trustees under the settlement, and he revokes it so far as it contains any such conveyance. I think he is entitled to do so.

It was ingeniously urged that although a donation to the wife herself might be revoked, it was otherwise with a provision made by Captain Melville in the mutual settlement for the children of the marriage. It was said the wife had purchased a succession for them by the mutual deed which the husband could not revoke even for behoof of any children which he might have by a second marriage. I cannot so regard the deed. The children of the marriage are no parties thereto, and in so far as they are concerned I think the spouses must be regarded as merely making testamentary provisions, each spouse conveying for behoof of the children merely his or her own estate. Logically the argument for the second party would come to this, that every penny Captain Melville may hereafter earn, and everything that he may hereafter succeed to, must be instantly handed over to the trustees for behoof of the children of his late marriage, for the mutual settlement conveys to the trustees everything that may belong to either of the spouses at their respective deaths, and although this view was hardly pressed in argument to its full extent, there was some difficulty and inconsistency felt in restricting the claim to the estate which might belong to the husband at the dissolution of the marriage. I am of opinion, however, that there is no ground at all for the contention that by the deed the wife purchased a succession to the children of the marriage. She really purchased nothing. She paid no price, and she gave no consideration for a sacrifice so great on the part of the husband—a sacrifice which might impair his wellbeing and hamper him all his future life.

I am of opinion, therefore, that all that the trustees, the second parties to the case, can claim under the mutual settlement is the £400 mentioned in the seventh purpose, which they will administer for behoof of the two children of the marriage between Captain Melville and his late spouse.

Lord Ormidale—Although in previous cases I have indicated, I think, a greater leaning than your Lordships in favour of such contracts as that in this Special Case, still here I do not feel any difficulty whatever. To adopt any other course than that proposed by Lord Gifford would amount even to an injustice to the husband.

Lord Justice-Clerk—I entirely concur in your Lordships' opinion.

The Court therefore answered the first question in the negative, and the second and third in the affirmative.

Counsel for First Party—Pearson. Agents—Pearson, Robertson, & Finlay, W.S.

Counsel for Second Parties—Low. Agents—Menzies, Coventry, & Soote, W.S.

Tuesday, July 15.

FIRST DIVISION

CITY OF GLASGOW BANK LIQUIDATION —(*CALEDONIAN BANK CASE*)— FRASER AND OTHERS *v.* THE LIQUIDATORS.

Public Company—Title to Sue—Individual Shareholder—Ultra vires—*Bank Advance on Security of Shares of another Bank.*

The contract of copartnery of a banking company of unlimited liability registered under the Companies Act of 1862 authorised investments in, *inter alia*, its own stock, or "the stocks of the Bank of England, or the Bank of the United States of America, or of any other banks or banking companies." The directors were to have all the powers that belonged to the company. In the course of its business a cash-credit advance was given to a customer upon the security of certain shares held by him in another bank. The directors had a transfer of these shares made out, and the name of the first bank was entered on the register of the second. On the failure of the latter the name of the former was placed on the list of contributories in the winding-up, and a petition was then presented by eight of its shareholders, in their own names, to have its name removed, on the ground that what had been done was *ultra vires* of the directors. *Held* that the petitioners had no title to sue, as neither the company nor its directors had acted *ultra vires* in making their bank a partner in another bank in order to secure advances.

Observed by Lord Shand that if the transaction had been *ultra vires*, individual shareholders either in their own or in the company name would have had a title to sue a petition such as that in question.

Opinion per Lord Shand that the mere statement in an article of copartnery that the business of a company is to consist of banking in all its branches will not of itself give a power of making a bank a partner in another bank.

This was a petition by Alexander Fraser, accountant, Inverness, and seven other shareholders of the Caledonian Banking Company, to have the name of the company removed from the register of the City of Glasgow Bank.

The Caledonian Banking Company was established in 1838, and was subsequently incorporated under the Companies Act 1862. By its contract of copartnership the parties thereto agreed to form themselves into a joint-stock banking company for carrying on the business of banking in all its branches and departments within the burgh or town of Inverness, and such other towns, cities, and places in Scotland as the ordinary directors for the time being should think fit; and for conducting the business thereby undertaken they agreed upon certain rules, regulations, stipulations, and conditions mentioned in the contract, all of which they and each of them bound and obliged themselves, and those in their right, to fulfil and observe. The liability of the shareholders was unlimited, and the capital stock

consisted of 62,000 shares of £10 each, of which £2, 10s. per share was paid up. In the fifth article of the contract of copartnership it was provided that "the trade and business of the company shall consist of banking in all its branches; issuing notes of all denominations and amounts; advancing or lending money on cash-credits or accounts, personal securities, bills of exchange, letters of credit, receipts, bills, promissory-notes, or other forms of obligation usual in banking transactions; investments in the Government funds, Exchequer and Navy bills, or other securities of the Government of Great Britain and Ireland, or of foreign States, purchases of the stock of this company, or of the stocks of the Bank of England, or the Bank of the United States of America, or of any other banks or banking companies, or of the East India Company, or of road, railway, shipping, and canal companies in Great Britain and Ireland, that may be approved of by the ordinary directors; or in the purchase or lease of such heritable property as may be necessary or beneficial for the interests of the said company; or in lending money to trustees or commissioners of roads, or to other public bodies, or on heritable security, but for and in no other adventure, trade, or merchandise whatsoever than in that of banking in all its branches, or the purchases and investments hereinbefore enumerated and described."

On 9th December 1874 the directors granted a cash-credit of £2000 to the firm of Messrs Conacher & Harris, farina manufacturers, Nairn. In security of the advances which might be made to that firm, Charles Waterston, the manager of the bank, entered into a transaction with Alexander Conacher, one of the partners of that firm, by which the latter assigned, transferred, and made over to the Caledonian Banking Company, *inter alia*, £400 of the stock of the City of Glasgow Bank. That transaction was carried out without the knowledge of the shareholders of the Caledonian Bank. In terms of article 37th of the contract of copartnery of the City of Glasgow Bank, which provides that the deed of transference of the shares of that bank should be prepared by such person as the ordinary directors might appoint at the head office in Glasgow, in such form and terms as the said directors might from time to time appoint, the following transfer was prepared:—"I, Alexander Conacher, merchant, Pitlochry, for certain good causes and considerations, do hereby assign, transfer, and make over to and in favour of the Caledonian Banking Company, their assignees and successors whomsoever, four hundred pounds sterling of the consolidated capital stock of the City of Glasgow Bank Company, with the whole interests, profits, and dividends that may arise and become due thereon, the said Caledonian Banking Company by acceptance hereof being, in terms of the contract of copartnership of said bank, subject to all the articles and regulations of the said company in the same manner as if they had subscribed the said contract; and we, the said Caledonian Banking Company, do hereby accept of the said transfer on the terms and conditions above mentioned." There was a minute of agreement between Conacher and the Caledonian Bank which set forth the security character of the transaction.

The name of the Caledonian Bank was thereafter placed on the register of members of the City of Glasgow Bank, and was consequently, when that bank went into liquidation, included in the list of contributories.

The petitioners pleaded, *inter alia*—"(1) The nature of the business contemplated under the contract of copartnery of the Caledonian Banking Company was that of banking in strict conformity with the principles and usages of banking in Scotland, and it being at variance with such principles and usages to lend money upon the security of shares and stocks of other companies whereby partnership liabilities are incurred, the alleged transfer of stock was illegal, and the placing of the corporate name of the Caledonian Banking Company on the stock ledger of the City of Glasgow Bank was unauthorised, and did not render the former bank or its shareholders or assets liable for the debts of the said City of Glasgow Bank. (2) The said transaction was not within the province of banking as carried on in Scotland, and not only is it not authorised, but it is prohibited by the contract of copartnery of the Caledonian Banking Company. (3) The said alleged transfer is not binding on the shareholders of the Caledonian Banking Company, in respect that the said directors and the said Charles Waterston had no authority to enter into the said transaction, and that the said Charles Waterston had no warrant or power to subscribe the said transfer on behalf of the company, to affix the company's seal thereto, and to cause the corporate name of the company to be placed on the register of the City of Glasgow Bank. (4) The City of Glasgow Bank was bound to make itself acquainted with the powers of the said Charles Waterston to represent and bind the Caledonian Banking Company before transacting with him, and having transacted with him on a matter on which he had no such authority, the said bank contracted with him alone, and are only entitled to hold him liable to them. (5) It was *ultra vires* of the City of Glasgow Bank to enter the corporate name of the Caledonian Banking Company on its register with the effect of subjecting the said company and its shareholders to the liabilities of partners without entitling them to the rights of partners. (6) It was *ultra vires* of the said Charles Waterston, and of the directors of the said Caledonian Banking Company, to authorise the entry of the corporate name of the said company on the register of the said bank, with the effect of subjecting the shareholders of the said company to all the liabilities imposed on partners under the 'Companies Act 1862,' without a special resolution of the said company having been passed to alter the provisions of its contract of copartnership. (7) The creditors of the City of Glasgow Bank were not entitled to transact with it on the footing that the Caledonian Banking Company was one of its partners, they being bound to know that the entry of its corporate name on the register was illegal, and could not give it the rights nor subject it to the liabilities of a partner."

The liquidators pleaded that the petitioners had no title to sue, and that the transaction was not *ultra vires* of the Caledonian Company.

Argued for the petitioners—(1) The petitioners had a title to sue, for they had an interest, and the directors had an adverse interest. The other shareholders no doubt were interested in the

same way as the petitioners, but whatever their motives, the fact that they did not sue ought not to bar the petitioners from suing. At all events, if the transaction complained of were *ultra vires*, the title of the petitioners would be unassailable. The first question therefore ran into the second, which was, (2) Whether the directors had acted *ultra vires* of the contract of the company in taking these shares as a security? Now, the fifth article of the contract authorised the purchase of bank stock, but bank stock was not mentioned among the securities upon which the bank might lend money. Nor could such a security be considered an "obligation usual in banking transactions." This was a Scotch bank, and Scotch banking business did not include such transactions. Even in England, in *Barned's Banking Company*, Lord Justice Cairns went upon the special terms of the contract of the company. The transaction here was therefore *ultra vires* of the company.

Authorities (on the question of title)—*Atwool* v. *Merryweather*, L.R., 5 Eq. 464, Note; *Meniers* v. *Hooper's Telegraph Works*, L.R., 9 Ch. App. 350; *Russell* v. *Wakefield Water-works Company*, L.R., 20 Eq. 474—(On the question of *ultra vires*) *Joint-Stock Discount Company* v. *Brown*, L.R., 3 Eq. 139, 8 Eq. 381; *Barned's Banking Company*, L.R., 3 Ch. App. 105; *Asiatic Banking Company*, L.R., 4 Ch. App. 252.

Argued for the respondents—(1) The petitioners had no title to sue. The directors alone could use the corporation name. That was the general rule, but in the case of this company, under article 9 of the contract, shareholders holding stock to the value of one-fifth of the whole could call a general meeting, and thereafter, if authorised, proceed in the company's name. That had not been done here. Individual shareholders could no doubt sue in certain circumstances, either when the directors had fraudulently got a command of the majority of the shares, as in *Atwool* v. *Merryweather*, or where the Act complained of was *ultra vires*. It must, however, be *ultra vires*, not of the directors merely, but of the company, so that the shareholders could not validate it—*Foss* v. *Harbottle*; *Mozley* v. *Alston*; *Orr* v. *Glasgow & Monklands Railway Company*. Now, no reading of the contract of this bank could make the transaction complained of *ultra vires*, not merely of the directors, but of the company. But (2) it was not *ultra vires* in any sense. The interpretation which the petitioners put upon the fifth article of the company's contract was wrong, for nearly every kind of security, even Bank of England stock, would be thereby excluded. But this was an "obligation usual in banking transactions." There was no distinction in this matter between banking in Scotland and banking in every other part of the world, and there could be no doubt that such a security was a proper one for English banks. Indeed, this bank was expressly allowed to hold bank stock, which showed, if it were necessary to do so, that transacting in the stock of other banks was part of the usual business of their bank at all events. (3) Assuming, however, that the transaction was *ultra vires*, that did not affect creditors, because the bank could hold stock as a purchaser, and this was sufficient to authorise all that appeared on the register.

Authorities—*Foss* v. *Harbottle*, 2 Hare 461; *Mozley* v. *Alston*, 1 Phil. 790; *Orr* v. *Glasgow Airdrie & Monkland Railway*, Dec. 18, 1857, 20 D. 327—April 24, 1860, 3 Macq. 799; *Gray* v. *Lewis*, L.R., 8 Ch. App. 1035.

At advising—

Lord President—This is a petition presented in name of eight individual shareholders of the Caledonian Banking Company, praying the Court to order the removal of the name of that company from the list of contributories in this liquidation. The Caledonian Banking Company is an incorporation under the Act of 1862, and in its corporate capacity it became the owner of a certain amount of stock of the City of Glasgow Bank, and it stands registered as a partner in respect of that stock. An objection has been taken to the title of the petitioners to make this application; and although I do not think it necessary to say much upon that subject, I cannot avoid expressing a very clear opinion that the petitioners have no title. It must be observed that they sue as individual corporators, and as a very small number of individual corporators compared with the whole body, and they desire to have the name of the corporation taken off the list of contributories against the will of the incorporation and of the great body of the corporators; and they are suing this petition as in a question with the liquidators of the City of Glasgow Bank representing the whole body of its contributories and creditors. I shall only say at present that I think the petitioners have no title to make such an application; but I am not desirous of dwelling further upon that subject, because I understand your Lordships to be all very clearly of opinion that this petition falls to be refused on its merits, and it is desirable that the question raised should be determined on its merits in this liquidation, for the benefit of all concerned.

Therefore I will proceed to consider the grounds on which these petitioners, supposing they have a title, ask that the name of the Caledonian Banking Company be removed from the list of contributories. The company became holders of £400 of the stock of the City of Glasgow Bank in circumstances which are very fully disclosed in the minute of agreement between that company and Alexander Conacher, merchant in Pitlochry, which we have now before us. That minute bears that the Caledonian Company granted a credit to the extent of £2000 in favour of Conacher & Harris, farina manufacturers in Nairn, on consideration that in addition to the personal security to the firm of Conacher & Harris, and the individual partners thereof, Alexander Conacher had in further security to the bank for advances to be made to the firm of Conacher & Harris, assigned and transferred to the banking company certain stocks which are therein specified, consisting of stock of the Caledonian Banking Company itself, of stock of the Clydesdale Banking Company, of stock of the City of Glasgow Banking Company, and of stock of the Union Bank—in consideration of that transference the bank agreed to give the credit required—and they also declared in this minute of agreement that these stocks which were transferred to them were to be held by them as securities for the advances to be made.

Such is the nature of the transaction under which the Caledonian Banking Company became partners in these different banks in respect of the stock thus transferred. As regards the City of Glasgow Bank stock, it was transferred into the name of the incorporation of the Caledonian Bank upon the requisition of the directors of that bank. The ground of the application is that this transaction was *ultra vires* of the directors of the Caledonian Banking Company, and the grounds upon which this is maintained are stated with considerable care and some detail in the petition, and it is of great importance to observe what is the ground that the petitioners there take up. They say—"The transaction, though believed by the petitioners to be consistent with the custom of bankers in England, India, and other countries, is entirely opposed to the principles of Scotch banking, and at variance with the usual custom and practice of banking companies in Scotland in carrying on their business as bankers. It is not within the province of Scotch banking companies in carrying on their business to become partners of other companies, and, in particular, it is not the practice of said banks to become partners of other companies by taking as security for advances to customers the shares or stocks of other companies to which any liability is attached. The Scotch banking system could not be carried out if such a practice existed. The moneys received by them as banks of deposit are repayable at call, the amount held in this way being about £78,000,000, sterling." And after some other statements in detail they say—"Their practice of banking, which is universally known and understood, cannot be conducted except on the footing that their liabilities are defined and published in their yearly balance-sheets to their shareholders and the public." And then at a subsequent part of the petition they say—"The contract of copartnery of the Caledonian Banking Company did not authorise the acquisition, whether by purchase or in security, of shares in a company incorporated under the Joint Stock Company Acts, nor did it subject the shareholders to the liabilities sought to be imposed upon them under those Acts. Before such an acquisition could be made for the Caledonian Banking Company, and such liabilities undertaken by its shareholders, provision required to be made in its contract of copartnery by passing a special resolution to that effect."

Now, if it be true that it is quite beyond the ordinary business of banking as carried on in Scotland to take shares in another company, or for a banking company to become a partner in respect of stock in any other banking company, and if that is part of the provisions of the contract of the Caledonian Banking Company, then no doubt this complaint is well founded. But if it be the practice of Scotch banks to abstain from placing themselves in that position, and supposing that practice to be founded upon what are represented here as the peculiar principles and rules of Scotch banking, then all I can say is that the Caledonian Banking Company under its contract does not profess to carry on banking on these principles, but, on the contrary, professes to carry on its business on the principles which are said to prevail in England, India, and other countries, because the fifth article of the contract of copartnery of the Caledonian Bank expressly authorises the investment of the funds of the company in the shares of any other banking company. That perhaps would be a sufficient answer to the ground of complaint as stated in the petition.

But then it was argued to us that although there may be an express allowance in that fifth article of the contract to acquire in property the shares or stock of other banking companies, it does not necessarily follow that they are entitled to take transfers of such shares or stock in security of advances. The distinction between the one and the other is a little subtle, and practically not very intelligible; but still if it can be made out that, either expressly or by clear implication, this corporation which is entitled to invest in such shares and stock, are prohibited from taking such shares or stock in security—if that be the true construction of the contract—then the petitioners on the merits would be entitled to prevail. But how does the fifth article of the contract stand? It begins by a general declaration that "the trade and business of the company shall consist of banking in all its branches"—a very comprehensive and important statement, and which has a considerable bearing, I think, upon what follows—"Issuing notes of all denominations and amounts, advancing or lending money on cash-credits or accounts, personal securities, bills of exchange, letters of credit, receipts, bills, promissory-notes, or other forms of obligations usual in banking transactions." Now, as regards that branch of the clause, I think it intends to prescribe, and does in fact prescribe, not what securities may be taken by the banking company, but what forms of obligation may be taken. I mean when I speak of securities, subjects of security, because obligations and personal securities which are here mentioned are no doubt in one sense securities—all written obligations are securities; but this does not express what subjects of real security may be taken by the bank. Nor is there any part of this fifth section that does prescribe what subjects of security may or may not be taken; but it goes on to express in what subjects investments may be made—"Investments in the Government funds, Exchequer and Navy bills, or other securities of the Government of Great Britain and Ireland, or of foreign States, purchases of the stock of this company, or of the Bank of England, or the Bank of the United States of America, or of any other banks or banking companies, or of the East India Company, or of road, railway, shipping, and canal companies in Great Britain and Ireland, that may be approved of by the ordinary directors, or in the purchase or lease of heritable property, or in lending money to trustees or commissioners of roads or to other public bodies, or on heritable security."

Now, it being therefore perfectly clear that it was competent for the Caledonian Banking Company to have acquired by purchase shares or stock in the City of Glasgow Bank, it would seem at the least very strange that a banking company with such a power of investment as that should be held not to be carrying on the trade or business of banking in all its branches when it accepted of one of these favoured investments as a security for an advance of money. It would be a very strange construction of a contract of copartnery that should have

this result, that that which is a good investment of the funds of the company is under the contract an illegal and prohibited security for an advance of money. It seems to me that the business of banking consists to a very great extent in making advances of money upon the security of such subjects as the bank might safely and properly acquire in property. That is the business of banking, or at least one of its branches, as I understand it.

But if we were to read this contract as limiting the subjects upon the security of which money was to be advanced, in the way proposed by the petitioners, observe what the necessary consequence would be. You must apply that not only to the stocks of other banks or banking companies, but to all the other investments specified in this article which stand in the same category as the stock of banks or banking companies. I do not understand that if it be incompetent to advance money on the stock of the City of Glasgow Banking Company, it would be competent under this clause to advance money upon the security of railway shares or canal shares, or the shares of any limited company, because all these are coupled together in the same category as the shares of unlimited banking companies. Nay, I should go a step further, and say, I can see no room for distinction, as far as this clause is concerned, between the Bank of England and the City of Glasgow Bank. They are coupled together, and it would therefore come to this, that an advance of money upon the security of a transfer of Bank of England stock would not be carrying on the proper business of banking of this Caledonian Banking Company. What answer can be made to that except this, that there is a difference in the constitution of such companies —some are limited, others are unlimited—and it is dangerous and not proper banking to transact in the shares of unlimited companies for the debts of that other company. But then that objection cannot be heard in the mouths of the shareholders of this Caledonian Banking Company, because their contract entitles the directors to incur that unlimited liability, and to incur it on behalf of all the shareholders of the company in so far as investment is concerned.

In short, it seems to me quite impossible to say that the power of advancing money on the security of particular subjects which are not specified in this clause shall be more limited than the power of investment in such securities. Whatever the company may regularly and legally under this contract acquire by purchase, it appears to me that they may with equal propriety and legality acquire as the subject of a security. And upon that ground therefore I am very clear, apart from the question of title, that this petition must be refused.

Lord Deas—I am of opinion with your Lordship that this petition falls to be refused upon its merits, apart from the question of title, so far as these two questions admit of being distinguished. It is admitted in the petition that it is quite consistent with the custom of bankers in England, India, and other countries, for a bank to accept of a security such as this. But it is said that this is not consistent with the practice of Scotch banking companies. It is very difficult to see why such a transaction should be consistent with the practice of banks in all other parts of the world, and at the same time to see why that which can be done legally in all other countries cannot be done in this country. There has been no authority stated for that at all. It has been decided again and again in England, in cases of undoubted weight and authority, that a security of this kind may be legally taken by a bank or a banking company—that is to say, one bank or banking company may purchase or take in security shares in another bank or banking company—and assuming these authorities to be equally applicable to Scotland as they are to England and other countries, it follows that according to law (without looking in the meantime to the contract of the company at all) a bank which is entitled to carry on the business of banking in other countries may accept a security of this kind.

If that be so, we have only to look at the contract of this company to see whether that which could be done according to the ordinary rules of law cannot be done in consequence of the terms of the contract; and when we look at that contract we find the very reverse, for in the fifth article it is expressly provided that the trade and business of the bank is to carry on the business of banking in all its branches, and it goes on to provide that they may lend money, and they may make investments in certain funds specified, including purchases of the stocks of the Bank of England, the Bank of the United States of America, or of any other banks or banking companies, or of the East India Company, or of road, railway, shipping, and canal companies, &c., that may be approved of by the ordinary directors. And in another article of the contract it is provided that the ordinary directors shall have all the powers that belong to the company, including of course the powers provided by that fifth article.

The transaction by which the corporation obtained a transfer from Mr Conacher of £400 stock of the City of Glasgow Bank is in the form of an absolute right, and if that had not been qualified in any way it seems to be quite plain that that absolute right to the shares would have been perfectly good, and they would have become the property of the Caledonian Bank, and they would have become so with all the liabilities as well as with all the rights attached to them. There is a relative writing, in a form which is very common, by which it is declared that the transfer, although on the face of it absolute, is intended only as a security. It is extremely difficult to see why that transaction, if it had been carried through in the shape of a purchase, carrying to the Caledonian Bank all the liabilities attaching to that purchase, shall not be good as a security which carries neither more nor less of the liabilities than would have been carried if it had been really and truly absolute. I cannot see any ground for distinction at all. If there is any difference between the two things, the purchase is the exercise of the larger power, and the taking of it in security is the exercise of a lesser power which is comprehended within the greater. I do not therefore see any ground of objection to this transaction in respect of its being a security in place of an absolute purchase. If that be so—if it was within the power of the corporation to take this security in the form in which it is done—and if, as is provided by the contract, the directors had the power to represent and act for the company, it seems to me that there is an end of this question.

And if upon the merits there is an end of this question, clearly there is an end of it otherwise, because the allegation of title cannot possibly be carried further than this, that there is a title in individual shareholders to object to anything which is clearly *ultra vires* of the directors, who act in name of the corporation. But if this is a transaction which was perfectly within the power of the directors as representing the corporation, how can there be a title in any individual shareholder to object. After the explanation which your Lordship has given, I do not see that it is necessary for me to say more than I have said to enable me to come to the conclusion that these individual shareholders have neither right nor title to insist in this application. No doubt the power of banks to become shareholders of other banks is a power which ought to be exercised with great caution and discretion. I have no doubt that it has been so exercised hitherto, and that it will be still more exercised in time to come after we have seen what the consequences are.

Lord Mure—I am of opinion with your Lordship that what is here complained of by the petitioners is within not only the spirit but the letter of the fifth section of the contract of this banking company. By that section "banking in all its branches" is declared to be the trade of this company, and it appears to me that the taking from a customer a transfer of stock of another bank in security of money advanced on loan to that customer is a branch of banking business. In support of this view it is unnecessary to go further than the statements in the petition, where it is admitted that such a transaction is consistent with the custom of bankers in England, in India, and other countries. That being so, it is very difficult to see on what ground it should be beyond the power of the Caledonian Banking Company to deal in the same way. As I understand the fifth section of the contract, the business of the company is not strictly limited to Scotland, because they are by that clause entitled to deal with stock of the Bank of England, the Bank of United States of America, East India stock, and generally with the stock of all other banking companies. There is no restriction as to the place where these banks are. That being so, the only ground on which, as I understand the petition, it is alleged to have been *ultra vires* of the Caledonian Banking Company to enter into this transaction is the great risk and liability that it incurred by becoming a shareholder in another bank—a risk so great that it was illegal for them so to act. That, I think, is negatived by the terms of the section, which although it does not say in express words that they are to lend on the security of the bank, gives them express power to invest in the purchase of the stocks of any of the banks I have mentioned. That being the position in which the contract of copartnery put the bank as regards the management of their affairs, I cannot hold it to be inconsistent with the power there given them to take a security in stock of this sort merely because they thereby exposed themselves to a certain risk. They are entitled in respect of the terms of that contract to expose the bank to risk by the purchase of stock in other banks; and I think that cannot be taken as a reason why it should be beyond their power to enter into an ordinary transaction of this sort, common to all banks in England and in India, and why it should be an illegal act in the management of a bank in Scotland.

That being my view on the merits of the case, I do not think it necessary to enter into any question about the title. I think the title is a difficult question in some views; but it being so clearly within the power of the company, in my opinion, to do what they here did, I think that six individuals of that company have no title to ask us to order them not to do it. The title and the merits here run a good deal into each other. If we came to the conclusion that it was *ultra vires* of the company to do what they have done, then I think the difficulties of the title would begin; and I should be rather disposed to hold that if it had been *ultra vires*, then the six or eight individuals who have come forward here had a title to proceed against the company itself —their own company—to have it declared by an action in this Court that they had gone beyond their powers, though not to come into Court and seek to have their names removed from the register of the other bank. That would be the inclination of my mind, but I do not think it necessary to give any decided opinion on that point, because it is not necessary to the disposal of the case.

Lord Shand—The argument of the respondents has been mainly addressed to the question whether the petitioners, being but a small section of the shareholders of the Caledonian Bank, have a title to insist in an application like the present, and has been rested on two distinct grounds. The first is, that as the act of the incorporation in accepting and registering this transfer of the City of Glasgow Bank stock was within the power of the directors, and was at least within the powers of the company, a section of the partners of the Caledonian Bank have no right or title to interfere to have that act undone; the second ground, that even if the act was *ultra vires*, still the petitioners have no title, because the corporation only could competently present a summary application in this liquidation to have the name of the Caledonian Bank taken off the register and list of contributories.

With regard to the second point, I am not prepared to say that the petitioners might not in certain circumstances have a title to insist in the application. If it be assumed that the Caledonian Bank acted illegally in accepting the transfer—that is, that their contract gave them no power to enter into such a transaction—and consequently that the City Bank acted also illegally in putting them upon the register, and if it appeared that the Caledonian Bank still insisted on remaining on the register, with the result of creating liability against every one of its partners for City Bank calls, in my opinion any one or more of the Caledonian Bank shareholders would have a title to have the illegal act undone, and, either in their own names, or at least by using the name of the company—which in such circumstances I think they would be entitled to do—would be entitled to compear in this liquidation to the effect of having the Caledonian Bank's name taken off the register. But although I express that opinion, I do not think it necessary to decide the question, for I am clearly of opinion with your Lordships that upon the other

grounds pleaded, the petitioners have no title to insist in this application.

It is conceded in the argument for the petitioners, and whether conceded or not it is clear, that the petitioners are only entitled to present an application of this kind if they are able to show that the act complained of was *ultra vires* not only of the directors but of the company under their contract, and that a general meeting of the body of shareholders could not have sanctioned the act and made it binding on the company. If therefore the act was within the power of the directors or within the power of the company it follows that the petitioners have no title. Upon that question I must say that from the moment that the junior counsel for the petitioners in the opening of the case read the fifth article of this contract I was quite unable to resist the conclusion that the act of putting the Caledonian Bank upon the register of the City of Glasgow Bank was plainly within the powers of the directors. I listened to the ingenious arguments of both counsel for the petitioners with every care and attention, but my original impression not only was not removed but deepened as the argument proceeded.

Section fifth of the contract opens with the words that "the trade and business of the company shall consist of banking in all its branches." I am not prepared to say that these words, without the provisions that follow, would necessarily include a power to accept shares in another joint-stock bank, and to put the Caledonian Banking Company on the register of that other bank, with the effect of making the shareholders partners in that bank, and liable for all its obligations. The mere statement in the contract that the business of a company is to consist of banking in all its branches will not, in my opinion, give power of making the company a partner in another bank. "Banking in all its branches" means, I think, *prima facie*, such banking only as is carried on by and subject to the control of the directors of the company themselves, and does not include such business carried on by another company under other management and under a different contract, with the responsibilities of shareholders in that company. But it would be unreasonable to take these words in the contract by themselves. We must look to the whole of the fifth section, and as we proceed with its terms we find an explanation of these opening words, and that one of the favoured securities contemplated to be taken by the bank was shares in any banking company. If they happen to have a surplus of funds at any time, the shares of any banking company are regarded in so favourable a light in point of security that they may even be made a permanent investment, notwithstanding all the liabilities that attach to them. That being so, we obtain the clearest light as to what within the meaning of the contract is included under the term "banking in all its branches." If such stock may be taken even as a permanent investment, it is surely competent for the directors to take it as a security. And so, taking that view of the fifth article of the contract, I am of opinion that this act was within the powers of the company.

I further think it was within the powers of the directors, for the directors had the management of the company, and the fifth article was plainly the code of directions by which they were entitled to walk. It follows that the petitioners, who are complaining of an act which was within the powers of the directors, have no title to interfere, and accordingly I should be disposed to deal with this application by holding that there was no title, and therefore dismiss it. In doing so, no doubt it has been necessary to form and express an opinion on the merits, because the title is strictly dependent upon the merits. It is really a matter of no consequence whether the application be disposed of on the title or upon the merits, for in substance the ground of judgment is that the directors did not act *ultra vires* in accepting the transfer of City of Glasgow Bank stock and registering it, and the petitioners therefore must fail in this application.

The Court refused the petition, with expenses.

Counsel for Petitioners—M'Laren—Trayner—Millie. Agent—J. M. Anderson, S.S.C.

Counsel for Respondents—Kinnear—Balfour—Asher—Lorimer. Agents—Davidson & Syme, W.S.

Tuesday, July 15.

FIRST DIVISION.

[Lord Craighill, Ordinary.

CRAIG & ROSE *v.* DELARGY (M'DONNELL'S EXECUTOR) AND OTHERS.

Shipping Law—Bill of Lading—Endorsee—Act 18 *and* 19 *Vict. cap.* 111 (*Bills of Lading Act* 1856), *sec.* 1 — *Rights of Endorsee of Bill of Lading against Shipowner where Shipper in Fault.*

Held (Lord Shand reserving his opinion) that the onerous endorsee of a bill of lading, suing the shipowner for damages on account of an erroneous statement in the bill, is subject to all the exceptions pleadable against the shipper.

Shipping Law—Bill of Lading—"Not responsible for Leakage"—Burden of Proof.

Held (following *Moes, Moliere, & Tromp* v. *The Leith and Amsterdam Shipping Company*, July 5, 1867, 5 Macph. 988) that in a bill of lading the addition of the words "not responsible for leakage" laid upon the owners of the cargo the burden of proving that the leakage was due to the fault of the shipowner or those for whom he was responsible.

Process—Relevancy—Personal and Representative Liability of Captain for Mis-statements in a Bill of Lading.

Averments and pleas in which *held* (*diss.* Lord Shand) that the question of a ship-captain's personal liability for mis-statements in a bill of lading was not raised.

Opinion (*per* Lord Shand) that in the circumstances as proved the captain was not personally liable.

The defenders in this action were the owners and the master of the vessel "Ann" of Liverpool, and the pursuers Messrs Craig & Rose, colour merchants, Leith, were the onerous endorsees of bills of lading for two lots of olive oil, amounting to 42 and 46 tons respectively, which was shipped