1865. *May 8th, 9th, 11th, June 22nd.*

LUMSDEN, ... APPELLANT.
BUCHANAN, ET AL., ... RESPONDENTS.

Responsibility of trustees investing their trust funds in trading speculations.—If trustees invest their trust money as partners in a joint stock company, they become personally liable, not only to the creditors of the concern, but also in questions of contribution *inter socios*. Should they desire to restrict their liability to the funds of the trust estate, they must stipulate expressly to that effect not only with the directors but with all the other shareholders.

Per the Lord Chancellor: According to the argument of the trustees, there would be two distinct classes of partners; one class composed of persons who became shareholders and would be partners with unlimited liability; the other class composed of trustees who took shares in their fiduciary character, and would be partners with limited liability. But the directors had no power to enter into any such contract.

Per the Lord Chancellor: By the law of England, if an executor or trustee joins a partnership or company, he is personally liable for all the consequences, and if he acted within the scope of his authority he must seek indemnity from the trust estate.

Per the Lord Chancellor: If it were held that persons entering into contracts with a trustee were really contracting, not with the individual but with the trust estate, it would be necessary to examine beforehand the state and amount of the trust estate, and the powers of the trustee; and it could not afterwards be dealt with or disposed of until the consequences of the contract were ascertained.

Per the Lord Chancellor: No such contract could be competently made unless it were entered into expressly between the trustees and every other shareholder personally.

Per Lord Cranworth: Trustees taking shares in these joint stock concerns make themselves personally liable as partners, even though they describe themselves as trustees, and they must be deemed to have intended to bind themselves absolutely.

Gordon v. *Campbell commented on.*—Per the Lord Chancellor: The words of the present contract contrast in a very remarkable manner with the words of the obligation in *Gordon* v. *Campbell* (*a*) decided by this House in 1842.

Per Lord Cranworth: In *Gordon* v. *Campbell* the contract entered into by the trustees would in England have made them personally liable.

THE Appellant, as sole liquidator appointed to wind up the affairs of the Western Bank, brought the action, out of which this Appeal arose, against the Respondents, concluding against them "personally as individuals, "and conjointly and severally," to make payment of certain calls in respect of sixty shares held by them in the bank as trustees of a marriage settlement.

The First Division of the Court of Session, adhering to Lord *Kinloch's* Interlocutor, and conforming to the opinions of the separate consulted Judges (*b*), decided on the 26th February 1864 that "by the terms of the "contract by which the trustees became partners of "the bank, they did not undertake any personal "liability, but that of trustees only; and that they "were not liable for the calls personally, but only to "such extent as they might possess funds belonging "to the trust estate."

Against this decision the present Appeal was tendered, and there appeared as Counsel in support of it the *Attorney-General* (*c*), Mr. *Rolt*, Sir *Hugh Cairns*, and Mr. *Murray*.

(*a*) 1 Bell. App. 428. 2 D. 639.

(*b*) Diss. Lord Justice Clerk, and Lords Cowan, Neaves, and Mackenzie.

(*c*) Sir Roundell Palmer.

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The *Lord Advocate* (*a*), Mr. *G. M. Giffard*, and Mr *A. S. Kinnear* were of Counsel for the Respondents.

The case as decided below is very fully reported in the Court of Session cases (*b*), and also in the Scottish Jurist (*c*).

The facts of the case and the grounds of the ultimate determination appear sufficiently from the following opinions.

Lord Chancellor's opinion.

The LORD CHANCELLOR (*d*):

My Lords, the Western Bank of Scotland was a company or partnership formed in the year 1832 for the purpose of carrying on the trade or business of bankers in Scotland.

By the contract of co-partnership it was declared that the holding or being entitled to a share of the capital stock of the company should constitute the rights and infer the liabilities of the partnership in the said company; and it was also declared that according to the number of shares of the stock of the partnership held by the partners "they should proportionally be entitled to such profit, and should in like manner be liable for such loss, as should be consequent upon the prosecution of the business of the company, to which extent, *pro ratâ*, they should be bound." And then follow these words in the contract, "and they hereby bind and oblige themselves and their aforesaids respectively to free and relieve each other of the whole debts, obligations, and engagements of the company."

Additional shares in the bank were created at different times.

The Respondents are the trustees of the marriage settlement of Mr. and Mrs. Brown, of Glasgow, and

(*a*) Mr. Moncreiff.
(*b*) Third Series, vol. 2, p. 695.
(*c*) Vol. 36, p. 346.
(*d*) Lord Westbury.

under the trusts of that settlement Mrs. Ellen Brown and other persons who are under disability are the beneficiaries. In the month of November 1846 the trustees invested the whole of the trust funds in the purchase of 60 shares in the Western Bank; and at the same time they (with the exception of the Respondent, Andrew Buchanan) signed a deed of accession, which is the same thing as if they had signed the original contract of partnership.

This deed was signed by them in their ordinary names and descriptions as the holders of 60 shares. But in the testing clause, after mentioning their names and designations, these words are added, "Trustees for Mrs. Ellen Brown, spouse of the said Charles Wilson Brown, the majority surviving being a quorum for 3,000*l.*"

The trustees were registered in the books of the company, and also in the register of shareholders made up under the Joint Stock Banking Companies Act of 1857, by their own proper names and addresses, with the addition of these words, "Trustees for Mrs. Ellen Brown, Glasgow."

The trustees now contend that the legal effect and operation of this mode of executing the deed is that they became parties to the deed of partnership, and therefore partners in the bank, as trustees only, without any personal liability. Further, they insist that their execution as trustees does not involve or imply any statement or inference that they were possessed of trust funds sufficient to answer the ordinary consequences of the contract and dealings they became parties to; but that every one of the shareholders, present and future, and every person dealing with the company, must be deemed to have had notice of their having joined the company as trustees only, and to have taken the chance of there being any trust

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funds to answer their share of any liabilities that might be incurred by the company. The trustees boldly contend that they never became liable to the external creditors of the partnership, and that whatever may be the losses sustained by the partnership they, the trustees, are not liable to contribute to them beyond the amount of the money paid for the shares held by them in the concern.

It is obvious that the position thus claimed for themselves by the trustees is wholly at variance with the spirit and intent of the partnership contract. It is repugnant to the obligations they expressly entered into. And it is impossible in law to derive an inference from the form of executions that shall contradict and annul the clearly expressed contract contained in the body of the deed.

According to the argument of the trustees there would be two distinct classes of partners; one, of persons who became shareholders in the ordinary way, and who would be partners with unlimited liability; the other, of trustees who took shares in their fiduciary character, and would be partners with limited liability.

It was not in the power of the directors to enter into any such contract, or to admit any persons as shareholders in the company upon any such terms. The proposition of the trustees is that the other shareholders are bound to indemnify them against all the debts and losses of the partnership; but no such contract could be competently made unless it were entered into expressly between the trustees and every other shareholder personally. Of such a contract so made there is neither proof nor allegation.

The addition in the testing clause describing the parties as trustees must be taken to have been made for a very proper and legitimate purpose, and which

sufficiently accounts for and exhausts the meaning of the words employed. It was intended by this addition not to alter or control the personal contract and obligation which the trustees had entered into, but to mark the property in the 60 shares as belonging to the trust estate. This is quite consistent with personal liability in the trustees.

By the law of England, if an executor or trustee joins a partnership or company for the purpose of investing or employing usefully part of the estate of the testator or of the trust, he is personally liable for all the consequences of his engagement; for the law assumes, and rightly, that he depended on the condition of the assets or trust estate for his own security, and if he acted within the scope of his authority he is left to seek his indemnity from the trust estate or the beneficiaries. And this is both just and expedient. If it were held that persons entering into contracts with a trustee were really contracting, not with the individual, but with the trust estate, it would be necessary to examine the state and amount of the trust property and the powers of the trustee before any contract was entered into; and the like examination would be equally indispensable after the contract was made; for, as the trust estate would be bound, it could not be dealt with or disposed of until the consequences of the contract were ascertained.

The Respondents in effect assert by their argument that if trustees in Scotland enter into a contract on behalf of the trust estate they are not personally answerable for the consequences.

I agree with the majority of the consulted Judges, that there is no such general rule.

A trustee may, both in England and in Scotland, so limit and restrict any contract he may enter into as to exclude (as between himself and the other parties

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to such contract) personal liability. But this must be the result of express stipulation. .

In the present contract the parties bind themselves, their heirs, executors, and successors (which is the recognized style by which an individual binds himself so as to be personally liable), and in the words of the deed, which I have cited, each partner personally obliges himself to contribute, *pro ratâ*, to the debts and losses of the company. There can be no question, therefore, as to the meaning, construction, and effect of the contract as contained in the deed of partnership.

The words of this contract contrast in a very remarkable manner with the words of the obligation in the case of *Gordon* v. *Campbell*, decided by this House in the year 1842, on an Appeal from the Court of Session, and on which the *Lord Ordinary* and the Respondent place great reliance. In that case certain trusees of a trust settlement borrowed a sum of money on the security of the trust estate, and the obligation was framed and worded in such a manner as to indicate that the engagement was made in the character of trustees alone. In that case the words of obligation were, " which sum we as trustees aforesaid bind and oblige ourselves, and the survivors and survivor of us, and such other person or persons as may be assumed by us into the trust, to repay." And in the subsequent disposition care was taken to express that everything was done by the parties in the character of trustees only. Therefore the style and form of words adopted throughout the instrument were such as properly belong to a dealing in a fiduciary character alone. The contract was so worded as to bind the existing trustees, as trustees only, and their successors in the trust. Accordingly this House, founding itself on the special language of the engagement, decided that no personal liability was intended to be contracted.

But the language of this deed of co-partnership is the very opposite to the style of the obligation in *Gordon* v. *Campbell.* The words here are "we (the individual parties to whom the shares of the said company have been allocated as aforesaid) do hereby severally bind and oblige ourselves, our respective heirs, executors, and successors," words which, as I have already observed, are the proper style of personal engagements.

Reliance is placed by some of the Judges on the fact that the deed of co-partnership and deeds of accession are expressed to be made and granted "by us, the several parties hereunto subscribing, and named and designed in the testing clause of these presents," words which incorporate the testing clause so far only as it contains the names and designations of the parties. But if they are considered to have the effect of annexing, by reference to the names and designations of these trustees, the words which are adjected in the testing clause, the result must, in my opinion, be the same; and these additional words cannot be taken as of force to control and alter the express form and terms of a contract, which, both in its style, its subject matter, and the nature of its express stipulations, is inconsistent with any other conclusion than that the parties who entered into it knew and intended that there would be personal liability.

It seems to have been considered by the majority of the Judges in the Court below that the trustees were certainly liable to the creditors, and this conclusion was *at first* not denied at the bar. But if the trustees are liable to creditors, the liability must in the present case be the result of a contract of partnership, and the contract of partnership is itself the result of the execution by the trustees of the deed of accession. But if there be liability to creditors there

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is *primâ facie* liability to contribute *inter socios*, and the onus lies on the Respondents to prove that the circumstances, which are not sufficient to exclude liability to creditors, are yet sufficient to prevent any liability to contribution. It would be necessary for the Respondents to prove a contract by all the other shareholders to indemnify the trustees against the debts and losses of the concern.

I cannot, therefore, concur with the reasoning of the *Lord President*, who seems to consider that, even if the trustees are liable to creditors, the form of their contract would be sufficient to exclude the claim of the other shareholders for contribution. This immunity would require a very special contract of indemnity. No such special contract is anywhere found; but the contrary is expressly stipulated in the body of the deed, and the whole case for the indemnity of the trustees is rested upon an inference drawn from the words added to the names and designation of the parties in the testing clause against the express tenor of the obligations and provisions contained in the deed of partnership, the nature of the contract itself, and the fact that the directors had no power to enter into any such contract as that alleged by the Respondents, which would be wholly at variance with the constitution and character of the company. The case demands, and has received, the anxious consideration of your Lordships. It has been discussed in a most elaborate manner by the learned Judges in the Court below and at the bar in this House. I have weighed with care the arguments contained in those judgments, and I am convinced that the view of the case taken by the *Lord Justice-Clerk*, *Lord Cowan*, *Lord Neaves*, and *Lord Mackenzie* is the just and correct one.

I must therefore advise your Lordships to reverse the Interlocutors, and to make a decreet in terms of the

conclusions of the summons, except as to the Defendant, Andrew Buchanan, against whom the Appeal must be dismissed with costs.

Lord Chancellor's opinion.

My Lords, my noble and learned friend reminds me that I quite forgot at the moment that the Interlocutor, so far as it relates to Mr. Andrew Buchanan, who never did sign the deed, must, I apprehend, be affirmed. And of course the Appeal, with regard to that Respondent, must be dismissed with costs.

Lord Cranworth's opinion.

Lord CRANWORTH:

My Lords, the question in this case is whether the Defendants, or any of them, have or have not made themselves personally liable to contribute to the sums which it has become necessary to raise for liquidating the debts of the Western Bank of Scotland.

It is certain that they became shareholders by executing the second deed of accession on the 2nd of December 1846; but it is contended that by this execution they incurred no personal liability, inasmuch as they executed the deed only in their character of trustees for Mrs. Helen Brown. There is nothing to show that they executed the deed as trustees only, except that in the testing clause they are described as "Trustees for Mrs. Helen Brown, spouse of Charles Wilson Brown, the majority surviving being a quorum."

It was argued that such a subscription imposes on the persons subscribing no liability beyond that of making good out of the trust funds, so far as they are sufficient for the purpose, the sums which, if they had been personally liable, they would have been bound to pay; that if the trust funds are deficient, the other shareholders have no claim on the trustees, and so are without remedy. This certainly is not the law of England; but it was argued that in this

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respect the law of Scotland is different from that of England, and for this reliance was placed mainly on the case of *Gordon* v. *Campbell*, decided in the Court of Session, and afterwards affirmed in this House, and on certain passages found in the works of Mr. Bell (*a*) and Professor Menzies (*b*).

It is important to attend closely to the language of the contract in the case of *Gordon* v. *Campbell*. It is as follows:

> We, A.B.M. and C.B., surviving and acting trustees appointed by the deceased A.B., and I, A.B., assumed by the trustees aforesaid in virtue, &c., and I, John Campbell, trustee also assumed, and we, W.P., &c., &c., trustees also assumed, grant us to have borrowed and received from Colonel J. Gordon the sum of 7,000*l.*, which sum we, as trustees aforesaid, bind and oblige ourselves, and the survivors or survivor of us, and such other person or persons as may be assumed by us in virtue, &c. to repay to the said John Gordon at Whitsunday 1833, with interest, &c. And for further security we, as trustees foresaid, do dispone from us and such other persons as may be assumed, &c., heritably but redeemably all those lands of Blainslie, &c. in real security for payment of said money, &c., in which several lands, &c. we bind ourselves as trustees foresaid, and the survivors, &c., duly to infeft the said John Gordon, &c., which disposition under reversion as after-mentioned, and all deeds to be granted by us as trustees foresaid we bind ourselves and them, but *quâ* trustees only, to warrant against all mortals; and that letters of horning on six days charge, and all other legal execution, may pass on a decree to be interponed hereto in common form.

It was held that this did not import a personal obligation by each trustee.

I cannot think that this case warrants the conclusion contended for by the Respondents.

By the law of England, as by the law of Scotland, trustees in dealing with third persons may so contract as to exempt themselves from personal responsibility, and to confine those with whom they are dealing to such relief as they can obtain from the trust funds. Whether this is the true effect of any contract into

(*a*) 1 Comm., p. 39.
(*b*) Conveyancing, pp. 208, 209.

which they are entering must in every case be a question of construction; and all that was decided in *Gordon* v. *Campbell* was that the contract entered into by the trustees in that case, though by the law of England it would have made them personally liable, had not that effect by the law of Scotland.

The different construction which is thus put on the same contract in Scotland and in England is probably owing, in part at least, to the different qualities of a trust in the two countries. In Scotland the trust, on the death of the trustees, comes to an end, unless the author of the trust has provided for its being kept alive by the assumption of new trustees. If that has not been provided for, the only course open to the parties interested, when the trustees are all dead, is to obtain from the Court of Session the appointment of a judicial factor, or sometimes of new trustees.. The trust has thus something of a corporate character incident to it, and it may therefore often be not unreasonable to understand the trustee, when he is acting in discharge of his trust, as meaning only to deal to the extent of his trust property. In England the case is different; trust property passes on the death of a surviving trustee to his real or personal representatives, and they take it clothed with the trust, and become *ipso facto* the trustees. The trust property and the duty of discharging the trusts remain connected, and pass together according to the ordinary devolution of property, though a person on whom a trust is thus cast by operation of law may, if he pleases, repudiate the duties of the trust. It may probably be from these circumstances that in England when a trustee enters into a contract describing himself as trustee, or as contracting only as trustee, that has never been held to qualify or restrict the extent of his engagement. Such words may be useful

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as between the trustee and those who are beneficially interested, but as to third persons they are inoperative. He is dealing with property over which he has complete dominion, and is understood to be contracting as absolutely as if he were dealing on his own account. If he means to limit his liability by the amount of the trust funds, he must do this by making express provision for the purpose.

Though, however, the effect of such a contract as that in *Gordon* v. *Campbell* was held not to impose in Scotland personal liability on the trustee beyond the amount of the trust funds, yet it must not be taken that in all cases when a trustee contracts as a trustee he is free from personal responsibility. That is not the law in Scotland any more than in England. There are many cases in which a trustee is personally responsible, even though he may have contracted expressly as a trustee. If he draws or accepts a bill of exchange, or gives an order for work to be done on account of the trust, in these and similar cases, though he contracts as trustee, yet he is, in Scotland as in England, personally liable for his engagements in the absence of express stipulation to the contrary.

The nature of the contract in these cases shows that the party contracting must have meant to bind himself personally. Ordinary transactions of buying and selling could not go on upon any other principle, and this is therefore in all such cases *primâ facie* understood to have been the meaning of the persons engaged.

The true question to be resolved in every case is, whether the circumstances do fairly show that the contracting parties were dealing only as trustees, and were not intending to incur liability beyond the amount of the trust funds. Looking to the present case, with that principle before me, I have come to

the conclusion that these Respondents must be deemed to be personally responsible. I concur in the view taken by the minority of the Judges; and I will state shortly the grounds on which I have formed this opinion.

In the first place, we must consider what it is which a person really does when he purchases shares in such a joint stock company as this. It is not as if he had invested money in the purchase of land or goods, or real or Government securities. He makes himself a partner in a trading concern,—a trading concern, it is true, having important statutory incidents attached to it, but which yet has this in common with ordinary trading concerns, that, if the business is successful, profits may be made to an unlimited extent, in all which the shareholders, who are in truth the partners, are entitled to participate rateably. And it is surely unreasonable to suppose, in the absence of express contract, that it could have been intended to admit any persons into such a partnership on the terms that they should, to an indefinite extent, share in its benefits, but should only to a limited extent contribute to its losses. The affairs of all these joint stock partnerships are of necessity placed under the management of a small board of directors, and the general body of shareholders would be justly entitled to complain of the admission of any persons as partners in the trade who should be placed on such unequal terms with themselves, and who, in the event of loss, would cause so much more than a rateable share of the burden to fall on them.

These considerations make it highly improbable that it could have been intended to admit as shareholders any persons who did not bind themselves to liability rateably with the whole body. Still, however, it is competent to all persons to make what

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contracts they please; and the question now to be decided is, what is the engagement into which these Respondents have entered? They contend that although they executed the deed of accession, and so became partners, yet they expressly or impliedly limited their liability to the amount of the partnership funds. This result, they say, followed from the circumstance that in the testing clause they are described as "trustees for Mrs. Helen Brown, spouse of Charles Wilson Brown, the majority surviving being a quorum." There is nothing else to restrict their liability, and therefore, unless by the law of Scotland persons so described are, without more, absolved from personal liability, there is nothing on which the exemption claimed can rest.

I cannot think that this would be a true representation of the law. The language of the contract in *Gordon* v. *Campbell* was very different from that in the present case. There the trustees not merely described themselves as trustees, but expressly bound themselves, and the survivors and survivor of them, *quá* trustees only. These words were strong to show that the persons using them did not intend to incur personal responsibility. All this careful use of terms restricting the extent of their obligations was superfluous, if by merely describing themselves to be trustees the same object would have been attained. It may, moreover, be noticed that these trustees do not in their signature describe themselves as trustees, as is done in the case of many other parties to the deed; but I do not place much reliance on this circumstance, as the testing clause forms part of the deed, and so the description there introduced must perhaps be treated as assented to by the parties executing it.

But besides the manifest difference between the language of the contract in *Gordon* v. *Campbell*, and

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that in this deed, there is what I consider to be even more important, an entire difference in the nature of the contract.

In *Gordon* v. *Campbell* the trustees were, for the purposes of the trust, borrowing money on security of the trust property. This was, from the frame of the deed, obvious to the person who was lending, no less than to those who were borrowing, the money. No persons were concerned but the lender and the borrowers; both parties were fully apprized of the terms of the contract, and must be taken to have been aware of its legal incidents. But in the present case all the shareholders in the bank are affected by limiting the liability of these Respondents.

It may be said as to persons becoming shareholders after the Respondent had purchased shares, that they had the means before they took shares of seeing that these Respondents were liable, if such were the true construction of the contract, as trustees only. Perhaps theoretically that may be, but as to all who had taken shares previously no such observation can be made, and practically even as to those taking shares subsequently, it can hardly be assumed that they can be treated as having examined the testing clauses as to the execution by all those who had previously become shareholders.

The Judges who decided this case in favour of the Respondents did not deal with the important question of the liability of these trustees to third persons, creditors of the bank. They did not consider that question as being before them. But although the liability or non-liability of the Respondents to creditors is not the precise question for decision in the present case, yet it is a point very important to be considered in deciding whether they are liable to contribute rateably to the losses which have occurred.

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If instead of becoming shareholders in a joint stock bank, they had alone opened a bank, it surely could not be argued that they would not be liable to depositors or others merely because they described themselves as trustees for Mrs. Helen Brown; and if they would have been responsible in case they had been the sole bankers, I can discover no ground for contending that they would not have been so if they were associated in partnership with others. Here they are bankers associated with a very large body of partners, but not associated on any terms which affect their liability to third persons. They do not, it is true, themselves, interfere in the conduct of the business, but they share rateably with the other partners in its profits, and delegate the management of it to others as their agents. A creditor who has recovered judgment against the company may take out execution against any of the shareholders, which would include all, whether described or not described as trustees, and if the debt should be levied on their goods it would be a strange equity to set up against the other shareholders that they ought to contribute more than their rateable proportion by reason of the trust property proving deficient.

These considerations have led me to the conclusion that trustees taking shares in these joint stock concerns make themselves personally liable as partners even though they describe themselves as trustees. But of course this general principle must give way to any express provisions in the deed of co-partnership limiting the responsibility of such shareholders. But so far from there being any such restriction in the deed now before us, there are several clauses which seem to me to exclude the notion of any such restriction.

In the first place, by the third clause it is declared that the holding shares shall constitute the rights and

infer the liabilities of partnership, and that the shareholders, according to their shares, shall be entitled to profit, and liable to loss consequent on the prosecution of the business of the company, to which extent the shareholders thereby bound themselves and their foreseids respectively to free and relieve each other.

Surely this engagement is wholly inconsistent with the hypothesis that these Respondents were to free and relieve rateably the other shareholders only to the extent to which the trust funds of Mrs. Helen Brown might enable them to do so.

Again, the fifth clause makes provision for the transfer of shares, and stipulates that on any transfer the party disposing of his shares shall be no longer liable as a partner, but that the person acquiring the shares shall take the precise place and liability of his cedent, and become subject to all the obligations incumbent on him. This is manifestly inconsistent with there being two classes of shares, one of limited, the other of unlimited, liability. According to the views of the Respondents, any person who should have purchased their shares would be liable to the extent of their trust property; and it would seem to follow, on the other hand, that if they had purchased the shares of any ordinary shareholder they would in respect of shares so purchased have become subject to all the obligations of the persons from whom they purchased, *i.e.*, would have incurred indefinite obligations.

This fifth clause seems to me wholly inconsistent with the hypothesis of there being different measures of liability attaching to different shares.

The only other clause to which I think it necessary to advert is the eleventh, which gives the form in which every person becoming a shareholder by purchase is bound to accept his shares. He agrees to become a partner in the Company, and binds himself

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to fulfil all the obligations contained in the contract of co-partnery. There is nothing enabling him to accept the shares otherwise than simpliciter as a partner, *i.e.*, as a person bound to relieve the other shareholders, in case of loss, rateably according to the number of his shares.

Lord Cranworth's opinion.

I have given this important case my best consideration, and I have come to the conclusion that the *Lord Justice-Clerk*, and the Judges who concurred with him, took the correct view of the law on this subject; that though, in contracts entered into by trustees, the language of the contract may, by the law of Scotland, show that no personal liability was incurred, even though such liability would, under the same words, have been incurred in England, yet the nature of the contract may be such as to show that no restriction on the full liability of the contracting parties was intended. And, considering the nature of the contract in the present case, I am of opinion that the Respondents, though described as trustees, must be deemed to have intended to bind themselves absolutely.

I ought not, however, to omit to mention the case of the Respondent, Andrew Buchanan. To him my observations do not apply, for he never executed the deed of accession.

Lord Kingsdown's opinion.

Lord KINGSDOWN:

My Lords, I confess that I entertain more doubt about this case than seems to be felt by my noble friends who have already expressed their opinion. The able argument of the *Lord Advocate* satisfied me that there are very serious differences between the law of Scotland and the law of England on the subject of trusts and the personal liability of trustees; that the same acts which would create a personal liability in the one country might not create it in the

other, but instead of it might give a direct and immediate remedy against the trust estate. When I see the mode in which trustees in this case in numerous instances have signed the deed, signing it by mandatories as trustees for A.B., or trustees for C.D., their individual names never appearing at all upon the deed or the register, I cannot divest myself of the impression that neither did these persons contemplate pledging their individual responsibility, nor did those who became partners with them contemplate such liability or look for contributions to anything but the trust estate. Nor does it seem to me that there is anything in the nature of the business which makes such an arrangement improbable or unreasonable. A single individual takes a certain number of shares; he is liable to the full extent of all that he possesses. Beyond this, his personal liability is worth little or nothing. Six trustees take the same number of shares, and are jointly and severally liable to the full extent of the estate which they represent. In this view of the case there seems to me to be no great inequality. But take it on the other hypothesis, the one gives his single liability, and the six are supposed to give each his individual responsibility to the full extent of all he possesses. In other words, supposing the personal respectability of both parties to be equal, the trustees give six times the security of the one. The first hypothesis therefore seems to me to be at least as reasonable and probable as the other. But I think that in either case the same rule would apply as to creditors and as to co-partners. There is no private dealing as amongst the co-partners. If the acts done by the trustees do not infer liability to the one class, they cannot, in my opinion, infer it to the other.

I own that the great reliance which I am disposed to place in the authority of the considerable majority

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of the Judges below, is somewhat weakened by their reluctance to deal with this question.

For the reasons which I have stated, I am much inclined to think that unless the express provisions of the deed are such as to exclude the construction put upon it by the Court below, the judgment complained of is right, and supported by the principles of Scotch law and the reason and probability of the case. But when persons have signed deeds of this description, it would be very dangerous to permit them to relieve themselves from the obligation of covenants into which they have expressly entered on any speculation founded on mere probabilities, that they did not really intend what the deed in terms expresses. Now, unless the covenants by which the parties subscribing the deed bind themselves, their respective heirs and successors, on the third clause of the first deed (p. 129), and the second deed of accession (p. 255), can be read so as by some interpretation to exclude those who sign as trustees, it is not disputed that the covenant infers personal liability, and there seems to me to be in this insuperable difficulty.

Upon the whole, with some hesitation and regret, I am obliged to concur in the opinion already expressed by your Lordships.

As to Dr. Buchanan, I think there can be no doubt that the judgment should be affirmed, with costs.

Mr. *Attorney-General:* Will your Lordships allow me to interpose before the question is put to the House. I think your Lordships may have overlooked the particular form of the Interlocutor, and not have observed that Dr. Andrew Buchanan was not distinguished from the others, but that these Interlocutors hold all the trustees to be liable to the extent of the trust funds. It rather strikes me, if I may be per-

mitted to say so, that your Lordships' principle would suggest another form as to him, namely, assoilzing him from the conclusions of the summons. He appeared together with the rest. Whether your Lordships will deal with the expenses, bearing that in mind, it is for your Lordships to say.

LORD CHANCELLOR: I think the Interlocutor must be taken together. Of course Dr. Buchanan is liable to the extent of the trust funds, and there is no certainty that there may not be trust funds still in the power of the trustees. We dismiss the Appeal, and give Mr. Buchanan costs.

JUDGMENT.

Ordered and *Adjudged*, That with respect to all the said Respondents to the Appeal except Andrew Buchanan, the said Interlocutors, in so far as complained of in the said Appeal, be, and the same are hereby reversed: And it is further *Ordered* and *Adjudged*, That with respect to the said Respondent Andrew Buchanan the said petition and appeal be, and the same is hereby dismissed this House: And it is further *Ordered*, That the Appellant do pay or cause to be paid to the said Respondent Andrew Buchanan the costs incurred by him in respect of the said Appeal, the amount thereof to be certified by the Clerk ofthe Parliaments: And it is further *Ordered* and *Adjudged*, That the cause be remitted back to the Court of Session in Scotland, with directions to that Court to pronounce decree against the said Respondents, except the said Respondent Andrew Buchanan, in terms of the conclusions of the summons in the action in that Court in the proceedings mentioned, subject to the provisions of this order and judgment, and to do further in the said cause as shall be just and consistent herewith.

MURRAY & HUTCHINS—GRAHAMES & WARDLAW.