[15*th August* 1834.]*

No. 33. WILLIAM DRUMMOND, for the Fife Banking Company, Appellant.

CHARLES HUNTER and others, Trustees of the late ANDREW THOMSON, Respondents.

Partnership — Sale — Homologation.—Circumstances under which it was held (affirming the judgment of the Court of Session), 1, That the share of a partner in a joint stock company had been transferred to an assignee, although the deed of assignation was not produced; and, 2, That the company by their conduct had waived a stipulation in the contract that all transfers should be made in a particular form and manner.

Proof.—Question, Whether it be competent to found on the scroll of a deed, as secondary evidence of its contents, without first proving the execution of the deed.

1st DIVISION.
Ld. Corehouse.

THE appellant, as cashier of the Fife Banking Company, which commenced business on the 2d of August 1823, brought an action before the Court of Session against the respondents, as representing the late Andrew Thomson of Kinloch, and against several other parties, setting forth, that in the month of May 1802 certain persons entered into a contract, by which they agreed to carry on a joint trade and business of banking, under the firm of the Fife Banking Company, for twenty-one years; that the capital stock was fixed at 30,000*l.*, divided into shares of 500*l.* each; and that the contract

* The correct date is 31st August 1835.

should endure for twenty-one years from and after the 2d of August 1802: That the late Andrew Thomson of Kinloch held one share, and subscribed the contract, and that the business was carried on for the stipulated period: That, a few months previous to the expiration of the contract, a proposition was made, and agreed to by all the partners, (with the exception of seven, of whom Mr. Thomson was not one,) that an extension of the old contract, or rather that a new contract, should be made, to endure for five years from the 2d of August 1823, when the original contract expired: That accordingly the new company proceeded to carry on business under the management of directors, while certain managers were appointed to wind up the affairs of the old concern: That these managers "from time to time "paid over to the officers of the new company, to be "placed by them to the credit of the old company, "such of the assets thereof as they recovered; that, "on the other hand, the new company, with the appro-"bation and by the authority of the old company, "retired the notes and other obligations of the first "company, when the same were from time to time "demanded:" That the new company brought their business to a termination in December 1825; and "that, agreeably to account current, commencing said "2d August 1823 and ending 2d August 1831, be-"twixt the first and second Fife Banking Companies, "the first company was, at the last of these dates, "addebted and resting owing to the second company "the sum of 143,000*l.*;" and he therefore concluded against the first bank, and the partners thereof (including the respondents), for payment of the above sum.

The respondents admitted that Mr. Thomson was originally a partner of the company, but alleged that he

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had transferred his share, in the year 1822, to Mr. Ebenezer Anderson, the cashier and manager of the bank, who was received by the company, and admitted into Mr. Thomson's place.

It appeared that Mr. Thomson had been cautioner to the bank for a Mr. Gourlay, who became bankrupt in 1820, and that, on the 11th of October of that year, his agent wrote to Mr. Anderson in these terms:—"Mr. Thomson of Kinloch wishes to sell "his Fife Bank shares, on purpose to pay his obli- "gation to the bank for Mr. Gourlay. Will you get "a merchant for them, or shall I advertise them in the "newspapers?" And in a subsequent letter he wrote, begging to "know whether it is necessary by the con- "tract to make an offer of the stock to the directors "before it is advertised for sale; and if so, what was "the last selling price, as Mr. Thomson is willing "that the directors shall have it at that rate?" The stock was afterwards advertised for sale, and was purchased by Mr. Anderson in 1822, at the price of 200*l.* The respondents alleged that a formal deed of assignation was granted in his favour, of which they produced the scroll; but stated that Mr. Anderson had fled from Britain; and as the deed had been delivered to him, they could not make it forthcoming. This sum, it was stated, had not been paid to Thomson, but was placed to his credit in the bank books, in extinction pro tanto of the debt due by him to the bank. By this assignation, Anderson acquired right to the dividends from August 1821.

Besides Mr. Thomson's share, Anderson held another, acquired from a Mr. Reid, and the dividends were 12*l.* 10*s.* per share. The first dividend was payable on the 7th of October 1822; and of that date an entry

appeared in the books of the bank in these terms:— "1822, October 7.—Pd. Eb. Anderson for 2 - £25;" and there stood a marking on the margin opposite to to the entry in the following words:—"William Reid, "Andrew Thomson;" which, it was said, denoted that the shares had formerly belonged to these parties; but the appellant alleged that this marking had been made ex post facto. Again, on the 4th of October 1823, being the last year of the old concern, there was the following entry:—"1823, October 4.—E. Ander- "son, 2 - £25." These entries it was alleged meant to represent that Anderson was proprietor of the two shares. He had not been an original shareholder; and it was not alleged by the appellant that these dividends had been paid in respect of any other shares than those of Thomson and Reid. It also appeared, that posterior to the date of the assignation, and until the termination of the first contract, Thomson was not called to attend any meetings. His name was introduced into the new contract as one of the partners who had agreed to renew it, but it was not subscribed by him. It consisted of five pages, and was signed on each of these pages by Anderson; and on the fifth page, (but not on the others,) there appeared at the end of all the other signatures one in these terms:—"Eb. Ander- "son, assignee of Andrew Thomson."

On the other hand, the appellant stated, "that it "was provided, that if any partner inclines to sell or "transfer his share, he shall give notice of the intended "sale, and the person to whom he proposes to sell, "thirty days at least prior to a general meeting, of "which notice the cashier shall immediately advise the "whole partners by circular letters; and, at the following

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" general meeting, the intending purchaser must be " approved of by a majority of the meeting properly " authorized to vote, otherwise no sale can take place." It was also provided, that the shares should be accepted of by the purchaser " in presence of the directors, who " shall also sign the deed of acceptance, after being " authorized by the company;" and it was alleged that this rule had not been complied with; that the other partners were not made aware of the transfer, and had never consented to it; that the entries in the books were not such as to inform the company that the right had been acquired by Anderson; and it was not admitted that the deed of assignation ever existed. The appellant therefore pleaded,—1. That as the transfer had not been executed according to the terms of the contract, it was not available in a question with the company; 2, That there was no legal evidence of the transfer; and, 3, That at all events the respondents were liable for all debts prior to the date of the transfer.

The Lord Ordinary, on the 21st of January 1834, pronounced this interlocutor:—" Finds it proved, by " the documents produced or referred to, that the late " Andrew Thomson sold his share as a partner of the " first banking company, in the year 1822, to Eben- " ezer Anderson, the accountant and teller of that " bank, for the sum of 200*l.*, and that the share was " conveyed to him accordingly by a deed of assignation " granted by the seller; that the transfer of the share " was not executed in the form and according to the " rules prescribed by the contract of copartnery, but " that it was recognised, homologated, and acted upon " by the company, and in consequence became effectual " in a question with them, as well as in a question

" between the seller and purchaser; therefore, that the " late Andrew Thomson was not a partner of the com- " pany at the expiry of the contract in 1823; assoilzies " the defender, Charles Hunter, as trustee for Thom- " son's representatives, from the conclusions of this " action, and decerns, and finds him entitled to ex- " penses; reserving action to the pursuer, in competent " form, for any sum for which Thomson's representa- " tives may be liable in consequence of Thomson being " a partner of the company previous to the transfer of " his share in 1822."

His Lordship at the same time issued this note:—

" Though the contract of copartnery prescribes certain " forms, according to which shares shall be transferred, " the company might dispense with these forms, if they " thought fit." (East Lothian Bank v. Turnbull, 3d June 1824; Turnbull v. Allan and Scott, 1st March 1833.)*

" In the present case, it is proved that Thomson " sold his share to Anderson, and executed a deed of " assignation in his favour. The original deed is not " produced, Anderson having absconded; but sufficient " adminicles are produced to prove its tenor, which it " is not necessary to do in a substantive action to that " effect, the deed being founded upon in defence only, " and for various other reasons. (Moderator of the Synod of Merse and Tiviotdale v. Scott, 21st Nov. 1753.) †

" That the transfer was recognised and acted upon " by the company, is proved by their giving Thomson " credit in account for 200*l.*, being the price of the " share, and applying that share in extinction of a debt " due by him to the company,—by payment of divi-

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* 3 S. & D. 95., and 11 S. & D., 487. † Mor. 15823.

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" dends on that share to Anderson, as holder of it, on " various occasions, from the date of the transfer to the " expiry of the contract,—by entries in the company's " books to all these effects, ignorance of which the " partners are not entitled to plead,—by Anderson's " admission into the second company as the holder of " the share,—by his being permitted to sign the second " contract in that character, and to receive dividends " upon it from the second company,—and various " other circumstances mentioned in the pleadings; " Holding it clear that Thomson ceased to be a partner " of the first company at the date of the transfer, it " follows that the present action cannot be maintained " against his representatives, as liable for any debts " contracted by the company subsequently.

" It has been argued, however, that the defender is " liable for sums applied towards the extinction of " debts contracted by the company before Thomson " ceased to be a partner, and that both at common " law, and by the provision in the 13th article of the " contract; but the Lord Ordinary thinks that that " question cannot be competently raised under the " record which has been closed in this action. The " sum concluded for against the defender, rateably " with the other partners and their representatives, is " '143,005*l.* 0*s.* 10½*d.*, with interest, agreeably to an " 'account current, commencing the 2d of August 1823, " 'and ending 2d August 1831,' both periods being sub- " sequent to Thomson's retirement; and it is not set " forth in the summons, that any part of that sum was " applied in paying debts or satisfying obligations ex- " isting prior to 1823. Farther, it is set forth in the " 22d article of the pursuer's condescendence, as the

" sole medium concludendi, ' that the defenders are
" ' either, 1st, original partners of the first company,
" ' who remained so at the expiry of its contract, or
" ' the representatives or trustees of such partners; or,
" ' 2d, purchasers or assignees of the shares of original
" ' partners, who thus held shares and were partners
" ' at the expiry of the contract; or the representatives
" ' or trustees of such purchasers or assignees, and are
" ' the whole parties jointly and severally liable for the
" ' debt sued for in this action.' Lastly, there is no
" averment in the pursuer's condescendence, nor plea
" in law annexed to it, applicable to this separate
" ground of liability. If it was to be insisted in, the
" pursuer, in fairness to Thomson's representative,
" ought to have brought it out distinctly on the record,
" that a defence might have been stated against it,
" which has not been done. But as it may perhaps be
" competently tried in another shape, action has been
" reserved."

The appellant having reclaimed to the Court, their Lordships, on the 22d of May 1834, adhered.*

Drummond appealed, and attempted to establish that the facts on which the interlocutors were founded were either inaccurate, or not supported by proper evidence; and that, at all events, the facts were not such as to convey to them such knowledge as was necessary to give relevancy to the plea of homologation, in order to elide the stipulation in the contract as to the mode of transfer.

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* 12 S. & D., 620.

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The respondents, on the other hand, contended that the facts were proved by competent and satisfactory evidence, and that the circumstance of having paid the dividends to Anderson was conclusive evidence of the recognition of him as the assignee of Thomson.

LORD BROUGHAM.—My Lords, the inclination of my mind is, that the question rests entirely upon the validity of the deed of assignation; that it need not be proved by an action of proving the tenor, as it was set up by way of exception, and not by way of the foundation of the original suit. I agree that an action of proving the tenor is not necessary where a deed is only founded upon, as in this case, and where without any such deed the same matter might be shown otherwise; yet where there is the necessity of showing, in the first instance, the existence of the deed as the very fundamental principle upon which the party can alone proceed, the admission of secondary evidence is not competent. Now, I cannot see how the Lord Ordinary could, without the circumstance being established that the deed was ever executed, or was destroyed, found his judgment upon evidence which he considered sufficient to prove what the contents of that deed were. Be it so, that secondary evidence could be let in of its contents, as is here contended for, still it cannot be legally done here, unless it be proved in the first instance that the deed ever existed.

With that exception, I must say I have no great ground to quarrel with the judgment of Lord Corehouse. His Lordship's interlocutor is by no means an interlocutor drawn per incuriam. It is, on the con-

trary, a very laboriously constructed interlocutor. I thought so yesterday, and I am more of that opinion now. I am satisfied of that upon a very attentive view of the whole circumstances of the case. There may be some points upon which one cannot go along with it, but it is not so upon others; and therefore, although upon the whole matter I should be inclined to say I at present see nothing exceptionable, yet, as it is entirely a matter of fact, I should request of your Lordships that there should be some further delay, to look into it.

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His Lordship afterwards moved, and —

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors, so far as therein complained of, be and the same are hereby affirmed.

ANDREW M'CRAE—RICHARDSON and CONNELL, Solicitors.