

the lease. Further, the buildings may be on any scale which the tenant may choose to adopt, provided that the sum which he asks the landlord to pay does not exceed £200. Lastly, and most important, the buildings may be of any materials, for there is not one word settling what are the materials of which the houses are to be built.

Now, that being so, it would be extremely difficult to sustain almost any objection taken by the landlord when the lease comes to an end. But what is the objection here? I do not see any, except that part of the structure is built of wood and contains no fireplace. The appellant says that he "is not bound and declines to pay the price or value of the wooden structure or chalet subsequently erected against the gable and walls of the said stone and mortar structure;" and he says further, that the petitioner found "the wooden apartment which he had raised against the gable of the said cottage for the reception of summer visitors and sporting purposes deficient and inconvenient." It was for the reception of summer visitors and sporting purposes that this lease was entered into. That is the statement of the appellant himself. Then he goes on—that for the purposes of convenience "he conceived the idea of making an extensive wooden covered-way, called a lobby, 33 feet in length and 7 feet broad, for no other purpose than securing a dry and sheltered passage from the chalet to a small kitchen and bedroom, which is all the accommodation the stone cottage contains, while the chalet has no vent or fireplace." Now, where a man makes a wooden structure such as this as an addition to a building containing nothing more than a bedroom and a fireplace, it is rather an unreasonable construction to hold that the wooden structure is not within the provision of the lease. I cannot hesitate to agree with the Sheriff. It appears to me impossible to deny that this wooden building was a part of the house which the tenant was entitled to erect at what was in fact his own caprice.

LORD DEAS—I am not prepared to say entirely "at his own caprice," but there is very considerable latitude. My difficulty is that we do not know what was erected. The whole matter is in the dark. We do not know what was the number of sheep upon the farm, or what proportion the buildings bore to the size of the farm. But we get a good deal of light from the letter of Mr Campbell to Mr Murray, in which he says—"I had always looked upon the chalet as your exclusive property, and it was my intention that the incoming tenant was to take the chalet and its adjuncts at valuation from you." From this it is very clearly to be understood that the chalet falls within the lease, for I do not think that these buildings could be passed on to the incoming tenant if they could not be passed on to Mr Campbell himself.

LORD MURE—As I read the interlocutors of the Sheriff, they hold these wooden buildings to be "offices." That is a wide word, and I am not prepared to differ, but I think the case a narrow one.

LORD SHAND—I see no reason to differ from your Lordships. The determining elements are these—that this was a lease of the shootings as

well as of the grazings, and that there is no limit as to the character of the house or as to the materials of which the tenant may build it. Therefore it may be merely such a house as a shooting tenant desires, and then wooden building comes up to that requirement.

The Court adhered.

Counsel for the Petitioner (Appellant)—Kinnear—J. P. B. Robertson. Agents—M'Neill & Sime, W.S.

Counsel for the Respondent—Dean of Faculty (Fraser)—Pearson. Agents—Murray, Beith, & Murray, W.S.

Friday, July 4.

SECOND DIVISION.

[Sheriff of Perthshire.]

SHARP v. M'COWAN.

Process—Sheriff Court—Want of Signature to Petition—Complete Writ—Sheriff Courts Act 1876 (39 and 40 Vict. cap. 70), sec. 24.

An action was raised in a Sheriff Court, the pursuer's agent signing the pleas-in-law but not the petition or condescence. The pursuer was successful, and the defender appealed to the Court of Session, where for the first time an objection to the competency of the action was taken on the ground that the petition was unsigned, that signature was essential, and that consequently there was no process. *Held* that the objection should have been taken in the Inferior Court, and an amendment allowed there, but that the Court might amend even at this stage; further, that there had been litiscontestation, and that was a good answer to the argument founded on the absence of a process.

Opinion (per Lord Gifford) that one signature at the end was sufficient for the whole record in such a process.

Friday, July 4.

FIRST DIVISION.

CITY OF GLASGOW BANK LIQUIDATION—(HOWE'S CASE)—WILLIAM HOWE v. THE LIQUIDATORS AND ALEXANDER M'EWEN.

Agent and Principal—Ultra vires—Misrepresentation—Fraud—Banking Company—Liability of Bank where Bank Officials arranged for Sale of the Bank Stock between Third Parties.

M wished to sell certain stock which he held in a joint stock company, and intimated his intention at the head office of the company. H subsequently intimated in

like manner his desire to purchase a similar amount of stock. A sale was agreed upon, and the transfer was duly signed by the parties, but the name of the seller was not disclosed until the time of signing the transfer, the whole transaction having been completed through the intervention of the assistant cashier and the transfer clerk of the company. The company had no power under its contract of copartnership to act as broker in the sale of its own stock, but it was shown to be a common practice for its officials to facilitate the transfer of its stock in that way. At the time of the transaction the company was in a state of irretrievable insolvency, which was known to the directors and the manager, but not to the assistant cashier nor to the transfer clerk. The company closed its doors shortly after the transfer had been signed, and before the name of the purchaser had been substituted on the register for that of the seller; but the substitution was effected after the failure, and subsequently the name of the purchaser was included by the liquidators in the list of contributories.

In an action against the liquidators of the company and the seller, in which the purchaser sought to have the contract set aside or to be relieved of his liabilities as a contributory, on the ground that the company, or some of its officials acting personally, had, as agents of the seller, fraudulently induced him to accept the transfer of the stock—*held* (1) that as matter of fact neither misrepresentation nor concealment had been proved sufficient to set aside the contract; and (2) that it would have been *ultra vires* of the directors or manager, and *a fortiori* of the assistant cashier, to bind the company in the obligations of broker in the sale of its own stock—defenders therefore assailed.

Opinions that the officials of a company who give their good offices in bringing together intending sellers and purchasers of their stock cannot in any way be said to act as agent of either party, or to incur the responsibilities of agency—either individually or as representing the corporation.

This was an action of reduction at the instance of William Howe against the City of Glasgow Bank and liquidators, and also against Alexander M'Ewen, raised on the 23d November 1878, with a relative petition for the rectification of the register of members and removal from the list of contributories to the bank. The Lord Ordinary (Young) dismissed the action as irrelevant, but the Court allowed the record to be amended, and thereafter granted a proof before answer. The following were the material averments of the pursuer as amended:—“(Cond. 2) On or about 7th August 1878 the pursuer purchased from the said defenders stock in the bank to the nominal amount of £500, for which he paid to the defenders a price at the rate of £236 per cent., amounting with stamp and other charges to the sum of £1186, 8s. 3d. (Cond. 3) The pursuer made the said purchase through the defenders the City of Glasgow Bank. Upon the said defenders' representations aftermentioned, the pursuer communicated directly to the said defenders, acting by their authorised officials after named, in the bank's offices in

Glasgow, his order or offer for stock to the amount of £500. By virtue of various provisions in the bank's contract of copartnership, and in pursuance of an established and recognised course of dealing, the said defenders, acting as aforesaid, had frequently quantities of stock at their own disposal, and portions thereof were from time to time sold and transferred by the said defenders as sellers to suitable persons in the pursuer's position; or the said defenders, when they had an order or offer for stock from a suitable person, purchased or acquired the stock required, and on payment by him caused the transfer to be executed in his favour. In the latter case, which also was authorised by the contract of copartnership and the said course of dealing, the said defenders acted in the purchase as agents for the transferee, and undertook to him, as in this transaction with the pursuer, the duties and responsibilities of agents. The said defenders, acting as aforesaid, having received the pursuer's said offer or order for stock, demanded £236 per cent. on behalf of the then undisclosed seller for whom they were acting, and having induced the pursuer to agree to this price, they thereafter, on or about 7th August 1878, intimated to the pursuer that they had procured stock to the amount wanted by him, and that they had advanced the price to the seller. The pursuer upon the same day, at the request of the said defenders, paid to them the price, as intimated by them, amounting in all, as aforesaid, to £1186, 8s. 3d. The said purchase and payment by the pursuer were induced by the frauds of the said defenders hereinafter libelled on. The said defenders, acting as aforesaid, in violation of their duties to him as his agents in the purchase, thereby betrayed him into what they then knew to be a ruinous purchase. (Cond. 4) The transfer of the said stock, executed by the defender the said Alexander M'Ewen on or about said 7th August 1878, and also executed on the same day by the pursuer, disclosed for the first time to the pursuer the name of the said Alexander M'Ewen as the seller for whom the said bank had negotiated the sale to the pursuer. It now appears that the said Alexander M'Ewen, who had been a shareholder from 1875, had, previous to the pursuer's application, employed the bank, acting as aforesaid, to procure a purchaser and to sell the stock on his behalf. Messrs John Turnbull and Robert Murdoch, respectively the cashier and assistant cashier of the bank, were the officials who personally accepted and acted upon the said Alexander M'Ewen's order to sell; and they both, or one or other of them, were also the officials with whom the pursuer personally communicated, and who negotiated the sale to him. They so acted in accordance with a course of dealing recognised by the bank, and known to the public and the shareholders, under which the bank through them negotiated between shareholders wishing to sell their stock and intending purchasers, and their actings in such negotiations were authorised and sanctioned by the directors and manager. In this case the said John Turnbull and Robert Murdoch negotiated the sale only after submitting the order from the said Alexander M'Ewen to Robert Summers Stronach, the manager of the bank, and only after he personally, by authority of the directors, had given instructions that the sale to the pursuer

should be negotiated by the bank. The said Robert Summers Stronach personally knew, approved of, and concurred in the whole proceedings of the said John Turnbull and Robert Murdoch in the matter of the said sale. A certificate, signed by the said John Turnbull for the manager, was issued in name of the pursuer, as alleged holder of the said £500 stock, dated 12th August 1878, which is herewith produced, but the said stock was never duly entered in his name in the stock ledger or register of the bank." And in the petition the pursuer explained that, owing to the circumstances already mentioned—*Macdonald Hume's case, supra*, p. 291—his name had not been substituted for M'Ewen's until after the bank had closed its doors. "(Cond. 5) By the terms of the transfer granted by the defender the said Alexander M'Ewen in the pursuer's favour as aforesaid, the said Alexander M'Ewen, in consideration of the said price paid to him, professed to 'sell, assign, transfer, and make over' to the pursuer '£500 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 subject of the pretended sale did not exist at the date of the said transfer, the whole capital stock of the said bank having been irrevocably lost prior to the said date. The pursuer never had made over to him any part of an actually existing capital stock or fund answering to the description and the warranty expressed or implied in the sale to him. Any partnership in the bank to which the pursuer agreed as for the said stock was a mere consequent of the alleged sale of stock above mentioned, and such sale was a mere simulate transaction in the form of a sale brought about by the defenders, in which there was no object. The sum taken by the defenders from the pursuer in name of price was so taken by the defenders without their giving in exchange the stipulated consideration, or any consideration whatever. (Cond. 6) The pursuer was induced to purchase the said £500 stock at the date above mentioned by false and fraudulent representations made by the defenders the said City of Glasgow Bank as to the state of their affairs. Such representations were made in the annual reports and abstract balance-sheets as at the first Wednesday of June in each year, and these reports and balance-sheets were made public at general meetings of defenders' company held in terms of articles 12 and 44 of the defenders' contract of copartnership, and particularly in July 1878. These reports and balance-sheets were by authority of the said defenders published in the newspapers, and they were communicated to the pursuer as a member of the public and an actual or possible purchaser of stock. The representations contained in the said reports and abstract balance-sheets, and to the effect thereof, were specially held out, continued, and confirmed to the pursuer by the said defenders, on the occasion of the sale to him, as inducements to purchase the said stock at the date above mentioned; and the pursuer, as the said defenders well knew, purchased in the belief that the said reports and representations were true. Special representations apart from the reports of the directors, approved of by the company, were made by the said John Turnbull and Robert Murdoch, with concurrence of the

said Robert Summers Stronach. They did so acting within the powers conferred on them by the directors. They, in order to induce the pursuer to purchase, and with the effect of inducing him to purchase on the terms demanded by them for the seller's behoof, specially directed his attention at the time of the sale to the market price of the bank stock following upon its last published report and balance-sheet of July 1878, and represented to the pursuer that the £500 stock now in question was worth the said £236 per cent., while at the same time they fraudulently concealed from the pursuer the facts then known to them and the said Robert Summers Stronach—that the bank was insolvent—that the last published report and balance-sheet gave an untrue account of the state of its affairs—that the market price of the stock following thereon was fictitious and misleading—that the stock was really worthless—and that the capital had been lost. If in the present case the said Robert Summers Stronach, John Turnbull, and Robert Murdoch be held to have acted, not as the representatives of the bank, but merely as individuals, the pursuer was induced to purchase by the fraudulent misrepresentations and concealments on their part as individuals, and as agents for the seller, which are above mentioned. The pursuer produces herewith and refers to the annual report and abstract balance-sheet in his possession for the year ending June 1878, published and communicated to the pursuer before his purchase. (Cond. 7) The said defenders' reports and abstract balance-sheets, and specially those of 1878, when the pursuer purchased the said £500 stock as above mentioned, were vitiated by mis-statements and misrepresentations to such an extent as to be wholly false and fraudulent, and to present an entirely untrue account of the state of the defenders' affairs. More especially, the pursuer complains of the representations contained in the said reports, and held out and continued to him as inducements to purchase, to the effect that the capital was intact, that the assets were not only equal to but much exceeded the liabilities, that the profits were such as to yield dividends averaging from 10 to 12 per cent., and to afford the accumulation of a large reserve fund, and that the stock was well worth the price which the pursuer paid to the defenders therefor. (Cond. 8) All the representations upon the faith of which the pursuer purchased the said £500 stock on the date above mentioned were false. The capital had been lost before the pursuer purchased; there was no reserve fund; and the assets were not equal to, but less by a very large amount than the liabilities; no profits were really being made from the business, taken as a whole, and the pretended stock which the pursuer was induced to purchase as aforesaid, was, at the date of purchase as above mentioned, worthless, and was, on a true state of the bank's affairs, merely then, as now, a share in a hopelessly insolvent concern, necessarily involving the holder in ruinous liabilities. (Cond. 9) All the representations by the defenders hereto other than the liquidators, on the faith of which he purchased the said £500 stock on or about the said 7th August 1878, were fraudulent. They were made, held out, and continued to the pursuer on the occasion of the sale to him by the said defenders acting by the directors, and by the

said Robert Summers Stronach the manager, the said John Turnbull the cashier, and Robert Murdoch the assistant cashier of the bank, all, or one or more of them, in the knowledge that they were false. It now appears that the bank's funds, to the amount of several millions, had been recklessly put into the hands and at the disposal of a few persons, consisting of the Glasgow directors individually and their friends, or the firms with which they were connected, and that without any security, or on grossly inadequate security. In 1873 four of these firms alone, viz., Morton & Co., Smith, Fleming & Co., James Nicol Fleming, and Innes Wright & Co., had received such advances to the amount of about four millions sterling, and these advances, along with others subsequently made, practically constituted the deficit of about six millions sterling which was disclosed at the stoppage of the bank in October 1878. The funds were thus thrown into the hands of a few speculators, contrary to all the rules of banking business, and the annual reports were framed for the purpose of concealing the true state of affairs. A heavy loss had accrued prior to pursuer's purchase, but in the reports and balance-sheets, and specially those for the year ending June 1878, the amount of liabilities was understated, and their nature was mis-stated. On the other side, the assets are overstated by including debts known to be bad to the amount of several millions, and by stating securities at amounts beyond their known value. In order still more completely to ensure the credit of the bank, the directors and manager thereof kept the bank stock up to a fictitious price, by employing brokers on the Glasgow Stock Exchange, with instructions to buy when necessary any stock offered for sale in public market, and for the same end the directors and manager of the bank encouraged in every possible way the negotiation, under their supervision and authority, of sales of stock privately through the agency of the officials in the head office of the bank in Glasgow. In this way, in the case of the pursuer's purchase, the bank, as agent for the shareholder wishing to sell out, procured for him by deliberate fraud a purchaser at a large premium—the bank, through its directors and manager and the other officials personally concerned in negotiating the sale, being aware of, but misrepresenting and concealing from the purchaser, the true state of the bank's affairs. During the year 1878, before the pursuer's purchase, the bank's affairs were rapidly approaching the final crisis. In the beginning of 1878 renewals of the bank's bills were being refused in London, and the reserve gold, which should have been held against the note issue, was being secretly sent by the directors and manager to London to meet the bank's obligations there. This operation was concealed by the falsification of the official weekly returns of reserve gold, which falsification was effected by the said John Turnbull and the said Robert Summers Stronach, acting by authority of the directors, and with the knowledge of the said Robert Murdoch. The pursuer was deceived, and acted in essential error under the influence of the fraudulent misrepresentations and concealments of the bank, acting on behalf of the said Alexander M'Ewen by its directors, and by the said Robert Summers Stronach, John Turnbull, and Robert Murdoch,

in the matter of the sale to the pursuer, and he had no means of discovering, and did not discover, the frauds by which he was induced to purchase until shortly before the raising of this action."

The pursuer pleaded—" (1) The pretended sale to the pursuer being void and of no effect in law, the pursuer is not a member of the City of Glasgow Bank. (2) The pursuer's purchase of stock, and his consequent agreement to become a member of the said company, having been induced by false and fraudulent representations of the bank defenders, as above libelled, he is entitled to be restored against the said frauds. (3) As against the City of Glasgow Bank, by reason of the nullity of the sale, as well as of the frauds practised by the bank upon the pursuer, as above libelled, the pursuer is entitled to total relief, by reduction, removal of his name from the register, interdict against calls, and repayment of the price. (4) As against the defender Alexander M'Ewen, the pursuer is entitled to total relief, by reduction, removal of his name from the register, and the substitution therefor of that of the said defender, and to repayment of the price, in respect (1) of the nullity of the sale, and (2) that the said defender is not entitled to retain any benefit obtained for him by the frauds of the bank, or of the said Robert Summers Stronach, John Turnbull, and Robert Murdoch, all or one or more of them. (5) Alternatively, as against the City of Glasgow Bank, the pursuer is entitled to decree for damages to the amount concluded for, in reparation of the loss, injury, and damage caused to him by and through the frauds of the said defenders above libelled on. (6) Further, and in the event of the pursuer not obtaining removal of his name from the register, and interdict against calls, the pursuer is entitled, *inter socios* of the City of Glasgow Bank, and in a question with the said Alexander M'Ewen, to decrees of reduction and repayment of the price, and to relief against calls. (7) The pursuer, upon the facts and circumstances set forth in the condensation, is entitled to decree or decrees in terms of the conclusions of the summons, with his expenses of process."

The pursuer therefore concluded for reduction of the various documents by which it was sought to make him a shareholder and contributory, for declarator that he was not a member of the company, and for repayment from all the defenders jointly and severally of the sum of £1186, 8s. 3d.; and in any event for such reduction, declarator, and repayment as in a question *inter socios* of the bank and with the defender M'Ewen, with relief against the defenders from his liabilities as a member of the company, or otherwise for £10,000 damages from the defenders the bank.

The purport of the proof will be found in the opinions of the Court *infra*.

Argued for the pursuer—The fraudulent misrepresentation consisted mainly in the issue of the false report and balance-sheet. It was that, together with the silence if not positive misrepresentation of the officials who actually transacted with the pursuer, which induced him to purchase the stock. Now, that being so, the defender M'Ewen at any rate was liable for the fraud of his agents; for that the bank or its officials were his agents did not admit of doubt. The practice of the bank to act as it did here was amply proved,

and in this case there must have been an agent, for the seller and purchaser never met, and the seller's name was not disclosed to the purchaser until the time of signing the transfer. Lastly, in a question with the defender M'Ewen, it was enough if the fact of agency was proved; the question of the power of the bank to become a stockbroker did not enter here. At all events, the bank officials personally acted as the defender M'Ewen's agents. M'Ewen was therefore liable. But (2) the bank was also liable. The fraud was the fraud of the bank, and it was not *ultra vires* for its officials to embark the bank in the business of brokers of its own stock. Such a business was not prohibited by the contract of copartnery, which permitted the bank to purchase its stock on its own behoof. Then it was shown to be the practice of the bank to act as it had done here, and this plus the benefit of manipulating the stock market brought the case within *The National Exchange Company v. Drew and Dick*. The bank therefore was also liable.

Authorities—*National Exchange Company v. Drew and Dick*, May 31, 1850, 12 D. 950—March 9, 1055, 2 Macq. 103; *Traill v. Smith's Trustees*, June 3, 1876, 3 R. 770; *Clydesdale Banking Company v. Paul*, March 8, 1877, 4 R. 626; *Barwick v. English Joint-Stock Bank*, May 18, 1867, L.R., 2 Excheq. 259; *Mackay v. Commercial Bank of New Brunswick*, March 14, 1874, L.R., 5 P.C. 394.

Argued for the defenders—(1) The evidence of misrepresentation had entirely broken down. The false report and balance-sheet proved nothing, for these had not by reference at the time been made part of the contract. The officials alleged to have bound the bank made no representations, and besides they were mere subordinates, who were ignorant of the insolvent condition of the bank. (2) It was *ultra vires* of the officials of this bank, and certainly of its assistant cashier, to engage it in the business of broker in the sale of its own stock; and therefore the fraud of the officials in such a business, however clearly proved, could not bind the bank.

Authorities—*Allan v. Wright*, June 7, 1853, 15 D. 725; *Inglis v. Lumsden*, January 4, 1859, 21 D. 192; *Addie v. Western Bank*, March 4, 1864, 2 M. 809—June 9, 1865, 3 M. 899—May 20, 1867, 5 M. (H.L.) 80, and 1 L.R., Sc. Ap. 145; *Royal British Bank ex parte Nicol*, January 22, 1859, L.J., 28 Ch. 257; *Weir v. Bell*, May 18, 1878, L.R., 3 Excheq. Div. 238 (Lord Justice Bramwell.)

At advising—

LORD PRESIDENT—It is not disputed in this case that the pursuer in the month of August 1878 purchased £500 of the stock of the City of Glasgow Bank from Mr M'Ewen. The transfer is dated on the 7th of August, and is expressed in the usual form. It transfers the stock to Mr Howe, and Mr Howe accepts of all the obligations of a partner of the bank at the same time that he receives all the privileges of a partner. The transfer having been placed in the hands of the officials of the bank, there was a stock certificate issued, dated the 12th day of August 1878, which certified that William Howe had been entered in the books of this company as the holder of £500 consolidated stock, and that is signed by John Wardrop for the accountant, and John

Turnbull for the manager. Now, at that date it was not true in point of fact that Mr Howe's name had been entered in the books of the company as the holder of this stock, and therefore the certificate was prematurely issued. We have had occasion in several other cases to see that in the course of the autumn of 1878 Mr Wardrop, the person whose duty it was to complete these entries in the books, was absent from the bank, and the consequence was that a number of entries got into arrear, and in point of fact Mr Howe's name was not entered in the register of shareholders until after the stoppage of the bank. We have held in other cases that the registration so made is not effectual, and of course it cannot be given effect to in this case; but at the same time, as in a question between Mr Howe the purchaser and Mr M'Ewen the seller, supposing that there is nothing else in the case, the completion of the transaction by the execution of the transfer by both parties is quite sufficient to settle the question. Mr Howe as purchaser must submit to be placed on the register of shareholders and list of contributories in place of Mr M'Ewen, unless there is some other ground upon which he can get rid of his obligation. All this, I think, is quite clearly settled in the case of *Allan v. Commercial Exchange Company*, 15 D. 725; and upon that state of the facts it is plain that the liquidators, who are also defenders in this case, would have no interest in the question, because the question would be merely whether Mr Howe or Mr M'Ewen is to be the partner in respect of those shares.

But then the remedy sought in this action presents a very different aspect of matters so far as the bank and the liquidators are concerned, because the pursuer concludes, in the first place, that all the defenders—that is to say, the bank and Mr M'Ewen—should jointly and severally be decreed to make payment to the pursuer of the sum of £1186, 8s. 3d.; or otherwise the defenders the City of Glasgow Bank should be decreed and ordained to make payment to the pursuer of the sum of £10,000 sterling in name of damages; and in any event it should be found and declared that the pursuer is entitled *inter socios* of the City of Glasgow Bank, and in a question with the said Alexander M'Ewen, to decree of reduction, and for payment of the said sum of £1186 as above concluded for. In short, the pursuer demands that he shall be liberated entirely from the contract concluded between him and M'Ewen, and that both M'Ewen and the bank shall be liable to him in reparation of all the damage he has sustained by entering into that contract, upon this ground—that the bank in the conduct of the sale acted as M'Ewen's agent—the agent of the seller, and, indeed, as the agent of both seller and purchaser—and did by their fraud induce the purchaser to enter into the contract of sale; and the seller being liable for the fraud of the bank as his agent, that is laid as the foundation of the reduction of the contract as between the buyer and the seller, and is also laid as the foundation of the claim of damages against the bank.

Now, this is an action of a very peculiar kind, and we had a good deal of difficulty in dealing with the record in this case, in seeing that there was any relevancy in the statements made by the pursuer as against either the one defender or the

other. But after the pursuer had been allowed to amend his record, his case, as disclosed on the face of the record, seemed to amount to this—that the bank acted as agent at least for the seller, if not for both parties, in the transaction of this sale between M'Ewen and Howe; that while acting as such agent the bank through its officials induced Howe to enter into the contract by fraudulent representations or fraudulent concealment, or both; and alternatively he stated that if the bank was not to be considered as acting as agent for the seller in the transaction of this sale, then the officials of the bank, viz., Murdoch and Turnbull, did act as such agents, and did while acting in that agency induce the pursuer, by fraudulent representation or fraudulent concealment, or both, to enter into the contract. Upon these averments we thought it desirable before answer to allow the pursuer a proof of his averments, and we have now that proof before us.

It is necessary to consider the case in both its aspects, both as regards the allegation that the bank acted as the seller's agent in the conduct of the sale, and also that the two officials Murdoch and Turnbull acted individually as such agents.

Now, in regard to the first of these points, it certainly occurs to one as a very great difficulty in the outset that this incorporated banking company was formed for the purpose of banking business, and that it is no part of its business according to its contract of copartnership to act as agents or brokers. That being so, if the bank did act as agent or broker for a seller in a transaction of this kind, it will seem naturally to follow that that was entirely beyond its proper banking business, and if the directors and manager had in name of the bank taken an employment of that kind, and undertaken, either for a consideration or without any pecuniary consideration, to act as a broker or agent in the sale of stock, the directors and the manager would have been going beyond the scope of their authority, because they are appointed by the corporation to transact the proper business of the bank, and not any business which is beyond the contract of copartnership. The bank itself as a corporation could of course do nothing. It must act through some individual; and I think even if it had acted through its directors and manager in the transaction of this business, it would be very difficult indeed to say that these plainly unauthorised acts of the directors and manager would be binding on the bank as a corporation. No doubt if the shareholders had authorised the director and manager to embark in such business, a specialty might be introduced into the case of a very serious kind, which, however, it is not the least necessary to deal with, because there is neither averment nor evidence of any such authority being given. But further, it is not said that this business was conducted by the directors and manager of the bank. All that is alleged is that two officials of the bank named Murdoch and Turnbull conducted the business; and the first alternative that the pursuer puts forward is this—that these two gentlemen, acting as agents for the seller in this transaction, were acting in name and for behoof and by authority of the bank, and so bound the bank as agents in the transaction. But they had no special authority. Nothing of the kind is averred or proved, and it appears to me quite out of the question, therefore, to say that anything that was done by Turn-

bull and Murdoch in this proceeding could be an act of agency on the part of this bank.

But assume that the bank was, as the pursuer says, agent in this case, the next question would be, What were the representations made by the agent in the conduct of this sale? And, again, it must be kept in view that the way in which the bank is said to have acted as agent is by the instrumentality of Murdoch and Turnbull; and therefore we must look to the representations made by Murdoch and Turnbull if it is said that representations were made of a fraudulent character to induce the pursuer to purchase. I cannot understand in a question of this kind—even supposing the incorporated company could be in any way implicated as agents—that the false report issued previously by the directors and approved of by the shareholders could be the fraud of the agent in this transaction. I apprehend that to bind a person like Mr M'Ewen, the seller, by the fraud of his agent, the fraud must be committed in the exercise of the agency. It would never do to say that a seller of stock on the Stock Exchange should be bound by the fraud of his broker not perpetrated in the conduct of the sale which he had been employed to transact, but perpetrated at some previous time when he was not acting as the seller's broker at all. And so, in like manner, if by any possible legal construction the incorporated company could be said here to be the agent, it certainly could be answerable only for fraud committed in the exercise of that agency, and not for any previous fraud or misrepresentation made upon a different occasion and for a different purpose.

Well, then, when we come to the representations made by the individuals who are said to have conducted this act of agency on the part of the incorporated company, what does it amount to? The pursuer himself may be looked to as giving the strongest account probably of any representations made to him in the matter. He was at the bank two or three times in the course of arranging this purchase of stock from Mr M'Ewen, and there are two occasions in particular to which he refers as interviews which he had—with Murdoch on the one occasion, and with, not Turnbull, but Wardrop, the transfer clerk, upon the other. As to the first of these occasions, he says that he had read in the newspapers the report of the directors to the shareholders in July 1878, "and on the following day I was at the bank. I made the remark to Murdoch that I had noticed in the papers that the annual meeting had been held the previous day, and that the bank seemed to be in a satisfactory position, and he assented to these facts." In cross-examination in reference to this same matter he is asked this question—"You say that Murdoch assented when you said the report seemed a satisfactory one; what did he say?—(A) I think the word he used was 'yes.' We did not go into particulars." Now, it seems a very strong thing to say that Murdoch there made any representation whatever as to the condition of the bank or its affairs. The report was undoubtedly a favourable one, and that was the observation made by Mr Howe, and that was the observation assented to by Mr Murdoch. But, says the pursuer, there was here a duty of disclosure upon Murdoch; he concealed the condition of the bank, and he ought to have disclosed it, because he was my agent; or at least he was

the hand through which the bank was acting as my agent. Now, it certainly seems a very curious idea that upon this first occasion, before there was any proposal to buy or sell at all, an observation of this kind passing between these two persons should be considered as a breach of that duty of disclosure which lies upon an agent instructed to conduct a purchase or sale. But still further, it is not, and does not appear to be, the fact that Murdoch had any such knowledge of the bank affairs as would have enabled him to disclose to this gentleman—even if he had been entitled to do so as an officer of the bank—anything connected with the bank affairs, or at least that he was entitled to disclose to him, or had the means of knowing, the actual condition of the bank as it stood at that time.

Now, what is the other occasion spoken to by Mr Howe? It is a day or two afterwards apparently, when, being in the bank again, "Wardrop, the transfer clerk, came to me and said that Murdoch had desired him to say to me the first time he saw me in the bank that he could not get the party to take less than £236 for the stock; that that was the market price of the stock; that it was worth that price, and he would not take less for it; and that Murdoch had taken it for me. I said very well, I will take the stock." Again, on being examined on that point by the Court he said in answer to this question—"On the occasion when you saw Wardrop in Murdoch's absence, and when the words were used that the stock was worth that price, did you understand that to be a statement made to you by the seller in standing upon his price, or to be a message from Murdoch?—(A) I understood it was a statement by the seller to Murdoch and communicated to me." Now, that is a representation, if it be a representation at all, made by the seller, and not by anyone else. But the rest of the evidence is all quite in accordance with what Mr Howe himself very candidly states as the result of these interviews. Mr Murdoch, for example, says that on the two occasions when he saw Mr Howe nothing was said about the value of the stock as an investment. "I said nothing to the effect that it was worth the market price. On the first occasion Howe said he had seen the report and he thought of buying £500 worth of stock. I did nothing to encourage him in that idea, either directly or indirectly. I did not say to him that it was very good stock. I did not know that it was good stock then. I did not know that the bank was insolvent." Mr Turnbull again seems to have had no concern with this matter at all. It does not appear, either from the evidence of Howe himself or from the evidence of Turnbull, that anything passed between them on the question of this purchase at all. And therefore it appears to me that as far as any misrepresentation or concealment is alleged on the part of Murdoch and Turnbull as the officials acting for the bank, upon the footing that the incorporated company was the seller's agent, what was done does not amount either to misrepresentation or concealment, even supposing that such misrepresentation or concealment would have been binding on the bank.

But there is the additional averment of the pursuer that if the bank was not the agent, then Turnbull and Murdoch must be considered to be individually the agents for the seller. Now, after what I have said about the interview between the

pursuer and Murdoch and Turnbull it is not necessary to say much upon that alternative view of the case, because there really were no representations made by them individually any more than as officials of the bank. But I have very great doubt indeed, and I think it right to express that doubt, that these gentlemen did act as agents for the seller or for anybody in this transaction. It appears to me that all they did was to intimate both to the seller and to the purchaser that stock was to be had in the one case and a purchaser was to be had in the other. That is in accordance with a practice which is perfectly well known to prevail in all banks and most incorporated companies of that kind. When persons want to buy stock they go to the bank to know if there is any stock for sale, and just as naturally on the other side a man who wishes to sell his stock goes to the bank to ascertain whether there are any persons wanting stock, and the officials of the bank or corporation—certainly not the corporation itself—give their good offices to these persons in a friendly way to bring them together. I confess I do not think that amounts to agency in any legal sense of the term. If it is agency at all, it must be agency for both buyer and seller. But it strikes me that it does not amount to agency in any sense. There is no charge made for those services. That is quite clear. And I should be very sorry indeed to give the slightest countenance to the notion that the mere circumstance of the bank officials in a case of that kind exercising a certain amount of civility and courtesy towards persons who are dealing in the stock of the company is, in the first place, to bind these gentlemen who act so courteously and civilly in all the legal responsibilities of double agency, and, in the second place, to create, as is here contended for, the liability of agency upon the part of the corporation whom they are supposed to represent. In short, it appears to me that this case of the pursuer fails upon every view of it that can be taken, now that we have the evidence before us; and therefore I am for assolving.

LORD DEAS—The petition of Mr Howe craves that the name of Mr M'Ewen should be substituted for his name on the register of shareholders and on the list of contributors. I do not see any grounds for that at all. Where a question arises between seller and buyer we have not decided that the mere fact of an irregularity having been committed in entering the name on the register may not be rectified. I look upon the allegation that the name of Mr Howe was put upon the register by Mr Wardrop without authority as of no relevancy or moment in this case at all.

But I think that whether put regularly on or no, Mr Howe has no title to ask under this petition that Mr M'Ewen's name shall be substituted for his. If, therefore, there were nothing before us but that petition, it seems to me that it would fall to be at once dismissed. It might have been so without any proof at all. But then there is the action against the bank and against Mr M'Ewen, in which it is alleged that the bank acted as agents in effecting this sale, that the sale was brought about by false and fraudulent representations, and therefore that the bank is liable to relieve Mr Howe of all the consequences of that purchase. And the same thing, it is said

alternatively, is to result from the way in which Mr Murdoch and Mr Turnbull acted in that transaction.

Now, as regards the position of the bank in that sale, I am very clearly of opinion that they did not act as agents either for the one party or the other. It cannot be alleged that they did anything in giving facilities for carrying through that transaction which is not done every day by all the banks in Edinburgh, and I suppose by all the banks in Scotland. That, of course, is not conclusive on the question, but I am decidedly of opinion that that which is so done, and which is said to have been done here, did not amount to agency on the part of the bank. It is simply, as your Lordship has said, an act of courtesy to facilitate the transaction between two parties, both of whom were anxious to obtain these facilities—the one desirous to purchase, and the other to sell—and that desire being made known to some of the officials of the bank, they gave facilities to the two parties for coming to an arrangement. I think that is all that was done; and I am of opinion that that is not agency.

As regards Mr Murdoch and Mr Turnbull, I agree with your Lordship that neither of them had any authority, either express or implied, to represent the bank in that matter. I am further clearly of opinion that neither Murdoch nor Turnbull, nor anybody else connected with the bank, did make any false representation either to the one party or the other. And therefore I entirely concur with your Lordship in the conclusion you have arrived at both in the petition and the summons, and as your Lordship has so fully and distinctly stated in detail the grounds of that opinion, it would be quite out of place in me to repeat them.

LORD MURE—I concur with your Lordship upon the main point in this case, viz., that upon the evidence adduced there is no sufficient proof of any representation having been made by Mr Turnbull or by Mr Murdoch, or by anyone connected with the bank, of the nature set forth by the pursuer in this case. I think there has been a total failure to prove it, and upon that ground I have no difficulty whatever in concurring with your Lordship. In that view it is not necessary to express any decided opinion on the question of agency; but on that also I am disposed to concur with the views which your Lordship and Lord Deas have expressed. I do not think there is any evidence to show that the bank ever instructed these gentlemen to act as agents in matters of this sort, though they appear as officials of the bank to have communicated information to the parties who came about it in regard to matters of this sort—I mean as to the simple fact whether there were shares to be had. But upon the main question of misrepresentation I have no difficulty upon the evidence in holding that there is a failure of proof upon that point.

LORD SHAND—There are two parties called as defenders here, and there are separate conclusions against them, the first of these parties being Mr M'Ewen, and the second the bank and its liquidators; and I think it is desirable to deal with the cases separately. I am clearly of opinion that there is no good action against either of them upon the facts as we now have them on

the proof, and I shall shortly state the grounds of my opinion.

As the case was originally presented against Mr M'Ewen there were averments on record that the purchase had been brought about, not only by the reports of the bank and its shareholders which Mr Howe had read in the newspapers, but by special misrepresentations made by two officials of the bank—Murdoch and Turnbull. But now that we have the evidence before us, it appears that there were no such representations made, and the case as it was finally discussed was not put upon any such representations. It was not contended on behalf of Mr Howe that anything that had been said by Murdoch could be regarded as an inducement to make the purchase, and so far as Turnbull is concerned, he never met the pursuer at all. The case therefore as between Mr M'Ewen and Mr Howe, in which the bank have really not taken part, is presented in this way—it is said that the bank acted as agents for M'Ewen in the sale of the stock, and the purchase having been induced by fraudulent representations made by the bank, M'Ewen cannot take the benefit of the contract. The only representations that have been relied upon are those contained in the report of July last, which it is said Mr Howe read in the newspapers, and these he holds to be the fraudulent representations of the bank. The case against M'Ewen involves two questions of fact. The first is, whether it has been proved that there was agency on the part of the bank in the carrying through of this sale? and the second, whether the bank, acting as such agents, made fraudulent representations which induced Howe to make the purchase? In reference to the first of these points, it appears quite clearly from the contract of the bank that they had no power whatever to act as agents. But I do not think that this disposes of the question of fact whether they did act as agents; and I am not prepared to say that there is not evidence to some extent of agency on the part of the bank in carrying through the sale. It appears no doubt that the bank through its officials only acted as is commonly done by large joint-stock companies in arranging for purchases and sales as between parties who applied to them to have such purchases and sales effected; but the fact that such a practice exists would not make it the less agency if the thing done was the carrying out of all that an agent usually does in a purchase or sale of stock for third parties. I cannot lose sight of this fact in the case, that this sale was entered into and concluded without either M'Ewen or Howe, the two principals, meeting each other. It was concluded by the bank after communicating with them, but they never met each other in regard to it; and if the case turned on the fact of agency, I should have difficulty in saying that there was not agency on the part of the bank. If, for example, in the course of carrying out the contract in accordance with the practice of the bank, the officials who really arranged the sale for M'Ewen had made fraudulent representations which led to the purchase, I think it would have been very difficult for M'Ewen to say that he was not responsible for the fraud because there was no agency on the part of the bank, or that the transaction must not be set aside on that ground.

But I think the case is perfectly clear on the

second branch of it, for even supposing that there was agency in fact on the part of the bank (notwithstanding the absence of power given by the contract), I fail to find the remotest evidence of fraudulent representations made in the course of any such agency transaction. There was no statement whatever made to Mr Howe. What he says constituted a fraudulent representation to him was the fact that he read in the newspapers a report of a meeting of the shareholders. But that was substantially a report made by the directors to the shareholders, which found its way into the newspapers as matter of information for the public. It would no doubt, if used in the course of making a contract with the bank, have become the bank's representation, but how it is possible to make it a representation by the bank to Mr Howe in the course of this agency transaction I am utterly at a loss to see. In order to succeed in a claim of this kind, by which it is proposed to make Mr M'Ewen responsible for the act of an agent, a representation must be shown to have been made with reference to the transaction in the course of the agency, and resulting in the sale. There was no representation made to Mr Howe at all, and certainly no representation made in the course of the agency, and with reference to the transaction, in which the bank gave their assistance, and on that ground I am clear that the case fails.

It was not seriously maintained in the argument on the proof that there could be any case of concealment. The only persons that Mr M'Ewen came into contact with were Murdoch and Wardrop, and there is no suggestion that either of them had the least reason to doubt the truth of the reports. I can see no ground in any view for the suggestion that they were bound to make any statements to the pursuer in regard to the condition of the bank. And so I think it is clear that there is no case against Mr M'Ewen.

It is, I think, even more clear that there is no case in a question with the bank. There was no contract with the bank. The reports of the directors to the shareholders are no doubt held to be the reports of the company if they be used in the making of any contract by the company, and are thus adopted by the company, but there was no contract of purchase with the company, and the representations therefore are not the representations of the bank, but the representations only of directors to the partners.

In the next place, if it be said that the bank has incurred responsibility from *de facto* acting as agents, the answer is conclusive that in so far as they did anything of that kind there was no authority for it under the contract of copartnership. Neither the manager nor the directors had any power whatever to carry through an agency transaction between third parties which could in any way affect the bank or its shareholders, because no such power was given by the contract. And accordingly on that ground it is clear that as there is no case against Mr M'Ewen, equally there is no case against the bank.

Something was said about the fact that Mr Howe's name had been put on the register after the bank closed its doors, but that is of no consequence in this case, for the simple reason that if Mr Howe's name had not been on the register now, Mr M'Ewen would have been entitled to have his name put there instead of his own—it having

been proved that a contract of sale had been entered into, and that the requisite documents had been transmitted to the bank, and ought to have been recorded at the time they were so transmitted.

In the action of reduction the Court assolizied the defenders, and they refused the prayer of the petition.

Counsel for Pursuer—Dean of Faculty (Fraser)—R. V. Campbell. Agents—Fyfe, Miller, Fyfe, & Ireland, S.S.C.

Counsel for the Liquidators—Kinnear—Balfour—Graham Murray. Agents—Davidson & Syme, W.S.

Counsel for M'Ewen—Trayner—Dickson. Agents—Graham, Johnston, & Fleming, W.S.

Friday, July 4.

FIRST DIVISION.

[Lord Rutherford-Clark, Ordinary.]

CITY OF GLASGOW BANK LIQUIDATION
— (HOULDSWORTH'S CASE) — HOULDSWORTH V. LIQUIDATORS OF THE CITY OF GLASGOW BANK.

Public Company — Partnership — Stock purchased through Fraudulent Misrepresentations of Directors — Rescission of Contract after Liquidation Commenced — Damages.

A party bought stock in a bank of unlimited liability from its manager and directors. Some two years afterwards the bank failed and calls were made upon him in respect of the stock which he had purchased. A month after the liquidation commenced he raised an action of damages against the bank on the allegation that he had been induced to purchase the stock by the fraudulent misrepresentations of the manager and directors. The action concluded for payment of the original price of the stock, damages for the loss suffered by the payment of the first call, and for payment of a sum of money to meet future calls. With a view to obtain this he asked either for a *pari passu* ranking with the creditors of the company, or for relief (after the creditors had been paid) out of the surplus assets of the company or out of the private estates of those partners of the company who might then be solvent. *Held (diss. Lord Shand)* that as the only remedy which would have been open to the pursuer if the bank had still been carrying on business would have been an action for rescission involving *restitutio in integrum*, and as that remedy was now impossible owing to the insolvency of the bank, the pursuer's claim resolved into a demand, not against the incorporated company, but against the individual corporators, who were asked to relieve him of his liabilities after the ordinary creditors had been satisfied, and that as such it could not be maintained.