such as is required in England, and that decision was based on the ground that by our forms the particulars must be set forth on record, to prevent surprise, with the same distinctness as is required in the separate statement which is necessary in England. I think that that difference has been statutorily recognised in the Patents, Designs, and Trade-Marks Act 1883, where, while section 29 provides that the plaintiff must deliver with his statement of claim, or subsequently, particulars of the breaches complained of, section 107, dealing with the application of the Act to Scotland, says that nothing is to affect the forms of process of the Courts in Scotland. I take that to mean that the requirements of the Act are to apply just as much to Scotland as to England though the Courts in Scotland are not to depart from their own forms of process; so I think the provision for setting forth particulars of the breaches complained of is just as much a statutory requirement in Scotland as in England, though the form in which it is to be done may be different.

Now, it is very necessary in patent cases to have full particulars of what is complained of, and I do not think the averments in this record are sufficient. The pursuers have come here with two amended patents, and the 20th section of the Patents Act of 1883 provides that where an amendment by way of disclaimer, correction, or explanation has been allowed no damages will be given unless the patentee establishes to the satisfaction of the Court that his original claim was framed in good faith and with reasonable skill and knowledge. Accordingly the onus of clearly specifying the breach alleged to have taken place before disclaimer is much greater than with regard to a breach after disclaimer, and therefore I think it is necessary that a pursuer with a disclaimer should make this clear by splitting up the sum claimed as damages so as to show what amount is claimed for breaches before disclaimer and what for breaches after it. I do not think it is necessary that separate sums should be claimed in the summons, but they must be clearly distinguished in the condescendence. That has not been done here, and the pursuers, feeling that difficulty, have lodged a minute of amendment which would make condescendence 5 read thus—[*His Lordship here read condescendence* 5 *as amended*]. Now, that amendment would of course obviate the difficulty that I have hitherto been dealing with, and if there were no other difficulty in the case the course would be to allow this amendment to condescendence 5 and send the case to proof.

But a further objection has been taken, which is in my view a good one, and it is that there are no averments to show what is the nature of the breach complained of. The averments are that the defenders have made and sold a certain cloth manufactured in breach of the pursuers' patents. Nothing is said but that it is an "extra flexible micanite cloth," and when we look at the pursuers' patents we see that they are for making extra flexible micanite cloth, but by different processes. I think the defenders are entitled to have a specification of the manner in which they are alleged to have infringed these patents, and as to which of the processes of manufacture the breach has occurred, whether it is the one or the other or both of them that are alleged to have been followed. There is also a want of specification as to the alleged purchases from the foreign firms. The pursuers must specify in what way Brandt and the Bergman Electricitats Gesellschaft are in breach of their patents, and which process they have infringed in manufacturing the articles which were purchased by the defenders. I think, therefore, the averments made here by the pursuers are not sufficient, and that, with regard to the second ground on which damages are claimed, they are not entitled to a proof. I would propose, then, that the Lord Ordinary's interlocutor should be recalled, and that the pursuers should be given an opportunity to amend their record should they see fit, but whether they decide to amend or not the case must go back to the Lord Ordinary.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court pronounced an interlocutor recalling the interlocutor of the Lord Ordinary of 27th March 1905, allowing the pursuers, if so advised, to lodge a minute of amendment in supplement of that tendered at the Bar, No. 30 of process, and continuing the cause.

Counsel for the Pursuers and Respondents —Younger, K.C. — Macphail. Agents — Mackenzie & Kermack, W.S.

Counsel for the Defenders and Reclaimers —Clyde, K.C.—J. R. Christie. Agent— E. I. Findlay, S.S.C.

Thursday, July 6.

SECOND DIVISION.

[Lord Low, Ordinary.

FERME, FERME, & WILLIAMSON *v.* DEWAR.

Trust—Testamentary Trust—Liability of Trust-Estate to the Trust Law-Agents for Expenses of Unsuccessfully Defending an Action—Interlocutor Finding Trustee not Entitled to Deduct from Trust-Estate his Expenses in Defending Action—Agent and Client—Bankruptcy.

In an action against a testamentary estate unsuccessfully defended by the trustee, the final interlocutor found "that in all questions with the pursuer in this action the defender is not entitled to deduct the expenses which he has incurred in the action from the trust estate." The trust estate having been sequestrated on the petition of the successful pursuer, the law-agents who

acted for the testamentary trustee in the action claimed to be ranked in the sequestration for their expenses in the action. *Held* that their claim was barred by the interlocutor.

Opinions as to the rights of law-agents of a testamentary trust as against the trust estate.

This was an appeal from the adjudication of the trustee on the sequestrated trust-estate of the deceased William Stephenson, farmer, Samuelston, Loanhead, on a claim put forward by Messrs Ferme, Ferme, & Williamson, solicitors, Haddington. An action was raised by the executor of a certain Miss Margaret Somerville against the testamentary trustee of William Stephenson for payment of an alleged debt due by Stephenson to Miss Somerville. This action was unsuccessfully defended by Stephenson's trustee, Cornelius Smith, seedsman, Haddington, and the present appellants, whom he had employed as agents in the trust, and who had been the law-agents of the truster, acted in connection with the defence.

The interlocutor, dated 3rd February 1904, whereby the Second Division of the Court of Session granted decree in favour of Miss Somerville's executor was, *inter alia*, in the following terms:—"Find that in all questions with the pursuer in this action the defender is not entitled to deduct the expenses which he has incurred in the action from the trust estate of the deceased William Stephenson."

On 22nd June 1904, on a petition presented by Miss Somerville's executor, William Stephenson's trust estate was sequestrated, and the respondent in the present appeal, J. Campbell Dewar, C.A., Edinburgh, was appointed trustee in the sequestration.

A claim was lodged in the sequestration by Messrs Ferme, Ferme, & Williamson, the present appellants, who claimed to be ranked preferably for the amount of their business accounts as agents in Stephenson's trust, including charges in connection with the unsuccessful defence of the action referred to. These latter charges are the subject of this report, for the purposes of which it is unnecessary to notice any further details of the appellants' claim.

The trustee in the sequestration rejected the claim in question, and the present appeal was taken by Messrs Ferme, Ferme, and Williamson.

On 11th May 1905 the Lord Ordinary on the Bills (Low) pronounced the following interlocutor:—"The Lord Ordinary having heard counsel and considered the cause, finds that the appellants are not entitled to make a claim against the sequestrated estates of the deceased William Stephenson in respect of professional services rendered or expenses incurred by them as law-agents for Cornelius Smith, sole testamentary trustee of the said William Stephenson, in connection with the action against the said Cornelius Smith at the instance of the executor of the deceased Miss M. Somerville, and that to that extent and effect the appeal falls to be dismissed and the deliverance appealed against affirmed."

Opinion.—"I am of opinion that the deliverance of the trustee is right in so far as regards that part of the appellants' account which relates to the expenses of the litigation with the representatives of Miss Margaret Somerville. It is plain that the appellants' client (the defender in that action) could not, in view of the interlocutor of the Second Division, have claimed these expenses, and the appellants cannot be in any better position.

"The claim of the appellants in respect of their professional services in managing the testamentary estate apart from the Somerville claim, and before that claim was known or intimated, may be in a different position. I do not think it can be affirmed as an absolute rule that the claim of the law-agent in a testamentary trust for remuneration for his professional services lies only against the trustees who employed him, and in no case directly against the trust-estate. I think that the result of the Scottish authorities is correctly stated by Lord M'Laren in his work upon Wills and Succession (vol. ii, p. 1233), where he says—'The presumption is that he (the law-agent of the trust) is employed as agent for the estate, and not on the personal responsibility of the trustees or trustee.'

"The question is no doubt very much one of circumstances, but I think that where, as here, the law-agents in the trust had also been the law-agents of the truster, and were therefore fully conversant with the position of the trust-estate, the case is a favourable one for the presumption to which Lord M'Laren refers."

[*His Lordship then considered details of the appellants' claim which are not dealt with in this report.*]

The appellants reclaimed, and argued—The case was the same as if the action had been raised by Somerville's executor against the late William Stephenson, and the reclaimers had acted for him, and after his death for his executor continuing the mandate of the deceased; they acted on the employment of the trust estate, not of the trustee—M'Laren's Wills and Succession, 3rd ed., p. 1234; *Cullen* v. *Baillie*, February 20, 1846, 8 D. 511; *Shepherd* v. *Hutton's Trustees*, February 24, 1855, 17 D. 516. The English decisions on this question were altogether inapplicable. The interlocutor of February 3, 1904, referred only to questions with the pursuer in the action; it did not affect the rights of the reclaimers, who were not parties to the action. The fact that an agent advising an action by a trustee was in full knowledge of the trust estate did not make him *eadem persona* with the trustee. The reclaimers were entitled at least to an ordinary ranking.

Argued for the respondent—The reclaimers could have no higher right than Mr Smith, and the present claim if made by him would be effectually barred by the interlocutor of February 3, 1904—*Pelly* v. *Wathen*, 1851, 1 De Gex, Macnaghten and Gordon, 16. The reclaimers had no direct

claim against the trust estate—Lewin on Trusts, 11th ed. 779; M'Laren's Wills and Succession, 3rd ed., sec. 2296; *Worrall* v. *Harford*, 1802, 8 Vesey junior 4; *Hall* v. *Laver*, 1842, 1 Hare 571; *Staniar* v. *Evans*, 1886, 34 Ch. D. 470; *Shepherd* v. *Hutton's Trustees*, *cit. sup.* When they advised the defence of the action raised by Somerville's executor, the reclaimers had full knowledge of the trust estate and must be held to have taken the risk of being unable to recover the amount of their business account.

At advising—

LORD JUSTICE-CLERK—This Division in the interlocutor of 3rd February 1904 in the case of *Somerville* v. *Smith* (*Stephenson's Trustee*) found "that in all questions with the pursuer in this action the defender is not entitled to deduct the expenses which he has incurred in the action from the trust estate of the deceased William Stephenson."

Sequestration has now taken the place of the testamentary trust, and in that sequestration the law-agents in the litigation to which the above finding refers demand a ranking on the ground that the trustee had power to employ agents and that their costs form a charge against the estate. The position they take up is that they are entitled to their charges, just as any tradesman who did work for the trust, such as repairing buildings, or painting, or similar work would be entitled preferably to be paid. I agree with the Lord Ordinary in holding that the contention of these law-agents is unsound. They are, I think, plainly not in the position of persons employed. Such persons do not know and cannot know the affairs of the trust. They are not employed to serve the trust, but simply to do work in their own business as ordinary tradesmen, such work being presumably to the advantage of the estate, and ordered for that reason. But law-agents are in a totally different position. The whole facts in connection with the estate are patent to them. They can judge whether as matter of prudence they should accept the employment as for the trust. It is not in their power to maintain that they did not look into matters for themselves, and were entitled to take it for granted that when the trustee asked them to act for the trust they thereby tacitly got a guarantee of there being funds to meet the expense. It appears to me that this is already well established in the law, and if so, it is conclusive of the whole question in the present case and debars the law-agents from the ranking which they seek. There is no right in them to a ranking. [*His Lordship proceeded to deal with the details of the appellants' claim, to which it has been unnecessary to refer for the purposes of this report*]. I would propose to your Lordships that the interlocutor under review be affirmed so far as relates to the suit against Stephenson's trustee and the deliverance of the trustee in the sequestration thereanent. . . .

LORD KYLLACHY—In this case it is common ground that by the interlocutor of the Court of 3rd February 1904, in the action at the instance of Somerville's executor, the trustee in this testamentary trust was effectually debarred from including in the expenses of his administration the expenses incurred by him in that litigation. The question which has now to be decided is whether the law-agents of the trust, who were not parties to the action, are similarly debarred from ranking for these expenses in the sequestration which has now displaced the testamentary trust. The law-agents maintain the negative, on the ground that ostensibly the trustee had power to employ them as in other matters of trust management, and to pledge the credit of the trust estate for their proper charges, and that they were not bound any more than tradesmen employed (say) to make repairs on the trust property, to go behind the trustees' apparent authority, or to investigate the limitations, actual or possible, of his powers.

The Lord Ordinary has held that the law-agents have in this matter no higher rights than the trustee himself, and that, as the trustee is debarred from charging the expenses in question as against the estate, the law-agents are in the same position. I do not know that I should be prepared to state the principle quite so barely as the Lord Ordinary, but I agree with his conclusion, and do so upon a ground which I think must have been present to his Lordship's mind, being indeed indicated by the authorities cited in the passage in M'Laren on Wills (pp. 1233-37) to which he refers.

The ground I refer to is this, that whatever may be the rights of ordinary persons contracting with a trustee without notice of any limitation (actual or possible) of his (the trustee's) powers to pledge the credit of the trust estate, the law-agents of the trust are, and are necessarily, in an exceptional position. For they have notice of everything. They are, or are presumed to be, conversant not only with the terms of the trust-deed, but with the whole circumstances of the trust estate, its amount, the claims upon it, actual or anticipated, and the results, probable or possible, of unsuccessful litigations. They are not, therefore, in the position of tradesmen or other persons employed in the ordinary course of the trust management. Unlike such ordinary employees, they cannot, if the trust funds prove inadequate, proceed against the trustee personally on the ground of his implied warranty of the adequacy of the trust funds. On the contrary, knowing all that the trustee knows, they are held, with respect to their charges, to take their chance of recovering from the trust estate. That, I think, must be held as settled by the authorities mentioned. And that being so, it seems to me to follow by parity of reasoning that if employed, as here, to conduct and advise as to a litigation which may or may not be successful, they take their risk of such contingencies as may be involved, including, in particular, the contingency that as the result of the litigation the trust estate, or a large part of it, may not be available for their costs.

I therefore agree with the Lord Ordinary that the appellants have in the circumstances no claim to be ranked for the expenses in question—no claim to be ranked either preferably or at all. [*His Lordship proceeded to deal with the details referred to supra, which are beyond the scope of this report.*]

I therefore, as I have said, agree with the Lord Ordinary with respect to the only matter really in controversy. Our interlocutor will, I suppose, be to affirm the Lord Ordinary's interlocutor and the deliverance of the trustee in the sequestration in so far as relating to the expenses of the litigation with Somerville's executor.

LORD KINCAIRNEY — I have found this case one of extreme difficulty, but I assent to the interlocutor of the Lord Ordinary and am prepared to affirm it.

LORD STORMONTH DARLING concurred.

The Court adhered.

Counsel for the Appellants and Reclaimers — Hunter—T. B. Morison. Agent —A. C. D. Vert, S.S.C.

Counsel for the Respondent — A. M. Anderson—J. Christie. Agents — Watson & Mathers, W.S.

Thursday, July 6.

SECOND DIVISION.

[Lord Dundas, Ordinary.

BUCHAN *v.* GRIMALDI.

Process — Jurisdiction — Foreign — Forty Days' Residence — Departure Prior to Raising of Action—Domicile and Jurisdiction.

The Court has no jurisdiction over a foreigner who at the date of the raising of an action against him has left Scotland, although fourteen days prior thereto he has been resident in Scotland continuously for forty days.

Corstorphine v. *Kasten*, December 13, 1898, 1 F. 287, 36 S.L.R. 174, *approved.*

Observations by Lord Kyllachy on the relation of domicile to jurisdiction in ordinary non-consistorial cases.

Opinion of Lord Stormonth Darling in *International Exhibition 1890* v. *Babty*, May 26, 1891, 18 R. 845, 28 S.L.R. 649, *reconsidered.*

Process — Jurisdiction — Foreign — Possession of Heritage in Scotland—Sale with View to Escape Jurisdiction.

A foreigner owning heritage in Scotland and *bona fide* disponing it immediately prior to the raising of an action against him, cannot be subjected to the jurisdiction of the Court on the ground that the disposition was effected with the purpose of escaping jurisdiction.

Jeannie Buchan, residing at the Bungalow, Milltimber, Aberdeenshire, on 28th December 1904 brought an action against George Frederick Grimaldi, carrying on business as a meat salesman, Central Markets, London, and described in the summons as residing at No. 74 Hamilton Place, Aberdeen, in which she sued him for £1000 damages for seduction.

The defender pleaded, *inter alia*—"(1) No jurisdiction."

The averments of parties on record bearing on the question of jurisdiction were the following:—"(Cond. 1) The defender . . . carries on an extensive business in London and Aberdeen as a meat salesman. At the date of this action he had his residence at 74 Hamilton Place, Aberdeen, where he had resided at least a year previous. The defender has funds and effects in Scotland which have been arrested." "(Ans. 1) . . . Admitted that the defender . . . carries on business in London. *Quoad ultra* denied. He does not reside in Aberdeen or elsewhere in Scotland, and has not done so since 1st October 1904. He is a domiciled Englishman."

The Lord Ordinary (DUNDAS) allowed a proof on the question of jurisdiction. The general character of the evidence appears from his opinion as given below.

Apart from those which bore on the question whether the defender, who was English by origin, had acquired a Scotch domicile (a point which ultimately did not bulk largely in the case), the important facts proved were (1) that the defender left Scotland a fortnight prior to the serving of the summons, having at the date of leaving been resident continuously in Scotland for upwards of forty days, and (2) that he had been possessed of heritable property in Scotland which he disponed to a Mrs Mitchell, a married daughter, on 16th December, a few days before the action was raised, in the knowledge that the fact of possessing heritable property in Scotland subjected a foreigner to the jurisdiction of the Scotch courts.

On 23rd March 1905 the Lord Ordinary pronounced the following interlocutor:—"Finds (1) that the defender's domicile of origin was in England, and that he had never changed that domicile or acquired a domicile in Scotland; and (2) that on 30th December 1904, when the summons in this action was served, the defender was not the owner of heritable property in Scotland: Therefore sustains the first plea-in-law for the defender, dismisses the action, and decerns," &c.

Opinion.—"In this action, which is one of damages for alleged seduction, the defender's first plea-in-law is 'no jurisdiction.' The averments of parties in regard to this plea are of the most meagre description, and are to be found at the end of answer 1 and condescendence 1 respectively. I allowed a proof of them, which has now been led at considerable length. The defender avers that 'he is a domiciled Englishman.' His case, as disclosed by the proof, is that his domicile of origin was in England, and that he has never abandoned that domicile or acquired any other. There is, I think, no room for doubt that the