of the petitioner having ceased to be a member of the City of Glasgow Banking Company. It is manifest, indeed, that the directors and secretary had no opportunity of making the alteration in the register which the petitioner desired should be made after his resignation as one of Mr Scott's trustees was sent to the bank on the 21st October.

At the debate both parties concurred in stating that they did not propose to try under the present application the question whether the petitioner was liable individually as a shareholder of the bank or only in his representative character of trustee, and yet it is plain, I think, that this question must be tried and determined before his name can now be removed from the register. But in order to have this question tried and determined a new application, not founded on the 35th section of the Act, but on the 98th section, will require to be made, or at anyrate the present application must be amended.

I have therefore no hesitation in holding that the prayer of this petition in its present form cannot be given effect to.

I have only to add, that it must be understood that I neither give nor indicate any opinion on the merits of the application, and in particular on the question whether the pursuer is or is not to be dealt with as a shareholder or member of the City of Glasgow Bank.

Lord Gifford—I entirely concur in the result at which your Lordships have arrived. In this case, which was fully argued before us, many questions of very great magnitude and importance have been raised. These questions, or most of them, will require to be decided very soon in the liquidation; but I agree with both your Lordships that it is not necessary to decide any of them in disposing of this petition as it stands, for it is a petition directed not against the liquidators or for their guidance in the liquidation, but against the bank itself and its directors, the liquidation not having been resolved upon at the date of the petition; and the prayer of the petition is not that an adjustment shall be made of the roll or list of contributories in the liquidation, but that a rectification shall be made by the bank itself of the register of its shareholders.

The application is founded solely on the 35th section of the statute, and the provision which is said to apply and is sought to be enforced in the petition is this—I read shortly that part of it on which the application is founded—"if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved" may apply under a summary form for rectification of the register.

Now, the question, and the only question which it is necessary to consider in order to dispose of this petition, as it stands, seems to me to be, Has default been made or has unnecessary delay taken place on the part of the bank in discharging its duty or the duty of its directors or office-bearers in reference to the petitioner's position. Now the bank closed its doors and ceased to carry on business on the 2d of October, at which date the petitioner admittedly was upon the register of shareholders—as he says, in a trust capacity. It was not till the 21st of October that he took steps to sever his connection with the bank. It was not till that day that he resigned his trusteeship, and it was not till the same date that he made intimation to the bank requiring his name to be struck out of the register. But by the 21st the bank had not only stopped payment, but the necessary notices had been given that a meeting was to take place next day (the 22d) to resolve whether liquidation should be gone into or not, and, as Lord Ormidale has pointed out, the directors had no meeting and no possibility of complying with the request betwixt the 21st and the 22d, they being in point of fact imprisoned on a criminal charge. Now, surely it cannot be said that in a case of that kind, and so standing the position of the bank, there was default of any kind, or unnecessary delay of any kind, on the part of the directors or on the part of the officials of the bank. I should therefore agree with your Lordships on that ground alone in dismissing the petition.

But then I agree with your Lordship that this petition, although formally presented against the bank, and with a view to the rectification of the register, is only a step to a further object which alone is important to the parties, and that is the deletion of the petitioner's name from the final list of contributories which is to be adjusted by the Court. I am averse to new proceedings. This petition may be amended if the petitioner desires it, in which case I agree with the course which your Lordship has proposed.

The Court refused the prayer of the petition.

Counsel for Petitioner—M'Laren—Moncreiff. Agent—J. W. Moncreiff, W.S.

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

Friday, December 20.

FIRST DIVISION.

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

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*, the Court unanimously holding that the case was not distinguishable from that of *Lumsden* v. *Buchanan*, 4 Macq. 950.

Observed that the 30th section of the Companies Act 1862 did not affect the previously existing practice in Scotland of noticing trusts on the register of joint-stock companies and of describing partners as trustees, and was only of importance as recognising it.

This was a Test Case, selected for the trial of the question of the personal liability of trustees holding stock in the bank.

William Muir of Inistrynich, Argyleshire, and others were trust-disponees of Mrs Mary Murdoch or Syme, widow of the late Francis Darby Syme, of No. 14 Great King Street, Edinburgh, and of Mrs Sophia Murdoch or Boyd, wife of John Boyd, 27 Melville Street, Edinburgh. As trust-disponees the petitioners were holders of £6000 stock of the City of Glasgow Bank, and their several names had been placed on the list of contributories by the liquidators of the bank under the head "First part contributories in their own right," and a call was made upon them collectively and individually to make payment of £30,000, being £500 per share of £100 each, payable the first half, viz. £15,000, on 23d December 1878, and the other half on 24th February 1879, in respect of the stock so held. The truster John Murdoch had died on 2d June 1873, leaving a trust-disposition and settlement dated 13th September 1843 conveying his whole estate to trustees, but a difficulty having arisen as to whether the conveyance of the trust-estate was sufficient in its terms to include the whole of Mr Murdoch's estate, the beneficiaries made up a title, and were confirmed executrices-dative to him. This having been done, they executed a trust-disposition dated 20th September 1873, and registered in the Books of Council and Session 28th October also of that year, by which they made over to the petitioners as trustees the whole estate, heritable and moveable, to which as next of kin of the testator John Murdoch they were entitled.

Besides the general conveyance, these beneficiaries on 27th January 1874 executed a transfer in favour of the petitioners as trustees foresaid of certain stock to the amount of £5000 in the City of Glasgow Bank, of which they were then the registered proprietors as next of kin to their father, and also of stock to the amount of £1000 issued by the bank in 1873, and subscribed for by Mrs Syme and Mrs Boyd at a premium of £100 per cent., and which they held as original allottees. The transfer assigned, transferred, and made over to William Muir and his three co-trustees, "the trust-disponees in a deed of conveyance in trust granted by us in favour of the said William Muir . . . dated and ratified the 20th day of September, and recorded in the Books of Council and Session the 28th day of October, both in the year 1873, and their successors and assigns whomsoever, six thousand pounds sterling of the consolidated capital stock of the City of Glasgow Bank Company, with the whole interests, profits, and dividends that may arise and become due thereon, the said William Muir, &c., . . . as trust-disponees foresaid, 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 we the said William Muir, &c., . . . as trust-disponees foresaid, do hereby accept of the said transfer on the terms and conditions above mentioned."

The instructions for the preparation of the transfer quoted in the petition were submitted to the directors, passed by them, and the transfer thereafter prepared by an officer of the bank in accordance therewith. The transfer, after being executed by the parties thereto, was by the authority and on behalf of the petitioners presented to the bank for registration in the register of members of the bank, and in consequence thereof the £6000 stock was transferred with their authority to their names, and the following entry was made in the stock ledger (which was stated to be the register of shareholders kept by the bank in terms of section 25 of the Companies Act 1862)—"William Muir, Esquire of Inistrynich, Argyleshire, merchant in Leith; William Thomson, Esquire of West Binny, Linlithgowshire; John Boyd, 27 Melville Street, Edinburgh; and James Lawrence Boyd, S.S.C., 1 Regent Terrace, Edinburgh, as trust-disponees of Mrs Mary Murdoch or Syme, widow of the late Francis Darby Syme, residing at No. 14 Great King Street, Edinburgh, and Mrs Sophia Maria Darby Murdoch or Boyd, wife of the said John Boyd.—Trust-disponees of Mrs Mary Murdoch or Syme and another."

In the statutory annual returns made to the Registrar of Joint-Stock Companies by the bank, the holding of the stock was described as follows—

"Syme, Mrs Mary Murdoch or, and Mrs Sophia Maria Darby Murdoch or Boyd, Edinburgh, trust disponees of, . £6000."

The names of the petitioners never appeared in any of the published lists of the shareholders.

The stock certificate certified that "the trust-disponees of Mrs Mary Murdoch or Syme, &c., have been entered in the books of this company as the holders of six thousand pounds consolidated stock."

The dividend warrants were in the following form:—

The City of Glasgow Bank.

Dividend No. 33, Second Instalment for Year 1873–74, payable 2d February 1875.

Warrant No. 1100. £330 on £6000 Consolidated Stock, standing in the name of the trust-disponees of Mrs Mary Murdoch or Syme and Mrs Sophia Maria Darby Murdoch or Boyd, Edinburgh.

(Place and date)
£330 sterling. *4th February* 1875.

Debit dividend account No. 33 with the sum of three hundred and thirty pounds sterling, being the second instalment of dividend declared at the general meeting of shareholders held on 1st July 1874 on the above Stock.

(Signature) John Boyd,
(Present address) 27 Melville Street, Edinburgh.

To the Manager of the City of Glasgow Bank, Glasgow.

P. John Boyd, 27 Melville Street, Edinburgh.

Incorporated under Act of Parliament.

The trust-disposition of Mr Murdoch and the trust-conveyances of Mrs Syme and Mrs Boyd were admitted not to have been produced or exhibited to the bank, though the latter deed was referred to in the transfer prepared by its officer.

On November 27, 1878, the petitioner presented a petition to the Second Division of the Court, which (along with the other legal proceedings arising out of the winding-up of the bank), was afterwards transferred to the First Division, praying the Court under the powers conferred upon it by the 74th and 138th sections of the Companies Act 1862, to ordain the liquidators of the bank

"to rectify the list of contributories by transferring the names of the petitioners from the first part thereof to the second part thereof, entitled 'Second part contributories as being representatives of others,' and to direct that the entry to be made therein shall set forth that the petitioners are holders of stock as representing the trust-estate constituted by Mrs Syme and Mrs Boyd, or that such entry shall be expressed in such other terms as shall limit the obligation of the petitioners to a liability to make the trust-estate forthcoming in a due course of administration, and meantime to prohibit and discharge the said liquidators from taking any measures for enforcing payment of the said call or any further calls that they may make against the petitioners individually, or to do further or otherwise as to your Lordships shall seem proper."

The petitioners averred—"The petitioners never agreed to become individually members or partners of the said City of Glasgow Bank. They only accepted the foresaid transfer in their representative capacity as administrators of the trust-estate conveyed to them as aforesaid. Their instructions to the officers of the bank were to prepare a transfer in their favour in that capacity, and the transfer so prepared and passed by the directors bears to be in favour of them as trustees and their successors and assigns whomsoever, and the obligation therein contained bears to be undertaken by the petitioners as trust-disponees foresaid. The entry in the stock ledger is qualified in the same terms."

"It was the regular practice of the City of Glasgow Bank, in virtue of the permission implied in section 30 of the Act 25 and 26 Vict. cap. 89, to recognise trustees in their trust capacity, and to insert their names in the said register of shareholders expressly as trustees. Trustees were by the company's contract debarred from attending meetings of the company."

"The company of the City of Glasgow Bank, by their assent given to the said transfer in manner foresaid, and by the entry in the stock ledger or register of shareholders, entered into a special contract with the principal petitioners to admit them as holders of stock in their representative capacity as trust-disponees under the deed of Mrs Syme and Mrs Boyd, or administrators of the trust-estate thereby conveyed, and by the terms of their obligation the petitioners 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. They are therefore only liable to be placed on the list of contributories in part second thereof as contributories in a representative capacity."

The liquidators, in their answers, founded upon the bank's contract of copartnery, and further stated—Denied that the petitioners only became liable "in their representative capacity as administrators of the trust-estate," or that the directors of the bank entered into a special contract with them whereby their liability was in any way limited. Neither the bank nor its directors had any power or authority to enter into any such contract, and they never did so. The list of contributories of the bank was made up by the respondents on 7th November 1878, acting as liquidators in the voluntary winding-up, in terms of the Companies' Act, 1862, and particularly sections 133 (8), 98, and 99; and in doing so the respondents rightly included the petitioners in the part of the said list entitled "first part-contributories in their own right." The petitioners are partners of the bank, and are contributories liable in their own right."

The terms of the contract of copartnery, and the clauses of the statutes so far as referred to, will be found in the opinions of the Court.

M'Laren for the petitioners—This was a Test Case brought to obtain a decision of the question whether persons who had been placed on the register of shareholders, and had accepted transfers under the description of trustees, had thereby become members in their own right or only in a representative capacity, in accordance with the rule that trustees entering into contracts within their powers as trustees were only under obligation to make the trust-estate forthcoming. The only speciality of this case was that whereas in its origin it was a testamentary estate, in point of form it was an *inter vivos* trust. The petitioners, for the purpose of their argument, assumed the law of previous decisions as to the liability of trustees as shareholders of companies, incorporated or unincorporated. But this was a new case. I. It was the first raising the question that had occurred since the passing of the Companies Act 1862, and there were differences between the relation of company and shareholder as constituted by the Act of 1862, and that of company and partner at common law, or under previous Acts of Parliament or charters which did not confer the status of an incorporated body upon the company. II. There was a special provision (sec. 30) in the Companies Act of 1862, under which it was permissible in Scotland, though not in England or Ireland, to transfer stock and make the entry in the register in such terms as to disclose the fiduciary character of the holder's right. III. The terms of the deeds here vesting the stock in the petitioners imported a contract with the trust-estate. IV. The leading case of *Lumsden* v. *Buchanan* did not apply. V. It was not *ultra vires* of such a company to accept a shareholder on any other conditions than that of individual and personal responsibility.

I. *Differences between Membership of an Incorporated Joint-stock Company and Private Partnership.*—A private partnership was not a separate person in the sense in which an incorporation was. Partners of private companies were universally responsible, because the act of one partner was the act of all. There was no separation except for accounting purposes, and for the purpose of suing and being sued. A company under the Companies Act of 1862 was, on the contrary, a corporation, and no individual member had any power to bind the rest. There was further in such a company no *delectus personæ*, and the stock was absolutely transferable along with its liabilities, and the transferor divested of all liability for the past and for the future, except that he was liable as a past member for a year if the company were unable by the contributions of all its members added together to meet its debts. In a private company which admitted of a transfer of a partner's share, a retired partner was liable for the firm's engagements previous to his retirement during the whole prescriptive period or till winding-up. As an ordinary rule of law applicable to incorporations, corporators were not liable for the debts of the corporation, *e.g.*, as municipal

corporations, universities, &c. Incorporation relieved the individual members of a corporation from liability. The Western Bank, which was only incorporated for the purposes of winding-up, appeared in *Lumsden* v. *Buchanan* to have been treated as an unincorporated company. The City of Glasgow Bank was incorporated while it was carrying on business, and thereby acquired all the privileges conferred on companies by the statute, which must be held to overrule the contract of copartnery in any question affecting the rights and liabilities of its members. Under the Companies Act of 1862 (clauses 45, 46, 49 *et seq.*) in the case of every company the management devolved upon the managers and directors. So under this contract of copartnery. The shareholders could not individually interfere with the conduct of business in either case. There were provisions in the statute similar to those in the contract of copartnery both as to the character of the stock and for its transference. A company was looked upon in both as a corporate estate divided amongst a number of corporators who had an interest in it which might be acquired by representative persons. It was very clearly recognised in the articles of copartnery (arts. 13 and 14) that trustees as such might be partners, but they were not to be entitled to vote. That showed that it could not be the intention that they be received as individuals.

II. *Notice of Trust.*—The Joint-Stock Act 1856 (19 and 20 Vict. cap. 47), sec. 19, provided—"No notice of any trust, express or implied or constructive, shall be entered on the register or receivable by the company; And every person who has accepted any share in a company registered under this Act, and whose name is entered in the register of shareholders, and no other person (except a subscriber to the memorandum of the association in respect of the shares subscribed for by him) shall, for the purposes of this Act, be deemed to be a shareholder." That statute did not originally apply to banking companies, but by the Act 20 and 21 Vict. cap. 49, sec. 3, it was extended so as to apply to these, and by section 15 it was specially provided that the 19th section above quoted of the Act of 1856 was not to apply to any banking company in Scotland registered under the Act. The Companies Act of 1862 by section 30 provided "that no notice of any trust, expressed, implied, or constructive, shall be entered in the register or be receivable by the registrar in the case of companies under this Act, and registered in England and Ireland." The object of the exception as to notice of trust in favour of Scotch banking companies might be held to be that it was a favourite investment in Scotland by trusters and trustees. It could not be to save the company from embarrassment arising from a complication of title, for in that case the Legislature would have laid down one uniform rule applicable to all companies. The Act of 1862 repealed the previous Joint-Stock Companies Act 1856, but the provisions of that Act threw light on the Legislature's intention in the successive changes that followed. The provisions with reference to notice of trust left it open for consideration as a new question whether, where trustees contracted in their fiduciary capacity, they could be held individually liable. The motive for prohibiting it in the 1856 Act was to insure individual responsibility, and in the 1857 Act to avoid it in the cases named.

III. *Meaning of the Contract of Copartnery.*—The language in the documents whereby the trustees became the transferees of the stock was the same as would have occurred in an ordinary conveyance or bond. A real right to the stock could not be given without a transfer. The transfer to an individual is to the party, his heirs, executors, and successors. The transfer in the present case was different. It was "successors and assigns whomsoever," which meant—to their successors in office. The terms of the transfer was the bank's Act under the Companies Act, and if their view was to accept trustees in their individual capacity they would insist upon the insertion of terms implying that. Further, the obligation was laid upon the parties specially as trust-disponees. So, too, in the register of shareholders and in the statutory list of members, and other documents. The acceptance of the stock was thus effectually qualified. Notice of trust on the register was not necessary to protect the beneficiaries' interests against the trustees' creditors—*ex parte Stewart, in re Shelley* 34 L. J., Banktcy. 6. Therefore where there was, as here, such notice, it was no answer to say that it was merely done to protect the beneficiaries or prevent a breach of trust. It had been held that where the contract was that trustees should be bound in a representative capacity that it was sufficient to qualify the words of the obligation by adding "as trustees"—*Cf. Gordon* v. *Campbell*, February 21, 1840, 2 D. 639, (H. of L.), 1 Bell's Apps. 428.

IV. *Previous Decisions.*—No doubt trustees had been held personally responsible, but it was always a question of the nature of the contract between the trustee and the other party. That was an answer to a class of cases about which there was a great deal of discussion in *Lumsden* v *Buchanan*—cases where, *e.g.*, a trustee had informally contracted obligations as a seller or purchaser, or taken up a lease, and where no writing passed. In such cases the question would always be, what was the fair understanding between parties? In the present case the words of the obligation themselves fixed the nature of the contract with reference to the extent of the obligation. *Gordon* v. *Campbell*, as being the latest case where there was express written obligation, was thus important. It might be different, *e.g.*, in cases of bills of exchange, the nature of which was to constitute an individual obligation, but these were distinct from the cases of documents the primary purpose of which was the transference of property or the constitution of a security over it. Here there was a clear agreement between the contracting parties to admit the petitioners in their capacity of trustees. There was no intimation by the company of anything else. —*Cf.* Bell's Comms. (5th ed.) i. 39.

Coming to *Lumsden* v. *Buchanan*, February 26, 1864, 2 Macph. 695 (H. of L.), May 8, 1865, 3 Macph. 89, 4 Macq. 950, the only limitation of the trustees' obligation there was a description of their character as such introduced into the testing clause of the deed of accession. It bore "subscribed by us, trustees of Mrs Brown." But it was clear law that no qualification contained in a testing clause of a mutual contract could ever bind the other party to the contract, and that ground alone was sufficient for the decision in *Lumsden's* case. What was filled into the testing clause merely at the request of one

party, without being submitted to the other, could not be read as part of the contract. But it was true there were other considerations affecting the liability which were entered into by the Court. There was the argument founded on the nature of the contract of copartnery as involving universal responsibility. But the Western Bank was only a private partnership, differing from ordinary partnerships only in respect its membership was numerous and its capital large. In the present case it was the corporation which contracted—the individuals not being liable as partners as in the Western Bank, but as contributories. [Lord President—You must take it as settled by *Lumsden's* case that if the parties are liable to creditors, they are also liable to relieve their copartners.] There were no partners in the present case; the word "Partners" was not to be found in the Companies Act, and it was the corporation which contracted. The liability was the statutory liability of a contributory, and the question was, was there an agreement to "become a member" (Companies Act 1862, sec. 23). In a private partnership the question was not—In what character did you agree to join the undertaking? but Were you one of those on whose joint employment the obligation was undertaken? There was the further argument in *Lumsden's* case, that the trustees were traders, and were therefore under a series of decisions responsible. But in the present case, as the company was incorporated, the individual members were not traders; if banking were a trade, then the corporation was the trader. In England the conditions for raising the present question did not exist, because notice of trust was refused there. Trustees were held personally liable there, but they were entered without notice of the trust. — *Cf. Bugg's* case, May 15, 1865, Deury and Smail, 452; *Davidson's* case, July 19, 1849, 3 De Gex and Smail, 21.

V. *Was it* ultra vires *of the Bank to accept Trustees with a Limited Responsibility?*—That involved two questions—(*a*) What were the powers of the directors under the Companies Act 1862? (*b*) Assuming they had acted *ultra vires*, What was the consequence? (*a*) The contract of copartnery contemplated that trustees should be partners. The petitioners were so designed in the stock ledger, and persons so entered were disqualified from attending meetings and voting. Then in the winding-up clauses of the Companies Act 1862 there was provision for making up the list in two parts, the latter for those liable in a representative capacity. That might apply to executors and assignees of bankrupts, but it had a much larger meaning. There was a great analogy between the case of a trust and of a limited company holding stock. The capital of the company was available, and so, too, there was the unlimited responsibility of the trust, which in the general case was as wealthy as the individual shareholder. Really in most cases it would be the individual responsibility of the truster—the man who was formerly the partner—and the estate was the same as during the truster's life. The liability of a trust was further more enduring than that of an individual. And the intention of the Legislature in authorising in Scotland the acceptance of trustees with notice of trust was to recognise and protect them in their corporate capacity.

(*b*) If the bank had no authority to accept the petitioners in their fiduciary character, they could not be made parties to a contract different from that to which they had agreed. The contract was void.

Balfour for respondents—I. The petitioners did become "partners" or "members" of this company. II. Having become so, they were liable personally for the debts of the concern.

I. *Did the petitioners become partners?* — The argument upon this head was submitted in respect of that part of the petition which prayed that the petitioners' names should be transferred from the first part of the list of contributories to the second part—entitled "second part contributories as being representatives of others." That prayer proceeded on a misapprehension of section 99 of the Companies Act 1862. Under that section the second heading of the classification could not contain the names of persons who became partners in the concern, either with personal or representative liability, but only the names of those who, not being partners, represented those who were, such as an executor on a dead man's estate or a trustee on a bankrupt estate. Section 23 of the Act, defined the term "member," and by later sections the definition was made applicable to companies not constituted under the Act, but only registered under it as the City Bank was, as well as to those constituted under it. Section 38 defined who were to be contributories, and in this statute limited liability in an unlimited concern was not recognised unless in the two cases of limitation by shares or by guarantee. The classes of contributories mentioned in sections 76, 77, and 78 satisfied the definition of "representative" contributories. So that it was clear the petitioners could not be placed in the second head of the list, as they were not "representatives."

II. *Were these petitioners partners with limited or with unlimited liability?* — The petitioners must distinguish their case from that of *Lumsden* v. *Buchanan* (H. of L. 3 Macph. 89.) One broad distinction between that case and the present was not favourable to the petitioners, viz., that in *Lumsden* the majority of the Court of Session founded their judgment on the fact that as all the debts of the bank had been paid, the question was one simply *inter socios*. And for anything that appeared the Judges here would have decided *Lumsden's* case as it ultimately was decided in the House of Lords, had it been as here a question with creditors. The grounds of the decision of the minority here, and of the House of Lords on appeal, were (*a*) that the terms of the contract of copartnery did not allow of a distinction between partners with limited and partners with unlimited liability, and (*b*) that such a distinction was repugnant to the very nature of the partnership contract into which the trustees had entered (2 Macph. 710). The petitioners here had therefore to show either that the contract of copartnery was so different from that of the Western Bank that the reasoning applied there did not apply here, or that the reasoning on the general question of personal liability in partnerships did not apply here.

The distinction drawn by the petitioners between members of a registered company and members of a private trading firm could not apply here, for the Western Bank was no more a private firm than the City of Glasgow Bank was up till November 29, 1862, when it was incorporated. They

were identically constituted; there was no *delectus personæ* in either, no mandate, and the directors had the same powers in both, and the very fact that there was no *delectus personæ* in either made it very unlikely that either bank should recognise such a principle as members coming in with limited liability. This first ground of distinction was then really present in *Lumsden's* case, and was taken into consideration.

It was further argued for the petitioner that the fact of this bank being incorporated created a distinction between the two cases, but as matter of fact the contract of copartnery had been in existence long before the 1862 Act, and up to that time it had been upon the same footing with the Western Bank. Again, the only effect of the Act of Incorporation was, that whereas so long as this was a private partnership a creditor must have had direct recourse against the individual partners, such recourse must thereafter be had through the company, not in a bankruptcy but in a liquidation. One man might previously have had to pay the whole debt at once, with recourse against the company, but the Act changed that. The incorporation had not the effect of introducing the ordinary rule of corporations which limited the liability, for in that case individual funds could never be reached at all. That rule had been altered with regard to trading corporations long previously to 1862 by the Acts 6 Geo. IV. cap. 91 (which related to charters), 4 and 5 Will. IV. cap. 94, and 7 Will. IV. and 1 Vict. c. 73. And the Act of 1862 did not displace any one of the considerations arising from a construction of the contract of copartnery of any company existing previously to that Act and registered under it. The contract of copartnery was made to come in place of the articles of association in the constitution of a company created under that Act—*cf.* sec. 196 of the Companies Act 1862. And therefore the considerations arising from the nature of the partnership relation on which *Lumsden's* case was decided still applied.

As regarded the clauses which were said to recognise varying liabilities, section 19 of the Act 19 and 20 Vict. c. 47, which had been quoted, did not distinguish companies in England and Scotland, but banking companies were never under that statute, and therefore it had no application. The Act of 20 and 21 Vict. cap. 49, however, made the last-named statute applicable to banking companies, but section 15 specially enacted that section 19 of that Act "shall not apply to banking companies in Scotland," so section 19 might as well never have been written so far as Scotland went. Neither the Western Bank nor the City of Glasgow Bank could ever have been affected by that section. You could not then, reading section 30 of the 1862 Act, found a distinction between the cases, for the fact was that banks in Scotland had always taken notice of trusts. The 1857 Act did not stop that being done, but only left the law to determine the effect of such a course. The common law liberty of banks in Scotland to take notice of trusts had in fact never been touched by statute. Shareholders in Scotch banks had found it convenient in their dealings to notice trusts, and it would have been an interference with Scotland to prevent the continuance of that practice.

Further, on the contract of copartnery, the petitioners urged that in the case of *Lumsden* the words added to the designations of the trustees in the testing clause were the words on which the judgment turned, and that there was an essential difference in the binding words in the transfers here. In *Lumsden* the words were "heirs, executors, and successors;" here the words were identical, except that "executors" was omitted, and there was nothing in the judgments in *Lumsden* to show that that word was considered specially material. The real ground was that, looking to the terms of the contract and its provisions regarding the liabilities of partners, it would be repugnant to the general scope and tenor of the deed if it were held that the trust only was bound. Too much stress had been laid by the petitioners upon the terms of the transfer, but it was not that but the contract that should be looked at. The transfer had to be sent in for registration, and that was equivalent to a signing of the contract by allottees—Section 38 of contract of copartnery. The clauses in the contract of the Western Bank were held to exclude the idea of two kinds of liability, and the clauses of this contract were identical in purpose though more logically framed and better worded. The test of liability defined in art. 5 of the contract of copartnery was the holding a share, and that clause was verbatim the same as in the Western Bank case, and was specially founded on by the Lord Chancellor (Westbury) there. Articles 13 and 14, which were said to recognise the existence of trustees, merely denied the right of voting to those trustees who were not themselves partners. Trustees who were themselves partners were entitled to vote. The opposite argument implied that where trustees took by transfer from a man who was under universal liability their own liability was not universal. That was inconsistent with the continuity of character of the partners, which the deed contemplated. If instead of taking by transfer the petitioners had taken by deed of accession, the analogy between this case and *Lumsden* would have been complete—*cf.* Lord Cranworth in *Lumsden's* case.

Again, there was nothing in the transfer which, even had it occurred in the contract, would have distinguished the case from *Lumsden's*. The words founded on were similar to those used in the testing clause in *Lumsden*, and were words of destination, not of obligation. The other documents founded on were no part of the contract. The case of *Gordon* v. *Campbell* was one of a loan transaction with a single individual, where the trustees carefully bound the estate, and that alone. It was fully considered in *Lumsden*, but it did not weigh in the decision.

Lastly, if it were *ultra vires* of the officials of the bank to admit trustees in that capacity, such persons would not necessarily be freed in a question with creditors, for creditors saw the terms of the contract, they saw the names in the register, both being published, and they were therefore entitled to assume that the admission had been regular. *Lumsden* v. *Peddie*, Nov. 16, 1866, 5 Macph. 34, was a case of a transfer, not of an original allotment.

Replied by the Dean of Faculty (FRASER) for petitioners—This case was not ruled by *Lumsden's*. The question was "Who were the partners, and in what capacity were they partners"? The

position the petitioners took up was, not that there were two sets of members, one with limited the other with unlimited liability, but that they were representatives of a trust-estate, and liable to the utmost farthing of the fortune they represented.

There were two main distinctions between this case and *Lumsden's*—(*a*) this was an incorporated company, and (*b*) the terms of the trustees' undertaking were different.

(*a*) There were the distinctions between a partnership and a joint-stock company, which had been already contended for, and there was a difference under the Statutes of 1856, 1857, and 1862 between England and Scotland as to notice of trust. The object of allowing notice in Scotland was not for identification. That was the suggestion of some one who had to find a reason. A trust when it went on the register carried with it the consequence that there should be only trust liability, according to the usage and the understood law of Scotland, down to *Lumsden's* case—*Cf.* Lord Moncreiff in *Gordon* v. *Campbell*, 2 D. 639. The exceptions where trustees had been found personally liable—where, for instance, they had exceeded their powers, or had granted bills under circumstances implying individual responsibility—merely confirmed the general law that it was the trust-estate which was responsible. The respondents desired to make a new exception to the ordinary rule of the common law, without any justification from necessity, expediency, or justice, which was the only excuse they could have for doing so. The Companies Act of 1862 made the law regarding notice of trust more distinct without in any way altering it. In England in such cases there was a legal estate in the trustee, and an equitable estate in the *cestui que* trust. In England, where there was notice of a trust behind, the beneficiaries might intervene in the case of a sale, but in Scotland a bank would be bound to honour the trustees' transfers.—Lewin on Trusts, 204, 559. In England the reason for preventing the notice of trusts upon the record was that of convenience. There was no inconvenience in allowing it in Scotland. There was further in England the object of preventing the interference of the *cestui que* trust or of the creditors. Therefore the law had laid down that the trustee there should hold both the legal and the equitable estate. Upon that point the Judges who decided *Lumsden* v. *Buchanan* might quite consistently give a different opinion now. The liability rested upon the estate represented by an individual whose name was put upon the register. There was nothing inconsistent with that in the contract of copartnery, which contemplated there being persons in two capacities on the register, one where the person represented himself and his own interests, and the other where he was the mere conduit pipe to convey the money of others. There was no doubt a *pro rata* liability, but the liability was that of the beneficiaries, who had to pay to the full extent of the trust-estate. That would result in no hardship to creditors, as the only names which were conspicuously before them in their dealings with the bank were those of the directors. The amount of a trust-estate was always ascertainable at the Commissary Office, but the amount of the fortune of a living man could not be ascertained by creditors.

(*b*) It was as "trust-disponees" that these trustees were received by the bank, and as such that they undertook the obligation. *Gordon* v. *Campbell* therefore applied. The entry in the annual list of members sent to the registrar, and also in that sent to the Commissioners of Stamps, was "Mrs Sophia Murdoch, the trust-disponees of," so that no creditor could complain, for the names of the petitioners had never been intimated.

It was said that such a contract as the petitioners pleaded was *ultra vires* of the bank. If so, what was the result? Was it that the qualification of trust-disponee was to be rejected? Where illegal conditions were attached to contracts, the contracts were held at an end. So the result in the present case would be that the petitioners would hand back the benefit they had got, and the bank would repay what had been given them in consequence of its having been entered into.

Sections 76, 77, and 78 of the Act of 1862 dealt with three cases where persons might be put on the register in a representative character. But their language covered the case now in hand, and there was no reason why there should be such a limit. The petitioners were accepted as representatives of a trust-estate, and therefore claimed the benefit of the 99th section of the statute. If that construction was not right, then section 30, which allowed a trust to appear on a register in Scotland, had no meaning.

Replied by KINNEAR for the respondents—The petitioners could not take the benefit of the provision for dividing the list of contributories because it was now admitted that they were partners. Therefore the only case they could make was that their liability should be qualified by some such words as they expressed in their prayer. It was true that the limitation was not to be a fixed sum, as in the case of partners of limited companies, but it was nevertheless an inferior liability to that of other partners. The undertaking which appeared to be contended for was that if at the time the liability attached the trustees happened to have funds out of the estate they would pay the calls, and that was all.

Was that the true nature of the contract of copartnery into which the petitioners had entered? It was said that the accident of a shareholder's death ought not to extend the liability attaching to his shares. But it was not because they represented a deceased shareholder, but because being shareholders they had disclosed the fact that they held in trust, that the petitioners claimed a different liability from the other partners. Thus the question was—could the case be distinguished from *Lumsden's?*

(1) *Lumsden's* case was not decided upon the terms of the obligation, as was pleaded on the other side, though that was a circumstance of weight in the case. But if it was decided upon that footing, there was the same ground here, for the effect of accepting the transfers was the same as that of subscribing the contract of copartnery, and the contract expressly bound subscribers and their heirs and successors.

(2) The judgment in *Lumsden* did not proceed on a peculiarity of English law, but exclusively on the Scotch law of partnership. But, further, the special terms of the deed of copartnery in

that case was held to exclude the contention of the trustees, and the contract in the present case was similar.

(3) As to the argument founded upon incorporation under the Act of 1862, there was no distinction in fact between the present case and *Lumsden's*. It was not material that incorporation of the Western Bank was only obtained for the purposes of winding-up, because the assumption was that registration operated so as to alter the liability under the contract of copartnery. But that contention was negatived in *Lumsden's* case. *Cf.* further section 196 of the Act of 1862, which provided that upon registration a company continued to be regulated in the same manner as before by the conditions of its own contract of copartnery, and there was no provision in the statute repugnant to the provisions under the contract rendering all parties personally liable. The only difference constituted under that Act was that instead of having a direct remedy, as previously, against the shareholders, a creditor must claim upon the common fund. The only new ground of distinction stated here was, that under the Statutes of 1856, 1857, and 1862 notice of trust upon the register was sanctioned in Scotland. But the Acts had made no difference on the previously existing law. [Lord Shand—I looked over the printed papers in the appeal in *Lumsden's* case, and I find that the effect of the Statutes was pressed.] Then there was an end to that distinction.

(4) The petitioners argued that they were transferees here, which put them in a different position from original shareholders or allottees. But the mode of execution of the contract by disclosing that a party was acting in a particular capacity could not control the plain meaning of the stipulations of the contract which was being undertaken. *Lumsden's* case settled that.

It was objected that the trustees' names did not appear either in the published lists or in those sent to the registrar. But they did appear in the true register of shareholders, which determined the rights of parties under the Statute. And that register (sec. 32 of Act of 1862) was open to the inspection of the public.

At advising—

Lord President—This is a case of very great and general importance. It has been argued on both sides of the bar with unusual ability and elaboration; and it has been considered by the Court with much anxiety and care. We are now to give judgment.

In the stock ledger of the City of Glasgow Bank, which is the register of shareholders, the names of the petitioners are entered as holders of £6000 stock of the company in the following terms:—"William Muir, Esquire of Inistrynich, Argyleshire, merchant in Leith; William Thomson Esquire of West Binny, Linlithgowshire; John Boyd, 27 Melville Street, Edinburgh; and James Lawrence Boyd, S.S.C., 1 Regent Terrace, Edinburgh, as trust-disponees of Mrs Mary Murdoch or Syme, widow of the late Francis Darby Syme, residing at No. 14 Great King Street, Edinburgh, and Mrs Sophia Maria Darby Murdoch or Boyd, wife of the said John Boyd." This entry was made in consequence of a transfer of £6000 stock of the company by Mrs Syme and Mrs Boyd as executors of their deceased father Alexander Murdoch, in favour of the petitioners, and accepted by them, having by authority of the petitioners been presented to the bank for registration. The transfer conveys the shares in question to the petitioners "as trust-disponees in a certain trust-disposition executed by Mrs Boyd and Mrs Syme, and their successors and assignees whomsoever, the petitioners 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 petitioners, on the other hand, as trust-disponees foresaid do hereby accept of the said transfer on the terms and conditions above mentioned." The transfer is duly subscribed before witnesses both by the transferors and the transferees. The entry in the register is thus precisely in conformity with the terms of the transfer accepted by the petitioners, and presented by their authority for registration. The names of the petitioners still stand on the register in the same terms, and have been included in the list of contributories.

The petitioners insist that they are entitled as trustees holding the shares registered in their names for the benefit of others to have an order upon the liquidators "to rectify the list of contributories by transferring the names of the petitioners from the first part thereof to the second part thereof, entitled 'Second part contributories, as being representatives of others,' and to direct that the entry to be made therein shall set forth that the petitioners are holders of stock as representing the trust-estates constituted by Mrs Syme and Mrs Boyd, or that such entry shall be expressed in such other terms as shall limit the obligation of the petitioners to a liability to make the trust-estate forthcoming in a due course of administration." To this demand the liquidators answer that the petitioners having become jointly partners of the company to the extent of £6000 stock are subject to all the liabilities of partners notwithstanding of their being trustees for others, and being registered under that description; and in support of this contention they cite the case of *Lumsden* v. *Buchanan*, as decided in the House of Lords, and the subsequent case of *Lumsden* v. *Peddie*, ,decided in the Second Division of this Court.

The rule of liability established by the case of *Lumsden* v. *Buchanan* may be stated in a single sentence. 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 of the company in trust for others, and are described as trustees in the register of partners and the other books and papers of the company. I had occasion to express my opinion on this question in the year 1864, and to assign at length my reasons for that opinion. The views of the law then adopted by myself and by Lord Cowan, Lord Neaves, and Lord Mackenzie were generally recognised as sound by the noble and learned Lords who advised the House of Lords on the appeal, and the judgment of the House of Lords was in accordance with the conclusion at which we arrived. It is quite unnecessary now to examine these opinions

in detail, because the result of the judgment, as I have already stated it, clearly applies to this case unless the petitioners can show either, first, that subsequent legislation has varied the law so authoritatively expounded and declared; or second, that the contract of partnership to which the petitioners became parties differs materially from the contract of the Western Bank; or lastly, that the petitioners were received as partners by the company on such terms and conditions as to justify their demand that they shall not be subjected to the ordinary liabilities of partners.

I proceed therefore to examine in their order the various specialties or alleged specialties on which the petitioners rely as sufficient to distinguish this case in principle from *Lumsden* v. *Buchanan*.

First, it is maintained that the City of Glasgow Bank stands in a different position from the Western Bank of Scotland in respect that it is a registered and therefore an incorporated company under the Companies Act of 1862. This distinction as matter of fact cannot be disputed, for the Western Bank was not a registered or incorporated company while it carried on business. It was registered under the Companies Acts of 1856 and 1857 only for the purpose of winding-up. But the question of importance is, whether this makes any difference on the position of persons holding shares in the company as trustees, and described as such on the register, or on their relation and liabilities to creditors of the company and to their copartners.

In estimating the influence of recent legislation on the present question it is necessary to keep in view that by the common law of Scotland joint-stock companies unincorporated, with transferable shares, were legal associations, and that the Bubble Act of 6 Geo. I. cap. 18, was never enforced in Scotland. It was found in 1825, when that Act was repealed by the 6th of Geo. IV. cap. 91, that during the preceding century, notwithstanding the provisions of the Bubble Act, many joint-stock companies had been formed, and were then carrying on business in Scotland. The Legislature in that year, so far from challenging the legality of these companies, did by another Act (6 Geo. IV. cap. 131) recognise the unincorporated joint-stock companies of Scotland, and enabled them to sue and be sued in the company name on this preamble—"Whereas the practice has prevailed in Scotland of instituting societies possessing joint-stock, the shares of which are either conditionally or unconditionally transferable, for the purpose of carrying on banking and other commercial concerns many of which have transacted business for a number of years to the great advantage of that country." This Act, which was limited in duration to twelve months, was made perpetual as regards banking companies by the Statute of 7 Geo. IV. cap. 67. These Scotch unincorporated companies thus depended for their legal existence on the common law, and for the privilege of suing and being sued in the company name, on the statute of 7 Geo. IV. cap. 67; and of these the Western Bank was one, till its registration under the Acts of 1856 and 1857, for the purpose of winding-up, and the City of Glasgow Bank was another till its registration, under the Act of 1862, on the 29th of November of that year.

It is also matter of historical fact that so great was the confidence reposed by the people of Scotland in the older banks that for the security of provisions contained in marriage-contracts and trust-settlements the stock of these banks was a favourite investment. Hence arose the practice referred to in the case of *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. No legislation has ever interfered with this practice. On the contrary, while a rule prevailed and was enforced by statute in England and Ireland to the effect that no joint-stock company should take notice of any trusts on its register of shares, the practice of Scotland in regard to shares of banking companies has been carefully saved. The 19th section of the Joint-Stock Companies Act 1856, provided that companies registered under its sanction should not take notice of such trusts. But this Act did not apply to banking companies, and when in 1857 it was extended in its application to banking companies by the Act 20 and 21 Vict. cap. 49, the 15th section of the latter Act, provided that the 19th section of the Act of the previous year should not extend to banking companies in Scotland. When, therefore, the 30th section of the Companies Act of 1862 provided that no notice of trusts should be entered in the register of companies registered under the Act in England or Ireland, it no doubt implied that such notice might be entered on the register of Scotch banking companies registered under the Act; but this implied permission only left the law as it stood before Scotch banking companies were dealt with by statute, and as previous Acts had likewise left it. In short, the law and practice of Scotland in this respect has never been different from what it is at this moment under the operation of the Act of 1862. It is difficult, therefore, to see what benefit the petitioners can take from the implied recognition by the 30th section of the Act of 1862 of the previously existing practice in Scotland of noticing trusts in the register, and describing the partners as trustees. The judgment in *Lumsden* v. *Buchanan* sanctioned and approved of that practice, not as affecting the nature or extent of the liability of partners so described, but as marking the shares with respect to which they are registered as trust property. It would be strange if the implied repetition of that sanction and approval by the statute should mean something different, and something so very different as the reversal of the rule of equal and proportionate liability established by *Lumsden* v. *Buchanan*.

The petitioners further contend that the City of Glasgow Bank having been registered under the Act of 1862, became thereby an incorporated banking company and that the rules of liability of shareholders in unincorporated banking companies are no longer applicable.

If a joint-stock company, by registration under the Act of 1862, becomes without condition or qualification a corporation, with all the characteristics belonging to a corporation at common law, there would be an end of this case. Such corporations are created by special statute, or by royal charter, for carrying out important public

objects, and have also been created occasionally for trading purposes, and notably for carrying on the trade of banking; and in such cases, if the special act or charter of incorporation does not expressly make corporators liable for the debts of the corporation, they will not be so liable. The corporation being a separate person has its own estate and its own liabilities, and the corporators are not liable for the corporation, but only to the corporation within the limit of the obligation they have undertaken to subscribe to the corporate funds. *Si quid universitati debetur, singulis non debetur; nec quod universitas debet, singuli debent.*

But nothing of this kind is intended or can be accomplished under the Act of 1862. Companies registered under it may be of limited or unlimited liability, depending on the provisions of their contracts of partnership—the limitation of liability where it exists, not arising from the statute, or from registration under it, but from the orginal constitution of each particular company. The effects of the registration, under the Act of 1862, of a company not formed under that Act, are ascertained and defined by sections 191 to 196, which clearly show that registration produces no change on the nature and extent of the partners' liabilities for company debts and obligations. If the incorporation of the City of Glasgow Bank, by registration under the Act of 1862, had the effect of making it, in any sense, a company of limited liability, the petitioners would no doubt succeed in escaping the liability of contributories in an unlimited company; but then so would all the other contributories. But this confessedly not being the effect of registration, it is difficult to see what benefit the petitioners can take from the fact of registration in the present case. They have no doubt the privilege, along with the other shareholders, of their effects being no longer directly exposed to the diligence of company creditors; but there is nothing in the provisions of the statute regarding registration, or in the legal consequences of the incorporation of the company, which can give the slightest countenance to the introduction of unequal or disproportionate liability of different classes of the registered partners in the winding-up.

An argument was also founded on the 99th section of the statute, as recognising a distinction between two classes of registered partners, namely, those who are contributories in their own right, and those who are contributories as the representatives of others. But the language of section 99, especially when taken in connection with sections 76, 77, and 78, demonstrates that the distinction intended is not between two classes of partners, but between persons who are partners, and registered as such, and persons who without being partners themselves represent partners, and are liable, to a greater or less extent, for their debts—such as executors of deceased partners, trustees for bankrupt partners, and husbands of female partners.

Second, the petitioners have been unable to point out any clause in the contract of copartnery of the City of Glasgow Bank more favourable to their claim of immunity from personal liability than the corresponding clauses in the Western Bank contract. The only noticeable difference between the two contracts is, that the former is distinguished by a more logical sequence of its clauses, and by more terse and clear expression. The 5th section provides that the 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 proportion to their respective interests or shares in the said capital stock. The 6th section provides that—"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." The 33d section declares that—"every partner who shall dispose of his share of the company's stock, agreeably to the regulations hereinbefore and after written, or who shall cease to have an interest in the concern through forfeiture or otherwise in terms hereof, shall be entitled to relief of the whole debts owing by the company, and of all obligations granted for the same, and in general of every prestation incumbent on him as a partner of the company; and the other partners shall be hereby bound to relieve him, his heirs and successors, of the same; but such partner shall be entitled to claim no other relief than that contained in this obligation; 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 have no claim whatever against the other partners of the company, whether prior or posterior to the period of such party or parties becoming partners, but he shall take and assume the place and liability of his author, ancestor, or other cedent, and become subject to all the obligations incumbent upon him." The 38th section provides that—"The said deed of transference, as also every assignment of shares in security or *mortis causa*, and confirmation thereof by right of succession, shall, after being completed, be recorded in a book to be kept for that purpose, and such deeds, transference, assignments and confirmations shall be delivered or returned to those in right of the same after having marked thereon a certificate of the registration thereof; and it is hereby declared that the production of such writings to the said manager or ordinary directors, for the purpose of registration, shall *ipso facto* infer the acceptance of the capital stock therein specified, and the liabilities of the partners having right to the same as partners of the company," . . . . "it being, however, always understood that the assignee, or heir, or executor to such selling, assigning, or deceasing partner, shall take the precise place of his author or ancestor, and shall have no claim on the other partners for relief from debts contracted or obligations entered into previous to his becoming a partner." And lastly, the 40th section provides 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." It is difficult to conceive clauses in a contract of partnership more clearly expressing the common law rule that every partner is entitled to a share of the profits and liable to a share of the losses in proportion to the amount of his share in the concern, and that the partners are all liable mutually to relieve each other of the debts and engagements of the company, so as to equalise and distribute proportionally liabilities and losses. No power is given to the directors to admit partners in terms different from these, and no countenance is given to the notion that any partners can in these respects be in a more favourable position, or subject to a liability different either in kind or degree from that to which his copartners are subject.

Third, I am unable to find, either in the averments of the petition or in the admitted facts, anything to show that the petitioners were admitted as partners, or dealt with on any terms or conditions different from those on which other trustees have been admitted as partners of this company, or from those on which the partners were admitted and described as trustees in the case of the Western Bank. It has, indeed, been noticed and pressed in argument that the lists of shareholders sent annually by the directors to the Board of Inland Revenue, and published by them, and also those sent to the Registrar of Joint-Stock Companies, did not contain the names and designations of the petitioners, but described the £6000 stock held by them in general terms, as being held by the trust-disponees of Mrs Syme and Mrs Boyd. This may have been an irregularity, and probably was an insufficient compliance with the Statute 8 and 9 Vict. cap. 38, sec. 13; but I am quite unable to see how this can affect the rights and liabilities of the petitioners as partners of the company, which depend on their recognition as such in the register of the company.

I am of opinion that this case cannot in any material respect be distinguished from *Lumsden* v. *Buchanan*, and I am therefore for refusing the petition.

Lord Deas—It is impossible to shut one's eyes to the fact that the result of the judgment proposed by your Lordship in this case, which admittedly will rule many other and similar cases, must be utterly to ruin a large class of excellent and benevolent individuals who could have had no motive for accepting the office of trustees and allowing their names to go upon the register of shareholders of the City of Glasgow Banking Company except the desire to serve their friends and the families—it may be the infant families—of their friends, without the possibility of a single shilling of gain to themselves. Since I came to the bench, now considerably upwards of a quarter of a century ago, I have not had so painful a duty to perform in a purely civil case as that of feeling constrained to say that I concur in the judgment proposed by your Lordship. The law, as decided in the highest tribunal in the United Kingdom, leads, I think, to that result, and I know my duty better than to allow any consideration of hardship to prevent me from acting upon it. I was one of the majority of eight, headed by the Lord President MacNeill, afterwards Lord Colonsay, who in the case of the Western Bank, on the 26th February 1864, decided in this Court, contrary to the opinions of a minority of four, headed by your Lordship now in the chair, then Lord Justice-Clerk, that individuals who were understood to have become partners of such a company as trustees did not thereby incur personal responsibility beyond the value of the trust-estate. But that decision was reversed on appeal in the House of Lords; and the only legitimate inquiry now is how far the law laid down on that occasion is or is not applicable to the present case. The judgment was a narrow one as applicable to the case then before the House. Of the three Lords who heard and decided it, one—the late Lord Kingsdown—so expressed himself as to show that, had he been sitting alone, he would have arrived at an opposite result. And it is a still more narrow case as a precedent to rule this case, because the contract of the Western Bank bound the parties, "their heirs, executors, and successors," which was held strongly indicative of an undertaking of personal liability, whereas the words heirs, executors, and successors do not occur in the contract of the City of Glasgow Bank, and without these words Lord Kingsdown stated distinctly he could not have concurred in the reversal of the judgment pronounced by so large a majority of this Court. In my early days of appearing at the bar of the House of Lords, Lord Kingsdown, then Mr Pemberton, afterwards Mr Pemberton Leigh, was a frequent counsel in Scotch appeals, and amongst his great contemporaries, whose names are now all blotted from the list, no man had the reputation of a sounder judgment. Here again, however, judicial duty compels me to acknowledge that, however narrow the grounds, and however small the majority, the judgment of a competent Court, more particularly of a Court of last resort, is entitled to unhesitating acceptance and respect. We are not bound by every observation made by the noble Lords individually in the course of delivering their opinions either in the case of *Lumsden* v. *Buchanan* or in any other; but when I look for the grounds of that judgment, so far as concurred in by a majority, and applicable to the present case, I find them to resolve into this—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 undertaken by the other partners or limit their liability to the value of the trust-estate. No doubt in the case of the Western Bank great importance was attached, as I have said, to the fact that the contract expressly bound not only the partners themselves, but "their heirs, executors, and successors," and these words, as I have also said, are not in the contract of the City of Glasgow Bank, although it must not be forgotten that they occur in section 11 of the Statute of 1862. But it appears to me that neither Lord Westbury nor Lord Cranworth regarded these words as essential to the result they arrived at, but that they rested their judgment on the occurrence of two things in combination—first, that the legal presumption *prima facie* was that in entering into a contract of copartnership such as that in question, for trading purposes, the partners bound themselves personally; and second, that this presumption was not affected or removed by their being designed as trustees for other parties named in the contract. The two

combined grounds of judgment thus adopted by the majority occur in combination in the present case, and therefore I am of opinion that it must be decided in the same way.

It was argued, no doubt—and the argument deserved, as it has received, careful consideration—that the Western Bank, so long as it was carrying on business, was not, and indeed could not have been, incorporated under the Statutes of 1856 and 1857, whereas the City of Glasgow Bank, while trading, was incorporated under the more recent Act of 1862, and this, it was said, made an important difference in the position of the shareholders of the two banks. Now, no doubt the difference is important; but I fail to see that it is vital to the present question. I can have no doubt it would have been so if the Statute of 1862 had incorporated the City of Glasgow Bank in unqualified terms, because if it had done so I agree with your Lordship that the liability of the partners would have been limited to the loss of their stock, and I agree also with your Lordship that a Royal Charter of incorporation might have had the same effect. A corporation, as your Lordship has said, is a separate person in law, and unless stated to be incorporated in a limited sense only, the debts and obligations are the debts and obligations, not of the partners, but of the corporation. The City of Glasgow Bank might have been registered as any other bank might be in virtue of the Act of 1862 with limited liability by taking certain steps which have not been taken. But as the registration stands, the incorporation has by the Act only certain limited and specified effects. Creditors can no longer take decree or do diligence against the individual partners directly as they could have done prior to the Act of 1862. They must constitute their debts against the company, but the partners of the company must contribute rateably to the common stock according to their holdings of shares or of stock, so that their ultimate liability remains as before. I do not think therefore that the privileges conferred upon them by the Statute of 1862 affect the present question.

I have to add, however, that while I am satisfied there was a majority in the House of Lords in the Western Bank case for the two grounds of judgment in combination which I have pointed out, and which I think decisive of the present case, I am glad to observe that, as touching our Scotch law of trusts, there was a majority for nothing beyond that. I say I am glad of this, because an experience of fifty years which have elapsed since I came to the bar, and an intimate knowledge of the practice and of the prevailing views of all branches of the profession during that time, satisfy me much more than the case of *Campbell* v. *Gordon*, or any other case to be found in the books, that the general law of trusts as recognised and acted on in Scotland has been far from identical with the law and practice of England, and has been most valuable to this country, and that it would be a grievous misfortune if it were to be supplanted or encroached upon by the law of England, which, however, I do not consider it to have been to any extent by the judgment in *Lumsden* v. *Buchanan*, which we are now to follow. On the contrary, the majority in that case—Lords Cranworth and Kingsdown—expressly stated that the law of Scotland and of England as to trusts is different in very important respects. There are some passages in the opinion of Lord Westbury which, taken by themselves, might seem to indicate that his Lordship did not recognise any great difference between the law of trusts in the two countries. But in construing a judicial opinion it must always be kept in view what the subject-matter of the action is, and I am disposed to think that this consideration must be taken into account as modifying the somewhat general words which, in one or two instances, and in one or two instances only, were used by his Lordship. Be this as it may, however, it is quite clear that, apart from cases in which the nature of the contract implies that the trustees bind themselves personally, the majority of their Lordships in deciding the case of *Lumsden* v. *Buchanan* recognised and affirmed the very substantial difference between the law in England and in Scotland. Lord Cranworth, for instance, said—"By the law of England as by the law of Scotland trustees in dealing with third persons may so contract as to exempt themselves from personal responsibility, and to confine those with whom they are dealing to such relief as they can obtain from the trust-funds. Whether this is the true effect of any contract into which they are entering must in every case be a question of construction, and all that was decided in *Gordon* v. *Campbell* was that the contract entered into by the trustees in that case, though by the law of England it would have made them personally liable, had not that effect by the law of Scotland." A stronger contrast between the two laws than that here pointed out could not possibly be conceived, whether as regards money obligations or conveyances of real estate, for the granters in *Campbell's* case acknowledged that they had borrowed the money, and bound themselves to repay it. The deed explained that in both respects they were acting as trustees, and in that character also they conveyed the real estate in security. This explanation, it appears, would have left them personally liable under an English deed. But the House of Lords (affirming the judgment of this Court) held that it did not do so under the Scotch deed—1 Bell's App. 428. Lord Cranworth, in continuation, says—"The different construction which is thus put on the same contract in Scotland and in England is probably owing in part at least to the different qualities of a trust in the two countries." He then explains that in Scotland the trust has "something of a corporate character incident to it, and it may therefore often be not unreasonable to understand the trustee when he is acting in the discharge of his trust as meaning only to deal to the extent of his trust property. In England the case is different." He further says that the question, whether the contracting parties were dealing only as trustees, and not intending to incur liability beyond the trust-funds, is always one of circumstances, and that in the circumstances of the case before the House he had "come to the conclusion that the respondents must be deemed to be personally responsible." He added—"I concur in the view taken by the minority of the Judges, and I will state shortly the grounds on which I have formed this opinion." It appears distinctly from what follows that by concurring in the view taken by the minority he did not mean to adopt all the observations of the minority, but only the specified grounds on which he agreed with them and their result, the substance

of his view being, that "besides the manifest difference between the language of the contract in *Gordon* v. *Campbell* and that in this deed, there is what I consider to be even more important—an entire difference in the nature of the contract." He further says—"I have given this important case my best consideration, and I have come to the conclusion that the Lord Justice-Clerk and the other Judges who concurred with him took the correct view of the law on this subject, that though in contracts entered into by trustees the language of the contract may by the law of Scotland show that no personal liability was incurred, even though such liability would under the same words have been incurred in England, yet the nature of the contract may be such as to show that no restriction on the full liability of the contracting parties was intended. And considering the nature of the contract in the present case, I am of opinion that the respondents though described as trustees must be deemed to have intended to bind themselves absolutely." His Lordship had previously pointed out very distinctly what the differences were between the language of the contract of the Western Bank and the language of the deed in *Campbell's* case, and also the difference between investing money in the purchase of land or goods or real or Government securities, &c., and becoming a partner in a joint-stock trading company, his observations to which effect I need not quote, because I have already substantially expressed them as the grounds of my judgment in the present case.

Then Lord Kingsdown says—"I confess that I entertain more doubt about this case than seems to be felt by my noble friends who have already expressed their opinion. The able argument of the Lord Advocate satisfied me that there are very serious differences between the law of Scotland and the law of England on the subject of trusts and the personal liability of trustees; that the same acts which would create a personal liability in the one country might not create it in the other, but, instead of it, might give a direct and immediate remedy against the trust-estate." Then he goes on to say that it did not seem to him that there was anything in the nature of the business which made such an arrangement improbable or unreasonable. "A single individual takes a certain number of shares—he is liable to the full extent of all that he possesses—beyond this his personal liability is worth little or nothing. Six trustees take the same number of shares, and are jointly and severally liable to the full extent of the estate which they represent. In this view of the case there seems to me to be no great inequality. But take it on the other hypothesis—the one gives his single liability, and the six are supposed each to give his individual responsibility to the full extent of all that he possesses. In other words, supposing the personal responsibility of both parties to be equal, the trustees give six times the security of the one. The first hypothesis, therefore, seems to me to be at least as reasonable and probable as the other. But I think that in either case the same rule would apply as to creditors and to copartners. If the acts done by the trustees do not infer liability to the one class, they cannot, in my opinion, infer it in the other. I own that the great reliance which I am disposed to place in the authority of the considerable majority of the judges below is somewhat weakened by their reluctance to deal with this question. For the reasons which I have stated, I am much inclined to think, that unless the express provisions of the deed are such as to exclude the construction put upon it by the Court below, the judgment complained of is right, and supported by the principles of Scotch law, and the reason and probability of the case. But when persons have signed deeds of this description it would be very dangerous to permit them to relieve themselves from the obligation of covenants into which they have expressly entered, on any speculation, founded on mere probabilities, that they did not really intend what the deed in terms expresses. Now, unless the covenants by which the parties subscribing the deed bind themselves, their respective heirs and successors, 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. Upon the whole, with some hesitation and regret, I am obliged to concur in the opinion already expressed by your Lordships." It is thus quite plain that if Lord Kingsdown had been sitting alone, or if the words "heirs, executors, and successors" had not been in the contract, he would have arrived at an opposite conclusion. I read all that, however, only for the purpose of showing that the majority in the House of Lords distinctly recognised and affirmed the great and substantial differences which exist between the law of Scotland and the law of England in regard to trusts. This is confirmed by the sections of the statute which were referred to in the argument. The Act of 1856, section 19, bore—"No notice of any trust, express or implied or constructive, shall be entered on the register or receivable by the company, and every person . . . entered in the register shall for the purposes of this Act be deemed to be a shareholder." But this, which was not meant or understood to be applicable to Scotland, is expressly qualified and explained by section 30 of the Act of 1862, which bears—"No notice of any trust, expressed, implied, or constructive, shall be entered on the register, or be receivable by the registrar in the case of companies under this Act, and registered in England or Ireland." The result of that plainly is, that there is no such restriction in Scotland as there is in England and Ireland against notice being taken of a trust; and where notice is actually taken of a trust in Scotland it obviously follows that you must look to the nature of the deed, and to the construction which the law of Scotland puts upon such a deed, in order to see what the effect of that notice is. In such a case as this, which is a contract of partnership for trading purposes, I hold, upon the authority of the House of Lords, that the notice does not prevent personal responsibility on the part of the trustees, or limit their responsibility to the trust-estate. I hold also, however, that it does not follow that there may not be, as I think there certainly are, many important trusts in Scotland of which notice of the trust has and ought to continue to have the effect of preventing the trustees from being personally liable. Such are contracts and deeds generally, which do not in their nature imply that the trustees have war-

ranted to others that they are undertaking personal liability, and these are expressly saved by the opinions of, at all events, the majority of the House of Lords in *Lumsden* v. *Buchanan*. The genius of the law of Scotland is, and has always been, to encourage avowed trusts, and to discourage latent trusts. With that view the Statute 1696, c. 25, was long ago enacted, and still remains in force, and I regard the judgment we are now to pronounce as leaving that general principle quite entire.

Lord Mure—I agree with your Lordship in thinking that this case must be disposed of with all due regard to the rules laid down by the House of Lords in the case of *Lumsden* v. *Buchanan*, in which the judgment of the majority of the whole of this Court, pronounced in a somewhat similar question, was reversed. I have examined that case with the greatest care, and with no indisposition to find sufficient grounds for holding that the rules there laid down did not necessarily apply in the circumstances of the present case; and so involve a body of gratuitous trustees, who, with one exception, have never in point of fact as individuals drawn or derived any benefit from any portion of the profits of the City of Glasgow Bank, in the most serious individual responsibilities for the losses of that bank. But after giving the whole case, and the able argument adduced to us, the most anxious consideration, I have been unable to see my way to any other conclusion than that which your Lordship and Lord Deas have arrived at, viz., that there are no such distinctions in the circumstances of this case as can be held to take it out of the rules applied in the case of *Lumsden* v. *Buchanan*.

Your Lordship has stated in very distinct terms the substance of the rules laid down in the House of Lords in that case, as they are to be found, I think, in a passage in the opinion of Lord Cranworth, at p. 966 of 4 Macqueen. Lord Cranworth's opinion is there very distinct, and conclusive of this question. But Lord Cranworth does not stand alone in the views there laid down. The opinion of the Lord Chancellor (Westbury) appears to me to be equally, if not more, decided to the same effect, where, with reference to the question of there being, according to the argument maintained for the trustees in that case, two classes of shareholders—one of limited, and the other of unlimited liability—his Lordship says (p. 954):—"According to the argument of the trustees, there would be two distinct classes of partners—one of persons who became shareholders in the ordinary way, and who would be partners with unlimited liability; and the other of trustees who took shares in their fiduciary character, and who would be partners with limited liability. It was not in the power of directors to enter into any such contract, or to admit any persons as shareholders in the company upon any such terms. The proposition of the trustees is that the other shareholders are bound to indemnify them against all the debts and losses of the partnership; but no such contract could be competently made, unless it was entered into expressly between the trustees and every other shareholder personally. Of such a contract so made there is neither proof nor allegation." Now, applying these rules to the circumstances of the present case, it appears to me that there is very much the same want of allegation here which the Lord Chancellor desiderated in the case of *Lumsden*. His Lordship says that it was not within the power of the directors, under such a contract of copartnery as that of the Western Bank, to enter into any such contract as that said to have been entered into between Brown's trustees and the directors of that bank. But neither is there any such power conferred on the directors by the contract of copartnery here in question, as I read that contract; and I do not see that it is alleged in the petition that there was. Neither is it alleged in the petition that the shareholders in the present case ever entered into any agreement to the above effect with the petitioners, as to the qualified terms on which alone the petitioners maintain that they were to be accepted as partners of the bank, or that the shareholders were ever consulted on that subject. There is here, therefore, the same absence of allegation as to material, or rather essential facts, which is pointed out by the Lord Chancellor in the case of *Lumsden*.

In these circumstances, it is almost unnecessary to enter into the special question here raised as to the distinction between the terms of the transfer in this case and those in the case of *Lumsden*, so strongly pressed in argument on the part of the petitioners. For if the directors of the company had no power to accept and register a transfer so qualified as to free the petitioners from all individual responsibility, it seems to me to matter very little what the precise terms of that transfer were. I am rather disposed to think that the terms of the transfer in the present case are somewhat different, and more favourable for the argument maintained for the petitioners than those of the transfer in the case of *Lumsden*, because the petitioners are throughout described as trustees in the body of the deed, and registered as such, whereas it was only in the testing clause in the case of *Lumsden* that their character as trustees was disclosed. But in dealing with this part of the case, one cannot leave out of view the fact that the case of *Lumsden* is not the only one in which the precise terms of the transfer were under the consideration of the Court with reference to the liability of a party in a fiduciary position who had taken a transfer of shares in the Western Bank. I allude to the case of *Lumsden* v. *Peddie*, 6th November 1866, 5 Macph. 34, referred to but not much commented on at the discussion. In that case Mr Peddie, as *curator bonis* for a lunatic, had under a family arrangement accepted some shares in the Western Bank in payment of the provision due to his ward, but he did so in the following very qualified terms, viz.—"And I, the said Donald Smith Peddie, as *curator bonis* foresaid, do hereby agree to take and accept the said capital stock, and as *curator bonis* foresaid hereby become a partner of the said bank, and as such bind and oblige myself to implement and fulfil the whole obligations" of the contract of copartnership. Now, the terms of this acceptance on the part of Mr Peddie appear to me to be at least as qualified and limited as those which occur in the present case—probably rather more so. If, therefore, I had considered myself at liberty to deal with this case on the footing that the petitioners' liability depended upon the terms of the transfer, and not upon the obligations undertaken by them in the contract of copartnery, I should still have felt myself bound

to hold it to be settled by the case of *Peddie* that a transfer in the terms of that founded on in the present case was not sufficient to free the petitioners from liability as individuals to contribute towards the liquidation of the debts of the bank.

Your Lordship has very fully explained the terms of the contract in this case, and shown that there is no material distinction in favour of the petitioners, as compared with the contract in the Western Bank; and therefore I do not think it necessary to detain your Lordships further with the details of the case.

The only other point raised, and strongly insisted on in the present case, which does not appear to have been the subject of much discussion in the case of *Lumsden* v. *Buchanan*, is that founded on the fact that the City of Glasgow Bank was registered under the Companies Act of 1862; and that by the 30th section of that Act there is an implied authority given to banks in Scotland to deal with trustees in a fiduciary character, and so to limit their liability to the value of the trust-estate administered by them. I do not, however, think that that clause, or any of the other provisions of the Act, can be held to have that effect. But as your Lordship has very fully and clearly explained the grounds on which the statute cannot in your opinion be so applied, I do not think it necessary to say more than that I concur in your views in that respect, as well as in the result which your Lordship and Lord Deas have arrived at as to the way in which this petition should be disposed of.

Lord Shand—I need hardly say that being fully alive to the very serious and indeed ruinous consequences which the decision of this case involves to a large number of persons I have given to it that full and anxious consideration which I know it has received from each of your Lordships.

The question to be determined is, whether the petitioners are partners of the City of Glasgow Bank personally and as individuals, or in a representative character only, as trust-disponees of Mrs Syme and Mrs Boyd, from whom they obtained, in January 1874, a transfer of the stock which, since that date, has stood in their names in the register of the bank, and liable, therefore, only for a due administration of the trust-funds under their care, as their contribution to meet the large amount of debt due by the bank?

If the general question which the petition raises had now occurred for decision for the first time, I should have thought it necessary, or at least proper, to enter fully into the legal considerations on which the decision of that question depends. But the subject was very fully and anxiously discussed in argument, and in the opinions of the whole of the judges in this Court, in the leading case of *Lumsden* v. *Buchanan* in 1864; and the question was decided on appeal in that case by the House of Lords in the following year. It was there held that persons entered on the register of the Western Bank as holders of stock, in terms which may be said to be identical with the entry in the present case, were liable as partners, not in a representative character only, but personally. That decision, pronounced upwards of thirteen years ago, was the subject of much notice at the time, as might have been expected with reference to a question of so much importance. It was followed by the case of *Peddie* in the following year, in which the same principle of personal or individual liability was applied in the case of a gentleman who had accepted and registered a transfer of stock in the Western Bank in his favour as *curator bonis* for another party, and whose name was entered in the bank's register as *curator bonis* of his ward.

These cases have been regarded since their date as an authoritative declaration of the law; and the inquiry now must be, whether this case can be distinguished from them, and particularly from the case of *Lumsden?* The leading ground of judgment in that case was, that from the nature and ordinary incidents of a partnership for trading purposes—including banking as one of these—it must be inferred that persons entering into such a partnership undertake individual liability, unless the contrary be expressly stipulated. The judgment decided that persons who become partners or members of a joint stock company, carrying on the business of banking, even though described as trustees for a third party in the testing clause of the deed subscribed by them, and also in the bank register, are liable in contribution towards the debts of the company individually, and not merely as representatives administering a trust-estate, unless, indeed, the terms of the contract under which they became partners expressly relieved them of personal liability, and substituted representative liability only. The accepting and holding an interest in a banking or other trading company, with a right to profits and a risk of losses, both of indefinite amount, was there distinguished from an act of mere investment of trust funds in the purchase of lands or goods, or real or Government securities; and it was held that the addition or description of trustees occurring after the names of the parties in the testing clause of the contract and in the bank's register was operative and useful merely to mark the property of the shares as belonging to the trust-estate pointed out, and not to control or alter the personal contract by which the parties were individually liable.

This general statement of the judgment and ground of judgment in the case of *Lumsden* v. *Buchanan* is sufficient to show that the petitioners are *prima facie* within the law there laid down. The stock which they held was that of a company trading in the business of banking. The contracts of the two banks are expressed in very much the same terms, and in the same terms particularly as regards the mutual liability of the partners to contribute towards payment of the company's debts. The petitioners have been for some years entered on the bank register of shareholders as holders of stock in their individual names, with the addition merely of "trust-disponees of Mrs Mary Murdoch or Syme and another." They were so registered in terms of a transfer, in which no doubt they were described as trustees, but which they severally executed, thereby accepting the stock transferred to them. They presented this deed for registration, and were registered as shareholders accordingly; and through one of their number, who acted under a factory granted by all, they have drawn dividends for four years, during which the trading has been going on. These are substantially the same facts and circumstances as occurred in the case of *Lumsden*, and were held to infer individual liability.

The argument of the petitioners has been directed to the end of showing that essential differences, nevertheless, exist between the two cases. But I agree with your Lordships in holding that the argument fails, and that the cases are the same in all respects material to the judgment.

It is said that an important provision is contained in section 30 of the Companies Act of 1862, under which the City of Glasgow Bank was registered and incorporated on the 29th November of that year, the effect of which is now to be considered by the Court for the first time—the liquidation of the Western Bank having been begun in 1858, and having taken place under the Joint-Stock Companies Act 1857, and Acts therewith incorporated, under which that bank was incorporated and registered only with a view to winding up. The provision of the Act of 1862 founded on is to the effect that no notice of any trust "shall be entered on the register, or be receivable by the registrar, in the case of companies under this Act, and registered in England or Ireland." It is said that this provision, which is designedly limited to England and Ireland, in place of being, like the other provisions of the statute, made applicable to the whole United Kingdom, recognises a difference between the law of Scotland and that of England and Ireland; and that as notice of trusts is admissible on the register of joint-stock companies in Scotland, it follows that persons who are designed as trustees for others on the register incur a representative liability only. The first answer to this argument is, that the law under the Act of 1862 is the same in regard to banking companies as it was under the statutes in force when the case of *Lumsden* was decided. The next is, that the argument now presented was urged in that case, and unsuccessfully; and it must, I think, be added that, even if this were not so, the fact that the Legislature has permitted trusts to be noticed on the register of joint-stock companies in this country admits of a reasonable explanation which is consistent with, and not subversive of, the law laid down in the case of *Lumsden*.

The Joint-Stock Companies Act of 1856, it is true, by its 19th section prohibited any notice of trust on the register of any company registered and incorporated under it in any part of the United Kingdom; but that statute did not apply to banking companies, which could not be registered under it. In 1857, another Act—the 20th and 21st Vict. cap. 49—"to amend the law relating to banking companies"—was passed. By that Act banking companies might for the first time be registered under the Companies Acts of 1856 and Amendment Act 1857; but by section 15th it was declared that section 19th of the Act of 1856 should not apply to banking companies in Scotland. It thus appears that from the time when it was made competent by statute to register any banking company under any Joint-Stock Companies Act, with a view to incorporation or otherwise, it continued to be lawful, in regard to banks in this country, to allow notices of trust to appear on the register of shareholders. The statute law on this subject was therefore the same before 1862 as it has been since the Companies Act of that year. It has always been lawful to notice the fact that partners or shareholders in a bank held their shares in trust for others. The statute law was thus the same when *Lumsden's* case was decided as it is now.

Not only so, but the same argument now maintained was submitted in that case. I have before me at present the written argument for Mrs Brown's trustees, the respondents in the appeal, which was laid before this Court and the House of Lords; and at pages 55 and 56 of their appeal case I find the provisions of section 19 of the Act of 1856, section 15 of the Act of 1857 relating to Banking Companies, and section 30 of the Act of 1862 are quoted, and made the basis of substantially the same argument as that now presented by the petitioners. That argument did not succeed, and indeed seems to have received no support in the opinions of any of the judges. The reason probably is, that in this country the notice of trusts on the register may often serve an important purpose by marking the property as being held by a partner of the bank as trustee on behalf of other parties. The law of Scotland as to proof of trust is very stringent—in my opinion too stringent for modern times, when parole evidence, including even the evidence of the parties interested themselves, is freely admitted—in requiring that in all cases the averment that property is held in trust can 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. It may be that the notice of trusts on the register which the Legislature has always allowed, even in the case of joint-stock companies registered under statute in this country, may also have important effects in questions of title and transference of stock, in questions as to the effect of the death or resignation of one or more of a body of trustees—a view which has been the subject of argument in other cases during the last two days. I express no opinion on that point now, further than to say, that I think the statutory provisions allowing of notice of trusts may have an important bearing on such questions. But it is, I think, clear, even if the point should not be held to have been disposed of, as having been before the Court in *Lumsden's* case, that the recognition by the Legislature of the practice of noticing trusts on the register of joint-stock companies in this country cannot have the effect of reducing personal and individual liability to representative liability in a case of partnership, by a mere notice on the register that the stock is held by a partner or partners in trust for another party.

Again, it is said this case presents an essential distinction from that of *Lumsden*, inasmuch as this company has since 1862 been incorporated under the Act of that year, while the Western Bank was incorporated under the Acts of 1856 and 1857 only for the purpose of winding-up. There would be, or might be, force in this argument if it could be shown that the act of incorporation, either by force of express provisions or by its legal effect, produced a change on the liability of the partners of the company, so as to make one class previously liable in an individual character thereafter liable in a representative character only. This would certainly be a remarkable result of incorporation under the statutes, for, of

course, the argument involves the proposition that by registration under the Acts a material change is brought about in the relative obligations of the partners to contribute to payment of the debts of the company—that change being not a limitation of liability which would affect all the partners equally, but that in place of personal liability on the partners to contribute rateably for payment of the debts of the Company, one set of partners would become entitled to the privilege of being representatives of a trust-estate only, while the others would have their obligations and liabilities increased to a corresponding extent. The same argument would, I think, have been equally available in the case of *Lumsden*, for although the registration was only for the purpose of winding-up, substantially the same provisions in regard to the measure of contributions by the members to meet losses occurred in the Act of 1856 as in the Act of 1862. Apart from this, however, it must be observed that the only provisions of the Act of 1862 which relate to representative as distinguished from individual liability (being sections 76, 77, and 78, and section 99) refer to the cases of the death or bankruptcy of a partner, or the marriage of a female partner, and in the last of these cases the liability of the husband is practically that of an individual partner, and unlimited. From these sections, therefore, the petitioners' argument derives no aid. The effect of registration and incorporation, having regard to section 196 of the Act of 1862, is to make the provisions of the existing contract of copartnery of the company the test of each partner's liability after registration and incorporation, just as before. The really material change is, that all the partners, in the event of insolvency resulting in a winding-up, get this benefit from the clause of incorporation and the provisions of the statute relating to winding-up, that they are not liable to the direct diligence of creditors, but have the company wound up by liquidators, to whom they must pay their rateable contributions, and who have power not only to satisfy the debts due to creditors, but to adjust the rights of the contributories *inter se*. This change affects only the mode of recovering and distributing the assets of the company and the contributions of the partners. I am of opinion, therefore, that registration and incorporation under the Act of 1862 having made no change on the measure of liability of the partners of the company, the petitioners' argument on this head is not well founded.

It has been further maintained that an important ground of judgment in the case of *Lumsden* was found in the fact that in the deed of accession to which *Brown's* trustees then became parties they bound themselves, "their heirs, executors and successors,"—words which usually denote personal or individual engagements,—while here these words do not occur. It is true that the use of these words is noticed in some of the opinions in this Court and in the House of Lords, but equally so that the true ground of judgment is not so much the use of such words of obligation as the nature and incidents of a contract of copartnery for trading purposes, and the obligations which naturally arise between partners in such a contract. The petitioners were not allottees of stock, and so had not to sign any deed of accession to the contract of copartnery. They signed a transfer of stock in their favour, and had this deed registered, with the effect of making them partners in the same way as if they had signed the original contract of copartnery of the bank. This seems to me to be the result of the contract, and particularly of the provisions of articles 4th, 5th, 6th, and of articles 33d, 38th, and 40th, as to which I have also to observe that they are almost identical with the stipulations of the contract of the Western Bank, which were thought material to the judgment in the case of *Lumsden*.

I have only further to notice, that reliance was placed on the fact that the petitioners' character as trustees was mentioned not only in the transfer in their favour, and in the bank register, but also in the dividend warrants; and that in the return to the registrar under the Act, and the published lists of shareholders, the petitioners' individual names even did not appear. But all of these facts occurred also in the case of *Lumsden*. It is clear that the returns to the registrar and the published lists were not in terms of the statutes; but this circumstance can have no effect in a question like the present, and enough has been already said as to the only effect which can be given to the description of the parties as trustees. On the whole, I am of opinion that the petitioners are liable as partners of the bank personally, and not in a representative character only, and that accordingly their names must remain on the register, and their petition be refused.

The Court therefore refused the petition, with expenses.

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

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

Saturday, December 21.

FIRST DIVISION.

CITY OF GLASGOW BANK LIQUIDATION—(*NELSON MITCHELL'S CASE*)—NELSON MITCHELL, PETITIONER *v.* LIQUIDATORS.

Public Company—Sale of Bank Stock—Leeman's Act (30 *Vict. cap.* 29)—*Registering Sale after Stoppage of Company—Companies Act* 1862, *sec.* 35.

A sale of bank stock was made upon a Stock Exchange on 28th and 30th September. Entries were made at the time in the respective "transaction books" of the two brokers, specifying the quantity and nature of the stock, the settling-day (October 16), and the name of the broker whose book it was not, and who thereupon initialed the entry. The name of the seller was verbally mentioned on 10th October by his law-agent and broker to the purchaser's broker, and the name of the purchaser, which was the bank itself, was given to the seller's broker by letter on the following day. On the 15th the bank, at whose