the petition should be refused. The Court would remove names from the register only in the two cases dealt with in section 32 (1) of the Act. Here section 32 (1) (*b*) alone could apply, and the petitioner must show fault or unnecessary delay in registering the transfer. Neither fault nor unnecessary delay was averred. But the company had stopped business, and the directors had published insolvency before they received the transfer. Not only were the directors and liquidator not at fault or in delay, but they were prevented from altering the register—*Nelson Mitchell* v. *City of Glasgow Bank*, December 21, 1878, 6 R. 420, *per* Lord President (Inglis) at p.429, and Lord Shand at p. 437, 16 S.L.R. 155, at pp. 159 and 164, *aff.* May 20, 1879, 6 R. (H.L.) 66, 16 S.L.R. 511; *Alexander Mitchell* v. *City of Glasgow Bank*, December 21, 1878, 6 R. 439, 16 S.L.R. 165, *aff.* May 20, 1879, 6 R. (H.L.) 60, *per* Lord Selborne at p. 65, 16 S.L.R. 503, at p. 506; Buckley on Company Law (9th ed.), p. 111.

LORD PRESIDENT—I think we have in the petition and answers facts adequate to enable us now to dispose of this application. The petitioner is the holder of 300 deferred shares in the Cosmopolitan Insurance Corporation. He alleges that he transferred these shares on the 29th January last to a certain person named Martin, and that on the 30th January his solicitor dispatched a letter to the company enclosing the transfer and requesting that it should be registered. That letter reached the company's office on the 1st February 1915. The petitioner alleges that the company went into voluntary liquidation on the 9th February 1915. And accordingly he now complains that the directors were guilty either of fault or of unnecessary delay in the matter of removing his name from the register, and he asks that his name be removed from the A list of contributories.

It now appears that on 30th January, the same day on which his solicitor's letter was dispatched to the company, the company dispatched a letter to the petitioner intimating that a meeting would be held on the 9th February to consider and, if so resolved, to pass a resolution that the company be wound up on the ground that in respect of its liabilities it was wholly unable to go on with its business.

In these circumstances I am clearly of opinion that not only were the directors not in default and not guilty of unnecessary delay, but that they would have been committing a grave breach of duty if they had removed the petitioner's name from the register and inserted the name of Martin, the transferee; and accordingly that, as this petition is exclusively rested upon the 32nd section of the Companies Act (8 Edw. VII, cap. 69), and as it seems to me plain from the petitioner's own statement that the directors were not guilty of either default or unnecessary delay, I think we ought to refuse the prayer of the petition.

LORD MACKENZIE—I am entirely of the same opinion. The law on this subject is stated thus in the 9th edition of Buckley on Company Law, pages 111-12—"A shareholder is not entitled on the eve of liquidation to insist on registration; the directors ought to refuse registration if the facts are such that the rights of creditors have intervened although a winding up has not commenced." On the facts disclosed in the papers before us it appears to me that this is a case to which that clearly applies, and that the petition should be refused.

LORD SKERRINGTON—I agree.

LORD JOHNSTON was absent.

The Court refused the prayer of the petition.

Counsel for Petitioner—Crabb Watt, K.C.—King Murray. Agents—W. B. Rankin & Nimmo, W.S.

Counsel for Respondents — Macmillan, K.C.—Wark. Agents—J. & J. Galletly, S.S.C.

Wednesday, July 14.

FIRST DIVISION.

[Lord Dewar, Ordinary.

IRVINE AND OTHERS *v.* POWRIE'S TRUSTEES.

Process—Reduction—Proof—Succession—Motion to Examine Chemically a Will the Authenticity of which was in Dispute.

An action having been brought for the reduction of a holograph will on the ground of forgery, it was averred by the pursuers that the will was not a genuine writing but had been transcribed by a chemical process, but that it could not be averred, until the will had been chemically examined, what were the precise methods which had been employed.

A motion, made by written minute, for such an examination of the will *granted*, subject to the conditions—(1) that the examination should be at the sight of the Professor of Chemistry in Edinburgh University, who should be satisfied that it would not affect the continued legibility of the document or its value as an item of evidence in the cause; (2) that similar facilities should be given to the defenders.

George Irvine, 1 Glengyle Terrace, Edinburgh, and others, the next-of-kin and representatives of the next-of-kin of Elizabeth Powrie, Newton Bank, Blairgowrie, deceased, *pursuers*, brought an action in the Court of Session against George Powrie Mitchell, agent of the Union Bank of Scotland Limited, Edzell, and others, trustees under an alleged holograph will of the said Elizabeth Powrie, dated the 30th day of April 1909, and as individuals, and against Mrs Annie Maria Mitchell or Laidlaw, 103 Minard Road, Crossmyloof, Glasgow, and others, trustees for certain of the beneficiaries under the said will, *defenders*, for reduction of the said will.

The pursuers averred, *inter alia*—"(Cond. 10) The pursuers have had the said pretended will carefully examined, and have discovered and aver that it is not the genuine writing of the said Elizabeth Powrie, but is a forgery. The paper on which the document is contained is of a soft absorbent and unglazed type, and the portion of the paper on which there is the appearance of writing has been subjected to chemical or other special treatment for and in connection with the production of the document. The material of which the characters in the said document are formed is not ordinary writing ink. Until the paper has been subjected to chemical examination the pursuers are unable to aver with certainty what special methods and materials were used for the production of the document. The pursuers are advised that such a chemical examination can be made without interfering with the legibility of the document. The said paper is ruled with pencil lines, but examination shows, and it is the fact, that the pencil lines were drawn after the document had been forged, the deposit of graphite from the pencil being distinctly visible in a continuous line where it comes in contact with the forged writing. If the said lines had been drawn on the paper previous to genuine writing being put upon it, the graphite would have been moved wherever the writing happened to come in contact with or cross the lines. Many of the letters in the said document bear distinct evidence of having been touched up, and while the characters all resemble Miss Powrie's handwriting, in many cases they have been formed by strokes which are not used in ordinary handwriting and which were never used by the deceased Miss Powrie. (Cond. 11) Before the said defenders who acted as trustees under the pretended will divided any part of the estate, the pursuers intimated to Mr Ferrier, agent for the said trustees, that they had reason to believe the document was not in the genuine writing of Miss Powrie. Notwithstanding this intimation, the said defenders took no steps to prove that the document was holograph of Miss Powrie, but on the contrary divided the estate. It was not until a later date, and after further inquiry, that the pursuers ascertained definitely that the document was not in Miss Powrie's genuine writing. In May 1913 the pursuer George Irvine wrote the agent for the trustees warning them against dividing the estate, and again he and the pursuer John Irvine, upon 10th October 1913, personally intimated to the agent of the trustees and to the said George Mitchell that they objected to the division of the estate owing to the invalidity of the alleged will."

On 6th February 1915 the pursuers having moved for leave to have the said will chemically tested by experts in presence of a chemical expert to be appointed by the Court, the Lord Ordinary (DEWAR) refused the motion.

Opinion.—"I am of opinion that this motion ought to be refused. I do not require to consider the general question raised, whether in all circumstances the Court will refuse to permit a registered deed to be subjected to chemical tests with a view to proving forgery. If the Court were satisfied that an experiment could be carried out without danger of destroying the deed, and was essential to the administration of justice, I see no reason why it should not be sanctioned. But I think it would only be sanctioned in very exceptional circumstances, because it is obviously not to public advantage that private persons should as a matter of course be permitted to experiment with public documents. I do not think there is anything exceptional in the circumstances of this case. The pursuers aver on record (condescendence 10) that the paper which contains the writing appears to have 'been subjected to chemical or other special treatment,' that the ink used is 'not ordinary writing ink,' that 'the pencil lines were drawn after the document had been forged,' that 'the letters in the said document bear distinct evidence of having been touched up,' and that 'while the characters all resemble Miss Powrie's handwriting, in many cases they have been formed by strokes which are not used in ordinary handwriting, and which were never used by the deceased Miss Powrie.' But it is not explained why a chemical test is necessary to prove these things, or how such a test would assist the case. All that is said is—'Until the paper has been subjected to chemical examination the pursuers are unable to aver with certainty what special methods and materials were used for the production of the document.' That is very vague and indefinite, and appears to me almost to amount to an admission that the pursuers do not yet know what precise purpose the proposed test is likely to serve. I accordingly refuse the motion. But as it raises an important question on which there is no direct authority I grant leave to reclaim."

On 18th May 1915 the pursuers, after a discussion in the procedure roll, renewed their motion, which the Lord Ordinary again refused.

The pursuers having reclaimed to the First Division the Court required them to embody their motion in a written minute, and after continuation a minute in the following terms was accordingly lodged—"Macquisten for the pursuers—in respect that the alleged will of the deceased Elizabeth Powrie has been recorded in the Books of Council and Session, and it has been ascertained by inspection of the document that in connection with its production one or more chemical solutions have been applied to its surface, and that no ordinary writing ink has been used, but a compound such as is used by draughtsmen in making reproductions of designs and drawings, and that it is essential to the justice of the case that the pursuers should have an opportunity of testing chemically the paper and ink forming the said document, which tests they are advised by experts of high standing will determine with precision the special methods used for the production of the same, and can be applied without interfering with its legibility—moved the Court to authorise the pursuers by their experts, and at the

sight of a chemical expert to be appointed by the Court, to have access to the said document, and to take therefrom (1) such parts of the paper and of the surface thereof as are not written upon, and (2) so much of the ink or other material forming the alleged writing as may be considered, for the purpose of chemical or other examination, necessary to enable them to determine and prove the means used in producing the said document, subject always to the condition that the said expert appointed by the Court shall be satisfied that any interference with the said document by the pursuer's experts shall not affect the continuing legibility thereof."

Argued for the pursuers (reclaimers)—The defenders had no interest to oppose the motion if the will was genuine, as they averred. The motion was analogous to one for inspection of a document, which had been repeatedly granted, as also motions for the production of wills in foreign courts at the instance of private individuals—*Duncan and Others* v. *Lord Clerk Register*, July 14, 1842, 4 D. 1517; *Dunlop* v. *Deputy-Clerk Register*, November 30, 1861, 24 D. 1861. A distinction should be drawn between wills and public records The interest of the Lord Clerk Register in the matter was defined in the Lord Clerk Register (Scotland) Act 1879 (42 and 43 Vict. cap. 44).

Argued for the defenders (respondents)—Such a motion was unprecedented. It was unnecessary in respect that even if it were proved that the will was produced by the materials averred there was no proof of forgery, since a testator might test in any manner he pleased. The motion was premature, since there was no expert evidence to support it. In any event there was nothing on record to justify the application—Taylor on Evidence, vol. ii (10th ed.), sec. 1809.

Argued for the Lord Clerk Register—Such a motion was unprecedented in Scotland, whatever was the rule in England. If granted it should be at the sight of a neutral expert.

LORD PRESIDENT—This is an action for reduction of a document said to be the holograph will of a lady who died on 28th August 1911. It bears to be dated 30th April 1909, and the ground of reduction is that the document is from beginning to end a forgery, although not a forgery in the ordinary acceptation of the term.

The circumstances are very peculiar; so far as I know they are unprecedented, for the pursuers say the paper on which the will is written is of a "soft, absorbent, and unglazed type, and the portion of the paper on which there is the appearance of writing has been subjected to chemical or other special treatment for and in connection with the production of the document. The materials of which the characters are formed is not ordinary writing ink." It has been explained to us, by counsel for the pursuers at the discussion, that no human hand has written any of the letters or characters on this paper, but that they have been transferred to the paper by some chemical process or tracing, and that this could not be determined with certainty, but at present remained within the region of conjecture more or less probable. Accordingly the pursuers say that until the paper has been subjected to chemical examination they are unable to aver with certainty what special methods and materials were used for the production of the document. At the discussion we were moved to grant to the pursuers leave to subject a portion of the paper on which the writing has been transferred and some of the ink to chemical examination in order to ascertain whether or no this document was, as is alleged, fabricated from beginning to end or was a genuine writing.

The motion was confessedly unprecedented, and accordingly we thought it desirable before considering it that the pursuers should express in a written minute the grounds on which they make the motion, and should state with precision the terms on which they desire it should be granted and the safeguards which they suggest in case chemical examination of the paper and the ink should be allowed.

We have now before us the minute, in which it is stated—". . . [*quotes*, *v. sup.*] . . ."

Now on principle there appears to me to be no objection to granting this motion. If I thought for a moment that the integrity or even the appearance, and—much more—the legibility of the document, would be affected by the proposed chemical examination, I should be at once for refusing this motion; but I cannot see that to subject a portion of the paper on which the writing exists—a portion of the paper on which there is no writing—to chemical examination could by any possibility affect the document one way or the other. And there is nothing to suggest that, if care is taken and responsible advice is followed, the removing of a portion of the ink for the purpose of subjecting it to chemical analysis would in any way destroy the legibility of the document or materially affect its condition and appearance.

But the motion was objected to on three separate grounds. In the first place it was said to be unprecedented. That may be true but is not decisive, because the circumstances of the case are, as I have pointed out, unprecedented. Secondly, it was said that it was unnecessary. Obviously that cannot be so if, as we are assured and as seems probable, chemical analysis and examination will result in demonstrating that the document is or is not a fabrication, or, in other words, will prove whether the characters have or have not been transferred to the paper by some process. Thirdly, it was said that the motion was premature. I cannot think so, for it seems to me eminently desirable that if the paper and the ink are to be subjected to chemical examination, this should be done at once and prior to the proof, so that when the evidence comes to be led all the evidence will be taken together and adjournments for indefinite periods and the allowances of additional proof will be avoided.

On these grounds I am for granting the

motion, but subject to this condition that the specimen of the paper and the specimen of the ink be taken at the sight of the Professor of Chemistry in Edinburgh University, and that he shall be satisfied, before there is any interference with the document, that the examination to be made by the pursuers' experts will not in any way affect the continuing legibility thereof.

We shall frame the interlocutor so that both parties shall secure the advantage.

LORD MACKENZIE—What we are asked to do here is to sanction a novel experiment—at least we have not been referred to any case in which such a proposal has been sanctioned.

I am bound to say that at first I was inclined to the view that this motion should not be granted upon mere averment, and that it would have been more prudent to have advanced the case up to the point of having evidence before the Judge trying the case to satisfy him that there was a reasonable prospect of this experiment proving of value in the case. But one quite recognises that that could only have been possible because of the accidental circumstance that this case is to be tried by way of proof, for if the case had been set down for jury trial one would have required to face the question *ab ante* on mere averment. Accordingly I concur in the course which your Lordship proposes.

At the same time, my view is that the expert should be satisfied not merely that what is done to the document should not affect the continuing legibility of the writing, but also that it should not affect the document as an item of evidence in the cause, because it may be necessary in the last resort for the Court, by an examination of the document, to come to a conclusion on the issue in the case. Therefore in my opinion the attention of the expert should be specially directed to that in the interlocutor to be pronounced.

LORD SKERRINGTON—I agree. I have only one observation to make which I understand is not inconsistent with the view entertained by your Lordships, namely, that if an opportunity is to be given to the pursuers to make experiments, either with a portion of the paper of which this document consists or with a portion of the ink removed from the document, similar facilities must be given to the defenders, otherwise the pursuers' experiments would be of no evidential value, and an injustice would be done to the defenders.

LORD JOHNSTON was absent.

The Court pronounced this interlocutor—

"Recal said interlocutor [of the Lord Ordinary]: Authorise the pursuers and compearing defenders by their respective experts, in the presence of the Depute-Clerk Register or of his depute, and at the sight of Professor James Walker, D.Sc., Ph.D., Professor of Chemistry in the University of Edinburgh, to have access to the will of the deceased Elizabeth Powrie mentioned in the summons and said minute, and to take therefrom (1) such parts of the paper and of the surface thereof as are not written upon, and (2) so much of the ink or other material forming the alleged writing, as may be considered for the purpose of chemical or other examination necessary to enable them to determine and prove the means used in producing the said document, subject always to the condition that the said Professor James Walker shall be satisfied that any interference with the said document by the experts of the parties shall not affect the value of the document as an item of evidence in the cause or the continuing legibility thereof: Find the expenses of the reclaiming note to be expenses in the cause: Remit to the Lord Ordinary to proceed therein as accords."

Counsel for the Pursuers (Reclaimers)—Watt, K.C.—D. Jamieson. Agents—Alex. Morison & Company, W.S.

Counsel for the Defenders (Respondents) and for Lord Clerk Register—Cooper, K.C.—Morton. Agents—Sharpe & Young, W.S.

Thursday, July 15.

SECOND DIVISION.

MACPHERSON'S JUDICIAL FACTOR v. MACPHERSON AND OTHERS.

Assignation—Trust—Effect of Assignation—Administration of Trust—Assignation of Interest in Trust Estate by a Trustee who Subsequent to Date of Assignation and Intimation Withdraws More than his Interest.

A trustee on a trust estate in which he was a beneficiary assigned to his marriage-contract trustees his interest up to a certain amount in the trust estate, and this assignation was duly intimated to the trustees. He subsequently overdrew the share due to him under the trust to such an extent that the balance was insufficient to meet the claims on the estate and the sum assigned. *Held* that the marriage-contract trustees were not barred by the intromissions of their cedent, the trustee, from claiming a *pari passu* ranking with the other beneficiaries for the sum assigned, and that the rule of English law whereby the assignee would have been affected by the intromissions of the trustee even when subsequent to the assignation and its intimation has no place in Scots law.

Observed per Lord Johnston that where a will gives trustees power to make advances, they will exercise that power subject to personal liability if after an assignation has been intimated to them they do not retain in their hands a sufficient sum to make good the amount assigned.