Wednesday, March 19.*

FIRST DIVISION.

CITY OF GLASGOW BANK LIQUIDATION—(*GILLESPIE & PATERSON'S CASE*)—JOHN GILLESPIE AND OTHERS *v.* THE LIQUIDATORS.

Public Company—Winding-up—Where Partners of a Firm held Stock for Themselves and the Survivor for behoof of the Firm.

Two persons had carried on the business of law agents and conveyancers for eight years, when it was agreed to form a new firm with the son of one of the old partners as an additional member. Prior to the execution of the contract of copartnership, but with a view to the arrangements of the new firm, certain stock in a bank of unlimited liability was purchased by the original partners, and the transfer taken in favour of themselves and the survivor for behoof of the firm. The new partner was not a party to this transfer, and was not aware of its terms. In a petition for rectification of the list of contributories upon which the firm's name was entered with the description "the trustees for," and also the names of the two partners individually described as "trustee for," the firm—*held* (1) that the name of the firm ought to be deleted from the list; and (2) that the name of the two original partners ought to remain, each partner being liable *in solidum*, and not merely for half the amount of the stock held by them.

In July 1878 the petitioners John Gillespie and Thomas Paterson (who now applied to have their names removed from the list of contributories of the City of Glasgow Bank) purchased £1000 sterling of the consolidated capital stock of the City of Glasgow Bank. The transfer of the stock was dated 13th and 29th July 1878, and was in these terms—"I, Alexander Tod, St Mary's Mount, Peebles, in consideration of the sum of £2395 sterling now paid to me by John Gillespie and Thomas Paterson, both Writers to the Signet in Edinburgh, do hereby sell, assign, transfer, and make over to and in favour of the said John Gillespie and Thomas Paterson, and the survivor of them, for behoof of the firm of Gillespie & Paterson, Writers to the Signet, Edinburgh, £1000 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 John Gillespie and Thomas Paterson 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 John Gillespie and Thomas Paterson, do hereby accept of the said transfer on the terms and conditions above mentioned: And we consent to the registration hereof, and of said contract, for preservation and execution."

The entry of the stock in the stock-ledger and in the transfer register of the company was dated 12th August 1878, and was as follows—"John Gillespie and Thomas Paterson, and the survivor of them, for behoof of the firm of Gillespie & Paterson, W.S., Edinburgh."

In the list of contributories the firm name of "Gillespie & Paterson" was entered with the description of "the trustees for," and John Gillespie and Thomas Paterson were each entered individually with the description "W.S., trustee for Gillespie & Paterson." There was a third member of the firm also a petitioner—John Hamilton Gillespie—whose name did not appear on the bank books or on the list of contributories.

It was admitted—1. That for eight years ending on 31st July 1878 the petitioners John Gillespie and Thomas Paterson carried on the business of law agents and conveyancers in Edinburgh as partners under the firm of Gillespie & Paterson. 2. That during the subsistence of the said partnership the bank account of the firm with the City of Glasgow Bank was kept in the name of the petitioner John Gillespie, who was individually a shareholder of the bank to a considerable amount. 3. That by contract of copartnery executed by the petitioners John Gillespie and Thomas Paterson on 14th August 1878, and by the petitioner John Hamilton Gillespie on 1st October 1878, the said John Gillespie and Thomas Paterson, on the narrative that the former partnership had come to an end as at 31st July 1878, agreed to continue the same and to assume the said John Hamilton Gillespie as a partner, on the terms, *inter alia*, that the copartnership should be continued under the firm of Gillespie & Paterson; that the bank account should be kept in name of the firm; that the said John Gillespie and Thomas Paterson should supply the necessary capital in equal proportions, either by holding bank stock in name of the firm or by advancing the requisite funds; and that the said John Hamilton Gillespie should receive a certain percentage of the clear profits of the business, the remainder being divided equally between the said John Gillespie and Thomas Paterson. 4. That prior to the execution of the said contract of copartnery, but with a view to the arrangements of the new firm, the £1000 stock in question was purchased by the said John Gillespie and Thomas Paterson, and the transfer taken in favour of themselves and the survivor for behoof of the firm. 5. That the purchase price of the said stock was paid on 26th July 1878, and was contributed in equal proportions by the said John Gillespie and Thomas Paterson; and the only dividend ever paid thereon (being the sum of £60 paid on 1st August 1878) was carried to their credit in the books of the firm in the proportion of one-half to Mr Gillespie and one-half to Mr Paterson. 6. That the petitioner John Hamilton Gillespie was not a party to and gave no authority for the purchase of the said stock, and was not aware of the terms of the transfer, or that the stock had been bought for behoof of the firm, until after the stopping of the bank.

The petitioners accordingly pleaded—"(1) that the petitioners Gillespie & Paterson, not being partners or holders of stock of the said company, nor registered as such, their firm name ought to be deleted from the said list of contributories; (2) that the petitioners John Gillespie and Thomas Paterson, not being partners or holders of stock

* Decided January 27.

of the said company as trustees for the said firm of Gillespie & Paterson, nor registered as such, the said list of contributories ought to be varied by the deletion of the words 'trustee for Gillespie and Paterson' in the description of the said John Gillespie and Thomas Paterson respectively; and (3) that in any case, in respect that the true interests or shares of the petitioners John Gillespie and Thomas Paterson in the capital stock of the said company above mentioned do not exceed the sum of £500 sterling each, the said list of contributories ought to be varied by the deletion of the sum of £1000, and the substitution of the sum of £500, as the extent of the interest of the said John Gillespie and Thomas Paterson in the said capital stock respectively.

Argued for the petitioners, on the question of the nature of the liability of the petitioners John Gillespie and Thomas Paterson—If this was a trust, there was an end of the case. But it was not a trust; it was a case in which the so-called trustees were themselves the beneficiaries. They ought, therefore, to be liable each for his share, and not *in solidum*. The general rule was that an obligation *in solidum* was not to be presumed—1 Bell's Comm. 345; Bell's Prin., secs. 51 to 53; Stair, i. 17, 20; Ersk. iii. 3, 74; *Cargill* v. *Mure*, Jan. 21, 1837, 15 S. 408; *Lawson* v. *Leith and Newcastle Steampacket Company*, Nov. 26, 1850, 13 D. 175; Wharton's Law Lexicon, "Joint Tenancy" and "Tenancy in Common."

Argued for the liquidators—The rights of partners *inter se*, not made known to the bank, were of no moment; but the private arrangements of the petitioners made it plain that there was here a trust. The transfer showed this. There was a survivorship clause, and this, read along with the destination, made it evidently a case of trust. Besides, it was in fact a trust, as there was a third party in the firm. Then, lastly, the argument on the other side would involve a splitting of dividends and two sets of receipts — *Kirby's* case, Reily's Albert and European Arbitration, 69; *Hill's* case, 20 Eq. 585; *Oswald's* case, *supra* p. 221.

It was ultimately conceded in argument by the liquidators that the firm name ought to be deleted.

At advising—

Lord President—The first part of the prayer of this petition is to delete from the list of contributories the firm name of the petitioners, Gillespie & Paterson. Now the firm name is not on the register of shareholders, and the only notice of the firm that is to be found in the books of the company is that certain persons, members of a copartnery, were registered as trustees for that copartnery; and the respondents very properly concede that in these circumstances it is impossible to keep the name of the firm on the list of contributories, because it is quite settled that persons for whose behoof shares are held by parties who are entered in the register in their own names cannot be made contributories in respect of the shares so held. But the other question raised by the remaining portion of the petition is, Whether Mr John Gillespie and Mr Thomas Paterson are to be entered on the list of contributories as joint holders of £1000 of stock, or whether each is to be entered for a separate sum of £500?

Now, that question seems to me to admit of an easy solution. The entry in the register of shareholders under date 12th August 1878 is "John Gillespie and Thomas Paterson, and the survivor of them, for behoof of the firm of Gillespie & Paterson, W.S.," and then the stock is entered "By stock purchased from Alexander Tod, £1000." That entry is quite justified by the transfer which the petitioners took in August 1878 of the shares purchased from Alexander Tod. That gentleman in his transfer acknowledged the receipt of a sum of money from John Gillespie and Thomas Paterson, both Writers to the Signet, Edinburgh, and in respect thereof he sold, assigned, transferred, and made over to the said John Gillespie and Thomas Paterson, and the survivor of them, for behoof of the firm of Gillespie & Paterson, W.S., £1000 sterling capital stock. That transfer, as accepted by the petitioners and as sent by them to the bank, was a complete warrant for the entry which was made in the register. Now, taking this entry in the register along with the transfer, I think that they prove conclusively, in the first place, that Mr Gillespie and Mr Paterson are joint owners of these shares, and that in the event of one of these gentlemen predeceasing the other, the survivor of them will be the sole owner of the entire amount of stock now standing in their joint names. And these documents seem to me to prove, in the second place, that Mr Gillespie and Mr Paterson held the stock as trustees for the firm of Gillespie & Paterson. That being so, the result seems to follow that they are liable *singuli in solidum* in respect of that amount of stock as partners of this company. This was decided in two different cases which were before the Court recently—the case of *Oswald* (*ante*, p. 221), and the case of *Cunninghame* (not reported)—but indeed it does not require the authority of these cases to settle the point, because it was decided previously in the case of *Lumsden* v. *Buchanan*, 4 Macph. 950.

But it is contended that the way in which this stock is held differs very much from the holding of stock by trustees in the cases to which I have referred—that in point of fact Mr Gillespie and Mr Paterson are simply holding the stock, not as trustees for a set of beneficiaries altogether unconnected with themselves, but for their own beneficial interest. And in support of this contention reference is made to the partnership arrangement in pursuance of which this stock was purchased and held. Now, I confess I entertain some doubt as to how far it is relevant in a question of this kind to go back upon this arrangement, and to seek thereby to contradict the plain and apparent meaning of the transfer and register upon which both creditors and shareholders are entitled to rely. But when we do go back, I do not think that the petitioners take any benefit from the inquiry.

It appears that Mr Gillespie and Mr Paterson have been in partnership for a very considerable number of years, but that their contract having expired, they were, in course of the year 1878, making arrangements for its renewal, and one of the terms of the new arrangement was that Mr Gillespie's son, Mr John Hamilton Gillespie, was to be assumed as a partner in the concern. Another condition was that he should not supply any part of the capital necessary for carrying on the business, but that Mr John Gillespie and Mr

Thomas Paterson should supply the necessary capital in equal proportions, either by holding bank stock in name of the partners, or by advancing the requisite funds. Now, it was for the purpose of carrying out this arrangement that this stock was bought, and it is not immaterial to observe that the stock was bought before the contract was signed, but with a special view to the arrangements contained in it, which leaves no room for any question as to how far the terms of the transfer and registration were verbally or substantially consistent with these provisions in the contract—the one being for the very purpose of fulfilling the other. I think that they must be taken in the view of the petitioners to mean one and the same thing—namely, that Mr Gillespie and Mr Paterson in taking the stock were fulfilling the obligation which they were about to undertake in the contract of partnership of holding bank stock in name of the firm. Therefore it is proved by going back to this partnership arrangement that Mr Gillespie and Mr Paterson are not the sole partners in the firm, but that there is a third partner, the son; and therefore that these two gentlemen who are registered as shareholders are not trustees for themselves only, or trustees for a firm of which they are sole partners, but trustees for a firm in which there were three partners. This makes the trust character all the more distinct. Taking that fact even as it stands disclosed on the face of the register and the transfer, or taking it by going back to the partnership arrangement, the result is the same—these gentlemen hold the stock as joint-owners in a fiduciary capacity. The result of this is, in the first place, that the survivor will be sole owner of the shares, and, in the second place, that they are liable jointly and severally in the obligations of partners in respect of the stock so held.

Lord Deas, Lord Mure, and Lord Shand concurred.

The Court directed the liquidators to remove from the list of contributories the name of the partnership firm of Gillespie & Paterson, and *quoad ultra* refused the petition.

Counsel for Petitioners — Lord Advocate—Mackintosh—Darling. Agents—Mackenzie & Kermack, W.S.

Counsel for Liquidators—Kinnear—Balfour—Asher—Graham Murray. Agents—Davidson & Syme, W.S.

Wednesday, March 19.*

SECOND DIVISION.

BLACK *v.* CORNELIUS.

Agreements and Contracts—Locatio operis—*Liability where Architect of Works employs a Surveyor to Measure.*

An architect of works consulted in the general way, with a view to the erection of buildings and an ascertainment of their probable cost, has authority to engage a surveyor to do the measuring and prepare the schedules, for the cost of which, if the work does not go on, the architect's employer will be liable.

* Decided January 24, 1879.

William Cornelius, a house painter in Edinburgh, being about to erect certain shops and dwelling-houses in May or June 1877, got a specification of the work to be executed from Mr Deas, architect, Edinburgh. Mr Deas received and accepted estimates for the work which Cornelius had empowered him to do. Mr Deas then employed Mr Edward Black, an ordained surveyor, to measure the works connected with the erection of the buildings, which he did from plans furnished to him. He also prepared the schedules of the work, and these measurements and schedules were used by Cornelius in obtaining estimates, and were issued by him to the different contractors, and formed the basis of the contracts that were entered into for the building. Black's account for the proportion of the schedules and measurements was charged by the various contractors, and was included in the contract prices. The buildings were not gone on with, and this action was raised by Black for payment of his charges, which had been refused.

It was averred by the pursuer that the plan adopted by Deas was in accordance with the usage of the professions or trades to which he and the pursuer belonged, and that Cornelius, the defender, was well aware of the usage.

The defender averred, *inter alia*—"Denied that the defender either employed the pursuer or authorised his employment. Explained that the defender's arrangement with Mr Deas was as follows, viz., that Mr Deas was to draw the plans, make all working designs, do all the surveyor's work, and superintend the erection of the buildings until their completion, for three and a-half per cent. on entire cost. Further, denied that the defender used or issued or authorised the issue of any schedules prepared by the pursuer, or that the amount sued for is due by the defender to the pursuer. *Quoad ultra* denied."

The Sheriff-Substitute (Hallard), after proof, pronounced an interlocutor finding, *inter alia*—"(3) That the employment upon which said work was done proceeded from the witness Deas, whom the defender had selected as his architect; (4) That the defender knew that Deas was not to do the work of a surveyor or measurer himself, and became aware in the course of its execution that the pursuer was doing it; (5) That the pursuer's claim is supported by the constant and uniform custom of trade;" and decerning in terms of the libel. He added this note—

"*Note.*—The owner of a site who desires to build on it employs an architect to prepare the necessary plans. These require a conversion into material for tradesmen's estimates. It is the surveyor or measurer who fulfils that function on the employment of the architect. He measures the plans and issues the schedules of specification for the use of the tradesmen who are invited to estimate thereon. If the work goes on, the tradesmen pay the measurer's fee, which is made an item in the schedules. Where the work does not go on, it is to the owner of the site, or client of the architect, that the surveyor or measurer looks for his fees, including the cost of schedules. That is the constant and uniform practice. Mr Brown's evidence on this point was remarkably clear and decisive. The equity which underlies that practice is that the surveyor's work is done for behoof of the owner with the owner's knowledge. If, in the present case, the architect