Lord Breadalbane for five years before. But passing over that, the state of titles produced by the defender shows that in 1819 Macdougall of Dunollicht, being owner of the *dominium utile* of "the six merk land of Soroba," got a conveyance to the superiority from the Duke of Argyll, and on that was entered as a Crown vassal in 1819, and then, having both these rights in his person, another Macdougall in 1831 consolidated the property and superiority, and his successor is now infeft as a Crown vassal in the superiority and *dominium utile* as consolidated in 1831. He holds the property of his estate, whatever it be, directly as a Crown vassal. But how that could put him in the position of being the superior of the defender I cannot see. He has a substantial estate of *dominium utile* held directly of the Crown; but in the estate we are dealing with under this summons there has been a mid-superiority reaching from 1740 to the present day, or at least to 1821. Is it possible that these two estates can be the same? A puzzle no doubt arises from the use of the same name; but it is possible, if not common, that there should be two such estates, and it is the only way of explaining the puzzle which the defender has created. But this is not the way to get over the title of a pursuer to claim a casualty, and I am clearly for adhering to the Lord Ordinary's interlocutor.

LORDS DEAS, MURE, and SHAND concurred.

The Court adhered.

Counsel for Pursuer (Respondent)—Asher—Low. Agents—Davidson & Syme, W.S.

Counsel for Defender (Reclaimer)—Trayner—Lorimer. Agents—H. & H. Tod, W.S.

Friday, November 5.

FIRST DIVISION.

[Bill Chamber.

CITY OF GLASGOW BANK LIQUIDATION—(*ANDERSON'S CASE*)—ANDERSON *v.* THE LIQUIDATORS.

Public Company—Companies Act 1862, *sec.* 121—*Contributory—Suspension of Charge against Defaulting Contributory without Caution or Consignation.*

A holder of bank stock was placed upon the list of contributories, and being unable to meet a call made upon him, arranged the terms of a compromise with the liquidators, to which authority was interponed by the Court, and in virtue thereof a discharge duly executed. Before the said discharge was delivered, however, the liquidators discovered that the contributory had not disclosed the fact that at the time when the compromise was effected he had already engaged to recommence business as partner in a new firm, to which he had with the assistance of friends made certain advances, and considering his explanation unsatisfactory they refused to deliver the discharge, and took decree against him as a defaulting contributory for the amount of his calls under the 121st section of the Companies Act. *Held*, on a suspension of the charge following on that decree, that the circumstances of the case warranted the Court in passing the note of suspension without caution or consignation.

This was a reclaiming note presented on behalf of the liquidators of the City of Glasgow Bank against the interlocutor of the Lord Ordinary on the Bills (LEE) in a note of suspension for James Anderson, farmer, Sandyhills, Shettlestone, of a decree obtained by them in this Court against him in absence as a defaulting contributory. Anderson's mother held stock in the City of Glasgow Bank, which at her death was transferred to her children, who all held it at the date of the stoppage of the bank on 2d October 1878. The share which fell to Anderson amounted to £257, and on this a call of £500 per £100 of stock was made on 13th November 1878, which he paid. On or about 8th April 1879 the liquidators made a further call to the amount of £5782, 10s., payable on 22d April of the same year. As Anderson was unable to pay this second call, he entered into negotiations with the liquidators for a compromise, and made the usual declaration and answered the usual queries required in such cases. The liquidators ultimately agreed to take, as in full of their whole claim, £1300 of paid cash, and to grant Anderson the usual discharge. Anderson accordingly raised money by bill and otherwise, and paid the said £1300 on 5th March 1880. Shortly thereafter application was made to the Court by the liquidators to interpone authority to this arrangement, which was done on 19th March 1880. In virtue thereof the discharge was duly executed by Anderson on 12th April 1880, and by the liquidators shortly afterwards. But after the sanction of the Court had been obtained to the proposed compromise, the liquidators discovered that at the time when he was negotiating the said compromise with them he was a partner in the firm of John R. Rennie & Company, tube manufacturers, Wallace Street, Tradeston, Glasgow, and had concealed that fact from them. On making this discovery the liquidators at once directed that the discharge should not be delivered, and that inquiries should be made as to his connection with said firm; the result of which inquiries was to show that Anderson had entered into partnership with John R. Rennie as tube manufacturers, by contract of partnership dated 2d July 1879, by which he agreed to contribute £1500 to the capital of said firm. The liquidators employed Mr John M'Lean, accountant, Glasgow, to examine the books of the firm, and from a report furnished by him it appeared that Anderson had, on 31st December 1879, a sum of £698, 3s. at his credit in said firm, which he had paid by instalments, the first on 29th August 1879, and the last on 31st December 1879. The liquidators after receiving Mr M'Lean's report called upon Anderson for an explanation, and on 4th May 1880 he furnished them with a statement in which he explained that the sum standing at his credit in said firm was made up of loans from various friends, together with a sum of £200 received by him from the fund established for the relief of contributories to the bank, and averred that he had made a full and fair surrender of his means and estate. The liquidators not being satisfied with this statement, called upon Anderson to account to them for the sum at his credit in said firm, and on his refusal to do so they took decree

against him as a defaulting contributory, and gave him the charge which he now sought to suspend.

In the note of suspension which was presented on 10th July 1880 the suspender offered to find caution, and the Lord Ordinary on the Bills ordered answers and sisted execution in the interim. On 4th August 1880, however, the suspender presented another note to the Lord Ordinary, in which he explained that the offer of caution had been made *per incuriam*, and that the decree complained of having been granted in absence, he was entitled, in terms of the Act 1 and 2 Vict. cap. 86, sec. 5, and relative Act of Sederunt, 24th December 1838, to have the note passed without caution or consignation. He was allowed to amend the note of suspension accordingly, and the following interlocutor was thereafter pronounced:—

"*Edinburgh, 4th August* 1880.—The Lord Ordinary having heard parties' procurators, and considered the note of suspension, answers thereto, and productions, grants special leave to the suspender to apply for suspension of the charge complained of without caution or consignation, and passes the note without caution or consignation."

The liquidators reclaimed, and argued—The suspender acted in bad faith in concealing his negotiations with Rennie & Co. The liquidators were entitled to withhold delivery of the discharge and to enforce their decree against the suspender, since he was not in a position to produce any evidence of an arrangement between him and them. Even if the discharge had been delivered, the declaration upon which it proceeded was not true or complete in the knowledge of the suspender. He was a partner at the time it was made, and the status of partnership was worth something and ought to have been disclosed.

The suspender pleaded—He had made a fair surrender of his estates, which the liquidators accepted after careful investigation; and having executed a discharge in terms of that compromise, they were not now entitled to refuse delivery thereof in duplicate. The decree, upon which the charge complained of proceeds, having been obtained in absence and without informing the Court of the compromise or the discharge which had been executed in terms of it, was obtained on partial and misleading information, and was therefore not due authority for the said charge. At all events, the suspender was entitled to have the note passed in order that the circumstances might be inquired into, and that without caution or consignation, in terms of the 121st section of the Companies Act 1862.

At advising—

Lord President—In this case there was an arrangement made between the liquidators of the City of Glasgow Bank and the complainer for a surrender of his estate, in respect that he was unable to pay the second call which had been made upon the shares held by him in the City of Glasgow Bank, and that arrangement proceeded upon a payment made by him of £1300, in respect of which it was arranged that he should obtain a discharge from the liquidators of his whole obligations as a partner; and that arrangement, the money having been paid, was sanctioned by the Court on the 19th of March last. The effect of that arrangement of course was to liberate Mr Anderson from all liability; but notwithstanding the liquidators have taken decree against him as a contributory in terms of the 121st section of the Companies Act of 1862, and he has brought a suspension of that decree upon grounds which are certainly rather peculiar. If the arrangement for compromise is binding upon the liquidators, it is quite plain that they were not entitled to take the decree against him which they have done. But the ground upon which they have proceeded is, that they discovered, after the sanction of the Court had been given to the arrangement, but before the discharge had been delivered to Mr Anderson, that he had not made a fair surrender of his estate, but was possessed of funds and of an interest in a trading company which he had not disclosed to them. Now, it is quite necessary in a case of this kind to attend particularly to the terms and effect of that 121st section of the statute. It provides that the liquidators having made up the list of contributories, and the list being finally settled, shall be entitled to present a petition to the Court containing a list of persons who are liable in payment of calls, and have not paid, and upon that list the Court is to give a decree, which is to be immediately extracted. And that has been interpreted in the case of *Lumsden*, in the year 1858, 21 Dunlop, 110, as meaning this, that where an application is made by the liquidators in terms of this section to the Court, decree passes as a matter of course, and no person against whom decree is sought under that application is entitled to be heard against the granting of the decree. But then the statute provides further, that no suspension of that decree shall be competent except upon caution or consignation, unless with special leave of the Court or Lord Ordinary. Now, although that part of the clause is expressed in a negative form, it plainly implies an affirmative enactment that a suspension may be competent upon caution or consignation, and also with special leave of the Court without caution or consignation. The question therefore comes to be, whether in the circumstances of this case we should comply with the demand of the complainer to pass this note without caution or consignation? That course is certainly not to be followed except in exceptional circumstances. But it rather appears to me on full consideration that we shall not be doing any violence to this clause of the statute, nor acting inconsistently with its spirit and intention, if we affirm the Lord Ordinary's interlocutor passing the note without caution or consignation.

It must be observed, that unless the liquidators are well founded in their complaint that this gentleman has not made a full and fair surrender of his estate, they would have had no right to take this decree against him at all, because they had undertaken that he should be discharged of all his obligations upon payment of a sum of £1300, which has been actually paid. And the peculiarity of the case therefore is, that this suspension must necessarily be passed, unless it can be shown by the liquidators that there is some justification for what they have done—I mean in withholding the delivery of the discharge. Under all ordinary circumstances, where the liquidators have not come under any obligation to the contributory, it would be quite out of the question to pass the note without caution or consignation,

because the contributory is on the list of contributories, and that is the foundation of his liability. But in the present circumstances this contributory would be entitled to have the discharge which has been actually executed delivered over to him, and in his hands, but for the allegation which the suspenders make that he has not made a full and fair surrender of his estate. Now, if the liquidators could have shown us in the Bill Chamber that this complainer was certainly possessed of funds and estate which he had not disclosed or given up, I think we should have been in a condition at once to refuse the note; but the circumstances brought before us do not bear that construction very clearly. I give no opinion on what the ultimate result of this case may be, but all I say in the meantime is, that without further inquiry I think we have not before us a sufficient justification of the liquidators refusing to go on to complete the arrangement which they made with this gentleman by delivering the discharge; and therefore I am for adhering to the Lord Ordinary's interlocutor.

Lord Deas—It appeared to me that this note should only be passed upon caution, but it is plain enough that that would prevent any investigation, and as such investigation after what has taken place is a thing which it would be satisfactory to have, and cannot occupy any very long time, I do not dissent from the proposed judgment of your Lordship passing the note without caution.

Lord Mure—I have come to the same conclusion. The only doubt in my mind was as to whether the note should be passed without caution; and in the circumstances of the case I have no doubt the note should be passed to try the points in dispute between the parties. There is a distinct allegation here on the part of the complainer that in the circumstances he made a fair surrender of his property. That is denied by the liquidators, and that is a very material fact in the case which requires investigation. Therefore to clear up that fact, upon which the whole matter turns, requires a proof. The difficulty is as to having that without caution. But it must be observed, that of the £5000 odd that the liquidators take decree for, a very considerable sum has been paid to them, and at least half of that sum was paid on the understanding that the compromise was to take place. The only circumstance which was strongly founded upon on the part of the liquidators is, that he did not disclose the fact that he was a partner of a concern in Glasgow at the time the declaration was emitted. Now, in point of fact that is correct. There was no specific disclosure of that fact. Though he had only recently become a partner, and had put no funds into the concern at that time, it might have been as well if he had stated that fact. But as far as I see at present, that is the only incorrect statement that he made in regard to the information given to the liquidators. It appears that since the date of the declaration he has paid certain sums of money into that concern; but I do not see any evidence that his statement is incorrect, that that money so paid in was all borrowed from friends after the date of the discharge, and that £200 of it was got from the relief fund in Glasgow which was distributed among the unfortunate shareholders of the bank. Now, I cannot conceive it possible that the parties who had the distribution of that relief fund would have contributed this £200 to the complainer if he had been in the position of having funds of his own. Upon the whole facts of the case I think we are warranted in passing the note without caution.

Lord Shand—I entertain a very clear opinion that the Lord Ordinary's interlocutor is right, and that he had no other course in justice to the complainer except that which he has adopted, of passing this note without caution. The statute, in the section of it to which your Lordship has referred, provides that decree shall pass against the contributories in a list given in by the liquidators, as a matter of course, and that a party shall not be heard to resist the granting of that decree at the time it is asked. That, I think, would have been a very harsh and a very unjust enactment if it had not been guarded as it has been by the Legislature; but there is a provision at the end of that section to the effect, that while decree shall be so given for the purpose of despatch in the liquidation, the Court have it in their power in a suspension to allow the decree to be suspended without caution or consignation; and I shall only say that I think that while the Court will no doubt jealously see that a note is not passed in such circumstances without reasonable grounds, on the other hand where there are reasonable grounds for trying the question as between the liquidators and a contributory, the contributory should have the benefit of that provision.

Now, in this case the suspender says—"I arranged that my entire liability should be met by a certain payment;" and the liquidators admit that. He says he made the payment, and the liquidators admit that. He is therefore in the position of having a concluded compromise with them with the authority of the Court. They say they have discovered something subsequently that destroys that agreement, but it appears to me to be very clear that the *onus* in regard to that matter is upon them; and unless they were in a position to satisfy the Court now beyond all question, upon the documents before the Court, that the agreement was not binding, I think this gentleman is entitled to have the note passed without caution, because it is obvious that if caution is imposed upon him it is simply throwing him out of Court and deciding the case against him.

I shall say nothing upon the merits of the question involved except this, that the case which the suspender presents is one of a class of which we have seen many—where a contributory ruined by the fall of this bank has made arrangements for beginning the world again as soon as he gets his settlement made. He had apparently arranged to enter into a contract of copartnery, and signed the contract in the beginning of March, and on 25th March he signed a declaration in which he says that he had disclosed everything he had in the world. The liquidators say he should have mentioned this contract of copartnery, and I do not say that a very cautious man might not have done so. But if the fact be that that contract of copartnery had given him nothing, and could give him nothing, in the way of property unless and until he got friends to advance money

for him to put into the business to enable him to begin the world again, I can perfectly well understand the reason why there was no notice taken of that contract in the declaration. Accordingly, he does say that he had not put a penny into this business, and had not a penny to put into it, and that after he had got his matters arranged friends lent him money, and he put that money subsequently into the business. I put it to the counsel for the liquidators if they were prepared to gainsay that, and if they were in a position to prove that this gentleman had funds of his own which he was improperly concealing, and I got the answer no. In these circumstances I have not the slightest doubt that the clear course in justice to the suspender was to pass the note, and that we ought to adhere to the Lord Ordinary's judgment.

I shall only say further that I think it will be matter of regret if the parties should think it necessary to go into a proof upon this matter unless they find on investigation that there is clear evidence of concealment here. On the one hand, I think the suspender is somewhat to blame for the very loose way in which his explanatory statement was framed. Perhaps he may not be himself at fault for that; it may be that his agent is to blame for it. There is undoubtedly enough in articles 5 and 6 of that statement to justify the liquidators in thinking for a time that there had been an improper concealment here. But when we come to the subsequent part of the statement, and the documents on which it is founded, I cannot help thinking that extra-judicial investigation should show one way or other quite clearly whether the sum of £600 put into the business was not got, as the suspender says it was, from friends after he had made the arrangement with the bank. If it should be found on such extra-judicial investigation—the suspender of course giving every facility in that direction—that this money was really borrowed from friends, and was not property of which he was possessed at the time he made this declaration, then I should hope that this litigation will proceed no further. It may be that the suspender ought to pay the expense caused by the loose statement in his declaration, but I think that this is a case in which the liquidators should make such extra-judicial investigation as I have pointed at, and if possible get this matter arranged.

The Court adhered to the interlocutor of the Lord Ordinary.

Counsel for Complainer and Respondent—J. G. Smith—Brand. Agent—Adam Shiell, S.S.C.

Counsel for Reclaimers and Respondents—Solicitor-General (Balfour, Q.C.)—Kinnear—Asher—Low. Agents—Davidson & Syme, W.S.

Friday, November 5.

SECOND DIVISION.

SPECIAL CASE—FERGUSSON AND OTHERS.

Succession—Trust-Disposition and Settlement—Legacy—Codicil—Construction.

By the eighth purpose of his trust-disposition and settlement D. directed his trustees to pay his nephew B. £18,000. By codicil dated nine months later he reduced the sum to £16,000. By later codicil he provided, "in addition to the legacy or legacies left to my nephew" B. "in the eighth purpose of my trust-disposition and settlement, I hereby leave him £2000." *Held* (*dub.* the Lord Justice-Clerk), on a construction of the trust-disposition and settlement and codicils thereto, that B. was entitled to a sum of £20,000.

Andrew Vans Dunlop, a surgeon in the service of the Honourable East India Company, died on 27th February 1880 leaving a trust-disposition and settlement dated 8th February 1879, and fourteen codicils thereto. By the said trust-disposition and settlement Dr Dunlop conveyed to trustees, of whom William Fergusson was the sole acceptor, his whole means and estate, and by the eighth purpose of the trust he directed them to pay "to Andrew Vans Dunlop Best, my nephew, if he survives me, or to his lawful issue if he predeceases me leaving lawful issue, the sum of eighteen thousand pounds sterling, declaring that in case the said Andrew Vans Dunlop shall predecease me without leaving lawful issue, the said sum of eighteen thousand pounds shall revert to and form part of my general estate at his death." The deed further left legacies and provisions to various persons, and finally constituted the Senatus Academicus of the University of Edinburgh to be residuary legatees.

The codicil of date 17th November 1879 (which was holograph of the testator) was as follows:—"With reference to the eighth purpose of my trust-disposition and settlement, which was executed by me in Edinburgh on the 8th day of February 1879, I hereby instruct my trustees and executors that I hereby reduce the sum of eighteen thousand pounds sterling to sixteen thousand pounds sterling, which I left in that eighth purpose to my nephew Andrew Vans Dunlop Best; and this I have done from a cause with which he is well acquainted. A. Vans Dunlop."

The codicil of date 5th February 1880 (which was also holograph of the testator) was as follows:—"In addition to the legacy or legacies left to my nephew Andrew Vans Dunlop Best in the eighth purpose of my trust-disposition and settlement which was executed by me in February last, I hereby leave him two thousand pounds sterling if my estate can afford it, and I have no doubt that it can do so. A. Vans Dunlop."

A question having arisen upon the construction of the codicil of date 5th February 1880, the parties submitted this Special Case to the Court for opinion and judgment, Andrew Vans Dunlop, who appeared as the second party in the case, maintaining that by the terms of the said codicil, of date 5th February 1880, the restriction imposed by the codicil of 17th November 1879 was implicitly revoked, and that he was therefore entitled to payment in all of £20,000, viz., £18,000 in respect of the eighth purpose of the trust-disposition and settlement, and £2000 in respect of the codicil of 5th February 1880; while the Senatus Academicus of the University of Edinburgh, who appeared as the third party, maintained that the restriction imposed by the codicil of 17th November 1879 was not revoked, and that the second party was therefore only entitled to £18,000 in all, viz., £16,000 in respect of the eighth purpose of the trust-disposition