I must state my opinion that their judgments should be recalled, and the defenders assoilzied.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"Find that by his settlement, dated 8th February 1831, Bailie George Mackay left a legacy of £400 to the Magistrates and Town Council of Kintore and the Minister of the parish of Kintore for the time being, for behoof of the parish: Find that the late Thomas Tait was appointed executor under this settlement: Find that the said legacy became exigible on the 20th December 1853, and that one of the investments belonging to the executry estate was in that year, by direction of the said Thomas Tait, realized by the Messrs Blaikie of Aberdeen, acting as agents for the executor, and so much of the proceeds as amounted to the said legacy was held by them for the purpose of paying the same: Find that payment was delayed by a question which arose between the Magistrates and Minister on the one hand, and the Parochial Board of the parish, as to the right to the said legacy, which was decided under a submission in favour of the former in 1854: Find that in these proceedings the Messrs Blaikie acted as agents for all concerned: Find it sufficiently proved that an agreement was made between the legatees on the one hand, and the Messrs Blaikie on the other, to which the executor was no party, to the effect that the money should remain as a new investment in the hands of the Messrs Blaikie at a specified rate of interest until the expenses incurred in the proceedings should be replaced: Find that this agreement was acted on until the year 1860, when the Messrs Blaikie became bankrupt: Find that no proceedings were taken by the original legatees against the executor, nor by the present pursuers, until the year 1871, when nearly every one cognisant of the transaction was dead: Find that the legacy sued for has been discharged, and that no claim in respect of it subsists against the representatives of the executor: Therefore sustain the appeal, Recall the judgment appealed from; assoilzie the defenders from the conclusions of the action: Find them entitled to expenses in both Courts, and remit to the auditor to tax and report, and decerns."

Counsel for Defenders (Appellants) — Watson and Balfour. Agents—Henry & Shiress, S.S.C.

Counsel for Pursuers (Respondents)—Solicitor-General (Clark), Q.C., and Asher. Agents—M'Ewen & Carment, W.S.

I. Clerk.