must be substituted in the issue for the word "procure."

The LORD PRESIDENT said—It was a different question whether what was done was according to mercantile procedure. The pursuers must take the risk of that if they go to trial under this issue. We will not at this stage determine the point. The pursuers' statement is that the defender ordered them to purchase, and that is tantamount to an admission.

The other Judges concurred, Lord DEAS observing that it seemed to him that what the pursuers averred, and what they proposed to put in issue, formed two quite different grounds of action.

MACDONALD'S TRUSTEES *v.* MUNRO.

Master and Servant—Accounting—Issues. Issues in an action by a master's trustees against his servant, in which it was alleged that the latter had uplifted money from bank for his master and failed to account for it.

Counsel for Pursuers—Mr Clark and Mr Shand. Agent—Mr J. T. Mowbray, W.S.

Counsel for Defender—Mr Gifford and Mr Deas. Agent—Mr John Robertson, S.S.C.

The pursuers are the trustees and executors of the deceased Captain Ronald Macdonald, who resided in Portobello, and they sued the defender, Archibald Innes Munro, who was the captain's servant for twenty years before his death, for payment of £500, with interest since 28th July 1864, when Captain Macdonald died; and the summons concluded alternatively that "the defender ought and should be decerned and ordained to exhibit and produce before our said Lords a full and particular account of the whole sums of money received by him for or on account of the said Ronald Macdonald, or delivered and entrusted to him by the said Ronald Macdonald between 2d May and 28th July 1864, and of the application of the said sums, whereby the true balance due by him to the said Ronald Macdonald at the time of his death may appear and be ascertained." This was followed by a conclusion for payment of the said balance.

It appeared that Captain Macdonald had by his settlement, executed in April 1864, left to the defender his wearing apparel and a legacy of £100; and after looking into the deceased's affairs his trustees found that there had been drawn from his account at the Royal Bank in Portobello, betwixt 2d May 1864 and 8th July 1864, four sums amounting to £600. It was averred by the pursuers that these sums had all been drawn by the defender, and that the deceased had no occasion for so much money for his own use, because he was bedridden from April until his death in July; at all events, that at the utmost he did not require for his own uses more than £150. It was also averred (Cond. 8), "Of the said sums the defender retained and still retains £450 or thereby, and the said sums so retained belonged to the said Ronald Macdonald, and now belong to the pursuers." And also (Cond. 14), "The defender intromitted with the said sums drawn as aforesaid. He made certain small payments out of these sums, but he never accounted for these sums to the deceased. If he handed the monies drawn from bank by any of said cheques to the deceased, he afterwards obtained possession of these monies to be held for behoof of the deceased, and he now retains possession thereof." The defence to the action is that although the defender was occasionally sent to the bank for money, he always instantly handed over the same to his master to be disposed of at his pleasure. There was no averment or plea that the money or any part of it had been gifted to the defender by the deceased; but before adjusting issues to-day, the pursuers minuted that they consented to the question of donation, if raised at the trial, being tried under the issues.

The pursuers proposed an issue putting the simple question whether the defender uplifted the four different sums, and is resting-owing to the pursuers the sum of £450, part thereof, with interest. They founded upon the cases of Mackenzie *v.* Brodie, 19th March 1859 (21 D. 804), and Byres *v.* Forbes, 5th December 1865, in which cases issues had been adjusted in similar terms.

The Court thought the case was a very peculiar one, and should be tried under two issues, which were adjusted in the following terms:—

"I. It being admitted that at the dates aftermentioned the defender was a servant in the employment of the said deceased Ronald Macdonald—Whether, of the dates after-mentioned, the defender, by virtue of cheques granted by the said deceased Ronald Macdonald on his account with the Royal Bank of Scotland, uplifted from the branch of that bank at Portobello the following sums—viz.,

On or about 2d May 1864.....	£150
On or about 12th May 1864.....	200
On or about 2d July 1864.....	50
On or about 8th July 1864.....	200
	£600

And whether the defender failed to account for, and is resting-owing to the pursuers, the sum of £450, part of the said sums, with interest since 28th July 1865, or any part thereof?

"II. It being admitted that during the period aftermentioned the defender was a servant in the employment of the said deceased Ronald Macdonald—Whether, during the period between 1st May and 28th July 1864, the defender obtained from the said deceased Ronald Macdonald part of the sums drawn under the said cheques, and amounting to £450, or any part thereof, for behoof of the said deceased, and whether the defender retains and is resting-owing to the pursuers the said sum of £450, or any part thereof, with interest since 28th July 1864?"

SECOND DIVISION.

DUKE OF BUCCLEUCH AND OTHERS *v.* COWAN AND OTHERS.

Process—Conjunction. Circumstances in which three processes having reference to the same matter, but in which the pursuers and defenders were not the same, were conjoined.

Counsel for the Pursuers—Mr Patton, Mr Shand, and Mr Johnstone. Agents—Messrs J. & H. G. Gibson, W.S.

Counsel for the Defenders—The Lord Advocate, the Solicitor-General, Mr Gordon, Mr Clark, Mr Gifford, and Mr A. Moncrieff. Agents—Messrs White-Millar & Robson, S.S.C.

This is an action at the instance of the Duke of Buccleuch, Lord Melville, and Sir William Drummond, proprietors of land on the banks of the river North Esk, and is directed against Alexander Cowan & Sons, William Somerville & Sons, and Alexander Annandale & Sons, papermakers, all of whom have mills on the banks of the river. The action concludes that the defenders should be prohibited and interdicted from discharging into the Esk from their respective paperworks any impure stuff or matter of any kind, whereby the water of the Esk, in its progress through the property of the pursuers, may be polluted or rendered unfit for domestic use, or for the use of cattle, or its amenity in angling diminished. There is an alternative conclusion that in the event of the defenders being found entitled to use the stream, they must filter the water after they have used it at their works in such a manner as to return it to the stream in as pure a state as possible. The defenders deny the pollution, and among other pleas maintain the acquiescence of the pursuers and their predecessors in the use made of the river by the defenders and former occupiers of the mills. They further say that the river North Esk having for time immemorial received the drainage and sewage of the adjacent towns and villages, and of the district gene-

rally, as well as the surface water of the neighbouring coal levels, and also the refuse of the manufactories and public works situated on the banks, the defenders are entitled to the use of the water for the purpose of their mills. It is further pleaded that from time immemorial the water has been dedicated to the purposes of manufacture, and that the water having been for so long a period polluted so as to be unfit for the primary uses, the action is unfounded, and at any rate that the defenders have acquired a prescriptive right to the use of the stream. A previous action had been raised in 1841, against the defenders in the above-mentioned action, in which other millowners or occupiers were called; and a third action has also been raised at the instance of different pursuers. The three cases have been for some time before the Court on the question of the adjustment of issues. To-day the Court disposed of a motion made on behalf of the pursuers that the three actions should be conjoined.

The LORD JUSTICE-CLERK said—We are now to dispose of the motion made by the pursuers of these three actions for conjunction. It seems necessary to recal the circumstances connected with the raising of the actions, and to understand their position exactly in disposing of the motion. The first action was raised in 1841, at the instance of several noblemen and gentlemen who are proprietors of lands on the banks of the North Esk, and was directed against a number of defenders who were owners or occupants of paper mills along the stream, the object of the action being to stop and put down for the future a certain pollution of the stream, said to be caused by the refuse of the paper mills being thrown into it. That case lay over a long time in consequence of the attempts of parties—I believe sincerely gone about—to make some arrangement. But after many years, the attempts having proved unsuccessful, the allegation was made that the pollution of the stream was continued and increased; and in these circumstances the action of 1841 was revived, and a proposal made to go to trial. The case came before us in 1864, upon a reclaiming note against an interlocutor of Lord Ormidale; and we then held that the pursuers, as proprietors of lands at various portions of the stream, had such a community of interest as entitled them to sue together to protect the stream; and we also held them entitled in one action to call all the defenders who were alleged to be wrongdoers. So that is fixed by the judgment in the action of 1841. Without stating in detail the pursuers of the action of 1841, it is important to observe who were the defenders in that action, and what were the mills represented. There were nine mills represented by the defenders in the first action, and all these defenders were alleged to be polluting the stream by throwing into it impure refuse. (His Lordship enumerated the mills). The first three mills have continued in operation ever since, and the occupants of them are said to have polluted the stream since 1841. The fourth mill (Esk Mill) is no longer occupied by Mr Brown, but by another company; and therefore *quoad* the first action Esk Mill is not represented by any party responsible for the alleged pollution at the time. The fifth mill has been burnt down, and need not be taken into account. The sixth has passed into other hands; and the seventh has been shut up. The eighth mill is that of Annandale & Son, and it is said that it has been polluting since 1841; but the partners now are different from the partners of that period. The ninth mill is now occupied by Wm. Tod & Son, in place of Mr Brookes, who occupied it at that period. Now, in the first action, as it was revived and came before us, the only defenders that were represented were the representatives, in the first place, of Alexander Cowan & Son, who represented the first three mills; the representatives of William Somerville & Sons, who represented Dalmore Mill; and those who represented Polton Mill, which is now in the occupation of Annandale & Son. There is no doubt of the right of the pursuers, according to the judgment of 1864, to go against any of these defenders who are said to have polluted the stream since 1841. But it is clear enough, in this state of the process, that there were a number of paper-mills on the stream not represented; and the pursuers seem to have thought—and I think naturally—that in order to try the question it was in every way desirable to bring all the parties who polluted in the same manner since 1841; and accordingly they have raised another action. If they had proceeded according to the plan of the action of 1841, it probably would have been necessary to raise only one action; but they have divided the second proceeding into two actions. Of these one relates to the mills which lie above Hawthornden, and consequently above the lands of all the pursuers, and the other relates to the mills lying between Hawthornden and Melville Castle. This, however, does not make much difference in regard to the present question. The pursuers are not the same in the two actions—there being three pursuers in the first and only two in the second. The consequence of raising these two new actions is this, that, with the exception of the mill that was burnt down and the mill that was shut up, all the mills that were originally represented by the defenders in the first action are now again represented in one or other of the second actions; and, in addition, there is another mill represented in the third action—Kevock Mill—occupied by Archibald Fullarton Somerville, one of the defenders. It appears that Mr Somerville's proceedings as a papermaker did not commence till 1848; but it was explained to us at the discussion that although that was the case, the mill was really in existence anterior to 1841; so that it was then, although not actually polluting the stream, yet erected for the purpose of the manufacture of paper, and therefore was likely enough soon to be in the way of causing the alleged pollution. In that state of the actions the proposal is made to conjoin them for the purpose that the question of pollution—the question whether the paper-mills on the Esk, by the manner of their operation and by reason of the refuse which they throw into the stream, pollute the stream to the nuisance of the pursuers. I took the liberty of saying at the time in regard to the first action that it seemed to me in the highest degree expedient that the question as to the pollution of the stream should be tried once for all before one jury, and I thick so still. And I think it is highly expedient that at the trial all parties should be represented. And I think therefore that in point of convenience or expediency the proposal of the pursuers is a reasonable one. The only question is, Is there any objection to it in respect of competency or of practice? As regards competency, it is somewhat important to observe that in the practice of this Court from a very early period actions that were naturally or necessarily connected were always as much as possible brought together under jurisdiction of the same judge or the same part of the Court, and accordingly remits *ob contingentiam* go back to an early period. But in the Act of 48 Geo. III., c. 151, it is provided that when one action relates to another in respect it has the same subject-matter, or has contingency with it, and it is expedient that they should go side by side before the same judge, then there shall be a remit. It does not follow that because there is a remit to the same judge there must be a conjunction, and therefore one process, because, when the case comes to be considered, it may often appear that, instead of being conjoined, one should be sisted and the other proceeded with. The judge can order that by having both processes before him, and the object of the remit is answered. But if it is not desirable that the one should be tried before the other, and if they have a natural contingency and raise the same question, I think that the leaning of the Court is to conjoin. No doubt conjunction is always a question of discretion. The two actions may be so complicated and raise such nice shades of distinction that perplexity may arise from conjunction, and, if there is any prospect of that, the Court won't

do it, but if the same issue will try both causes there will be conjunction. These appear to me to be the considerations that ought to influence the Court, and now let us see what the contingency between these processes is, and what is the issue which they raise. The object of the first action, as its conclusions clearly show, is to have it found and declared that the pursuers as riparian proprietors are entitled to the use of the water in a pure state fit for the consumption of man and beast, and that the defenders are not entitled to convert it from a pure state into a polluted one. The second conclusion of the action prays for a prohibition against their doing so. That is all the action, because it is not necessary to try the subsidiary questions by a separate issue before the jury. The conclusions of the two new actions are exactly the same, and therefore the main question, and the only question is, whether the defenders have caused the pollution of the stream to the nuisance of the pursuers? It appears to me that all considerations of expediency are in favour of the conjunction of these processes, that one jury may dispose of the question in presence of all the parties.

The other Judges concurred.

The motion for conjunction was accordingly granted, and the pursuers were appointed to lodge issues.

POTTER *v.* POTTER.

Proof—Payment of Money. An allegation that a legacy of £100 had been paid can only be proved by writ or oath.

Counsel for the Pursuer—The Lord Advocate and Mr H. J. Moncreiff. Agent—Mr A. D. Murphy, S.S.C.

Counsel for the Defender—Mr A. R. Clark and Mr Deas. Agents—Messrs Duncan & Dewar, W.S.

This is an action for payment of a legacy of £100 claimed as having been left by the late John Potter, shipmaster in Limekilns, to the pursuer, who is his grandson. The action is founded on John Potter's disposition and settlement, dated the 14th January 1843, and is directed against the defenders as executors confirmed to James Potter, nephew of the the testator, or at least as having viciously intromitted with and taken possession of his whole means and estate. In answer to the claim the defenders state that on 15th May 1853 the pursuer being desirous of setting up in business, a sum of £100 to enable him to do so was paid by his uncle, James Potter, as the legacy due to him under his grandfather's settlement. James Potter was sole executor under John Potter's settlement, intromitted with his estate, and is now dead.

On 23d November 1864 the Lord Ordinary (Kinloch) found that the defender had not proved or offered relevant and sufficient evidence to prove payment of the legacy sued for, and repelled the defences, reserving to the defender all competent reference to the oath of the pursuer. The Lord Ordinary held it was incompetent for the defenders to prove by parole evidence the alleged fact of the amount of the legacy having been paid to the pursuer. On advising a reclaiming-note for the defender, the Second Division, on 19th January 1865, opened up the record, and remitted to the Lord Ordinary to appoint parties to revise and adjust their statements respectively, and thereafter to close the record, and to proceed with the cause. On reconsidering the case the Lord Ordinary again found that the defender had not proved payment of the legacy sued for by the writ of the pursuer, and is not entitled to obtain an allowance of parole evidence in proof of the allegations made by him towards instructing payment; and of new repelled the defences. To-day the Court unanimously adhered, but received a minute tendered by the defender, referring the alleged payment of the legacy to the oath of the pursuer.

DONALDSON'S TRUSTEES *v.* MACDOUGALL.

Trust Deed—Construction. Terms of a trust deed under which held (alt. Lord Kinloch), (1) That a liferent had lapsed; and (2) That the fee should be distributed *per capita* and not *per stirpes*.

Counsel for Mr J. Lawford Young—Mr Patton and Mr Cook. Agents—Messrs Thomson & Dickson, W.S.

Counsel for Lieut. Macdougall and Others—Mr Gordon and Mr Duncan. Agents—Messrs Adam, Kirk, & Robertson, W.S.

This case has been on several occasions before the Court. The questions now in controversy regard the meaning of a clause in the third codicil to the late Mr Donaldson's settlement. By the previous parts of that settlement, as construed by the judgment of the House of Lords, the residue of Mr Donaldson's estate was given to certain grand-nephews and grand-nieces, subject to the condition that if any of these died without issue before the testator's widow, by whom the whole estate was liferented, the share of such deceaser "shall belong to and be divided equally, or share and share alike, among the survivors of my said grand-nephews and grand-nieces equally." By the third codicil Mr Donaldson, to some extent, altered this provision as regarded grand-nieces, and appointed his trustees "to pay the share or shares bequeathed to my said grand-nieces in or by the foresaid deed of settlement to them and their respective husbands only in liferent, for their, her, or his liferent use allenarly, and the fee of such shares to the lawful issue of my said grand-nieces equally; whom failing, to the survivors of them, and my grand-nephews, also named in the foregoing settlement or codicils, equally in liferent, and their issue, also equally in fee, after the death of the longest liver of me and my wife."

The present process regards the one-sixth share bequeathed to the testator's grand-niece, Eliza Young or Cuthbertson, wife of Allan Cuthbertson. Mrs Cuthbertson predeceased the testator's widow without leaving issue, but survived by her husband, Mr Allan Cuthbertson. By judgment of the Inner House, of 15th January 1864, it was found "that Mrs Eliza Cuthbertson having predeceased the testator's widow, leaving no issue, but survived by her husband, the claimant, Allan Cuthbertson, the said Allan Cuthbertson is entitled to a liferent use and enjoyment of the fund *in medio*." The judgment further found that the fee of the said fund belongs to the issue of the testator's grand-nephews and grand-nieces existing at the date of the widow's death, whether their parents survived that term or not." Mr Allan Cuthbertson survived this interlocutor only four days, having died on 19th Jan. 1864. By this event the liferent of the fund terminated; and two questions thereon arise (1)—Whether the fee opened to the parties in right of it unburdened with any further liferent? and (2) whether the right of fee, found by the Inner House to belong to the issue of the whole grand-nephews and grand-nieces, was divisible *per stirpes* or *per capita*. In regard to the first question, the Lord Ordinary (Kinloch) was of opinion that on the death of Mr Cuthbertson a liferent of the fund in question emerged to the three surviving grand-nieces and grand-nephews equally among them; but in the case of the grand-nieces, he did not think the liferent passed to their husbands on their deaths, the provision to that effect applicable to an original being omitted in regard to a devolved share. In regard to the second question, the Lord Ordinary held that the fee was divisible *per stirpes*.

To-day the Court altered this interlocutor, and held that the liferent had lapsed, and that the division of the fee should be *per capita*.

The LORD JUSTICE-CLERK said—In disposing of the two questions which are raised by these reclaiming notes, we must have regard specially to the judgment which has been already pronounced in this process, and also in the previous process, regard-