SECOND DIVISION.

DUKE OF BUCCLEUCH *v.* COWAN AND OTHERS (*ante*, pp. 141, 163).

Appeal to House of Lords. Leave to appeal interlocutors—(1) repelling preliminary pleas, (2) conjoining processes, (3) adjusting issues, and (4) repelling a plea of acquiescence, *refused.*

Diligence to Recover Documents. Circumstances in which a diligence to recover the private books of the defenders, and plans and sketches of their property, *refused;* but diligence to recover excerpts from their books, to a limited extent, *granted.*

Counsel for the Pursuers—Mr Patton, Mr Shand, and Mr Johnstone. Agents—Messrs J. & H. G. Gibson, W.S.

Counsel for the Defenders—The Lord Advocate, the Solicitor-General, Mr Gordon, Mr Clark, Mr Gifford, and Mr A. Moncrieff. Agents—Messrs White-Millar & Robson, S.S.C.

This case came before the Court to-day, on a motion by the defenders for leave to appeal to the House of Lords against—(1) The judgment disposing of the preliminary pleas; (2) the interlocutor by which the two actions had been conjoined; (3) that settling the form of the issues; and (4) that disposing of the plea of acquiescence.

The defenders referred to the case of Losh *v.* Martin, 20 D., 721; and Western Bank *v.* Douglas, 22 D., 447; and the pursuers to Longworth *v.* Hope, 3 M'Ph., 1049; Gordon *v.* Davidson, 2 M'Ph., 758; and Carron Company *v.* Jardine's Trustees, 2 M'Ph., 1372.

The SOLICITOR-GENERAL, for the defenders, argued that no general rule could be deduced from a consideration of the authorities. Every case depended on its own circumstances—the question always being whether, on a balance of all considerations, it was more expedient to have a trial before the appeal or not. The question generally arose in cases destined to trial by jury, but it might also arise in ordinary cases. The present was a peculiar case. One reason commonly urged against the leave being granted was that the party opposing was interested in dispatch; that his interests might suffer by the delay which the appeal would occasion. The pursuer could not urge that here, for the first action was begun in 1841, and the second was brought in 1864, and the dilatory pleas stated in the first action did not come up for discussion till June 1863. The question of delay, therefore, was laid out of sight. But this action was unprecedented in the combination of pursuers and defenders which it presented, and in its conjunction of processes, and would present a novelty in jury trial. The trial would be of a most embarrassing and of a most expensive description, and it would be matter of grave regret that it should take place at all if it could in any way be avoided. That was why he wished to go to the House of Lords at this stage of the case.

The LORD JUSTICE-CLERK observed that he could not subscribe to the doctrine advanced by the defenders that previous cases were not to be taken into view. From these cases he deduced the general rule of practice, never to grant leave to appeal at this stage of a case unless there was great and pressing expediency to recommend it. The sort of argument to support motions of this kind never varied, and the speech the Solicitor-General had delivered was just a reproduction of that which he had made in Gordon *v.* Davidson. What was the result of that case? The case went to trial. It certainly occupied a considerable time, but it resulted in a verdict for the defender — the Solicitor-General's own client. There was no bill of exceptions there. No appeal was taken, and the case was at an end. With regard to the preliminary defences, his Lordship did not think they were attended with great difficulty; and as to the plea of acquiescence—the only plea disposed of since the preliminary defences had been decided—it had no ground to rest upon at all. The only other matter that had been disposed of was the judgment conjoining the processes and fixing the form of the issue. That was a matter on which, with the greatest possible respect for the Court of Appeal, he thought the Court here were better judges than they. His Lordship concluded by saying he had never seen a clearer case for refusing the motion.

The other judges concurred; and leave to appeal was therefore refused.

A motion was then made on the part of the pursuers for a diligence to get access to the books of the defenders, that excerpts might be taken therefrom relative to the materials of the mills, the expenditure on buildings, returns of paper manufactured, accounts of sale, notes and invoices showing the nature and extent of the materials employed therein, and all plans and sketches of mills and works belonging to, or in the possession of, the defenders.

Mr PATTON, for the pursuers, explained that the object of this diligence was to ascertain the kind and extent of the materials employed in the works, in order to arrive at specific conclusions as to how far these entered into the pollution of the river. With regard to the expenditure on buildings, that was to show the extent to which the value of the property had increased on account of these buildings.

The LORD JUSTICE-CLERK—The defenders, you will see, will prove this. To make an impression upon the jury you are entitled to prove that the mill at such and such a place had been doubled in value, but you are not entitled to get access to the private books of the defenders. You can put one of the defenders in the box to prove this. With regard to the demand for plans and sketches of the mills, I suppose this is made on the analogy of plans for coal workings; but that is a very different matter. I think as regards these plans the demand is out of the question; and, with regard to the other documents required, we must limit the diligence to such excerpts from the books of the defenders as show the nature and quantities of the whole of the materials used in the various mills. A diligence is a valuable instrument, but it is liable to abuse as overlaying cases with irrelevant matter; and this is one of the reasons why jury trials are so tedious and expensive.

Mr GORDON, for the defenders, then asked what period should be embraced by the diligence?

The LORD JUSTICE-CLERK—We must give it for the whole period of forty years embraced in the issue. Both parties are to blame for the extent of that period.

GRAHAM *v* M'LELLAND.

Joint Stock Companies Acts — Winding-up—Contributory—Trustee. Held (1) That a trustee who held bank shares under a transfer subscribed by him is not distinguishable, as regards liability, from one who has signed the contract of copartnery; (2) That a contributory may be compelled to pay the sum for which decree has passed against him, although the debts of the company have all been paid, the object being not only to pay the debts, but also to equalise the losses; but (3) Note of suspension passed to try the questions whether one of two trustees, who have both subscribed the transfer, can be made liable *in solidum*, and whether he had been so decerned against.

Counsel for the Suspender—Mr Hamilton Pyper and Mr D. Mackenzie. Agent—Mr D. J. Macbrair, S.S.C.

Counsel for the Respondent—The Solicitor-General, Mr Shand, and Mr J. T. Anderson. Agents—Messrs Davidson & Syme, W.S.

This was a suspension of a charge, upon a decree pronounced on 15th March 1859, in a summary appli-

cation at the instance of the liquidator of the Western Bank against the complainer as a contributory in his character as one of a body of marriage contract trustees. The chief grounds of suspension insisted in were the following:—The complainer did not sign the contract of copartnery nor any deed of accession thereto. But by transfer in 1840 there was made over to the complainer and the other trustees certain shares to be held by them for the purposes specified in the marriage contract, by which transfer the said trustees "hereby become partners of the said company," and bound themselves to fulfil all the obligations contained in the company's contract of copartnery, held as repeated *brevitatis causa*. This transfer was signed by the complainer. The complainer pleaded that by accepting the transfer of the shares he did not incur any personal liability as partner of the bank, but only held, and was liable on, the shares in his representative character of a trustee, which he has now ceased to hold. He further maintained his non-liability for payment of the sums charged for, in respect that the debts of the bank, for payment of which the decree was pronounced, had all been paid; that these sums were not required for the purpose of enabling the respondent to pay the debts due to creditors of the bank; and that he was not liable to contribute any sum for the adjustment of the rights of the shareholders *inter se*.

On the 25th of January last the Lord Ordinary (Mure) passed the note of suspension on caution, in order, as his Lordship observed, to try the questions —(1.) "Whether, seeing that the decree charged on was pronounced entirely *ex parte* and without inquiry, under a petition founded upon the 104th section of the Act 19 and 20 Vict., c. 47, subdivision 6, which authorised the liquidators to make calls for the payment of debts, and was rested and depended for its relevancy upon the allegation that there were debts, payment of which was required, the liquidator is now entitled to take proceedings against the complainer under that decree, seeing that he has already, as is alleged, paid off all the debts?" and (2.) "Whether, by accepting a transfer of stock expressly and solely *qua* trustee, the complainer is to be considered as in the same category with those who signed the contract, or is free from personal liability, in respect of his never having signed it?"

Mr M'Clelland reclaimed, and to-day the Court adhered to the Lord Ordinary's interlocutor passing the note.

The LORD JUSTICE-CLERK said—I should be very unwilling to pass a note of suspension of a charge on such a decree except on some very relevant allegation, or on an allegation raising some question not yet decided in this branch of law, because it was the policy of the Joint-Stock Acts to make recovery of calls very summary; and to provide that shareholders should not have a ground for suspending except by showing that they were not partners or proper contributories. The first ground that is relied on by the suspender is, that he and the other joint-owners of the shares in question hold them as trustees; and they say that the existence of the trust exempts them from personal liability for payment of the calls upon grounds in law not affected by the judgment in the recent case in the House of Lords of Lumsden *v.* Buchanan. The ground of difference suggested between that case and the present is, that in that case the parties who as trustees were held personally liable had subscribed the contract of copartnery; whereas the suspender in the present case has not subscribed the contract of copartnery, but has become a shareholder in the company only by subscribing and accepting the transfer. The question therefore is, whether the legal effect of subscribing the transfer is the same as subscribing the contract of copartnery. Upon that point I entertain not the slightest doubt. I think the effect is the same. I think this is clearly shown both by the terms of the transfer itself, and by the terms of the contract of copartnery. Under the 5th head of the contract of copartnery there is a declaration that no one can acquire shares without putting himself in the same position as the person from whom he acquired them, as regards both rights and liabilities. But no doubt it may be said that this is a clause in a contract which the party has not subscribed. But this is met by the form of transfer. The form of transfer is prescribed by the 11th section of the contract of copartnery. Colonel Graham and Sir H. Seton Stewart, who, on the part of the trust-estate, accepted of this transfer, agreed "to take and accept the said capital stock, and hereby become partners of the company, and bind and oblige ourselves as such to implement the purposes and fulfil the whole conditions, rules, and regulations contained in the contract of copartnery, here held as repeated *brevitatis causa*." Therefore, in so far as this ground of suspension is concerned, it is quite impossible to distinguish this case from that of Lumsden.

In the second place, it is said that the liquidator, under existing circumstances, is not entitled to enforce this decree. The circumstances, it is said, are completely changed since the Court gave him this decree, and that change is, that the whole debts of the company have been paid. This is admitted on the part of the respondent, under the qualification that the liquidator has either paid all the debts or at least is in funds to pay them. The question comes to be, whether the decree obtained in 1859 can be made available to compel a contributory who has not paid up his share of the funds necessary to pay the debts, can be still compelled to pay up that share for the purpose of equalising the loss among the other partners; or, in other words, whether the decree can be made available for purposes of contribution, apart from purposes of payment. That appears to me to depend on the 5th section of 21 and 22 Vict., c. 60. That section applies to cases of involuntary winding-up. But section 14 applies to cases of voluntary winding-up, and through that section the powers given by sec. 5 are made applicable to the present case. There is a double object in this Act. The first is to pay the creditors of the company; the second is to equalise the losses of contributories. I am therefore of opinion that this objection also is unfounded.

The third plea maintained on the part of the suspender, and which, so far as I can find from the note of the Lord Ordinary, does not appear to have been mentioned to him, is that the decree which is sought to be enforced by the charge is a decree which proceeds upon a petition praying for decree against the several contributories named in the list annexed to the petition, Colonel Graham's name stands in the list thus: "Lieutenant-Colonel William Graham of Mossknowe, Ecclefechan; Lord Hallyburton, Sir John Hay, Bart., of Park; and Montague Bere of Morebattle, Devon, trustees for E., D., and Mrs Joanna Grace Sandford, Edinburgh;" and the sum set against these names is £5500. The parties entered here as contributories are plainly jointly interested in fifty-five shares; are jointly liable to pay £5500. The objection stated is, that this is not a decree against these gentlemen jointly and severally. It is a remarkable fact that, while the two gentlemen who made themselves partners of the company by signing the transfer were Colonel Graham and Sir Henry Seton Stewart, it is the name of only one of these that appears in the decree; and the question is, whether under these circumstances decree has gone out against Colonel Graham for payment *in solidum*. The question is one of some difficulty. If the liquidator had put the names both of Colonel Graham and Sir Henry Stewart into the list, I should have had no difficulty in holding them jointly and severally liable. But I cannot read this at present as a decree against Colonel Graham *in solidum*. I am therefore for passing the note to try this question.

The other Judges concurred.