will that it was to take effect only in the event of the testator outliving his brother. This seems to me to be the natural construction of the letter and all the other circumstances of the case are perfectly in coincidence with this view.

LORD GIFFORD—I find no room for doubt in this case. I read the letter as if it had been wrapped round the two wills, declaring that the one will was to take effect in one case, and the other will was to take effect in another case. The expression in the second part of the letter, "drawn as if I happened to outlive you," clearly means "drawn in such a manner as if I happened to outlive you." The letter refers to certain donations to be added to the legacy left by the first will to the servant Janet; and it is worthy of notice that several of the legacies left in the second will are the same as those mentioned in the letter.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the Special Case, are of opinion and Find that the party of the first part is entitled to administer the moveable estate of the deceased, as executor under the testament of 15th June 1859, and that he will be bound to give effect to the undated letter by the testator, and to pay the legacies therein set forth, and that he is not bound to pay the legacies set forth in the testament of 1st September 1871; Allow the expenses incurred by the parties to the Special Case to be paid out of the moveable estate of the deceased, and remit to the Auditor to tax the same and to report, and decern."

Counsel for First party—D. Crichton.—Agents—D. Crawford & J. Y. Guthrie, S.S.C.

Counsel for Second parties—Rankine. Agent—David Milne, S.S.C.

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*Wednesday, March* 17.

## SECOND DIVISION.

### BROWN AND OTHERS *v.* SUTHERLAND.

*Bill—Partnership.*

Trustees of a company having accepted a bill drawn on them by a member of a company, in payment of a company's debt, and not having qualified their subscriptions, *held* individually liable.

Robert Brown, Robert Utterson, and John Smith, trustees of the New Imperial Building Association, and Joseph R. M'All, chairman of the Association, presented a note of suspension against James S. Sutherland, plasterer, also a member of the said Association, who had charged them on a bill for £200.

The following were the circumstances:—On 13th February 1874 a building society was formed, under the name of the New Imperial Building Association. By the fourth head of the Articles of Association, the complainers, Brown, Utterson, and Smith, were appointed trustees for behoof of the Association, and were empowered to sue for and uplift all sums of money due to the Association, and authorised to grant all deeds, writs, or others on its behalf; and all deeds and others granted by the said trustees for behoof of the Association were declared to be valid and binding on the Association without the concurrence of the other members. By the tenth article the members bound themselves to grant their personal obligation, if required, along with the trustees, in bonds, bills, notes, or other securities.

The respondent James S. Sutherland, who was a member, was employed by the Association to execute the plaster-work of certain buildings in Leith, which they were then erecting. A contract for the plaster-work was entered into between the respondent and R. Thornton Shiells, the architect of the Association, and the respondent was to be paid by instalments as the work proceeded, on the amount from time to time due being certified by the architect.

The respondent proceeded with the work, and on 23d September 1874 he obtained from the architect a certificate that he had executed such portion of the work as to entitle him to payment of the first instalment, amounting to the sum of £200 sterling. In payment of this instalment the bill in question was drawn by the respondent upon and accepted by the complainers. The bill was in the following terms:—'*Edinburgh, 30th October* 1874.—Two months after date, pay to me or my order, within the British Linen Co. Bank, St Mary Street, Edinburgh, the sum of Two hundred pounds sterling, value received. (Signed) James S. Sutherland, Robert Utterson, John Smith, Robert Brown, Joseph R. M'All.' It was addressed to 'Messrs Robert Brown, 10 East Norton Place, Edinburgh, Robert Utterson, contractor, Leith, and John Smith, spirit merchant, Leith, trustees of the Imperial Building Association, and Mr Joseph R. M'All, builder, Lutton Place, Edinburgh.'

The bill was dishonoured when it fell due on 2d January 1875, and the respondent having charged the acceptors to pay the amount of the bill, the complainers presented this note of suspension, and obtained a sist on caution. They failed to find caution, and referred the whole cause to the oath of the charger. The grounds of suspension were, that the acceptors in granting the bill did so merely for the accommodation of the respondent; that they did not thereby bind themselves as individuals for the amount of the bill, but merely on behalf of, and as representing, the Association, and that the respondent took the bill on that footing; that by his contract with the Association the respondent was not entitled to payment for his work, except by instalments, when the trustees should become possessed of the funds of the Association; and that the respondent being himself a partner of the concern, is not entitled to do diligence upon the bill against his copartners.

The Lord Ordinary (CURRIEHILL) pronounced the following interlocutor:—

"*Edinburgh, 25th February* 1875.—The Lord Ordinary having considered the note of suspension and productions, and the respondents' oath on reference, and heard the counsel for the parties, finds the oath negative of the reference; therefore recals the sist: Finds the letters and charge orderly proceeded: Refuses the note of suspension, and decerns: Finds the respondent entitled to expenses: Appoints an account thereof to be lodged, and when lodged, remits the same to the Auditor of Court to tax and to report."

"*Note.*—[*After narrating the facts as above*].

I am of opinion that, according to the sound construction of the terms of the Articles of Association, and of the bill, apart from the oath of the respondent, the complainers would not be entitled to prevail in this suspension, and that the oath is negative of the grounds of suspension in so far as these are not founded upon the terms of the articles and of the bill. . . . .

"I think that the true meaning of the Articles of Association is, that as the trustees are appointed the sole collectors and holders of the funds of the Association, not only are they to bind the Association and its funds for the proper debts of the Association, but that unless they expressly limit their liability by the terms of the obligations granted by them, they will be personally liable for the amount of such obligations. In the present case there is no such limitation in the bill in question. They are merely designed as trustees in the address upon the bill; but the obligation to pay the amount of the bill is undertaken by them and by M'All absolutely as individuals. It is quite settled by many cases, both in this Court and in England, that although a bill is addressed to a person in a fiduciary or factorial character, his acceptance, unless expressly qualified, binds him personally for the amount. See *Webster* v. *M'Calman*, 10 D. 1131; and *Chiene* v. *The Western Bank*, 10 D. 1523; and in the recent case of *Dutton* v. *Marsh*, 40 L.J. (Q.B.), p. 175, it was held that where the directors of a joint-stock company granted to one of the shareholders of the company a promissory note for money lent by him in the following terms:—'We, the Directors of the Isle of Man Slate Company (Limited), do promise to pay to J. D. £1600, with interest at 6 per cent. till paid, for value received,' the note, though sealed with the company's seal, and admittedly granted for a loan to the company, bound the directors personally to pay the amount.

"It appears to be of no importance in such questions that the receiver of the bill or note knew of the fiduciary or administrative character of the granters, or that he happens to be a partner of the company, if, in fact, the consideration for which it is granted is onerous, and has been given in *bona fide*.

"The terms of the respondent's oath distinctly negative the allegations of the complainers, that the bill was granted for his accommodation—that it was taken by him on the footing that the acceptors were not to be individually liable to him for the amount—and that by his agreement with the Association he was only to receive payment by instalments as the funds of the Association were realised by the trustees; and on this part of the case it may be noticed that the complainers have neither averred nor attempted to prove that they are not possessed of funds belonging to the Association, or that the Association and remanent members are insolvent.

"On the whole matter, I am of opinion that the note must be refused, with expenses."

The complainers reclaimed against this interlocutor.

Authorities—Lindley on Partnership, vol. ii. p. 919 *et seq.* 915; Bell's Princ., § 397; *British Linen Co.*, 15 D. 277; *Cavan*, 10 S. 550; *Neale*, 4 Bing, 149; *Teague*, 8 B. and C. 345; *Chiene*, 10 D. 1523; *Webster*, 10 D. 1131; *Dutton*, 40 L.J., Q.B. 175, 6 L.R., Q.B. 361; *Alexander*, 4 L.R. Exch. 102; *Lindus*, 2 H. and N. 293, 3 H. and N. 177; *Aggs*, 1 H. and N. 165; *Cameron*, 9 Macph. 786, 2 Smith's L.C. (sixth edition), 244; *Lumsden*, 3 Macph. (H.L.) 89; *Preston*, 1 Anst. 50; *Beecham*, E. B. and E. 442; *Bedford*, 1 Bingham's new cases, 399.

At advising—

LORD JUSTICE-CLERK—This suspension belongs to a category of cases in which difficult questions may arise. But in this case I find no difficulty. This is not an action against partners in respect of their being partners. The complainers were charged, not as partners, but as individual obligants. I have indeed considerable doubt whether the defence stated by the complainers can be competently pleaded by them, as the record stands. If they have partnership funds in their hands they are undoubtedly liable. But they have made no statement that they have no company's funds in their hands. I therefore think they are in any case liable.

But I am prepared to go farther. I am of opinion that the bill was accepted by the complainers, not *factorio nomine*, but that the subscription must be read, and was intended to be read, as an individual subscription. The signatures are not qualified in any way; and the authorities clearly establish that, in such a case, the acceptors are individually liable. This is clearly brought out by Lord Chief-Justice Cockburn in the case of *Dutton*. In the present case I am of opinion that the subscription was purposely not qualified, because the respondent might not have been willing to take the obligation of the company. I therefore agree with the Lord Ordinary's interlocutor.

LORD NEAVES—I am of the same opinion. The difficulties stated as to the law of partnership seem to me to be chiefly deserving of consideration as showing that no one would have taken a bill subject to such difficulties. It is not easy to conceive that this tradesman would have given his labours for mere moonshine. This bill is a document of debt, capable of summary diligence. Was this not intended by the parties? That it was so is clearly established by the oath of the respondent, to which the whole circumstances were referred by the complainers. They make no statement that there are no company funds. Why do they not give this man a share of them, in payment of a company debt? But in my opinion the *bona fides* of this transaction is, that this was not a company debt, but a personal obligation undertaken by the complainers. They are therefore clearly liable in payment of this bill, and, if they have funds of the company in their hands, they can recoup themselves in a count and reckoning with their co-partners.

LORDS ORMIDALE and GIFFORD concurred.

The Court adhered to the Lord Ordinary's interlocutor, with additional expenses.

Counsel for the Reclaimer — J. C. Smith. Agents—T. & W. A. M'Laren, W.S.

Counsel for the Respondent—Dean of Faculty (Clark), and Thorburn. Agents—Wallace & Foster, Solicitors.