This is an action of count, reckoning, and payment at the instance of Mrs Anderson, sole surviving executrix-dative *qua* nearest in kin decerned and confirmed to the deceased Andrew Dalgairns, Esq., against Christopher Kerr, conjunct town clerk of Dundee, factor and commissioner for the executry estate of the said deceased Andrew Dalgairns. Mr Dalgairns died in 1840, and on 22d April 1841, the pursuer and her brother were confirmed executors of the deceased. The pursuer and her co-executor, with consent of the other next of kin, executed a deed of factory in 1841, in favour of the defender, who, in consequence, intromitted with the estate. The present action is brought by the pursuer to call the defender to account. The other executor is now dead. Several points of a special nature are raised in the record, but the only point on which the judgment of the Court turned is raised by the fifth plea in law for the defender, which is to the following effect :—"The survivor of two executors-dative is not entitled to sue actions against parties who acted for or transacted with both." The Lord Ordinary (Jerviswoode) repelled this plea, and remitted the defender's accounts for examination and inquiry by an accountant. His Lordship added the following note to his interlocutor :—

. . . . "The fifth plea is, however, in the opinion of the Lord Ordinary, of a more formidable character ; and although he has repelled it, he is sensible of the importance and difficulty of the question it raises.

"The argument in support of it is, as he understands, rested mainly on an analogy between the office of executors-dative and tutors-dative.

"As respects the latter class, it has been finally determined by the judgment of the House of Lords in the case of Scott *v.* Stewart, 7th November 1834 (7 Wilson, S. and Maclean, p. 211) that the office of tutors-dative, constituted by gift in favour of three persons, terminates by the death of one of them.

"If, then, the principle thus established has application to the case of executors-dative, it would follow that the death of one of the executors, and in this case that of the late Peter Dalgairns, had operated so as to cut down the title to sue, which is here alleged on the part of the pursuer. But the Lord Ordinary is not satisfied as to the precise correspondence between the two offices, as respects the characteristics which can alone have a relevant bearing on the point now raised.

"Tutors have charge of the person of the pupil, and consequently the direction of his or her education and upbringing. But, as respects the office of executor, the characteristics now adverted to, which appear to have weighed so much in the estimation of the Lord Chancellor in disposing of the case of Scott, are altogether awanting.

"Accordingly, it is laid down by Lord Stair (3, 8, 59), 'Amongst co-executors the office accresceth to the survivors, who are in the same case as if the defunct executor had not been named, only in so far as the testament was executed before that executor's death his share is transmitted to his executors, and accresceth not, but is transmitted *cum onere debitorum defuncti pro rata.*' And, again (3, 8, 9), that 'if any of the executors be dead, the office accresceth to the survivors, and they are liable and convenable alone,' and so forth.

"The statement of the late Professor Menzies, in his lectures (page 488), is on this point to the effect that, 'when several executors die, the entire office accrues to the survivors,' and it may therefore be assumed, as the Lord Ordinary has seen no adverse judgment in the reported cases, that the doctrine of Lord Stair is that which, as respects this matter, has been acted on in practice during a period long subsequent to the judgment of the House of Lords relative to the office of tutor-dative, to which the Lord Ordinary has adverted, and on which the defender so strongly founds." . . . .

The defender reclaimed.

WEBSTER, for him, was heard in support of the reclaiming note.

MILLAR, for the pursuer, was not called upon.

At advising,

The LORD JUSTICE-CLERK—This case presents no difficulty. It does not appear to me to be necessary to decide the abstract question, What is the power of the survivor of two executors-dative ? because the title of the pursuer stands entirely clear on the face of the deed of factory to Kerr the defender. The pursuer has by that deed a contract right to sue an action of accounting. The provisions of the deed are unambiguous. From them it appears to me beyond doubt that the pursuer, as a party to the deed and as the employer of Mr Kerr, has a right to call for an account of his intromissions as factor, and that is all the length we need go. We need not decide as to the pursuer's right to sue for payment. It may be that under this action she may not be entitled to get decree for payment at all. I am, therefore, of opinion that the 5th plea in law, stated as an abstract proposition, is quite applicable to the present case, and therefore ought to be repelled ; but I think it right to say that the question raised by it is entirely different from that decided by the House of Lords in Scott *v.* Stewart, and I think it would be a bad plea under any circumstances. But it is not necessary to decide that, as the pursuer has a good title to sue otherwise.

Lord Cowan and Lord Benholme concurred.

Lord NEAVES—On the general question which has been raised it is not necessary to give any opinion, but I concur in thinking that there is no foundation for such a doctrine. The office of executor-dative is confirmed by the decree of a judge, and it is quite different from such an arbitrary paternal thing as a gift of tutory, and when I see it laid down by Dune and again by Erskine, that there is no distinction in this respect between executors-nominate and executors-dative, I should hesitate and require a strong reason to say that the office of executor-dative falls on the death of one of those who were originally confirmed.

The Lord Ordinary's interlocutor was accordingly adhered to.

Agents for Pursuer—Adam & Sang, S.S.C.

Agents for Defender—Morton, Whitehead, & Greig, W.S.

Friday, Nov. 16.

SECOND DIVISION.

WESTERN BANK *v.* PEDDIE (BROOMFIELD'S CURATOR).

Bank—Partner—Curator bonis. Held, in conformity with the judgment of the House of Lords in Lumsden *v.* Buchanan, that a *curator bonis* who had acquired shares in a bank on behalf of his ward had by the transfer made himself a partner of the bank, and was therefore personally liable in calls.

The question in this case is whether a judicial trustee, who acquired seven shares of the Western Bank stock on behalf of his ward, is personally liable beyond the value of the curatorial estate. The shares were acquired by the defender by a transfer which was executed by him, and produced for the purpose of registration, and recorded in the bank's books, in terms of article 11 of the bank's contract of copartnership. The entry of the transfer in the bank's books bore to be in defender's name as *curator bonis*. After the date of the transfer the dividends on the shares were paid to the defender, who signed the dividend warrants therefor. The defender further, as a shareholder of the bank, and after it had stopped payment, executed, along with a large number of the bank's shareholders, a deed of alteration of article 35 of the bank's contract of copartnership. These receipts were granted, and the other steps were taken, the defender says, in his curatorial capacity. The ward of the curator was a lunatic, and the estate is exhausted. The Lord Ordinary (Kinloch) held the defender personally liable, on the ground that by these acts he made himself, and not his ward, a partner of the bank. His Lordship added the following note to his interlocutor :—

"The question in the present case is, whether the defender, on whom the shares in question devolved, as *curator bonis* of Mrs Jane Broomfield, is personally liable in the calls made in respect of those shares, under the authority of the case of Lumsden *v.* Buchanan, as decided in the House of Lords; M. 2. 695, and 3. 89.

"In that case, certain trustees under a contract of marriage invested, under authority of the contract, the trust-funds under their charge in Western Bank stock. The bank contract was subscribed by five out of six trustees, under the designation of 'trustees for Mrs Ellen Brown, spouse of the said Charles Wilsone Brown, the majority surviving being a quorum.' The Court, by a majority of the whole Judges, found that this imported nothing more than a liability as trustees, and to the extent of the trust-estate. The House of Lords reversed this judgment, and found that the trustees who subscribed the contract had become partners of the bank, and were personally liable for the calls. The sixth trustee, who had not subscribed, was found not liable.

"It appears to the Lord Ordinary that, applying the principle of this decision, the defender, the curator, must be found equally liable in the present case. It is true that he is a judicial trustee—not a trustee nominated by a private party. But it appears to the Lord Ordinary that this circumstance is not sufficient to vary the case. The curator was under no necessity to accept the office; he did so voluntarily, and in the presumable contemplation of all its risks. A part of the funds belonging to the lunatic ward consisted of shares of Western Bank stock, which were transferred to the curator by the executer of Mr Broomfield, the lunatic's deceased husband, in name of her rights as his widow. The curator was under no obligation to register the transfer, and so become a partner of the bank, in whatever capacity. He might have sold the shares, which appear then to have been in the market at a premium (the £50 shares selling at £82), and might have left the purchaser to register himself as partner. In place of doing so, the curator accepted the transfer, registered himself as partner, and drew dividends on the stock. It is true that he accepts the transfer, and is registered under the name of *curator bonis* of Mrs Broomfield. But the Lord Ordinary conceives that under the judgment of the House of Lords this did not protect him from personal liability. He was also not an original subscriber to the contract, as were the trustees in the case of Lumsden *v.* Buchanan. But his registration as a partner placed him, as the Lord Ordinary thinks, in the same position. Whilst described in the transfer as *curator bonis*, and accepting the transfer as such, he at the same time declares that 'he, as *curator bonis* foresaid, hereby becomes a partner of the said bank, and as such binds and obliges himself to implement, perform, and fulfil the whole obligations and conditions, rules, and regulations, contained in the said bank's contract of copartnership, which are held as repeated *brevitatis causa;* more particularly to the effect of authorising summary diligence thereon.' He thus accepted all the obligations of the contract, exactly as if he had signed the deed. The ground of judgment against him, as appears to the Lord Ordinary, is the same in the present case as in the former—viz., that however holding and disclosing a trust character, the subscriber to such a contract of copartnery, not guarding himself against liability more than the curator did, is liable personally in the obligation of a partner to his copartners, reserving what relief against others may legally belong to him.

"In one point of view, the present case may be said to be more favourable for the application of the principle than that of Lumsden *v.* Buchanan. In the last-mentioned case, the trustees had full authority to invest the trust-funds as they did. The Lord Ordinary finds it impossible to say the same in the present case. He has a strong opinion that it is not within the duty of a *curator bonis* to invest the funds of the lunatic in the shares of a speculative company. This is not an investment in a proper legal sense. There can be no doubt that the curator acted in the matter with entire good faith, and in consistency with a very common, but a very inconsiderate, practice of putting the shares of such a bank on the same footing with other investments, properly so called. But legally he had no right (as the Lord Ordinary thinks) to expose his ward to the risks of trade. His duty was to realise the shares by a sale at the earliest possible period; and no request by the lunatic's relatives would justify his not performing this duty. If this be so, it affords an additional argument in favour of personal liability; for if the transaction was against law, the curator could not bind his ward, and could only bind himself.

"The Lord Ordinary was of the majority of the Court in deciding the case of Lumsden *v.* Buchanan. He foresaw that the judgment of the House of Lords would raise many other questions of a serious character, of which the present is one. But it is his duty to give the judgment fair and full effect in every case to which in sound construction it is applicable.

"It is only to be added, on the subject of expenses, that although the Lord Ordinary has by no means come to the conclusion that it was incompetent for the liquidators to proceed as they did by way of summary diligence against the defender, he is clearly of opinion that they cannot subject the defender to the full expenses of two actions. The Lord Ordinary has given them, as they requested, decree in the ordinary action, leaving in the suspension a mere question of expenses."

The defender reclaimed.

D. F. MONCREIFF and ORR PATERSON for

him argued—The defender is not, in the sense of the Joint-Stock Companies' Acts, a contributory liable in payment of calls. He never became a partner of the Western Bank; and the only partner having been Mrs Broomfield, the lunatic, for whom he was curator, he is not liable beyond the value of the curatorial estate. The curatorial estate being exhausted, there is no personal claim against the defender. Further, the defender is not personally liable, because in the transfer by which the shares were acquired, and by subsequent steps, Mrs Broomfield was recognised as proprietrix by the bank. The case of Lumsden *v.* Buchanan is not in point, because there the estate was vested in the person of the trustees, who were held to be partners of the bank, whereas, in the present case, the estate remained vested in the person of the ward. The following authorities were relied upon:—Western Bank, 21 D. 110; Gordon, June 13, 1842, D. 639; 1 Bell's Appeals, 428; Ferguson, 16 D. 260, 12 and 13 Vic., cap 41, sec. 13; Scott, 18 D. 624; M'Conochie, 19 D. 366; Forbes, 7 D. 853; Bell's Prin. 1991; Lumsden, 2 Macp. 695; 3 Macp. 89.

YOUNG and A. B. SHAND, for the respondent, answered—At the date of the registration of the Western Bank, under the Joint-Stock Companies' Acts, the defender was a shareholder and partner of the company to the extent of seven shares of its stock; and the fact of his being designed in the register of shareholders of the bank *curator bonis* for "Mrs Jane Broomfield, Edinburgh," and being such *curator bonis*, had not the effect of creating in his favour any limitation on his liability as a shareholder. Lumsden, *ut supra.*

At advising,

The LORD JUSTICE-CLERK—The defender, Mr Peddie was in July 1856 appointed by the Court *curator bonis* to Mrs Jane Broomfield, on the allegation, supported by medical certificates in common form, that she was, from mental imbecility, incapable of managing her own affairs. From the date of his appointment, the defender took the exclusive management of Mrs Broomfield's affairs. Her only means consisted of the claim which she had *jure relictae* to one-third part of the free moveable estate of her deceased husband, Adam Broomfield.

The right and duty of defender, as *curator bonis*, was to obtain from the executor of Adam Broomfield payment in cash of one-third of the free realised moveable estate of the deceased; and the duty and obligation of the executor was to realise and divide the executry estate, and *inter alia* to pay to the widow or her *curator bonis* one-third part of the realised produce of that estate *deductis debitis et impensis.* The curator was under no obligation to take from the executor any equivalent for money, or to accept any assignment to an existing investment of the executry estate, or of any part of it. Least of all was he obliged to accept of any transfer of shares of a trading company as an equivalent for his or his ward's pecuniary claim against the executor.

But the curator thought fit to enter into an arrangement with the executor by which he held and admitted (it may be assumed quite accurately) that the amount of one-third part of the free executry estate was £522, 16s. 1d., and consented, in satisfaction of his ward's claim for that amount of money, to take over seven shares of the stock of the Western Bank, valued at £539, and to pay the difference, being £16, 3s. 11d., in cash to the executor out of the first dividends received on the stock.

Whether this was a proper act of curatorial administration is not the question raised in the present proceedings; and upon that question the Court desires to abstain from expressing any opinion. It is sufficient for the present purpose that the arrangement was on the part of the curator entirely voluntary. He was entitled to £522, 16s. 1d. in cash, and he preferred to take the value in Western Bank stock.

Whether he was right or wrong in this proceeding as curator, it is at least perfectly clear that he had no power as curator to make his ward a partner of the Western Bank or of any other trading company, and any attempt to do so would have been utterly futile; but, in point of fact, he made no such attempt.

Mr James Broomfield, who had been confirmed executor-dative to his deceased father Adam, had these bank shares carried to him by his confirmation, but only on a title of administration; and he had the power both at common law, and by the express provision of the Western Bank contract of partnership, to dispose of these shares, and convey them to a purchaser or other third party without himself becoming a partner of the company. But the purchaser or other transferee taking the shares from the executor could acquire them only under such a deed of transference as is prescribed by the company's contract; and if he took the shares under such a deed of transference, he necessarily thereby became a partner of the company.

Now what the defender did in carrying out his arrangement with the executor of Adam Broomfield was simply to accept of such a transfer. By deed of transfer, dated 7th and 8th August 1856, the executor transfers the shares to the defender, "as *curator bonis* to Mrs Jane Fairbairn or Broomfield;" and the defender on the other part accepts of the transfer, "and as *curator bonis* foresaid do hereby agree to take and accept the said capital stock, and as *curator bonis* foresaid hereby become a partner of the said bank, and as such bind and oblige myself to implement, perform, and fulfil the whole obligations and conditions, rules, and regulations contained in the said bank's contract of copartnership, which are here held as repeated *brevitatis causa.*"

This deed was recorded in the register of transfers of stock of the company, in terms of the contract of copartnery on the 11th August 1856.

We can entertain no doubt that the effect of these proceedings was to make the defender a partner of the company to the extent of seven shares of the capital stock. It is in vain after this to appeal to entries in books kept by the officers of the company for the purpose of showing that these officers thought that the lunatic Mrs Broomfield was truly the partner, and not her curator Mr Peddie. If they did think so, which is not at all probable, they were altogether wrong, and their mistake cannot alter the legal position of the defender in relation to the other partners of the company and to the liquidator as representing them. There cannot, we think, be the smallest doubt that the defender could not make his ward a partner of the company and that he did not intend or even think of doing or attempting such a thing, and that he did in fact make himself a partner of the company.

If this be so, it is in vain to allege that he became a partner of the company only as *curator bonis*, and is therefore not liable *ultra valorem* of the curatory estate; for it is now well settled that in this or any the like company no one can become a partner with a limited liability or with any other

liabilities than such as are borne in common by all the partners.

We are therefore of opinion that the Lord Ordinary's judgment is perfectly well founded, and must be adhered to.

The Lord Ordinary's interlocutor was accordingly adhered to.

Counsel for Pursuers—Mr Young and Mr Shand. Agents—Davidson & Syme, W.S.

Counsel for Defender—The Dean of Faculty and Mr Orr Paterson. Agents—J. & A. Peddie, W.S.

Saturday, Nov. 17.

FIRST DIVISION.

JENKINS AND OTHERS *v.* MURRAY (*ante*, vol. ii. p. 190).

Jury Trial—Special Jury. In a right of way case which had been already tried by a common jury, motion for a special jury for the second trial *granted.*

This case was tried in March last before Lord Ormidale and a common jury, when a verdict was returned for the pursuers. In July last this verdict was set aside as contrary to evidence, and a new trial granted. The second trial is to take place at the Spring sittings.

JOHNSTONE, for the defender, now moved that the second trial should take place before a special jury. In support of his motion he referred to Magistrates of Elgin *v.* Robertson and Others, 12th March 1862, 24 D. 788, where the Lord Justice-Clerk said "that a question as to a right of road case is one which should be tried before a special jury, for in these cases it is sought to impose a burden upon heritable property;" and also to Bell *v.* Reid and Others, 24 D. 1428, a right of way case which was twice tried, and on the second occasion before a special jury.

MILLAR and MACKINTOSH, for the pursuers, objected, and cited Urquhart *v.* Bonnar (vol. ii. p. 178); but in answer to a question from the Lord President stated that they knew of no right of way case in which a motion for a special jury for a second trial was refused.

The Court granted the motion. The case was one of great nicety, and in trying it a common jury had already failed. The pursuers could suffer no hardship by the motion being granted, and the cases cited by the defender were precedents, while none were referred to on the other side.

Agents for Pursuers—G. & W. Donaldson, S.S.C.

Agents for Defender—Russell & Nicolson, C.S.

Tuesday, Nov. 13.

OUTER HOUSE.

(Before Lord Ormidale.)

BREMNER *v.* TAYLOR.

Poor—Derivative Settlement. A woman, who had an illegitimate pupil child, having acquired a new settlement in another parish through her marriage,—Held (per Lord Ormidale) that that settlement enured to the child, although he continued to reside in the parish of his birth with his maternal grand father and did not reside with his mother.

Summons—Revisal—New Ground of Action. Circumstances in which held that the alteration of the date when the pauper first received relief, on revisal, was not the introduction of a new ground of action.

Condictio indebiti—Error in Law. Held that a parish who had repaid advances on behalf of a pauper, believing itself to be the parish of settlement, could not afterwards claim repetition on a different application of the principle in virtue of which it had admitted liability, such error being error of law, not of fact, and not grounding a claim of repetition by the law of Scotland.

Mora—Taciturnity—Acquiescence. Circumstances in which held that the plea of *mora* was not good to exclude a claim of repayment.

Modification of Expenses. Circumstances in which expenses were modified from £125 to £100.

In this action the parish of Rathven concluded against the parish of Huntly for the sum of £115, 5s. 6d.; being the amount of advances made to a pauper, whose settlement was said to be in the parish of Huntly from March 1847, the date of statutory notice, until 1863, and for relief from future advances. The following facts were relied upon, which were not materially in dispute between the parties. The pauper was born in Rathven in 1825, and was an illegitimate child. In 1831 his mother married, and acquired through her husband a derivative settlement in the parish of Huntly. The pauper did not go to Huntly to reside with his mother after her marriage, but remained with his maternal grandfather in the parish of Rathven. In 1835 he obtained relief from the parish of Rathven on his own account, and in addition to this relief he obtained relief as a member of his grandfather's family from 1838 from the *quoad sacra* parish of Enzie, forming part of the parish of Rathven. The sums obtained from Enzie commenced at the rate of 4s. yearly, and were increased until May 1844, when they ceased, to the sum of 14s. The pauper was bedrid from 1838, until 1845, and unable to support himself by his own industry. Soon after the statutory notice in 1847, Huntly admitted liability as the parish of the pauper's settlement, repaid the advances made by Rathven prior to that date, and continued to pay for the pauper up till 14th May 1853, at which date there had been paid to Rathven, for advances made to the pauper, sums amounting to £32, 13s. 11d. After the decision of the Court in Hay against Scott, 23d Nov. 1852, Huntly recalled its former admission of liability, and besides refusing further payment, insisted on being repaid what had been paid to Rathven. After being threatened with legal proceedings, Rathven paid back the said sum of £32, 13s. 11d. It was maintained in argument that this repayment was made under protest of liability, but the Lord Ordinary found that that was not established. In February 1856, the Court decided the case of Hay *v.* Thomson, to the effect that an illegitimate child follows the settlement of the mother in whatsoever way she may have acquired it, which was a return to the law as it had been interpreted prior to the judgment of the Court in the case of Hay *v.* Scott. Accordingly, Rathven again intimated to Huntly that Huntly was the parish of settlement, and claimed repayment of advances from 1847 to the date of the first statutory notice, and further relief. Huntly refused to admit the claim, and after a lengthened correspondence, in which the claim was continuously asserted by Rathven, Rathven raised an action against Huntly, with conclusions as above stated. In the summons it was stated that relief