

had used about £400 of that sum in paying small accounts. £600 remained, which he at once gave up to the liquidators. The liquidators told him that he must restore the £400 which he had paid away. I do not question the propriety of the attitude adopted by the liquidators, but so much is clear that if they had sequestrated William Bain they could not have recovered the money so paid away.

At the interview with Mr Jamieson the latter no doubt asked William Bain whether he could not find that £400, and I think it is not improbable that Bain then told him that (as William Bain junior was unable to pay) the only source from which he could get it was from his son James Bain to whom he made an advance of which he had never intended to demand repayment; and that Mr Jamieson then told him that if he could furnish the £400 (which as I have said the liquidators could not have recovered in a sequestration) they would be satisfied.

This, of course, is conjecture; but from loss of evidence we are practically shut up to conjecture. At the same time from what we know of the wide discretion with which the liquidators were entrusted in settling with contributories the conjecture is not improbable.

The objects of these compromises were, on the one hand, to enable the liquidators to bring the liquidation to a speedy conclusion, and on the other to give the contributory a fresh start in life. Prompt settlement and finality were what was aimed at. The liquidators did not desire to take over unrealisable assets or irrecoverable debts such as William Bain junior's promissory-note. Moreover, we see from one of the questions (No. 8) put to contributories that the liquidators were ready, and considered themselves entitled (subject always to the control of the Court with whom they were constantly in communication), to take into consideration the circumstances of the surrendering contributory's family and dependents. And the reason why they resisted the transfer to the Assets Company of papers relating to surrenders no doubt was that they feared that a limited company uncontrolled by the Court would seek to set aside these transactions which they had carried through with so much trouble and so much pain, on grounds which they would not have put forward, and at a time when explanations of their reasons for accepting the surrenders could no longer be given. This case shows that their apprehensions were not unfounded. In these circumstances I am not prepared to find that the pursuers have established fraud on the part of William Bain.

On 28th May, when the case was put out in Single Bills to sign interlocutor, counsel for the defenders renewed their motion for leave to amend the record by adding a plea of "no title to sue," but did not desire to insist in the motion unless it could be granted without any conditions as to expenses.

The Court refused the motion and pronounced the following interlocutor:—

"The Lords of this Division, along with the three consulted Judges of the First Division, having heard counsel for the parties on the reclaiming-note for the pursuers against the interlocutor of Lord Kyllachy, dated 13th June 1903, in conformity with the opinions of the majority of the said Judges, recal the said interlocutor reclaimed against: Reduce, decern, and declare in terms of the reductive conclusions of the summons: Find the compearing defenders jointly and severally liable to the pursuers in expenses of process; allow an account of said expenses to be lodged, and remit the same to the Auditor to tax and to report: *Quoad ultra* remit to the said Lord Ordinary to proceed with the cause, and with power to him to decern for the said expenses when taxed."

Counsel for the Pursuers and Reclaimers—Salvesen, K.C.—Clyde K.C.—Leadbetter. Agents—J. & D. Smith Clark, W.S.

Counsel for the Defenders and Respondents, William Bain's Trustees—Tait—Wark. Agents—J. & J. Galletly, S.S.C.

Counsel for the Defender and Respondent William Bain—Ure, K.C.—Cooper—Tait. Agents—Davidson & Syme, W.S.

Saturday, May 28.\*

## SECOND DIVISION.

(With the Lord President, Lord Adam, and Lord Kinnear.)

[Lord Kyllachy, Ordinary.]

### ASSETS COMPANY LIMITED v. PHILLIPS' TRUSTEES.

*Title to Sue—Assignment of Assets—Statute—Construction—Right to Challenge—Discharge Granted before Assignment—Claim of Damages—City of Glasgow Bank Liquidation Act 1882 (45 and 46 Vict. cap. cliv).*

In 1882 the Assets Company, Limited, under a private Act of Parliament, took over the whole assets and property of whatever nature and wheresoever situated, including all rights, claims, and privileges of every description to which the City of Glasgow Bank, which had gone into liquidation in 1878, or anyone on their behalf, then had right. Assets were defined to mean "all lands and heritages, debts, bonds, mortgages, securities, moneys, effects, choses in action, claims and demands whatsoever, including claims for unpaid calls, and in general all property, real or personal, heritable or moveable, whether situate in the United Kingdom or elsewhere, belonging to or vested in the bank or liquidators or which the bank has power to acquire." It was provided that all

\* The Interlocutor is dated 18th March.

actions and rights of action in respect of the assets enforceable by or for the bank at the date of vesting should remain as good and valid for the company as they would have been for the bank if the Act had not been passed. The Act incorporated a specification of the assets of the bank as at 22nd October 1881. In this specification the right to challenge discharges already granted to contributories by the liquidators was not expressly included.

In 1902 the Assets Company brought an action against the trustees of a contributory who had in 1879 been discharged of his liabilities to the bank on a compromise with the liquidators concluding for a reduction of the discharge or for damages on the ground that the contributory in transacting with the liquidators concealed or failed to disclose a portion of his property.

The defenders pleaded no title to sue on the ground that a right to challenge discharges granted by the liquidators had not been assigned to the company.

The Court *repelled* the plea of no title to sue.

*Assets Company, Limited v. Shirres's Trustees*, January 23, 1897, 24 R. 418, 34 S.L.R. 353, *followed*.

*Discharge—Reduction—Misrepresentation—Discharge Founded on Disclosure of Assets—Non-Disclosure of Shares Thought to be Worthless.*

The City of Glasgow Bank went into liquidation in 1878, and in 1879 A, one of the contributories, settled with the liquidators and was discharged of his liabilities to the bank, which amounted to £30,250, on payment of £11,800, that being the value of A's property as disclosed in a state submitted by him to the liquidators.

In 1902 the Assets Company, who had in 1882 taken over the assets of the bank, brought an action against A's testamentary trustees concluding for reduction of the discharge, or alternatively for damages on the ground that A had not entered in the state certain shipping shares belonging to him at the time and which at his death in 1881 were valued at over £800.

The defenders admitted that these shares had not been entered in the state, but they led evidence to show that the shares were of no market value in 1879.

*Held* (rev. judgment of Lord Kyllachy, *diss.* Lord Young and Lord Moncreiff) that the pursuers were entitled to decree on the ground that A had no right at his own hand to conceal any property which he held simply on account of his view of its value, that being a matter in which the liquidators were entitled to exercise their own judgment, and that was if the shares were not marketable in 1879 that did not necessarily imply that they would never become so.

This action was heard both in the Second Division and before the Court of Seven Judges along with the *Assets Company,*

*Limited v. Bain's Trustees*, the immediately preceding report. The two cases were of the same character, and involved the same questions, with the exception that in the present case (1) the trustees had not been discharged, and were still administering the estate; (2) the defenders pleaded "No title to sue"; and (3) the property not disclosed was alleged by the defenders to have been of no value at the date of the compromise. The present case is only reported on the points where it differs from that against *Bain's Trustees*, and takes no account of charges made on record by the pursuers against Mr Phillips which were unsupported by any evidence.

By the City of Glasgow Bank (Liquidation) Act 1882, and relative discharge by the liquidators of the bank, recorded 30th December 1882, the assets of the bank as defined in the Act were vested in the Assets Company at that date.

The Act proceeded on the preamble, *inter alia*, that "whereas a large amount of the outstanding assets of the bank, though believed to be of increasing value, cannot at present be advantageously realised, and the committee of contributories, in order to enable the liquidation of the bank to be finally closed, so as to prevent accumulation of interest on the amount of claims unpaid, and the possibility of any further call on the remaining partners of the bank, and in order to preserve these assets for more advantageous realisation than could be effected in the ordinary course of liquidation, proposed to form and register under the Companies Acts 1862 to 1880 a company to be called 'The Assets Company, Limited' (hereinafter referred to as 'the Company'), with a memorandum of association in the form set forth in the First Schedule to this Act, with relative articles of association, to take over the assets subject to the conditions contained in the agreement set forth in the Second Schedule to this Act." . . .

The Act enacted, *inter alia*, as follows:—  
Section 1—"In this Act . . . 'the assets' means all lands and heritages, debts, bonds, mortgages, securities, moneys, effects, choses in action, claims and demands whatsoever, including claims for unpaid calls, and in general all property, real or personal, heritable or movable, whether situate in the United Kingdom or elsewhere, belonging to or vested in the bank or the liquidators, or which the bank has power to acquire, or which are or is held in trust for or to be realised solely for account of the bank at the date of vesting hereinafter mentioned, but shall not comprise the liability of any contributory to calls, except such as have been made by the liquidators before the passing of this Act." Section 2 confirmed the agreement referred to in the preamble, and set forth in the Second Schedule. Section 3—"When and so soon as the company shall have fulfilled article I of the agreement, the liquidators shall execute a discharge to the company (in the form set forth in the Third Schedule hereto), and on such discharge being recorded for preservation in

the Books of Council and Session (the date of recording whereof is hereinafter referred to as the date of vesting), all liability of the contributories for calls, except liability for calls already made, shall absolutely cease and determine." Section 7—"All causes, suits, actions, and rights of action in respect of the assets which shall have accrued before, or shall be in any manner enforceable by, or for, or against the bank at the date of vesting (other than the claims of the general creditors), shall, subject to the provisions of this Act, be and remain as good, valid, and effectual for or against the company as they would or might have been for or against the bank if this Act had not been passed."

The agreement, on the narrative, *inter alia*, that "whereas, from the report (and relative appendices) for the year ending 22nd October 1881, being the third year of the liquidation, issued by the liquidators to the contributories, it appears that the total assets of the bank as at that date amounted to £1,508,698, 12s. 1d., and the total liabilities to £1,338,116, 6s. 9d., as is more particularly shown by the state of affairs appended to said report, a copy of which state is also appended hereto: And whereas the said liabilities are almost entirely long past due, and the amount thereof is increasing by reason of interest accruing upon some of them, and it is the duty of the liquidators to take measures for paying the same; but they are satisfied that if they were at present to force the realisation of some of the assets, such enforced realisation would not produce, by a considerable sum, the amount at which the said assets are entered in said state of affairs: And whereas with a view to enabling the liquidators to pay the liabilities of the bank, and also with a view to preventing a forced realisation of the assets, it has been resolved by the said committee of contributories to form a company with limited liability under the Companies Acts 1862 to 1880, or under a special Act of Parliament, or under all or some of them, an object of which company shall be to acquire from the liquidators the whole assets remaining in their hands, the company paying to the liquidators a sum which shall be sufficient to clear off the liabilities of the bank and the unpaid expenses of the liquidation,"—provided, *inter alia*, as follows:—"(*First*) In the event of the said company being formed and carried out, the second parties [the persons acting for the company] hereby undertake that it shall pay to the first parties [the liquidators], on or before the 1st day of October 1882—first, a sum sufficient to enable them to pay and discharge the whole liabilities of the bank, which shall previous to said date have been claimed for and admitted in the liquidation. . . . (*Second*) In respect of said payments the first parties shall, if and when required, transfer, dispoise, convey, and make over to the said company or to their nominees or assignees the whole assets and property of whatever nature and wheresoever situated, including all rights, claims, and privileges of every description,

to which the said City of Glasgow Bank, or anyone on their behalf, shall then have right; and the company shall thereafter be entitled to the income or annual produce which may be received, or which may accrue upon the said assets and property."

The state of affairs appended to the agreement showed liabilities amounting to £1,338,116, 6s. 9d., and assets amounting to £1,508,698, 12s. 1d. under the heads (1) cash due by bankers and cash in hand; (2) bills current; (3) bonds, debentures, stocks, &c.; (4) estates of large debtors; (5) heritable properties in Scotland; (6) balances of credit accounts and overdrafts; (7) bills current at the stoppage of the bank considered good; (8) past-due bills; (9) New Zealand and Australian Land Company's stock; (10) amount estimated as recoverable from contributories; estimated surplus £170,582, 5s. 4d.

In January 1902 the Assets Company brought an action against the trustees of the late Alexander Phillips, merchant, Glasgow, who died on 6th February 1881, concluding for reduction of (1) an interlocutor of the First Division dated 10th June 1879, sanctioning an arrangement for compromise between the liquidators of the bank and Mr Phillips; and (2) an agreement and discharge between him and the liquidators dated 25th July and 1st August 1879; further, concluding for an accounting by the defenders as to their intromissions with his estates, and failing an accounting for payment to the pursuers of £30,000 as the balance of their intromissions, and further concluding alternatively for payment of £39,472, 5s. 7d. as damages.

The pursuers averred that Mr Phillips was a holder of £1100 of the capital stock of the City of Glasgow Bank when it went into liquidation on 22nd October 1878, and he was placed on the list of contributories as a holder of that stock and became liable for calls amounting to £30,250; that he represented to the liquidators that he was unable to pay the calls in full, and emitted a solemn declaration dated 10th May 1879, "under which he declared that his whole property and estate were truly and correctly disclosed in the answers which form part of said declaration"; that the net value of the property thus disclosed amounted to £6751, 13s. 2d., and that in reliance upon the said answers and relative declaration the agreement and discharge under reduction was executed with the sanction of the Court under which Mr Phillips was discharged of his liabilities on payment of £6300 in addition to £5600 already paid.

The pursuers further averred—"(*Cond. 4*) The said declaration and relative answers did not contain a true, accurate, and complete statement of the said Alexander Phillips' affairs, means, and property. The said Alexander Phillips did not disclose his whole assets, but on the contrary he fraudulently concealed several important assets belonging to him. In particular, at the date of the said declaration he was proprietor of and vested in, *inter alia*, 1359 shares of £1 each of the Scotia Shipping

Company, Limited, fully paid up. The said company was formed in or about November 1877, at which date the said shares were of the value of £1359, and they continued to be of that value at and for some time after the date of the settlement with the liquidators. Reference is made to memorandum of agreement between the said Scotia Shipping Company, Limited, the said Alexander Phillips and others, dated 27th November 1877, which is herewith produced and referred to. . . . The said Alexander Phillips was well aware of the existence of the foresaid shares . . . at the time when he emitted the said declaration and made the foresaid settlement with the liquidators." The pursuers then averred that they were in right of the whole assets of the City of Glasgow Bank under and in virtue of the Act of 1882 and relative discharge, and that by the fraudulent representation and concealment on the part of Mr Phillips the said bank and the pursuers as now in right of the assets of same had sustained loss and damage to the extent of £39,472, 5s. 7d.

The defenders, *inter alia*, "admitted that at the time of his discharge Mr Phillips was the owner of 1359 £1 shares of the Scotia Shipping Company, and that they do not appear in the inventory of his property in the discharge signed relative to the declaration." "(Stat. 4) Since the omission to enter the shares of the Scotia Shipping Company in the said schedule has been brought under their notice, the defenders have made such inquiry as they could with regard to said company, and they believe and aver that the company was never prosperous, that it never paid any dividends on its shares, and that at the date of the said compromise the shares were of no value. In 1889 there was a rise in shipping property, and it having become in consequence possible to sell the four steamers which the company owned, they were sold and the company wound up. The company was in consequence able to pay back to the shareholders between 10s. and 11s. per share. It is believed and averred that the said shares were omitted from the schedule because they were at that date of no value, and that this was done with the knowledge and assent of the liquidators. (Stat. 5) The said shares were entered in the inventory of the deceased's estate given up in October 1881, and the liquidators and the pursuers have since that date known, or had the means of knowing, the facts on which they now found this action."

The pursuers pleaded, *inter alia*—“(1) The answers and declaration condescended on having contained statements which were not true, accurate, and complete, the said interlocutor and the discharge following thereon are invalid and reducible, and should be reduced as concluded for. (2) The said agreement and discharge having been granted on the basis and on the condition of the truth, accuracy, and completeness of the statement of his affairs, means, and property by the said Alexander Phillips contained in said answers and declaration,

and the said Alexander Phillips having failed to fulfil the said condition as condescended on, the discharge is not binding on the pursuers. (3) The said compromise having been sanctioned, and the interlocutor sought to be reduced having been pronounced under essential error induced by the false and fraudulent representations and concealment of the said Alexander Phillips as condescended on, the same should be reduced. (4) *Separatim*, the said Alexander Phillips having fraudulently concealed estate and effects belonging to him, and having thereby induced the liquidators of said bank to enter into the agreement and discharge libelled, and to obtain the sanction of the Court thereto, the pursuers as now in right of the said liquidators are entitled to decree of reduction as concluded for. (5) The pursuers being lawful creditors of the deceased Alexander Phillips are entitled to decree of accounting, or alternatively of payment as concluded for. (6) In any event the pursuers having suffered loss and damage through the fraudulent misrepresentations and concealment of the said Alexander Phillips to the amount of the sum concluded for in the alternative conclusion of the summons, decree should be pronounced in terms thereof."

The defenders pleaded, *inter alia*—“(1) No title to sue. . . . (5) The pursuers' statements so far as material being unfounded in fact the defenders should be assolized."

On 11th July 1902 the Lord Ordinary (KYLACHY) allowed the parties a proof of their averments and the pursuers a conjunct probation.

The defenders reclaimed, and argued, *inter alia*—The pursuers had no title to sue. The case of *The Assets Company, Limited v. Shirres' Trustees*, January 28, 1897, 24 R. 418, 34 S.L.R. 353, appeared no doubt to be conclusive on the point, but they asked the Court to reconsider that case.

Argued for the pursuers—They had a title to sue. That had been conclusively settled in *The Assets Company, Limited v. Shirres' Trustees*, *supra*, and also in *Liquidators of City of Glasgow Bank v. Assets Company, Limited*, February 27, 1883, 10 R. 676, 20 S.L.R. 438.

The case was advised on 13th January 1903 along with the *Assets Company, Limited v. Bain's Trustees*.

LORD JUSTICE-CLERK—The Assets Company, under authority of a Special Act of Parliament, took over from the liquidators of the City of Glasgow Bank the assets on which the liquidators might have claim against contributories who were liable to pay the debts of the bank. In the two cases before the Court the Assets Company seek to reduce agreements of compromise of claims made with two of the contributories, on the ground that at the time of the agreement the contributories in question did not make a full and fair disclosure of their estate in certain particulars, but concealed assets in defraud of

the liquidators' claims. That the liquidators, had they remained in the exercise of their powers, could have pursued such actions I have no doubt, and I also have no doubt that the Assets Company, as coming in their place, have the same title to follow funds which would have been liable to be impounded in the liquidation if such are discovered not to have been disclosed when the contributory took a discharge from the liquidators, upon the footing that he had disclosed and given up the estate of which he was master. Upon the question of title the cases quoted by the pursuer appear to me to be conclusive. . . .

In the case of *Watt*, following what I have said, I think the plea against title to sue should be repelled, and I agree with the Lord Ordinary in holding that the pursuers are entitled to probation upon the averments they make as to the 1359 shares of the Scotia Shipping Company. . . . If the pursuers are successful in establishing the facts they allege in regard to the shipping shares, that would be sufficient for their success in the reduction by which the settlement compromise would be nullified. . . .

LORD YOUNG—In the case of *Bain* there is no plea against the title to sue, while in the other case there is. I have no doubt of the title to sue. It is not necessary in the case of *Bain* to pronounce any decision upon it, there being no plea. In the other case I concur in the interlocutor repelling that plea. I think in the case of *Bain* there was very properly no objection to the title to sue. . . . The case for the pursuers is, that when the Act of 1882, by which they were constituted, was passed, the liquidators were in a position, upon such facts as are averred in this record, to reduce the arrangement with Mr Bain, including the decree of this Court, by which it was approved of and confirmed, and that this right in the liquidators was by the Act transferred to the pursuers. This involves two questions, upon neither of which we can now pronounce any decision. These are—first, the right and duty of the liquidators while they held office and acted as such, and second, the construction of the statute regarding the transference to the pursuers. There is certainly a title to sue, because any person must have a title to sue a relevant case stated by him which entitles him on proof of his statement to a decree for £63,000, or for any sum against the party called as defender. There must be a title to sue, but in order to succeed in the suit it must be shown to our satisfaction upon the relevancy—which we have not decided and are not now deciding—that the pursuers' construction of the Act, giving them the right which they assert, is sound. I do not mean the title to sue, but a right to the money which they are suing for. If their action is relevant, and they shall prove the facts averred, then they say they are entitled to decree against the defenders for £63,000. Their claim will be decided according to our judgment, upon the construction of the statute and upon the evidence of the facts. If we should find

their case to be relevant, and if they support the relevancy in point of law, and support the statements of fact, to say that they have no title to sue the action would appear to me to be an untenable proposition. They may fail in the action, and I can see grounds upon which it may be at least plausibly maintained that they ought to fail, but they are nevertheless entitled to sue and have the points which they present as their grounds of claim, whether in law or in fact, adjudicated upon. . . .

LORD TRAYNER—As these cases are to go back to the Lord Ordinary for proof, I abstain from making any reference to the special facts more than is absolutely necessary for the decision of the question which is directly before us. The case of *Bain* does not stand on the same footing as the other, and therefore I shall take it separately. . . . Upon the relevancy of the case I think there was a good deal of argument, but I am not unwilling, in order to save difference of opinion, to take it that at present we are deciding nothing upon the relevancy. I think, however, it is necessary to distinguish very distinctly between the question of no title to sue and no title to recover. I assume that in *Bain's* case the Assets company have a title to sue, because no one has said that they have not. It has been decided by this Court in more than one case similar to the present that the company have a title to sue. Whether they have a title to recover will depend entirely on whether the facts which they have averred are sufficient to impose liability on the defenders, and if these facts are admitted or proved the pursuers will be entitled to decree, but I do not think the question of relevancy interferes in the least with the plea as to title to sue. It is not necessary to affirm it in *Bain's* case, because nothing to the contrary has been pleaded. . . .

In the case of *Watt* I think we must repel the first plea of the defender of no title to sue. That is a plea which must be disposed of *ante omnia*, because if there is no title to sue the case can go no further. I understand that title to sue, apart from right to recover, is a matter on which we are agreed. The only thing that remains to be said in *Watt's* case has regard to the restriction of the proof which your Lordship has suggested. For the reasons which I have already stated I would consent to the proof being restricted in the manner which your Lordship has proposed.

LORD MONCREIFF—I agree with all your Lordships that the pursuers have a title to sue. I think that is settled by two cases—the case of the *Liquidators of the City of Glasgow Bank v. The Assets Company*, in 10 Rettie, and the later case in this Division—*The Assets Company v. Shirres*, in 24 Rettie. In the first of these cases the Lord President puts it thus on page 679:—"Cases of fraud, I should rather imagine, will not be numerous, and I entertain a tolerably strong opinion that nothing short of fraud would induce the Court to set aside any of these discharges. Still, whatever the value

of these documents may be, the Assets Company are, in my opinion, plainly entitled to the possession of them." The pursuers therefore having a title to sue this action, the question which we have to consider and which was argued before us is, whether they have set forth a relevant ground of action? On that matter I am willing that, under reservation of all pleas of parties except as to title, a strictly limited proof should be allowed in both cases. I may say that I think, especially in the case of *Bain*, such an inquiry, leaving everything open except the question of title, will be in the interests of the defenders themselves as well as of the pursuers. . . .

In the case of *Watt* the defences are not quite so full as those in *Bain's* case, and there are two matters as to which I think the pursuers are entitled to proof before answer. The first of these is as to the matter set forth on condescence IV, as to the value of certain shares which were said to be of no value at the date of the discharge, and were shortly afterwards found to be of substantial value. . . .

The Court pronounced the following interlocutor:—"Recal the said interlocutor reclaimed against; repel the first plea-in-law for the defenders; remit to the said Lord Ordinary to allow the defenders to satisfy the production, and to make up a record on the merits; and that having been done, to allow the pursuers a proof before answer of the averments contained in condescence IV of the undue concealment of the shares in the Scotia Shipping Company, Limited, there specified." . . .

On 24th January 1903 the Lord Ordinary (KYLACHY) held the production satisfied, held the record as closed as the closed record on the merits, and before answer allowed a proof in the terms directed by the Inner House.

After a proof, of which the result sufficiently appears from the opinions of the Judges, the Lord Ordinary assolized the defenders from the conclusions of the summons.

*Note.*—"In this case of Phillips the general features are not dissimilar to those of the case of *Bain* which I have just decided. But there is no question here as to the continuance of the defenders' trust; and although the delay in bringing the action has been equally great, and I think equally unjustifiable, I doubt whether it can be said, at all events as the facts have come out, that the delay has caused—at least in the same degree—the prejudice to the defenders' position which it caused in the case of *Bain*. For there is here no question such as the question of the promissory notes in the case of *Bain*. The question here more closely resembles the other question in *Bain's* case, namely, the question as to Mrs Bain's interest in Mr Potter's succession; and here, as with respect to that question, I have found enough for the decision without having to face difficulties arising out of the death of the shareholder, and the deaths of all but one of the liquidators.

"The discharge of Mr Phillips is sought

to be set aside in respect of two alleged concealments in his state of affairs. The assets said to have been concealed are (1) 1350 shares of a shipping company called the Scotia Company. . . .

"The controversy is therefore in substance confined to the Shipping Company's shares, and as to that my view is this:—

"I am satisfied upon the evidence that the shares in question were really, as the defenders allege, of no saleable value in the year 1879. They existed, no doubt, as shares in what may be called a going company, but I think it is sufficiently proved that they were at that time worthless, so that if realised, or sought to be realised, by the deceased or the liquidators, they would have fetched nothing. The company had been in existence for some years but had paid no dividends. In fact it had accumulated a debit balance nominally of over £3600, but really (with depreciation allowed for) of over £6300—being more than one-fifth of its capital. Its ships were of an unsuitable class. The market generally was depressed, and there were no signs of improvement. Even judging by subsequent results, no dividends were paid for some years afterwards; and these were of small amount, and (allowing for depreciation) were really paid out of capital. Moreover, although when the company was wound up and its ships sold in 1889 there was a return of capital to the shareholders of about 12s. 8d. per £, that occurred, it is I think clearly proved, in a wholly different condition of the shipping trade, and when the company's position had been thereby and otherwise materially improved.

"This being the fact, I am not prepared to affirm that the omission of those shares from Mr Phillips' statement of his assets detracted in any reasonable sense from its truth. In any case it appears to me that the omission to set forth an asset which was in the position which I have described cannot possibly be construed into a fraud. Probably the proper course would have been to have entered the shares in the statement, putting against them a nominal value; but that would have been a difference of form and not of substance.

"I am accordingly of opinion that the Scotia Company's shares are really in the same position as the reversionary interest in Mr Potter's estate, which had to be considered in the case of *Bain*. And that, as I indicated at the outset, makes it unnecessary to consider whether the pursuers are entitled to have it assumed that the shares in question were not in fact disclosed to Mr Cameron—I mean the late Mr Cameron (one of the liquidators), who resided in Glasgow, and with whom Mr Phillips transacted. I may say, however, to a large extent for the same reasons as I have endeavoured to state in the case of *Bain*, I do not consider that the pursuers are entitled to make this assumption. Mr Phillips and Mr Cameron were both in Glasgow, and were probably, and indeed presumably, in personal communication. The shares being what they were, it was not unnatural (assuming perfect honesty) that

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they should be omitted from Mr Phillips' formal statement and mentioned in conversation. And on the other hand it is extremely difficult (assuming dishonesty) to believe that Mr Phillips should, while surrendering everything else, have imperilled his discharge by concealing assets which, in the most sanguine view possible, had so little even prospective value.

"On the whole matter, therefore, I am of opinion that the pursuers have failed in this case as in the other, and that the defenders are entitled to absolvitor."

The pursuers reclaimed, and after hearing argument in the case along with that against *Bain's Trustees*, and taking the cases to avizandum, the Second Division on 2nd December 1903 appointed both cases to be argued before Seven Judges, consisting of themselves with the assistance of the Lord President, Lord Adam, and Lord Kinnear.

At the hearing before the Seven Judges on 12th January 1904, argued for the pursuers and reclaimers—(1) *On Title to Sue*—This question had not been remitted to the Seven Judges. But even if it had, the Assets Company's title to sue was clear. The definition of "assets" in the Act, and the terms of clauses 7 and 8, made it plain that the transfer to the Assets Company was made on the footing that right to challenge discharges was included. Besides, the point had already been decided in *Assets Company Limited v. Shirres' Trustees, supra*, and *Liquidators of City of Glasgow Bank v. Assets Company Limited, supra*. (2) *On the Merits*—It was admitted that the shares had belonged to Mr Phillips at the date of the compromise, and had not been entered in the list of his estate given up to the liquidators. It had been proved that these shares had been entered in the inventory made up on Mr Phillips' death, two years thereafter, as worth over £800, that dividends had been paid on them to his trustees, and that on the Shipping Company being wound up there was a return of capital to the shareholders of 12s. 6d. per £. Mr Phillips' statement to the liquidators, on the faith of which he received his discharge, was thus false in an essential particular, and the discharge could not stand. The pursuers did not need to show fraud on the part of Mr Phillips, but if they did the proof disclosed a *prima facie* case of fraud.

Argued for the defenders—(1) *On Title to Sue*—Right to challenge discharges already granted by the liquidators was not one of the assets transferred to the Assets Company under the Act. The state of affairs appended to the Act showed what these assets were, and a right to challenge discharges did not come under any of the ten heads. Nobody was now left with any right to challenge the discharge. The case thus was in the same position as *Edinburgh United Breweries, Limited v. Molleson*, March 9, 1894, 21 R. (H. L.) 10, 31 S.L.R. 922. (2) *On the Merits*—The proof showed that at the date of the compro-

mise the shipping shares were worthless, and the idea that a man making out a list of his assets required to include in it things which he considered of no saleable value was absurd. Mr Phillips had given up all the assets he possessed to the best of his knowledge and belief, and the discharge should therefore stand. The charge of fraud against him had utterly broken down, and ought never to have been made on record. The judgment of the Lord Ordinary was sound.

At advising—

LORD PRESIDENT—By this action the pursuers seek to obtain reduction of (1) an interlocutor of this Division of the Court, dated 10th June 1879, by which it sanctioned the liquidators of the City of Glasgow Bank carrying out, *inter alia*, an arrangement for a compromise with Alexander Phillips, a contributory, and for discharging him of his obligations to the bank and the liquidators; (2) an agreement and discharge entered into between Mr Phillips of the first part and the liquidators of the second part, by which the liquidators discharged him of further liability to them; and (3) for an accounting by the defenders, his testamentary trustees and executors, of their intromissions with his estate, and for payment of such sum as may be found to be due in respect of his having been a shareholder of the bank at the time when it went into liquidation.

The leading questions in this case are similar to those which arise in the case of *Bain*, but one of the pleas stated in that case is not and could not be maintained in this case, viz., that the testamentary trustees of the contributory were not liable to be sued, in respect that they had executed their trust and been discharged of it. In the present case the persons nominated as trustees and executors of Mr Phillips accepted these offices, and are in course of executing their trust. I do not now repeat but merely refer to what I have said in the case of *Bain* with respect to the other preliminary pleas, including the plea of *mora*, in so far as they relate to questions similar to those raised in the present case.

Mr Phillips held £1100 of the capital stock of the City of Glasgow Bank when it went into liquidation on 27th October 1878, and he was placed upon the list of contributories as a holder of that amount of stock. He thus became liable for calls amounting to £30,250, to account of which he paid £11,800. He died on or about 6th February 1881.

Mr Phillips represented to the liquidators that he was unable to pay the calls in full, and he made a solemn declaration before a justice of the peace for the county of Ayr on 10th May 1879, in which he stated that his whole property and estate were truly disclosed in the answers which formed part of that declaration. The property thus disclosed consisted of specified estate, to the value of £14,016, 10s. 7d., but it did not include 1350 fully paid-up shares of £1 each of the Scotia Shipping Company, Limited, which were then held by Mr Phillips.

In reliance upon the answers and relative declaration made by Mr Phillips, the liquidators on 5th June 1879, presented a note to this Division of the Court, in which they craved the Court to sanction their carrying out, *inter alia*, a compromise with Mr Phillips in respect of payments amounting to £11,800 made by him to them, and discharging him of all his obligations to the bank or the liquidators. In the note and relative list and memorandum it was stated that Mr Phillips had made a complete surrender of his estates; on 10th June 1879 the Court sanctioned the compromise, and thereafter Mr Phillips was discharged from all calls made or to be made by the liquidators upon the contributories.

By a minute, dated 18th November 1878, the liquidators resolved, *inter alia*, that persons who were not prepared to make payment of the call then made in full, or to satisfy them that it would be paid without undue delay, should be required to return answers to the queries contained in the schedule appended to it, and to attest these answers by a solemn declaration. The minute further bore that any discharge to be granted should proceed upon the truth of the declaration emitted by the applicant, any untrue statement therein being held to invalidate the discharge.

The second question put to Mr Phillips was—"What property do you possess, and what is its nature and value, to the best of your knowledge and belief?" and he was required to specify the particulars, if necessary, in a separate signed list of schedule marked A, and to accompany the statement with valuations, certified rentals, and other evidence of value by competent parties. In answer to this question Mr Phillips wrote—"I hold property to the value of £6751, 13s. 2d., as per schedule A sent herewith," and while that schedule enumerated various items of property it made no mention of the shares held by him in the Scotia Shipping Company. In a written declaration appended to the answers Mr Phillips solemnly and sincerely declared that the several matters and things mentioned and contained in the answers were true and correct answers to the printed queries prefixed thereto, to the best of his knowledge and belief, and stated that he made this solemn declaration conscientiously believing it to be true.

As already stated, the minute of the liquidators under which the discharge was granted bore that any discharge to be granted should proceed on the truth of the declaration emitted by the applicant, any untrue statement made therein being held to invalidate the discharge. The discharge was thus conditional, one of the essential conditions of it being that the declaration emitted by the applicant should be true (which as there used appears to me to mean in accordance with the facts), and that any untrue statement (which I understand to mean any statement not in accordance with the facts) should be held to invalidate the discharge.

I understand it to be admitted by the

defenders that at the date of the declaration Mr Phillips held, and knew that he held, 1359 £1 shares of the Scotia Shipping Company, as also, that these shares were not disclosed in the declaration made by him, or otherwise, so that *prima facie* an essential condition of the discharge was not fulfilled, and the discharge was therefore, in my opinion, *prima facie* ineffectual.

Mr Phillips died on 6th February 1881, and the inventory of his personal estate given up by his executors contained an entry of 1359 £1 shares of the Scotia Shipping Company, Limited, fully paid up, valued at £841, 19s. 3d.

Mr Phillips appears to have been an original shareholder in three vessels which were built in 1876 and 1877. These vessels were not at first the property of a limited company, but were divided among the owners, who each held so many 64th shares of them in the ordinary way. On 1st November 1877 the Scotia Shipping Company was formed in order to purchase and take over the shares held by the co-owners of the three vessels. The company does not seem to have acquired the whole shares in these vessels, but only the major portion of them, which, however, was sufficient to give the company a controlling voice in their management. At the time when the limited company was formed Mr Phillips held two 64th shares in each of the vessels. In compliance with an application by him, dated 22nd December 1877, 1359 fully paid-up £1 shares of the Scotia Shipping Company were allotted to him on 8th March 1878. There is a marking on the back "Kept in suspense in case of claim £60." On 19th March 1878 the secretary of the company wrote to Mr Phillips enclosing a certificate of these 1359 shares, and asking him to sign and return the receipt which he sent, and Mr Phillips signed and returned that receipt.

A report embracing the accounts of the company down to 15th August 1878 was issued, apparently on 9th November 1878, after the failure of the City of Glasgow Bank. As Mr Phillips received the report a few days subsequent to that failure, he cannot have been ignorant of the existence or of the value of the shares at the time when he replied to the questions put to him by the liquidators.

The result of the evidence appears to me to be that about 10 per cent. of the capital of the company had then been lost, but that the rest of that capital remained intact, subject to any allowance which might require to be made for depreciation of the value of the ships. I do not think that the shares could, with any approach to truth, be represented as then valueless. Mr Scott Tait in his evidence traces the subsequent history of the company. It appears that for the year ending 15th August 1882 the company paid to the shareholders a dividend of 5 per cent., in 1883 it paid 2½ per cent., in 1884 2½ per cent., and in 1886 2½ per cent., being 12 per cent. in four years, or, on an average, 3 per cent. per annum. I understand that the shares came to have a value of £841 during the



currency of the liquidation. The company was finally wound up on 20th February 1890, and the amount of the returns of capital made to the shareholders was, in the aggregate, 12s. 8½d. per £1, or £901, 7s. 6d. upon the shares held by Mr Phillips.

Under these circumstances it appears to me that we cannot hold that the shares had no value, either at the time of the failure of the bank or at any subsequent time; but even if they had not been saleable, or yielding a profit, at a period of such mercantile collapse as existed in Glasgow and elsewhere at and subsequent to the stoppage of the bank, this would not, in my judgment, have formed any reason or justification for Mr Phillips' failing to enter the shares in the statement of his assets which he submitted to the liquidators.

While it is, in my judgment, sufficient to invalidate the discharge granted by the liquidators of the bank to Mr Phillips that the condition upon which it was granted was not fulfilled, I think there would be strong grounds for holding that the discharge could not stand, in respect that when Mr Phillips failed to enter the shares in the list of his assets, they, to his knowledge, could not be correctly described as of no present or prospective value. But whatever view might be held in regard to their value or want of value, it was, in my judgment, the clear duty of Mr Phillips to disclose them *in specie*.

It was maintained by the defenders that if the ship shares were not disclosed in writing, it is to be presumed that their existence was disclosed verbally at an interview with one of the liquidators, but I am unable to accept this suggestion in the absence of any evidence or probability to sustain it. When a contributory pointedly called upon to specify all his assets in writing, failed to disclose the existence of such an asset as the Scotia Shipping Company's shares, it appears to me that there is no presumption that he would, but every presumption that he would not, disclose them verbally. It is to be kept in view that what the liquidators demanded from contributories who desired to compromise was a written not a verbal disclosure.

I refer to my opinion in the case of *The Assets Company Limited v. Bain's Trustees and Others* for a detailed statement of the views which I hold upon other questions which were argued in this as well as in that case.

For these reasons I am of opinion that the interlocutor of the Lord Ordinary should be recalled, and that decree of reduction should be pronounced as concluded for.

LORD JUSTICE-CLERK—Lord Young (who was present at the hearing, but had left the Court after delivering his opinion in the case against *Bain's Trustees*) requested me to state that his opinion is in accordance with that of the Lord Ordinary. For my own part my opinion agrees with that of the Lord President, and I refer to Lord

Trayner's opinion which he has prepared, and which expresses my views.

LORD ADAM—I have had an opportunity of considering Lord Trayner's opinion, in which I agree. It is the same as that of your Lordship.

LORD KINNEAR—The point on which I dissented from the opinion of your Lordships in *Bain's Trustees* does not arise in this case, and upon the merits I agree in the result of your Lordship's opinion.

LORD TRAYNER—This case is very much of the same character and involves some of the same questions as the case of *Bain's Trustees* which we have just disposed of. I refer to my opinion in that case for my view of the meaning and import of the agreement and discharge now challenged, and shall only here advert to those points which are peculiar to this case.

The first of these is the plea that the pursuers have no title to sue. That point was not remitted to the consideration of the Seven Judges, for we of the Second Division had already, by interlocutor dated 13th January 1903, repelled that plea, as had been previously done in the case of *Shirres' Trustees*, 24 R. 418. I have never been able to see any ground for the plea, having regard to the terms of the Assets Company's Act. I refer especially to the definition of "assets" there given in section 1, and to sections 6 and 7, whereby practically all the rights of the liquidators are transferred to and vested in the pursuers' company. I do not think it can be doubted that the liquidators, on relevant grounds, could have reduced the discharge granted by themselves, and it follows that the pursuers have equally right and title to do so.

The second matter in which this case differs from the case of *Bain* is this—that it is contended by the defenders that the asset which the late Mr Phillips concealed, or failed to disclose, in the state of his affairs, on the truth, accuracy, and completeness of which the discharge in question was conditioned, was of no value, and therefore (1) did not need to be disclosed or surrendered, or (2) that non-disclosure in such circumstances did not affect the discharge. The Lord Ordinary's judgment in favour of the defenders proceeds mainly on this ground. The facts material to the decision of this case (except as to the matter of value, if that is material) are not in dispute. Mr Phillips, like all other contributories in his position, was required by the liquidators to answer this question—"What property do you possess, and what is its nature and value to the best of your knowledge and belief? Specify the particulars," &c.; and in his answer he states that he holds "property of the value of £6751, 13s. 2d. sterling, *per* schedule A, sent herewith." This schedule did not contain any reference to 1359 shares of £1 each, fully paid, of the Scotia Shipping Company, Limited, which were then held by Mr Phillips. It is not suggested that Mr Phillips had forgotten about these shares,

or did not know he held them, when he gave up the schedule A with his answer; but the defence is, as I have already indicated, that the shares were valueless and did not need to be disclosed. Now, with regard to this defence, I observe (1) that the shares were property belonging to Mr Phillips which, in answer to the question put to him, he was bound to have disclosed. He could have stated, if he thought the statement true, that he valued them at *nil*. He was invited to state what he thought to be their value, but he was not entitled at his own hand to conceal any property which he held simply on account of his view of its value, that being a matter on which the liquidators were entitled to exercise their own judgment. (2) Even if the shares were not marketable at the date of Mr Phillips' surrender, that did not necessarily imply that they would never become so. In fact it turned out otherwise. In July 1881—that is, about two years after the date of the discharge, and less than six months after Mr Phillips' death—they were valued by Gow & Company, the managers of the Scotia Shipping Company, at £841, 19s. 3d., and they were stated by Mr Phillips' executors in October 1881 as of that value in the inventory of his estate given up by them for confirmation. They received that sum for the shares when the company was wound up, being a return of capital to the shareholders of more than 12s. 6d. per £. (3) The shares being fully paid up, with therefore no liability for calls, they were plainly such as many investors (or speculators) would buy—not perhaps at par value, but at some value. But if they were of any value they should have been surrendered. There is, no doubt, some evidence of opinion that the shares were not marketable at the date of the discharge, but even if that were a true view it would not affect my opinion. But it is an expert opinion on which I place no value, especially in view of the facts I have above stated. Accordingly, I am of opinion that the ground on which the Lord Ordinary has proceeded is unsound. I shall only add a word in reference to the defenders' statement that these shares were left out of Mr Phillips' schedule A, "it is believed with the knowledge and sanction of the liquidators." There is no evidence of this, and as I pointed out in *Bain's* case, such a proceeding would have been so directly contrary to the plain duty of the liquidators that it cannot be presumed.

On the whole matter I am of opinion that the pursuers are entitled to our judgment.

**LORD MONCREIFF**—Although this case resembles the case of *Bain* in its main features, there are some differences which must be noted.

In the first place, there is a subsisting trust; the trust has not lapsed.

In the second place, the defenders state a plea to title, but that plea was repelled by the interlocutor of the Second Division of 13th January 1903, when remitting the

case for proof to the Lord Ordinary; and therefore I do not see how we can entertain that plea now.

In other respects the two cases closely resemble each other. . .

This case therefore involves the same question of law as to *mora*, warranty, and the necessity for proving fraud; and I do not think it necessary to repeat what I have said on these subjects in the case of *Bain*.

It remains to consider whether the pursuers have succeeded in proving that Alexander Phillips fraudulently concealed the shipping shares. The view presented by the pursuers is that this is beyond dispute. At the date of the surrender Phillips was possessed of 1359 shares of £1 each of the Shipping Company Limited, fully paid up. He undoubtedly knew that he possessed them. He did not disclose their existence in his statement to the liquidators, and when he died only two years later the shares were entered in his inventory at the value of £841. In regard to that statement of the case I repeat what I said in the case of *Bain*, that it is so simple as to suggest doubt of its being conclusive. In this case also we are unfortunately, owing to the long delay, driven to conjecture upon more than one point. The surrender was carried through entirely by Phillips and Mr Cameron, one of the Glasgow liquidators: they are both dead. On the death of Phillips the shares were valued for inventory purposes by Mr Joshua Clements, the manager of the Shipping Company. Mr Clements also is dead; and we do not know on what footing the valuation was made beyond this, that it could not have been upon the footing of the market price of the shares, because there was no market for them. Lastly, the books and papers of the Shipping Company were destroyed in 1897.

In these circumstances we have very scanty materials for getting at the truth of this transaction; but we do know this, that at the date of the surrender, owing to losses sustained by the Shipping Company, the shares were unsaleable—there was no market for them. No doubt if the ships had been sold, as they ultimately were, some part of the price would have been returned to the shareholders in proportion to their shares. But neither Alexander Phillips nor his assignees could have forced a sale of the ships, and it would not have suited the purposes of the liquidators at the time of the surrender to have taken over the shares in the hopes of ultimately realising something from the sale of the ships. Mr Tait in his evidence says very candidly—"The object of compromising was to get an immediate payment in cash. The liquidators wanted the thing wound up. What was wanted to be known by the declaration were subjects that had an immediate realisable value."

I am therefore of opinion that the following statement by the defenders is probably true:—"It is believed and averred that the said shares were omitted from the schedule because they were at that date of no value, and that this was done with the knowledge and assent of the liquidators."

I may say that the fourth and fifth statements of facts by the defenders state, in my opinion concisely and accurately, all that is known or can now be known in regard to these shares.

It is also to be observed that Mr Cameron, the liquidator, was manager of the Assets Company, Limited, for one or two years, about 1885 or 1886. He was on the spot and had the means of knowledge both about the affairs of the Shipping Company and Alexander Phillips; and we know that discharges were not given by the liquidators without the surrendering contributory being subjected to a close examination as to the completeness of his statement.

The only other observation which I have to make is, that I see no conceivable reason for Phillips concealing the existence of the shares and imperilling his discharge, as the shares at the time and in the then condition of the Shipping Company seemed to be worthless.

It might, as the Lord Ordinary observes, have been more prudent for Mr Phillips to enter the shares in the statement as worth a nominal sum or nothing; but I agree with the Lord Ordinary in being unable to construe as a fraud the omission to do so.

I am therefore of opinion that the defenders should be assoilzied.

The Court pronounced this interlocutor:—

“The Lords of this Division, along with the three consulted Judges of the First Division, having heard counsel for the parties on the reclaiming-note for the pursuers against the interlocutor of Lord Kyllachy dated 13th June 1903, in conformity with the opinions of the majority of the said Judges, recal the interlocutor reclaimed against, reduce, decern, and declare in terms of the reductive conclusions of the summons.” . .

Counsel for the Pursuers and Reclaimers—Salvesen, K.C.—Clyde, K.C.—F. C. Thomson. Agents—J. & D. Smith Clark, W.S.

Counsel for the Defenders and Respondents—Ure, K.C.—Hunter. Agents—J. & J. Ross, W.S.

Tuesday, May 17.

## FIRST DIVISION.

[Lord Low, Ordinary.]

VAN LAUN & COMPANY v. NEILSON,  
REID, & COMPANY AND OTHERS.

Agent and Principal—Amalgamation of  
Businesses — Commission — Quantum  
meruit.

In 1899, A, a merchant and agent in London, entered into communication with three engineering firms in Scotland (which were already acquainted with each other), suggesting that the firms should amalgamate, and offering his services as intermediary. Certain negotiations followed, and a contract

providing, *inter alia*, for A's remuneration, was proposed but never executed. Early in 1900 the firms concerned intimated to A that they did not propose to proceed with the amalgamation. In 1903 the three firms were amalgamated as a limited company, but in this amalgamation A was not employed.

A brought an action against the three firms, concluding for payment of commission, and based, alternatively, on contract and on the principle of *quantum meruit*. In support of the latter plea he averred that the amalgamation was the direct result of his services, and that, but for these, the defenders, who were jealous of each other, would never have proposed it.

Held that these averments were irrelevant.

This was an action at the instance of H. T. Van Laun & Company, merchants and freight contractors, 1 St Helen's Place, Bishopsgate Within, London, of which firm Henry Theodore Van Laun was the sole partner, against Messrs Neilson, Reid, & Company, Messrs Dubs & Company, and Messrs Sharpe, Stewart, & Company, Limited, all engineers in Glasgow, concluding for payment of £34,207 in name of commission for services rendered in connection with the amalgamation of these firms.

The pursuers averred that in November 1899 they wrote to each of the defenders asking if they would be disposed to consider a proposal for amalgamation of their business with a firm whose business was analogous in character, and pointing out the advantages of such amalgamation. Letters passed between the parties, and some meetings took place, and Messrs Van Laun & Company and the partner of that firm averred that they were instructed by each of the said three firms to arrange for an amalgamation of their different businesses, and they undertook the work. The terms upon which “they” were employed by the said firms were contained in a memorandum of agreement, copy of which was handed to and approved by each of the said firms. Said agreement is as follows:—“The undersigned firms agree that they will enter into a proper legal contract, when prepared, with Messrs H. T. Van Laun & Company for the purpose of placing in their hands the conduct of the amalgamation of their businesses, the basis of the amalgamation being— . . . (3) That the undersigned firms undertake, in the event of the amalgamation being carried out, that Messrs H. T. Van Laun & Company shall be paid 2½ per cent. on the total amount paid to the vendors for their services in the matter, subject to deduction of the reasonable costs of advertising the new company. (4) Any capital which is necessary to be found shall be left to Messrs Van Laun & Company to negotiate, underwrite, or find subscribers for, it being understood that any commission which may have to be paid on this capital will have to be paid out of the capital of the amalgamated company, and not from the 2½ per cent. commission above referred to. (5) The payment of the com-