Thursday, November 16.

FIRST DIVISION.

SCOTT'S TRUSTEES *v.* BRUCE AND OTHERS.

Trust—Marriage-Contract—Construction—Failure of Trust—Event Apparently Unprovided for.

A father in the antenuptial contract of marriage of his daughter bound himself to provide a sum of £10,000 for, *inter alia*, these purposes—*In the second place*, for paying the income to the wife, *i.e.*, the truster's daughter, as an alimentary provision. "*In the third place*, upon the death of" the wife, "in the event of" her husband "surviving her and of there being issue of the said marriage," the trustees were to pay the income to the husband for behoof of himself and the children of the marriage until their attaining majority, or in the case of daughters their marriage whichever should first happen, when the capital was to be payable to the children, but until majority, or marriage, their interests were not to be vested: "And *lastly*, in the event of there being no child or children of the said intended marriage, the said trustees shall pay to" the husband, "in the event of his surviving" the wife, "the free proceeds and interest of the said capital sum . . .; and upon the death of" the husband "the whole sums hereby settled . . . shall revert and belong" to the settlor, whom failing to his other children jointly, and the heirs of their bodies, whom failing to the wife's appointees. The wife survived her father and also her husband, and there were no children of the marriage.

Held, in a Special Case, that the marriage-contract trusts with regard to the fee of the sum of £10,000 had not failed, but that the intention of the truster being plain, the last purpose was to be construed as if it had read—"Upon the death of the survivor of the spouses, there being no issue of the marriage, the whole sums hereby settled shall revert," &c.

Process—Special Case—Competency—All Parties Interested not yet Ascertainable.

A Special Case was brought in which the liferentrix of a certain share of a trust estate maintained that, in the events which had happened, a certain destination of the fee to, *inter alios*, the heirs of the body of A was inapplicable, and that she was entitled to the fee, and hence to immediate payment. Her contention was opposed by, *inter alios*, the heirs of the body of A as at a certain date prior to the Special Case, who maintained that the destination was applicable to the events which had happened, that vesting of the fee had taken place in them, and that they would be entitled to payment on the death of the liferentrix.

The Court *held* that the case was competent to this extent, that the liferentrix was entitled to have her claim determined, as she, if right, was entitled to immediate payment, but, having negatived her claim, they *refused* to determine the date of vesting of the fee in respect that the proper contradictors, the heirs of the body of A as at the date of the death of the liferentrix, could not meantime be ascertained.

Baillie's Trustees v. *Whiting*, 1910 S.C. 887, 47 S.L.R. 684, *followed*.

A Special Case was presented for the opinion and judgment of the Court by Mrs Mary Dalziel Scott or Bruce, widow of John Bruce of Sumburgh, Shetland, and others, the trustees acting under the trust-disposition and settlement of Ralph Erskine Scott, C.A., dated 10th February 1885, and relative codicil and memorandum dated respectively 12th November 1886 and 11th February 1885, *first parties;* the said Mrs Mary Dalziel Scott or Bruce, *second party;* the trustees acting under the antenuptial contract of marriage entered into between the said John Bruce (then John Bruce, younger of Sumburgh) and Mrs Mary Dalziel Scott or Bruce, *third parties;* the trustees acting under the trust-disposition and settlement and deeds of apportionment and direction by Ebenezer Erskine Scott, C.A., Edinburgh, *fourth parties;* the trustee acting under the trust-disposition and settlement of Miss Christian Scott, *fifth party;* the surviving daughters of the said Ebenezer Erskine Scott and the testamentary trustees of his deceased son, *sixth parties;* and the whole of the grandchildren of the said Ebenezer Erskine Scott existing at the date of the Special Case, *seventh parties*.

By antenuptial contract of marriage, dated 28th November and 11th December 1871, entered into between John Bruce, younger of Sumburgh, with consent of his father John Bruce of Sumburgh, on the one part, and Miss Mary Dalziel Scott, youngest daughter of Ralph Erskine Scott, C.A., Edinburgh, with the special advice and consent of her said father, and in consideration of provisions therein made by said John Bruce junior and John Bruce in favour of the said Mary Dalziel Scott, "the said Ralph Erskine Scott, having agreed to settle the sum of £10,000 on trustees for behoof of the said Mary Dalziel Scott and John Bruce junior, and the children of their marriage, in manner after mentioned, hereby binds and obliges himself, his heirs and assignees, to make payment to the said Ebenezer Erskine Scott, Robert Bell, Thomas Fraser Bruce, and Robert Russell Simpson, and the survivors and survivor, acceptors and acceptor of them, . . . as trustees and trustee for the ends, uses, and purposes hereinafter written, the sum of £5000 sterling within six months after his death in the event of his being survived by his wife Mrs Jane

Dalziel or Scott, and the further sum of £5000 within six months after the decease of the said Mrs Jane Dalziel or Scott, or, in the event of the said Mrs Jane Dalziel or Scott having predeceased the said Ralph Erskine Scott, he binds and obliges himself and his foresaids to make payment to the said trustees of the whole of the said sum of £10,000 within six months after his decease, and that for the ends, uses, and purposes after written, viz.—*In the first place*, for payment of the expenses of executing this trust: *In the second place*, the said trustees shall pay the annual interest and produce of the said capital sum to the said Mary Dalziel Scott during all the days of her life on her own receipt as an alimentary provision to her which shall not be affectable by the debts or deeds of the said spouses or either of them: *In the third place*, upon the death of the said Mary Dalziel Scott, in the event of the said John Bruce junior surviving her and of there being issue of the said marriage, the said trustees shall pay the free annual interest and produce of the said capital sum to the said John Bruce junior for behoof of himself and the child or children of the said marriage during all the days of the lifetime of the said John Bruce junior, or until the said children attain majority, or in the case of daughters are married, whichever of these events shall first happen, when the capital shall be payable to the children in manner after mentioned." [There followed a provision that the right or interest of John Bruce junior should cease in the event of his marrying again, but should revive if he survived his second wife.] "And it is hereby provided and declared that the said capital sum shall be divisible among the children of the said marriage if more than one, or their issue, in such proportions and under such restrictions and upon such terms and conditions as the said John Bruce junior and Mary Dalziel Scott, or the survivor of them, may appoint by any writing under their, his, or her hand." [The contract then prescribed the manner of division failing such deed of division, and gave certain powers of making advances of capital to the children. Then followed a declaration that the shares of daughters should be exclusive of the *jus mariti* and *jus administrationis* of any husbands, and a declaration that the provisions should not become vested interests in the said child or children until the majority, or in the case of daughters the marriage, of each child.] "And *lastly*, in the event of there being no child or children of the said intended marriage, the said trustees shall pay to the said John Bruce junior, in the event of his surviving the said Mary Dalziel Scott, the free proceeds and interest of the said capital sum; but declaring that such payments shall be suspended during the subsistence of any second marriage entered into by the said John Bruce junior: And upon the death of the said John Bruce junior the whole sums hereby settled by the said Ralph Erskine Scott, as aforesaid, and any income that may be accumulated during the subsistence of said second marriage, as aforesaid, shall revert and belong to the said Ralph Erskine Scott, whom failing to the said Ebenezer Erskine Scott and Christian Scott, daughter of the said Ralph Erskine Scott, jointly, and the heirs of their bodies, whom all failing to such person or persons as the said Mary Dalziel Scott by any writing under her hand may direct."

John Bruce junior and Miss Mary Dalziel Scott were married on 13th December 1871. There was no issue of the marriage, which was dissolved by the death of John Bruce junior on 4th July 1907.

By his holograph last will and settlement, dated 10th February 1885, and along with relative holograph codicil and memorandum, dated respectively 12th November 1886 and 11th February 1885, recorded in the Books of Council and Session 14th May 1887, the said Ralph Erskine Scott conveyed his whole estate to the trustees therein mentioned, and thereby, *inter alia*, directed his trustees to dispose of his estate as follows:—"Thirdly, that my said trustees, after paying deathbed and funeral charges and obligations incumbent on me, also all expenses in the management of the trust, shall ascertain the net amount of my funds and estate, which shall be divisible as follows:—*In the first place*, in implement of the obligation undertaken by me in the antenuptial contract of marriage between the said John Bruce and my daughter Mary, dated the 28th day of November and 11th day of December 1871, with this exception, that the £10,000 therein specified shall be paid by my trustees to the marriage-contract trustees in one sum at the first term of Whitsunday or Martinmas after my death in place of by two instalments as provided for in said contract. *In the second place*, in implement of the joint and several obligations undertaken by me and my son in the antenuptial contract of marriage between him and Annie Goddard Mackay, dated March One thousand eight hundred and seventy-three. . . . *In the third place*, the net residue of my estate having been ascertained, the amount thereof shall be divisible equally among my three children then surviving, or if any have predeceased, the parent's share will fall to his or her family, but from my son's share shall be deducted Three thousand eight hundred and fifty pounds as at present advanced to him, and on which he is to pay interest at four per cent. during my lifetime, and he will also from said share, if he has not already done so before, provide for said annuity to his wife, in terms of his obligation to his wife under the contract of marriage with her, and from Mary's share will be deducted the Ten thousand pounds to be paid to the trustees under her marriage-contract. I direct that the surplus of Mary's share beyond the Ten thousand pounds shall be invested by my trustees in the stock of any of the aforesaid banks, or on good heritable security in their names for her behoof, and the interest thereof

paid to her half-yearly on her own receipt, and exclusive of the *jus mariti* or right of administration of any husband, present or future, the capital thereof to be settled in the same way and for the same purposes as are specified in the contract of marriage; declaring, however, that in the event of my said daughter predeceasing her husband John Bruce without leaving a family, or should there be a family but not surviving till majority, then the whole funds thereby left to Mary shall revert to my other children equally with my other funds; and it is hereby provided that the interest of my son-in-law in the funds shall be limited to the income of the Ten thousand pounds as provided in said contract." The said sum of £10,000 was duly paid over to the third parties, and at the time of this Special Case was held by them. The one-third share of residue (under deduction of the said £10,000) was still held by the trustees acting under said last will and settlement (the third parties). It was invested in the securities authorised by said holograph last will and settlement, and the interest thereon was being paid by them to Mrs Mary Dalziel Scott or Bruce (the second party). The parties were agreed that the provisions of Mr Ralph Erskine Scott's said codicil and memorandum had no bearing on the question raised in the present case.

Ralph Erskine Scott died on 7th May 1887. He was survived by his wife, who died on 22nd September 1889, by one son, the late Ebenezer Erskine Scott, who died on 13th June 1897, and by two daughters, Miss Christian Scott, who died on 11th August 1896, and Mrs Mary Dalziel Scott or Bruce. Ebenezer Erskine Scott left a trust-disposition and settlement containing deeds of apportionment and direction, dated 17th October 1896, and recorded in the Books of Council and Session 23rd June 1897, whereby he conveyed his whole estate to the trustees therein mentioned, and exercised the powers of apportionment conferred on him with regard to the estate of his sister Miss Christian Scott. The trustees presently acting under said trust-disposition and settlement were the parties of the fourth part. Ebenezer Erskine Scott was survived by his wife, who, however, died before this case, by five daughters, and one son. Of these one daughter and the son died before this case.

Miss Christian Scott left a trust-disposition and settlement, dated 8th September 1887, whereby she conveyed to the trustees therein mentioned her whole estate belonging to her, or of which she might in virtue of the testamentary deeds of her parents or otherwise have power of disposal at the time of her decease.

The first parties *maintained* that, in the events which had occurred of there being no children of the marriage between Mr and Mrs Bruce, and of Mr Bruce having predeceased his wife, the marriage-contract of Mr and Mrs Bruce contained no trust purpose applicable to the fee of said sum of £10,000, and that said sum, subject to the burden of Mrs Bruce's liferent, formed part of the residue of Ralph Erskine Scott's estate.

The second party maintained that the marriage-contract trusts with regard to the fee of the said sum of £10,000 had failed, and that the said sum, subject to her own alimentary liferent, belonged to her as part of her one-third share of the residue of Ralph Erskine Scott's estate, the direction to deduct the same from her said one-third share of residue having become inoperative. She further contended that the fee of her said one-third share of the residue of Ralph Erskine Scott's estate, exclusive of the said sum of £10,000, belonged to her absolutely.

The third and seventh parties maintained that in the events which had happened the said sum of £10,000 had been validly disposed of under the marriage contract between Mr and Mrs Bruce, and that upon the death of Mrs Bruce, the liferentrix, it would vest in the then surviving heirs of the body of Ebenezer Erskine Scott. Further, the seventh parties maintained that the fee of Mrs Bruce's one-third share of the residue of Ralph Erskine Scott's trust estate had been validly disposed of by his trust-disposition and settlement, and that upon the death of Mrs Bruce, the liferentrix, it would vest in the then surviving heirs of the body of Ebenezer Erskine Scott.

The fourth and fifth parties maintained that in the events which had occurred, of there being no children of the marriage between Mr and Mrs Bruce, and Mr Bruce having predeceased his wife, the marriage contract of Mr and Mrs Bruce contained no trust purpose applicable to the fee of said sum of £10,000, and that said sum, subject to the burden of Mrs Bruce's liferent, had fallen into intestacy, or alternatively that it formed part of the residue of Ralph Erskine Scott's estate. They further maintained that the fee of Mrs Bruce's third share of the residue of Ralph Erskine Scott's estate had not been disposed of by his trust-disposition and settlement, and had fallen into intestacy.

The parties of the sixth part maintained that in the events that had happened the fee of the said sum of £10,000 had been validly disposed of under the terms of the said contract of marriage, and that it vested upon the death of Mr Bruce in the then surviving heirs of the body of Ebenezer Erskine Scott. They further maintained that the fee of the said one-third share of the residue of the said Ralph Erskine Scott's estate, liferented by Mrs Bruce, vested upon the death of Mr Bruce in the then surviving heirs of the body of Ebenezer Erskine Scott.

The *questions of law* for the opinion and judgment of the Court were—"1. In the events which have happened, does the said antenuptial contract of marriage between Mr and Mrs Bruce effectually dispose of the fee of the sum of £10,000 which the late Ralph Erskine Scott became bound to pay to the trustees under the said antenuptial contract of marriage? 2. In the event of the first question being answered in the affirmative, did the fee of the said sum of £10,000, subject to the second party's life-

rent, vest, on the death of the said John Bruce, in the heirs of the body of the said Ebenezer Erskine Scott, now represented by the sixth parties; or is vesting thereof postponed till the death of the second party? 3. In the event of the first question being answered in the negative, does the fee of the said sum of £10,000, subject to the second party's liferent, (1) belong to the second party as part of the one-third share of the residue of the testator's estate bequeathed by him to her; or (2) fall into the residue of the testator's estate and become divisible among his residuary legatees, including the second party; or (3) form intestate succession of the testator? 4. (1) Does the fee of the one-third share of the residue of the testator's estate bequeathed by him to the second party (exclusive of the said sum of £10,000) belong to the second party absolutely; or (2) did the said fee vest, on the death of the said John Bruce, in the heirs of the body of the said Ebenezer Erskine Scott, now represented by the sixth parties; or (3) is vesting of the said fee postponed till the death of the second party; or (4) does the said fee form intestate succession of the testator?"

On the question of competency the following cases were cited:—*Baillie's Trustees* v. *Whiting*, 1910 S.C. 887, 47 S.L.R. 684; *Provan* v. *Provan*, January 14, 1840, 2 D. 298; *Harveys* v. *Harvey's Trustees*, June 28, 1860, 22 D. 1310, and *Cairns' Trustees* v. *Cairns*, 1907 S.C. 117, 44 S.L.R. 96.

At advising—

LORD JOHNSTON—I have considered the competency of this Special Case with reference to the authorities, and I think that in part only is it competent.

Mrs Bruce is entitled by action of declarator and payment to have determined her own rights in the funds settled on her by her father in her marriage contract, and by his will, for if her contention is sound it will result in present payment of such funds in whole or in part. To meet such action there are adequate contradictors even in the two sets of trustees, still more if to these are superadded all those in life who can put forward competing claims. These parties are all represented in the Special Case. So far, then, as Mrs Bruce's claims are concerned, the Special Case is competent. But I do not think that, if Mrs Bruce fails in her contention, the Special Case can proceed to determine interests that would arise in that contingency. For these are not interests resulting in present payment, nor can all possible claimants be at present ascertained. Some may not be in existence.

So far only, therefore, as query 1, query 3, and the first branch of query 4 go, is the Special Case competent. As regards the other queries it is incompetent.

The difficulty that has occurred in interpreting Mrs Bruce's marriage contract and her father's will arises from the fact that the marriage contract apparently omits to provide for a contingency which has happened, viz., the contingency of Mrs Bruce's surviving her husband, John Bruce of Sumburgh, and of there being no issue of the marriage; and from the further fact that her father, Mr R. E. Scott, being a man of business but not a conveyancer, wrote his own will.

I think, however, that though the draftsmanship of the marriage contract is not all that could be desired, the omission is only apparent, and that Mr R. E. Scott's intention in his will can be ascertained with sufficient certainty.

Mr R. E. Scott settled £10,000 on his daughter Mrs Bruce by her marriage contract for the following purposes:—In the *second* place, the income was to be paid to her as an alimentary provision during her life.

In the third place, "upon the death of the said Mary Dalziel Scott in the event of the said John Bruce junior surviving her, and of there being issue of the said marriage," a limited life interest was given to Mr Bruce "for behoof of himself and the child or children of the said marriage." It was limited by the provision for payment out of the capital to the children. The children's shares in the capital were payable to them on majority or marriage, and did not vest until majority or marriage.

In the last place, "in the event of there being no child or children of the said intended marriage," John Bruce junior, in the event of his surviving his wife, was to enjoy the liferent, and upon his death the settled fund was to revert and belong to Mr R. E. Scott, who provided it, whom failing to his other children jointly and the heirs of their bodies, whom failing to Mrs Bruce's appointees.

At first sight it would appear that this last purpose only provided for the contingency of there being no issue of the marriage and of John Bruce junior being the survivor of the spouses, and that the resulting trust for the settlor, whom failing his other children, only came into operation on that particular contingency. Literally I admit that that is the result, but I cannot think that that was the intention. And the real intention is, in my opinion, sufficiently plain notwithstanding the obscurity of the language.

In the first place, the provisions of the second purpose, giving Mrs Bruce a liferent, require that the last purpose should be impliedly prefaced by the same words as the third purpose. It would then run thus—"Upon the death of the said Mary Dalziel Scott, in the event of there being no child or children of the said intended marriage, the said trustees shall pay to the said John Bruce junior, in the event of his surviving the said Mary Dalziel Scott," the income of the settled fund. In this there is no difficulty of construction. And when the last purpose proceeds to say, "and upon the death of the said John Bruce junior the whole sums hereby settled by the said Ralph Erskine Scott as aforesaid" shall revert and belong, &c., I think that the clear meaning and intention is, though badly expressed, again supplying by necessary implication the initial words of the

purpose, this, "upon the death of the said Mary Dalziel Scott," and upon the death of the said John Bruce junior, that is in effect, on the death of the survivor, there being no issue of the marriage, the whole sums hereby settled shall revert and belong, &c.

If this be, as I think it is, the sound construction, Mrs Bruce's contention put forward in the Special Case fails, and the first query falls to be answered in the affirmative, and it becomes unnecessary to answer the third.

Turning now to Mr R. E. Scott's will, I think its interpretation is comparatively easy. Mr Scott would have more intelligibly expressed his intention had he put his third purpose first. For that is the way in which the thing presented itself to his mind. But the result of his first three purposes taken together, is that he divides his net residue among his three children, Ebenezer Erskine Scott, Christian Scott, and Mrs Bruce equally, but directs £10,000 out of Mrs Bruce's share to be paid to her marriage-contract trustees in implement of his obligation under her marriage contract. He does not, however, give Mrs Bruce absolutely the surplus of her share beyond the £10,000, but retains it in the hands of his trustees for her life interest, not in this case made alimentary, "the capital thereof to be settled in the same way and for the same purposes as are specified in the contract of marriage." What that settlement must be I have already dealt with. It is on children, if any, of the marriage, and failing them to revert and belong, &c. There follows a declaration limiting Mr Bruce's liferent in any event to the £10,000 settled by the marriage contract, and providing that if there were no issue of the marriage, Mrs Bruce's whole share was to revert to the testator's other children. This declaration is expressed in the same confused language and want of grasp of the contingency with which it is dealing as is the relative clause in the marriage contract. But it makes it nevertheless abundantly clear that Mrs Bruce, whatever the reason or want of reason, was to take no share of capital in any event.

The first branch of the fourth query will therefore fall to be answered in the negative.

LORD PRESIDENT—I agree in the result at which your Lordship has arrived. I think the rules as to competency were carefully considered in the case of *Baillie's Trustees* v. *Whiting* (1910 S.C. 887), and I do not think we can go back upon what we there decided.

So far, therefore, as the £10,000 is concerned, it is clear that inasmuch as the liferent of the £10,000 is an alimentary liferent, there cannot be any payment of the fee of that £10,000 to whoever it belongs; and as, even supposing the fee was in Mrs Bruce, she could not ask the trustees to denude, it is evident, so far as that sum is concerned, that she is not in a position to ask any present payment. And it is equally evident that, as she is not in that position, we have not got before us all the persons who may become possible competitors for that fee when the liferent has expired.

But so far as the sum left her by her father's will is concerned, that is not in the same position. The third provision of the will is that which deals with the residue, and it directs that the residue shall be divisible between the three children. Then it makes a provision as regards the deduction of the sum already paid to the son during his father's life, and then it goes on in the words, "and from Mary's share will be deducted the ten thousand pounds to be paid to the trustees under her marriage contract."

Now I think that, although not very clearly expressed, the meaning there is perfectly clear, that is to say, that the £10,000 already paid is to be taken *in computo* in settling Mary's share, just as the £3850 the son had got during his father's lifetime is also to be taken *in computo* in fixing his share. But then the testator goes on and directs "that the surplus of Mary's share beyond the £10,000 shall be invested by my trustees . . . and the interest thereof paid to her half-yearly on her own receipt . . . the capital thereof to be settled in the same way and for the same purposes as are specified in the contract of marriage."

Now here the liferent which she is given is not made an alimentary liferent; and therefore, if under the concluding words she got a fee, she would be entitled to say "I am now in possession of the liferent and fee of the same sum, and therefore I ask you to hand over the sum to me," that has been settled again and again to be within her power.

Accordingly I think the Special Case does become a competent Special Case so far as she is concerned, because she is in a position, if her contention is right, to ask for an immediate payment of that sum of money which represents what a third of the residue is under deduction of £10,000.

But then, in order to find out whether she has a fee of that sum, one has to go back to the marriage contract, because the capital is "to be settled in the same way and for the same purposes as are specified in the contract of marriage." When I come to the contract of marriage I go along with the reasons given by my brother Lord Johnston, and I do not find it necessary to repeat what he has said.

Accordingly I find that, in my opinion, she has not the fee of this other sum. Well, then, who has it? Well, the person who will have it will be the person who is entitled under the clause in the marriage contract; thus the proper contradictors are not here, because we cannot tell at this present moment who at the expiry of the liferent, which is the first period at which it can be paid, may be the heirs of the body of Ebenezer Erskine Scott and Christian Scott. Of course they may not be the people who are entitled to get it, because it may be that the heirs are to be taken at a different time.

Accordingly I think that the Special Case cannot be further proceeded with, and that we ought simply to negative Mrs Bruce's claim to an immediate payment of any money at all.

LORD CULLEN—I concur.

The Court pronounced this interlocutor—

"Answer the first question of law in the case in the affirmative, and the first branch of the fourth question in the negative: Find it unnecessary to answer the third question; and refuse to answer the second question, and the other branches of the fourth question: Find all the parties to the case entitled to their expenses out of the testamentary estate."

Counsel for the First Parties—Johnston, K.C.—Chree. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Fourth and Fifth Parties—Fleming, K.C.—Malcolm. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Second Party—Murray, K.C.—Macmillan. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for the Third and Seventh Parties—Sandeman, K.C.—Inglis. Agents—R. R. Simpson & Lawson, W.S.

Counsel for the Sixth Parties—Constable, K.C.—Jameson. Agent—R. Simson, W.S.

Saturday, November 18.

EXTRA DIVISION.

[Lord Skerrington, Ordinary.

NEW MINING AND EXPLORING SYNDICATE, LIMITED *v.* CHALMERS & HUNTER AND OTHERS.

Partnership—Liability—Fraud of Partner—"Course of Business" of Firm—Partnership Act 1890 (53 *and* 54 *Vict. cap.* 39), *sec.* 11 (*b*)—*Gratuitous Benefit from Partner's Fraud.*

A, a law agent, while acting as secretary of a limited company, assumed B as his partner, under a contract of copartnership which bore that the signatories had agreed to become partners "as law agents and conveyancers," that they should "devote their whole time and attention to the business," and that "all fees, including directors' fees, salaries, and other emoluments payable to either partner individually shall be credited to the firm unless by special agreement between the partners to the contrary." About five and a half months later A & B, as a firm, were appointed secretaries to the company, and A shortly afterwards absconded, having embezzled a considerable amount of the company's money. The company having sued B for, *inter alia*, the money which A had embezzled from the date of B's assumption as a partner to the date of the firm's appointment as secretaries, it was proved that the money embezzled, which consisted of sums paid for shares in the company by members of the public, had been entered in the firm's cash-book, that the office staff had been employed to do the secretarial work, and that one letter in connection with that work had been signed by B in the firm's name. It was proved, further, that A was debtor to the firm during the whole period, that he had withdrawn for his own purposes large sums from the firm's account at the bank, where they had a large overdraft, and that he had paid the money embezzled into that account without, however, reducing the overdraft below the figure at which it stood at the commencement of the period.

Held (1) that the money embezzled by A had not been received by the firm in the course of its business within the meaning of section 11 (*b*) of the Partnership Act 1890, and (2) that the firm had not been gratuitously benefited by the payment of the money into its bank account, and therefore that the firm and the remaining partner were not liable.

Observations (*per* Lord Skerrington, Ordinary) as to the position of a firm of law agents with regard to claims under contracts of employment with individual partners prior to the formation of the partnership.

The Partnership Act 1890 (53 and 54 Vict. cap. 39), section 11 (*b*), enacts—"Where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm, the firm is liable to make good the loss."

The New Mining and Exploring Syndicate, Limited, Edinburgh, brought an action against the dissolved firm of Chalmers & Hunter, W.S., Edinburgh; Hugh B. Hunter, W.S., as partner thereof and as an individual; and R. M. Maclay, C.A., Glasgow, trustee on the sequestrated estates of R. S. Chalmers, the only other partner of the firm, for a sum of £1400, which they alleged had been received by Chalmers and his firm while acting in succession as the pursuers' secretaries and law agents and embezzled by Chalmers. Chalmers was appointed secretary and law agent to the pursuers on 21st May 1907, and on 1st August 1907 he assumed the defender Hugh B. Hunter as a partner under the firm name of Chalmers & Hunter. On 17th December 1907 the firm were formally appointed secretaries to the pursuers, and they acted as such till 26th February 1908, when Chalmers absconded. Chalmers' trustee did not appear to defend, but Hugh B. Hunter, and the firm of Chalmers & Hunter, lodged defences, in which, while they admitted liability for any sums embezzled from 17th December 1907, when the firm were