are informed he could not assign the requisite number of days to take the proof continuously. If he was unable to give such a diet the pursuers were entitled to ask for a commission to have them examined; and I think they could not reasonably detain the four witnesses in question for so long a period as two months and ten days at their opponents' expense. In this case, therefore, having in view the time at which the action was raised, and the time when the witnesses became available for examination, I am of opinion that it is not reasonable to allow more than the expenses for a fortnight of the witnesses detained, and even this allowance would probably have been largely in excess of the expense of executing a commission. If this view be acted on, the amount to which the pursuers should be found entitled would be reduced to the sum of £45, 18s. 6d., which sum I think we ought to allow instead of the sum of £177, 16s. 8d. fixed by the Auditor.

The LORD JUSTICE-CLERK, LORD DUNDAS, and LORD GUTHRIE concurred.

The Court sustained the objection to the extent of allowing, in place of the sum of £177, 14s. 8d. objected to, the sum of £45, 18s. 6d.

Counsel for the Objectors—C. H. Brown. Agents—J. & J. Ross, W.S.

Counsel for the Clan Line Steamers, Limited—W. T. Watson. Agents—Webster, Will, & Co., W.S.

Wednesday, October 31.

SECOND DIVISION.

UNION BANK OF SCOTLAND LIMITED, PETITIONERS.

Company—Memorandum of Association—Objects of Company—Alteration of Constitution—Companies (Consolidation) Act 1908 (8 *Edw. VII, cap.* 69), *secs.* 9 *and* 264.

A bank, which was constituted by contract of copartnership, and was entitled to carry on business in the United Kingdom only, presented a petition under the Companies (Consolidation) Act 1908, secs. 9 and 264, for confirmation of a memorandum, with articles of association, to take the place of the contract of copartnery, and in the memorandum took, *inter alia*, power to extend the operations of its business to any part of the world, and also power to amalgamate the business of the company with other businesses. The Court *granted* these powers, but *refused* power to sell the undertaking and assets, and also a clause providing that objects expressed in any paragraph setting forth objects should not be limited by reference to any other paragraph or to the name and description of the company.

The Companies (Consolidation) Act 1908 (8 Edw. VII, cap 69) enacts—Section 9—"(1) Subject to the provision of this section a company may by special resolution alter the provisions of its memorandum with respect to the objects of the company, so far as may be required to enable it (*a*) to carry on its business more economically or more efficiently; or (*b*) to attain its main purpose by new or improved means; or (*c*) to enlarge or change the local area of its operations; or (*d*) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company; or (*e*) to restrict or abandon any of the objects specified in the memorandum. (2) The alteration shall not take effect until and except in so far as it is confirmed on petition by the Court. (3) Before confirming the alteration the Court must be satisfied (*a*) that sufficient notice has been given to every holder of debentures of the company, and to any persons or class of persons whose interests will, in the opinion of the Court, be affected by the alteration; and (*b*) that with respect to every creditor who in the opinion of the Court is entitled to object, and who signifies his objection in manner directed by the Court, either his consent to the alteration has been obtained, or his debt or claim has been discharged or has determined, or has been secured to the satisfaction of the Court: Provided that the Court may in the case of any person or class, for special reasons, dispense with the notice required by this section. (4) The Court may make an order confirming the alteration either wholly or in part, and on such terms and conditions as it thinks fit, and may make such order as to costs as it thinks proper. (5) The Court shall, in exercising its discretion under this section, have regard to the rights and interests of the members of the company or of any class of them, as well as to the rights and interests of the creditors, and may, if it thinks fit, adjourn the proceedings in order that an arrangement may be made to the satisfaction of the Court for the purchase of the interests of dissentient members; and may give such directions and make such orders as it may think expedient for facilitating or carrying into effect any such arrangement: Provided that no part of the capital of the company may be expended in any such purchase. (6) An office copy of the order confirming the alteration, together with a printed copy of the memorandum as altered, shall, within fifteen days from the date of the order, be delivered by the company to the Registrar of Companies, and he shall register the same, and shall certify the registration under his hand, and the certificate shall be conclusive evidence that all the requirements of this Act with respect to the alteration and the confirmation thereof have been complied with, and thenceforth the memorandum so altered shall be the memorandum of the company. The Court may by order at any time extend the time for the delivery of documents to the registrar under this section for such period as the Court may think proper. (7) If a company makes default in delivering to the Registrar of Companies any document required by this section to be

delivered to him, the company shall be liable to a fine not exceeding ten pounds for every day during which it is in default." Section 264—"(1) Subject to the provisions of this section a company registered in pursuance of this part of this Act may by special resolution alter the form of its constitution by substituting a memorandum and articles for a deed of settlement. (2) The provisions of this Act with respect to confirmation by the Court and registration of an alteration of the objects of a company shall so far as applicable apply to an alteration under this section, with the following modifications:—(*a*) There shall be substituted for the printed copy of the altered memorandum required to be delivered to the Registrar of Companies a printed copy of the substituted memorandum and articles; and (*b*) on the registration of the alteration being certified by the registrar the substituted memorandum and articles shall apply to the company in the same manner as if it were a company registered under this Act with that memorandum and those articles, and the company's deed of settlement shall cease to apply to the company. (3) An alteration under this section may be made either with or without any alteration of the objects of the company under this Act. (4) In this section the expression "deed of settlement" includes any contract of copartnery or other instrument constituting or regulating the company, not being an Act of Parliament, a royal charter, or letters-patent."

On 20th June 1917 the Union Bank of Scotland Limited, *petitioners*, presented a petition praying the Court to confirm certain proposed alterations in the substance and also in the form of their constitution. The petitioners were instituted as a joint-stock banking company by contract of copartnership in 1830, in terms of the Act 7 Geo. IV, cap. 67, under the name of the Glasgow Union Banking Company.

The *petition*, *inter alia*, set forth—"2. By article 44 of the contract power was given to the company in general meeting to alter, vary, or modify the clauses and conditions of the deed, and to the company or the directors to make such additional regulations as experience might suggest in the prosecution of the business, if consistent with the contract, provided that such regulations were thereafter submitted to the next general meeting of the company for approval or rejection. 3. The company from time to time exercised the powers conferred by article 44 and made alterations on the original contract. These alterations are detailed in the appendix to the copy contract produced. Reference is made specially to the amendments dated 11th May 1843, 14th May 1874, and 28th April 1875. On 11th May 1843 the name of the company was changed to the Union Bank of Scotland. Upon 4th September 1862 it was resolved that the company should be registered as an unlimited company under the Companies Act 1862, and this was duly done. On 2nd February 1882 it was resolved that the company be registered under the Companies Acts 1862-1880 as a limited company under the name of the Union Bank of Scotland Limited, and this was done on 3rd April 1882. . . . 5. The constitution and regulations of the Bank are embodied in the contract and in the amendments made thereon in terms of said article 44. Many of the regulations are cumbersome and inconvenient, and certain of the provisions of the contract have become obsolete. The Bank under these circumstances desires to substitute for the constitution of 1830 as amended from time to time a memorandum and articles of association in modern form under the provisions of the Companies (Consolidation) Act 1908. 6. Upon 25th April 1917 a special general meeting of the partners of the Bank was held in Glasgow, and the following resolution was passed unanimously as a special resolution:—'That the memorandum and articles of association submitted to this meeting, a printed copy of which has for the purposes of identification been docqueted and subscribed by the chairman of this meeting, be and the same are hereby approved, and that, pursuant to the provisions of the Companies (Consolidation) Act 1908, sections 9 and 264, the form of the company's constitution be altered by substituting the said memorandum and articles of association for the company's contract of copartnership, dated 10th March 1830 and subsequent dates, as altered, amended, and added to from time to time.' . . ."

The following clauses were, *inter alia*, set forth in the proposed memorandum of association, the words in italics being deleted, and the words within square brackets being added by amendment at the bar:—"Third. The *objects* for which the company is established are—(1) To carry on the business of banking in all or any of its branches, and to do all acts and things usual to be done in the prosecution of such business, or which may conduce or be calculated directly or indirectly to facilitate or render profitable the prosecution of such business, or may be calculated to promote the profitable employment or use of the assets of the company. . . . (14) To grant indemnities against loss and risks of all kinds, *provided that nothing in this memorandum contained shall empower the company to carry on assurance business within the meaning of the Assurance Companies Act* 1909. . . . (26) To amalgamate the company with or make arrangements for securing reciprocity of interests between the company and any other company or person having objects similar to the objects of the company or any of them, *or which may be calculated to advance the interests of the company or the development of its business or assets;* and that by the issue or sale to such other company or person of any of the shares or stock or debentures of the company, or by purchase of all or any of the shares or stock or debentures or other interest in the business of any such other company or person, or by an arrangement of the nature of partnership, or by an exchange of such stock, shares, debentures or interests, or by the sale of the whole or any part of the assets of the company for the time being, or by the purchase or acquisition of the whole or any part of the

assets of such other company or person, and to exchange any of the assets of the company for the time being for any other assets which the company is entitled to hold. . . . *(32) To sell or dispose of the whole or any part of the undertaking or assets of the company for such consideration as the company may think fit, and in particular for stock, shares, debentures, or securities of any other company.* . . . (34) To do all or any of the above things in any part of the world, and as principals, agents, contractors, trustees, or otherwise, and by or through trustees, agents, or otherwise, and either alone or in conjunction with others. (35) To do all such other things as are incidental or conducive to the attainment of the above objects. And it is hereby declared that in this memorandum [unless there be something in the context inconsistent therewith] words denoting the singular number only shall include the plural number, and *vice versa*; that the word 'company' except where used in reference to the company shall be deemed to include any partnership or other body of persons whether incorporated or unincorporated and whether domiciled in the United Kingdom or elsewhere; and *that the objects specified in each paragraph of this clause shall, except where otherwise expressed in such paragraph, be in no wise limited or restricted by reference to or inference from the terms of any other paragraph or the name or description of the company* [it is hereby further expressly provided and declared that nothing in this memorandum contained shall empower the company to carry on Assurance business within the meaning of the Assurance Companies Act 1909]. . . . Fourth. The liability of the members is limited. . . . Fifth. The share capital of the company is £5,000,000, divided into 100,000 shares of £50 each. [Not more than one-fifth of the nominal amount of each share shall be called up unless on the winding up of the Bank, and the remaining four-fifths shall not be capable of being called up except in the event and for the purpose of the company being wound up.]"

No answers were lodged to the petition.

On 3rd July 1917 the Court remitted the petition to William Smith, Esq., W.S., to inquire and report.

On 23rd October 1917 Mr Smith, *inter alia*, reported:—" . . . The case now appears to be properly brought, and so far as procedure is concerned your reporter is satisfied that it is regular. At this point it was strongly urged that the reporter should stop his investigations and report favourably on the granting of the prayer of the petition, on the footing that the Court, being satisfied with the regularity of the proceedings, could only grant confirmation. That was said to depend on section 9, subsections 3 and 5 (quoted in the petition). Sub-section 3 has been dealt with; all parties necessary are called, and no person has objected, but that does not affect the Court's right and duty of interference; sub-section 5 does not apply to the petitioning company as the shareholders are all of one 'class' and of one mind. The view of the petitioner seems to be founded on a dictum of Lord Chancellor Loreburn in *Poole* v. *The National Bank of China*, [1907] A.C. 236—'It is no part of the business of a court of justice to determine the wisdom of a course adopted by a company in the management of its own affairs.' This case has no resemblance to the present, and belongs to a different branch of company law, viz., questions arising between different 'classes' of shareholders. The reporter has been unable to adopt the suggestion made to him, and has proceeded with his inquiries.

"It is here that the real difficulty in this case begins. Your Lordships are asked to confirm (1) a change in the form of the constitution, viz., by the substitution of this memorandum and articles of association for the contract of copartnership, and (2) a change in the substance of the constitution, viz., by the substitution of the new powers contained in this memorandum for the previously existing powers; and in a sentence it will be seen how extensive the new powers are. The Bank is hereafter and for the first time not only to have power to carry on the business of banking all over the world, and to exercise the widest powers of investment, but also is to be allowed to carry on any business in which any of the company's debtors or customers may be engaged or interested (except assurance business) 'in any part of the world.' The reporter has to confess that he has been unable to find any case closely resembling the present.

"If in Scotland what may be called the subsidiary powers in a memorandum were to be read as in England, as merely ancillary to the leading power—and one of the Scottish cases (*London and Edinburgh Shipping Company, infra*) seems to lend some countenance to the idea—and if this memorandum were to be so read, perhaps some of the objections to the 'powers' might fall. But it is clear that this memorandum is not intended to be so read, for at the end of sub-clause (36) of clause 3 (the objects clause) there is this interpretation clause or rider added—'the objects specified in each paragraph of this clause shall, except where otherwise expressed in such paragraph' (and the exception is unimportant) 'be in no wise limited or restricted by reference to or inference from the terms of any other paragraph or the name or description of the company.'"

The petition came before the Second Division on 30th October 1917.

Argued for the petitioners—All the powers asked were within the statute and were necessary for the efficient working of the institution—and that was all that was required—*John Walker*, 1914 S.C. 280, 51 S.L.R. 246. The petitioners were within the requirements of the statute in asking that the geographical limits to the company's business be removed. This was necessary for the proper and efficient carrying on of the bank's business, as all banks now issued letters of credit to their agents in all parts of the world. The granting of such powers would merely constitute a recog-

nition of existing facts and would place the bank in a position to resist any possible challenge on that ground. In the case of the *London and Edinburgh Shipping Company, Limited*, 1909 S.C. 1, 46 S.L.R. 85, similar power had been granted. Power for the amalgamation with other businesses should also be granted for the same reason, although the authorities as to granting such a power varied. Counsel cited the following authorities—*Pool* v. *The National Bank of China*, [1907] A.C. 229; *Caldwell & Company, Limited* v. *Caldwell*, 1916 S.C. (H.L.) 120, 1915 S.C. 527, 53 S.L.R. 251, 52 S.L.R. 450; *Young's Paraffin Light and Mineral Oil Company, Limited*, (1894) 21 R. 384, 31 S.L.R. 303; *King Line, Limited*, (1902) 4 F. 504, 39 S.L.R. 337; *in re Mayfair Property Company*, [1898] 2 Ch. 28; *Scottish Employers' Liability and Accident Assurance Company, Limited*, (1896) 23 R. 1016, 33 S.L.R. 731; *Glasgow Tramway and Omnibus Company, Limited*, (1891) 18 R. 675, *per* Lord Kinnear at p. 682, 28 S.L.R. 467; *Stephens* v. *Mysore Reefs (Kangundy) Mining Company*, [1902] 1 Ch. 745; Palmer's Company Precedents, Part I., p. 1312; and section 247 of the Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69).

The Court, without giving opinions, pronounced the following interlocutor—

"Confirm the alteration of the form of the Bank's constitution by the substitution for the contract of copartnership of the memorandum and articles of association as amended at the bar, the amendments being shown thereon in red ink manuscript, and initialed by the petitioners' counsel; and confirm the alterations made with respect to the objects of the Bank contained in the said memorandum of association as amended, and decern: Direct that the print of memorandum and articles of association as amended be signed by the Clerk of Court, and order that the same shall remain in process."

Counsel for the Petitioners—Macmillan, K.C—Anderson, K.C.—Pitman. Agents—J. & F. Anderson, W.S.

Saturday, July 14.

SECOND DIVISION.

[Sheriff Court at Rothesay.

KELLY AND OTHERS (ANCIENT ORDER OF FORESTERS FRIENDLY SOCIETY'S TRUSTEES) *v.* PEACOCK AND OTHERS.

Friendly Society—Trust—Mora—Dissolution of Branch of Friendly Society without Consent of Central Body—Friendly Societies Act 1896 (59 *and* 60 *Vict. cap.* 25), *sec.* 78 (1) (*c*)—*Rules of the Ancient Order of Foresters Friendly Society.*

On 30th December 1912 a Court of the Ancient Order of Foresters Friendly Society wrote to the central body that it desired to dissolve, that it had the consent of five-sixths of its members, and the necessary form completed, and asking whether the consent of the central body was required, and, if so, how it was to be obtained. The reply came that no dissolution of a Court could be sanctioned, and reference was made to a provision in the general rules as to moneys not used for their particular purpose coming to the High Court Relief Fund. A correspondence followed, but no steps were taken to prevent the Court proceeding to dissolve, or to divide its funds amongst its members, which it did after giving definite notice to the central body. In August 1914, when the funds had been completely divided, the trustees of the central body raised an action to recover the moneys divided, against the Court's trustees, its officials, and the members of a committee of management.

Held, applying *Schultze and Another (Lees' Trustees)* v. *Dun*, 1913 S.C. (H.L.) 12, 50 S.L.R. 520, that the defenders' plea of *mora*, acquiescence, and taciturnity could be of no avail against the pursuers, who were acting as trustees; that as under the Rules and under section 78 (1) (*c*) of the Friendly Societies Act 1896 a dissolution of the Court required the consent of the central body, and that had not been obtained, the defenders were personally liable for the moneys they had divided; and that in the circumstances no distinction as to liability could be drawn between the individual defenders.

The Friendly Societies Act 1896 (59 and 60 Vict, cap. 25), section 78 (1), enacts—"Subject to the provision of this Act as to the dissolution of societies with branches, a registered society or branch may terminate or be dissolved in any of the following ways— . . . (*c*) as respects friendly societies or branches, by the consent of five-sixths in value of the members (including honorary members, if any) testified by their signature to the instrument of dissolution, and also by the written consent of every person receiving or entitled to receive any relief, annuity, or other benefit from the funds of the society or branch unless the claim of that person is first duly satisfied or adequate provision made for satisfying that claim, and in the case of a branch, with the consent of the central body of the society, or in accordance with the general rules of the society."

The *General Law* 29 of the Ancient Order of Foresters Friendly Society provides, section 4—"The account of each Court fund shall be kept separate and distinct; and any Court appropriating any portion of the sick and funeral fund for any other purpose than paying the sick and funeral allowances claimable under the Rules . . . shall forfeit the money so appropriated to the High Court Relief Fund, to be recovered by legal process as a penalty. . . ." Section 6—"No Court shall divide any of its funds or any part thereof, which shall be devoted solely to carry out the objects of the Order.