sustained, yet he had been recommended to consider of the propriety of pressing his appeal further, and he was clearly wrong on the merits of his appeal. The interlocutor appealed from ought to be affirmed with costs, including the respondent's costs of discussing the competency of this appeal." Here the costs were reserved. The respondent has been successful upon the merits of the appeal to your Lordships, and the case appears to me to form an important precedent for my application. The costs were reserved. I apprehend that in a clear case they would not have been reserved. The costs were reserved, as I apprehend, in order to see what became of the appeal upon the merits, and on the merits the respondent has been entirely successful, and therefore I trust your Lordships will give us those costs. This is a case between husband and wife, in which the husband is receiving £1200 a-year from the lady's property.

Mr. Anderson.—Costs were reserved in reference to this application by my client, not by the other side, but by the appellant; and I apprehend it is the settled course of this House, where costs are reserved in favour of a party, who has established the competency of an appeal, to give them. No doubt there are cases where the question involved in the competency is analogous to that involved in the merits. And the appellant, being wrong on the merits, is wrong on the competency. The House has power in that case to include the costs of the competency. But the general rule is otherwise, that, where the respondent establishes his right upon the merits, but fails in his attempt to exclude the appeal altogether, he pays for that unsuccessful attempt, though he may get the costs of hearing upon the merits. In the case of *Kerr* v. *Keith*, 1 Bell's App. C. 426, where the matter was argued at your Lordships' bar, your Lordships will find the question discussed. After some interlocutory observations, Lord Brougham, addressing himself to the respondent's counsel, said, "The decision on the competency is against the other party," that is, against the respondent, "and they must pay the costs taxed by the proper officer with respect to the question of competency, and that settles the whole question;" and the order of this House upon that point was included in the judgment:—It is ordered "that the said respondent William Keith do pay, or cause to be paid, to the said appellant in the said original appeal, the costs incurred in respect of the case, and proceedings in this House, arising out of the said petition." My learned friend has now raised this matter as a renewed application. I made the application, at the time your Lordships decided this interlocutor in my favour, that the respondent should pay to the appellant the costs of that appeal, and I believe it was in consequence of my making the application, that the House reserved the matter till they had disposed of the case upon the merits.

LORD CHANCELLOR.—My Lords, in this case, I think it is quite clear that there ought to be no costs on either side.

Interlocutors affirmed without costs.

First Division—Smedley and Rogers and Dodds and Greig, *Appellant's Solicitors.*—Grahame, Weems and Grahame, *Respondent's Solicitors.*

DECEMBER 3, 1852.

THE NORTH BRITISH BANK and CHARLES HUTCHESON, *Appellants, v.* EDWARD COLLINS, *Respondent.*

Partnership—Contract—Construction—Summons—Relevancy—Fraud—*A partner of a Joint Stock Banking Company brought an action to have it found, either that the company was* ipso facto *dissolved by force of a provision in the deed of copartnery declaring that losses to a certain extent should void the company, or that, in respect of the allegations in the action, (fraud, malversation, &c. &c., on the part of the directors,) he was entitled to have the company wound up. The defence was, that the action was irrelevant, and excluded by the terms of the contract. The Court of Session,* ante omnia, *in the circumstances and state of the record, remitted to an accountant to report as to the accuracy of the balances, and the amount of losses as at a particular period.*

HELD (affirming judgment), *that the remit and inquiry were right, and did not necessarily interfere with the company's business.*

Appeal—Competency—Remit to accountant—*An interlocutor remitting to an accountant to discover whether the losses of a company were such as to require dissolution,*

HELD *an interlocutor on the merits, and appealable.*[1]

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[1] See previous report 13 D. 349; 23 Sc. Jur. 155, 236. S. C. 1 Macq. Ap. 369; 25 Sc. Jur. 119.

The appellants brought under the review of the House of Lords the judgments of the Court of Session in the previous reports, and prayed (in their *printed case*) that they might be reversed, on the following grounds:—1. Because the Court of Session ought not to have entertained the application for investigation and diligence until after the appellants' defences and pleas against the relevancy and competency of the summons and record had been disposed of. 2. Because there were no relevant allegations to support the action. And, 3. Because it was excluded by the contract of copartnership; and, even though the respondent's averments had been relevant, the contract provided the redress and procedure open to any dissatisfied shareholder.

The respondent maintained in his case that the judgments were well founded, because, according to the contract of copartnery, the company becomes *ipso facto* dissolved on the occurrence of loss to the extent of the whole reserved fund, and 25 per cent. on the advanced capital stock. The respondent is entitled, on proving the occurrence of such loss, to have the dissolution of the company declared and enforced. His action, therefore, to this effect, is a proper one, and the Court were entitled to appoint evidence of the respondent's allegations to be taken by means of the inquiry ordered by them.

Bethell Q.C., and *Anderson* Q.C., for appellants.—1. The Court ought not to have remitted to an accountant until the defences and pleas against the relevancy and competency of the summons and record had been disposed of. These defences tended to exclude the action altogether, even assuming the allegations of the summons to be true, and therefore it was obviously a waste of time and money to inquire into the truth of that which, even if true, might not be relevant. The pleas in the defences were, that the action was excluded by the contract of copartnery, and the relevancy of that defence ought to have been first disposed of. The inconvenience of departing from that rule was seen in *Irvine* v. *Kirkpatrick*, 7 Bell's App. C. 213. 2. The summons has two alternative conclusions. One is, that owing to the gross malversation of the directors, the company should be dissolved. But the allegations of fraud and mismanagement are too vague and general to warrant the course taken by the Court. Mere abstract assertions of fraud, misappropriation, insolvency, &c., are not enough, unless the summons state the particular acts which are fraudulent. This is a well-known rule of law—*Palmer* v. *Mure*, 2 Dickens, 489; *East India Co.* v. *Henchman*, 1 Ves. Jr. 287; *Kyle* v. *Allen*, 11 S. 87; *Irvine* v. *Kirkpatrick*, *supra*. Besides, these allegations are mixed up with the alternative conclusion of the summons as stated below. But even if they were proved, they are irrelevant, for they would only go to shew, that the directors are personally liable for their misappropriations, and not that the company ought on that ground to be dissolved. 3. The other alternative of the summons is, that a certain event has already arrived—viz. the fact, that the losses of the company amount to a certain sum fixed by the contract But here there is a gross inconsistency in the summons. It first alleges, that losses to the extent required have occurred, and then it goes on to say, that these losses have been caused by the fraud, &c., of the directors. Now § 54 says, that if it shall at any time be found, "on balancing the company's books," that a certain loss has occurred, the company shall be *ipso facto* dissolved. The balancing here alluded to means the balancing under the previous §§ 39 and 50—viz. the balances set forth in the yearly abstract of the directors. The losses, accordingly, must mean the losses in the regular way of the company's business, and cannot mean such as are caused by the fraud of the directors, for which the directors themselves would be answerable. Section 52 also states what remedy there is for the shareholders, if they are not satisfied with the yearly abstracts of the directors. At any general meeting, a majority of shareholders may appoint two of their number to investigate the accounts, and see that no delusion has been practised; but beyond this remedy, each is conclusively bound by the contract to rest satisfied with the statements made. In an analogous case—*ex parte Holme* in *North of England Banking Co.*, 2 De G. M. & G. 113—the Lord Chancellor said, that each shareholder was clearly bound by the annual reports of the directors. There being, therefore, a remedy provided by the contract, it is clear that this remedy must be resorted to, and first exhausted, before any court of equity will interfere,—and here the respondent does not allege that he has resorted to it. Lord Eldon clearly laid down that rule, that the partner must first take the remedy under his own contract, before he can go into the Court—*Waters* v. *Taylor*, 15 Ves. 10. Hence the strongest allegations of mere fraud will not suffice—*Foss* v. *Harbottle*, 2 Hare, 461. The remedy in the contract is most reasonable, for, the business of the company essentially requiring secrecy, this was a course which secured that advantage. Whatever, therefore, was the contract made between the partners, they must abide by it in preference to resorting to Court—Story's Partnership, 309. *Lastly*, Even if the Court was right in making the remit, it ought to have followed the plan laid down by the deed—viz. to have appointed two of the shareholders to conduct the investigation, and not an accountant, who was in fact one of the public, and not bound to secrecy. On the whole, therefore, we say, that the Court below was wrong in ordering so expensive an inquiry into so irrelevant a statement as the summons contains; that the allegations of fraud in the abstract are utterly useless; that the losses alleged are not the losses contemplated by § 54, but that the directors would be personally liable for them,—and the balance meant that which was the result of the company's operations in the regular course of business; but, at all events, that

each partner was bound to rest content with the annual statements, unless a majority of shareholders appointed two auditors to investigate them,—and that not being done, no partner is entitled to the protection of the Court. As the matter stands, the order of the Court tends to shut up the company's business entirely, for all their books must be dragged away from Glasgow to Edinburgh, where the accountant may detain them for years, as is often done, before his report is made up. And to affirm this appeal, would be to countenance the doctrine, that any discontented shareholder may by dint of the most wanton allegations of fraud in the abstract, be able to break up the most opulent companies, it being difficult to say, at any given moment, whether their losses may exceed a certain limit or not.

Lord Adv. Inglis and *Rolt* Q.C., for respondent.—The case set forth in the summons is simply this—that the losses of the company have already exceeded a certain amount, which by agreement was to cause a dissolution *ipso facto*, or, at all events, the condition of the company's affairs is such that it will be the ruin of all concerned if it be not forthwith dissolved. Taking the allegations together, there is an ample *primâ facie* case. It is said we have bound ourselves by the deed of copartnery to rest contented with the yearly statements. But it cannot be said that we are so bound where these statements are fraudulent, as we assert here. The contract was not founded on that assumption—fraud was not in the contemplation of the parties—and we cannot therefore be prevented coming to a Court of Equity for protection. It is said the losses of the company causing the dissolution must be losses in the way of business, and not such as are caused by the fraud and mismanagement of the directors. But the meaning is evidently "losses howsoever caused or brought about," and it is quite as much a loss to the company if the directors have caused it, as if any other event had caused it. Then it is said we ought to have exhausted the remedy provided by the contract, but it is plain we could not avail ourselves of that remedy, if it was a remedy. Our case is, that owing to the mismanagement of the directors, and the undue control they exercise over a majority of the shareholders, it is utterly impossible for us to obtain a majority. The directors have taken care to provide a majority to back them in all their perverse schemes, and we come to the Court in the face of that majority, alleging concert and undue use of the company's means. We allege that the directors have exceeded their powers, and have perverted the funds to illegitimate purposes, such as miscellaneous speculations quite alien to our proper business as a company, and therefore it is quite competent for any one shareholder to file his bill, or raise an action, as we have done—*Colman* v. *Eastern Co. R. Co.* 10 Beav. 1. Then it is said that this remit should not have been to an accountant, but in the way pointed out by § 52, that is, by appointing two shareholders to conduct the investigation; but when the subject is taken to a court of justice, the court takes its own way of ascertaining what is necessary. A remit has been accordingly made to an accountant of respectability, in whom the Court had confidence, and there can be no objection to that course. It is not true that it will be necessary for the books of the company to be taken from Glasgow to Edinburgh; on the contrary, it is the intention of the accountant to go to Glasgow and conduct the investigation there, with as little disturbance to the operations of the bank as possible. *Lastly*, We object to the competency of the present appeal, because this is an interlocutory matter, and not a judgment on the merits, which has been brought under review contrary to the statute 48 Geo. III. c. 151, § 15.

Anderson replied.—As to the objection to the competency of the appeal, it is enough if the interlocutor appealed against affect the whole merits of the case, which this does—*Clyne's Trustees* v. *Dunnet*, M'L. & Rob. 28; *Fleming* v. *Dunlop*, *ibid.* 547.

LORD CHANCELLOR ST. LEONARDS.—My Lords, this appeal arises out of an action in the Court of Scotland, in which a shareholder in a banking joint stock company desired to have one of two declarators—either that, by force of a provision in the articles of copartnership, in the event which has happened, there had already *ipso facto* been a dissolution of the copartnership; or, secondly, in the alternative, that under the facts alleged, he was entitled now to have a declarator of a dissolution of the copartnership.

This matter, like all others of the same nature, originated in a summons, which summons ought to state generally the grounds upon which the pursuer proceeds. That summons is followed by a condescendence, in which, more particularly following up the grounds, the party who applies for relief states in articles the grounds of his seeking relief, and those articles are followed by denials or admissions, as the case may be, on the part of the defender.

Now, that ceremony having taken place in the Court below, the Lord Ordinary made a certain reference, which is affirmed by the Lords of the First Division, and from that affirmance there is an appeal to your Lordships' House. In the *first* place, it is insisted that there was no competency in regard to the party to have any such reference as was made. It is said, that it was incompetent to make the reference under the circumstances which existed—that there was no *primâ facie* case made out, in point of allegation, to entitle the respondent to the relief which has been given to him—and that, even if there was an allegation, he is again excluded by the terms of the copartnership deed, which creates a domestic forum, from which there is no appeal to a court of justice in the case which is alleged; and *lastly*, it is said, that if all these objections

should be removed, yet the order is not a proper order—that it destroys the capacity of the bank—and is such as not to enable the bank to proceed in its business.

Now, it was insisted at the bar in the opening of the case, that the allegations did not bring down the alleged losses of the company to the time at which the action was commenced in Scotland. I think that cannot be contended. I think it is quite clear, following up the summons from point to point, that the loss to that extent, which by the deed of copartnership amounts to a dissolution, is alleged sufficiently to give the Court jurisdiction upon the subject, if there be no objection arising from the deed itself. The condescendence follows it up in the same way; and I think, my Lords, it is perfectly clear from all the pleadings, that a sufficient case is alleged in order to bring the matter fairly before the Court.

Before I go into the merits of the case at all, my Lords, I will just say a word upon what is called the "relevancy," the statement as to which it is rather difficult to understand. Under the act of parliament, the appellants could not have come to this House for relief against the interlocutor complained of, if it had been an interlocutory matter, and therefore they are forced to assume, in order to give them a standing in that behalf, that this interlocutor does include merits, otherwise this appeal could not be maintained, for there was no difference of opinion between the Judges, and the Judges did not give leave to appeal. Therefore the appellants would be out of Court unless they admitted—which, for the purpose of standing where they do, they must admit—that there were merits included in the interlocutor in question. But then the learned counsel say—"Well; but although we may admit that there are merits, yet there is this which we have to complain of, that there is no judgment upon the relevancy of those merits." There is a direction to an accountant to take certain accounts, with the view of establishing, upon the facts alleged, that there was a given loss which would confer a right *ipso facto* to dissolve the partnership. Now it is said (for it amounts to that) that it is not prefaced by a judgment upon the relevancy and competency. That I understand to be the objection. My Lords, in point of fact that objection cannot be maintained, and for this simple reason, that the very direction to the accountant to take the account, is of itself impliedly a judgment upon the merits, for the purpose, and only for the purpose, of making that declaration. The question has arisen in the Court of Chancery in England a thousand times over; and in this way a man files a bill for a specific performance; it is insisted by the answer, that he is not entitled to a specific performance; but the question ultimately turns upon title, and the Court directs a reference to the Master to inquire whether a good title could be made, without declaring that the plaintiff is entitled to a specific performance:—Just this case. But the very reference implies this, for if he could not make a good title to a specific performance, the reference to the Master to see whether a good title could be made, would never be directed. And so here: The reference is to an accountant to take the account. For what purpose? To inquire whether the circumstances exist, by which, *ipso facto*, the partnership is determined. Therefore the very reference itself amounts to a judgment, that a case is made upon the pleadings, which entitles the Court to make that reference. And if you look, my Lords, to the case itself, you will find, that that very point of relevancy upon this very question was argued both before the Lord Ordinary, and before the Judges of the First Division. You will find, that not only was the question of relevancy included clearly by the very reference, but, as it appears upon the face of the interlocutor of the First Division, the matter itself was argued by the parties fully upon the question of relevancy. Thus Lord Fullerton says, "But, in the *first* place, it is clear from the Lord Ordinary's note, that both of these defences were fully argued to him, and considered by him," that is, on the question of relevancy; "and, *secondly*, we have had the same advantage." It is clear, therefore, that there is no decision sending this matter in an imperfect state to the accountant, but that it is a decision after the case has been fully argued—in the *first* place, before the Lord Ordinary, and, in the *second* place, before the Judges of the First Division. Therefore, my Lords, I am of opinion that that objection cannot be maintained. I think, if it could be maintained, it would prevent the appellants from having the right to appeal. If the appeal is admitted, it is only upon the ground, that this did include, in fact, merits—that it is not to be considered as a mere interlocutory order—and that, therefore, there is a competency in the appellants to appeal.

Now, my Lords, with respect to the facts which are alleged, if we look through all these papers, I do not understand what the appellants would have. You see, as in most cases I think, that everything is alleged. I do not see, therefore, but that there is a *primâ facie* case. You must assume the facts here alleged, for the purpose of entertaining this reference. Remember that this reference decides nothing but to ascertain the fact, and the right upon the allegation is to have the fact determined. When you have the fact determined, the merits are at an end. Is it the allegation of a *primâ facie* case? What is the statement? The provision of the deed is, that if at any time there shall be a given amount of loss of trading capital and the reserve fund, *ipso facto* there shall be an end of the partnership. The parties determine not to go on to ruin, but that if there should be so heavy a loss as is there pointed out, then, without any declaration whatever, or interference of any one, there should at once be an end of the partnership. Now the respondent proceeds upon a ground altogether consistent with that provision. He says that

there has been fraudulent management, and that not only has there been reckless trading, and not only have the directors diverted the assets of this copartnership from the proper purposes, and carried on business as general merchants, as speculators, and every other description of business—making charges against them in that respect—but that by this reckless trading, and by these improper speculations, a loss has accrued, which renders it impossible for the business to be carried on. If the business has so been mismanaged—if, instead of carrying on the banking concern, they have been carrying on every other concern but banking—if they have ceased, as they admit by these answers they have, to be a bank of issue, that of itself shews a state of insolvency. They might have been very glad to have had shares in speculation in their own paper, but they have ceased to issue paper. That would be a sufficient ground of itself,—and consequently there is quite allegation enough to maintain an action of this sort in Scotland, supposing that the party is not estopped by the particular deed of partnership from resorting to a court of justice.

Now, there is a very singular argument advanced, which is, that if this loss has arisen from the misconduct of the directors, the learned counsel for the appellants say, that the directors are personally responsible for it, and that it is not a loss which can by any means enable a court of justice to put an end to the partnership. That does not at all follow. There may be personal relief to be had against the directors, but the directors, being the chosen body by whom all the affairs of the copartnership are to be managed, if they by reckless conduct, if they by improper speculation, do in point of fact reduce the capital below the amount with which it is possible to carry on the trading, why should it not be a case in which relief should be given to stop impending ruin? What matters it how it has arisen, if it has in point of fact arisen in the course of carrying on the trade? It cannot be in character to say, "Go on, with this loss, with this bad bank—you are in a state of ruin—you have no capital—the capital is all absorbed—but go on, and render yourselves personally liable,"—because the directors have themselves brought it to that point by improperly conducting the business, or rather by conducting business not authorized by the copartnership, instead of carrying on the proper business, and that which was solely entrusted to them. It is almost ludicrous;—see what the effect of that would be. My Lords, if the capital be gone, and the partnership cannot be carried on, the directors, if they have misconducted themselves—of course I am not saying that they have in any measure—I have no materials before me for coming to such a conclusion;— but if they have misconducted themselves, they may have made themselves personally liable; and yet it may be that the consequences of their conduct have of themselves worked a dissolution of this partnership; and if not, that a court of justice would dissolve the partnership.

My Lords, if there be, as there is I apprehend, quite a sufficient case for the Court to proceed upon, then the question is, Is the right of the respondent barred by the articles of copartnership? Now those articles are very stringent,—and it is fit that they should be as regards a bank of this nature—a joint stock bank; for unless very great care is taken, every shareholder being a partner, may claim a right to look at all the accounts, and therefore it is very proper that they should restrain the shareholders from a general inspection of the books or the accounts, and that there should be secrecy observed. All that is very right, and all these things are provided for—they are things to be done at a regular general meeting. There may be a meeting as a general meeting, or by three fourths of the shareholders. It is only necessary to look at the state of this company—there being a million of capital divided in the 100,000 shares, those shares, therefore, going down as low as £10—to see how very difficult it is to get persons representing three fourths of that capital to agree to a measure for the purpose of dissolving this partnership; and what is alleged upon the face of these pleadings (it may or may not be true) is this, that the greater portion of those persons are under a liability to the bank—that is, they have had accommodation from the bank, as shareholders are very apt to have, and buy shares for that very purpose—and they are consequently under the dominion of the directors, who can sue them for the liability, and therefore you cannot get those persons to come forward with this object. That may or may not be so, but that is the allegation which is here made. But there is a provision which states, that the partnership may have an end put to it by the parties; and I wish carefully to guard myself, in anything which falls from me on this occasion, not to have it understood, that a partner in a partnership, like this particularly, can come, upon general allegations, and desire to break up that company suddenly, not resorting, as he ought to do, to the provisions of the deed. If this case can be maintained by the respondent, it must be upon its own grounds, and not upon any supposed right of a particular shareholder to come, against the sense of the majority, and endeavour to break up the concern.

Now the 54th section of the deed of copartnership, and upon which certainly a great deal turns, is in these words—"It shall be competent to any of the partners of the company holding not less than three fourth parts of the whole original and additional capital stock of the company, at any general meeting to be held in terms of this contract, by a written agreement, to dissolve the company." That is followed up by these words—"But it is hereby expressly provided and declared, that if it shall at any time be found, on balancing the company's books, that losses

have been sustained equal to the whole of the reserved surplus fund, and also to £25 per centum on the advanced capital stock of the company, such loss shall *ipso facto*, and without the necessity of any further procedure, dissolve and put an end to the company." Now it is insisted that that means simply a balancing under the former provision; and it is not necessary for your Lordships to decide that it does not mean that. It may mean that, but it may mean something beyond it. It is impossible to say in a court of justice, if it be true that false accounts have been made up by these directors in order to cover their own course of action, that you are to be bound by that balance, and that you are to act contrary to the fact, upon the assumption that there is capital sufficient to carry on the business, which already, in point of fact, has ceased for want of capital. There is nothing in this partnership deed either to point to that, or to lead to the consideration of law. It is a case not within the partnership deed, and the partnership deed is only referred to for this purpose, (independently of another question, whether it is confined or not to the preceding losses,) to shew, that if that be the case, there ought to be *ipso facto* a dissolution of the partnership.

Now, are the words to be so confined? They state, that if, on balancing the books, you shall find that there has been that loss, *ipso facto* the partnership is not to stand any longer. It is alleged that, on balancing the books, it will be found,—and the respondent takes upon himself to maintain that he can prove from those books that there was the actual loss here pointed out, so that the partnership has in point of fact, and therefore in point of law, come to a termination. Can parties in their own wrong set up fraudulent and improper balances, and then say that you are to be bound by them under a deed, which assumes that all goes on correctly? It is a certain mode of taking the account agreed upon by the parties, and acted upon by the copartnership. It is not a question of going contrary to the deed; but you are going with the intention of the deed, and you are giving effect to that intention. The intention of the deed was, that if it appeared, on balancing the books, that there was that loss actually incurred, the copartnership should be at an end. But it is asserted, that the fact does exist, and that it would have appeared upon the balances of the directors themselves, if they had truly made up the accounts. Now, it is impossible to say that a party can screen himself from an investigation in a court of law by anything which is found in this instrument, and therefore I apprehend that it is quite clear that the allegation of the respondent does make out a case for relief notwithstanding the particular provisions of this instrument; and I think, that as the words are general as to balancing the accounts, a court of justice is justified in looking at those words in a general sense, and that if, upon a balancing of the accounts, however it chooses to direct that balance to be made, the fact is ascertained, the Court is justified in considering it to be an ascertainment of the fact. I think that, independently of balancing the accounts at all, if it appears that this company is incapable of carrying on its trade, and the very case has arisen which the parties have provided should be of itself a dissolution of the partnership, that is a sufficient case for dissolving it.

Now certain results were pointed out, which, it was alleged, would flow from this view of the subject. It was said, for example,—if you are to give this general sense to the provision of the deed, then, at any single moment at which you establish, after a distance of time, that there has been that loss which is pointed out here, although it might not appear by the balancing of the accounts, but would appear on looking at them, there is an end of the partnership. I do not see that any such consequence follows; for, assuming that there was that supposed loss at a given moment, which was not ascertained at the time, and there was no necessity for ascertaining it, but that that loss had not affected the prosperity of the company, and that they recovered the loss by going on, there need not be any inquiry into any supposed loss of that description. But if a just balance was taken of the accounts, and it did appear that, upon a balancing of the accounts, there was a loss, then every single shareholder in this company could set that up. It need not be done by every member of the company, but it might be done by one single shareholder, and they could not defeat its being set up as against that single shareholder.

Now, my Lords, I am naturally anxious, in a case of this sort, (we are obliged to a certain degree to assume both the merits and the demerits,) to see what the answer of the defenders is. Would they like to rely upon the accounts which they have set forth in these papers, with the view of shewing what the state of a great banking concern is? They are precisely balanced here to shillings and pence, and the items are without the slightest explanation:—Can it be said, that in a concern of this nature, such a document as that would give the information of the real state of this bank? If they had assets in their hands, they knew that in point of fact the case had not arisen which was provided for by the deed, and they might have thrown the *onus* on the respondent of establishing a *primâ facie* case. They do not either shew the nature of their liabilities, and the actual state of their assets, or produce any account which in any manner affords the slightest explanation. Then, what is to prevent such an account being taken? What is it they ask? Do they ask an examination into the charges against them before that account is taken? They ask no such thing. They say there is no relevancy to direct the account, but they do not come forward and say, "We have plenty of assets to carry on the bank—you are interfering with it—you are destroying this company—you ought not to be permitted to do so."

They do not tell you what step you are to take—they desire your Lordships to stop this proceeding, but they suggest no other—their short object is, to get rid of the investigation which is directed.

My Lords, upon these grounds, without troubling your Lordships further, I am clearly of opinion that this interlocutor was properly pronounced, and that it ought to be affirmed. At the same time, I am anxious, as I said before, to guard myself, and to guard your Lordships, against it being supposed that the decision of this House would, in any manner, allow any partner, contrary to the terms of the copartnership deed, to come, without any cause, and endeavour to break up the concern.

Then it is said, my Lords, admitting all this as true, that the interlocutor ought to be altered, because of the inconvenience which, it is suggested, would result from it, which is, that there may be certain shareholders who might obtain access to the books. Secrecy is, no doubt, by the deed of copartnership, enjoined. Secrecy, in point of honour, ought to be maintained as far as it can; but the secrecy is for the purpose of carrying on the trade. The banking trade, I take it, must be very inconsiderable. The bank of issue has gone. What the bank is, I do not know —that is not now before me; but there is no doubt, that if the business is being carried on, which I assume it is, the accounts ought to be taken in such a manner as not to interfere unnecessarily, in the slightest degree, with the carrying on of the business—and therefore I observe with satisfaction the statement of the Lord Advocate, that it was not understood that the accountant was to take away the accounts, but that he was to go to the bank and there inspect the books, and examine them;—and your Lordships would expect that should be carried strictly into execution, because, if this partnership is not at a stand *de facto*, whatever it is in point of law, (I do not mean to say how it is—your Lordships will not assume either way,) this party ought not in effect to bring it to a stand, as it is stated it would be brought to, if this order were to be improperly carried into execution—that it would have the effect, at all events, of destroying the partnership the moment that it was operated upon. That, therefore, ought not to be allowed. I see nothing in the Lord Ordinary's interlocutor which at all directs the books to be sent away from the bank—there is nothing of the sort; and as it has been stated that the intention was, and is, that the accountant should go there, I do not see any objection to the order being carried out.

Then, as to secrecy, the accountant is bound to secrecy as an officer of the court, and he is spoken of by the Judges in the Court below as a man of honour, in whom they all have confidence. I think, therefore, that the books would be very safe in his custody;—and what now falls from me in advising your Lordships, may operate more strongly as a caution to him to be very careful not to allow the accounts of the different customers of this bank, to be known to any person whatever.

Under these circumstances, my Lords, I do not see what difficulty there would be in carrying this order into execution. These accounts ought to be taken very carefully; and your Lordships are not sending it to the Master, but are directing an account to be taken by an accountant. And are you to give credit to the statement at your Lordships' bar, that such accounts may occupy years in the preparation of them? That, my Lords, can only arise from negligence. Probably there is, in reality, no such apprehension. I am unwilling to believe that it does exist —I will not believe that this account, properly taken by an accountant, would occupy more than a very short time. Accounts of this nature cannot be investigated off-hand, but the accountant ought not to consume much time in the matter; and I shall be very glad, after what has been stated in this case upon that subject, to believe that there is no real apprehension that such will be the result.

I therefore move your Lordships that these interlocutors be affirmed with costs.

Interlocutors affirmed with costs.

First Division.—Grahame, Weems and Grahame, *Appellants' Solicitors.*—Law, Holmes, Anton and Turnbull, *Respondent's Solicitors.*

DECEMBER 13, 1852.

SIR JOHN ANDREW CATHCART, *Appellant, v.* ANDREW GAMMELL, *Respondent.*

Entail—Completing Titles—Infeftment—*A proprietor executed, in* 1815, *a strict entail in favour of himself in liferent, and B and his heirs male in fee, whom failing, C and his heirs male, whom failing, D and his heirs male, &c. The deed contained a power of revocation, and warrants of infeftment applicable to the destination. In* 1823, *the granter availed himself of the reserved power to execute a new deed, whereby he recalled the destination in favour of the persons called before and after D and his heirs, and executed a new conveyance in favour of*