approval of the composition does not give the bankrupt all the accounting to which he is entitled, viz., an accounting for the period of the trustee's administration subsequent to the approval of the composition. I note that by the provision in section 142 the trustee is not to be called on to account for everything—the expenses, for instance, have been already provided for in the previous section. What he is to account for is his "intromissions," and it is clear that although a composition has been agreed to, that does not affect his intromissions with the estate. And so I think that section 142 is a very necessary section, for it has this object, that it makes it necessary for the trustee to account to the bankrupt for all the money that he has ingathered for his estate. In short, section 142 provides for his discharge *quoad* the bankrupt, his discharge *quoad* the creditors having been provided for in the preceding section.

That was substantially the argument of Mr Blackburn, and I agree with all that Lord Kinnear has said with regard to the audit by the commissioners and the impossibility of reading the statute as meaning that the trustee is to be called on to account a second time for the figures in his accounts that have been already investigated. There is no suggestion here that the trustee has failed to account for his intromissions. The only questions that are raised are as to postages, copying expenses, and fees to the valuator and law agent. All these matters have already been the subject of investigation. I therefore agree that no relevant case has been stated for the appellant.

LORD MACKENZIE—I am of opinion that the pursuer has failed to state a relevant case. I do not think that the effect of the 142nd section of the Bankruptcy Act is to allow the bankrupt to ask for an accounting from the trustee in regard to matters that have already been adjudicated upon under section 141. To make a relevant case it would be necessary for the pursuer to aver that there were items which had not been dealt with under section 141, and I am unable to find such averments here. Therefore I think the opinion of the Sheriff is right.

The LORD PRESIDENT gave no opinion, not having heard the case.

LORD PEARSON was absent.

The Court refused the appeal, affirmed the interlocutor of the Sheriff, and of new dismissed the action.

Counsel for Pursuer (Appellant)—Morison, K.C.—A. M. Anderson. Agent—J. M. Glass, Solicitor.

Counsel for Defender (Respondent)—Blackburn, K.C.—Kemp. Agent—William Geddes, Solicitor.

Saturday, June 6.

FIRST DIVISION.

[Lord Johnston, Ordinary.

J. M. & J. H. ROBERTSON *v.* BEATSON, M'LEOD, & COMPANY, LIMITED.

Principal and Agent—Agent's Powers—Company Promoter—Amalgamation of Companies—Right to Involve Principal's Credit with a Law Agent.

A limited liability company, which proposed to acquire the business of another similar company, employed a chartered accountant to carry out the amalgamation. He employed a firm of law agents to execute certain deeds, informing them that they were to do the work for one of the amalgamating companies. The company had not given him any authority to do so.

Held that the law-agents could not sue an action for their account against the company.

On 31st December 1906 Messrs Robertson, writers, Glasgow, and the individual partners thereof, raised an action against Beatson, M'Leod, & Company, Limited, wine merchants, Kirkcaldy, in which they sued for payment of a business account amounting to £19, 12s. 2d. with £11, 1s. 1d. of outlays.

The defenders pleaded no employment.

The circumstances out of which the action arose are stated in the *opinion* of the Lord Ordinary (JOHNSTON), who, on 6th June 1907, after a proof, granted decree as craved.

Opinion.—"I do not think it necessary that I should take time to consider this case, because it appears to me to be a fairly simple one. I agree with counsel on both sides in regretting the necessity that has caused it, because it is clear that one or other of the parties to it must suffer for what I cannot characterise as other than the fraud of the agent Fulton, (*v. infra*), who came between them. Mr Fulton's position it is hardly possible to understand. But that he has defrauded one or both of the parties is perfectly clear. That leaves it, therefore, necessary to determine the legal rights of the parties irrespective of any question of hardship, because hardship must fall on one or other of them.

"The circumstances out of which the case arose are these—Messrs Beatson, M'Leod, & Company, of Kirkcaldy, are wine merchants, carrying on a limited liability business in Kirkcaldy. Mr Fulton was their auditor. Messrs John Taylor & Company, also a limited company, and carrying on a business something of the same character in Glasgow, were apparently not very prosperous; and, inasmuch as Mr Fulton was also their auditor, and therefore knew the circumstances of both businesses, he, very likely in concert with the managing director of Taylor & Company, brought before Beatson, M'Leod, &

Company a proposal that they should acquire the business of Taylor & Company. That resulted in certain negotiations, the details of which are not very clearly proved or necessary to be proved, but they ended in heads of an agreement being adjusted. These are not dated, but we are told that they were prepared by Mr Fulton in conjunction with the managing director of Taylor & Company, and that they embody the heads on which the managing parties in both these companies were prepared to entertain the suggested acquisition, which resulted in course in the amalgamation of the two companies. These two companies were both private limited companies, and I think it is pretty clearly to be inferred that the real interest in them was in the managing officials. Matters having got this length, it is admitted by Mr Beatson that this is what ensued. Mr Fulton as, whatever you like to call him, general agent, or middleman, or broker, who brought the parties together, who had been a party to the adjusting of the above-mentioned heads of agreement, was told to carry through the amalgamation, and he did so. He became, as it seems to me, the general agent of both these limited companies, and he occupied what I may call, to borrow a phrase from conveyancing, the position of a general special agent. He had a special mandate to carry through this particular piece of business, which was the amalgamation of these two small private limited companies, but he had a general mandate to do what was necessary for the purpose.

"Now if it had not been for a term in the agreement I think that Messrs Robertson, who did some work under Mr Fulton's employment, would have had to sue both parties to the amalgamation. But I think I have already said that the Court never favours circuity in litigation, and that inasmuch as Messrs Beatson, M'Leod, & Company have, by a term of the agreement, undertaken to pay the whole expenses of the amalgamation, it is quite proper to allow the action to proceed against Messrs Beatson, M'Leod, & Company alone, without calling Messrs Taylor & Company, to whom they are liable in relief.

"Now the position of an agent who is appointed for a special purpose, without terms or conditions qualifying the appointment, appears to me to be perfectly soundly stated in 'Evans on Principal and Agent.' I think, unless there is any special restriction in his appointment, that he has the powers necessarily incident to proper performance of the business that is confided to him, and, as Mr Evans says, 'Amongst such powers are those which enable the agent to employ all the necessary and usual means of executing the principal authority with effect.' Now I ask, first, what was the thing he was set to do? To carry out the amalgamation of the two companies. That is not just such a simple thing as Mr Beatson, the managing director of one of these companies, seems to have thought. First of all, in ordinary practice, and I think necessary practice, when you are dealing with companies, one of which is to be wound up and the other has to issue shares in payment to the first, and so on, a formal written agreement is required. I do not see how the transaction can be carried out otherwise. *Inter alia*, I do not see how the proper stamp duty can be adjusted. And, moreover, it involves the keeping the two companies straight in matters of company law in carrying out the details of such a transaction. I do not think there can be a better example of the necessity than the way in which the managers of Messrs Beatson, M'Leod, & Company have carried through this matter, so far as they acted by themselves and without taking proper advice. The resolutions which they proposed to their shareholders are totally inconsistent with the situation which they were attempting to create, and show that they were ignorant of the methods of company amalgamation, and lead to the conclusion that they would have done well to have put themselves more instead of less under legal guidance.

"Mr Beatson's position as secretary would warrant one to suppose that he was sufficiently familiar with company law to enable him to carry through such a matter. But it is quite evident that in a small company such as this the secretary and managing director may be a practical man, carrying on the business efficiently, and yet knowing little or nothing about company law. Accordingly, there is a discrepancy between the draft heads of agreement, the final agreement, and the resolutions of the company, which ought to have been resolutions approving of a provisional agreement, but which, instead of that, are resolutions offering the terms contained in an agreement which the directors had already signed on the same day as a final agreement.

"Well, now, if it was natural and proper that a written agreement should be entered into, and that what had to be done in fulfilment of that agreement should be carried out in proper formal order, is it the business of the company promoter—if you choose to call him so—to carry it through at his own hand without any legal advice? I think it is not. I think that what was committed to him in the carrying out of this amalgamation justified and necessitated that at the proper point he should take the proper assistance. I think that in applying to Messrs Robertson's firm he did nothing it was outwith his duty to do, and that if in carrying out the amalgamation he had—either in the agreement or in the necessary subsequent steps—made mistakes, he would have been responsible for not having got the proper advice. Messrs Robertson's position is perfectly above board in this matter. Mr Fulton applied to them, first of all, to put the heads of agreement into a draft agreement; and further, to put the adjusted draft into an extended agreement, which they did; and, moreover, to attend to the matter of the stamp duty. I do not think that a company promoter would be justified in adjusting the stamp duty on the transfer of its business by one company to another without legal advice. That is perhaps the

most important matter that Mr G. W. T. Robertson, of the firm of Messrs J. M. & J. H. Robertson, had to do. But I should gather that he had further to give Mr Fulton, if I may judge of his capacity from his appearance in the box, a good deal of further assistance.

"Now Mr Fulton undoubtedly employed him. Mr Fulton's shifty conduct afterwards may lead to surmising as to what was in Mr Fulton's mind when he did so. But if the mandate to employ was given him, the shifty nature of Mr Fulton's mind can in no way affect the rights of the person employed. The person employed did the work, and the work done was brought under the notice of Messrs Beatson, M'Leod, & Company, because it is impossible for Mr Beatson to say that the agreement bearing Messrs Robertson's name, and accompanied by the usual schedule for execution, was so like the draft heads of agreement that he could suppose that the one was just a transcript of the other. There are changes; and although it was not a difficult deed to draw, it is a deed which is put into legal form, and there is a considerable difference between it and the draft heads. The deed is signed, and the deed is acted upon, and it has been so adopted that at the present moment it must be taken to be a binding agreement between the two companies.

"If that is the case, then let us look at Mr Fulton's conduct subsequently. After a bit he gets £200 to cover his charges, expenses, and outlays. That £200 unquestionably covered Messrs Robertson's account. But then that is behind the back of Messrs Robertson, and the fact that Mr Fulton had himself been paid, and has to a certain extent misapplied the payment to him in respect that he has not used it to pay charges in connection with this amalgamation, does not in any way preclude Messrs Robertson from going direct to the disclosed principal with their accounts. It appears to me Mr Fulton began by deceiving Messrs Robertson by leading them to assume that the amalgamation was hanging fire, and that the agreement, although signed, was not being carried through; and then taking advantage of this deception to lead them to offer to take their mere outlays; and then, when they had done so, he went to Messrs Beatson, M'Leod, & Company and got from them a cheque to pay Messrs Robertson's outlays, which cheque he never transmitted to Messrs Robertson, but appropriated to his own use. Messrs Robertson have stood for four or five years without obtaining any remuneration for their services, and it seems to me that in such circumstances they are entitled to go for payment of their accounts direct against Mr Fulton's principals.

"It is to be regretted that Messrs Beatson, M'Leod, & Company should be called upon to pay, if I may say so, three times over. They have already paid £200, which ought to have covered this claim; they have paid the ten guineas which was remitted by them for the purpose of paying Messrs Robertson's outlays; and they have now to pay again their whole account. But I am afraid the results of Mr Fulton's fraud must fall somewhere, and in my opinion the law requires that they should fall upon Messrs Beatson, M'Leod, & Company.

"In the matter of expenses, of course, Messrs Robertson must have their expenses. I admit they were quite entitled to come here for judgment; but I think that the case was one which might have properly been disposed of otherwise, and when I see the account of their expenses as taxed I may consider it proper to make some modification. I shall find them entitled to expenses as taxed, reserving the question of modification."

The defenders reclaimed, and argued—The defenders had not employed the pursuers. The pursuers had been employed by Fulton, and they should have sued him. No question of "general" agency arose; this was a case of "special" agency; and Fulton accordingly had no general mandate—Evans on Principal and Agent, p. 122. The defenders' contract with Fulton was one of "hire," and not one of "mandate." A company promoter (such as Fulton was here) was not entitled to employ law agents at his clients' expense.

Argued for respondents—The Lord Ordinary was right. The respondents had been employed by an agent who had implied authority to do so. Fulton was a chartered accountant and not familiar with legal work. His employment of the respondents, therefore, was both reasonable and necessary—Bell's Prin. 225; *Robertson* v. *Foulds*, February 9, 1860, 22 D. 714; *Black* v. *Cornelius*, January 24, 1879, 6 R. 581, 16 S.L.R. 475. This was the case of a disclosed principal. The defenders were aware of the pursuers' employment. Moreover, the defenders had availed themselves of the pursuers' work, and they were therefore liable in reasonable remuneration—Bell's Prin. 539.

At advising—

LORD PRESIDENT—This is an action by a firm of Glasgow solicitors against a business firm, Beatson, M'Leod & Company, Limited, for a law account of £33; and it is a case in which it is impossible not to let drop some unavailing judicial regrets that—I will not say the time of the Court has been taken up—but that so much expense should be wasted in such a case. The truth of the matter is that the person who is really due this £33 is not the defender, while on the other hand the pursuers are entitled to their money. The real debtor, who is a certain gentleman whom we have not before us, has long ago been paid the money which ought to have been paid over by him to the pursuers. Therefore, it being one of these unfortunate cases where a loss has got to be put upon innocent persons, one cannot help regretting that it did not occur to someone that the apportionment of £16, 10s. to each of the parties would have saved a great deal of money in the long run. But thus is the law enriched and the reporters are saved from idleness.

The decision of the case will depend upon whether there was or was not employment. It had its origin in the fact that Beatson, M'Leod, & Company, Limited, wished to effect an amalgamation with a firm called Taylor & Company, and in order to bring about this amalgamation they employed a person of the name of Fulton, who professed himself skilled in those things. The amalgamation was brought about, and in the course of dealing with it Fulton, who did not think himself equal to drawing one of the deeds which was necessary, went to the present pursuers, Messrs Robertson, writers, Glasgow, and there is no question that Messrs Robertson executed the work in perfect good faith and with perfect ability and skill; the question is, on whose credit did they do it? There is not practically any doubt about this. One might take it either from the testimony of the one side or the other. So far as the pursuers are concerned, Mr Robertson, the pursuer, himself says—"I never heard of Beatson, M'Leod, & Company, Limited, or Taylor & Company, before the date Fulton came and told me to do the work. I have never met any of the directors of Beatson, M'Leod, & Company, Limited." Of course I entirely believe Mr Robertson that Fulton told him that he was to do the work for Beatson, M'Leod, & Company, Limited; but then of course that does not prove authority. In the same way if you take the testimony of Mr Beatson, the defender, he says Mr Fulton never told him that he was going to employ a firm of lawyers in Glasgow. "I never heard that a firm of lawyers had been instructed till some years afterwards and I never knew there was such a firm."

The Lord Ordinary has found the defenders liable, although he agrees that Fulton had long ago been paid, because he considered that he had the power to do such things as were necessary for his agency. As regards that general proposition there is no doubt, but I do not think that the business of arranging an amalgamation of companies or company promoting is so well defined that it necessarily carries with it a right to involve the principals' credit with a law agent. I think that such a business must be on very much more regularly known lines to admit of any such general proposition. The sort of class of case where right to employ a law agent would be necessarily understood is well illustrated by one of those cases which is in the books, where it was held that a person who told an Edinburgh agent to prosecute an appeal before the House of Lords must be presumed to know that the Edinburgh agent could only do it by employing a parliamentary solicitor; and even although the client had never any direct relations with the parliamentary solicitor, he must pay the parliamentary solicitor's bill. That I quite understand, because there is only one way of doing that; but when you come to arrange about amalgamation of companies, there are many firms of accountants who do such work, who would carry through the whole transaction themselves. There are many persons—I am not going to mention names—who have been before your Lordships in Court, who are capable of conducting large amalgamations, and who would never think of employing a law agent. To say that the defenders were to take the measure of Mr Fulton and to see—as his Lordship said he could see—that that gentleman was not very clever, and that they must necessarily have said to themselves "We are giving him authority to pledge our credit with any law agent to whom he chooses to go," is a proposition which I cannot bring myself to face.

The only other point is that there is written on the back of the deed, in the ordinary way, the name of a solicitor, and that is the solicitor who was employed. That is rather a slender ground for liability. It is rather difficult to be quite certain even that Beatson, M'Leod, & Co., Ltd., ever read the name of the solicitor on the back of the deed. Even supposing they did, that did not necessarily show that they had pledged their credit. According to their idea, Fulton was taking a slump payment to see them through, and all I think the name on the back necessarily brought to their minds was that Fulton, for his own purposes, had gone to a law agent and employed him. That does not seem to put the matter any further. I have come to the conclusion that I cannot agree with the Lord Ordinary, and I think that the pursuers—there is no question that they did the work—ought to have sued the man who directly employed them, and not the present defenders, who never employed them at all.

LORD M'LAREN—If this had been the ordinary case of the promotion of a company, the law is perfectly well fixed that where, in order to establish a new commercial undertaking, it is necessary that a law agent, engineers, or other experts should be employed by the promoters, these persons have a claim against the promoters, who are liable to them, and against no other person unless that person can be shown to have taken over the obligation. It is not unusual in such cases that the company undertakes to relieve the promoters of their obligation and to pay the preliminary expenses. I suppose there are few companies that do not give some undertaking of the kind; but supposing that they do not choose to do it, the experts employed by the promoters have no claim except against the person who employed them. I do not think the principle is varied by the fact that here the object proposed was an amalgamation of two existing companies in order to form a third, because the question still remains, who employed this law agent? I cannot see that he has any claim against either of the companies unless they knew of his employment and sanctioned it or agreed that the company was to be responsible for his fees. Without entering into the question of whether money was given to Fulton to provide for the payment, it is enough for the decision of this case that no direct employment of the pursuers by either of the companies is made out, and therefore

no action can lie against either at the instance of the pursuers.

LORD KINNEAR—I concur with your Lordships that Mr Fulton had no authority from the defenders to employ the pursuers' firm, and it follows that the pursuers have no action against the defenders.

LORD PEARSON was absent.

The Court recalled the Lord Ordinary s interlocutor and assoilzied the defenders.

Counsel for Pursuers (Respondents)—Wark—T. G. Robertson. Agents—J. & J. Galletly, S.S.C.

Counsel for Defenders (Reclaimers)—Morison, K.C. — Mair. Agent — James Ayton, S.S.C.

Saturday, June 6.

FIRST DIVISION.

[Lord Dundas, Ordinary.

BLACK AND OTHERS (COLVILE'S TRUSTEES) *v.* MARINDIN AND OTHERS.

Right in Security — Confusio — Heritable Bond over Entailed Estate—Succession by Heir of Entail in Possession to Creditor in Bond—Acquisition of Personal Right by Conveyancing Act 1874*—Subsequent Declarator of Invalidity of Entail by Succeeding Heir.*

In 1842, A, the heir in possession of certain entailed estates succeeded *ab intestato* to the creditor in a bond affecting part of the entailed estates. A died in 1856 without having made up a title to the bond, and was succeeded by his son B, who also acquired *ab intestato* the right to make up a title to the bond but failed to do so. He, however, acquired a personal right to the bond in virtue of the Conveyancing Act 1874 (37 and 38 Vict. cap. 94), section 9. B died in 1880 leaving a trust-disposition and settlement. In 1881 the succeeding heir of entail obtained decree of declarator that the deeds of entail affecting the lands were invalid in virtue of the provisions of the Entail Amendment Act 1848 (11 and 12 Vict. cap. 36), section 43.

Held that the bond was not extinguished *confusione* in the person of B, but was carried to his trustees by his trust-disposition and settlement.

Succession—Destination—Fee and Liferent —Fiduciary Fee.

A party in right of a heritable bond conveyed the same by a disposition assignation and settlement to certain persons in liferent, and to the heir of entail who might be in possession of certain estates at the expiry of the liferent in fee.

Opinion (*per* the Lord President) that such a destination could not be effectual without the interposition of a trust.

Succession—Destination—Fee and Liferent —Destination to Heir of Entail who might be in Possession of Certain Estates at Expiry of Liferent in Fee—Disentail before Expiry of Liferent.

A, the creditor in a heritable bond granted in 1833, executed in 1841 a disposition assignation and settlement, whereby she conveyed the bond to certain parties in liferent and the heir of entail who might be in possession of certain entailed estates at the expiry of the liferent in fee. A died in 1842. In 1881 decree of declarator of invalidity of the entail was obtained by the heir then in possession, and the destination evacuated by his trust-disposition and settlement. The last liferenter died in 1905. *Held* (by the Lord Ordinary and acquiesced in) that the destination in the disposition assignation and settlement had failed, that the bond became intestate succession of A, and that the party who would have been heir of entail in possession in 1905, had the entail subsisted then, had no claim to the bond.

Succession—Intestate—Heritable or Moveable—Heritable Bond—Titles to Land Consolidation (Scotland) Act 1868, *sec.* 117 *—Bond Granted before* 1868*—Death of Intestate before* 1868*—Intestacy Ascertained after* 1868.

The creditor in a heritable bond died in 1842 leaving a disposition assignation and settlement conveying the bond to certain parties in liferent, and to the heir of entail who might be in possession of certain entailed estates on the expiry of the liferent in fee. In 1881 decree of declarator of invalidity of the entail was obtained. The last liferenter died in 1905. *Held* (by the Lord Ordinary and acquiesced in) that the destination having failed, the bond was intestate heritable succession of the creditor in it, and did not become moveable in virtue of the Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. cap. 101), section 117.

By bond and disposition in security dated 17th May 1830, the late Andrew Colvile, otherwise Andrew Wedderburn Colvile of Ochiltree, conveyed the lands of Muirside (now forming part of the estate of Crombie and Craigflower in the county of Fife) to the late John Blackburn of Killearn, in security of the sum of £4500 borrowed from him. Mr Blackburn was duly infeft, and in 1834 conveyed the lands and assigned the bond and disposition in security to Miss Margaret Blackburn, who was duly infeft. By a disposition assignation and settlement, dated 24th August 1841, Miss Margaret Blackburn, on the narrative that she had resolved to settle the destination and right of succession of the foresaid sum of money, and heritable security for the same, in the event of her death, disponed and conveyed the lands of Muirside, and her whole right and interest to and under the said bond and