law Mr Hume, whom failing to Mrs M'Cracken. This liferent corresponds to the annuity given in the case of *Campbell*. The executors continued to hold the property, and to pay the liferent to Mr Hume. The original executors were Mr Hume and Mr M'Cracken. Mr Hume having died, Mr M'Cracken continued to be the sole trustee in the administration till 1878, when he assumed two new trustees and executors in the persons of Francis Cairncross and George Heron, the pursuer and real raiser in this action. The whole property was conveyed over to these new trustees in trust to be applied for the purposes of the will. A further change in the administration took place in October 1878, when Mr M'Cracken died and Mr Cairncross resigned his office of trustee, thus leaving the administration alone in the hands of Mr Heron, the pursuer, who has continued to administer the estate for behoof of Georgina M'Cracken, to whom the revenues have been paid since Mr Hume's death. The only difference between this case and the case of *Campbell* is this, that in the case of *Campbell* the property was at the time of the death in Portugal and brought to this country by the executors, whereas in the present case the property was within the United Kingdom at the time of the death, but this, according to the English decisions as cited by Mr Hanson in his treatise on the Succession-Duties Acts (p. 225), is immaterial—'It is to be observed that in this case the testator expressly directed that his property should be invested in this country, but the principle of the decision equally applies to cases where the trustees have power to invest it here or abroad at their discretion, or where the property itself is already actually invested in this country. For when once the property has been appropriated to answer the specific gift, it acquires the character of a trust-fund as distinguished from an ordinary legacy.' Now, then, let us see what were the grounds upon which the case of *Campbell* was decided. The Lord Chancellor (Lord Hatherley) said (p. 528)—'In order to have the personal property administered you must seek the *forum* of that country where the person whose property is in question had acquired a domicile. Then, when you obtain possession of that property, you do all which has to be done in the country to which the testator belonged. The question is afterwards, when the property has been so obtained and administered, and is in the state in which the testator desired it to be placed, in what condition do you find the fund? You find it in the condition of a settled fund. That condition arises no doubt from the operation of the testator's will; but I can see no difference in consequence of that circumstance from its having arisen in any other manner, as, for instance, from a deed executed in his lifetime, as might have been the case, or supposing he had transmitted to his bankers a sum of money to be invested upon the same trusts. When there is any fund standing in this country in the names of trustees in consols or other property which has a *quasi* local settlement, which stock in the funds has all the dividends having to be received in this country, and the persons who have to be dealt with in respect of it being persons residing in this country, that fund is subject to succession-duty. The settlement provides for the succession, and the interest of each person on coming into possession is liable to the payment of duty upon that interest to which he so succeeds. That is really the whole question involved in this case.' Now, applying these reasons to the present case, we have an estate situated in, and with executors resident in, the United Kingdom. They obtain probate as such executors, and they and the assumed trustees vest themselves with the administration of this estate, which they continue until the life-renter dies. The fund which is to be given to Georgina M'Cracken upon the expiry of the liferents has as much the character of a settled fund as the sum which was appropriated to paying the annuity in the case of *Campbell*.

"The executors in the present case are required by the will to give the property over to Georgina M'Cracken under conditions, viz., 'that the capital shall be placed in such a way that she can neither lend it or spend it, but may, if she please, buy an annuity with it.' It is very clear that a person to whom money has been bequeathed, without any right overgiven to any other person, cannot be deprived of the *jus disponendi* by a mere prohibition against alienation; nor can the executor insist, and he does not insist, upon purchasing an annuity for Georgina M'Cracken." . . .

Counsel for the Pursuer and Real Raiser—G. R. Gillespie. Agents—Drummond & Reid, W.S.

Counsel for the Crown—A. J. Young. Agent—D. Crole, Solicitor of Inland Revenue.

Friday, June 1.

FIRST DIVISION.

[Lord Trayner, Ordinary.

HEDDLE *v.* M'LAREN (MARWICK & HOURSTON'S TRUSTEE).

Partnership—Liability of New Firm for Debts of Old.

The mere fact that a new firm takes over the whole assets of the old business will not *per se* render the new firm liable for the debts of the old. It is in all cases a question of circumstances, and must be proved that the new firm agreed to adopt the debts of the old firm and become liable for them.

M, who had carried on business as an ironmonger and general merchant, died in 1873, leaving his widow with no means to carry on the business. In these circumstances A, who had been M's law agent, came to Mrs M's assistance, and found the necessary funds. The business was carried on by managers until July 1878, when Mrs M took H into partnership. Down to this date the whole receipts, with some small exceptions, were daily paid to A, who paid the accounts for goods furnished. The result of these transactions as at the date when Mrs M assumed H as a partner was a debit balance due by Mrs M to A of £2347, 4s. 5d. The firm of M & H was sequestrated in 1886, and

A's widow claimed to rank upon the estates of the firm for this amount, together with interest to the date of the sequestration, amounting to £1472, 16s. 4d., under deduction of £1706, 8s. 2d., the amount of a contra account due by A as after mentioned.

It was proved that H had entered Mrs M's employment as manager in February 1877 at a salary of £80, and that in July 1878 he became a partner along with Mrs M. No contract of copartnery was entered into. The bankrupts deponed that H was to receive one-third of the profits, but it was proved that H, who was possessed of no individual means and estate, contributed practically nothing to the capital of the business. M & H carried on the business in the same way as before; no new set of books were opened, the old being continued. The only change was that the firm opened a bank account in their own name in place of the former system, by which the drawings were paid to A, who paid the accounts. M & H paid the whole trade debts of the old business other than that due to A; they paid a bill accepted by Mrs M for the balance of the debt due upon a bank account kept by A for behoof of the business; they had during the copartnery supplied A with furnishings to the value of £1706, 8s. 10d., for which they had not asked payment; and the circular and state of affairs issued in 1886 to the creditors of the firm by their authority set forth the debt due to A, and showed a deficiency only upon the footing of their being liable for this debt.

Held that M & H had adopted and dealt with the debt due by Mrs M to A as a debt of the firm, and that A's widow was entitled to rank therefor upon the firm's estate.

James Marwick, ironmonger and general merchant in Kirkwall, died on the 28th March 1873 leaving a widow and family. His business was a considerable one, but he left no means to enable his widow to carry it on. In these circumstances Mr Heddle, solicitor in Kirkwall, who had acted as Mr Marwick's law agent, came forward and assisted his widow to carry on the business for behoof of herself and her children. This she did until July 1878 by means of managers. During this period Mr Heddle paid the accounts for goods furnished for the business and received all the drawings with small exceptions.

In February 1877 Mr William Hourston entered the employment of Mrs Marwick as manager of the business with a salary of £80. In July 1878 he was assumed by Mrs Marwick as a partner in the business. At this date there was due to Mr Heddle a large balance upon his transactions with Mrs Marwick.

Mr Heddle died on 23rd September 1884, and thereafter a claim was made by Mrs Heddle, as executrix of her husband, against the firm of Marwick & Hourston for the amount of this balance.

On the 16th of August 1886 the estates of the firm of Marwick & Hourston, and the individual partners thereof, were sequestrated, and Thomas M'Laren, S.S.C., Edinburgh, was appointed trustee in the sequestration. Mrs Heddle, as executrix of her husband, claimed to rank in the sequestration for the following sums—(1) The sum of £4402, 13s. 7d., due to Mr Heddle for advances made to the foresaid business between April 16th 1873 and July 17th 1878, the date at which the firm of Marwick & Hourston was formed; (2) the sum of £2240, 0s. 1d., being the interest thereon to the date of the sequestration; (3) the sum of £207, 5s. 9½d., due to Mr Heddle and his executrix on account-current between them and the firm of Marwick & Hourston commencing on December 17th 1878 and closing on May 15th 1886; (4) the sum of £6, 19s. 2d., being interest thereon to the date of the sequestration.

The trustee on 26th January 1887 pronounced the following deliverance—"Finds (1) that, to the extent of £214, 5s. thereof, the claimant is entitled to be ranked as a creditor on the estates of the bankrupt firm of Marwick & Hourston, and to that extent admits the claim accordingly; and (2) that, to the extent of £6642, 13s. 8d. thereof the claimant is entitled to be ranked as a creditor on the individual estate of Mrs Marwick, a partner of that firm, subject, however, as to this second finding, to the condition that the cash accounts are properly vouched, and that the business accounts will be taxed by the auditor, as between agent and client, *quam primum*. *Quoad ultra* the trustee rejects the claim."

Mrs Heddle appealed against this deliverance of the trustee to the Court of Session.

The appellant pleaded, *inter alia*—"The bankrupts having taken over the assets and liabilities of the business which had been carried on by Mrs Marwick, including the debt due to Mr Heddle, the appellant is entitled to be ranked on their estates for the amount of the said debt, with interest, in terms of her claim.

The respondents pleaded, *inter alia*—"(3) The firm of Marwick & Hourston having incurred no liability for the debt in question, and it not being a debt incurred by the said firm in the course of its business, the judgment appealed against is well founded, and ought to be sustained, with expenses."

A proof was allowed, the import of which appears in the opinions of the Judges *infra*.

The Lord Ordinary (TRAYNER) on 5th November 1887 pronounced the following interlocutor:—"Recals the deliverance by the respondent appealed against: Directs the respondent to rank the appellant as a creditor on the sequestrated estates of Marwick & Hourston for the debt claimed, when that debt has been constituted, or otherwise properly vouched: Finds the appellant entitled to one-half of the expenses of process, as the same may taxed down to the date of closing the record: Remits the account of such expenses to the Auditor to tax and report; *quoad ultra* finds no expenses due, and decerns.

"*Opinion.*—The appellant claims to be ranked as a creditor on the sequestrated estates of Marwick & Hourston (on which the respondent is trustee) for the sums of £214, 5s. and £6642, 13s. 8d. respectively. The respondent has admitted the appellant's claim to rank for the first of these sums, but as regards the second he has refused the appellant's claim to rank on the estates of the firm, but has admitted the claim to rank on the estates of Mrs Marwick, an individual partner thereof, subject to the condition 'that the cash accounts are properly vouched, and that the business accounts will be taxed by the auditor.'

Against the latter part of this deliverance the present appeal is brought, the appellant contending that she is entitled to be ranked on the firm's estate (and not merely on Mrs Marwick's) for the full amount of the debt claimed.

"From the proof which has been led before me it appears that prior to 28th March 1873 the late James Marwick (who died of that date) carried on business as an ironmonger and general merchant in Kirkwall; that from that date till July 1878 the business was continued by Mrs Marwick (who was her husband's executrix) for behoof of herself and her family; that in February 1877 Mr Hourston entered the employment of Mrs Marwick as manager of said business at a salary of £80 per annum; and that in July 1878 he became a partner in the business along with Mrs Marwick. No contract of copartnery was ever executed between Mrs Marwick and Mr Hourston, but it is stated that the latter was to get a third of the profits of the business. It is not clear, on the evidence, whether a proper balance-sheet showing the condition of the business was prepared at the time when Mr Hourston joined the business as a partner, but from his acquaintance with the business as manager Mr Hourston had at least some knowledge of how the affairs of the business stood. When the partnership of Marwick and Hourston was formed that firm continued the same business which had formerly been carried on by Mr Marwick and continued by his widow. The whole stock and assets of the old firm were handed over to and traded with and used by the new firm as the stock and assets of the latter. No new set of business books were opened; the old ones were continued. The only change which took place was, that a bank account was opened in the name of the new firm—the bank account for the business carried on by Mrs Marwick for some time prior to July 1878 having been kept in name of the late Mr Heddle, who was in effect the cashier and financial manager for Mrs Marwick. Further, the whole debts due by the old firm (except the debt due to the late Mr Heddle) were paid by the new firm of Marwick & Hourston from the proceeds of their business, and the whole debts due to the old firm were collected and discharged by the new firm.

"The debt claimed by the appellant (so far as a claim of debt may be established by her) was incurred to the late Mr Heddle in connection with and for behoof of the old firm. For several years he acted not only as the law agent of Mrs Marwick, but also as financial manager and cashier of the business she was carrying on. I think there is no doubt that Mr Heddle made advances on behalf of Mrs Marwick's business, without which that business could not have been carried on.

"In this state of the facts I do not think the law is doubtful. It appears to me that the present case is not distinguishable in any essential particular from the cases of *Miller*, 23 D. 359, and *M'Keand*, 23 D. 846. In the latter case it was laid down by the Lord Justice-Clerk (Inglis) 'that when parties take up a going business in that way, and take the stock, they must also take the liabilities,' and that in effect was the judgment pronounced.

"The respondent sought to distinguish between this and the cited cases in three respects—(1) That Hourston paid in capital to the new firm; (2) that he did not know at the date when he became a partner that any debt was due by the old firm to Mr Heddle; and (3) that whenever he became aware of the present claim he at once repudiated liability thereof. Each of these points deserves consideration.

"1. Capital.—In his examination in the sequestration Mr Hourston stated that under his contract of copartnery he was to subscribe one-third of the capital. He certainly never did that. In his evidence in this case he says he paid into the capital of the business three sums, viz., on 22nd February 1877, £46; on 18th February 1878, £20; and on 2nd October 1882, £113. The first and second of these sums, it will be observed, were paid before the partnership commenced. Mr Hourston explains that these sums were due to him by Mrs Marwick, and that he allowed them to lie in the business as part of his capital. Assuming that statement to be true, it would only show that Hourston had paid £66 towards purchase of one-third of the business, its stock and assets, an altogether inadequate price. The third sum (£113) is said to have been paid in on 2nd October 1882. I am not satisfied that that sum was ever paid. There is no voucher for it, except an entry in the firm's books in the handwriting of Mr Hourston. The entry is written on an erasure, of which Mr Hourston can give no explanation; and the entry is not posted in the ledger. In my opinion it is not proved that Mr Hourston paid anything whatever towards the capital of the new firm. I have already stated what I think of the alleged payment of £113, and with regard to the other two small payments I think they were at the best debts by Mrs Marwick to Mr Hourston, which may or may not have been imputed to capital some time after the partnership was formed. I incline to the view that the idea of imputing them towards payment of capital is quite a recent idea. But even taking them as payments towards capital, they are so trifling as to make no real difference between the present case and the cases I have referred to.

"2. Ignorance of the debt.—It may be the fact that Mr Hourston did not know the amount of the debt due to Mr Heddle by the old firm, or that there was any debt due to him at all; but if Mr Hourston became a partner of the new firm under such circumstances as imposed a liability on it for the debts of the old firm, I fear his ignorance affords him no exemption from liability. He should have made sure of the extent of his liability before he became a partner. He knew quite enough, however, to put him on his inquiry, for he knew that while he was manager (from February 1877 to July 1878) Mr Heddle was financing the business, receiving all its drawings and paying all its accounts. I am bound to add that I am not satisfied that Mr Hourston was as ignorant of the debt due to Mr Heddle as he now represents himself to have been.

"3. Repudiation of the claim.—On this subject there is some conflicting evidence. It is said on the one hand that when the account now claimed for was rendered, Mr Hourston, along with Mrs Marwick and her son, did not dispute liability thereof, but on the contrary agreed that the account should be settled by the new firm continuing to supply goods to the representatives of Mr Heddle to the extent of about £200 per annum until the account was settled.

This agreement is denied by Mr Hourston, Mrs Marwick and her son, who say they never heard of such proposal. If there was no evidence in the case on this branch of it, except the parole testimony, I should be placed in considerable difficulty, for not one of the witnesses on one side or the other (except the accountants, Garioch, Magnus Marwick, & Hewison) impressed me as being worthy of much confidence. There was, on the part of them all (except those I have specially named) such a want of recollection as to matters which they could not reasonably be supposed to have forgotten, and such pretended ignorance regarding things which they should have known according to all reasonable probability, that I formed the impression above stated. There is, however, a piece of real evidence which I think conclusive on this subject. In May 1886, after the account now in question had been rendered, Mr Hourston, as representing his firm, consulted Mr Thompson, solicitor, Kirkwall, with regard to the condition of his firm's affairs. What it was that immediately led to Mr Hourston consulting Mr Thomson is not of much moment; the result of the consultation is of more importance. It resulted in Marwick & Hourston executing a trust-deed in favour of Mr Thomson for behoof of their creditors. Mr Thomson intimated that this had been done by a circular issued by him to the creditors of Marwick & Hourston, of which No. 69 of process is a copy. The circular, which had an 'approximate state of affairs' appended to it, stated that 'the annexed state of affairs shows the assets and liabilities of the firm, and brings out the former as showing 10s. 4d. in the £;' that the firm solicited an 'arrangement on the basis of the state of affairs,' and added, 'if this arrangement, or a settlement of say 10s. 6d. in the £, be carried through, the firm will be enabled to continue its extensive business with benefit to all.' Turning to the state of affairs, I find that the debt now claimed by Mrs Heddle is entered among the liabilities of the firm. It is suggested now that that debt was entered in the state of affairs not as a debt which the firm was bound to pay, but merely as an intimation to the other creditors that such a debt was claimed. I regard that suggestion as quite without foundation; it is distinctly negatived by the state of affairs. For it will be observed that it is by including the debt in question that the estate is shown to yield only 10s. 4d. per £, and it is on the representation that that debt is the debt of the firm that a settlement is 'solicited' on a composition of 10s. 6d. per £. So far therefore from the debt in question being inserted in the state of affairs as an intimation merely that it was claimed (as distinguished from its being an admitted debt), the other creditors are solicited to make an arrangement on the footing that that debt has to be provided for by the firm, just as and no less than its other obligations. Indeed, on any other view the circular and state of affairs were absurd. Exclude the debt in question, and the firm was solvent, its liabilities only amounting to £3496, 14s. 10d., and its assets to £4173. In such circumstances a trust-deed was unnecessary, and certainly in such circumstances the other creditors were not likely to yield to the solicitation for a settlement on a composition of 10s. 6d. per £.

"It is further said by Mr Thomson, the local law agent of the firm (who is the author of the suggestion I have been dealing with), that neither Mr Hourston nor Mrs Marwick ever saw or authorised the circular and state of affairs, and Mr Hourston and Mrs Marwick say the same thing. I cannot accept these statements as correct; they are contradicted by the contemporaneous entry in Mr Thomson's account, and Mr Thomson rather departs from his statement when pressed on examination.

"I come to the conclusion on this part of the case that the firm of Marwick & Hourston distinctly adopted the debt in question, and recognised their liability for payment thereof.

"The appellant has thus in my opinion failed in each and all of these three particulars to distinguish this case from the others above cited.

"I was referred to the case of *Nelmes*, 10 R. 974, in which no doubt an opinion was expressed opposed to some of the views expressed in *M'Keand's* case. But that case was decided upon grounds which leave the authority of *M'Keand's* case unaffected. I am of opinion that the firm of Marwick & Hourston are liable for the debt in question, not only because being a debt of the old firm they took it over as an obligation when they took over the old firm's business and assets, but also because they distinctly adopted it as their debt, and represented to their other creditors that it was so.

"Although I have arrived at the conclusion that the debt due to the late Mr Heddle is a debt against the firm of Marwick & Hourston, yet I am not in a position to order the respondent (as prayed for in the appeal) to rank the appellant on the firm's estate as a creditor to the extent claimed. The respondent has, I think, very prudently only admitted the ranking on the estate, even of Mrs Marwick, subject to the claim being properly vouched. That has still to be done.

"It appears from the deliverance appealed against that the respondent had called on the appellant to produce evidence of the claim now made being a debt due by the firm, and that in answer to that call certain documents were produced. I cannot say that these productions were such that the respondent should at once in respect of them have admitted the claim; and therefore, although he has been unsuccessful on the question principally argued before me, I cannot hold him entirely accountable for the present litigation. I therefore find him liable to the appellant in one-half of the expenses of this appeal down to the date of proof being allowed, and I mark my dissatisfaction with the evidence adduced on both sides by finding no expenses due to either party since that date."

The respondent reclaimed, and the Court remitted to Mr Molleson, C.A., to examine the accounts in dispute and the vouchers, and to report, and superseded consideration of the reclaiming-note. In obedience to this remit Mr Molleson reported that a settlement of the amount due to Mr Heddle had been arrived at, and that the balance of principal and interest as mutually agreed on was £3820, 3s. 9d.

The reclaimer argued—This claim was not good against the firm. It was not an ordinary trade debt. It was not disclosed, though there

was a special obligation on Heddle to disclose it if he meant to claim payment from the new firm. The incoming partner was not aware of its existence. These facts distinguished this from the cases on which the Lord Ordinary had based his judgment—*M'Keand* v. *Laird*, March 30, 1861, 23 D. 846; *Miller* v. *Thorburn*, January 22, 1861, 23 D. 359. A partner was not liable for debts incurred by a firm before he entered into partnership unless he agreed to be so, though such liability could be inferred from facts and circumstances—*Nelmes* v. *Montgomery*, June 15, 1883, 10 R. 974; Bell's Prin., sec. 371; Lindley, i. 389-392; *Rothes* v. *Bank of Australia*, 1 Priv. Council App. 27. There were no such facts and circumstances here. The way in which Heddle treated this debt showed that he looked upon it as a claim against Mrs Marwick alone.

The appellant argued—The present case was very similar to *Miller* v. *Thorburn, supra cit.* It was not material that the incoming party did not know of a particular debt, for where a new firm took over the whole assets of a business, it followed that they took over its liabilities also, otherwise the creditors of the old firm would be deprived of all the stock, on the faith of which they allowed their debts to be incurred. There was a material distinction between the English and Scotch law on this matter. In English law the question was whether the new partner had become responsible for the debts of the old firm. In Scotch law whether a person, by creating a new *persona* in the shape of a new copartnery, could prevent his creditors having any claim against the assets of the old firm until all the creditors of the new *persona* were paid. The case of *Rothes* raised the question very sharply as to the circumstances from which the liability of the new firm would be inferred. It was a pregnant fact if the new firm had paid a sum to account of a debt due by the old firm. If the new firm paid some of the old firm's debts, there would be a presumption that it had undertaken liability for the debts of the old firm as a whole.

At advising—

Lord Adam—The question in this case is whether Mrs Heddle, as executrix of her husband the late Mr Heddle, is entitled to be ranked on the sequestrated estate of Messrs Marwick & Hourston for a sum now ascertained to amount to £3820, 3s. 9d. This sum consists of a sum of £2347, 4s. 5d. of principal due by Mrs Marwick as at 17th July 1878, when the firm of Marwick & Hourston was formed, and a sum of £1472, 16s. 4d. of interest to the 16th August 1886, when that firm was sequestrated. It is not disputed that Mrs Heddle is entitled to be ranked on the individual estate of Mrs Marwick, one of the partners of the firm, for the sum in question.

The facts on which the question depends would appear to be these.

Mrs Marwick's husband, the late James Marwick, had carried on a very considerable business in Kirkwall as a ironmonger and general merchant down to the date of his death on 28th March 1873. He left a widow Mrs Marwick, and five young children. Mrs Marwick was decerned his executrix. Mr Marwick died, if not insolvent, at least with no means to enable his widow to carry on the business, which apparently was the only resource she had to look to for the support of herself and her children. In these circumstances Mr Heddle, who had been her husband's law agent, and a friend of the family, came to her assistance and undertook to find the funds necessary to enable her to carry on the business. This she did by means of managers, who attended to the business in the shop, until 17th July 1878, when she took Mr Hourston into partnership. It appears that during this time the whole drawings of the shop, with the exception of some small payments, were paid over daily to Mr Heddle, who, on the other hand, paid the accounts for goods purchased for the business. While thus financing the business Mr Heddle on 7th April 1873 opened an account with the Union Bank in name of Marwick's representatives. This account was closed on 19th May 1873, and the balance carried over to a new account, which he opened in his name as trustee for Mrs Marwick. This account ceased to be operated on in April 1875, but various payments continued to be made in reduction of the balance due to the bank, and it was closed on 2nd October 1875, when the balance due was £639, 19s. For this sum Mr Heddle drew a bill on Mrs Marwick, which she accepted, and the bill was discounted with the bank. Payments to account of this bill were made from time to time down to the date of the copartnery, and bills granted for the balance. At that date the amount of the bill current was £436, 16s. 10d. This bill was retired by Mr Heddle paying £25 to account, and drawing a new bill, with interest added, for £418, 15s. 7d., which was accepted by Mrs Marwick. Payments were made from time to time to account of this bill, and renewals granted for the balance, which was ultimately paid. It is material to observe that all these payments were made by the firm out of the drawings of the business by cheques on their bank account.

When the account with the Union Bank ceased to be operated on in April 1875 Mr Heddle did not open an account in connection with the business with any other bank. He acted as banker, and intromitted with the funds through his own account, crediting the business with the cash received from the shop, and debiting it with the payments made by him for goods purchased, with the result that there is an admitted balance due by Mrs Marwick of £4053, 16s. 3d., but from this there is deducted a contra account due by Mr Heddle of £1706, 8s. 10d., leaving a balance of principal, as before stated, of £2347, 7s. 5d. due as at the date of the copartnership.

I do not think it can be disputed that this was a proper trade debt of the business. Mr Heddle's advances were made in connection with and for behoof of the business from the beginning, and without them it could not have been carried on.

In February 1877 an arrangement was entered into with Mr Hourston, by which he entered Mrs Marwick's employment as manager of the business. He was to receive a salary of £80 per annum, and an interest in the business in proportion to the capital he might be inclined to put into it from time to time up to a third of the profits. He continued in this employment until July 1878, when he was taken into partnership by Mrs Marwick.

There was no written contract of partnership

between them. It is difficult to discover what the terms of the arrangement were. Mr Hourston says that besides the salary which he was drawing he was to receive one-third of the profits. If this be so, the inference is that he was to pay for one-third of the assets, if any. Mrs Marwick says nothing about the terms of the copartnery. Mr Hourston further says that there was a balance-sheet prepared under the supervision of Mr Heddle with a view to the partnership which showed the debts and liabilities which were to be taken over by the firm, and that this did not include Mr Heddle's claim. This alleged balance-sheet shows a surplus of assets of upwards of £1700. Mrs Heddle denies that any such balance-sheet was prepared prior to the formation of the partnership, and I am of opinion that it is not proved that any such balance-sheet was ever prepared and exhibited to Mr Hourston.

On the other hand, Mrs Heddle avers that a trial balance-sheet was prepared as at 16th July 1878 when the copartnery was entered into, and that in this balance-sheet the debt due to Mr Heddle was stated as amounting to £3468, 6s; that this balance-sheet was prepared in order to show the state of affairs at the date of the copartnery, and that its contents were perfectly well known to the partners. According to this balance-sheet the liabilities of the firm, including the debt due to Mr Heddle, exceeded the assets by £1339, 6s. 8½d.

I have no doubt that this balance-sheet was as stated. But Mrs Marwick and Mr Hourston deny that they ever saw it, or were aware of its contents. However that may be, I do not think that it is proved that it was exhibited to them. But I agree with the Lord Ordinary that, looking to Mr Hourston's previous acquaintance with the business as manager, and the way in which it was worked, he could not well have been ignorant that there was an outstanding account between Mr Heddle and the business—although he might not have been aware how the balance stood, or what it was—and that ought to have led him to inquire how matters stood. Mr Hourston says that if he had seen this balance-sheet he never would have entered into the partnership and undertaken liability for such a debt. I do not think, however, that in his circumstances, having so far as appears, no means of his own, that that was a consideration likely to weigh much with him.

Mr Hourston further says that he put some money into the concern at the time of the partnership. The sums he refers to are a sum of £46, which he had paid in on 22nd February 1877, and another sum of £20 on 18th February 1878. Undoubtedly he had these sums at his credit before the partnership was entered into, and he allowed them to remain. He further says that on 2nd October 1882 he made a payment to capital of £113. On the grounds stated by the Lord Ordinary, and which I need not repeat, I am clearly of opinion that it is not proved that he paid this sum.

In this state of matters it is material to see how the new firm was carried on. It appears to me that the only change which was made in the business was, that the firm opened a bank account in their own name, on which they operated, in place of the former system, under which the drawings were paid to Mr Heddle and the accounts paid by him.

In all other respects the business just went on as before. Mr Hourston drew his salary as before. He says—"When the partnership was entered into we did not begin a new set of books, we just continued the old. So far as I know the business was carried on just as before. There was no change made in the stock, except what would be made from time to time as the demands of the business required. Marwick & Hourston paid the debts which had been incurred by the business before the date of the copartnery. All the trade debts which had been incurred by Mrs Marwick were paid by the new firm. Marwick & Hourston also uplifted monies due to the business as carried on by Mrs Marwick. The new firm collected all the monies due to Mrs Marwick and paid all the trade debts due by her."

The firm continued to carry on business until the beginning of May 1886, when they got into pecuniary difficulties in consequence of the bank refusing to make further advances, their account being largely overdrawn. This led to the execution of a trust-deed for behoof of their creditors. Mr Thomson, the agent whom they had consulted, intimated this fact to the creditors by a circular, which had an "approximate state of affairs" appended to it, stating that "the annexed state of affairs shows the assets and liabilities of the firm, and brings out the former as showing 10s. 4d. in the pound," and that the firm solicited an arrangement on the basis of the state of affairs, and added, "if this arrangement, or a settlement, say of 10s. 6d. in the pound, be carried through, the firm will be enabled to carry on its extensive business with benefit to all."

The debt now claimed by Mrs Heddle is entered in the state of affairs as a liability of the firm. The Lord Ordinary, for the reasons stated by him, in which I entirely concur, and to which I can add nothing, regards this as distinct evidence of the liability of the firm for the debt claimed. I also concur with the Lord Ordinary in thinking that the circular and state of affairs were seen and authorised by both partners.

There is only one other matter of fact to which I think it necessary to refer. It appears that the firm had an account against Mr Heddle for furnishings, extending over the whole period from 1873 till his death in 1884. The amount due by him at the date of the partnership was £682, 12s. 3d., and at his death £1706, 8s. 2d., and this sum had been deducted from the amount of Mr Heddle's claim now proposed to be ranked. It appears that notwithstanding the pecuniary difficulties of the firm, payment of this account was never asked, or the account rendered, during Mr Heddle's life. It is difficult to account for this otherwise than because the firm was aware of the large counter claim which he had against them.

These being the facts of the case, the question is, whether the firm of Marwick & Hourston is in law liable for this debt?

I do not suppose that anyone will contend that when a new firm is constituted by a person becoming a partner in an existing business, whether carried on by an individual or a firm, the new firm becomes liable for the debt of the old business. Neither do I think that the mere

fact of the new firm taking over the whole assets of the old business will *per se* render the new firm liable for the debts of the old business. I think in all cases it is a question of circumstances, and that it must be established by presumption, or by proof of facts and circumstances, that the new firm agreed to adopt the old debts and to become liable for them. The Lord Ordinary refers to the cases of *Miller* and *M'Keand* as ruling the present case, which he thinks is not distinguishable from them in any essential particular; and he quotes from your Lordship's judgment in the latter case the opinion that "when parties take up a going business in that way, and take the stock, they must also take the liabilities." We must therefore see what "that way" was to which your Lordship refers, and the facts on which your Lordship and the Court proceeded in that case are thus summarised by your Lordship. "Now, what was the true nature of the transaction? That comes to be the next question. It was just this, that Mr Laird being in business as a trader, and having apparently a pretty extensive business—whether it was a profitable one or not—thought it desirable either, after consulting with the appellants, or upon their suggestion—it does not very clearly appear which—but at all events with their knowledge as his principal creditors, he thought it desirable to give his two shopmen a small interest in the business for the purpose of stimulating their zeal and energy in the promotion of the interests of his concern—not a very uncommon arrangement certainly in businesses of this kind; I might almost say a matter of everyday occurrence in such trades. But was it ever heard before that when a transaction was entered into, the beginning and end and whole distinctive character of which amounted to this, that the two shopmen were to have each one-eighth share in the business as part of their remuneration for their services, that that constitutes a new company to the effect of handing over to the new firm the whole stock of the individual trader, and depriving the prior trade creditors of the individual trader of all recourse against its stock and property." This case was before seven Judges, four of whom concurred with your Lordship. As I read the case, however, the two dissentient Judges—Lords Colonsay and Curriehill—did not differ as to the law but only as to the facts. The former says—"If I could have, along with your Lordships, thrown aside the contract of copartnery, and have treated this as a case in which two persons were admitted into a share of a going business without any contract of copartnery, I should not have had much difficulty in concurring with your Lordships."

The interlocutor of the Court set forth the following findings in fact—"1st, That the debt in dispute was originally incurred in connection with the drapery business carried on in Paisley, which was afterwards transferred to and carried on by the bankrupt under the name or firm of Robert Laird. 2nd, That upon entering into the contract produced, of date 5th April 1850, the bankrupts obtained possession of the whole stock-in-trade which had been previously acquired for and used in the said business, then belonging to the said Robert Laird as an individual, and which greatly exceeded in value the capital of £600 mentioned in the said contract. 3rd, That the bankrupts William Thomson and William Smith were neither of them possessed of any individual means and estate, and neither of them contributed anything to the stock or capital used in the said business, or to the funds comprehended under the sequestration of the bankrupt as a company trading under the foresaid firm. 4th, That the debt now in dispute was assumed, taken over, and all along dealt with by the bankrupts trading under the said name or firm as a debt of the said firm or company."

Now, in this case, as in that, the bankrupts in July 1878, on entering into the copartnery, obtained possession of the whole stock-in-trade which then belonged to Mrs Marwick as an individual. The bankrupt Mr Hourston was not possessed of any individual means and estate, and contributed practically nothing to the stock or capital used in the business, or to the funds comprehended under the sequestration of the firm, and I think that the facts clearly show that the debt now in dispute was assumed, taken over, and all along dealt with as a debt of the firm. I have referred to this case at some length, because I think it is a most authoritative judgment, and clearly applies to this case.

That case was followed by the case of *Miller*, reported before but decided after that of *M'Keand*. In that case your Lordship said this—"As a matter of general principle it seems absurd to hold that a person in trade by taking his son into partnership can do anything to injure the rights of his trade creditors; and the way in which the law interpones in such a case to prevent injustice is by holding that where a new firm takes over the whole stock and business of a going concern it is held also to take over the whole liabilities. In short, the business being taken over and not wound up, the business and its liabilities must be held to go together. This is matter of general principle, and well settled, which was established by the cases of *M'Keand* and *Ridgeway*, and I see nothing to take this case out of it." Lord Cowan says—"I concur in the general principle given effect to in the cases of *Ridgeway* and *M'Keand*, that in the general case, where the whole estate of a company is given over to and taken possession of by a new concern or partnership, the business being continued on the same footing, the estate goes to the new company *suo onere*—that is, the liabilities go along with the effects. To sustain any other principle might result in the greatest injustice. This is the general presumption, although there may be special circumstances in particular cases not admitting of its application. In this case there are no such specialities. Of course private debts are not in the same position as trade debts."

In the present case I am of opinion that this general presumption does apply, and that there are no special circumstances not admitting of its application. But I think further that there are facts and circumstances proved which clearly show that the new firm took over the whole liabilities of the old business. In the first place, they paid the whole trade debts of the creditors of the business other than that due to Mr Heddle. In the next place, they paid the bill accepted by Mrs Marwick for the balance of the debt due to the Union Bank, and for which Mr Heddle was liable to the bank. But this bill represented a debt due by Mrs Marwick to Mr Heddle for advances in

connection with the business, which was contracted in precisely similar circumstances with the debt now claimed, and as the firm admitted liability for the one by paying it I do not see how they can repudiate liability for the other.

In the next place, the firm distinctly admitted liability for the debt in question in the circular and state of affairs issued by their authority to the creditors of the firm by Mr Thomson when the trust-deed was granted. And lastly, the manner in which the account of the firm against Mr Heddle was dealt with can only be explained on the ground that they knew that he had a contra account against them to a large amount. On the whole matter I am of opinion that Mrs Heddle is entitled to rank for the amount of the debt now ascertained to have been due by Mrs Marwick at the date of the partnership, on the ground that the new firm assumed, adopted, and dealt with the debt as a debt of the firm.

Lord Shand—I entirely concur in the view which has been presented by Lord Adam, and in the grounds of his Lordship's judgment. I do not think that this case raises any question of general law or of difficulty such as was presented for consideration in a good deal of the argument. I hold that it has been established—and clearly established, in so far as my judgment goes—that the new firm in this case expressly undertook liability for this debt by their actings in relation to it. The debt was incurred in consequence of Mr Heddle having acted practically as banker in financing the business for a number of years; and therefore I do not think it can be disputed that it was practically a trade debt. Mr Hourston, when he went into the business and became a partner, was necessarily aware of it, for he saw what was going on for a year while he was in the employment of the firm, and while Mr Heddle was financing the business, and it is impossible to doubt that he must have known that that account had to be cleared off when Mr Heddle ceased to act, and the business was put on another footing. Mr Hourston says he did not know of the existence of this debt, and it was further stated for him in the argument that if he had known the precise position of the affairs of this company he would not have joined it. But, as Lord Adam has pointed out, Mr Hourston was not putting any capital into the business. Again, it may be that the business was not paying, and that there was a balance standing against it; but, on the other hand, it was an old-established business, and all parties seemed to think that if well managed it would in the end produce a large amount of profit.

I think a conclusive answer to the statement of the case presented by the defenders is this, that while no doubt Mr Hourston says he did not know of this debt, I can only accept that as meaning that he did not realise quite the amount of it at the best. Mr Heddle is not here to speak for himself, for he is dead, but this fact speaks to me with a clearness that puts the matter beyond question, that from 1878 to 1884, a period of six years, the new firm went on supplying Mr Heddle with furnishings to the extent of about £200 a-year, and never asked for payment of a penny of their money. They were in difficulties during all this time, and desirous of getting money; that appears on the proof. If Mr Heddle was owing them upwards of £1000 for furnishings during that time, it is impossible to doubt that they would have pressed for that money, and it would have been paid. It is admitted that there never was a payment of that kind made by him. In that state of the matter the only explanation that occurs is, that they were working off the balance of the debt that was due to Mr Heddle when Mr Hourston became a partner. So I am clearly of opinion that, taking the proof as a whole, and taking into account the different matters which Lord Adam summarised at the close of his opinion, the new firm undertook responsibility for this debt, just as they undertook responsibility for the other debts of the firm. In regard to the general question of law, it has been so fully argued that I shall only say that I concur in thinking that it must always be a question of circumstances whether a new firm becomes responsible for the obligations of the old. On the one hand, if an old-established firm, consisting of one or two partners, arranges to take in a clerk and give him a future share of the profits, or if one of the partners has a son who has just come of age and is taken into the business, and they arrange to give him a share of the profits of the new firm thereby constituted, it appears to me that, if that new firm takes over the stock-in-trade and the book debts and whole business of the old firm and the goodwill of that business, equity requires that they shall take over its obligations. If a person grants a universal disposition in favour of another party that can only be under burden of the obligations for which that person is liable. It appears to me that in such a case as I have put, where you have practically a new copartnery, with the transfer of the whole assets of the business and goodwill of the old firm, the creditors must continue to have their hold upon the assets in the new firm. To hold otherwise would be to open a door to fraud. The assumption of a new partner it may be to-day, of another six months afterwards, and of a third six months after that, thereby cutting off the rights of creditors to share in the assets of the firm, would produce not only confusion but great injustice to the creditors. On the other hand, if a partner comes into a business, paying in a large sum of capital, and the other partners merely put in their shares of a going business as their shares of the capital, a different question might arise. In such a case as that probably some special circumstance would require to be proved in order to impose liability on the new partner for transactions entered into prior to the date when he became a partner. Then, again, intermediary cases will occur between these two classes of cases. In all of them I think it must be a question of circumstances, to be determined by the Court upon the facts, whether there has been adoption of the debt of the old firm. In this case I do not think such questions as I have pointed out arise, and I concur in the opinion expressed by Lord Adam that Mr Hourston is clearly liable for the debt due to Mr Heddle's executrix.

Lord President—I agree with both your Lordships that the evidence shows that the new firm of Marwick & Hourston adopted and took over this debt due to Mr Heddle. That being the

result of the evidence, there is no difficulty in law to be solved. I entirely concur, however, with the remarks made by Lord Adam as to the cases of *M'Keand* and *Miller*. In the later case of *Nelmes* the Lord Ordinary thinks that there were opinions expressed at variance with the views expressed in the two former cases. The difference is, I think, more apparent than real. If other similar cases arise the law to be applied will, I imagine, be very much the same as that enunciated in the two older cases, and by two of the learned Judges in the later case.

The Court adhered to the interlocutor reclaimed against, refused the reclaiming-note, and remitted to the trustee to rank the appellant as a creditor on the sequestrated estates of Marwick & Hourston for the amount of £3820, 3s. 9d., and found the appellant entitled to expenses since the date of the Lord Ordinary's interlocutor.

Counsel for the Respondent and Reclaimer—Asher, Q.C.—Strachan. Agent—John Walls, S.S.C.

Counsel for the Appellant and Respondent—Gloag—C. N. Johnston. Agent—D. Maclachlan, S.S.C.

Tuesday, June 12.

FIRST DIVISION.

[Sheriff of Lanarkshire.

SHAW *v.* CALEDONIAN RAILWAY COMPANY AND ANOTHER.

Process — All Parties not Called — Company — Action for Registration of Transfer.

The transferee of stock in a railway company raised an action against the company to have them ordained to register the transfer. The company in defence averred that the transferor had instructed them not to register the transfer, on the ground that the transferee was "illegally disposing of" the transferor's stock, and pleaded "all parties not called."

Held that it was not necessary to call the transferor as a defender to the action, but that its dependence should be formally intimated to him, and upon this being done, and the transferor lodging defences averring fraud, the Court remitted to the Sheriff to allow the parties a proof of their averments.

On 9th November 1887 John Shaw, sharebroker, London, raised an action in the Sheriff Court of Lanarkshire, at Glasgow, against the Caledonian Railway Company, in which he prayed the Court "to ordain the defenders to register in their register of transfers a transfer at present in their hands granted by John Rayner, late of Hoburne, Christ Church, Hants, and now of 89 Hugh Street, Eccleston Square, London, S.W., in favour of the pursuer, dated the 26th day of July 1887, whereby the said John Rayner transferred to the pursuer £80 consolidated stock of and in the defenders' undertaking, and to ordain the defenders to deliver to the pursuer a certificate or scrip in his favour representing that he is now the holder of the said stock." He stated that on 26th July 1887 he wrote to the railway company enclosing the certificate for the stock in question in name of John Rayner, and transfer by Rayner in his favour, and requested them to record the transfer, but that the company refused to do so.

The defenders averred—"On 27th July 1887 the defenders received from the pursuer a transfer of said stock, which *ex facie* appeared to be granted by the said John Rayner in favour of the pursuer. The stock certificate in name of the said John Rayner was sent along with the transfer, and the defenders were requested to register the transfer in name of pursuer. At the same time the pursuer sent to the defenders' registrar a transfer of said stock by him to a Mr G. L. Payne, and requested that the registrar should certify this transfer. The said transfer was not executed by the transferee Payne, and the object of the pursuer in asking the registrar to certify the transfer was to enable the pursuer to get payment of the price from the purchaser G. L. Payne." (Stat. 2) "Simultaneously with the receipt of the transfer and stock certificate by the defenders they received from the said John Rayner, the transferor, a post-card, of which the following is a copy—'S.W., 4 Passmore St., Chester Square, London. The Secretary, &c., Caledonian Ry. Co., Glasgow. Sir,—There is a man named Shaw, an outside broker, illegally disposing of my stock; it is not to be transferred out of my name.—Yours very truly, JNO. RAYNER.'" (Stat. 3) "The registrar of the defenders sent to pursuer a copy of the above post-card on the day it was received, viz., 27th July 1887, and intimated that in the circumstances he must defer doing anything until the matter had been arranged between the pursuer and the said John Rayner." (Stat. 4) "In reply to the above letter the pursuer on 28th July 1887 wrote to the defenders, stating that he need hardly say he should be very unlikely to dispose of stocks illegally. He also intimated that the transfers, &c., were duly completed, and that there could be no question as to his title, and gave notice that Mr Rayner had transferred the £80 stock to him. Subsequently on 30th September the pursuer asked the defenders' registrar to return the transfer which he had executed into the name of Mr G. L. Payne, and this was done." (Stat. 5) "A copy of the above letter was on 4th August 1877 transmitted by the registrar of the defenders to the said John Rayner, and he was asked if he still adhered to the terms of his post-card of 26th July, and to that letter he replied on 6th August in the following terms—'I have nothing to add to mine of the 26th. Mr Shaw has no claim to my stock.—Yours very respecty. JNO. RAYNER.' The defenders also received from the said John Rayner a post-card in the following terms—'Gand, Belgium, Oct. 13, 1887.—Sir,—I am surprised you have not sent divd. as usual; the man Shaw has no legal claim on my stock. I suppose I must take proceedings against him for its recovery. — Yours faithfully, JNO. RAYNER.'" (Stat. 6) "It is the practice of the defenders, in common with all other railway companies and other corporations, to issue in the case of every transfer received by them for registration a notice to the transferor of the receipt by the defenders of the transfer, the object of the notice being to give the transferor an opportunity of stopping the registration of the transfer. No such notice