JUNE 22, 1865.

ROBERT LUMSDEN and Others (Liquidators of the Western Bank), *Appellants, v.* WALTER BUCHANAN and Others (Brown's Trustees), *Respondents.*

Trust—Joint Stock Company—Liability of Trustees who invest Trust funds in shares—*By the copartnership deed of the Western Banking Co. it was provided that shareholders should proportionally be entitled to the profit, and liable to the loss incident to the business of the bank, and they bound their heirs, executors, and administrators, to free and relieve each other of debts and obligations of the company. B. and others, being trustees of E., and authorized to invest trust funds in a bank, took shares in the Western Bank, signing the deed as individuals, but adding the words "trustees of E," and they were entered as individuals (with the description added of trustees) in the register, and were described and treated as trustees in letters, notices, etc., sent from the Western Bank. There was no express stipulation in the deed that B. and his co-trustees should be liable only to the extent of their trust estate.*

HELD (reversing judgment), *That when B. and his co-trustees invested their trust funds in shares of the Western Bank, which was a trading concern, they became personally liable, not only to the creditors, but in questions of contribution* inter se; *and if they had wished to limit their liability to the extent of the trust estate, they could only have done so by an express contract with all the other partners and with the creditors.* (LORD KINGSDOWN hæsitante.)[1]

The liquidator of the Western Bank appealed against the interlocutor whereby it was held, that Walter Buchanan and others, the trustees of Mrs. Ellen Brown, were not personally liable to contribute to the calls made by the liquidator beyond the extent of their trust funds.

The deed of copartnership, which was subscribed by the trustees, (adding the words "trustees for Mrs. Ellen Brown,") contained the following clauses :—

"And they, the said parties, do not only hereby severally bind and oblige themselves, and their respective heirs, executors, and successors, to exert their utmost diligence in furthering and promoting the interests and prosperity of the company, but they do also hereby mutually resolve and agree, that the said company shall be conducted, and the business thereof prosecuted, upon the terms and conditions, and subject to the regulations and provisions, after mentioned.

Third. . . . According to which share or shares, so belonging to the parties as aforesaid, they shall proportionally be entitled to such profit, and shall, in like manner, be liable for such loss, as shall be consequent upon the prosecution of the business of the company; and to which extent, *pro ratâ*, they shall be bound, and hereby bind and oblige themselves and their foresaids, respectively, to free and relieve each other of the whole debts, obligations, and engagements of the company.

Fifth. . . . Declaring also, that every party, who shall dispose of his share or shares of the company's stock, agreeably to the regulations herein before and after written, or who shall cease to have an interest in the concern, through forfeiture or otherwise in terms hereof, shall be entitled to relief of the whole debts owing by the company, and of all obligations granted for the same, and, in general, of every prestation incumbent on him as a partner of the company; and the other partners shall be bound, as they hereby bind and oblige themselves, and their foresaids respectively, to relieve him, his heirs and successors, of the same: Declaring further, that the party or parties acquiring the share or shares so disposed of, or otherwise coming in right of the party or parties so ceasing to have interest, shall have no claim whatever against the other partners of the company, for relief from any of the debts and obligations contracted by the company, whether prior or posterior to the period of such party or parties becoming partners; but that he or they shall take and assume the precise place and liability of his or their author, ancestor, or other cedent, and become subject to all the obligations incumbent upon him.

Eleventh. . . . And it is hereby provided, that the said deeds of conveyance, or assignment, together with every conveyance of shares in security, or *mortis causa*, and confirmations thereof, by right of succession, or an abstract thereof, shall, after being executed and completed, be recorded in a proper book or books to be kept for that purpose, by the company, under the

[1] See previous report 2 Macph. 89 : 36 Sc. Jur. 346. S.C. 4 Macq. Ap. 950 : 3 Macph. H. L. 89 : 37 Sc. Jur. 516.

immediate inspection of the secretary of the company, and, failing him, of such officer or officers of the company as shall be appointed by the said directors for that purpose, which officers shall likewise mark or endorse a certificate of the registration of such sale, transfer, or succession, upon the same, which shall then be returned to those having right; and it is hereby declared, that the production of such conveyances *mortis causâ*, or confirmations, to the said ordinary directors, for the purpose of registration, shall, *ipso facto*, infer the acceptance of the capital stock therein specified, and the liability of the parties having right to the same, as partners of the company, in like manner and to the same extent as is specified in the form, above inserted, of an assignation *inter vivos;* but it is hereby expressly declared, that no purchaser, or other assignee of, or successor to, shares so acquired, shall be recognized as a partner, until the writing, constituting his title as aforesaid, is recorded, in the books of the company, in manner above specified."

The trustees of Mrs. Brown purchased, in 1846, 60 shares with their trust funds. They signed the deed of accession, which was equivalent to signing the deed of copartnership in their individual names, but added the words "trustees for Mrs. Ellen Brown." In the stock ledger their individual names were entered with the addition, "trustees of Mrs. Ellen Brown." The same was the case in the register of shareholders.

The *Attorney General* (Palmer), *Rolt* Q.C., *Sir H. Cairns*, and *Murray*, for the appellants.—The Court below mistook the general rule which applied to the present case. The general rule is, that trustees who invest their trust funds in a trading partnership, make themselves personally liable to the same extent as the other partners, not only as regards the creditors of the partnership, but also *inter se;* and it requires some special words and stipulations to qualify this *primâ facie* absolute liability. To hold that trustees so becoming partners are liable only to the extent of the trust funds, which means a limited liability, while the other partners are liable without limit, leads to absurdity. In the first place, this being a trading company, established under the terms of their deed, there was no power in the directors of the bank, as these are declared by the deed of copartnership, to admit some of the shareholders on the exceptional terms of limited liability. There is no power to introduce any inequality into the terms of the contract; otherwise all the other partners might at their will and pleasure transfer their shares to trustees having limited liability. The deed of copartnership can only be interpreted consistently with the notion, that the partners are all in one class, and on the same footing of equality. All the clauses point to this state of equality, and none are inconsistent with that fundamental principle. By signing the deed of accession, the trustees became partners of the trading concern on the same footing as other individuals. The clause providing power to the directors to put a veto on the transfer of shares, was meant only to secure to the directors the first offer of the shares, and not for any purpose which is consistent with limited liability in some partners. The form of the certificate, adapted to meet the case of an executor of a deceased shareholder continuing to hold the shares, also shews that such executor was not to be privileged, or to be subject only to limited liability. Then if the deed of copartnership contemplate only one class of liability, viz. absolute liability of the partners, was there anything in the peculiar form of execution of this deed by the respondents which exempted them from personal liability, or qualified this *primâ facie* unlimited liability? No such words in the deed can be found. It is true the respondents describe themselves in the deed of accession as trustees, but that is immaterial, and mere matter of description adopted for brevity, and to earmark the shares, not entering into the substance of the engagement, or qualifying their personal liability. The important thing is, that the deed expressly binds all those who subscribe the deed, "and their respective heirs, executors, and successors." This is the most stringent form that could be adopted of binding the parties personally. The form of certificate of registration shews; that no distinction is made between trustees and any other individuals signing the contract or purchasing shares.

[LORD CHANCELLOR.—If the trustees had invested the trust funds in shares, and there had been no power in the trust deed authorizing the investment, what would be the effect of their signing the deeds?]

It would make them clearly partners, and justly so, because it is their duty to know, whether their trust deed is or is not repugnant to the contract they enter into.

If these trustees had, instead of joining another bank as partners, set up a bank of their own, they would have been liable personally to their last shilling to the creditors. There can be no difference merely because they joined others in carrying on the bank.

The Judges in Scotland say, that if the trustees so express their contract, they may make themselves personally liable; but they mistake that for the exception, which is in fact the rule. It lies on the trustees, if they wish not to bind themselves personally, to take care so to express the contract as to leave no doubt on that point.

The general rule, that a trustee investing trust moneys in a trading concern incurs an absolute personal liability, is well settled—*Wightman* v. *Townroe*, 1 M. & S. 412; *Ex p. Garland*, 10 Ves. 110; *Ex p. Richardson*, 3 Madd. 138; *Labouchere* v. *Tupper*, 11 Moore, Pr. C.C. 198; *Re Spence*, 17 Beav. 203; *Fenwick's Case*, 1 De G. & Sm. 557; *Ex p. Blakeley*, 3 Mac. & G. 726; *Hall's Case*, 1 Mac. & G. 307; *Davidson's Case*, 3 De G. & Sm. 21; *Armstrong* v. *Burnett*,

20 Beav. 434; *Hoare's Case*, 2 J. & H. 229; *Ex p. Barrett*, 33 L. J. Ch. 617; *Preston* v. *Grand Colliery Co.*, 11 Sim. 346. The cases in Scotland do not materially differ—*Higgins* v. *Livingston*, 6 Paton, App. 259; *Thomson* v. *Maclaughlan*, 7 S. 787; *Eaton* v. *Macgregor*, 15 S. 1012; *Gordon* v. *Campbell*, 1 Bell, Ap. 428.

In ordinary contracts entered into by trustees, they are liable precisely like other individuals contracting, even though everybody knows they are acting as trustees at the time—*Jeffrey* v. *Brown*, 1 S. 102; 2 Sh. App. 349; *Thomas* v. *Walker*, 11 S. 162; *Fairlie* v. *Neilson*, 1 S. 222; *Marquis of Abercorn* v. *Grieve*, 14 S. 168. So trustees litigating with others are liable personally for the expenses—*Robertson* v. *Morrison*, 2 S. 553; *Scott* v. *Pattison*, 5 S. 172; *Gibson* v. *Pearson*, 11 S. 656; *Wylie* v. *Smith*, 13 S. 40; *Sandeman* v. *Shepherd*, 15 S. 416; *Torbett* v. *Borthwick*, 11 D. 694.

In both countries the reason of the rule is, that trustees must take the risk of the trust estate not being sufficient to satisfy the expenses and incidents of the contract entered into, for they have the best information on the subject.

It is said, that Bell (1 Com., p. 39, 5th ed.) and Menzies (Lect. p. 202) lay down the doctrine as contended for by the respondent, but those authors do not support the proposition, nor do the authorities they rely upon.

As to Buchanan, he knew his name was inserted in the bank register and in the certificate, and that the co-trustees signed the deed for him as well as themselves — *Hoare's Case*, 2 J. & H. 229.

The *Lord Advocate* (Moncreiff), *Gifford* Q.C., and *A. S. Kinnear*, for the respondents.—The law of Scotland seems to differ from the law of England on this subject, and may be stated in the following propositions :—1. The whole estate vests in the trustees, and there is no equitable estate in any one else.

[LORD CHANCELLOR.—Do you mean the whole *dominium* vests in the trustees ?]

Yes. Nothing remains in the granter of the trust corresponding to what is called in England an equitable estate. A *jus crediti*, no doubt, exists in the beneficiary; but the whole estate, subject only to the conditions of the trust, goes to the trustees. 2. The trust right does not descend to the executors, but goes to the surviving trustees in the first place, and if all the trustees fail, then the trust lapses, and the Court appoints a judicial factor—*Smith*, 10 S. 531; *Sheriff* v. *Boyd*, 7 S. 314. The executor of a trustee can, therefore, take no part of the estate—2 Shand, Pract. 995. 3. The obligations entered into by the trustees, within the powers of the trust deed, bind the trust estate, but they do not bind the trustees themselves. There can be no relation between the trustees and beneficiary in the nature of indemnity, for the trustees work out their own indemnity by means of the trust estate in their hands. Again, the creditors of a trust estate can go against the trust estate directly.

As to the general rule of the law of Scotland, Bell (1 Com., 5th ed., p. 39) says, that trustees acting within the limits of the trust make the estate, but not themselves, personally liable—Bell's Pr., § 1999, 3rd ed. The case of *Macdowal* v. *Russell*, 2 S. 682, shews, that though the radical right remains in a trustee, if the benefit of the trust is for himself, yet it is not so in other cases. The *jus crediti* which a beneficiary has, that is, the right to call the trustee to account, is not in the nature of real estate; it is not an equitable estate at all such as exists in England.

[LORD CHANCELLOR.—It seems to be a mere difference in nomenclature. The right passes to the beneficiary's executor, and it is assignable by the beneficiary. Therefore it has the incidents of an equitable estate. What harm, therefore, is there in calling it an estate ?]

It does not at all events give rise to any relation of indemnity between the trustees and beneficiary, such as is said to exist in England. It is true that the Lord Justice Clerk in the Court below said, that there was no rule, that the trustee did not bind himself personally. But Bell's authority is to the contrary—1 Bell's Com. 39, 5th ed.

[LORD CHANCELLOR. —Suppose the trustee entered into a contract with one who did not know he was a trustee, would the trustee be liable personally ?]

He would, no doubt, be personally liable, if he concealed his character as trustee. But not if he stated, on the face of the transaction, that he was acting as trustee. Prof. Menzies (Convey., p. 208, 3rd ed.) also recognizes the rule, that a trustee is not personally bound even when he gives a bond, because a trustee is liable only to make the trust funds forthcoming. To the same effect is Duff on Deeds, p. 168, ed. 1840. It is true these authorities also imply, that if the trustee invest the trust funds in his own name, he may be liable as well as the trust fund. The general rule has always been, however, that the trustee is not personally liable, if he contract *qua* trustee. There may be exceptions.

[LORD CHANCELLOR.—Just let us hear a few of what you consider to be the exceptions to your general rule.]

For example, if a trustee unnecessarily, and without authority of the trust deed, carry on business or trade, or rent a house from a landlord, or take a feu from a superior, he may be personally liable in these cases. He may also be personally liable, if he vexatiously causes costs —*Dickson* v. *Bonar*, 8 S. 99. It is difficult to draw the line, and say where personal liability

will be incurred, and where the general rule will apply. In the case of *Gordon* v. *Campbell*, 1 Bell's App. 428, the general rule as now stated was confirmed, for in that case the trustees had executed a bond for borrowed money, and yet the Courts held, that the trustees were not liable personally. That was a case about which there was no specialty.

[LORD CHANCELLOR.—I think you will find there was a specialty there. In the first place, the trustees bind themselves only as trustees, and not their heirs and executors. Moreover, it was for a sum of money to be secured on the trust lands themselves.]

Nothing, however, turned on these specialties. The House of Lords had the English authorities discussed; and Lord Campbell said there was nothing in the law of England corresponding to that estate in the law of Scotland. The law was laid down in the same way by Lord Eldon in *Cunynghame* v. *Higgins*, 4 Paton, App. 402; 6 Paton, 243; and he states expressly, that unless there is something in the terms of the contract, that the trustee makes with others, which pledges his personal liability, a trustee will be understood as engaging only as a trustee, that is, without incurring personal liability. The cases cited on the other side are all special cases, and form exceptions which only confirm the general rule. Many cases directly support the rule, that there is no personal liability, if the trustees confine themselves to acts within their power—*Kirkland* v. *Gibson*, 9 S. 596; *Kirkland* v. *Cadell*, 16 S. 860.

[LORD CHANCELLOR.—If a trustee cast in his lot with others in some adventure involving indefinite liability, whereby he incurs an absolute liability to creditors, must this external liability not involve necessarily this consequence, that the partners must *inter se* divide that liability, and relieve each other rateably? Must not that liability depend very much on the nature of the undertaking itself?]

That may be true. But the contract entered into must be read by the light of these first principles already referred to. It is said by the appellant, that the present contract makes the trustees personally liable, because, 1. They expressly bind themselves, their heirs and executors. 2. That the nature of the transaction or business was inconsistent with any other understanding than that of personal liability. 3. Even if neither of the above grounds would have sufficed by itself to import personal liability, yet the directors of the bank were not entitled to assume any partners on the footing of limited liability. Now the trust deed gives express power to these trustees so to invest the funds; therefore, so far as their power goes, they were fully authorized. It is said the preamble of the deed of copartnership binds the parties and their respective heirs, executors, and successors. Those, however, were mere words of style, framed to meet a great number of cases, the majority of which were individuals not being trustees; but they do not apply to the special case of trustees. The words "heirs and executors" could have no meaning as to trustees, for the executor of a trustee does not get the estate, and, therefore, cannot be affected by any liability on that ground. At most the word "executor" can only shew, that the directors ought not to have assumed any partner who could have no executor.

[LORD CHANCELLOR.—Though the active power to carry on the trust might not pass to the executor, still a breach of trust might do so?]

Perhaps that may be so. As regards the word "successors," that is the only word appropriate to the trustees, and is consistent with the respondents' argument, for it implies the opposite of personal liability. Then it is said, that the effect of the respondents' construction is to make a distinction between the partners; and, while the rest of the partners were bound absolutely without limit, the trustees were limited in liability. But this is founded on a misconception. When an individual becomes a partner he thereby becomes liable so far as his estate will go to pay the debts of the concern. So does the trust estate, for the estate must be looked on as the real partner, and not the trustees personally. When the trust estate became a partner—be the amount more or less—the whole of it becomes liable to the last shilling to the creditors of the company. This, therefore, is precisely the same footing on which individuals become partners, so that it is not correct to say, that a distinction is made between the partners, and that the trust estate is privileged over others by being limited in its liability. Besides, there was no concealment; all the other partners, as well as the directors, must have seen and known, that these trustees engaged only the trust estate and not themselves personally. They dealt with the respondents as trustees throughout. It is the well known practice in Scotland for trustees to invest trust funds in these banks, and all the partners as well as the creditors at once see and understand by their description of trustees, that their liability is limited to the extent of the trust estate. Many other trustees signed the same deed of copartnership on the same footing.

[LORD KINGSDOWN.—The Judges below seemed to think, that all that the trustees guaranteed when they took these shares was to pay the full amount of the shares and calls made upon them for capital, but nothing beyond. Now why do they stop at that point?]

It is not admitted, that the trustees engaged to pay all the calls that may be made, but only so far as the trust estate could enable them.

[LORD CHANCELLOR.—Does the contract not imply, that the trustees have got funds sufficient to implement the contract with all its consequences? Surely that would be so, if the trustees

opened a bank of their own. How does the fact of a partnership make any difference? Do you admit these trustees were personally liable to the creditors of the bank?]

We are not prepared to admit that they were. This is an action of contribution, and raises merely a question as to liability *inter se;* and even assuming that there was absolute liability to creditors, yet it does not necessarily follow that there is such liability *inter se.*

[LORD CHANCELLOR.—In cases of partnership, the liability to contribute to the losses *inter se*, is a necessary consequence of the liability to the external creditors, if there is no express stipulation to the contrary in the deed of copartnership. The one results from the other, and it is difficult to see why, if these trustees were liable to creditors, they can stop short of liability to contribute *inter se.* The Judges below did not seem to consider the case in that light.]

The Judges seem to have thought, that even assuming the trustees would be liable to the external creditors, yet that would make no difference, for this was a question of liability between the partners *inter se.*

[LORD CHANCELLOR.—Yes; but it is precisely the same question, for the very same act of signing the deed of copartnership or deed of accession created the liability in both cases.]

The case was not so treated in the Court below, and we do not admit, that there was personal liability towards the creditors, for they had means of ascertaining from the register, that the respondents were trustees merely, and joined the bank with liabilities limited to the extent of the trust estate. Lastly, as to Mr. Buchanan, as it is proved he never interfered in the matter, and never signed the deed of copartnership, he cannot be liable.

The *Attorney General* replied.—There is no sound distinction between the law of England and the law of Scotland on this subject. As to the alleged difference, that in Scotland the beneficiary has no equitable estate, that is a mere difference of phraseology; and, in short, as to the other leading doctrines, when compared systematically, there is nothing but differences of phraseology between the law of the two countries on the subject of trusts—Paterson's Compend. E. & S. Law, § 202 *et seq.* The authorities referred to by the respondent do not shew, that the general rule is not equally established in Scotland as in England, that trustees investing trust funds in a trading concern are personally liable. Bell, in his Commentaries, 6th edition, qualified the generality of his former statement on the subject. Nor is there anything in Menzies on Conveyancing warranting the argument of the respondent, nor in *Gordon* v. *Campbell.* If it be once admitted, that the trustees would be liable to creditors, it is impossible to resist the conclusion, that they must be liable to contribute *inter se.*

[LORD CHANCELLOR to the *Lord Advocate.*—Do you admit, or do you not, that the same contract which would make the trustees liable to external creditors must necessarily also make them liable to contribution *inter se?*

Lord Advocate.—On consideration we admit we must go that length, and contend that the trustees were not personally liable to creditors of the bank.]

Then if that is so, much of the reasoning in the Court below is inapplicable, and the conclusion drawn by the appellant is irresistible.

Cur. adv. vult.

LORD CHANCELLOR WESTBURY.—My Lords, the Western Bank of Scotland was a company or partnership formed in the year 1832, for the purpose of carrying on the trade or business of bankers in Scotland.

By the contract of copartnership it was declared, that the holding, or being entitled to a share of the capital stock of the company should constitute the rights, and infer the liabilities, of the partnership of the said company; and it was also declared, that according to the number of shares of the stock of the partnership held by the partners, "they should proportionally be entitled to such profit, and should, in like manner, be liable for such loss, as should be consequent upon the prosecution of the business of the company, to which extent *pro ratâ* they should be bound." And then follow these words in the contract, "and they hereby bind and oblige themselves, and their foresaids respectively, to free and relieve each other of the whole debts, obligations, and engagements of the company." Additional shares in the bank were created at different times.

The respondents are the trustees of the marriage settlement of Mr. and Mrs. Brown of Glasgow, and under the trusts of that settlement, Mrs. Ellen Brown and other persons who are under disability are the beneficiaries. In the month of November 1846, the trustees invested the whole of the trust funds in the purchase of sixty shares in the Western Bank; and at the same time, they (with the exception of the respondent, Andrew Buchanan) signed a deed of accession, which is the same thing as if they had signed the original contract of partnership.

This deed was signed by them in their ordinary names and designations as the holders of sixty shares. But in the testing clause, after mentioning their names and designations, these words are added, "Trustees for Mrs. Ellen Brown, spouse of the said Charles Wilson Brown, the majority surviving being a quorum, for £3000."

The trustees were registered in the books of the company, and also in the register of shares holders made up under the Joint Stock Banking Companies Act of 1857, by their own proper names and addresses, with the addition of these words, "Trustees for Mrs. Ellen Brown, Glasgow."

The trustees now contend, that the legal effect and operation of this mode of executing the deed is, that they became parties to the deed of partnership, and therefore partners in the bank as trustees only, without any personal liability. Further, they insist, that their execution as trustees does not involve or imply any statement or inference, that they were possessed of trust funds sufficient to answer the ordinary consequences of the contract and dealings they became parties to, but that every one of the shareholders, present and future, and every person dealing with the company, must be deemed to have had notice of their having joined the company as trustees only, and to have taken the chance of there being any trust funds to answer their share of any liabilities that might be incurred by the company. The trustees boldly contend, that they never became liable to the external creditors of the partnership, and that, whatever may be the losses sustained by the partnership, they, the trustees, are not liable to contribute to them beyond the amount of the money paid for the shares held by them in the concern.

It is obvious, that the position thus claimed for themselves by the trustees is wholly at variance with the spirit and intent of the partnership contract. It is repugnant to the obligations they expressly entered into. And it is impossible in law to derive an inference from the form of execution, that shall contradict and annul the clearly expressed contract contained in the body of the deed.

According to the argument of the trustees, there would be two distinct classes of partners, one of persons who became shareholders in the ordinary case, and who would be partners with unlimited liability, and the other of trustees who took shares in their fiduciary character, and who would be partners with limited liability.

It was not in the power of directors to enter into any such contract, or to admit any persons as shareholders in the company upon any such terms. The proposition of the trustees is, that the other shareholders are bound to indemnify them against all the debts and losses of the partnership; but no such contract could be competently made, unless it was entered into expressly between the trustees and every other shareholder personally. Of such a contract so made, there is neither proof nor allegation.

The addition in the testing clause, describing the parties as trustees, must be taken to have been made for a very proper and legitimate purpose, and which sufficiently accounts for and exhausts the meaning of the words employed. It was intended, by this addition, not to alter or control the personal contract and obligation which the trustees had entered into, but to mark the property in the sixty shares and belonging to the trust estate. This is quite consistent with personal liability in the trustees.

By the law of England, if an executor or trustee joins a partnership or company for the purpose of investing or employing usefully part of the estate of the testator or of the trust, he is personally liable for all the consequences of his engagement, for the law assumes, and rightly, that he depended on the condition of the assets or trust estate for his own security; and if he acted within the scope of his authority, he is left to seek his indemnity from the trust estate or the beneficiaries. And this is both just and expedient. If it were held, that persons entering into contracts with trustees were really contracting not with the individuals, but with the trust estate, it would be necessary to examine the state and amount of the trust property and the powers of the trustee before any contract was entered into; and after it was made, as the trust estate would be bound by the contract, it could not be dealt with or disposed of until the consequences of the contract were ascertained.

The respondents, in effect, assert by their argument, that this is the state of the law in Scotland, and that, if trustees enter into a contract on behalf of the trust estate, they are not personally answerable for the consequences of that contract.

I agree with the majority of the consulted Judges, that there is no such general rule.

A trustee may, both in England and in Scotland, so limit and restrict any contract he may enter into as to exclude (as between himself and the other parties to such contract) personal liability. But this must be the result of express stipulation; and whether this be or be not the effect of any particular contract, is a question depending on the construction of the instrument and the nature of the contract.

In the present contract, the parties bind themselves, their heirs, executors, and successors, (which is the recognized style by which an individual binds himself so as to be personally liable,) and, in the words of the deed which I have cited, each partner personally obliges himself to contribute *pro ratâ* to the debts and losses of the company. There can be no question, therefore, as to the meaning, construction, and effect of the contract as contained in the deed of partnership.

The words of the contract contrast in a very remarkable manner with the words of the obligation in the case of *Gordon* v. *Campbell*, decided by this House in 1832, on an appeal from the

Court of Session, and in which the Lord Ordinary and the respondent place great reliance. In that case certain trustees of a trust settlement borrowed a sum of money on the security of the trust estate, and the obligation was framed and worded in such a manner as to indicate, that the engagement was made in the character of trustees alone. In that case the words of obligation were, "which sum we, as trustees aforesaid, bind and oblige ourselves, and the survivors and survivor of us, and such other person or persons as may be assumed by us into the trust, to repay." And in the subsequent disposition care was taken to express that everything was done by the parties in the character of trustees only. Therefore the style and form of words adopted throughout the instrument were such as properly belong to a dealing in a fiduciary character alone. The contract was so worded as to bind the existing trustees as trustees only, and their successors in the trust. Accordingly this House, founding itself on the special language of the engagement, decided that no personal liability was intended to be contracted.

But the language of this deed of copartnership is the very opposite to the style of the obligation in *Gordon* v. *Campbell.* The words here are "we (the individual parties to whom the shares of the said company have been allocated as aforesaid) do hereby severally bind and oblige ourselves, our respective heirs, executors, and successors"—words, as I have already observed, which are the proper style of personal engagement.

Reliance is placed by some of the Judges on the fact, that the deed of copartnership and deed of accession are expressed to be made and granted "by us, the several parties hereunto subscribing and named and designed in the testing clause of these presents,"—words which incorporate the testing clause so far only as it contains the names and designations of the parties. But if they are considered to have the effect of annexing, by reference to the names and designations of these trustees, the words which are adjected in the testing clause, the result must, in my opinion, be the same, and these additional words cannot be taken as of force to control and alter the express form and terms of a contract which, both in its style, its subject matter, and the nature of its express stipulations, is inconsistent with any other conclusion than that the parties who entered into it knew and intended that there would be personal liability.

It seems to have been considered by the majority of the Judges in the Court below, that the trustees were certainly liable to the creditors, and this conclusion was at first not denied at the bar. But if the trustees are liable to creditors, the liability must in the present case be the result of a contract of partnership, and the contract of partnership is itself the result of the execution by the trustees of the deed of accession. But if there be liability to creditors, there is *primâ facie* liability to contribute *inter socios*, and the *onus* lies on the respondent to prove that the circumstances which are not sufficient to exclude liability to creditors are yet sufficient to prevent any liability to contribution. It would be necessary for the respondent to prove a contract by all the other shareholders to indemnify the trustees against the debts and losses of the concern.

I cannot, therefore, concur with the reasoning of the Lord President, who seems to consider that, even if the trustees are liable to creditors, the form of their contract would be sufficient to exclude the claim of the other shareholders for contribution. This immunity would require a very special contract of indemnity. No such special contract is anywhere found; but the contrary is expressly stipulated in the body of the deed, and the whole case for the indemnity of the trustees is rested upon an inference drawn from the words added to the name and designation of the parties in the testing clause against the express tenor of the obligation and provisions contained in the deed of partnership, the nature of the contract itself, and the fact, that the directors had no power to enter into any such contract as that alleged by the respondents, which would be wholly at variance with the constitution and character of the company.

The case demands and has received the anxious consideration of your Lordships. It has been discussed in a most elaborate manner by the learned Judges in the Court below, and at the bar in this House. I have weighed with care the arguments contained in those judgments, and I am convinced, that the view of the case taken by the Lord Justice Clerk, Lords Cowan, Neaves, and Mackenzie, is the just and correct one.

I must therefore advise your Lordships to reverse the interlocutors, and to make a decree in terms of the conclusions of the summons, except as to the defendant, Andrew Buchanan, who never signed the deed, and therefore against whom the appeal must be dismissed with costs.

LORD CRANWORTH.—My Lords, the question in this case is, whether the defendants, or any of them, have or have not made themselves personally liable to contribute to the sums which it has become necessary to raise for liquidating the debts of the Western Bank of Scotland.

It is certain that they became shareholders by executing the second deed of accession on the 2nd December 1846, but it is contended that by this execution they incurred no personal liability, inasmuch as they executed the deed only in their character of trustees of Mrs. Ellen Brown. There is nothing to shew, that they executed the deed as trustees only, except that in the testing clause they are described as "trustees for Mrs. Ellen Brown, spouse of Charles Wilson Brown, the majority surviving being a quorum."

It was argued, that such a subscription imposes on the persons subscribing no liability beyond that of making good out of the trust funds, so far as they are sufficient for the purpose, the sums

which, if they had been personally liable, they would have been bound to pay; that if the trust funds are deficient, the other shareholders have no claim on the trustees, and so are without remedy. This certainly is not the law of England, but it was argued, that in this respect the law of Scotland is different from the law of England, and for this reliance was placed mainly on the case of *Gordon* v. *Campbell*, decided in the Court of Session, and afterwards affirmed in this House, and on certain passages found in the works of Mr. Bell and Professor Menzies.

It is important to attend closely to the language of the contract in the case of *Gordon* v. *Graham*. It is as follows:—"We, A. B. M. and C. B., surviving and acting trustees appointed by the deceased A. B., and I, A. B. F., assumed by the trustees aforesaid in virtue," etc., "and I, John Campbell, trustee also assumed, and we, W. P.," etc., etc., "trustees also assumed, grant us to have borrowed and received from Col. J. Gordon the sum of £7000, which sum we, as trustees aforesaid, bind and oblige ourselves, and the survivors and survivor of us, and such other person or persons as may be assumed by us in virtue," etc., "to repay to the said John Gordon at Whitsunday 1833, with interest," etc. "And for further security, we, as trustees foresaid, do dispone from us and such other persons as may be assumed," etc., "heritably but redeemably, all those lands of Blainslie," etc., "in real security for payment of said money," etc., "in which several lands," etc., "we bind ourselves, as trustees foresaid, and the survivors," etc., "duly to infeft the said J. S.," etc., "which disposition, under reversion as after mentioned, and all deeds to be granted by us as trustees foresaid, we bind ourselves and them, but *qua* trustees only, to warrant against all mortals, and that letters of horning on six days' charge, and all other legal execution, may pass on a decree to be interponed hereto in common form." It was held that this did not import a personal obligation by each trustee.

I cannot think that this case warrants the conclusion contended for by the respondents.

By the law of England as by the law of Scotland, trustees, in dealing with third persons, may so contract as to exempt themselves from personal responsibility, and to confine those with whom they are dealing to such relief as they can obtain from the trust funds. Whether this is the true effect of any contract into which they are entering, must in every case be a question of construction, and all which was decided in *Gordon* v. *Campbell* was, that the contract entered into by the parties in that case, though by the law of England it would have made them personally liable, had not that effect by the law of Scotland.

The different construction which is thus put on the same contract in Scotland and in England, is probably owing in part at least to the different qualities of a trust in the two countries. In Scotland the trust, on the death of the trustees, comes to an end, unless the author of the trust has provided for its being kept alive by the assumption of new trustees. If that has not been provided for, the only course open to the parties interested when the trustees are all dead, is to obtain from the Court of Session the appointment of a judicial factor, or sometimes of new trustees. The trust has thus something of a corporate character incident to it, and it may therefore often be not unreasonable to understand the trustee, when he is acting in discharge of his trust, as meaning only to deal to the extent of his trust property. In England the case is different. Trust property passes on the death of a surviving trustee to his real or personal representatives, and they take it clothed with the trust, and become *ipso facto* the trustees. The trust property and the duty of discharging the trusts remain connected, and pass together according to the ordinary devolution of property, though a person on whom a trust is thus cast, by operation of law, may if he pleases repudiate the duties of the trust. It may probably be from these circumstances, that in England, where a trustee enters into a contract describing himself as trustee, or as contracting only as trustee, that has never been held to qualify or restrict the extent of his engagement. Such words may be useful as between the trustee and those who are beneficially interested, but as to third persons they are inoperative. He is dealing with property, over which he has complete dominion, and is understood to be contracting as absolutely as if he were dealing on his own account. If he means to limit his liability by the amount of the trust funds, he must do this by making express provision for the purpose.

Though, however, the effect of such a contract as that in *Gordon* v. *Campbell*, was held not to impose in Scotland personal liability on the trustee beyond the amount of the trust funds, yet it must not be taken, that in all cases when a trustee contracts as a trustee, he is free from personal responsibility. That is not the law in Scotland any more than in England. There are many cases in which a trustee is personally responsible, even though he may have contracted expressly as a trustee. If he draws or accepts a bill of exchange, or gives an order for work to be done on account of the trust, in these and similar cases, though he contracts as trustee; yet he is, in Scotland as in England, personally liable for his engagements in the absence of express stipulation to the contrary.

The nature of the contract in these cases shews, that the party contracting must have meant to bind himself personally. Ordinary transactions of buying and selling could not go on upon any other principle, and this is, therefore, in all such cases, *primâ facie* understood to have been the meaning of the persons engaged.

The true question to be resolved in every case is, whether the circumstances do fairly shew, that the contracting parties were dealing only as trustees, and were not intending to incur liability beyond the amount of the trust funds. Looking to the present case, with that principle before me, I have come to the conclusion, that these respondents must be deemed to be personally responsible. I concur in the view taken by the minority of the Judges, and I will state the grounds on which I have formed this opinion.

In the first place, we must consider what it is, which a person really does when he purchases shares in such a joint stock company as this. It is not as if he had invested money in the purchase of land or goods, or real or Government securities. He makes himself a partner in a trading concern—a trading concern, it is true, having important statutory incidents attached to it, but which yet has this in common with ordinary trading concerns, that if the business is successful, profits may be made to an unlimited extent, in all which the shareholders, who are in truth the partners, are entitled to participate rateably. And it is surely unreasonable to suppose, in the absence of express contract, that it could have been intended to admit any persons into such a partnership on the terms, that they should, to an indefinite extent, share in its benefits, but should only to a limited extent contribute to its losses. The affairs of all these joint stock partnerships are of necessity placed under the management of a small board of directors, and the general body of shareholders would be justly entitled to complain of the admission of any persons as partners in the trade, who should be placed on such unequal terms with themselves, and who, in the event of loss, would cause so much more than a rateable share of the burden to fall on them.

These considerations make it highly improbable, that it could have been intended to admit as shareholders any persons who did not bind themselves to liability rateably with the whole body; still, however, it is competent to all persons to make what contracts they please, and the question now to be decided is—What is the engagement into which these respondents have entered? They contend, that although they executed the deed of accession, and so became partners, yet they expressly or impliedly limited their liability to the amount of the partnership funds. The result, they say, followed from the circumstance, that in the testing clause they are described as "trustees for Mrs. Ellen Brown, spouse of Charles Wilson Brown, the majority being a quorum." There is nothing else to restrict their liability, and therefore, unless by the law of Scotland persons so described are, without more, absolved from personal liability, there is nothing on which the exemption claimed can rest.

I cannot think, that this would be a true representation of the law. The language of the contract in *Gordon* v. *Campbell* was very different from that in the present case. There the trustees not merely described themselves as trustees, but expressly bound themselves and the survivors and survivor of them *qua* trustees only. These words were strong to shew, that the persons using them did not intend to incur personal responsibility. All this careful use of terms restricting the extent of their obligations was superfluous, if, by merely describing themselves to be trustees, the same object would have been attained. It may, moreover, be noticed, that these trustees do not in their signature describe themselves as trustees, as is done in the case of many other parties to the deed; but I do not place much reliance on this circumstance, as the testing clause forms part of the deed, and so the description there introduced must perhaps be treated as assented to by the parties executing it.

But besides the manifest difference between the language of the contract in *Gordon* v. *Campbell* and that in this deed, there is, what I consider to be even more important, an entire difference in the nature of the contract. In *Gordon* v. *Campbell* the trustees were for the purposes of the trust borrowing money on security of the trust property. This was from the frame of the deed obvious to the person who was lending, no less than to those who were borrowing the money. No persons were concerned but the lender and the borrowers; both parties were fully apprised of the terms of the contract, and must be taken to have been aware of the legal incidents. But in the present case all the shareholders in the bank are affected by limiting the liability of these respondents.

It may be said, as to persons becoming shareholders after the respondents had purchased shares, that they had the means before they took shares of seeing, that these respondents were liable, if such were the true construction of the contract, as trustees only. Perhaps theoretically that may be, but as to all who had taken shares previously, no such observation can be made, and practically, even as to those taking shares subsequently, it can hardly be assumed, that they can be treated as having examined the testing clause as to the execution by all those who had previously become shareholders.

The Judges who decided this case in favour of the respondents did not deal with the important question of the liability of these trustees to third persons, creditors of the bank. They did not consider that question as being before them, but although the liability or non-liability of the respondents to creditors is not the precise question for decision in the present case, yet it is a point very important to be considered in deciding, whether they are liable to contribute rateably to the losses which have occurred.

If, instead of becoming shareholders in a joint stock bank, they had alone opened a bank, it surely could not be argued, that they would not be liable to depositors or others merely because they described themselves as trustees for Mrs. Ellen Brown, and if they would have been responsible in case they had been the sole bankers, I can discover no ground for contending, that they would not have been so, if others were associated in partnership with them. Here they are bankers associated with a very large body of partners, but not associated on any terms which affect their liability to third persons. They do not, it is true, themselves interfere in the conduct of the business, but they share rateably with the other partners in its profits, and delegate the management of it to others as their agents. A creditor who has recovered judgment against the company may take out execution against any of the shareholders, which would include all, whether described or not described as trustees, and if the debt should be levied on their goods, it would be a strange equity to set up against the other shareholders, that these ought to contribute more than their rateable proportion by reason of the trust property proving deficient.

These considerations have led me to the conclusion, that trustees taking shares in these joint stock concerns make themselves personally liable as partners, even though they describe themselves as trustees. But, of course, this general principle must give way to any express provisions in the deed of copartnership limiting the responsibility of such shareholders. But so far from there being any such restriction in the deed now before us, there are several clauses which seem to me to exclude the notion of any such restriction.

In the *first* place, by the *third* clause it is declared, that the holding shares shall constitute the rights and infer the liabilities of partnership, and that the shareholders, according to their shares, shall be entitled to profit and liable to loss consequent on the prosecution of the business of the company, to which extent the shareholders thereby bound themselves and their foresaids respectively to free and relieve each other.

Surely this engagement is wholly inconsistent with the hypothesis, that these respondents were to free and relieve rateably the other shareholders only to the extent, to which the trust funds of Mrs. Ellen Brown might enable them to do so.

Again, the *fifth* clause makes provision for the transfer of shares, and stipulates that, on any transfer, the party disposing of his shares shall be no longer liable as a partner, but that the person acquiring the shares shall take the precise place and liability of his cedent, and become subject to all the obligations incumbent on him. This is manifestly inconsistent with there being two classes of shares—one of limited, the other of unlimited liability. According to the views of the respondents, any person who should have purchased their shares would be liable to the extent of their trust property; and it would seem to follow, on the other hand, that if they had purchased the shares of any ordinary shareholder, they would, in respect of shares so purchased, have become subject to all the obligations of the persons from whom they purchased, *i. e.* would have incurred indefinite obligations.

This *fifth* clause seems to me wholly inconsistent with the hypothesis of there being different measures of liability attaching to different shares.

The only other clause to which I think it necessary to advert is the eleventh, which gives the form in which every person becoming a shareholder by purchase is bound to accept his shares. He agrees to become a partner in the company, and binds himself to fulfil all the obligations contained in the contract of copartnery. There is nothing enabling him to accept the shares otherwise than *simpliciter* as a partner, *i. e.* as a person bound to relieve the shareholders in case of loss rateably according to the number of his shares.

I have given this important case my best consideration, and I have come to the conclusion, that the Lord Justice Clerk and the other Judges who concurred with him, took the correct view of the law on this subject, that though, in contracts entered into by trustees, the language of the contract may, by the law of Scotland, shew, that no personal liability was incurred, even though such liability would under the same words have been incurred in England, yet the nature of the contract may be such as to shew, that no restriction on the full liability of the contracting parties was intended. And considering the nature of the contract in the present case, I am of opinion, that the respondents, though described as trustees, must be deemed to have intended to bind themselves absolutely.

I ought not, however, to omit to mention the case of the respondent, Andrew Buchanan. To him my observations do not apply, for he never executed the deed of accession.

LORD KINGSDOWN.—My Lords, I confess that I entertain more doubt about the case than seems to be felt by my noble and learned friends who have already expressed their opinions. The able argument of the Lord Advocate satisfied me, that there are very serious differences between the law of Scotland and the law of England on the subject of trusts and the personal liability of trustees—that the same acts which would create a personal liability in the one country might not create it in the other, but, instead of it, might give a direct and immediate remedy against the trust estate. When I see the mode in which trustees in this case in numerous instances have signed the deed, signing it by mandatories as trustees for A. B. or trustees for C. D., their individual names never appearing at all upon the deed or the register, I cannot

divest myself of the impression, that neither did these persons contemplate pledging their individual responsibility, nor did those who became partners with them contemplate such liability, or look to anything but the trust estate for contribution. Nor does it seem to me, that there is anything in the nature of the business which makes such an arrangement improbable or unreasonable. A single individual takes a certain number of shares; he is liable to the full extent of all that he possesses. Beyond this his personal liability is worth little or nothing. Six trustees take the same number of shares, and are jointly and severally liable to the full extent of the estate which they represent. In this view of the case there seems to me to be no great inequality. But take it on the other hypothesis. The one gives his single liability, and the six are supposed to give each his individual responsibility, to the full extent of all he possesses. In other words, supposing the personal responsibility of both parties to be equal, the trustees give six times the security of the one. The first hypothesis, therefore, seems to me to be at least as reasonable and probable as the other. But I think, that in either case the same rule would apply as to creditors and as to copartners. There is no private dealing as amongst the copartners. If the acts done by the trustees do not infer liability to the one class, they cannot, in my opinion, infer it in the other.

I own, that the great reliance which I am disposed to place on the authority of the considerable majority of the Judges below, is somewhat weakened by their reluctance to deal with this question.

For the reasons which I have stated I am much inclined to think, that, unless the express provisions of the deed are such as to exclude the construction put upon it by the Court below, the judgment complained of is right, and supported by the principles of Scotch law, and the reason and probability of the case. But when persons have signed deeds of this description, it would be very dangerous to permit them to relieve themselves from the obligation of covenants into which they have expressly entered on any speculation founded on mere probabilities, that they did not really intend what the deed in terms expresses. Now, unless the covenants by which the parties subscribing the deed bind themselves, their respective heirs and successors, in the third clause of the deed and the second deed of accession, can be read so as by some interpretation to exclude those who sign as trustees, it is not disputed, that the covenant infers personal liability, and there seems to me to be in this insuperable difficulty.

Upon the whole, with some hesitation and regret, I am obliged to concur in the opinion already expressed by your Lordships. As to Dr. Buchanan, I think there can be no doubt, that the judgment should be affirmed with costs.

The *Attorney General* called attention to the fact, that the interlocutor of the Court below did not distinguish Dr. Buchanan from the other trustees, and that the best course would be to assoilzie him from the conclusions of the summons.

LORD CHANCELLOR.—I think the interlocutors must be taken together. Of course Dr. Buchanan is liable to the extent of the trust funds, and there is no certainty that there may not be trust funds still in the power of the trustees, As Dr. Buchanan does not appeal from the interlocutor, all we can do is to dismiss the appeal, and give Dr. Buchanan costs. As to the respondents, therefore, except the respondent Dr. Buchanan, the interlocutors will be reversed, and an order made in terms of the conclusions of the summons, and, with respect to the respondent Dr. Buchanan, the appeal will be dismissed with costs.

Interlocutor reversed, except as to one of respondents.

Appellants' Agents, Davidson and Syme, W.S.; Murray and Hutchins, London.—*Respondents' Agents*, Gibson Craig, Dalziel, and Brodies, W.S.; Grahames and Wardlaw, Westminster.

FEBRUARY 12, 1866.

HENRY JACK, Inspector of the Poor of the Parish of Dundee, *Appellant*, *v.* ROBERT HAWKER ISDALE, Hat manufacturer, Dundee, *Respondent.*

Poor (Able Bodied), Right of, to Relief—Statute 8 and 9 Vict. c. 83, § 68—Right to Demand Relief—*Before* 1845 *able bodied paupers were not entitled to relief; but the kirk session might give relief to them as occasional poor out of the church door collections. By* 8 *and* 9 *Vict. c.* 83, § 68, *occasional poor as well as permanent poor were declared entitled to relief out of the assessments, but nothing was to confer a right to demand relief on able bodied paupers.*