

PATRICK DAVIDSON, ET AL., . . . APPELLANTS.
 GEORGE TULLOCH, ET AL., . . . RESPONDENTS.

Transmission of Redress, and Responsibility, in cases of Fraud.—The maxim *Actio personalis moritur cum persona* does not hold always, if at all, in Scotland. Thus, where a deceased person has by a fraud occasioned pecuniary loss to another person also deceased, the representative of the wrongdoer must, in *quantum lucratus*, make compensation to the representative of the injured party.

1860.
 Feb. 20th, 21st,
 and 23rd.

Per the Lord Chancellor : If a delict occasions pecuniary loss, and the guilty party dies, the law of Scotland will give redress against his executor, if he be *lucratus*, that is, if he have assets ; p. 790.

Per Lord Brougham : The personal representatives are liable to be called upon to make good the damage sustained by the misconduct of those whom they represent so far as they have assets ; p. 795.

Per Lord Cranworth : It is the law of Scotland that if a wrongful act is fraudulently perpetrated, and if the person who has perpetrated that wrongful act dies, a right accrues to the party injured to go against the representatives of the wrongdoer for redress ; p. 795.

Per Lord Cranworth : If this principle of transmission is not adopted by the law of England, I am of opinion that the circumstance is much to be regretted ; p. 795.

Joint Stock Company—Ratification of Fraud.—Per the Lord Chancellor : There are frauds alleged here, and facts stated, which could not be ratified by the Company ; p. 792.

Per Lord Cranworth : The course of transactions alleged is such as no body of shareholders could sanction, even against a single absent shareholder ; p. 797 (a).

(a) See the next case.

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Per Lord Cranworth: In respect to any transaction which the body of shareholders could not ratify, there may be a right of action ; p. 797.

Allegation of Fraud.—Per the Lord Chancellor: I think we need look no further than the 19th Article of the Condescence, in which it is alleged that “relying on the truth of the foresaid reports, which were publicly made known and circulated by Mr. Davidson and his co-directors, the late Dr. Tulloch was induced to purchase shares in the bank ;” p. 791.

Measure of Damage.—Per the Lord Chancellor: The proper mode of measuring the damages is to ascertain the difference between the purchase money and what would have been a fair price to be paid for the shares in the circumstances of the Company at the time of the purchase ; p. 790.

The House does not correct verbal Defects in Issues.—Per Lord Cranworth: I think it would not be a proper course for this House to take, to be correcting merely verbal defects in issues, if they substantially raise the question which it is necessary should be raised for the justice of the case ; p. 797.

Unless there be an Order by the House the Suit proceeds below.—Per the Lord Chancellor: There having been no Order on the Appeal to this House, there was no stay of proceedings, and the Court below had a right under those circumstances to act as if no Appeal had been lodged ; p. 792.

THE Appellants were Patrick Davidson, Duncan Davidson, James Davidson, and Alexander Davidson, trustees, general disponees, and executors of their deceased father, Duncan Davidson, of Tillichetly and Inchmarlo, who in his lifetime had been Governor and Director of the Aberdeen Joint Stock Banking Company.

The Respondents were the Rev. George Tulloch and the Rev. Patrick Tulloch, executors dative of their deceased brother, Dr. Tulloch, a Professor of the

Aberdeen University, who in his lifetime had been a shareholder in the said bank.

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The questions were whether a deceit and fraud had been practised by the testator of the Davidsons on the testator of the Tullochs, and whether redress was demandable by the representatives of the injured individual against the representatives of the supposed wrong-doer; both the alleged delinquent and the alleged sufferer having prior to the suit sunk into the grave. The action commenced with the Tullochs' summons of the 6th May 1857, praying a decree against the Davidsons for payment back to the Tullochs, as executors of Professor Tulloch, of 1,910*l.*, the price which had been paid by him in 1834 for ten shares of the Joint Stock Banking Company aforesaid, with interest thereon; and also the sum of 250*l.*, with interest, being the amount of calls made on the Professor, which he had satisfied. The summons further concluded for payment of 3,000*l.* in name of damages by reason of the loss alleged to have been sustained by him in the premises.

The following were the pleas in law for the Tullochs:—

1. The late Dr. Tulloch having been induced to purchase the stock held by him in the bank in question, and to pay the call thereon, in consequence of false and fraudulent representations made by the late Mr. Davidson, the Pursuers are entitled to recover from the Defenders, as Mr. Davidson's representatives, the amount which was in consequence expended and lost, with interest thereon.

2. At all events, the Pursuers are entitled to recover from the Defenders the amount of loss and damages sustained by the late Dr. Tulloch, in consequence of the culpable and fraudulent violation of duty as director on the part of Mr. Davidson, in misapplying the funds of the Company and otherwise.

3. *Separatim*. The Pursuers are entitled to recover from the Defenders the amount of loss and damage sustained by the late Dr. Tulloch in consequence of the false and fraudulent misrepresentations and concealment of the Company's affairs on the part of Mr. Davidson, posterior to the time when Dr. Tulloch became a shareholder of the Company.

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The following were the pleas in law for the Davidsons :—

1. The Pursuers' statements are irrelevant and insufficient to support the conclusions of the summons, and no good ground of action is stated.

2. The Defenders, as executors and representatives of the deceased Mr. Duncan Davidson, are not liable to the Pursuers in respect of alleged fraud and delinquency of the said deceased, as set forth in the summons, and the summons discloses no good ground or cause of action against them as such executors and representatives.

3. The other directors of the bank, who were parties to the alleged acts and proceedings upon which the action is founded, or their representatives, ought to have been called as Defenders.

4. The Pursuers have no title to pursue the Defenders for the losses, or for any part of the losses, sustained by the bank, or for any damage suffered by the deceased Dr. Tulloch by depreciation in the value of his shares or otherwise, in consequence of such losses.

5. At all events, the Defenders cannot be made responsible for any losses sustained by the bank, which were not caused by the misconduct of the late Mr. Davidson.

6. The Pursuers' averments being untrue in point of fact, the conclusions of the action are untenable.

The following was the judgment of the *Lord Ordinary*, to which the Second Division of the Court of Session adhered :—

“*2nd March 1858.*—The Lord Ordinary having heard parties' procurators, and made avizandum, repels the second, third, and fourth pleas in law for the Defenders (*a*), in so far as these are directed—first, against the liability of the representatives of the deceased Mr. Duncan Davidson, for reparation of loss alleged to have been incurred by the Pursuers in respect of alleged fraud and delinquency of the deceased; second, against the action proceeding without the other directors of the bank, parties to the alleged acts on which the action is founded, or their representatives, being called as Defenders; and, third, against the title of the Pursuers to sue the Defenders, as concluded for in the summons. And, as regards the first plea in law for the Defenders, Finds that the Pursuers have averred on record matter relevant to entitle them to obtain issues in order to a trial of the cause: Orders the case to the roll, that parties may be heard on the adjustment of the issues which have been proposed by the Pursuers.”

(*a*) The Davidsons.

Thereafter the Second Division approved of the following issues for trying the cause :—

“1. Whether, on or about the 3rd October 1834, the late Dr. Tulloch was induced to purchase ten shares of 100*l.* each of the stock of the Banking Company at Aberdeen, at the price of 1,910*l.*, by false and fraudulent representations made by the deceased Duncan Davidson, and other persons acting along with him as directors of the said Banking Company, in regard to the affairs thereof, to his loss, injury, and damage ?

“Amount claimed (1) 1,910*l.*, being the price paid for said shares, and interest since 3rd October 1834 ; and (2) 250*l.*, being the amount of a call paid on said shares, with interest of first instalment of 125*l.* thereof, from 3rd May 1843, and interest of remaining instalment of 125*l.* thereof from 4th December 1843, under deduction of the dividends received by Dr. Tulloch.

“2. Whether the said Duncan Davidson, while a director of the said Banking Company, and others acting along with him as directors thereof, did fraudulently, and in violation of their duties as directors, make large advances out of the funds of the said Banking Company to Mr. William Pirie, manufacturer in Aberdeen, Mr. Patrick Pirie, senior, manufacturer there, Mr. Alexander Bannerman, Messrs. Thomas Bannerman and Company, and Messrs. Milne, Cruden, and Company, all merchants there, or to any of these parties, knowing or having reason to believe that the same would not be repaid, whereby the value of the shares of the stock of the said company held by the late Dr. Tulloch was destroyed, or greatly depreciated, to his loss, injury, and damage ?

“Damages claimed, 3,000*l.*”

“3. Whether the said Duncan Davidson, while a director of the said Banking Company, and others acting along with him as directors thereof, did fraudulently, and in violation of their duties as directors, misrepresent and conceal from the shareholders the true state of the Bank's affairs subsequent to 3rd October 1834, whereby the late Dr. Tulloch was deprived of the means of bringing about a dissolution of the said Banking Company, and of otherwise preventing or alleviating the depreciation of the value of the stock of said Company, to his loss, injury, and damage as holder of certain shares thereof ?

“Damages claimed, 3,000*l.*”

In support of the Appeal the *Attorney-General* (a), Mr. *Roundell Palmer*, and Mr. *Montague Smith*.

(a) Sir Richard Bethell.

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This case was unexampled. The transaction challenged is alleged to have taken place so far back as 1834, and the action is commenced when both the original parties to it have departed from the scene. The maxim *Actio personalis moritur cum personá* has been entirely overlooked. To ground a demand of this description, the representation relied upon must have been with the express intent to produce the contract. But this is an action by a single shareholder seeking redress for acts done by the entire Company, or which is the same thing, by their Directors. Such a proceeding would not be allowed in this country, and in this respect the laws of the two countries are not different; *Freeman v. Cooke* (a), *North of Scotland Banking Company v. Thomson* (b), *Burns v. Pennel* (c), *National Exchange Company of Glasgow v. Drew* (d), *Randall v. Herrington* (e), *Irvine v. Kirkpatrick* (f), *Gordon v. Douglas* (g), *Barclay v. Lawrie* (h).

Mr. Rolt and Mr. Anderson for the Respondents. There is nothing in the law of Scotland to prevent a single shareholder from suing, and there is no obligation upon him to make all the directors Defenders. Thus in *Leslie v. Lumsden* (i), which strongly resembled the present case, a single shareholder was allowed to sue without making the shareholders or the Company parties to the action, and it was held that the Pursuer might proceed against one or more of the directors as he might think fit. This is the law of Scotland, and it justifies the present claim, which is not to be defeated by precedents borrowed

(a) 2 Excheq. 654.

(b) 1 Stuart Milne, 904.

(c) 6 Bell, App. Ca. 541.

(d) 2 Macq. Rep. 103.

* (e) 10 Ves. 427.

(f) 7 Bell, App. Ca. 237.

(g) 3 Paton, 428.

(h) 19 Sec. Ser. 488.

(i) 14 Sec. Ser. 213.

from the law of England. The maxim *Actio personalis moritur cum personâ* is not a maxim of the law of Scotland ; neither is it a maxim of good sense.

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The LORD CHANCELLOR (a) :

*Lord Chancellor's
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My Lords, I see very great difficulties which must be encountered in the trial of this case, and I rejoice that I shall not be the judge to preside on the occasion ; but what we have to consider is whether on the pleadings there is a sufficient cause of action alleged ; and, then, whether there is any answer to that cause of action.

Now there are two causes of action alleged :—First, with respect to the original purchase of the shares ; and secondly, with respect to the misconduct of Davidson, one of the directors, *after* these shares had been purchased and while Dr. Tulloch was a shareholder.

With regard to the first cause of action—the original purchase of the shares,—if the Pursuers had sought to disaffirm the contract, and to recover back the purchase money, I should have held that the action was not maintainable, because a contract tainted by fraud is not necessarily void ; it is voidable and it may be rendered void, but that must be as soon as the party defrauded knows of the fraud, and while he can restore things to the situation they were in before the fraud was perpetrated. Here Dr. Tulloch continued for years as a shareholder, receiving dividends and acting as a shareholder.

But, my Lords, when we come to see the exact manner in which the case is alleged, I am of opinion that it is alleged in such a manner that the action is maintainable, because the gist of it is this, that Davidson, now deceased, by false and fraudulent misrepresentations induced Dr. Tulloch to buy his shares,

(a) Lord Campbell.

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whereby he was injured. He bought shares not of the Company, but of a third person ; and there was a binding contract between them, and that contract stands ; that is sufficiently alleged.

But then comes the manner in which the damages are calculated. That cannot be supported, because the damages are calculated as if Davidson was obliged to take the shares off the hands of Tulloch and to place him in the same situation as he would have been in if he had never been a shareholder ; for that loss is calculated upon what took place after Dr. Tulloch was shareholder and during the many years that elapsed before the company was wound up. That cannot be the proper mode of calculating the damages.

The proper mode of measuring the damages is to ascertain the difference between the purchase money and what would have been a fair price to be paid for the shares in the circumstances of the Company at the time of the purchase ; and that may be made the measure of damages if a trial shall take place.

We come then to consider whether, Dr. Tulloch having died, and this being an action against executors, the action can be maintained, for that seems to be the only bar to the action that we can now take notice of. The delay was very properly held to be no bar to the action ; it is merely a reason for looking more critically at the allegations. Now the law on this subject, by which we must be governed, is the law of Scotland ; and I must say that it has been proved even to demonstration that this is the law of Scotland,—that if by a delict there is a pecuniary loss occasioned, and the party dies who was guilty of that fraudulent misrepresentation, an action lies against his executor, if the executor is *lucratus*, that is, if he has assets.

There was some uncertainty at first introduced into

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the argument by that word *lucratus*—it was supposed that that might mean that merely the party who was guilty of the fraud was *lucratus*; but that was explained satisfactorily by Mr. *Anderson*, and was shown also to mean an executor who has assets in his hands of a person who has made himself liable by a wrongful interference with the property of the person complaining. That being so, my Lords, the action lies against executors just as much as if it had been brought against Mr. Davidson himself. So much for the first objection as to the relevancy.

Then the second objection is (and I think it is confined to this objection now) that there is no sufficient allegation that this false statement was made, so as reasonably to be supposed to have induced Dr. Tulloch to buy the shares. I think we need look no further than the 19th Article of the Condescence, in which it is alleged that “relying on the truth of the foresaid reports, which were publicly made known and circulated by Mr. Davidson and his co-directors, the late Dr. Tulloch was induced to purchase shares in the bank.” What is the natural meaning to be ascribed to those words? Clearly that these were false reports of the circumstances of the Company; and that those reports were printed and that they were circulated in Aberdeen, and so were made public by the Defendant and those who were acting in concert with him; and that Dr. Tulloch reading those reports thought this was a very flourishing concern; that it would be a good investment for him, and that he went in and bought the shares, and so became and since continued a member of the Company.

Then arises the question as to whether the action can be maintained by an individual shareholder and ought not to be brought by the Company. On looking at the allegations they show a concurrence of *damnum*

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cum injuriâ, primâ facie therefore an action lies. It would be incumbent on the other side to show that an action cannot be maintained by the party who is injured. Now, my Lords, no authority has been brought forward on that subject; but, on the contrary, we have the authority of the Court of Session in *Leslie v. Lumsden* (a), which is precisely the same case as the present. It is not binding on us, but it is a decision of the Court of Session pronounced a number of years ago, which was not appealed from, but which has been acquiesced in and treated as law from that time to this. If nothing were alleged here as done by Davidson and his co-directors but what the general meeting of the shareholders might have ratified, there might have been strong reason to suppose that, according to the English authorities and what is understood to be the practice in this part of the kingdom, an action might be brought by the Company, but could not be brought by an individual shareholder. But, my Lords, there are frauds here alleged not merely by lending money to insolvent persons, but by systematically making false reports and declaring false dividends that were not justified by the real state of the Company. There are allegations of fraud here, and facts stated which could not be ratified by the Company, and which therefore rendered the cases which are relied upon on the part of the Appellant not at all applicable.

That being so, it seems to me that the action is maintainable, because this form of action applies equally to a representative as to the person himself.

My Lords, with respect to drawing up the issues, I apprehend the Court below proceeded with perfect regularity. There having been no order on the Appeal to this House there was no stay of proceedings, and

(a) 17th Dec. 1851; 14 Sec. Ser. 213.

the Court below had a right under those circumstances to act as if no Appeal had been lodged (*a*).

• With regard to the form of the issues, I think it is said now on the part of the Appellants that they are indifferent respecting the form of them. The first and second issues seem to me to be perfectly unexceptionable. As to the third, both sides seem to be agreed. I do not think that it is our duty to interfere, although that third issue certainly is an issue as to which I do not at present see how it can ever be practically brought to a satisfactory termination.

Upon the whole, therefore, I advise your Lordships that the Appeal be dismissed with costs.

Lord BROUGHAM :

My Lords, I entirely agree with my noble and learned friend, and among the other remarks which he has made, I particularly agree in one, in expressing my great satisfaction that I have not to try these issues, whether re-formed or not ; for I think whoever has to try this question, as far as regards the mode and the manner and measure of the compensation in damages, will have a very difficult task to perform.

But, my Lords, for us the only question is, Does the action lie? And I consider it to be quite clear that the 19th Article of the Condescence (other Articles also may be taken into account) does set out a distinct and valid ground of action—it alleges frauds committed during a series of years, a constant paying of profits out of capital, pretending that they were paid out of profits, where the parties making those payments had

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(*a*) An Appeal had been presented to the House, but a counter petition having been presented praying that the Appeal might not be received, no order of service issued ; consequently the Court below proceeded as if no Appeal had been lodged.

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entire knowledge of the state of the concern, and kept that knowledge to themselves, and gave a false representation of the state of the concern. And it is also distinctly alleged that the party who is said to be damnified by their conduct was wholly ignorant of these matters, and that relying on that state of the concern, relying on the value attached to these shares by these fraudulent representations, and this fraudulent conduct on the part of Davidson and the other directors, he was induced to purchase shares, and was damnified by that purchase.

My noble and learned friend has stated what is undoubtedly correct, that the mode which is adopted here of setting forth or estimating the damages is not the correct one; but he has stated what the correct one is, namely, to claim the difference between what Dr. Tulloch paid for the shares and the fictitious value which the shares had acquired by the fraudulent conduct of Davidson and his co-directors. The difference between what he paid, and what, in the circumstances of the case, the real value of the shares was, is the amount of damage which he sustained, and no greater amount can he recover. I do not go into the other allegation of his being induced by the false and fraudulent misrepresentations to pay a call which came afterwards; that it is unnecessary to go into; but that this amounts to a valid allegation of conduct on the part of the Defenders whereby the Pursuer was damnified, I have no manner of doubt, any more than has my noble and learned friend.

As to the issues, I think to the first two there can be no kind of objection; as to the third, I take it for granted that the Respondents who desire to have the matter tried can have no objection that it should be so far re-formed as to meet the objection which has been made to it. I, therefore, agree with my noble and

learned friend in recommending your Lordships to dismiss this Appeal.

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Before I conclude, however, there is one thing I beg leave to say,—I entirely agree with my noble and learned friend that it has been clearly and distinctly made out by the authorities cited, and it is fit that it should be mentioned in order that it may be seen that there is no difference among us on that point, that in the circumstances of this case the action transmits to the executors, transmits to the personal representatives, they being liable to make good the damage sustained by the misconduct of those of the parties whom they represent as far as they have assets. It is quite clear that the law of Scotland makes this undoubted provision for the remedy of parties who have been injured by the wrongous proceeding of a deceased party ; if that proceeding pecuniarily damages, as they call it patrimonially damnifies, the party who sues, the action transmits against the Pursuer's representative, as far as he has assets in his hands.

Lord CRANWORTH :

*Lord Cranworth's
opinion.*

My Lords, with respect to the last point to which my noble and learned friend has just adverted, I must say that I think the decision at which your Lordships are arriving is not only in conformity with the law of Scotland, but is in conformity with what good sense and justice requires. My Lords, I entirely concur with the argument of Mr. *Rolt* that if the principle, of transmission is not adopted in our system of law, the circumstance is much to be regretted ; but I am glad to be able to find, as we do on the authorities to which we have been referred in this case, which are not numerous, that we are warranted in saying that unquestionably it is the law of Scotland that if a wrongful act is fraudulently perpetrated to the injury

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of my property, and if the person who has perpetrated that wrongful act dies, I have a right to go against his representatives for redress.

The first point on which the Appellants complain at your Lordships' bar is with regard to so much of the summons of Dr. Tulloch as complains that he was led in 1834 to purchase these shares by false representations. I think that has been completely cleared up and explained. It was not, as I was led to suppose in the opening, that there was an attempt to upset that purchase; that would have been impossible, because the sellers were not before your Lordships; but on looking at the course of proceedings and at the issues as finally directed, I observe that there is no issue directed to any such result. The only question is whether Dr. Tulloch or his representative is not entitled to recover damages by reason of his having been wrongfully induced to give for these shares what he would not have given had the truth been disclosed to him, or rather, had not falsehoods been pressed upon him. That is not a part of the case upon which I have ever had any doubt. The doubt I have had has been upon the point whether Dr. Tulloch, as an individual shareholder, was entitled to maintain this action with respect to frauds that were perpetrated during the time he was a shareholder. On that subject I do not believe there can be any difference in principle between the law of Scotland and the law of England, and I take that principle to be clearly and well enunciated by stating that in respect to any transaction which the body of shareholders could not sanction, there may be a right of action; but that in respect to any transaction which they could sanction, although the directors might not have been justified in what they were doing, there could be no right of action — that the remedy must be of a different nature.

The question, therefore, really is *this*, Whether the acts alleged to have been perpetrated by Davidson and the other directors come within the one class or the other? If there had been nothing alleged against the directors but that they had advanced money (even putting in the word "fraudulently") for the benefit of persons with whom they or some of them were associated, and whom they wished to assist, I should have been very reluctant indeed to hold that that was not an act which the body at large might not have sanctioned; for in truth it amounts to no more than this, an improvident and improper advance of funds. But, my Lords, there are allegations on the face of the condescendence of acts done by the directors which no body of shareholders could have sanctioned against a single dissentient. No body of shareholders could authorize their directors to put forward and to represent to the shareholders who were not parties to such an arrangement, false accounts of the different transactions in which they were engaged, and to pretend that dividends were payable year after year out of profits when in truth they were paid only by sinking the capital. That is a course of transactions which no body of shareholders could sanction, even against a single shareholder who might have been absent when such an attempt to sanction it was made. It is quite clear to my mind that this was an injury to each individual shareholder who was or might have been deceived by the false representations so put forward. I therefore think, my Lords, on both grounds that the action is maintainable.

With respect to the form of the issues, I regret that they are framed so loosely; but I think it would not be a proper course for this House to take, to be correcting merely verbal defects in issues if they substantially raise the question which it is necessary should be raised

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for the justice of the case ; that is not the proper function of this House ; and I think, looking at these issues, that although they are not drawn up in the mode in which, if I had been framing the issues, I should have drawn them up, or in the mode in which, if more experienced pleaders than myself had drawn them, they would have framed them, still I think they all do raise the substantial point in question. And I must observe that whatever difficulties there will be in the trial of the third issue, if the parties are not wise enough to abandon the third issue, which I think they had much better do, the difficulties are difficulties not arising from the form of the issue but from the substance of it. There will be exactly the same difficulties in whatever way you frame it, because the question is, whether from the course of dealing throughout the whole of the partnership Dr. Tulloch was not lulled to sleep, and led not to take the steps for bettering his condition which if the real state of things had been disclosed to him he would probably have taken. To the substance of the issue I think the Respondents were entitled, and consequently the Interlocutors affirming the issues ought not to be interfered with.

*Interlocutors affirmed, and Appeals dismissed
 with costs.*

LOCH AND MACLAURIN—DODDS AND GREIG.

NOTE.

A request (entitled to the greatest attention as springing from the most amiable motives) has been sent to us, begging of us to say, that “the whole statements in this case imputing personal fraud to the late Mr. Davidson having been withdrawn and departed from, the action was amicably arranged without proceeding to a jury trial.”