# SUMMER SESSION, 1879.

## HOUSE OF LORDS.

*Monday, April 7.*

(Before the Lord Chancellor (Cairns) Lord Hatherley, Lord Penzance, Lord O'Hagan, Lord Selborne, Lord Blackburn, and Lord Gordon.)

CITY OF GLASGOW BANK LIQUIDATION—(*MUIR'S CASE*)—MUIR AND OTHERS (MURDOCH'S TRUSTEES), PETITIONERS *v.* THE LIQUIDATORS.

(In the Court of Session December 20, 1878, *ante*, p. 139).

*Trust—Partnership—Liability of Trustees — Companies Act* 1862 (25 *and* 26 *Vict. cap.* 89).

The City of Glasgow Bank was a joint-stock company formed in 1839 under a contract of copartnery, and subsequently incorporated under the Companies Act 1862.

Where notice of a trust appeared upon the register and in the other books and papers of the company, and stock belonging to the trust-estate had been transferred from the truster's name to that of the trustees by means of a registered transfer—*held* that the trustees were partners of the company, and as such were personally liable for its debts, alike in questions with creditors and *inter socios.*

*Observed per* the Lord Chancellor (Cairns) that among the purposes of the permission to notice trusts on a register of shares was (1) to mark it as the property of a particular trust, that being a benefit to the beneficiaries rather than to the trustees; (2) to publish the fact that the shares are *held* on a joint-account with a right of survivorship; and (3) perhaps to enable a retiring trustee to remove his name from the register more easily than in the case of other joint-owners.

The circumstances of this case, and the arguments at the debate, are set forth very fully in the report in the Court of Session on Dec. 20, 1878, *ante*, p. 139, to which reference is made. An appeal was taken by the petitioners, who were unsuccessful in the Court of Session, to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—My Lords, the City of Glasgow Bank is a joint-stock partnership which has carried on business since the year 1839. In 1862 it was registered as an "unlimited company," under the Companies Act of that year. The partnership contract (to the terms of which I shall have afterwards to refer) was registered as the articles of the company under the Act. In this bank the late John Murdoch held at the time of his death £6000 of stock. He died in 1873. He had made a deed of trust-disposition and settlement dated in 1843, but a question having arisen whether the bank stock would pass under it, his daughters Mrs Syme and Mrs Boyd made out a title to his estate as executrices-dative, and executed a supplementary deed of trust dated the 20th September 1873, by which they assigned and made over to the appellants the whole estate of their father, including the stock in question, to be held upon the trusts contained in the settlement of their father. On the 27th January 1874 a transfer of the stock was executed by Mrs Syme and Mrs Boyd to the appellants, in order that their legal title to the stock might be completed. By this transfer Mrs Syme, who was a widow, and Mrs Boyd, with the consent of the appellant John Boyd, her husband, assigned and made over to the appellants, described as "the trust disponees" in the deed of conveyance in trust, dated the 20th September 1873, and "their successors and assigns whomsoever," the £6000 capital stock—the appellants, "as trust disponees aforesaid, by acceptance hereof, being, in terms of the contract of copartnership of said bank, subject to all the articles and regulations of the said company in the same manner as if they had subscribed the said contract;" and the appellants, "as trust disponees aforesaid," thereby accepted of the said transfer on those terms and conditions. In the stock ledger of the bank the appellants were entered by their names and addresses, their names and addresses being followed by these words, "as trust disponees of Mrs Mary Murdoch or Syme, widow of the late Francis Darby Syme, 14 Great King Street, Edinburgh, and Mrs Sophia Maria Darby Murdoch or Boyd, wife of the said John Boyd." A stock certificate was also issued by the bank to the appellants in these words:—

"Glasgow, February 4, 1874.—These certify that the trust disponees of Mrs Mary Murdoch or Syme, widow of the late Francis Darby Syme, and residing at 14 Great King Street, Edinburgh, and Mrs Sophia Maria Darby Murdoch or Boyd,

wife of John Boyd, residing at 27 Melville Street, Edinburgh, have been entered in the books of this company as the holders of six thousand pounds consolidated stock."

And on the back the certificate was endorsed thus—

"William Muir, Esq. of Inistrynich, Argyleshire, merchant in Leith; William Thomson, Esq. of West Binny, Linlithgowshire; John Boyd, Esq., residing at No. 27 Melville Street, Edinburgh; and James Laurence Boyd, Esq., Solicitor Supreme Courts, Scotland, and residing at No. 1 Regent Terrace, Edinburgh, as trust disponees within mentioned."

In the returns made to the Board of Inland Revenue and to the registrar of joint-stock companies the stock is described as held by the trust disponees of Mrs Syme and Mrs Boyd. The liquidation of the bank commenced on the 22d October 1878, and the liquidators have entered the appellants in the first part of their list as contributories in respect of the stock in question. The effect of this is to make the appellants personally answerable for calls. Whether they should thus be made answerable is the question to be determined in this appeal. The respondents, the liquidators, contend that the appellants are personally liable, and this has been the unanimous decision of the Court of Session. The appellants, on the other hand, contend that they are not personally liable, but that the bank entered into a special contract with them, to use the terms of their petition, "to admit them as holders of stock in their representative capacity as trust-disponees," and that by the terms of their obligation they undertook only to subscribe to the undertaking, and to be liable in the obligation incumbent on holders of stock to the extent of the trust-funds under their administration.

Whether in any particular case the contract of an executor or trustee is one which binds himself personally, or is to be satisfied only out of the estate of which he is the representative, is, as it seems to me, a question of construction, to be decided with reference to all the circumstances of the case, the nature of the contract, the subject-matter on which it is to operate, and the capacity and duty of the parties to make the contract in the one form or in the other. I know of no reason why an executor, either under English or Scotch law, entering into a contract for payment of money with a person who is free to make the contract in any form he pleases, should not stipulate by apt words that he will make the payment not personally but out of the assets of the testator. If, for example, A B, the executor of X, contracted to make a payment as executor of X, and as executor only, to C D, it would be difficult to suppose that any obligation except an obligation to pay out of assets was intended. C D, in the case supposed, would have authority to accept a contract so limited, and the words used could have no meaning, and could be referred to no object other than that of limiting responsibility. I do not know that there is in this respect any difference in principle between English and Scotch law, although there may be a difference in the application of the principle. It may be (I will not say more) that from the English system of judgments in actions at common law, and from the difficulty of obtaining a judgment *de bonis testatoris* founded upon an engagement made by the executor, the English Courts have leaned against a construction which would not result in a judgment *de bonis propriis;* whereas in Scotland, where law and equity are jointly administered, such a difficulty has not arisen.

But the first question, whether in Scotland or in England, must be, What is the contract which the parties have entered into? and that must be accompanied by another question—What is the contract which the parties were competent to enter into? For if words have been used of any ambiguity, or the object of which may be open to any doubt, that construction must, according to the well-known rules of law, be given which will make the contract a legitimate and valid one, and not the construction by which the contract will be destroyed. Now, it is to be observed that the directors of the bank were a body with limited and clearly-defined powers, and acting in the execution of a delegated and limited authority. The appellants must be taken, as must all persons who deal with the directors of a company, and especially those who deal with the directors for admission into the company, to have known the nature and extent of the authority of the directors, and the character of contract which they were empowered to enter into. With regard to the directors, also, it is to be borne in mind that if they exceeded the powers committed to them by the deed of partnership, they placed the stock and capital of the bank in the power of persons brought upon the register upon terms less favourable to the other shareholders than the deed authorised the directors, who would incur a liability to their constituents for so doing, and it is not to be supposed that they intended to incur this liability.

With these observations, I will now ask your Lordships to bear in mind the general scope and provisions of the deed of partnership. There is no limit of liability whatever for the shareholders of the company. The deed takes notice that the shareholders might be individuals or companies and bodies corporate, but the scheme of the deed is that the shares shall be held by individuals or by companies (that is to say, partnerships consisting of individuals), or by corporations, without any limit of liability in the individual so far as he has property, or in the corporation so far as it has property; and I need hardly observe that there was no power by law to afford any limit of liability upon the shares except by a resort to statutable arrangements, which in this case was not resorted to. By the 4th section of the deed the parties bound themselves to contribute and pay, when required, the sums of money corresponding to the number of shares of the stock subscribed. By the 5th section the partners were to have the right to the profits and to be liable for the losses, and bound to relieve each other of all the debts and engagements of the company in the proportion of their respective interests or shares in the capital stock. By the 6th section any person holding a share, whether as an assumed subscriber or as a purchaser, heir, or other representative of a subscriber, "shall be entitled to all the rights and subject to all the liabilities of an original partner of the company." The 13th and 14th sections contain careful provisions for the purpose of preventing any person interested in a share other

than the partner in whose name the share stands on the register, from attending or voting or interfering with the concerns of the company. The 33d and 34th sections relate to the transfers. The shares are to be transferable by the partners, and shall transmit and descend as personal property to their executors or representatives by testament. Every partner who shall dispose of his share of the company's stock agreeably to the regulations therein written, or who shall cease to have an interest in the concern through forfeiture or otherwise, in the terms of the deed, shall be entitled to relief of the whole debts owing by the company, and the party or parties acquiring the shares so disposed of, or otherwise coming in right of the party or parties so ceasing to have interest, shall take and assume the place and liability of his author, ancestor, or other cedent. A gratuitous assignment by a deed *inter vivos* of any shares is to be effectual if sanctioned by the directors. If they withhold sanction, the share is to be sold by the directors, and the price accounted for to the assignee. Shares may be disposed of onerously, but the name of the purchaser and the price must first be intimated to the directors, who are to have the option of purchasing for the bank. By the 37th section it is provided that where the shares of any partner are transferred, conveyed, or sold in terms of the article, the deed of transference shall be prepared at the head office; and the 38th section provides that the deed of transference, and also every assignment of shares in security or *mortis causa*, and confirmations thereof by right of succession, shall be recorded in a book to be kept for that purpose, and the production of such writings to the manager or directors for registration shall *ipso facto* infer the acceptance of the capital stock therein specified, and the liabilities of the parties having a right to the same as partners of the company, but no purchaser, or other assignee of, or successor to, shares so acquired shall be recognised as a partner until his title is recorded in the books. The 40th section provides that the person or persons, companies or corporations, whose names shall at any time stand in the stock-ledger containing the list of the partners of the company, whether as original or as assumed partners, shall be deemed and taken to be the proprietors of the several shares standing in the ledger in their respective names, and shall be liable to the payment of every call for instalments of capital stock to be made therein, and to all actions, suits, obligations, forfeitures, and penalties, and entitled to the whole profits, and liable for the losses, to which the original proprietors of shares in the company are subject, liable, and entitled to by the deed, and the names entered in the ledger and the amount of shares shall be the sole evidence receivable at any meeting of the partners as to the right of voting at the meeting.

I have now referred to the principal clauses of the deed, and it is upon the terms indicated in these clauses, and upon these terms alone, that the directors had any authority to admit an assignee of shares as a partner in the bank. The scheme of the deed is clear—the bank is to consist of partners, and these partners are to be either individuals or corporations. There is no limit of liability. If the partner is an individual, he is absolutely liable to the extent of his means as an individual for the proportion of the debt of the bank attributable to his share. If the partner is a corporation, the corporation is liable to the extent of all the property that it may possess. It is necessary to contrast with this the contract which the appellants allege was entered into between them and the bank by reason of the use in the transfer to them and in the stock-ledger of the words "as trust-disponees of Mrs Syme and Mrs Boyd." The appellants undertook, as they say, to be liable in the obligations incumbent on holders of stock to the extent only of the trust-funds under their administration. In the view of the appellants there were, as to these shares, to be no partners of the bank individually liable. The liability as to this share was not to be the liability of the trustees, but the liability of certain funds under the administration of the trustees. As to what these funds might be nothing is said. The trust might consist of nothing more than the shares themselves, and thus the shares be their own security, and the trust-funds might be such as that in a due course of administration they might all be parted with before any liability came to be enforced against them. The bank would be obliged to consider and scan every deed of trust in order to determine whether the trust-funds could under the trusts declared be properly used in the purchase of bank stock or in the payment of bank liabilities. But putting these considerations aside, and assuming that the trust-fund was a definite, declared, and always available sum of money, what would this be but the creation of shares with a limited liability? And if this limit of liability could be created for some shares in the bank, why not for all the shares in the bank? If the argument of the appellants is right, what would there be to prevent every share in the bank being held by trustees who would be furnished as a trust-fund with the precise amount to be paid upon the share, and would have no further liability? But this is just what the law would not permit to be done with regard to a joint-stock company of this kind, except by means of the constitution of a company with liability limited according to the statute, and such a company the City of Glasgow Bank never was.

My Lords, I have no hesitation in saying that in my opinion the directors had no power under their deed, and the appellants must be taken to have known that they had no power to enter into or accept a contract of this description, and the contract, if attempted to be made, would have been *ultra vires* and void. But for this very reason it appears to me to be necessary that your Lordships should consider whether the words upon which the appellants rely require a construction which would invalidate the contract in which they occur. Now these words are—"as trust-disponees of Mrs Syme and Mrs Boyd." My Lords, I do not wish to say that in a case in which such a contract would be within the competency of the contracting parties, and where these words could not be referred to any other object or purpose, they might not, on the construction of the whole instrument, be held to negative the idea of personal responsibility, but I have endeavoured to show your Lordships that such a contract would not be within the competency of the

parties in the present case, and there is no difficulty whatever in assigning the words a meaning and a purpose clear, intelligible, and within the limits of the contracting power of the directors. One object of these words, and one purpose served by them, is noticed in the judgment of the Lord President and Lord Shand. The Lord President says that the practice of using them and of entering them upon the register arose (*ante* p. 147) "not for the purpose of altering the liability of the holders of such stock as compared with the other holders of stock in the same company, but only for the purpose of marking the stock as the property of the particular trust named in the transference and in the register." The Lord President further observes that it was the Scotch practice of marking trust-stock in this way which prevented the Legislature extending to Scotland the enactment that no joint-stock company should take notice of any trusts on its register of shares; and I may add there is no doubt that a permission to notice trusts on a register of shares is *prima facie* a permission introduced for the benefit of the beneficiaries and not of the trustees. Lord Shand observed that the law of Scotland as to the proof of trust is very stringent (*ante* p. 154) "in requiring that in all cases the averment that property is held in trust shall be proved only by a writing subscribed by the alleged trustee, or by his oath on reference, and no more effectual way of avoiding the dangers of this limited mode of proof can exist than by having the title to the trust-property qualified by a declaration on its face that the property is held for behoof of others."

A second purpose served by the words is that they make it clear that the shares are held upon a joint account, with a right of survivorship, and that they do not belong to the persons named on the register as tenants in common.

It is possible—I will not say more—that there may be a third purpose served by the words, founded on the law of Scotland, which gives peculiar facility to a trustee for retiring from the trust, and which might justify, in the case of a retiring trustee, a simpler mode of removing his name from the register than in the case of another joint owner.

My Lords, I have not up to this point referred to any authorities bearing upon the question, and even in the absence of authority I should have been of opinion, for the reasons I have stated, that the appellants were personally liable in respect of these shares. I should have been of opinion that it was incompetent for the directors of the bank to have made with them any contract but a contract of personal liability, and that the words relied upon by the appellants as limiting liability were introduced for and served a different purpose. But, my Lords, almost the whole of the observations which I have made will be found, as it seems to me, to be supported by two authoritative decisions of your Lordships' House, and which will be the only cases to which I shall feel it necessary to refer your Lordships. The first of these is a case of *Gordon* v. *Campbell* (Bell's Apps. i. 428). In that case certain trustees borrowed, for the purpose of their trust, from Colonel Gordon of Cluny £7000, and granted a heritable bond over the trust property to secure the loan. They also bound themselves, "as trustees aforesaid," to make payment of the loan, and in the clause of warrandice of the land they bound themselves, "*qua* trustees only," to warrant at all hands and against all mortals. Now, this was exactly such a case as in the earlier part of my observations I supposed might arise. It was perfectly competent to Colonel Gordon and these trustees to make any contract they pleased. Colonel Gordon might have insisted that they should be personally liable to him, or he might have agreed that they should only be liable as trustees, *i.e.*, to the extent of their trust-funds. They professed in one part of the instrument to contract as trustees, and in another as trustees only, and it was obvious that they meant in both places to contract in the same way. Further, if these words "as trustees only" were not introduced to limit liability, there was no other purpose in the deed which they could possibly serve. They were absolutely unmeaning if they did not mean that the trustees were not contracting individuals. Under these circumstances the Court of Session, and afterwards this House, held that there was no personal liability created against the trustees beyond their possession of the trust-funds. The other case was that upon which so much of the discussion before your Lordships in the present appeal took place—the case of *Lumsden* v. *Buchanan* (4 Macqueen, 950). The principal respondents in that case had signed a deed of accession for shares in the Western Bank. In the testing clause their names and designations were followed by the words "trustees for Mrs Ellen Brown," the "majority surviving being a quorum." This House held that the trustees were personally liable. The observations of the Lord Chancellor and of Lord Cranworth have been so frequently referred to during the argument of the present appeal that I will not here repeat them. They appear to me to apply conclusively to the present case, and the decision of your Lordships in *Lumsden* v. *Buchanan* appears to me to derive, if it were possible, additional strength from the circumstance that my late noble and learned friend Lord Kingsdown stated that it was with some hesitation and regret he felt obliged to concur in the judgment, and from the further circumstance that this House had before it a most full and learned examination of the subject from all the Scotch Judges, of whom at that time four had declared themselves in favour of the appellants in *Lumsden* v. *Buchanan*, and eight in favour of the respondents. My Lords, I ought to observe that in *Lumsden* v. *Buchanan* the words in the deed and in the register were "trustees for Mrs Ellen Browne." In a case, however, in the same bank, which occurred immediately afterwards—*Lumsden* v. *Peddie* (5 Macph. 34)—Peddie was *curator bonis* to Mrs Broomfield and he accepted stock in these words—"I, the said D. S. Peddie, as *curator bonis* foresaid, do hereby agree to take and accept the said capital stock, . . . and as such bind and oblige myself," &c. The Lord Ordinary in that case, and afterwards the Court of Session, held that the case was governed by *Lumsden* v. *Buchanan*, and that the introduction of the word "as" made no difference. From this decision there was no appeal. The Lord Justice-Clerk, in giving judgment in that case, observed—"It is now well settled that in this or any like company no one can become a partner with a limited liability, or with any other liabilities than such as are borne in common by all the partners." My Lords, this decision must be

taken along with that of *Lumsden* v. *Buchanan*, and shows what was then understood in Scotland to be established as the law in such cases.

On the whole, my Lords, I am of opinion that the decision of the Court of Session now under appeal is correct, and I must move your Lordships to dismiss the appeal. It is difficult to use words which will adequately express the sympathy I feel for all those who have been overwhelmed in the disaster of the Glasgow Bank, and that sympathy is peculiarly due to those who, without any possibility of benefit to themselves, and probably without any trust-estate behind sufficient to indemnify them, have become subject to losses or ruin by entering for the advantage of others into a partnership attended with risks of which they probably were forgetful or which they did not fully realise. The duty of your Lordships is, however, to declare the law, and of the law applicable to this case your Lordships can, I think, entertain no doubt. I move, my Lords, that the appeal be dismissed, and if no other arrangement has been made between the parties, it must, I conceive, be dismissed in the usual way, with costs.

Lord Hatherley—My Lords, it would be impossible to come to any other conclusion in the present case than that which has been already announced as the conclusion arrived at by my noble and learned friend on the woolsack. Most anxiously does one scrutinise every case, especially every case presenting an appearance in any degree whatever of novelty, in order to see that the edge of justice is administered duly and not with undesirable sharpness. But, my Lords, this case really did appear to be one in which the appellants must have been painfully conscious from the first opening that they had to struggle against that which had been settled and determined by the highest Court of the Legislature, and which in reality, therefore, was not open to revision by any Court whatsoever. In vain did I listen during the argument for what I was most anxious to see —whether or not there had been any failure of justice in the case of *Lumsden* v. *Buchanan*, but there was no distinction which could be made in any way available pointed out between the cases. The last distinction which was referred to by the Lord Chancellor—namely, that of the introduction of parties as trustees—seems to have existed in the subsequent case of *Lumsden* v. *Peddie*, and in that case the distinction was not found to be available, or not so available as for it to be thought possible that an appeal could be founded upon any such distinction. The distinction raised before us was, that in the one case new shares were applied for, and that in the other case shares were accepted by way of transfer, being dealt with in the open market. I apprehend, my Lords, that there can be no distinction founded upon any such thin discrepancy as that.

The real point of the whole case is, as it appears to me, summed up in one or two clauses of the contract of copartnership. The fourth clause of that deed is as follows:—"The parties do hereby bind themselves respectively to contribute and pay, when required, the sums of money corresponding to the number of shares of the said stock subscribed by them, as the same are specified in the testing clause of these presents, and are likewise *in majorem evidentiam* adjected to their signatures, and which several sums of money are held to be herein repeated." The fifth clause is this—"The said partners shall have right to the profits and be liable for the losses, and bound to relieve each other of all the debts and engagements, of the company in the proportion of their respective interests or shares in the said capital stock, declaring that the whole capital stock and profits of the company, as well as the said parties and the aforesaid individually shall be bound and obliged to free and relieve the governor and deputy-governor of the company elected or to be elected as after mentioned, in the event of either of them not becoming parties thereto, of all liability for the debts and engagements of the company." And by the sixth clause—"Any person holding a share of the said capital stock, whether as an assumed subscriber or as a purchaser, heir, or other representative of such subscribers, shall be entitled to all the rights and subject to all the liabilities of an original partner of the said company."

My Lords, what are these great companies in fact? They are very large and extensive partnerships. Every partnership, as we all know as a matter of almost elementary jurisprudence, involves equality of liability and equality of participation in the profit and loss, or if not equality of participation, at all events participation upon some rule analogous to equality, upon which the whole basis of the transaction stands. It does not depend upon who are the holders of the shares. The shares themselves are the things which regulate, on the one hand, the responsibility of the person who is the owner of those shares, and, on the other hand, the advantage and profit which the person who is the owner of the shares is to acquire. Whosoever at any given time, be it for profit or be it for loss, finds his name attached to the ownership of a given number of shares, that person has to deal with those shares as provided by the articles of the partnership deed—namely, to contribute to the loss, and to share in the profit in proportion to the number of shares that he holds. That at once differs the case from the case of *Gordon* v. *Campbell*, because in that case it was held that by the terms of the bond any person who stipulated or acted as trustee could say that he stipulated or acted as trustee only, which is the just reading of that deed. But when a person says that, you must find whether those with whom he is dealing have power so to deal with him. In the case of *Gordon* v. *Campbell* all the parties were *sui juris*, and had power to deal as they thought fit. But here, when you are dealing with a company, either in applying for new shares, or in buying shares in the stock market, and bringing them to be registered, which makes you a shareholder in the company, upon what terms do you become a shareholder? You must become a shareholder on the original terms and upon no other terms. The directors have a good many powers of an extensive description—powers when shares are offered for sale to purchase on behalf of the company, and a variety of other powers not altogether usual in companies of this kind. But these powers which they have in the deed are the only powers they are entitled to exercise, and there is no power to allow them to treat a certain set of shares in the company as being held by a different tenure from all the other shares, viz., as far only as certain particular estates will hold out. So that, as has been

observed already, you might—to take an extreme case—imagine almost every lot of shares to be held upon different tenures as between the different proprietors of those shares, whereas the true principle from beginning to end of the deed, and the principle which, as I apprehend, was determined in the case of *Lumsden* v. *Buchanan*, was this—that those who are partners under a deed of this description take their profits and bear their losses according exactly to the number of shares which they hold.

As regards the introduction of the names of the trustees as trustees on the share list, we perhaps in England are a little surprised at it, because we have now long been accustomed to the practice which first began with the Bank of England, which has always refused to recognise trusts at all, and the same practice has been adopted by railway companies and the like, in which, wisely or unwisely, trusts are not recognised upon the face of the share list. We are surprised to find any recognition of this trust, but the use of it one can easily see. With all its advantages the rule of the Bank of England is productive sometimes of great inconvenience. I have myself known cases of considerable inconvenience where a man has become, say the surviving trustee of three trustees. Perhaps he has in the bank £5000 or £6000 of his own, and £10,000 as a trustee, and some day when he goes to the bank he would be surprised to find that he has £15,000 of stock, because the bank will not recognise trusteeship at all, and he finds himself registered as the owner not only of his own stock but of the stock that he holds upon trust. That is not always the most convenient arrangement, and sometimes it leads to worse accidents than that, because if the last survivor of three or four trustees happened to be a person of dishonest character, he is the sole proprietor, and has the sole command of the stock, and the bank is entirely free from all the responsibility in dealing with it. That appears to have been thought, as the learned Judges say, not a desirable position to place matters in; and therefore, for the sake of the *cestuique* trust, notice is taken, upon the face of the bank books of the existence of the trust, and a second advantage also accrues to him—namely, that when changes take place in the trust, then there is a note in the bank books, which tells what has occurred without the necessity of having a new deed entered for the purpose of saying that such a change has been made, and parties are thereby liberated from some expense and from a good deal of inconvenience. Many reasons may be assigned for it, but whatever reasons may be assigned it is impossible to hold that the other shareholders, who have either entered into the original contract of copartnership or have become shareholders since in a bank like this which we have now before us, can repudiate responsibility for anything professed to be done on their behalf by the directors contrary to the general stipulations of the deed. The directors can only do that which their power and authority entitle them to do, and one has asked in vain to have any passage pointed out in this deed which authorises the directors in dealing with different lots of shares to manipulate them in such a way that one lot of shares may go into one trust and another lot into another trust, and a third lot into no trust at all, and that those shares may, in the event of disaster to the company, be held upon a different footing from the other shares, so that, so far from partaking according to the number of their shares in the profit and loss, it would be found that there was, as regards a very large proportion of the individual shares of the company, a regulation contrary to the express stipulations of the deed.

Perhaps I have occupied already too much time in the few words that I have said, because I am only saying what I believe to have been the principle in the case of *Lumsden* v. *Buchanan:* and beyond the case of *Lumsden* v. *Buchanan* I have not the inclination, nor do I see in any way how your Lordships have the power, to go.

Lord Penzance—No question involved in this appeal—though one of the deepest interest to the parties concerned—depends for its solution upon any very numerous or intricate considerations. It is not to be denied that the appellants on the face of the transfer deed into which they entered with the banking company, whereby they became shareholders in it, announced in express terms that they did so as trust disponees for other people. The question is, Whether the statement of this fact has in any degree exonerated them from the obligations which attached to the character and position of shareholders, which it was the object of that deed to confer upon them. Speaking generally, there might no doubt arise an inference (if not rebutted by other circumstances) that a person who derived no benefit himself, and who acted only for the benefit of others, in contracts or engagements of any kind into which he might enter, would not intend thereby to expose himself to personal liability if it could be avoided. A general consideration of this character has, I think, largely pervaded the reasoning upon which the exemption of the appellants from personal liability has been based and enforced in argument. But meanwhile it will not be doubted that a person who in his capacity of trustee or executor might choose to carry on a trade for the benefit of those beneficially interested in the estate, in the course of which trade debts to third persons arose, could not avoid liability for those debts by merely showing that they arose out of matters in which he acted in the capacity of trustee or executor only, even though he should be able to show in addition that the creditors of the concern knew all along the capacity in which he acted. The case of an agent who acts for others is of course entirely different. His contracts are the contracts of his principal, and the liabilities, from which as a general rule he is personally exempt, fall upon his principal who acts through him.

But to exonerate a trustee something more is necessary beyond the knowledge of those who deal with him that he is acting in that capacity, and it would not be sufficient in all cases to state that fact on the face of any contracts he may make. To exonerate him it would be necessary to show that upon a proper interpretation of any contract he had made, viewed as a whole—in its language, its incidents, and its subject-matters—the intention of the parties to that contract was apparent, that his personal liability should be excluded, and that although he was a contracting party to the obligation the creditors should look to the trust-estate alone.

These propositions are, I conceive, conformable to the law of Scotland equally with that of this country. It is not enough, then, in the present case to show that the appellants on the face of the transfer deed accepted the stock in question "as trustees," but they must go on to show that the proper construction of that instrument showed the intention of the parties to be, that being trustees they should not be personally liable. It becomes, then, material to inquire what was the nature of the partnership whose stock they agreed to accept, and in whose business they agreed to become partners, and how far the nature of that stock and the constitution of that partnership are consistent with the exemption which they now claim. The constitution of this banking company was framed and declared by the partnership deed to which reference has been made. It provides for one class, and for one class only, of shares and shareholders, and declares in express terms that the partners shall have a right to the profits, and be liable for the losses, and bound to relieve each other of all debts and engagements of the company in the proportion of their respective interests or shares in the capital stock thereof. The exact provisions of the deed in this respect have been recalled to the attention of your Lordships by the Lord Chancellor, and it is needless to repeat them. This deed the appellants have not actually signed, but they have executed the deed of transfer, in which they have expressly declared their acceptance of the stock in question, upon the footing that they would be subject to all the articles and regulations of the said company in the same manner as if they had subscribed the contract of copartnership.

Having thus become shareholders in a partnership, the members of which have by their deed of partnership agreed to stand upon an equal footing one with the other, entitled equally to the profits and bound equally to the losses, the question arises, Whether by stating in that deed of transfer that they so became shareholders and trustees for other persons, the appellants have altered or limited the obligations that otherwise would attach to them? In my opinion they have not. There are many contracts in respect of which if a man were to state in contracting that he only did so as trustee, it is quite conceivable that his contract might be construed as not being intended to bind him personally. The case of *Gordon* v. *Campbell* offers an example of such a construction. Other cases may be easily imagined in which, on the one hand, the intention to restrict the liability of the person contracting may be clearly inferred from the character in which he declared that he contracted, taken in connection with the other circumstances of the case, and in which, on the other hand, nothing is to be found inconsistent with the restriction in the subject-matter of the contract. But in this case the subject-matter of the contract was the stock of an association whose shares were by the very terms of its constitution to be held only by persons who were all to be personally and equally liable to its obligations, and it cannot be held that the liabilities in respect of this stock were intended to be restricted by the words "as trustees" without ignoring the very nature and inseparable incidents of the thing which formed the subject-matter of the contract. In a word, it comes to this—such a thing as a share in this association with a limited liability in the holder of it did not exist. No such share or stock had ever been created. No provision is made for it in the partnership deed, and every provision to be there found which speaks of the liability of those who hold the shares is diametrically, and in the most express language, opposed to it. If, then, the appellants did not become bound to the liabilities attaching to ordinary shares and ordinary shareholders, they did not become bound at all, and the contract of transfer would be void. But before your Lordships can arrive at such a conclusion you must, I think, be at least satisfied that the words "as trustees" in this particular deed so clearly imported an intention not to undertake the obligations of shareholders (though the entire contract might thereby be rendered contradictory and absurd) that they could have been introduced for no other purpose. For if a reasonable interpretation can be assigned to these words, which would permit the deed to stand as a consistent one, competent to effect that transfer of stock which it was the obvious intention of the parties to bring about, your Lordships would be bound to accept that interpretation. Such a reasonable interpretation was suggested in the case of *Lumsden* v. *Buchanan*, and is referred to by the Lord President in his judgment in the present case. His Lordship says (*ante* p. 147)—"Hence arose the practice referred to in *Lumsden* v. *Buchanan*, of taking notice of trusts in the transference and registration of such stocks—not for the purpose of altering the liability of the holders of such stock as compared with the other holders of stock in the same company, but only for the purpose of marking the stock as the property of the particular trust named in the transference and in the register."

The whole question then is, as it seems to me, one of construction, and of the proper interpretation to be put upon this transfer deed and the acts of the appellants under it, and for the solution of that question your Lordships have before you these two alternatives—on the one hand, a construction which gives a reasonable and efficient meaning to the words "as trustees," and is not inconsistent with that transference and acceptance of stock which was the sole object of the instrument; and, on the other hand, a construction which defeats the intended transfer of stock altogether, and reduces the deed of transfer to a nullity. According to all known principles of construction, your Lordships are, I apprehend, bound to accept the construction which gives effect to the instrument. A great deal was said in the course of the argument as to the difference between the law of Scotland and that of England in regard to trustees. But the principles upon which written instruments are to be construed—and particularly the principle to which I have just alluded, that any construction which invalidates the instrument altogether ought to be rejected if a reasonable construction can be found which gives effect to it—are surely common to the law of both countries, and in whatever light the law of Scotland may regard trustees, if it does not go the length of regarding them as corporate bodies (which it has been admitted it does not), they must, I think, remain liable upon contracts and engagements, into which they have personally entered, and in

which no exemption from that liability is to be found, expressed or properly implied.

I have offered these remarks to the House upon the footing of the matter being *res integra*, but in truth the present case is in my opinion governed in principle by the case of *Lumsden* v. *Buchanan*. The principle involved in that decision was, as I think, rightly appreciated and declared by the learned Judges of the Court of Session. The Lord President said the rule of liability then established might be stated in a single sentence, as follows (*ante*, p. 146):—"Persons becoming partners of a joint-stock company such as the Western Bank, and being registered as such, cannot escape from the full liabilities of partners, either in a question with creditors of the company or in the way of relief to their copartners, by reason of the fact that they hold their stock in trust for others, and are described as trustees in the register of partners and the other books and papers of the company." And Lord Deas said that the grounds of decision in *Lumsden* resolved themselves into this (*ante*, p. 149)—"that when trustees join in a contract of partnership for trading purposes—such as a contract for carrying on the business of banking—the mere designation of them as being trustees will not exempt them from the same personal liability as is undertaken by the other partners, or limit their liability to the value of the trust-estate."

It is matter for deep concern, not unmingled with surprise, that the legal effects attaching to these contracts of trustees having been thus asserted and exposed in a notable case as long ago as the year 1865, people should have been found still willing to enter into them. But in all probability the profound conviction with respect to the great banks in Scotland that such a thing as loss or liability was not to be practically apprehended at all may have led to a widespread indifference as to the legal consequences of this improbable event should it ever come to pass. Be this however as it may, your Lordships, while bound to give effect to the lawful rights of the creditors, will not the less commiserate losses and sufferings which in their amount and intensity rise to the level of a national calamity.

Lord O'Hagan—I agree with the Lord Chancellor that it is impossible to approach the decision of this case without feelings of the deepest pain. That persons undertaking the onerous duties of trustees from kindliness to others, and without the smallest view to their personal advantage, should be involved in ruinous responsibilities, which in many cases may not have been within their contemplation when they accepted their trusts, must be regarded as a calamity appealing to our sympathy and compelling our regret; but we are bound simply to regard the legal rights and obligations of the parties before us, and I am constrained to the opinion that the unanimous judgment of the Court of Session must be affirmed.

My Lords, the question of this appeal appears to be concluded by authority, and I do not feel that it is necessary to discuss the grounds on which the decision in *Lumsden* v. *Buchanan* was pronounced, as it would have been if the matter were *res integra*. These reasons have been shown by my noble and learned friends who have preceded me to have been very cogent; but I am content to rest on the decision of this House in a case which I think undistinguishable in any material particular from that before us. I shall only refer to the arguments by which it was justifiable, as applicable to both of them, and establishing identity between them. The question is one of contract and construction, and the contract of the trustees in *Lumsden* v. *Buchanan* was in substance, and, as I shall indicate immediately, almost in terms the same as that with which we deal in the present case. True as ever, it was urged that the directors of a company formed on the principle of unlimited liability had no authority to admit a shareholder on terms inconsistent with the principles or the competency of the directors of the Western Bank, which was held to be bounded by the provisions of their deed of copartnery. They had admittedly no statutable powers under the Limited Liability Acts; they had received no authority from individual shareholders to alter or modify the conditions of membership of the company; there was no pretence for denying that the words of the deed and the undertakings of the allottees or transferees had relation to anything but liability of that kind; and therefore it was expressly stated as the main foundation of the judgment that the directors, being incompetent to qualify the responsibilities of the shareholders on the ground of trusteeship, or to create limited liability unauthorised by statute, they should not at least be assumed to have committed an act quite *ultra vires* if the terms of the contract with these trustees were in any reasonable way capable of reconcilement with the proper discharge of their duty and the true effect of the copartnery deed. The custom of noticing trusts on the register of companies in Scotland was assumed in the Court of Session and in the judgment of this House to have arisen for the purpose of facilitating the proof of the character of the property, and not as qualifying the liabilities of the shareholders, inasmuch as the Scotch law requires evidence of trusteeship either by the oath of the trustee or by a writing under his hand, which cannot always be obtained, and this was taken as a sufficient account of the reason of the thing. The maxim *ut res magis valeat quam pereat* now applies. It is plain that this ground of decision is as applicable here as it was in *Lumsden* v. *Buchanan*. Then it was determined that the terms of the deed in *Lumsden's* case had no contemplation of more than one class of shareholders, and no regard to a distinction between fiduciary liability and personal liability. The reasons for hesitating to admit such a distinction with a view to commercial policy and results have already been pointed out by the Lord Chancellor, but in my view it is enough to say that that case and this case are identical in the want of a pretence for making the distinction, for in *Lumsden* v. *Buchanan* one class of shareholders only was admissible, with equal privileges and equal liabilities. It is impossible to find authority for admitting another in the contract and copartnery of the City of Glasgow Bank.

Next, the conditions of partnership in *Lumsden* v. *Buchanan* were in no way more stringent or more absolute for the purpose of creating the largest liability than in the present case. The appellants accepted a transfer of the stock of

Mrs Syme and Mrs Boyd, "with the whole interests, profits, and dividends that may arise and become due thereon," the said appellants by acceptance thereof being, in terms of the contract of copartnership of said bank, subject to all the articles and regulations, and declaring that they accepted of the said transfer on the terms and conditions above mentioned. The acceptance was made by them as "trust-disponees," but it bound them to all the articles and regulations of the company. I shall not again go over the articles and regulations to which my noble and learned friends have sufficiently referred in detail, but I will advert to the stock certificate procured by the appellants, referring to the entry of their names on the stock register, and describing them as "holders" of the stock, and then point to the 6th section of the contract of copartnery, which is in these terms:—"Any person holding a share of the said capital stock, whether as an assumed subscriber, or as a purchaser, heir, or other representative of such subscriber, shall be entitled to all the rights, and subject to all the liabilities, of an original partner of the said company." I shall only further refer to the 40th section, which declares that "The person or persons, companies or corporations, whose names shall at any time stand in the said stock-ledger containing the list of partners of the company, whether as original or assumed partners, shall be deemed and taken to be the proprietors of the several shares standing in the said ledger in their respective names, and shall be liable to the payment of every call or calls for instalments of capital stock to be made thereon, and to all actions, suits, obligations, forfeitures, and penalties, and shall be entitled to the whole profits and liable for all the losses to which the original proprietors of shares in the company are subject, liable, and entitled to by these presents, and the names entered in the same stock-ledger and the amount of shares annexed thereto shall be the sole evidence receivable at any meeting of the partners as to the right of voting at said meeting."

Now, looking to the contract of the appellants as the transferees of these shares, and the articles and regulations to which they bind themselves to abide, nothing could be conceived more full and conclusive, more absolute and unconditional, than the grant on the one side and the assumption of liability on the other. It is not pretended that in this respect the contract of copartnery of the Western Bank differed materially from that which we have been considering. Indeed, it is hard to imagine any collection of words more decisive for the purpose of negativing any distinction between classes of shareholders, or any difference in their respective liabilities, and therefore in the important matter of the specific terms of the contracts *Lumsden* v. *Buchanan* is wholly undistinguishable. Both the contracts were manifestly framed with a view to the maintenance of the recognised rule which establishes mutuality of responsibility *inter socios*, and divides the profits and the losses among the members of a partnership according to their respective interests. In neither is their the least indication of a design to depart from that rule by creating an exceptional class with peculiar immunities. The words of Lord Kingsdown, whose hesitation to agree with the majority of the law Lords makes his ultimate concurrence more striking, significant, and important on this point, were (3 Macph. H. of L. 99) —"When persons have signed deeds of this description it would be very dangerous to permit them to relieve themselves from the obligations of covenants into which they have expressly entered on any speculation founded on mere probabilities that they really did not 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, in the third clause of the first deed and the second deed of accession, 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 be in this insuperable difficulty." I shall have to observe just now on the argument as to the omission of the word "executors" in the City of Glasgow Bank partnership contract, and I note in passing that the words "heirs and successors," on which Lord Kingsdown relies as asserting the insuperable difficulty in the way of limiting the liability of trustees, are equally implied in the contract, in the same connection, and with the same purpose, as in the contract of the Western Bank. The general grounds, therefore, of the decision in *Lumsden* v. *Buchanan* seem to me completely applicable in this case as to the character of the contract, the incompetency of the trustees to limit liability in defiance of its terms and in disregard of the relations created by the legal impossibility of accepting fiduciary shareholders as a separate class, and the clear and unequivocal words of the covenant stipulating for no exemption as they forego no right.

If this be so as to the general grounds of decision, is there anything in the particular differences which have been suggested between the deeds that relieve us from the necessity of following the authority of *Lumsden* v. *Buchanan*? It has been argued there is such a difference in the fact that in this case the appellants are described as trustees in the body of the deed, and so registered, whilst in *Lumsden* v. *Buchanan* the fiduciary character appears only in the testing clause. But that clause is clearly embodied by reference in the deed, and is dealt with as being so embodied in the judgment of the noble and learned Lords. In this matter, therefore, for the purpose of decision, the difference was immaterial. Then it was said that the introduction of the word "as" in the transfer of the City of Glasgow Bank before "trust disponees," which is not found in the testing clause in *Lumsden* v. *Buchanan*, demonstrates that the appellants qualified their liability, and entitled themselves to say that they are only answerable to the extent of the trust-estate. There seems some plausibility in the argument representing "trustees" as a mere word of description, while the inserting of the words "as trust disponees" is indicative of the character in which alone the transfer was accepted, and the case of *Gordon* v. *Campbell* undoubtedly shows that in certain cases a trustee may by apt words limit his liability. The words in that case were held by this House to be sufficient for the purpose, but then the parties were free to enter into such a contract. Their intention to do so was put beyond all question by the phrase "*qua* trustee," and proper effect was given to it. That case, therefore, scarcely

applies, when the directors of a bank are incompetent to make a contract of the kind, when the nature of the dealing does not admit of it, and when, as in *Lumsden* v. *Buchanan*, a fair interpretation in another sense may be put on the words, reconciling them, as I have said, with the duty of the directors and the rights of the shareholders. But the decisive answer seems to be that the whole reasoning of the noble and learned Lords proceeded on the assumption that the trustees had dealt with the Western Bank only in that character, and that the *ratio decidendi* and the decision itself would have been exactly the same if in the testing clause the word "as" had also been employed. This difference alone appears to me to be insufficient to diminish the coercive force of the authority. It was further argued that another distinction arose because the appellants were not original allottees of the stock, and did not personally enter into an undertaking which might have bound them in that character. But I fail to appreciate the value of the point. The original allottees took shares without limit of liability, and the other shareholders and creditors of the bank therefore acquired certain rights to be exercised in certain contingencies, and are these rights to be destroyed merely because the appellants are transferees, having accepted transfer expressly "subject to all the articles and regulations of the company in the same manner as if they had subscribed the original contract?" And had they made a transfer it seems impossible to hold that those holding under them could have been dealt with on a different principle. The directors were incompetent to deal with them or any other. There seems to be, therefore, no material differences between the cases for the purpose of the argument in the diverse modes by which the shares were acquired. Then it was strongly urged that the use of the words "heirs, executors, and successors" in the deed of the Western Bank implied the liability of the trustees, and unquestionably Lord Kingsdown placed reliance on these words, although, as I have already said, he omitted from them in his citation the word "executors," and thus reduced them to the expression "their heirs and successors," which occur and have equal force in the last clause of the contract of copartnership of the City of Glasgow Bank, which declares "that parties hereto and their heirs and successors shall be bound and obliged to observe and perform their respective parts of the present contract;" so that in the view of Lord Kingsdown the words of the deed before us could equally have imputed personal responsibility with those which he thought important in the deed of the Western Bank. Besides, the absence of the word "executors" could have no differential effect which is not removed by the presence of the word "heirs" in the interpretation given to it by the Scotch law as connected equally with the devolution of personal and real estate. On this point also the argument has failed to satisfy me that any real distinction exists between the cases.

My Lords, I have adverted to the particular instances in which it has been sought to set aside the differences between *Lumsden* v. *Buchanan* and the case of the appellants, and certainly with no indisposition to recognise such differences if they can be shown to exist; and after very grave and careful consideration, I find myself unable to discover a real distinction between them, and I think, with the Scotch Judges, that the decision of the former case is absolutely binding in the latter. We were pressed to regard the law and practice of Scotland as distinct from those of England, especially in reference to the position of trustees, as clothed with something of a corporate character by the former, which is admittedly unknown to the latter; and undoubtedly if a Scotch trust constituted a trustee or a number of trustees a corporation, that would have relieved the individuals composing it from liability in their separate persons, and imposed it on the body. But I fail to discover authority for such a position, whilst there seems to be high authority the other way. Arguments were also founded on the registration and incorporation of the City of Glasgow Bank under the Act of 1862, as distinguishing its position from that of the Western Bank. These arguments appear to have been elaborately urged in the Courts below, but were not relied on much before your Lordships, and I think it enough to refer to the very able refutation which was applied to them in the judgments of the Lord President and Lord Shand in the Court of Session. The Joint Stock Acts of 1856 and 1862 operated certain changes, but there have been none with reference to the entry of notice of trusts upon the register of companies, or as to the character of the obligations undertaken by a shareholder, and which were ascertained from the deed of copartnership. I have adverted, I think, to all the material points which have been raised in the course of the able and elaborate arguments of the counsel for the appellants, and on the whole, whilst I participate fully in the painful sympathy which has been expressed by my noble and learned friend on the woolsack, I am obliged to agree with his conclusion that the judgment of the Court of Session should be affirmed and the appeal dismissed.

Lord Selborne—My Lords, by the 5th, 6th, 33d, 38th, 40th, and last clauses of the copartnership deed of the City of Glasgow Bank, it is in effect provided that every person who is at any time admitted as a partner shall be absolutely and without limit liable for all the debts and engagements of the company, and that all the partners shall be equally liable, *inter se*, in proportion to their respective shares. It is consistent with this that a plurality of persons may be (as it is contemplated by the 13th and 14th clauses) co-proprietors of the same shares. The aliquot part of the common burden cast by the partnership contract upon those shares is exactly the same whether they are held by one or more than one person. If by more than one, every one of the co-proprietors is bound to the company for the whole proportionate liability attaching to those shares, neither more nor less, and they among themselves are *prima facie* bound to contribute equally to that liability. In this there is nothing extraordinary, nothing unjust. Whether they undertake the obligations of partners for their own benefit or for the benefit of others is a question for themselves and not for the company. By the 40th clause it is provided that those who stand registered as shareholders in the stock ledger of the company are for all purposes of liability on the one hand, and of participation in profits on the other, to be regarded as "the proprietors" of the shares. The effect of this provision when considered in con-

nection with the absence in this deed and in the relative statute law of anything to prevent the company from taking notice of trusts, is that although any partner who holds his shares in a fiduciary capacity will, of course, be bound to apply and account for any share of profits to which he may be entitled according to his trust, the company is entitled and is bound to look to him, and to him only, as having for all partnership purposes the sole title to the shares both as to profit and as to liability, and he must be taken to have known and understood this when he accepted them. Corporations (including, of course, incorporated companies, and therefore all companies formed with limited liability under the Act of 1862) might under clause 40 be members of this copartnership, and being legal persons they would be subjected in respect of any shares which they might hold to precisely the same equal and unlimited liability with individual shareholders, every one of them being liable to the full extent of his whole means and estate. In the one case the whole property of the individual, in the other the whole property of the corporation, would be answerable to the creditors and (in contribution) to the copartners of the bank. But no authority has been produced showing this to be the law of Scotland, and it appears to me (postponing for the present all consideration of the effect of the decision of *Lumsden* v. *Buchanan*) to be at variance with the case of *Martin* v. *Wight*, Feb. 3, 1841, 3 D. 485. There Lord Mackenzie said—"A trust with a power of assumption does not establish a corporation." I do not think that a private trust is to be considered as of "the nature of a corporation;" and Lord Fullerton said—"The case is different from a corporation, which is held to be one person. . . . A trust for purposes does not create a separate constructive person like a corporation. The title of each trustee stands on the right made up in his own person." These observations related indeed to the mode of making up titles to heritable property held in trust when new trustees had been assumed, but the principle could not be limited to that case. If authority had been wanting, reason would lead to the same result. Corporations, properly so called, are public bodies, created for definite purposes by royal charters or by public law, and this is equally true of quasi-corporations, or bodies having some but not all of the incidents of corporations. But if the constitution of any private trust could in law have a similar effect, every individual would be able for purposes and upon conditions of his own choice, without any restraint or regulation by public law, to invest himself or others with a corporate character, and so to limit and subdivide by mere operation of law what would otherwise be the effect of his and their engagements. In *Lumsden* v. *Buchanan* the respondents were five persons, individually named and described in the testing-clause of the deed, with this designation superadded to their personal names and descriptions, "Trustees for Mrs Helen Brown, the majority surviving being a quorum." That designation, though occurring in the testing-clause, was incorporated by the words of reference into the inductive and operative parts of the deed. That could mean nothing less than that the title and interest of these five persons to and in the shares for which they subscribed was fiduciary and not beneficial, and that in this sense, at all events, they subscribed "as trustees." If by the general law of Scotland they were a corporation or quasi-corporation (it was admitted at the bar that trustees cannot sue or be sued under any collective designation without using their own individual and personal names), I can imagine no ground on which it could possibly be held that they did not subscribe that deed in their corporate character. But the decision of this House was that they were all individually and personally liable. To my mind the present case depends upon this single point. But I think it right also to consider another and less technical way, by which it has been sought to reach practically the same conclusion. The inequality which would be produced by allowing trustees to be accepted or assumed as partners upon the footing that the whole trust property, and that only, should be liable, is said to be apparent only, and not real, because the copartnership and its creditors can never in any case get more from any partner than the whole of his property available for the payment of his debts, which property must in all cases have some limit, less or more, according to circumstances, which the other partners may know, and of which they must take their chance, and in some cases it may really be worth nothing at all; and it is contended that if they get the liability of the whole property, subject to a particular trust, they get what is as good as, and may perhaps be better than, the liability of individuals.

On these grounds, it has been contended that it was open to the directors of the City of Glasgow Bank to accept the appellants as partners on those special terms, and that they in fact did so. The principle of this argument, when applied to such a copartnership as the City of Glasgow Bank, seems to me altogether fallacious. However common a practice it may be in Scotland for simple money obligations and other ordinary contracts to be made between trustees and other persons competent to contract in any manner which they think fit, upon the footing that the trust estate only is to be held liable, a contract of the kind supposed would really be for limited liability, though of an anomalous nature, the limit being undefined as to amount, variable in different cases, and subject in many conceivable cases to various doubts and questions. By the Joint-Stock Companies Act of 1862 provision is made for limited liability in either of two ways, one of which is called liability limited by guarantee. This consists in an engagement by each shareholder to contribute towards the payment of the debts and engagements of the company in case of its being wound-up a sum of money not exceeding a certain specified amount. The City of Glasgow Bank was not a company limited by guarantee or otherwise. If any individual shareholder had proposed to the directors to take an allotment of shares upon the condition that he should in no case be liable beyond a certain specified amount (in other words, that he should be a shareholder limited by guarantee), it is clear that the directors would have had no power under this deed to agree to such a condition, whether accompanied or not by a pledge in security of any particular fund or property. *A fortiori* such a condition could not be annexed to a transfer of shares originally issued and held by the transferor upon the ordinary terms of unlimited liability. The effect of the appellants' contention practically is that on the occasion of the transfer to them of

the shares registered in their names something equivalent to this was done, though without specifying the amount of the trust funds constituting the assumed limit of their liability. It is stated that in the present case there were trust funds beyond the shares themselves of large amount. But the principle of the argument when taken in connection with the terms of this copartnership deed goes much further. If sound, it would enable a trustee shareholder, when no other property was in trust, to become a partner without any personal liability at all, and also without any liability of any property or fund beyond the shares themselves. There is nothing in this deed to prevent any purchaser of shares in the market from causing them to be transferred into the name of a trustee declared to be such on the face of the transfer, who, according to this view, would be under no personal liability, and therefore would have no occasion for or right to any indemnity against the beneficiaries, or against the author of the trust; and the purchaser himself, having never become a partner, would also be free from all liability. Nor would such a transaction (at all events if it took place when the bank was a going concern and in good credit) be impeachable for fraud. This copartnership deed does not anywhere contemplate that shares once issued can undergo any alteration in their character or incidence by reason of any subsequent transfer. No authority is given to the directors to impose or accept any special terms upon the accession of any transferee to the contract. They have power under clause 34, in the case of a gratuitous transfer, to require shares to be sold in the market, and in the case of a transfer for value, to purchase them at the price proposed to be given if they think fit to do so. Unless they exercise this power they cannot intercept the right of transfer or object to receive any transferee on the ground that he is a mere trustee, or for any other reason arising out of his relations to the transferor or any other person —relations into which, so far as I can see, he is not bound to recognise their right even to inquire. All that they can do is to regulate under clause 37 the form of the transfer. The effect of the transfer when made is treated by the deed as the same in all cases. Under clause 6 the transferee (when registered) becomes "entitled to all the rights and subject to all the liabilities of an original partner of the company," and under clause 38 he is to "take the precise place of his author." What, then, under these circumstances is the effect of the introduction of the word "as" before "trust-disponees" in the transfer deed, by which the appellants in this case expressly agreed to become, "in terms of the contract of copartnership of the said bank, subject to all the articles and regulations of the said company in the same manner as if they had subscribed the said contract?" This word "as" (twice used) constitutes the sole difference which can possibly be represented as substantial between the present case and *Lumsden* v. *Buchanan*, the omission of the word "executors" in the obligation undertaken at the end of this partnership deed by "the parties thereto and their heirs and successors" being certainly immaterial. It is urged that the necessary import of a contract in Scotland "as trustees" is to exclude unlimited personal liability, and that if that could not be done the transfer and consequent registration did not impose upon these trustees a liability to which they had never consented, but must wholly fall to the ground. Whether, if the premises were right, this conclusion would follow, it is unnecessary to inquire, because I think that the premise is not correct. The authorities cited at the bar—*Gordon* v. *Campbell* and *Thomson* v. *M'Lachlan's Trustees* (7 S. 787)—show that there is no fixed rule in Scotland as to the effect of such words, but that it must always depend upon the context and upon the nature and circumstances of the contract in which they occur. If they are open to either of two constructions—the one consistent with the context and with the substance of the contract, the other repugnant to and destructive of it—the former ought certainly to prevail. Applying that test, it appears to me that in this deed of transfer the words "as trust-disponees" not only may mean, but do mean, the same thing which was meant by the designation of trustees (though without the word "as") in *Lumsden* v. *Buchanan*, and therefore that the Court of Session was right in holding the position of the present appellants to be undistinguishable from that of the respondents in *Lumsden* v. *Buchanan*, and to be governed by your Lordships' decision in that case.

It is hardly necessary for me to add that I concur to the fullest extent in the expression given by my hon. and learned friend on the woolsack to the sympathy which all your Lordships must feel for sufferers in this most painful case.

Lord Blackburn—I also am of opinion that the judgment of the Court of Session in this case was right, and should be affirmed. In an ordinary case I should have contented myself with an expression of a general agreement with the various reasons given by the noble and learned Lords who have already spoken, but the amount at stake and the hardship on the appellants is so great that I think it right to give my own reasons.

The facts on which the question arises are few, and may be briefly stated. The contract of copartnership of the City of Glasgow Bank was originally framed in 1839. It is set out that the 6th article provides that any person becoming the holder of a share shall have all the rights, and be subjected to all the liabilities, of an original partner. The shares have since been converted into stock, and this article now applies to holders of stock. By the last article—"The parties hereto and their heirs and successors shall be bound and obliged to observe and perform their respective parts of the present contract"—it seems to me quite clear, and I think was not disputed, that those who took shares or stock, and acceded without qualification to this contract, became personally liable to fulfil the terms of it as much as the original subscribers. But the appellants contend that they did not accede without qualification, and it is necessary to inquire how they acceded. By a deed of transfer, dated 27th January 1874, the then holders of £6000 stock transferred and made over to William Muir and three others named, the "trust-disponees," in a deed described "their successors and assignees," £6000 stock in the City of Glasgow Bank—"The said William Muir and others named 'as trust-disponees' aforesaid, by acceptance hereof being,

in terms of the contract of copartnership of the said bank, subject to all the articles and regulations of the said company in the same manner as if they had subscribed the said contract, and we, the said William Muir, &c., as trust-disponees aforesaid, do hereby accept of the said transfer on the terms and conditions above mentioned." And this is subscribed by the four persons in their own names; and there was an entry made in the stock-ledger of the company, "William Muir" and the three others "as trust-disponees." I do not think that there is any other fact affecting the question before the House. It appears, therefore, that these four gentlemen are in the same position as if they had with their own names subscribed the contract of copartnership, but stated on the face of the instrument that they were trust-disponees, and that the stock was conveyed to them (the trust-disponees), their successors and assigns, and that they as such "trust-disponees" accepted the stock, and as if the bank, knowing all this, entered their names as the trust-disponees; and the question raised I take to be whether these statements do so qualify the contract into which they entered as to make them not bind themselves, their heirs and successors, personally, as would have been the case if they had subscribed the contract without any qualification.

Before the decision of this House in *Lumsden* in 1865, this question was one on which much difference of opinion prevailed, but nine years before the parties executed this transfer the decision of this House, so far as it extended, settled the law. I have carefully considered the judgments in that case, and I think this much at least must be considered as decided and settled, viz., that trustees (not created by a statute) are not by the law of Scotland a body corporate, or, as it has been loosely said, a quasi-corporation. I have myself no doubt that if individuals enter into a contract because they are trustees and for the benefit of the trust, it would be prudent in them to stipulate that should they bind themselves to see that the trust funds are properly applied to fulfil that contract, that their contract shall extend no further, and that they will not be personally liable to make good the deficiency; and if they express such a limitation with sufficient clearness, and the other contracting party (being *sui juris*) accepts such a limited engagement, he cannot call on the trustees to do other than to fulfil that limited engagement. There was an opinion entertained by many Scotch lawyers—and to some extent countenanced by the decision in this House of *Gordon* v. *Campbell*—that by the law of Scotland the mere statement on the face of the contract that the contractors were trustees and entered into the contract because they were trustees, was, as a matter of law, enough to express that the engagement was of this limited kind. I do not, speaking for myself, doubt that it is an important element to be taken into consideration in construing a contract, but I think the decision of *Lumsden* v. *Buchanan* determines that it is not by itself enough to give any contract this limited effect, and certainly that it is not enough to do so when the contract is a contract of copartnership, the nature of which would make such a limited engagement, to say the least, very inconvenient. If the matter were *res integra*, I think I should have come to the same conclusion, for the statement that the parties are trustees is not thereby made an idle or inoperative statement. It marks, as has been pointed out, that the property in the shares is trust property, which is, it is true, for the convenience of the trust only, but it also informs the bank that the property belongs to trustees, and will consequently, in case of death, vest by survivorship, and it is for the benefit of both parties that this should be known from the beginning. But even if it were an inoperative statement, I do not think it a sound rule of construction that some effect must be found for every word, even if that can only be done by giving it a force beyond what it can reasonably bear.

But I do not rest my judgment on this. I act on the ground that the decision in *Lumsden* is binding as far as it goes, and I see what I think good reasons for acting on it strictly in this and the other cases arising out of the stoppage of this bank. I think that the main object of the parties in the present case was that the shares should vest in the four gentlemen, and it is at the best very doubtful whether, if the contract was understood as the appellants contend, that object would not be frustrated. Now, as a general rule of construction, ambiguous expressions in a contract should not be construed in a sense that would frustrate the main object of the contract. They should be construed *ut magis valeat*, and if the trustees meant to limit their liability, it was for them to see that the words were sufficient to make that clear. For both reasons, it seems to me to rest on anyone who after 1865 became or continued a shareholder to show that there is some substantial difference between the terms of his accession to the contract and the terms of that which had been determined not to restrict the liability of the trustees in 1865. Now, as far as I can see, there is scarcely any difference in form, and none at all in substance, between the two. The contract of copartnership of the Western Bank began by saying that the parties bound themselves, "their heirs, executors, and successors;" that of the City of Glasgow Bank by declaring that they bind themselves, "their heirs and successors." Does the omission of the word "executors" make any difference? I cannot think that it does, and it is perhaps worth noticing that Lord Kingsdown quotes the words of the contract in the Western Bank case (inaccurately it is true) as being that they bound themselves, "their heirs and successors," showing that he did not think the word "executors" was material. The parties in *Lumsden* v. *Buchanan* acceded to the contract by subscribing a contract. That deed of accession narrated that the directors had created new shares and allocated them to a large number of persons designated in the testing clause. The designations were differently worded, I presume, according to the words in which the applications for shares were expressed. The designation of the appellants in *Lumsden* v. *Buchanan* was "trustees for Mrs Helen Brown, the majority surviving being a quorum;" that in the present case is "as trust disponees." Can that make any difference? I think not. I therefore agree in the motion of the Lord Chancellor that this appeal should be dismissed with costs.

Lord Gordon—After the very full expression which has been given of the grounds on which your Lordships have proceeded, it would be quite out of the question for me to detain the House by saying more than that I concur in the judgment of your Lordships.

Their Lordships affirmed the interlocutor of the Court of Session, and dismissed the appeal with costs.

Counsel for Appellants—Napier Higgins, Q.C. —M'Laren—Grosvenor Woods. Agent—William Robertson, Solicitor.

Counsel for Respondents—Kay, Q.C.—Benjamin, Q.C.—Davey, Q.C.—Kinnear. Agents—Martin & Leslie, Solicitors.

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*Thursday, March 20.*

(Before Lord Chancellor (Cairns), Lord Hatherley, and Lord Selborne.)

## COSTINE'S TRUSTEES *v.* COSTINE.

(In Court of Session March 19, 1878, *ante*, vol. xv. p. 446, 5 R.)

*Succession—Parent and Child—Power to Revoke*—Jus quæsitum tertio.

A father and son entered into a deed of agreement by which the father agreed to pay his son £7000 as the price of his consent to the disentail of an estate. £4000 was to be paid absolutely, the remaining £3000 was to be paid to trustees, "to be held by them in trust for the use and behoof of the son, but under the declaration that it should be lawful for the father to limit the power and control of the son over the said sum to such extent and in such way as he should think proper, and in particular to direct the trustees to hold the sum for behoof of the son in liferent only, and for the issue of his body in fee, whom failing to his nearest heirs and assignees." The father thereafter executed a deed of declaration of trust, which was also signed by the son, who therein expressly declared his concurrence and acquiescence, providing *inter alia* that in the event of the son dying without issue the trustees should hold the £3000 for the father's sister and her heirs. The trustees paid the income to the son. After his father's death the son married, and at his death he was survived by his wife, to whom shortly before, in a deed of revocation of the declaration of trust, he had bequeathed the £3000. *Held* (affirming judgment of the Second Division of the Court of Session) that the deed of revocation was effectual, the destination in the deed of trust being truly a testamentary destination by the son, and no *jus quæsitum* therefore having arisen to the beneficiaries under it.

This was an appeal by Mrs Isabella Costine or Wightman and four of her children against a judgment of the Second Division of the Court of Session, who (*diss* Lord Ormidale) had reversed a decision of the Lord Ordinary (Curriehill). The circumstances of the case will be found fully detailed in the Court of Session report and in the judgments of the House of Lords *infra*.

At delivering judgment—

Lord Chancellor—My Lords, an elaborate and lengthened argument has been presented to your Lordships in this case ranging over a number of legal questions as to which in the abstract there cannot, I think, be much doubt. But the first inquiry to be made, as it seems to me, is what exactly are the facts of the present case, and what was the position of the parties concerned. If your Lordships arrive, as I have no doubt you will, at a correct appreciation of those facts and of that position, you will not, I think, find much difficulty in determining what is the law to be applied to them.

Now, your Lordships have here the case of an owner of a Scotch entailed estate in possession. He was desirous of barring the entail, and for the purpose of effecting that object he had to obtain certain consents, and notably the consent of his only son. The obtaining of that consent became, as it was perfectly right it should become, a matter of bargain between him and his only son, and a bargain was ultimately struck for that purpose. The terms of that bargain are expressed in writing, and there can be no doubt or controversy as to this, that the terms must be extracted from the writing, and the writing appears to me reasonably plain as regards the construction of it. I will ask your Lordships' attention, therefore, in the first place, to what was the agreement which was arrived at between the father John Costine the elder and his son John Costine the younger; and, I will say, my Lords, at the outset, that so far as I can understand these papers, that agreement is the only agreement that ever was arrived at between the parties. I find no trace of either father or son intending afterwards to alter the agreement. I find them nowhere coming together and entering into a new arrangement between them. Any new arrangement, if come to between them, would have been wholly without consideration. The consideration for this agreement was the disentailing of the estate; when that was accomplished any further agreement could only have been a gratuitous one. In point of fact, as it seems to me, no further agreement—no substituted agreement—was ever formed between the parties.

Now, what was the agreement between the father and the son as expressed in the writing to which I have referred? The father was to pay for obtaining the consent of the son to the disentailing of the estate a sum of £7000, but that payment was to be made in two different sums—£4000 was to be paid or secured to the son absolutely and without any kind of qualification, the residue of the sum of £3000 was to be secured and the security was to be in the names of trustees. A bond was to be given to the trustees for the sum, and the enjoyment by the son of that sum was to be qualified in the way I am now going to describe.

In the contract between the father and the son which is the agreement of the 20th of October 1870, it was provided as to this £3000 that it was to be held by the trustees in trust for the use and behoof of the said John Costine junior. I will ask your Lordships to observe that the trusts