conclusion, and upon the same grounds, although we have latterly been involved in some rather complicated questions of fact. The first question which arises is, Who was the real trader—the farmer—Who was liable for the furnishings? And it is impossible not to see that when a farmer or a shopkeeper acts under an assignation in security there is always room for saying that it is not the true man who is put forward. It is also obvious how hard it is, without differences and disputes, for one man to help another. It is hard to help a family who will not help themselves. Cameron's motives were of the best, yet he has become involved in somewhat difficult questions. He agreed to help the Johnston family, and he thought Johnston's difficulties were due partly to himself, and that he would do well to take his wife and sons to council. And he was quite entitled to insist upon this without becoming responsible as the real tenant. He said—"You are in debt and in arrears; I'll pay the whole £300; and I'll pay your landlord so long as your lease subsists, having power to renounce the lease at any time. But if I do all this, and at no profit to myself, I stipulate that you shall work harmoniously and well, and not by yourself." All this is not illegal; and old Johnston does not cease to be the real tenant.

We must now see whether Cameron really became the farmer to the extent of being liable for all the furnishings. He certainly might have done so. Had he brought his own grieve, for instance, or even had he kept old Johnston as his grieve, he might have incurred this liability. The pursuer's case on record becomes thus intelligible enough. The proof is a long and contradictory one, but I have come to concur entirely with your Lordship in the chair; and I may say, too, that I feel a want of trust in the evidence of the Johnstons and of Hardie, and I am reluctant to decide the case upon that evidence. The pursuer has, I think, utterly failed to prove that Cameron was the real farmer. He was only a friend of the family who gave advice, urged economy, and so forth. It is true that he got states sent him weekly or termly, but it was all as a friend, and he might have done so had there been no assignation at all. It is hardly to be taken off Hardie's hands that he never knew of the assignation at all. Hardie never dealt with Cameron as his debtor; Cameron's name never came into his books, nor were the things sent to him or to his house. When he did change the name it was with reference to a suspicion of his own as to who was the new tenant. I do not see how Hardie can say that Cameron was his sole debtor; yet if he fails in that his ground of action falls from him. This case differs somewhat from *Eaglesham's*, but is more favourable for Cameron, for there the trader had actually been drawing the proceeds, whereas Cameron's was a case of advance and increasing advance throughout. I therefore concur with your Lordships on this branch of the case.

Coming now to the next question, how does it stand? If Cameron is not the farmer, what other category save that of cautioner for the farmer can he come under? Now, it is impossible to make out that he was cautioner except by writing. This used to be the common law, but the 6th section of the Mercantile Law Amendment Act 1856 (19 and 20 Vict. c. 60) makes it quite clear. If you give credit to A on the faith of B, you must have B's writing. Hence the eagerness of the pursuer to denounce the idea of a cautionary obligation; but what else is it? The statute very clearly comes in here. As to the words used, I may remark that to "see a thing paid" is just the good old Scottish way of expressing "to stand cautioner." As to the effect of the expression used by the pursuer's counsel, to stand "paymaster" to a person, I cannot say, but it is not necessary to decide upon it.

On the whole matter I agree entirely with your Lordships.

The Lords adhered to the interlocutor of the Lord Ordinary.

Counsel for Pursuer—D.-F. Fraser—Black. Agent—D. Howard Smith, Solicitor.

Counsel for Defender—C. J. Guthrie. Agents—Lindsay, Paterson, & Co., W.S.

Wednesday, November 16.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

CITY OF GLASGOW BANK AND LIQUIDATORS *v.* MOORE (BELL'S TRUSTEE).

Partnership—Bill of Exchange—Separate Debt of Partner—Fraud.

A creditor taking a security for a debt due to him by a partner of a firm as an individual, granted in name of the firm, must, in order to bind the firm, have the express authority of the other partners.

Bell was a partner of Wright & Co. of London, of which firm Wright and Scott were the remaining partners. Wright and Scott were also the sole partners of another firm, Wright & Co. of Glasgow. The last-mentioned firm was largely indebted to the City of Glasgow Bank, and in security of this debt gave the bank bills, which were drawn and endorsed by Scott as representing the Glasgow firm, and were accepted by Wright on behalf of the London firm. The bills were dishonoured, Wright & Co. of Glasgow and its partners having been sequestrated. The bank thereupon called on Bell to pay as representing the acceptors, the London firm. It appeared that Bell was a sleeping partner of the London firm; that he knew nothing about the bills in question, which were never passed through the books of his firm until after they had been dishonoured; and that though they bore to be for value received, that was not in fact the case. It appeared, further, that the bills, which were for nine and twelve months, were not passed through the bank books in the ordinary course of business, but were treated as security bills, and that the manager of the bank was fully aware that the London and Glasgow firms were separate concerns, and that Bell was a sleeping partner of the former, and not a member of the latter. In an action by the bank against Bell—*held* that

Bell was not liable on the bills, the acceptance by the London firm being a fraudulent attempt to make Bell cautioner for a private debt of Messrs Wright and Scott.

Homologation—Adoption—Partnership.

Where one partner, on dissolution of the firm of which he was a member, undertook "to pay the whole debts and liquidate the obligations" of the firm—*held* that this undertaking did not amount to an homologation or adoption of the liabilities incurred by the other partners as on behalf of the firm, but for which the firm was not truly liable.

John Innes Wright & Co. were for many years merchants in London and Glasgow. In the spring of 1877 the London firm assumed as a partner Mr John Bell, merchant, Glasgow, and a new contract of copartnery was then entered into between Wright, Bell, and Scott, dated in March 1877, by which it was provided that the new firm should carry on business in London under the name of John Innes Wright & Company, and in Rangoon as W. Scott & Company. Article 3 of the contract provided that "the firm of John Innes Wright & Company, merchants in Glasgow, shall exist as a separate and independent firm, the copartnership hereby established having no concern therewith." Article 4 provided that certain property in Rangoon called Duniedaw should be copartnery property, and that the cost thereof—including plant, machinery, &c., and expenses—should be borne by the copartnery; and by the same article Scott, in whose name the property then stood, acknowledged and declared that he held it in trust for the copartnery. Article 5 provided that "the partners shall contribute equally, and from time to time as required, the capital necessary for working the business; each sum contributed shall be entered to the credit of the partner paying the same in the books of the copartnership; and each shall be allowed interest on the sum standing at his credit at the rate of 5 per cent. per annum,"—the parties being by article 6 declared to be interested in the business and to share in the profit or loss equally. It was provided that regular books should be kept in Rangoon and in London, and that proper assistants and managers should be appointed to take charge of the business in both places. By article 8 it was provided—"Excepting interest on capital as aforesaid, and working salary as after mentioned, the partners shall not be allowed to draw out capital or profits except of mutual consent, and the profits of each shall be annually placed to his credit." Article 12 contained the following provision—"Each partner shall be entitled to subscribe the firm in the proper business of the company; but the partners are hereby prohibited and restricted from using or applying the said firms, or the funds of the company, for any purpose whatever not connected with the business hereby undertaken; and it is hereby especially provided and agreed that the firms hereby established shall not on any account be used as sureties or cautioners for or in giving accommodation to, or on accommodation bills for, or on account of, any person or persons, company or companies, whatever."

The Glasgow firm of John Innes Wright & Co. were largely indebted to the City of Glasgow Bank. As part security for this indebtedness the bank took bills for £32,000, drawn by John Innes Wright & Co. of Glasgow, and accepted by the London firm of the same name. These bills were six in number, and were drawn at twelve and nine months.

John Innes Wright & Co. of Glasgow, and the partners thereof (Wright and Scott), were sequestrated on 23d October 1878, and this was an action by the bank and its liquidators against Bell, as a partner of the London firm, for payment of four of the above bills (amounting in all to £24,000), the other two having been duly retired at maturity. Mr Bell died while the action was in dependence, and the trustee on his sequestrated estate, Mr Alexander Moore, C.A., Glasgow, was sisted in his place.

The following was the statement of facts for the defender, with the pursuers' answers:—"(Stat. 1) The signature of the drawers of the bills libelled was adhibited by Mr Scott, and the signature of the drawees by Mr Wright. (Ans. 1) Admitted. (Stat. 2) The said bills were drawn and accepted solely for the private purposes of Mr Scott and Mr Wright, and were intended to be handed, and were handed, to the City of Glasgow Bank as a security for large sums, to the amount of which their firm of John Innes Wright & Company of Glasgow had overdrawn their account with the said bank. (Ans. 2) Admitted that the bills were handed to the bank in security of the overdrawn account of John Innes Wright & Company of Glasgow with the bank. *Quoad ultra* denied. (Stat. 3) No value was received by the said John Innes Wright & Company of London. The said bills were not accepted by Mr Wright in course of the business of the said firm of John Innes Wright & Company of London, and the said acceptances were granted by him wholly in excess of his powers as a partner of the said firm, and in violation of his duties as a partner of that firm. The said acceptances were not made in connection with the business of the said London firm, and the said firm were not, and are not, liable for the same. The defender has been informed, and avers, that they were granted and lodged with the bank in order to present a colourable diminution of the balance due by John Innes Wright & Company of Glasgow to the bank. The said bills are not entered in the books of John Innes Wright & Company of Glasgow, nor were they entered in the books of John Innes Wright & Company of London, and their existence was unknown to anyone connected with the said firm except Mr Wright and Mr Scott until after the stoppage of the said City of Glasgow Bank. In particular, Mr Bell never heard of the said bills until after the stoppage of the said bank. The averment in explanation in the answer is denied." *What follows within brackets in this statement, and also in the answer thereto, and in the pleas-in-law, was added after the record had been closed, as explained in the Lord Ordinary's note, infra*—["With reference to the averments of adoption and homologation made in the answer hereto, the defender refers to the agreement founded on for its terms. *Quoad ultra* these averments are denied, and it is explained that at the date of the said agreement Mr Bell did not know the object and purpose of the acceptances in question, or the circumstances under which they had been granted. So soon as he came to know the true nature of the bills and their cause of granting, he, by 21st October 1878,

repudiated liability for said acceptances, both to the bank and John Innes Wright & Company of Glasgow. The first intimation that Mr Bell was alleged to have adopted said acceptances was made at the diet of proof in the cause on the 30th November last, after the death of Mr Bell, which happened on 28th March 1880. It is further explained that Mr Strong's state of affairs was inaccurate in various respects, and did not show the true state of John Innes Wright & Company of London's affairs. (Mr Strong was an accountant in Glasgow who under Mr Bell's instructions examined the affairs of the London copartnery, as is stated *infra*.) In particular, and *inter alia*, Mr Strong did not debit the London firm with bills granted and then current for the price of Duniedaw—a property which he entered as one asset worth £12,000, or with £4700 advanced by Mr Bell.] (Ans. 3) Admitted that the bills were endorsed and lodged with the bank to lessen the balance due by John Innes Wright & Company of Glasgow to the bank. *Quoad ultra* denied, and explained that when the said bills were granted and endorsed John Innes Wright & Company of London were indebted to John Innes Wright & Company of Glasgow to the full amount thereof. [On 8th October 1878, in consequence of the insolvency of Mr Wright and Mr Scott, an agreement was entered into and executed by them and Mr Bell, whereby Mr Wright and Mr Scott withdrew from the business of John Innes Wright & Company of London and William Scott & Company of Rangoon, and made it over to Mr Bell, he undertaking to pay them out their interest. Further, Mr Bell bound and obliged himself 'to pay the whole debts and liabilities, and liquidate the obligations of the said two firms.' Before Mr Bell entered into the said agreement he was well aware that the bills now sued for formed part of the debts and liabilities of John Innes Wright & Company of London. He had had several meetings with Mr Scott and Mr Wright regarding the affairs of the said firms, and Mr John Roxburgh Strong, chartered accountant, Glasgow, was by his direction and on his behalf sent to London on 4th October 1878 to make an inquiry into the affairs of John Innes Wright & Company of London. Mr Strong examined the books of the company, and made full inquiries into its affairs, and prepared a state of affairs which was (before the agreement was entered into) submitted to and considered at a meeting at which Mr Bell, Mr Wright, and Mr Scott were present. In the said state of affairs the bills now sued for are entered under the 'liabilities' of the company thus—'Acceptances to John Innes Wright & Company, Glasgow, £24,000.' After being fully informed of the nature and purposes of the said acceptances, and of the assets and position of the said London firm, Mr Bell did not repudiate liability therefor, but, on the contrary, undertook by the said agreement to pay the same.] (Stat. 4) The said bills were drawn and accepted in the circumstances above set forth at the request of the City of Glasgow Bank, and of their manager Mr R. S. Stronach, who were fully aware of the facts hereinbefore set forth, and of the constitution of the partnership of John Innes Wright & Company of Glasgow and John Innes Wright & Company of London as set forth in the condescendence. The existence of the bills for £3000 and £5000, mentioned in the answer in explanation, was not known to Mr Bell. They are not entered in the books of either John Innes Wright & Company of London, or John Innes Wright & Company of Glasgow, and Mr Bell never gave anyone authority to bind his London firm by them. If paid by said firm, they were paid without his knowledge or authority. (Ans. 4) Admitted that the bank knew of the existence of the two companies, and that the late John Bell was a partner of the London company. *Quoad ultra* denied, and explained that at the time when the first two bills for £7000 each were endorsed, other two bills of the same parties for £3000 and £5000 respectively were granted and endorsed to the bank. The said last-mentioned bills were duly met at maturity on 26th April and 26th July 1878."

The pursuers pleaded—"The defender being a partner of the acceptors' firm, is liable to the City of Glasgow Bank, the indorsees and holders of the bills libelled, for the amount thereof, with interest as concluded for. [(2) *Separatim*, The deceased John Bell, by the agreement of 8th October 1878, homologated or adopted the bills libelled, and is liable for the amount thereof.]"

The defender pleaded—"(2) The bills libelled not being debts of the firm of which the said John Bell was a partner, decree of absolvitor should be pronounced. (3) *Separatim*, The action cannot be maintained, because the City of Glasgow Bank became holders of the said bills in knowledge that they were accepted by the said John Innes Wright in name of his said firm, without value, and in excess of his powers as a partner. [(4) The deceased John Bell not having homologated or adopted the bills libelled, the defender is not liable for the amount thereof.]"

After a proof, the import of which appears from the opinions *infra*, the Lord Ordinary (CURRIEHILL) pronounced an interlocutor assoilzieing the defenders. His Lordship added the following note:— . . . . "The difficulty of the case is one of fact rather than of law, the question to be decided being—Whether Mr Bell is to be regarded as having been liable for all the bills granted by his firm, or whether he falls under the recognised exception to the general rule of liability in respect of the bills having been handed by his partners to the bank, in security of their own private debt to the bank, without the knowledge and consent of Mr Bell? The circumstances of the case are peculiar. The firm of John Innes Wright & Company originally carried on business in London and in Glasgow, the sole partners being John Innes Wright and William Scott, and for many years they were largely indebted to the City of Glasgow Bank. In the spring of 1877 the London firm assumed as a partner the late Mr John Bell, merchant, Glasgow, and a new contract of copartnership was then entered into between Wright, Bell, and Scott, dated in March 1877, by which it was provided—[*His Lordship here narrated the chief provisions of the contract, as above*].

"It is important to observe that this contract of copartnership of the London and Rangoon firms was, soon after it was entered into, communicated to Mr R. Stronach, the manager of, and on behalf of, the City of Glasgow Bank, by Mr Innes Wright, who was not only a partner of all the firms, but was also one of the directors of

the bank. That Stronach was, as manager of the bank, deeply interested in all the business relations of Wright and Scott, who were so largely indebted to the bank, and that he was well acquainted with the terms of the contract, is, I think, clearly proved. He therefore knew precisely the position occupied by Bell as a partner of the London firm of John Innes Wright & Company, and as an entire stranger to the Glasgow firm of that name.

"It appears at first that Bell contributed no capital in cash, but within a day or two either before or after the stoppage of the bank he had paid into the firm a sum of capital of about £2500 or £2800. The property of Duniedaw, however, had not been paid for by Scott, and towards his share of the capital. Bell, soon after the formation of the company, supplied the funds to pay the price of that property by means of bills of his own firm of J. & M. P. Bell & Co. Neither Mr Innes Wright nor Mr Scott individually contributed any capital, although, as was stated by both of them in the witness-box, the balance on the trade transactions of the London and Glasgow firm was generally in favour of the latter firm to the extent of upwards of £20,000, which was regarded as equivalent to the contribution of capital by Mr Wright and Mr Scott as individuals. Assuming this to be so, it is obvious that if the Glasgow firm did not always leave a floating balance of at least that amount in the hands of the London firm, and if they should at any time call up that balance or a material part thereof, they would be guilty of violating the express provision of the contract prohibiting any partner from drawing out any part of his capital.

"Mr Bell, it should be explained, was from the beginning truly a sleeping partner, and left the management entirely in the hands of the other two partners, in whom he appears to have had implicit confidence, and that this was his position must, I think, have been known by Mr Stronach, the manager of the bank. Although Bell appears to have called occasionally at the office of the Glasgow firm, and had some general conversation with any of the partners whom he might find there about the London and Rangoon business, he never saw the books, which were all kept in London, and everything was managed, as I have said, by his partners, the financial department being exclusively managed by Scott, while the general business seems to have been conducted by Wright and an assistant of the name of Galbraith in London.

"In March 1878 it appears that there was a balance in the London books at the credit of the Glasgow firm of John Innes Wright & Company of a little over £20,000, and at the same time the Glasgow firm was largely indebted to the City of Glasgow Bank—one item of their indebtedness being the proceeds of certain bills drawn by Glen, Walker, & Company, and accepted by the bank, which had been handed to the Glasgow firm of John Innes Wright & Company to be discounted, on the footing that they were to retain a portion of the proceeds for their own business, and to hand the balance to the bank. On 28th February 1878 the Glasgow firm had failed to account for £48,000 of these proceeds, and the bank then insisted on obtaining substantial security for the deficiency. The Glasgow firm being unable to give the security required, it seems to have been arranged between Mr Scott, Mr Wright, and Mr Stronach that the Glasgow firm should draw upon the London firm to the extent of £32,000; that the London firm should accept these bills, and that the Glasgow firm should hand the acceptances to the bank as a security in the matter of Glen, Walker, & Company's bills. This was accordingly done. The bills were drawn in Glasgow by Scott in name of the Glasgow firm, and were accepted in Glasgow by Wright in name of the London firm, and were then handed to the bank, Mr Bell being kept in utter ignorance of the whole affair.

"Scott, indeed, alleges that these drafts were made in the ordinary course of business, and were covered by goods which the Glasgow firm had sent out to Rangoon, the proceeds of which were to be remitted by the Rangoon house to the London firm. I do not think that that statement is proved. On the contrary, Wright says that the bills were not granted against goods, but were granted in order that they might be handed to the bank as a security for the Glasgow firm's debt. But even if the bills had been covered in part by a balance at the credit of the Glasgow firm in the books of the London firm, it is certain that to a large extent the bills were not so covered. The balance in favour of the Glasgow firm did not exceed £20,000 even on Scott's own showing, while the drafts were for £32,000, and it must at the time have been obvious to anyone acqainted with the contract of copartnery, and the relations subsisting between the two firms, that if payments of these acceptances were to be demanded from the London firm, the whole of the alleged capital said to have been contributed by Scott and Wright would be drawn out of the London concern, which would thus be left without any working capital at all, and with no means of carrying on its business except a marginal credit of £5000 which the Rangoon firm had from the bank; and this view of the case is not in any way affected by the fact that certain of these bills, to the extent of £8000, were retired by Scott, as there still remained the four bills for £24,000 now sued for.

"Another remarkable circumstance is that the bills were not ordinary trade bills, but were drawn at twelve and nine months. Moreover, they were not entered in the books of the London firm until after the stoppage of the City of Glasgow Bank, and the most serious feature in the case is that the fact of the bills having been granted was carefully concealed from Bell, who did not become aware of their existence till after the stoppage of the bank.

"Now, bearing in mind the admitted facts, viz.—that Stronach was well acquainted with the constitution of the London firm, and with the terms of its contract of copartnery; that Innes Wright was one of the partners of both the London and Glasgow firms, and was moreover one of his own directors; and that Stronach was in constant communication with Wright and Scott with reference to the affairs of the Glasgow concern, and was pressing them as the partners of that concern to give the bank some security for their defalcations in the matter of Glen, Walker, & Company's bills, and accepted as such security the bills of the London firm in the handwriting of Wright, of which firm Wright and Scott were only two out of three partners, the currency of

the bills, moreover, being of such unusual duration as to take them out of the character of proper trade bills—it is, in my humble opinion, difficult to avoid the suspicion that this was a scheme concocted by these three persons for the purpose of obtaining the bills of the London firm as a security for the private debts of two of the partners. And, in any view, the presumption that such was the case is so strong as to throw upon the bank, who are now claiming payment of these bills from Bell or his representatives, the *onus* of proving that Mr Bell knew that the bills had been granted by the London firm, and consented to their being applied in securing the private debts of Wright and Scott, two of the partners of the firm, incurred by them in trading in Glasgow under another and totally distinct firm.

"In the record, as originally prepared, the only question raised was, whether in point of fact the bank knew the relations which subsisted between the two firms, and that the bills had been accepted by John Innes Wright in name of the London firm without value and in excess of his powers as a partner; and in the proof which was originally allowed the defender was appointed to lead. But in the course of the cross-examination by the pursuers of Scott, the first witness examined, he stated that Bell, a few days after the stoppage of the bank, became aware of the existence of the bills, and homologated and adopted them by a written deed. The proof was accordingly stopped for further inquiry, and the result was a very material amendment of the record, in which the pursuers stated that on 8th October 1878, in consequence of the insolvency of Mr Wright and Mr Scott, an agreement was entered into between them and Bell, whereby they withdrew from the business of John Innes Wright & Company of London, and W. Scott & Company of Rangoon, and made the same over to Bell, he undertaking to pay them out their interest, and 'to pay the whole debts and liabilities and liquidate the obligations of the said two firms,' and that before he did so he 'was well aware that the bills now sued for formed part of the debts or liabilities of John Innes Wright & Company of London.'

"That, no doubt, is a formidable statement, and undoubtedly it appears that in the state of affairs in the London concern prepared by Mr Strong, accountant, Glasgow, with a view to the proposed dissolution, an entry occurs crediting the Glasgow firm with £24,000 (being the acceptances now sued for), but bringing out a balance of upwards of £10,000 in favour of the London firm. And if I thought that the proof clearly established that Bell then really understood the nature of the transaction and the history of these bills, I should be of opinion that the defenders would have considerable difficulty in escaping from the conclusions of this action. But I am satisfied upon the proof that Bell did not understand the position of matters, and that it would not be fair to hold him bound to the bank by this undertaking in the contract of dissolution, which was never communicated to the bank, and which remained unknown to them until Scott alluded to it in the witness-box in the course of the proof in this action. It was at best an arrangement *inter socios* to which the bank was not a party, and I think it means nothing more than this, that Bell was merely to undertake such debts and liabilities as could fairly come under the denomination of partnership liabilities. He accordingly at once set about investigating the matter thoroughly, and on 21st October, within a few days after the dissolution took place, he became aware that the bills were not truly partnership liabilities at all, but had been got up in the way already explained behind his back, and he at once intimated to the bank that he repudiated all responsibility for the bills and declined to pay them. As I think nothing was done by him between the failure of the bank and 21st October 1878 amounting to homologation or adoption of these bills as in a question with the bank, my opinion is that these bills, though nominally the acceptances of the London firm, were truly granted by one partner of that firm as a security for the debt of himself and another partner; that this was known to the bank, and that the bank have failed to discharge the *onus* incumbent on them to show that this was done with the consent of the firm and of the remaining partner. (See Bell's Prin., secs. 354–355.) The defender must therefore be assoilzied with expenses."

The pursuers reclaimed, and argued — There was an implied mandate in one partner of a mercantile firm to sign money documents relating to the firm's business. But when the creditor of one partner took a firm obligation in discharge of his private debt, then the creditor must show that he has the consent of the other partners. Now how did the facts stand here? In the first place, as between the Glasgow firm and Mr Bell—The London firm were debtors of the Glasgow firm to the extent of £22,000. [Lord President—But that was just Wright and Scott's contribution to the capital of the London firm. Wright's evidence is quite candid that it was only capital.] It was not at anyrate put in as capital *eo nomine*. [Lord Shand—But even assuming that, £32,000 is a plain overdraft against £22,000.] The bills here in question were only for £24,000. [Lord Shand—That is still an overdraft.] Not to such an extent as to vitiate the bills. At least, if the Glasgow firm were entitled to credit themselves with the £22,000, the bills were good for that amount. But (2) as in a question with the bank—If they either knew, or were put on their inquiry, as to the badness of the bills *inter socios*, assuming the bills to be so, the bank could not maintain an action on the bills. But it was not said that they actually knew, and there was nothing to put them on their inquiry. There was nothing to show that they knew the state of affairs between the two firms, or to redargue the presumption that the bills were ordinary trade bills. Then (3) as to homologation, assuming the bills to be bad as in a question with the bank—Bell had adopted or homologated the bills by undertaking all the liabilities and obligations of the London firm.

Argued for the respondent—The bills were accepted *ultra vires*, and consequently Bell was not bound. To draw against the £22,000 was virtually to take out the capital which Wright and Scott had put in, and that was contrary to the terms of the contract of copartnery. Beyond the £22,000, there was nothing to the credit of the Glasgow with the London firm. Besides, the bills were not passed through the books of the London firm, and so Bell had not the usual means of knowing of their existence. Further (2) the

bank was put on its inquiry as to the character of the bills. They were not ordinary trade bills, and the bank did not treat them as such; they treated them as security bills. They were for nine and twelve months. Further, the manager of the bank had read the contract of the London firm, and knew consequently Bell's position in it. He ought therefore to have asked Bell whether he sanctioned the acceptances or not. (3) As regards the homologation. All that Bell did was merely to undertake the liabilities of the firm, whatever these were, and that left the question just where it was. There was nothing to show that the peculiar character of the present bills had been brought under his notice. [The Court did not hear the respondents' counsel in reply to the Lord Advocate for the reclaimers on the question of homologation.]

Authorities — *Bo'ness Canal Company* v. *M'Alpine, Fleming, & Company*, Nov. 23, 1791, Hume 751; *Miller* v. *Douglas*, Jan. 23, 1811, F.C., 3 Ross' L.C. (Com. Law) 580; *Clark* v. *Shepherd*, Nov. 30, 1821, 1 S. 170, and Feb. 28, 1823, 2 S. 224; *Blair* v. *Bryson*, June 11, 1835, 13 S. 901; *Mackenzie* v. *British Linen Bank*, February 11, 1881, 18 Scot. Law Rep. 333; *Swan* v. *Steele*, Feb. 7 1806, 7 East. 210, 3 Ross' L.C. (Com. Law) 459; *Hope* v. *Cust*, 1774, 1 East. 48; *Sandilands* v. *Marsh*, 1819, 2 Barnwell and Alderson, 672, 3 Ross 463; *Ridley* v. *Taylor*, Nov. 28, 1810, 13 East. 175; *Levieson* v. *Lane*, Nov. 7, 1862, 32 L.J. C.P. 10; *Kendal* v. *Wood*, May 18, 1870, Law Rep. 6 Exch, 243; Bell's Prin. 355; Bell's Comm., 5th ed., ii. 616, M'Laren's ed., 504; Lindley on Partnership, i. 325, 329.

The Court took the case *ad avizandum*.

At advising—

Lord President—In this case I agree with the Lord Ordinary in thinking that there is no difficulty about the law, but the facts of the case require very special attention.

Prior to 1877 Wright and Scott carried on business in Glasgow under the firm of John Innes Wright & Company. Mr Wright was a director of the City of Glasgow Bank, and he and Mr Scott were very large creditors to that bank. Mr Wright says that he was surprised to find, when the crisis in that bank's affairs arose, that he was its debtor for several hundred thousand pounds. The bank, therefore, plainly had a very large and deep interest in the affairs of Messrs Wright and Scott, and they appear to have made themselves very fully acquainted with those affairs from time to time. In the year 1877 those two gentlemen, Messrs Wright and Scott, resolved to take an additional partner into their house in so far as it did business in London, and to constitute a firm of John Innes Wright & Company of London, as distinguished from John Innes Wright & Company of Glasgow; of which London firm there were to be three partners, Mr Wright and Mr Scott, and Mr John Bell, merchant in Glasgow. The contract of copartnery bears date the 22d and 23d March 1877, and there are some of its provisions which it is necessary to notice in detail.

The preamble or narrative of the contract sets out that Mr Scott had recently purchased certain property in Rangoon, British Burmah, called Duniedaw, the title to which stands in the name of Mr Scott; "and whereas the parties hereto have agreed to enter into partnership for the purpose of carrying on the said business of commission merchants in London, and of forming and establishing the business of commission merchants in Rangoon, therefore" they agree as follows:—The third article of the contract provides that "the firm of John Innes Wright & Company, merchants in Glasgow, shall exist as a separate and independent firm, the copartnership hereby established having no concern therewith." The fourth article provides that "the foresaid property called Duniedaw shall be copartnership property. The cost thereof, including plant, machinery, &c., and expenses attendant thereon, being borne by, and any profits earned since the purchase being paid to, the copartnership hereby undertaken. The said William Scott hereby acknowledges and declares that he holds the said property in trust for the copartnership now formed." Then the fifth article provides that "the partners shall contribute equally, and from time to time as required, the capital necessary for working the business; each sum contributed shall be entered to the credit of the partner paying the same in the books of the company, and each shall be allowed interest on the sum standing at his credit at the rate of five per cent, per annum." It is stated by Mr Wright in his evidence that it was understood between the three partners, at the time of commencing business under this contract, that Mr Bell should put £10,000 into the business under this fifth head, and that he and Scott should put in £20,000, so that this fifth article may be read as meaning that that was to be the contributions of the partners. Then the eighth article provides—"Excepting interest on capital as aforesaid, and working salary as after mentioned, the partners shall not be allowed to draw out capital or profits except by mutual consent, and the profits of each shall be annually placed to his credit, interest being allowed thereon at the rate of 5 per cent. in the same way as on capital." It then appears from the ninth article that Mr Bell is not to be actively engaged in the business of the partnership, but is to be in effect a sleeping partner; and the 12th article provides that "each partner shall be entitled to subscribe the firms in the proper business of the company, but the partners are hereby prohibited and restricted from using or applying the said firms or the funds of the company for any purpose whatever not connected with the business hereby undertaken; and it is hereby specially provided and agreed that the firms hereby established shall not on any account be used as securities or cautioners for, or in giving accommodation to, or on accommodation bills for or on account of, any person or persons, company or companies, whatever,"—and in the event of any of the parties contravening these conditions the contravention is to be held as an extinction of the partnership.

Now, this contract of copartnery was shown to Mr Stronach, the manager of the bank, at the time, or very shortly after the time, when it was executed; and it is not at all surprising that it should be shown, because the bank, for the reasons I have already stated, had fully as great an interest in the affairs of Messrs Wright and Scott as they themselves had, and although Mr Stronach was not very candid in any of his admissions, it is quite obvious from

his evidence, and also from the evidence of Mr Wright, that Mr Stronach was perfectly well acquainted with the terms and conditions of this contract of copartnership.

Now, such being the relation in which Messrs Wright and Scott stood to Mr Bell, the next point for consideration is, how the bills which are now sought to be enforced against Mr Bell's representatives as obligations of the London firm came to be made. There is a minute of the directors of the bank dated the 28th of February 1878, which shows this pretty clearly—"The manager reported that the bank had recently been brought into cash advances to the extent of £48,000, from the proceeds of drafts being short, accounted for by Messrs J. Innes Wright & Company in connection with the credit of £100,000 granted to Glen, Walker, & Company, per minute of 11th January 1877, and also £18,000 in the placing of the drafts of J. Nicol Fleming in liquidation." It appears from this minute, and also from some other evidence in the case, that the acceptances of the firm of Glen, Walker, & Company had passed through the hands of John Innes Wright & Company of Glasgow, and that they had failed to account to the bank for those acceptances to the extent of £48,000. The consequence of this was that the bank brought considerable pressure to bear upon Messrs Wright and Scott, the partners of the Glasgow firm, to give some security for the future payment of that unaccounted for balance of £48,000. And it will appear that the bills now in question were really made for the purpose of affording the bank security *pro tanto* of that £48,000. Another minute of the 6th of June 1878 bears this:—"In connection with the minute of 28th February last, and 14th and 21st March last, it was agreed to carry to the debit of an account to be opened in the name of John Innes Wright & Company the amount short paid by that firm in connection with the credits of Glen, Walker, & Company, the said amount being £49,808, 7s. 9d. The securities held by the bank, consisting of acceptances of the London firm of John Innes Wright & Company amount to £32,000, to be credited to this account as they mature. The committee reported that on account of Mr William Scott's illness they had not been able to meet with him to complete the arrangements for the full cover, as referred to in the minute of 21st March last."

Now, the obligation which was thus sought to be secured was an obligation of the Glasgow firm of John Innes Wright & Company, but that, in other words, means simply an obligation of Mr John Innes Wright and Mr William Scott, who are the only two partners, and it appears that of the £32,000 for which the bills were drawn, £8000 was afterwards provided for by Mr Wright and Mr Scott—in what particular way we do not exactly see. But that reduced the obligation of the London firm to the sum of £24,000. Now, this obligation was contained in four different bills of exchange, which bear to be drawn and endorsed by the Glasgow firm and accepted by the London firm of John Innes Wright & Company. Of these four bills, two were dated on the 23d January, and two on the 21st of March. These were payable at nine months' date, and one was payable at twelve months' date, and the way in which these bills were made, *de facto*, was this, that Mr William Scott signed the Glasgow firm as drawer and endorser of each of the bills, and Mr John Innes Wright signed the London firm as acceptor; and it is not, I think, disputed that this was done entirely without the knowledge of their partner Mr Bell. Mr Scott conducted the financial part of the business of both firms, and Mr John Innes Wright conducted the ordinary mercantile business of both houses. Mr Bell being a partner of the London firm only, was in effect a sleeping partner and knew nothing about this transaction.

Now, I think in these circumstances it can hardly be disputed that the making of these bills and the giving of them in security to the bank for the debt of the Glasgow firm was a fraud upon Mr Bell, practised by his copartners Wright and Scott. They were security bills in which the London firm was made, in practical effect, cautioners for the private debt of Messrs Wright and Scott. Or, to put it more simply still, the effect of that was to make Mr Bell, their partner in the London house, cautioner for them, *pro tanto*, for the deficiency of £48,000 in their accounting with the City of Glasgow Bank. That that debt was the debt of Wright and Scott, and of Wright and Scott only, as in a question with Bell, admits of no doubt, and that the obligation—the acceptance—of the London firm was given to the bank in security of that private debt of two of the partners of the London firm, is just as clear; and nothing can be in more direct violation of the express words of the 12th article of the contract of copartnery. That would be enough, but, independently altogether of the words of the contract of copartnery, it is a plain and distinct fraud committed by those two persons upon their copartner Mr Bell.

All this, however, will not prevent the bank from enforcing the obligation against the London house, if the bank were entirely ignorant of the circumstances and not in any way participant in the fraud, or any way in the knowledge of the fraud. It is said, however, on the part of the bank, that these drafts upon the London house were justified, notwithstanding the fact that they were for the private debt of Wright and Scott, or, in other words, for the debt of the Glasgow house, because in point of fact at that time the London house was owing the Glasgow house somewhere about £20,000. If this were so, it is not very easy to see how it could justify drafts to the amount of £32,000, or even to the amount of £24,000. But it was not so at all. The London house was not in any proper sense the debtor of the Glasgow house, and there were no funds in the hands of the London house against which the Glasgow house was entitled to draw. The matter stood thus:—The capital which Mr Bell was to contribute had been contributed in this form, that he had undertaken obligations to pay the price of the Rangoon property which had not been paid by Mr Scott, but which stood, so far as the title was concerned, in Mr Scott's name. In that way he had contributed to the capital of the London and Rangoon firms to the extent of somewhere about £12,000—that is to say, rather in excess of what he had undertaken to do, as I have already mentioned. On the other hand, Wright and Scott had not directly contributed any money to the London and Rangoon houses, but they had allowed the price of

certain goods which were sold for the Glasgow house by the London house to remain in the hands of the London house, to the extent of the capital which they had undertaken to contribute, and that money, therefore, in the hands of the London house, was just their share of the capital of the company which they were bound to contribute. And if they drew upon that capital, or in any way took it out of the hands of the London house, they were just withdrawing capital which they had put in, which again would be in express violation of the contract of copartnery, which entirely prohibits any capital once contributed from being withdrawn. I do not say that this being the mode in which the capital was contributed—that is to say, just allowing the price of goods to remain in the hands of the London house—it might not in the ordinary course of business have been very convenient, perhaps slightly, to vary the total amount of that capital at one time or another—the total amount, I mean, of the money lying in the hands of the London house—but to make a draft against that in-put capital to the extent of £32,000, or even to the extent of £24,000, was plainly a violation of the 8th article of the contract of copartnery of the most direct and plain kind. Mr Wright, who certainly is entitled to the credit of giving his evidence with very considerable candour, makes this matter very clear. He is asked—"What amount had you and Mr Scott contributed for carrying on the business of the London firm at February 1878?—(A.) The amount standing at our credit, as I understood from Mr Scott, was upwards of £24,000. Besides that amount we had contributed nothing towards the carrying on of the business of the London firm. Our contribution to the London firm was the amount standing at our credit in the books of the London firm. I cannot say if that sum ever reached £32,000." Then further on, in cross-examination, he says—"The London firm required considerable capital to carry on their business." The effect of drawing these bills, whenever they came to maturity and were to be paid by the London firm, was just to withdraw every shilling of capital which Wright and Scott had put into the London firm, again against the plain terms of the contract of copartnery.

Now, the case standing thus between the partners, the next question comes to be, how the bank are affected by this fraudulent proceeding, and in order to judge of this it is necessary to see precisely what was the state of knowledge of Mr Stronach, the manager of the bank, for he may be taken in this question as simply the bank. Now, in the first place, he knew very well that Bell was a sleeping partner in the London house, and took no charge of the business,—that the business was carried on by Wright, and the financial part of its arrangements managed by Scott. He knew, in the second place, that Wright and Scott were in the greatest pecuniary embarrassments, and were very heavy debtors to the bank, and that the bank were pressing them for security to make up the defalcation of £48,000 already mentioned. In the third place, he knew that the bills which he took in security of this £48,000 were not made in the ordinary course of business transactions between the two firms, but were intended as security bills only. That was plain from the dates and currency of the bills, and they were so treated by the bank, for they were not entered in the bank's books as bills in the ordinary course of business, but were kept merely in deposit as security for the debt of Wright and Scott. He knew, in the fourth place, that the debt thus secured was the private debt of Wright and Scott. In the fifth place, he knew that the granting of this security for the debt of the partners was in direct violation of the contract of copartnery, having made himself acquainted with the terms of that contract. And, in the sixth place, he was perfectly cognisant of this most material fact—being well acquainted with the signatures of both Wright and Scott—that these security bills were brought into existence by the signature of one of the debtors to the bank drawing and endorsing the bills, and the other debtor to the bank accepting the bills in name of the London firm. Now, when Mr Stronach is seen to be placed in these circumstances of knowledge, one looks with some curiosity to know how he proposes to justify what he did; and the way in which he does it is this—He says he was told by Mr Scott that the £48,000 which they had improperly (to use a mild phrase) failed to account for to the bank out of the proceeds of Glen Walker & Company's acceptances, had been expended or employed in the business of the London and Rangoon firms, and that therefore Wright and Scott were justified in drawing upon the London firm for the amount of these bills. Now, this is a very strange statement, because if Scott was speaking the truth when he said that he had employed this £48,000 without the consent of the bank, to whom it belonged, in the business of the London firm, he was simply confessing to a very gross act of dishonesty; and if that was so, was Mr Stronach encouraged thereby to trust to the veracity of this gentleman who made this representation to them, or was not he bound by the very nature of the confession made to him by Mr Scott to make very sure indeed how he was dealing with this London firm? It appears to me that it is a very mild way of stating the case against the bank here to say that those circumstances to which I have adverted necessarily put them upon their inquiry. I should be disposed to go a great deal further than that, and to say that no banker in ordinary circumstances would ever for one moment have dreamt of taking those security bills with the knowledge of the circumstances that Mr Stronach had, and therefore I come to the conclusion that the bank clearly erred in this matter, and had quite sufficient knowledge of the whole circumstances of the case to render it an unjustifiable act on their part to take those bills in security without communicating with Mr Bell and ascertaining that he approved of the proceedings.

I am therefore for adhering to the interlocutor of the Lord Ordinary.

Lord Deas—This case involves a considerable sum of money. It has been very fully considered by your Lordships at our consultations, with every anxiety to reach a right conclusion. The liability of Mr Bell depends upon the answers given to two questions,—in the first place, was he really made an obligant upon those bills by the signature of the London firm? and, in the second place, if he was not so, is he notwithstanding liable to the bank as *bona fide* holders of these bills? I am of opinion with your Lordship that

the London firm, and Mr Bell as a sleeping partner of that firm, were not made liable for these bills; and, in the second place, I am also of opinion with your Lordship that the bank, and the officers of the bank as representing it, were not in the position of *bona fide* holders of these bills, so as to entitle the bank to exact payment of them upon that plea. The correctness of the answers to these questions, and of the opinion I have expressed, depends upon a great variety of circumstances, which your Lordship has very fully, and to my mind very accurately, gone over. If I were to attempt to go over them again, the only result would be repetition, and the risk of confusion upon some of them; the detail given by your Lordship I hold to be perfectly accurate. Therefore I shall not attempt to detail the circumstances. I simply express my entire concurrence with your Lordship on what I may call both branches of the case, viz.—the liability of Mr Bell to the partners, and, in the second place, the liability of Mr Bell to the bank upon the footing of their being *bona fide* holders. I agree entirely with the view your Lordship has arrived at upon both those branches of the case.

Lord Mure—I also concur entirely in the observations which your Lordship has made upon both the important branches of this case. I think it is clear beyond the possibility of dispute that the transaction was a gross fraud against Mr Bell upon the part of Wright and Scott; that the bills were signed by the one as drawer, and by the other as acceptor, for an object which was directly at variance with the provisions of the contrart of copartnery; and that this was done deliberately, in the entire ignorance of Mr Bell. That, I think, is a point which was made as clear as can be upon the evidence in this case. That being so, the only remaining question is, whether the bank were aware of this conduct on the part of the Glasgow house towards the London house? and upon that I would refer to the evidence which Mr Stronach has given. He was manager of the bank at the time, and Mr Innes Wright of the Glasgow house was a director of the board which sanctioned this proceeding. How in those circumstances the bank could be supposed not to have been aware what the nature of the transaction was it is very difficult to understand. I think Mr Stronach's evidence, though he does not admit it in plain words, can lead to no other inference than that he was quite aware of the nature of the transaction. The contract of copartnery and the formation of the London house was in March 1877, and this transaction in question was in February or March 1878, a year after the formation of the house. Mr Stronach says—"I was aware that in March 1877 a new London house of John Innes Wright & Company was formed, and a contract of copartnery entered into. I think the partnership was entered into before I knew of it; but it could not be in existence long before I came to know about it. I saw the contract of copartnery afterwards. I do not remember on what date I saw it." Then he adheres to that about not recollecting the exact date. "(Q) Do you think you had seen the contract of copartnery within the first year of that firm's existence?—(A) I think it is likely I would." I say, for myself, that I think it is extremely likely he would, and that the moment he saw that document he would read it and endeavour to understand it. Then the question is put—"There is no doubt of that, is there?—(A) I think it is likely I would see it within that time. The bank were deeply concerned in the affairs of the Glasgow firm of Innes Wright & Company." Then he is questioned about taking care that their advances were not improperly increased; and he winds up by saying—"The acceptances of John Innes Wright & Company of London were never entered in the books of the bank; they were just held as collateral security, the same as a bond." Therefore, knowing the terms of the contract of copartnery, the 12th provision of which prohibits security of that sort, he agrees to take these bills for the bank as security for the deficiency on the part of the Glasgow firm. In these circumstances I have no doubt that the evidence is sufficient to instruct the knowledge of the bank of the fraud that was perpetrated by Innes Wright and Scott upon Bell.

Lord Shand—I quite concur in the opinions which have already been delivered by your Lordships. The rule or principle of law which I think is sufficient for the decision of this case may be thus expressed—that as the granting of a security in the name of the company for the payment of the debt of the individual partner is beyond the implied mandate of that partner, the creditor taking such a security must have the express authority of the other partners to bind the firm. That is a rule settled by a series of authorities in our law which were quoted in the course of the discussion, and it is equally clear that the rule is observed in England. It appears to me to have been very happily expressed by Sir Montague Smith in one of the most recent cases that were referred to—I mean in the case of *Kendal* v. *Wood*, 1871, before the full Court of Exchequer, and reported in Law Reports, 6 Exch. I read from p. 253. Sir Montague Smith there says—"When a separate creditor of one partner knows he has received money out of partnership funds, he must know at the same time that the partner so paying him is exceeding the authority implied in the partnership—that he is going beyond the scope of his agency—and express authority, therefore, is necessary from the other partner to warrant that payment. Now, I quite agree with what has been stated, that there may be conduct on the part of the other partner which may be a substitute for express authority—conduct which may lead persons dealing with the other partner to suppose that he had that authority given to him. But in this case there is no authority whatever; on the contrary, express authority is negatived, and there is no evidence of any conduct on the part of the plaintiff by reason of which the defendants may reasonably have supposed he had given such authority." The case with which the learned Judge was dealing was one in which money of a firm had been given, and not a security only; but the opinion applies equally to the case of a security, and if the giving of a security were substituted, in the words I have read, for the payment of money, the whole of the statement I have read seems to me to apply directly to this case.

On the facts of the case I have but a very few words to add to what your Lordship has said. I

think it is clear beyond question—and indeed it was scarcely questioned by the counsel for the bank—that as between the partners of this firm —as between Mr Bell on the one hand and his partners Mr Innes Wright and Mr Scott—the drawing and acceptance of these bills was a most unwarrantable proceeding. It is true that there had been no putting in of capital and opening of a proper capital account in the books of that firm *eo nomine;* but it is equally plain that even though there had been no making up of such a capital account, each partner had practically contributed his £10,000 in the way which your Lordship has explained; and the result of the granting of these acceptances would simply have been this, that Mr Bell was left the sole contributor of the capital, and that his partners had surreptitiously withdrawn their capital from the firm. I think that appears on the admission of one of the gentlemen examined, in the passage your Lordship has cited. But it is also made clear by the whole evidence—the real evidence—in the case. Mr Wright, or rather Mr Scott, who was the person who manipulated this transaction, was certainly plainly conscious of this, for he took care to conceal the granting of these bills from Mr Bell. He avoided making any entry of them in the books. He himself retired the first two of them which had been granted, although the firm was the acceptor, and retired them with funds which were not provided by the firm, but by himself; and, in addition to that, there is this circumstance to be kept in mind, that the bills which were granted did not even correspond with the sum which the partners might have said they were entitled to withdraw as not having been specially appropriated to capital, but were greatly in excess of the contributions of Wright and Scott taken together. And so, as between Mr Bell on the one hand, and Innes Wright and Scott on the other, the granting of these bills was obviously a most unwarrantable proceeding. It may, nevertheless, be that the bank may be entitled to say that "as *bona fide* holders we were entitled to take these bills, however wrong it was of Wright and Scott to draw them and accept them as they did; we took them in *bona fide.*" It might have been shown that bills of this kind had come into the coffers of the bank in the ordinary course of banking business, by discount, passed on to a discount account, and credited in the usual way; and in that case it may be that the bank might have had a case to retain the bills on the footing that they had every reason to believe that these represented transactions in the ordinary course of trade, and that they were entitled to take them as such. But turning to what occurred between Innes Wright and Scott and the bank, I think the whole circumstances negative that idea. In the first place, as your Lordship has pointed out, it is plain the bank were pressing for the debt of individual partners, and it is equally plain that these bills were made at the solicitation of the bank—expressly made by Wright and Scott for the purpose of granting a security. It is, in my view, of no consequence that in this contract of copartnership there is an express provision that a partner should not grant the security of the firm for his individual debt, for I think that stipulation added nothing to what the common law provides. I think the case would have been precisely the same without that clause in the contract. No partner at common law is entitled to grant the obligation of the firm as a security for the partners. But it is a circumstance that in addition to the common law the parties made that stipulation amongst themselves.

Well, then, that being the state of matters—the bank asking this security, and getting the security of the firm for the purpose of covering the individual partners' debt—how can they possibly maintain it? They can only maintain it if they are able to show that though they knew Scott and Wright were going beyond the implied mandate of the partnership, they had the express authority of Bell in some shape or other. There has been no attempt to show any such authority. The argument offered is this—Scott informed the bank that there was a balance due by the London firm to the Glasgow firm, and that these bills were to meet that balance. If such an argument were sustained—if that were held to be sufficient, and such an argument sustained—it would lead to most disastrous consequences in this branch of the law. In the common case of an individual pressed for payment of his own debt, where he grants the bill of his firm, I have no doubt it is the usual statement—"The company are owing me so much money, and I will just draw upon them, and give you their acceptance." That is just the case that is presented by the bank here, with this difference, that it is not an individual and a firm, but it is one firm and another firm in which there is another individual interest. But it would be out of the question to say that a creditor is to take the statement of a partner that the firm owes him money as a sufficient warrant for enabling him to secure himself, and so bind a partner who knows nothing about the transaction. It appears to me, in the whole circumstances, that the case is a clear one, and that the rule of law to which I have referred must be applied.

I have only to make this further observation, that there is one point of the case which I think should have been cleared up, but it has not been so—I mean the point adverted to in the discussion, that while it appears from the minutes of the directors, dated, I think, the 28th of February and 14th of March 1878, that these securities were pressed for about that time, it appears at the same time that two of the bills had been already granted—two of them had been granted upon the 23d of January previously—and there must have been two even before that, because there were two which were to fall due on the 26th of April and the 26th of June. But though the evidence does not show whether there had been an antedating of those bills, or whether the previous bills had been granted under pressure from Mr Stronach, the manager, or it may be Mr Potter, who seems to have been the gentleman who took the main charge of this matter—whichever of these two things may be the true explanation, I think we must infer from the evidence as a whole that the bills, whatever their dates were, were granted to secure the individual debts, under pressure by the bank, and in the knowledge on the part of the bank that they were getting the security of the firm without having the authority of Mr Bell, the person who was interested in the granting of these securities. So that although there is that point not cleared up

upon the proof, I do not think it should make any difference in the result.

The Lords adhered to the Lord Ordinary's interlocutor.

Counsel for Reclaimers—Lord Advocate (Balfour Q.C.)—D.-F. Kinnear, Q.C. — Solicitor-General (Asher)—Lorimer. Agents—Davidson & Syme, W.S.

Counsel for Respondent—J. P. B. Robertson—Jameson. Agents—J. & J. Ross, W.S.

Tuesday, October 18.

OUTER HOUSE.

[Lord Fraser.

COGHILL *v.* DOCHERTY.

Reparation—Slander—Newspaper — Innuendo—Issue.

In an action for damages for slander against the publisher of a newspaper, on account of statements as to the manner in which the pursuer, who was a burgh magistrate, discharged the duties of that office—*held* that the issue for trial of the case must contain an innuendo that he was by these statements represented "to be a person who had been guilty of wilful falsehood and of dishonesty, and as a magistrate who disgraced that office, and who used it for the purpose of gratifying his private spite." *Form of issue adjusted.*

The pursuer of the action was senior magistrate of the town of Thurso, and claimed damages from the defender, who was proprietor, publisher, and editor of *The Caithness Courier and Weekly Advertiser for the Northern Counties*, for defamation alleged to have been uttered and circulated concerning him in various letters and paragraphs reflecting on his conduct as a magistrate published in the columns of that paper.

He pleaded—"(1) The defender having maliciously written and published slanderous statements of and concerning the pursuer, is liable to him in reparation and damages. (3) The said letters and paragraphs having been published by the defender to wound the pursuer's feelings as a private individual, and to degrade him in the estimation of the society in which he resides, the defender is liable to the pursuer in reparation therefor."

The defender pleaded—"(4) The publications complained of being fair criticisms of the public conduct of the pursuer, who was the holder of a public office, are privileged, and do not infer responsibility for damages. (5) *Veritas.*"

An issue was proposed by the pursuer in the following terms—"Whether the said letters and paragraphs, or part thereof, are of and concerning the pursuer, and were published, or caused to be published, by the defender in pursuance of an intention to expose, and did calumniously or injuriously expose, the pursuer to public contempt and ridicule." This issue was disallowed by the Lord Ordinary (FRASER), who pronounced the following interlocutor and note:—"The Lord Ordinary having heard counsel on the adjustment of issues, disallows the issue proposed by the pursuer, and appoints the case to be put to the roll to allow the pursuer to propose another issue for the trial of the cause."

"*Note.*—The action is one claiming damages for defamatory letters and paragraphs said to have been published by the defender in a newspaper of which he is the proprietor and publisher. The pursuer is senior magistrate of the town of Thurso, and the statements complained of are comments upon the mode in which he discharged the duties of his office. These statements are innuendoed as containing charges of dishonesty, of being an unjust judge, and of his using his position in the interests of a clique so as to sacrifice the best interests of the town. The pursuer in the issue which he has proposed does not undertake to prove any of these innuendoes. If he had done so it would have been necessary to consider whether the language used by the defender could be fairly or reasonably held to bear the construction put upon it in the innuendo. It has repeatedly been found that where the words 'of alleged libel are not in themselves of a plainly libellous character, but require to have an innuendo put upon them, the question is, whether in the circumstances the innuendo is admissible or not, for some innuendoes are so unreasonable and forced that we cannot allow them to go to a jury'—(*Per* Lord President in *Brydon* v. *Brechin*, May 17, 1881, 18 Scot. Law Rep. 497; *Broomfield* v. *Greig*, 6 Macph. 563; *Caldwell* v. *Munro*, 10 Macph. 717).

"The pursuer simply puts the question, whether the defender published the statements 'in pursuance of an intention to expose, and that they did calumniously or injuriously expose, the pursuer to public contempt and ridicule?' The statements were comments upon the public and official proceedings of a public man, and upon the mode in which he performed his duties. With these kinds of comments the public are perfectly familiar. There is not a newspaper published in which similar tirades against officials will not be found, and unless it be averred and proved that they go beyond the latitude of license given to the public press of this country in reference to such matters, and are made from malicious motives, they are not actionable. These are the penalties that must be suffered as one of the consequences of exalted office. The vindication of the official who is aspersed, and whose conduct is impugned, is not by an action at law. He must live down the suggestion of calumny and the judgments of ignorance, and in the end he successfully does so.

"Now, the pursuer, although he has averred that all the statements made by the defender were made maliciously, declines to take an issue with that word in it, and he thinks that there are precedents for such a course, and for the general kind of issue which he demands. To use the weapons of ridicule and sarcasm against a man is very often the best way of serving the general interests of the public. They are the natural scourge of incompetence and folly in persons of station and high office. If the critic does not travel into domestic life, or into a man's private affairs, to point his slanders, but confines himself to comments upon public acts, in which he has or may have as much interest as the official himself, he performs laudable work. The language complained of in the action is, no