Mackenzie had to buy shares registered in London, but had to pay for them a larger price than what Blakeney's had been sold for, and he now sued Mackenzie for the difference, for brokerage, for time, and for travelling and personal expenses, &c., incurred in the conduct of the negotiations. The summons concluded for payment of £196, 14s. 6d., and the action was brought in the Sheriff Court of Forfarshire at Dundee.

After a proof, the nature of which sufficiently appears from the terms of the interlocutor and of the opinions of the Court, the Sheriff-Substitute (CHEYNE) gave the pursuer decree for £190, 8s. 6d., being £168, 7s. 6d., the difference in the price plus commission, and the balance being for the other items charged, and on appeal the Sheriff (MAITLAND HERIOT) adhered.

The defender reclaimed.

At advising—

LORD JUSTICE-CLERK—In this case I think that the judgments given by the Sheriff-Substitute and the Sheriff are well founded. The pursuer, we have it in evidence, himself told the defender that he did not know anything about these stocks; at that very time the defender knew of this difficulty or peculiarity as to their transfer, and presumably of their consequent depreciation in value in the London market, even if a sale could be effected. Yet the defender never said one word indicating his knowledge of this fact, but suffered Mr Mackenzie to go on with the matter and to sell the shares. The broker acted according to the orders he received, and the fault lies with the person whose concealment, or whose silence at least, caused the difficulty.

On the matter of expenses, however, I cannot think Mr Mackenzie is entitled to travelling expenses to London, which were incurred really in support of his own claim against the defender, and not in the latter's interest. Again, his personal outlays, time, telegrams, &c., are either covered by brokerage or they fall under the same category as the travelling expenses. With this change I should propose to your Lordships to adhere to the interlocutor reclaimed against.

LORD ORMIDALE—I quite concur in the views expressed by your Lordship in the chair. It is important to keep before us the fact that Mr Mackenzie was a young stockbroker commencing business in Dundee, and not likely there to have seen transactions in these particular stocks. But there is besides this a statement by Mr Ross, who introduced the defender to him, that he told Mr Blakeney that he knew nothing of this stock, and would through his London correspondents sell it for him. Now this being so, it appears to me that the silence of the defender was, to say the least of it, remarkable—indeed it was unaccountable when he knew, as we have it in evidence from the correspondence that he did, how matters truly stood and how the shares of these banks were unsaleable on the London Stock Exchange, or at least unsaleable in the usual way and with the ordinary rules as to delivery, transfer, and so forth.

This brings us to another question, whether Mr Mackenzie failed in any way to do his best to save the defender from loss so far as lay in his power? He bought at once, as he was bound to buy, other and saleable stock it cost more, but he delivered it to the purchaser and closed the transaction, and now he sues for the difference. I think he did all in his power, and I entirely concur with your Lordships in that result, and also as to the matter of the travelling and other expenses.

LORD GIFFORD—I am of the same opinion, and think the Sheriffs are right. Had this action been one brought under the civil law, it would have been one of those termed *actio contraria ex mandato*. Now the question is, did Blakeney authorise and instruct the sale? If so, he must pay, unless Mackenzie gave to his London correspondents different instructions from those which he received from the defender. But he did not do so. As to the fault committed by the pursuer in not sending copies of the certificates to London, if fault there was at all, it was of the nature of a *culpa levissima*, but the fault of Blakeney in concealing his knowledge I should class as *culpa lata*. The expense in going to London must be disallowed as really being a journey undertaken as to a question between a broker and his client.

The Court pronounced this interlocutor—

"Find that the stock in question was not saleable on the London Stock Exchange, being registered in Australia, as the certificates for the same bear: Find that this was well known to the appellant, and was not communicated to the respondent when the order in question was given: Find that the sums for which this action is brought, with the exception of the charges for expenses of a journey to London and for telegrams and postages, amounting to £21, were incurred solely in consequence of the conduct of the appellant: Therefore, and under deduction of the said sum, dismiss the appeal, and affirm the judgment appealed against, and decern: *Quoad ultra* recal the same: Find the respondent entitled to expenses," &c.

Counsel for Pursuer (Respondent)—R. Johnstone. Agents—J. Smith Clark, S.S.C.

Counsel for Defender (Appellant)—Balfour—Darling. Agents—Lindsay, Paterson, & Co., W.S.

Friday, July 18.

FIRST DIVISION.

CITY OF GLASGOW BANK LIQUIDATION—(*M'EWEN'S CASE*)—PETER M'EWEN AND OTHERS (M'EWEN'S EXECUTORS) *v.* THE LIQUIDATORS.

Public Company — Winding-up—Trustees and Executors—Companies Act 1862 (25 *and* 26 *Vict. c.* 89), *sec.* 24—*Where Confirmation sent to Company and Executor has resolved not to Sell the Stock, and has drawn Dividends for Several Years.*

The confirmation of certain executors, who were also trustees, was in 1873 sent by their agent to the office of a banking company, stock of which belonged to the executry estate. The bank failed in 1878, and the

names of the executors which had been on the register of members were placed on the list of contributories as of persons liable in their own right. The executors had, in the exercise of an option in the trust-deed, resolved from the first not to sell the stock; they had granted a mandate to their agent to draw the dividends; and they had executed a transfer of some stock in another bank which belonged to the estate. *Held* that they were personally liable as contributories.

Explanation (*per* Lord President INGLIS) of the rights and obligations of executors under the Companies Act 1862, and the contract of copartnery of the bank in question.

The late William M'Ewen, farmer, Newton of Huntingtower, Perthshire, died on 13th July 1873. By his trust-disposition and settlement, executed on 9th September 1870, and codicil thereto, dated 18th April 1873, he nominated the petitioners to be his trustees and executors, and declared that they should not be bound to change any investments standing in his name at his decease. Part of the estate consisted of £300 stock of the City of Glasgow Bank. After the funeral on the same day a meeting took place, at which there were present the law-agents for the deceased, the petitioners, and some friends of the family. A minute was written out containing a list of stocks and funds belonging to the testator, and also the following paragraph:—"The parties named trustees and executors agreed to accept, and appointed J. & J. Miller to be their agents, and directed the settlement to be recorded in the Sheriff Court Books for preservation, and that their title to the heritable and moveable estate should be made up." Acting on this authority Messrs Miller obtained confirmation in favour of the petitioners as executors on or about 2d September 1873. The confirmation was sent by Messrs Miller to the bank, and the petitioners' names were entered in the stock ledger in the usual way as executors of the deceased. On the failure of the bank the names of the petitioners were placed upon the list of contributories in the winding-up, and this petition prayed that they might be removed.

The petitioners averred that they "never agreed to become members of the said City of Glasgow Bank, and they never authorised any person to contract in their names or in their behalf the obligations of membership. The petitioners have since the stoppage of the bank ascertained the following facts with reference to the foresaid £300 of stock. On obtaining the confirmation in name of the executors, Messrs J. & J. Miller, without the instructions or authority of the petitioners, wrote to the secretary of the bank on or about 6th September 1873, enclosing the stock certificate in name of the testator and the said confirmation in favour of the executors. Messrs Miller were at the time ignorant of the terms of the bank's contract of copartnery, and neither they nor any of the petitioners ever saw the said contract or any copy thereof until after the stoppage of the bank. In particular, they were ignorant of the stipulations of the 38th section of the said contract after quoted. The petitioners were never asked by Messrs Miller for authority to make them members or partners of the said City of Glasgow Bank, and they were not informed that their names had been placed on the list of partners of the bank. They never saw any stock certificates or dividend warrants with reference to the said stock. The dividend warrants were all signed by Messrs Miller, who received the proceeds, and applied the same to the credit of the executry estate. The petitioners granted a special mandate to Messrs Miller to uplift the dividends. The mandate had been prepared by Messrs Miller, and was placed before and signed by the petitioners, but they were not informed and did not understand that the document attached any responsibility to them beyond the liability to account for the dividends which might be received under it, which they were quite prepared to do."

The 36th section of the contract of copartnery of the City of Glasgow Bank provided—"In case the shares or interest of any partner shall be arrested in the hands of the company, such partner shall be obliged to loose every arrestment so used within twenty days after being required so to do by letter from any officer of the company; and in like manner, in the event of the shares or interest of any partner deceasing being attached by the diligence of confirmation *qua* creditor, his representative, if he any have, shall be obliged to remove the attachment within the like period of twenty days, after being required so to do by letter as aforesaid; otherwise, and in case of failure to comply with such requisition, and also in case a partner deceasing, although no diligence had been or should be used against his estate, and of no party choosing to represent such deceased partner by confirming executor, or otherwise assuming his estate within twelve calendar months after his decease, it shall be in the power of the said ordinary directors of the company either to sell or dispose of the shares so arrested, attached, or not taken up by a legal title, on the lapse of the said respective periods of twenty days and twelve months, or to retain and appropriate the same to the use of the company, in like manner and as fully and freely in all respects, and subject always to the same claims of deduction and retention as are herein provided with regard to the shares of bankrupt partners—the creditor arresting or confirming having only right to the price of the said shares if sold, or to the said value thereof if appropriated as aforesaid, but always under deduction and retention as herein mentioned."

The 38th section provided—"The said deed of transference, as also every assignment of shares in security or *mortis causa*, and confirmations thereof by right of succession, shall, after being completed, be recorded in a book to be kept for that purpose, and such deeds, transference, assignments, and confirmations shall be delivered or returned to those in right of the same after having marked thereon a certificate of the registration thereof: And it is hereby declared that the production of such writings to the said manager or ordinary directors for the purpose of registration, shall *ipso facto* infer the acceptance of the capital stock therein specified, and the liabilities of the parties having right to the same, as partners of the company; but it is hereby declared that no purchaser, or other assignee of, or successor to shares so acquired shall be recognised as a partner until the writing constituting his title is recorded in the books of the company in manner above specified." Neither the foresaid trust-disposition and settlement nor the said confirmation was produced to the manager or ordinary directors of the

bank, nor recorded in terms thereof. The confirmation was recorded by a clerk of the bank, who made the entries after quoted, and returned the confirmation to Messrs Miller.

A proof was led in the case before Lord Shand, the purport of which, as well as of the arguments of the parties, will be found in the opinions of the Court *infra*.

At advising—

Lord President—In this case the truster died in the month of July 1873, leaving a trust-settlement in favour of the parties who are the petitioners in this case; and that deed among other things contained powers of investment which it is not immaterial to consider—"power to invest on heritable, moveable, or personal security, in Government, India, or Colonial stocks or bonds, or in bank, railway, or other stocks, and debentures or mortgages of public companies; declaring that my trustees shall not be bound to uplift or change any investments standing in my name at my decease unless they think proper to do so." Now, this was, as we see from the inventory, a mixed estate, consisting of a great variety of subjects, and when the trustees named in the deed made up their minds to accept of this trust they were bound to consider what was the estate that they had undertaken to administer. It appears to me to be quite out of the question to listen to persons in their situation, when they say that although they accepted this trust they knew nothing about business. They should not have accepted the trust if they knew nothing about business; and above all, if they found that the estate of the testator was to any considerable extent embarked in trade, it was undoubtedly their business as trustees, as soon as they accepted, to make themselves acquainted with the nature of the interests they had in trading companies. And it seems to me to make very little difference whether the trading companies in which a testator is concerned are private trading companies or joint-stock incorporated trading companies. If it had been a private trading company, surely the first thing that these trustees would have inquired into was what was the nature of the business, how it could be best made available for the purposes of the trust, and what was necessary to be done in order to make it available. But the duty in regard to a public incorporated joint-stock company is not a bit the less than in regard to a private trading concern, and it seems to me that in that case the trustees have a corresponding duty to make themselves acquainted with the nature of that interest, how it ought to be dealt with, and how it is to be made available for the purposes of the trust. One thing they distinctly made up their minds upon, and that was, in terms of the option given them in the trust-deed, not to change the investments, but to keep them. And among other things they resolved to keep as a permanent investment of the trust-funds the stock of the Bank of Scotland, the stock of the Clydesdale Bank, and the stock of the City of Glasgow Bank. It was therefore not in their contemplation to avail themselves of any provisions that there might be, either by statute or by contracts of these companies, to sell the stock as their first act of administration, or as an early act in the administration of the trust. Now, if they were to hold on stocks of trading companies particularly incorporated joint-stock companies, it necessarily followed in the law that they must become partners of these companies. They say they did not know that. A great many people do not know it I daresay, but still it is impossible to overlook the fact that if they are to continue holders of that stock for any purpose they can only hold it in the character of partners of the company. They did not consider these things at all they say; they did not understand them; they did not turn their attention to them; they left everything to their agent Mr Miller—for that is really what their evidence comes to.

Now, then, let us see what they actually did, as recorded in their minutes. At the meeting after the funeral we have a statement that, all the trustees being present, there was laid before them a copy, or an inventory rather, of the different titles which were found, embracing among other things the certificates for those bank stocks of which I have spoken; and upon that they agreed to accept, and appointed, Messrs Miller to be their agents, and directed the settlement to be recorded for preservation, and that their title to the heritable and moveable estate should be made up. Now, the petitioners say that they did not know what that involved; they did not consider what was to be the effect of making up a title to the heritable and moveable estate. But I think we can hardly take that off their hands without a little qualification, looking to the evidence of Mr Buchanan, who was there as the representative of the Messrs Miller; for he says—when he is asked whether the word confirmation was used in talking over this matter—"I cannot recollect positively, but I must have stated to them the effect of completing their title to the personal estate—that confirmation would have to be expede and entered with the companies. I knew it was necessary to enter them with the companies to vest the trustees with the stock." In another place he says, being asked "Did you understand you were to get the stocks transferred to the names of the trustees?—(A) Yes. (Q) What led you to have that understanding?—(A) I must have told them that an inventory of the estate would require to be made up by one of them and confirmation got, and then the confirmation sent to the different companies." And further on still he says that the object of transferring the stock to the names of the trustees "was simply to vest the stocks in the names of the trustees to enable them to deal with them. (Q) But was anything said about that at the meeting to the effect you have now stated?—(A) Well, no, that is a mere matter of recollection, but I must have stated to them that the stocks would require to be transferred to their names. (Q) You have no doubt you did say that to them?—(A) I have not the slightest doubt I must have said that to them. (Q) Did they assent to that?— (A) They did not object; they considered the stocks all good." Now that being so, I think it is pretty plain that it must have been explained to them at the time when they accepted the trust that since they were resolved to hold these stocks as part of the trust-estate, they would require to have them in some way put into their own names as trustees. That they were not acquainted with the legal consequences of what was to be done I can very well believe. I suspect that the greater number of trustees who have been made personally answer-

able as partners of this bank in the course of the liquidation were just as ignorant as the present petitioners in regard to that. I think that extremely probable. But the only question that we have to deal with is, whether they are sufficiently proved to have given authority to do what was necessary to keep these stocks in their names as part of the trust-estate? There is a passage in the evidence of Mr Brown, one of the petitioners, which I think rather remarkable in this respect—"Did the trustees, including you, resolve to keep on Mr M'Ewen's investments?—(A) Yes. (Q) Did you instruct your agent to do what was necessary for that purpose?—(A) I do not think that there were any particular instructions given to our agent about it so far as I remember. (Q) Did you know that any of the deceased's bank stock was transferred to your names as trustees?—(A) No, we did not consider—at least for my own part I did not consider that it was necessary to have them transferred to our names. (Q) But did you know as a fact that part of the bank stock which belonged to the deceased had been transferred to the names of you all as his trustees?—(A) No, not one of them." But being referred to the acceptance (which all the trustees had signed) of the Bank of Scotland stock, and the question being repeated, all he has got to say to that is "I do not recollect." Now a non-recollection in opposition to what Mr Buchanan said in his evidence I think cannot avail. It is pretty plain I think, therefore, that at this first meeting of the trustees they really left the matter in the hands of their agents to do what was necessary to enable them to continue to hold these bank stocks as part of the trust-estate,—to hold them, not for a temporary purpose—not for the purpose of realising them—but as an investment to be continued. Mr Miller says that although he knew quite well that what he did would have the effect of transferring the stocks into the names of the trustees, and although he says distinctly that he intended to have the stocks transferred into the names of the trustees by the communications he made to the bank, he did not know that that would make them personally liable. There, again, we have just that sort of very unintelligible ignorance which seems to have been prevalent among persons acting as trustees, and what is still more extraordinary, among their law-agents and advisers, notwithstanding the judgment in the case of *Lumsden* v. *Buchanan*, which seems to have been entirely forgotten by them all. But I am afraid that that cannot affect the question of the liability arising from acts that were done, and done by authority.

Now, to say that anything else could have been done by Mr Miller under the instructions which he received from the petitioners, I think is out of the question. As I read the contract of copartnery of the City of Glasgow Bank, and as I think we have always understood the law applicable to transferences from the dead to the living, the state of the rights of parties stands thus—if executors or personal representatives do not choose to take up the estate of the deceased, then under the 36th section of the contract of copartnery the shares belonging to him in the bank will fall to be sold. A year is given for the purpose of the representatives having an opportunity of confirming, and if within that time they do not take up the shares, then the directors of the company are entitled to sell them. Now, what is meant by that? It surely is not meant that they shall merely confirm, but they must also intimate the fact of their confirmation to the bank, otherwise the bank cannot be interpelled from selling the shares at the end of the year. They are not bound to know of the confirmation of the executors unless it is communicated to them, and if they proceeded to sell the shares, and then the confirmed executors proposed to stop them, would not the natural answer of the bank directors be—"Very well, send in your confirmation if it is so; but we are not to take for granted that it is so if you do not send it in, because the 38th section of the contract requires that all confirmations shall be registered in our books, and if that confirmation is not registered in our books, we will proceed with our sale." These appear to me to be the rights of parties under these two sections.

Then if the confirmation is sent in under the 38th section of the contract, what must follow? It is quite within the power, no doubt, of the executors, by themselves or their agents, to say—"We are sending you this confirmation merely for the purpose of satisfying you of the fact that we are confirmed, and we are going immediately to sell these shares in virtue of the power conferred upon us by the 24th section of the Companies Act 1862"—a procedure which even before the passing of that Act would according to the law of Scotland have been competent to executors in that position, because it was clearly an assignable interest, and I think by the law of Scotland every assignable interest could be made the subject of sale. But be that as it may, what I am now speaking of is this, that in sending in the confirmation to the directors acting under this contract of copartnery, the executors may, if they think fit, say—"We are not sending in this confirmation for the purpose of having the shares transferred to our name, but only to give you notice that we are in right of the shares as executors, and that we mean to sell them." If they do not say so, what is the necessary consequence. When the executors of a deceased party are dealing with his shares in a particular joint-stock company, they are bound to know about that joint-stock company, and they find if they inquire—as they are bound to do—that if they send in their confirmation without any such qualification as I have suggested, it will be forthwith recorded, and recorded in such a way as to make the executors partners of the bank. And therefore if they send it in without any qualification, they must just submit to the necessary consequence arising from the provisions of the contract. Now, that is what was done here by Mr Miller beyond all doubt, and I think Mr Miller says so distinctly enough—"I have no doubt they"—that is, the petitioners—"must have known that stock in other banks"—*i.e.*, the Clydesdale and the Bank of Scotland—"had been transferred to their names, because they signed a transfer on two occasions;" and it would have been very curious if the fact thus brought to their knowledge had not also opened their eyes to the fact that they must stand in the same position as regards the City of Glasgow Bank stock.

But there is more in the case than this. There is a minute of the 29th of August 1873, at which meeting all the trustees were present, and Mr Miller reported that the inventory of the personal

estate had been given up, "and as about £300 was required to meet immediate payments, the trustees after consideration directed that £220 Clydesdale Banking Company's stock should be sold," and further, "the trustees signed mandates to the various companies authorising payment of dividends or interest to the trust agents until further notice." Now, that is one of the transfers that Mr Miller refers to in his evidence. So that as early as the 29th of August 1873—about a month after the testator's death—they found themselves in the position of acting as partners of this bank by signing a transfer, and at the same time all of them signed the mandate, which certainly is abundantly clear in its terms, because it contemplates that whether the stock shall be standing for the time in name of the deceased untransferred, or whether it has been transferred to the names of the petitioners as trustees or executors, or whether it be standing (as it would do in the case of English investments) in their own names on joint account, in all these three different positions the agents of the trust are empowered to uplift and discharge the dividends. After this, again, on the 10th of September 1873, the acceptance of the Bank of Scotland stock, which Mr Brown was asked about in the course of his examination, was signed by all the trustees, and there can be nothing ambiguous, one would think, about the expression of that document, because they "do hereby, as executors foresaid, agree to and with the governor and company of the Bank of Scotland to fulfil the several conditions under which the said deceased William M'Ewen held the said stock prior to the same being transferred to our names." As to their relations to the Bank of Scotland, therefore, there can be no room for ambiguity at all. Then they took new allotments of stock both from the Clydesdale Banking Company and from the Bank of Scotland. They say they did not know that these were to be taken in their names, but thought they were to be taken for the trust-estate. That is just another piece of ignorance which I am afraid cannot avail them. It is not pretended that they did not authorise the allotments. They were only unaware of the legal consequences of them, but that just stands in the same position as their general authority given at the beginning to do all that was necessary for the purpose of making these stocks available as part of the trust-estate. Now, when you add to all that that the administration of this trust goes on consistently in the same way for a period of five years, that accounts are regularly rendered by the agents to the trustees of their administration and management of the trust-estate, and that upon the face of these accounts it is perfectly plain that these stocks remained as part of the estate, and that charges are made in the accounts for having the stock registered in the name of the trustees—for it is impossible to escape from that by any form of expression in the way of making these charges—when you take that all into account—it seems to me to be altogether out of the question to say that at the end of the five years, merely because they now begin to find that what they have done and authorised to be done, and knowingly authorised to be done, is attended with personal liability of a very serious kind, they are to say—Well, we did not understand all this, and therefore we cannot be subjected in that liability. If they did not understand it, they ought to have understood it, and persons cannot escape from the liability consequent upon acts they have done merely by saying that they did not know that these acts would infer such liability.

I am therefore for refusing the petition.

Lord Deas—I am sorry to say that I do not see any possibility, consistently with what has been already decided in a variety of cases, to come to any other result than that which has been arrived at by your Lordship. The further we go on in this liquidation, the more disastrous we see the consequences to be of the judgment we found ourselves constrained to pronounce in *Muir's* case—disastrous, I believe, to the banks as well as to the shareholders, bringing down as it did the bank stocks by one-third of their price, and depriving the banks of their best shareholders and customers and their friends. All that we cannot help. The Legislature may do something for it sometime, but we cannot, and this case is just one of the natural results.

These trustees held these stocks for five years, and by themselves or their mandatories drew the dividends, signing all the documents which have been placed before us, many of which it was impossible for anybody of ordinary intelligence to have read and considered without seeing that they were going on in the capacity of shareholders of these banks and other companies. I have no doubt they did all that in reliance that the well-known and highly respectable agents whom they employed would do and were doing everything according to law, and it is extremely likely that they never thought for themselves as to what might be the consequences. But the more trustworthy these agents were, and the more they were trusted, the clearer it becomes that all this course of action just amounts to an implied mandate by these parties to their agents to do whatever they thought proper in the matter; and if they had such an implied mandate, and it was acted on and acquiesced in by the parties during all that time, I am not able to say that that is not the same thing as if they had done it all themselves directly. It is perfectly clear that they must have known and understood that the object was not to sell the stocks and convert them into money within a short period, which might have led to a very different result, but they knew and understood that the object was to hold these stocks on permanently.

These may be greater or less hardships in individual cases, but in this case I can only come to the conclusion with your Lordship that the petitioners are liable as partners of this bank.

Lord Mure—I am constrained to concur. Looking to the whole circumstances of the case, and to the evidence, oral and documentary—to the fact that these gentlemen have for five years continued to deal with this bank stock as stock that they had the command of—granting mandates, drawing dividends, and actually taking allotments—I cannot come to any other conclusion than that they made themselves partners of the bank, and liable as such. They resolved to hold stock. From their evidence that is quite clear. They appointed an agent to make up a title to it, and that agent knowing what they intended, had

no other course open to him but that which he followed. It is very likely that it never struck them that they were incurring any personal liability by so acting, but I cannot doubt that in having the shares transferred to their names they made themselves partners of the bank, and therefore personally liable.

Lord Shand—I am also of opinion that the petitioners have failed to show that they are entitled to have their names removed from the register, and consequently that the petition must be refused. The case presents this peculiarity, that all the petitioners say they did not know that their names had been registered in the books of the bank as shareholders, and having taken the proof in the case it is only right I should say that I believe this statement. It is quite true, as your Lordship has said, that Mr Buchanan, speaking of the meeting immediately after the funeral, believes it was then mentioned that the stock would require to be transferred to the executors' names, but I do not think his evidence amounts to an absolute statement that anything of the kind was in point of fact said. What he does say is that he explained that confirmation would have to be sent in in order to vest the stock. That occurs in a passage immediately before that, which your Lordship read. When he is asked—"But with regard to the transfer of the stock to the names of the trustees?" he answers—"No, it was simply to vest the stocks in the names of the trustees to enable them to deal with them. (Q) But was anything said about that at the meeting to the effect you have now stated?—(A) Well, no; that is a mere matter of recollection, but I must have stated to them that the stocks would require to be transferred to their names. (Q) You have no doubt you did say that to them?—(A) I have not the slightest doubt I must have said that to them." Now, that is not the language of a man who can say distinctly that such a thing was said, and I think when his examination towards the close is looked at—particularly in reply to questions put by the Court—his evidence scarcely amounts to that. The petitioners themselves all say that in point of fact nothing of the kind was said, and that they never understood that their names were to be registered. The cases with which we have hitherto dealt have generally been of the class of trustees and others who knew that their names had been entered in the bank's books, but were not aware of the legal effect of this, and who maintained in point of law that although their names were on the bank's books the effect was not to make them partners; or they have been of the class in which persons had signed dividends which expressly bore that their names were so entered, and who were therefore bound by these documents as writings upon which the bank had acted, and which contained on their face the statement that the parties' names were entered in the books of the bank as the holders of the stock.

But although it be taken that the petitioners did not know that the shares had been transferred to their names, I am still of opinion that in the circumstances in which they stand they must be held responsible as partners of the bank. It is very material in that question that the petitioners had no intention whatever of selling the stock, as many executors have, for the purpose of realising and distributing the estate. Their intention was to hold it. That intention received effect so far that they had in point of fact held it for five years, and they meant to continue to hold it at the date when the stoppage occurred. In such circumstances I think the law must presume that they could not fail to be aware that the rights of third parties—creditors and fellow-partners of the bank—were involved in the course which they followed. In that view the first document which I think material as bearing upon what they did is the mandate which they granted with reference to the payment of dividends. I look at it as a document which was transmitted to the bank, and to be acted upon by the bank; and it bears on its face that the Messrs Miller are thereby authorised to pay the dividends on the City of Glasgow Bank stock "standing in the name of the late Mr M'Ewen, or in our names as his trustees or executors." That, with the letter from Messrs Miller of 4th September, accompanied by the confirmation and a request that the stock should be transferred to their names, was, I think, quite sufficient to entitle the bank to act upon the footing of authority given by the trustees to register them as shareholders. The circumstance that they did not read the mandate will not save them if in its terms it is sufficient to entitle the bank to treat it as a mandate to put them on the register. The only meaning of the words "or in our names as his trustees or executors" in a mandate addressed to the bank must have been that the shares standing in the name of the deceased might be transferred to their names; for in no other way could their names be in the books of the bank. Accordingly, I think the bank were entitled to hold, in a question with the trustees, that they had given authority to their agent to put them on the register when he sent the confirmation with such a mandate as this; and at least that the authority cannot be questioned after having been so long acted on in the payment of dividends.

But in addition to that, I agree with your Lordship in thinking that the trustees were bound to make themselves to some extent acquainted with the contract of copartnery under which these shares were held—at all events, that they were so bound looking to the length of time they had held the stock. I think the effect of sections 36 and 38 of the contract was to give the bank a right to sell the shares at the end of twelve months unless the executors thought fit to come forward and put themselves on the register. If this registration had not occurred, the other partners of the bank at the end of twelve months would, it may be presumed, have sold the shares (unless indeed the petitioners chose then to register), and so have got other suitable persons to become partners. That is to be assumed, because power is given in the contract for that very purpose. But if by the actings of these executors, or of their agent, who was left to act in this matter for them as he thought fit, the other shareholders were deprived of the right of selling the shares at the end of twelve months, and that on the footing that they had got the executors as partners in respect of these shares, then I think the petitioners were not entitled after the lapse of four years, and after other persons' rights had become involved, to say—"We shall get rid of this liability altogether, and have our names taken off the register." The truth seems to be that the

whole conduct of this matter was left to the Messrs Miller with the full confidence that they would do what was right, and that they had power to do what they thought proper. That being so, and the Messrs Miller having thought fit to use the mandate and the confirmation for the purpose of registration, it appears to me that the petitioners, at this distance of time, and after the rights of third parties—creditors as well as shareholders—have become involved, cannot succeed in their present application. I am confirmed in the view that the management of the executry estate was left in the hands of Messrs Miller with full powers by what occurred in regard to the other stocks. Messrs Miller had put the trustees' names on the register in regard to them, and when a new allocation of stock took place, it was accepted by the trustees in their own names, and they were consequently put on the register. In the whole circumstances of the case I think this petition must be refused.

The Court refused the petition with expenses.

Counsel for Petitioners--Dean of Faculty (Fraser) —Pearson. Agents—Boyd, Macdonald, & Co., S.S.C.

Counsel for Respondents—Kinnear—Balfour—Asher—Lorimer. Agents—Davidson & Syme, W.S.

Friday, July 18.

FIRST DIVISION.

[Lord Craighill, Ordinary.

COWBROUGH *v.* ROBERTSON.

Proof—Reference to Oath—Intrinsic and Extrinsic—Where Debtor deponed that Creditor granted Discharge for a Consideration which was not Part of Original Contract.

The defender in a reference to oath regarding the balance alleged to be due by him on certain accounts incurred during the years 1848 to 1854, in his deposition admitted the constitution of the debt, but stated that the pursuer had agreed to grant him his discharge upon receiving an assignation to certain debts —a consideration which did not form part of the original contract—and that the debts were so assigned and the discharge granted. *Held* (*dub.* Lord President Inglis) that there was no proof that the debt was resting-owing, and that therefore the deposition was negative of the reference.

Examination (*per* Lord Deas) of the authorities upon the question what is intrinsic and what is extrinsic of a reference to oath.

James Cowbrough & Coy., and James Cowbrough the only partner of that firm, who formerly carried on business as grocers in Stirling, sued Robert Robertson, the defender, at one time a hawker there, but at the date of the action resident in America, for the sum of £63, 18s. 4½d., with interest thereon, being the balance said to be due by the defender to the pursuer for goods sold and delivered conform to a series of pass-books commencing 23d October 1848 and ending 13th July 1854. The defender pleaded the Statute 1579, c. 83, and the matter was referred to his oath. The substance of his deposition will be found in the opinion of Lord Deas *infra*.

The Lord Ordinary (Craighill) found the deposition affirmative of the reference, and repelled the defences, adding this note—

"*Note.*—There are two questions which were the subjects of argument. The first was, whether the deposition was affirmative or negative of the reference? and the second was, assuming that the deposition is negative, whether the transactions by which the debt sued for was said to be discharged were intrinsic or extrinsic of the reference. The latter comes to be comparatively immaterial, inasmuch as the Lord Ordinary is of opinion that the deposition is affirmative. But had it been necessary to decide this point, the Lord Ordinary would have acted upon the view that the transactions referred to were intrinsic and not extrinsic of the reference in a case like the present. Two things have here to be established—the constitution and also the subsistence of the debt. The burden of both is upon the pursuer; and if the defender depones that in any way the debt sued for has been discharged, the Lord Ordinary is of opinion that this statement is admissible, and must be accepted.

"The question whether the deposition of the defender is affirmative or negative is a matter of some delicacy. The defender has again and again deponed that the debt sued for was discharged. If the words he uses must be taken as he gave them, the deposition must be regarded as negative; but if the Court is entitled or is bound to review all which the deposition contains, and to determine whether the defender's statement that the debt was discharged is well or ill founded upon the facts disclosed in the deposition (which is the view of the matter upon which the Lord Ordinary has proceeded), the defender's deposition, he thinks, must be taken to be affirmative. In the first place, the defender depones that the debt sued for was not paid or discharged except in one or other of the ways which he has explained. This necessarily introduces the question, whether the ways in which, as he says, the debt was discharged, are, when taken together, such as lead to or warrant the conclusion that the things sworn to by the defender really were such as are represented? If this is not an admissible inquiry, the defender's deposition must be taken to be negative, because he has repeatedly deponed that his debt had at different times and in different ways been discharged; but if, on the contrary, the inquiry is admissible, the result, as the Lord Ordinary thinks, must be that the deposition is affirmative.

"What is first said by the defender is, that there was an agreement between the pursuers and him, by which he gave, and they accepted of, the debts which were due to him as satisfaction of the debt which was due by him to the pursuers. The defender swears that there was an agreement to this effect, but nevertheless he proceeds afterwards to explain that the pursuers acted towards him, and that he treated the pursuers, as if no such agreement had been concluded. What is referred to is, that they demanded, and he paid, a sum of £20, on the condition that this payment should be accepted as in full satisfaction.

"The Lord Ordinary thinks that the last of these statements is irreconcileable with the first. There could hardly have been such an agreement