

have no doubt that the money was properly paid by Stewart's trustees to Mr and Mrs Laidlaw, who in return gave a valid receipt and discharge therefor. It appears that this money was advanced clearly with the wife's consent. She agreed to assign her interest in Stewart's estate in return for the advance which was made to her husband. Now, this took the money out of the trust. Could the spouses effectually do so; was it not *ultra vires*? This question depends upon whether in the construction of the provisions of the marriage-contract this case is to be ruled by the case of *Ramsay* or the case of *Menzies*. If the former, then as the husband and wife were entitled to take the money out of the trust, Newlands is not entitled to make the present claim. Now, it appears to me that this fund was entirely at the wife's disposal, and it is further to be observed that there is no interest in the fund given to children; therefore I agree with the majority of your Lordships in thinking that this case resembles and is governed by the case of *Ramsay*.

I wish to give no opinion as to whether the wife is entitled to rank in this sequestration or not. Mrs Laidlaw may have made a donation of this money, or it is possible that she may only have intended to lend it, in which latter case it is possible that she may obtain a ranking.

The Court refused the note of appeal, and adhered to the interlocutor appealed against.

Counsel for Appellant — Pearson — Shaw.
Agent—Andrew Newlands, S.S.C.

Counsel for Respondent—Mackintosh—Wallace.
Agents—Millar, Robson, & Innes, S.S.C.

Friday, July 14.

FIRST DIVISION.

JAMIESON & OTHERS V. MACKINNON.

Process—Expenses—Agreement.

In the Auditor's taxation of an account of expenses of a process where objections were taken (1) to the fees allowed by him to professional accountants, and (2) to the manner in which he proposed to deal with the accounts for printing, which were exceptionally large—the Court, after hearing parties, altered his finding on the first branch and increased the allowance by one-third in respect of the quantity and quality of the work done, and found on the second branch that by agreement of parties the whole of the printing account fell to be paid by the losing party.

In the case of *Jamieson and Others (Liquidators of the City of Glasgow Bank) v. Mackinnon*, reported *ante*, p. 278, their Lordships of the First Division, by interlocutor of 23d December 1881, *inter alia*, found the respondent William Mackinnon entitled to expenses, allowed an account thereof to be lodged, and remitted the same to the Auditor to tax and report.

On the 18th March 1882 the Auditor issued his report taxing the respondent's account at £3619, 9s. 6d., and he added a note for the guid-

ance of the Court in the event of objections being lodged to his report.

On the 12th May 1882 a note of objections was lodged by the respondent, who objected to the said report in so far as it disallowed various items specified therein, amounting in all to £2764, 14s. 8d.

In the note appended to his report the Auditor referred to the account of expenses in the ordinary action raised by the liquidators in the Outer House prior to the instituting of the proceedings before the First Division of the Court. That action was sisted immediately after the closing of the record, and without any debate, to await the issue of the Inner House case. In consequence of the decision of the Inner House that action was abandoned, and the account of expenses incurred in it was taxed at £1673, 12s. 10d.

The respondent objected to this taxation in so far as it disallowed items amounting to £941, 6s.

On the 13th May 1882 LORD KINNEAR issued the following interlocutor:—"The Lord Ordinary in respect it is stated that the same question of audit between the same parties is in dependence before the First Division of the Court, reports this cause to the Lords of that Division, and grants warrant for enrolling in the Inner House rolls."

When the case came on for discussion it was argued for the objector Mackinnon—(The Auditor had classified the expenditure under various heads):—(1) *As to charges for printing*—The effect of the agreement between the parties contained in their correspondence, which is quoted by the Lord President, was that 500 copies of the large print were to be thrown off, and that to give effect to the proposal of the Auditor would virtually be to review the agreement between the parties. By the 28th April 1881 the print was complete, and at that date each party had got, or there was lying at their order, 250 copies. Owing to the magnitude of this case unusual expense was unavoidable. (2) *As to accountants' charges*—The sum allowed by the Auditor quite inadequate. In a case such as this a charge should be allowed for accountants' work in the preparation of the record. The sum claimed was reduced after the summons was raised owing to what was brought out by the accountant Harding.

Authorities—*Millar v. Ure*, 1853, 15 D. 781; *Inglis v. Baird*, *Millar*, 1861, 23 D. 872.

Argued for the liquidators:—(1) *As to printing account*—The auditor availed himself of the assistance of a printer in fixing the amount that should be charged under this head. Down to August 1880 there was no agreement between the parties for more than the ordinary 60 copies, and nothing can be gathered from the subsequent letters to enlarge the responsibilities of parties. There was no agreement that the losing party should pay extra charges. (2) *As to the accountants' charges*—Two professional men ought not to be paid as for separate work when one of them simply revised and checked the work done by the other.

At advising—

LORD PRESIDENT—The Auditor's report on the respondent's account of expenses, and the note of objections taken to it, raise three points for our consideration. First, the respondent objects to the disallowing of various items in the account for printing amounting to £367; second, to the

disallowing of fees to accountants to the extent of £1302; and lastly, to the disallowing of certain large sums as the expenses of the American commission, amounting to £1094. Now, I may say at the outset that we are all agreed that the last of these items objected to, viz., the payment for the American commission, has very properly been disallowed by the Auditor. As to the second—the accountants' fees—it is to be observed that the sum which ought to be allowed in cases of this kind is a matter very much in the discretion of the Auditor, and in ordinary circumstances I should be disposed to leave it entirely to him. The total amount charged is £1933, and all that the Auditor has allowed is 600 guineas. Now, we have had an opportunity of seeing a good deal of what has been done by the accountants from beginning to end of this case, and of judging to some extent of the nature of their work, and it appears to us that the sum allowed by the Auditor is hardly enough. I believe therefore that I am stating the views of all your Lordships in saying that the amount under this head ought to be increased to 900 guineas. As to the apportioning of this sum among the different accountants, that is a work which the Court cannot undertake, and which must be carried out by Mr Mackinnon himself. To this extent, therefore, the allowance of the Auditor must be altered.

As to the printer's account—there is no doubt that this stands in a very peculiar position. It is in every respect an exceptionally large account, and provided that there was no agreement about it between the parties a great part of it would fall to be disallowed. As to the matter contained in the large print, there can be no doubt that there is a great deal in it that should never have been there; and as to the number of copies, it is equally certain that there were far too many thrown off.

But then it is urged that it was matter of agreement between the parties that the full amount incurred for printing was to be stated in the account of and to be paid by the losing party. Now this depends upon the construction which is to be put upon the letters passing between the parties. Three periods of time have also to be kept in mind in considering this correspondence. On the 22d July the respondent's agents wrote to the liquidators' agents in these terms:—"Referring to Mr Forrester's call upon you to-day, we are anxious to have . . . (3) a complete copy of the correspondence with Messrs Irvin & Co., Mr G. A. Thomson, Mr Alex. Mitchell for himself and others, and the bank, in connection with the American railways, embracing all the correspondence referred to in the minutes of meeting of the directors during the period embraced in this summons. As you mentioned to us that . . . Mr Muir had the whole correspondence above referred to arranged and tabulated in such a form as would enable him to get it at once put into print, we agree to your getting the correspondence printed, as also the investigation committee's report of 1857, and to pay one-half of the expense of printing, on the understanding that the expense shall be held to form part of the expenses of process, and be afterwards dealt with as such."

To this the liquidators' agents answer on the 28th July, as follows:—"The third thing you

want is a complete copy of the correspondence with Messrs Irvin and others relating to the Western Union Railway. We wrote Mr Muir, and have also seen him and Mr M'Grigor, as to printing the correspondence. We are now willing that it should be printed, on the understanding mentioned in your letter. We should warn you, however, that the correspondence is very voluminous, and the expense of printing will therefore be great. To save the expense of getting a copy made we have arranged that the print is to be set up in Glasgow direct from the original documents. Mr Muir, who is most familiar with the correspondence, is to see that the letters are handed to and received back from the printer. So soon as a proof of any portion is ready we shall send it to you."

After a meeting which seems to have taken place between the parties on the 5th August an arrangement was arrived at that the prints should be completed irrespective of cost, and had the correspondence ended here the Auditor is of opinion that the cost, however great, would have formed a part of the expenses of process, to be dealt with in the ordinary way. The second portion of the correspondence is in the month of October and November 1880.

On the 21st October the respondent's agents wrote the liquidators' agents as follows:—"With reference to the number of copies of the correspondence to be printed, seeing that the case will probably go to the House of Lords, and that there may be a good deal of litigation here, we propose that 500 copies should be printed." In reply Messrs Davidson & Syme wrote on the following day—"You do not say whether the 500 copies mentioned are for yourselves, or whether you propose that 500 copies in all should be thrown off, half being allotted to you and the other half to us." The answer was—"Five hundred copies in all is what we think should be thrown off, one-half being allotted to you and one-half to us."

To this letter the following reply was sent by the agents of the liquidators on the 4th November 1880:—"Mr Maclehoose, the printer in Glasgow employed in connection with the printing of the correspondence, &c., in this case, has applied to the liquidators for a payment to account of £1250. As there has already been considerable outlay connected with the matter, we are sure you will agree with us that it is proper that such a payment should now be made, and we shall accordingly be glad to receive Mr Mackinnon's half thereof, viz., £625, at your convenience." On 8th November Messrs Murray, Beith, & Murray answered thus—"When we agreed to a joint print being made at this stage of the case we had no idea that the print was to assume such large dimensions, or would have taken such a length of time in its preparation. We do not, however, see any reason for departing from the usual course followed by the Edinburgh printers, which is not to charge for a joint print until it is finally completed, and then to render their account to each of the parties, who respectively settle their share of the expense."

Now here the matter stopped; the print had not been completed, and therefore the time had not arrived for making any payment to account, nor had anything been said about the number of copies which were to be thrown off, nor whether

the expense caused by the excess of numbers was to be dealt with in any way different from the expense caused by the excess of size.

But the correspondence was continued, and this brings us to what may be called the third period. By April the print was completed, and as it would have been unreasonable to have delayed any longer in making a payment to account, the agents of the respondent wrote to the agents of the liquidators on the 28th of April to the following effect:—"We have now received authority from our client to pay to you £1000 to account of his half of the proportion of Mr Maclehose's account for printing the seven volumes of the large print." We accordingly enclose our cheque on the Commercial Bank of Scotland in your favour for £1000 to account of the print, of which please acknowledge receipt. In sending the enclosed it is on the understanding that Mr Mackinnon does not in the meantime admit the correctness of Mr Maclehose's account, and also that whatever the sum is paid by him in respect of the expense of printing shall be held at the taxation of his account of expenses, in the event of his being held entitled to expenses, to be a proper charge as against the liquidators."

Now, this is a very distinct proposal, and means that whatever sum is paid for the print is to be a charge against the losing party. It was quite open to the liquidators when they received that letter to have replied—"Oh no, that is not our agreement at all;" but what they did say is contained in a letter of the same date written by their agents to the agents of the respondent, and is in these terms:—"You will understand that whatever sum the liquidators have paid or may pay to Mr Maclehose to account of his charges for printing is or will be paid subject to the same condition as you stipulate at the end of your letter, viz., that at the taxation of the liquidators' account of expenses, in the event of their being held entitled to expenses, the account is to be a proper charge as against Mr Mackinnon." That is to say, that parties agree that the entire printer's account is to be dealt with as proper expenses of process. It appears to me, therefore, that Maclehose's account as paid must be considered as a burden on the losing party.

LOKDS DEAS, MURE, and SHAND concurred.

Counsel for Liquidators—Robertson—W. C. Smith. Agents—Davidson & Syme, W.S.

Counsel for Respondent—Lorimer. Agents—Murray, Beith, & Murray, W.S.

Saturday, July 15.

FIRST DIVISION.

NOTE FOR PETER COUPER, LIQUIDATOR OF
CALEDONIAN HERITABLE SECURITY
COMPANY (LIMITED).

*Public Company—Winding-Up—Settling List of
Contributories—Liability of Past Members—
"B" List of Contributories—Act 25 and 26
Vict. c. 89 (Companies Act 1862), sec. 38.*

Circumstances under which decree was
given in a winding-up against the past

members of a limited company who had been such members within one year prior to the commencement of the winding-up, reserving to each such past member the right to open up the question of his liability by application to the Court—and form of note of application for approval of list of such contributories, with procedure thereon.

The Caledonian Heritable Security Company (Limited) went into voluntary liquidation on 13th July 1880. The liquidation was placed under supervision of the Court on 11th December 1880. On 24th August 1880 the liquidator settled a list of contributories of present members (the A list), and on 14th September 1880 made a call of £3 per share, being the whole amount uncalled on the company's shares, payable on 6th October 1880, and proceeded to enforce the call and realise the estate of the company. He also ranked the creditors, and paid them two dividends, one of 6s. 8d. per pound on 11th November 1880, the other of 2s. per pound on 15th May 1881. He made up a report of his actings and dealings for the first year of the liquidation to 13th July 1881.

The report and relative accounts showed that the liabilities of the company as at 31st July 1881 amounted to £107,944, and the assets to £149,615, showing an apparent surplus of £41,671. But the liquidator explained that the principal asset was £135,784, the amount contained in heritable bonds held by the company, and that he was unable to make any estimate of the ultimate outcome from £71,604 of that amount; that he estimated as recoverable £16,247; and that the only amount he considered wholly good was £47,932—£135,784. These estimated recoveries proceeded on the footing of a reasonable time being allowed for realisation. The realisation of the apparent surplus disclosed upon the above estimates was thus postponed and contingent. Meantime the creditors had only received 8s. 8d. per pound upon their debts.

The liquidator thus finding it necessary, in order to provide funds for the payment of the company's debts and the other purposes specified in the Companies Act 1862, to call upon the past members of the company during the year prior to the liquidation (viz., 13th July 1878 to 13th July 1880), after intimation to the parties, prepared the B list of contributories, and submitted it to the Court for approval.

The Companies Act 1862, sec. 38, provides—"In the event of a company formed under this Act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for the payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with the qualifications following (that is to say)—(1) No past member shall be liable to contribute to the assets of the company if he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding-up. (2) No member shall be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member. (3) No past member shall be liable to contribute to the assets