and plant at its value for use at the pit: Finds that the pursuer is not entitled to make any claim for the value of pit-sinkings: And with these findings remits to Mr T. Chalmers Hanna, chartered accountant, to take an account of the copartnery, and to report; with power to him to call for the production of all necessary writs and documents.

"*Note.*—In December 1871 the defender became tenant of a coal-field under a lease which endured for thirty-one years. On 22d April 1872 he entered into a contract of copartnery with the pursuer in order that the lease might be worked on joint-account, and it was declared that the copartnery should endure as long as the lease.

"The sixth article of the contract provides that in the event of the bankruptcy of either party the partnership shall be dissolved, and the lease should be the property of the solvent partner, the balance belonging to the bankrupt should be ascertained, and the solvent partner should give bills for the amount by equal instalments at six, twelve, and eighteen months; and that neither the bankrupt nor his creditors should have any claim to the prospective value of the lease.

"In May 1873 the estates of the pursuer were sequestrated, and the lease in consequence became the property of the defender. The pursuer was in December 1874 reinvested in his estates, and he now sues the defender for an accounting in relation to the copartnery.

"The pursuer does not dispute that the copartnery came to an end by his sequestration; but he contends that in settling his interest under it the lease should be valued as a going concern, and that he is entitled to have a value set on the pit-sinkings. The defender, on the other hand, contends that the valuation should proceed as on a winding-up, and that the pursuer has no claim for the value of the pit-sinkings.

"Both parties were desirous that the Lord Ordinary should decide the principle on which the interest of the pursuer should be settled. This he was willing to do as far as possible, but he wished that the parties should endeavour by mutual admissions to prepare the case for final judgment. Unfortunately they have not been able to agree. But they concurred in asking the Lord Ordinary to dispose of the following points on the record as it stands.

"With respect to the machinery and plant, the Lord Ordinary is of opinion that it should be valued as for use at the pit. The defender took it over and used it. The Lord Ordinary therefore thinks that the defender is bound to pay for it, not at its value for breaking up or removal, but at its value for use.

"But he thinks that the pursuer is not entitled to make any claim for the value of pit-sinkings. The pursuer does not maintain that he can claim repayment of the moneys contributed by him for the purpose of sinking pits. He claims only the value of the pit in so far as available for the output of minerals. To the Lord Ordinary this seems to be a claim for the prospective value of the lease—a claim which is excluded by the contract."

The pursuer reclaimed.

The defender was not called on.

At advising—

Lord Justice-Clerk—It is possible that under some circumstances a distinction might be drawn between the value of a mineral lease and the value of the pit-sinkings. But here we have the case of two gentlemen who enter into a copartnership for the purpose of working this mineral lease, and they contract with their landlord that the necessary excavations should be made. The 6th clause of the contract of copartnership provides—[*reads*]. The prospective value of the lease means the value at the date of the dissolution of the copartnership, that is, its value to a new tenant, an assignee, or purchaser. That necessarily includes the pit-sinkings. The machinery is not the subject of lease, and is also in a different position on the words of the lease. Therefore, notwithstanding the able and ingenious argument of Mr Rankine, I entirely concur with the Lord Ordinary.

Lord Ormidale—I concur. The pit-sinking is not a tangible moveable subject like the machinery. It is of value only in connection with the prospective value of the lease. The sinkings might indeed not pass on a sale; they might be closed up and a new pit opened, but in that case the old sinkings would become valueless.

Lord Gifford—I concur. The stipulation of the partners is that in the event of bankruptcy the insolvent partner shall lose his share of the lease. That, as Mr Rankine said, is not a penal clause, but it is the bargain of parties—a natural and not unusual bargain—and I think it must be given effect to. A lease at its inception has little value; it becomes valuable as the workings proceed. Take the illustration of the branch railway, the construction of which is provided for in the lease. On the other hand, towards the end of the lease the minerals might be near exhaustion. All these things enter into the commercial value of the lease, and here it is quite impossible to separate the lease and the sinkings.

The Court adhered.

Counsel for Pursuer—Rankine. Agents—M'Lachlan & Rodger, W.S.

Counsel for Defenders—M'Kechnie. Agents—Welsh, Forbes, & Macpherson, W.S.

Tuesday, June 12.

SECOND DIVISION.

[Lord Adam, Ordinary.

M'RAE *v.* WILLIAMSON BROTHERS.

Proof—Loan—Writ.

Entries in a defender's business books which *held* not to prove loan *scripto*.

This was an action by M'Rae, a commercial traveller, against a firm of timber merchants near Queensferry, and Alexander Thomson Williamson, South Queensferry, and Robert Williamson, Grangemouth, the individual partners of said company, for the sum of £50, with interest from 5th July 1876.

The pursuer averred that from 1st July 1876 till the end of September he had, according to

agreement, acted as commercial traveller for the defenders, at a salary of £104 per annum, with travelling expenses. About 5th July he advanced £50 to the defenders, who then represented themselves as in want of funds. For this he received a written acknowledgment, which was afterwards lost. No period of repayment was specified.

The defenders denied both employment and loan. They explained that in June 1876 they were contemplating a dissolution of partnership, and it was proposed that the pursuer should advance a sum of £200 to the defender A. T. Williamson, with the view of buying out the defender R. Williamson and becoming himself a partner. This proposal was not carried out. It was admitted that the defender A. T. Williamson owed the pursuer £17, 15s. 9d. in respect of private, not company, business.

The pursuer recovered the following documents under diligence:—

"Excerpt from Cash Book of Williamson Brothers.

Fol. 112.

Dr. Cash, July 1876.

July 7. Alex. T. Williamson.
Recd. from him [*Alex. M'Rae*]....£50 0 0

"Excerpt from Journal of Williamson Brothers.

Fol. 145. 31st July 1876.
To Alex. T. Williamson.
367. Recd. from A. M'Rae.....£50 0 0

"Excerpt from Ledger of Williamson Brothers.

Fol. 367.

Dr. Alex. T. Williamson. Pri. a/c. *Cr.*
July 31. By cash, £50 0 0

"Excerpt from A. T. Williamson's Diary.

Cash Book, October 1876.

Date.	Account of moneys.	Received.	Paid.
	MacRae.....	£50 0 0	£0 0 0

"Letter, Mr Alexander M'Rae to Mr A. T. Williamson.

South Queensferry, 26th Sept. 1876.

Mr A. T. Williamson,
South Queensferry.

Sir,—Unless you pay me the sum of fifty pounds sterling, due by you to me, on or before 6 o'clock P.M. of Thursday the 27th September 1876, I will take legal proceedings to enforce payment of same.—I am, Sir, yours, &c.,

ALEXANDER M'RAE."

The words "Alex. M'Rae" in the cash-book had been written over the original entry, and were admittedly in the pursuer's handwriting.

The defenders produced several excerpts from their cash book, showing entries of small sums paid Alexander M'Rae between 7th July and 21st August 1876, amounting altogether to £32, 4s. 3d.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 23d December* 1876.—The Lord Ordinary having heard counsel for the parties, and considered the cause, Finds that the pursuer has failed to prove *scripto* the loan of £50 libelled on: Therefore assoilzies the defenders from the conclusions of the action, and decerns.

"*Note.*—This is an action for payment of a sum of £50 alleged to have been advanced to the defenders Williamson Brothers by the pursuer on 5th July 1876. It is alleged that an acknowledgment for the sum was granted, but that it has been lost. The pursuer has produced in process excerpts from the defenders' books recovered under a diligence. He does not ask any further recovery of the writ of the defenders.

"The defenders' books do not instruct the constitution of the debt. There is no entry in them of any sum having been received from the pursuer.

"The books, however, instruct the receipt by the firm, on 7th July 1876, of a sum of £50 from Alexander Thomson Williamson, one of the individual partners of the firm. The contention of the pursuer is that this is the sum in question; that it was not advanced to Williamson as an individual, and by him to his firm, but to Williamson as a partner of the firm, and for the firm; and that he (the pursuer) is truly the creditor of the firm for this sum.

"There is also in the books an account against the pursuer, in which he is charged with a number of small sums paid to him during the months of July, August, and September 1876, amounting in all to £32, 4s. 3d. The pursuer proposes to read this account in connection with an admission made in answer to article 2 of the condescendence, that 'it is believed Mr A. T. Williamson is owing to the pursuer £17, 15s. 9d.' The two sums together amount exactly to £50. The pursuer maintains that it must be inferred from this that the advances were made to him by the firm in repayment of the sum of £50 lent by him to the firm by the hands of the partner A. T. Williamson; that it proves the adoption of the loan by the firm; and that therefore he has sufficiently instructed the constitution of the debt. The Lord Ordinary does not concur in this view of the case. He is of opinion that the writs founded on do not instruct that the advance in question was made to the company.

"The Lord Ordinary thinks that this is an action against the company and the partners *qua* partners, and that he cannot competently give decree against Alexander Thomson Williamson, as asked by the pursuer, for the sum admitted to be due by him, not as a partner, but in his individual capacity."

Against this interlocutor the pursuer reclaimed.

Argued for him—The defenders' cash book proves receipt of money, and the *onus* lies on them to show that they did not receive it as a loan, or that they repaid it—*Fraser* v. *Bruce*, November 25, 1857, 20 D. 115, where the Court looked at jottings of interest on the back of a promissory-note as supporting proof of loan *scripto*. At least, the admissions of the defenders entitle the pursuer to a proof by parole *quo animo* the money was received.

At advising—

LORD JUSTICE-CLERK—I concur with the Lord Ordinary. The pursuer has not proved his case by writ. The books show that the firm got an advance from A. T. Williamson, and that Williamson got the money from the pursuer. A debtor's books are not generally evidence of discharge, but we must take both sides of the account, and it appears that of the £50 advanced £32 odds was repaid in small weekly sums, and the balance Williamson says he is ready to pay. The pursuer has therefore not shifted the *onus* of proof, but he may still put in a reference to oath.

I reserve my opinion on the effect of payment by A. T. Williamson into the firm account.

LORDS ORMIDALE and GIFFORD concurred.

Counsel for Pursuer—Darling. Agent—Alex. Morison, S.S.C.

Counsel for Defender—Low. Agent—William Black, S.S.C.

Wednesday, June 13.

FIRST DIVISION.

[Lord Adam, Ordinary.

PETITION—WEIR'S TRUSTEES.

(Before Seven Judges.)

Trust—Powers of Trustees—The Trusts (Scotland) Act 1867 (30 *and* 31 *Vict. cap.* 97), *secs.* 3 *and* 7.

Where a power of sale is expedient for the execution of a trust, and not inconsistent with the main design and object thereof, the Court will grant such power to trustees, and will authorise them to advance the price to be obtained for the maintenance and education of minor beneficiaries.

Circumstances in which, under secs. 3 and 7 of the Trusts (Scotland) Act of 1867, the Court granted power to trustees to sell heritable property belonging to the trust.

The late Samuel Weir died on 17th October 1876, survived by a daughter, Isabella, aged twenty-six, and three sons, Duncan, Samuel, and Alexander, the eldest of whom, Duncan, was seventeen years old, and the other two in pupillarity. Mr Weir had been a man of considerable means, but, after retiring from business some years before his death, had been living on the capital of his estate, and had met with some loss through a cautionary obligation, so that at the date of his death his only property remaining consisted of (1) a house in South Clerk Street, Edinburgh; (2) two-thirds of a shop in West Adam Street, Edinburgh, the other one-third belonging to his son Duncan, in right of his mother; (3) household furniture, valued at £158, 10s. 6d.; and (4) money in bank, £108, 17s. 8d.

Mr Smith left a trust-disposition by which he conveyed his whole estate and effects to William Smith, writer, Edinburgh, and to his daughter Isabella, as trustees and executors. They were directed to pay his debts; to hold the residue of his estate till his youngest child should attain the age of twenty-one, paying the income of the residue equally to his children, and giving Isabella the use of the house in Clerk Street on condition that the other children should live with her; and when his youngest child should attain twenty-one years of age, to convey the Clerk Street house to Isabella, one-third of the shop in Adam Street to each of his younger sons, and to divide the residue equally among his children.

The money found in bank was almost expended in payment of the truster's debts and in the maintenance of his children up to the date of this petition. The shop in Adam Street was let at a rent of £35 per annum, and this was all the family had for their support. In these circumstances the trustees presented this petition, praying the Court to authorise them, under the Trusts (Scotland) Act 1867, secs. 3 and 7, to sell the two-third shares of the shop and advance the price for the maintenance and education of Samuel and Alexander Weir, and to borrow money on the security of the house in Clerk Street, or to sell it, and to pay the sum so borrowed, or the proceeds of such sale, to Isabella Weir.

The Lord Ordinary remitted to Mr J. W. Tawse, W.S., to inquire into the circumstances set forth in the petition, and to report. Mr Tawse reported, *inter alia*, as follows:—" . . . On the whole, the reporter feels the matter remitted to him one of considerable difficulty, as while it was evidently the intention of the truster that his children should occupy the house in Clerk Street, and receive the rents of the shop in Adam Street till the youngest was twenty-one, when the properties were to be conveyed—the house in Clerk Street to the daughter, and one-third of the shop in Adam Street to each of the two younger children—it is impossible in the present state of matters the intentions of the truster can be carried out, because at present the children have no means of subsistence. In these circumstances, therefore, the reporter thinks it will be sufficient if power is given to the trustees to sell the two-thirds of the shop in Adam Street, and should it be necessary to borrow on the Clerk Street house at a future time, application may be made to the Court for that purpose."

The Lord Ordinary thereupon refused the prayer of the petition, adding the following note:—

"*Note.*—This is a petition by the trustees of Samuel Weir to obtain authority to sell two-third shares of a shop which belonged to the truster, and to apply the proceeds in the education and maintenance of his two sons Samuel and Alexander Weir, to whom these shares are respectively directed to be conveyed on the youngest attaining twenty-one years of age. The Lord Ordinary does not doubt that it would be expedient that the subjects should be sold, and the proceeds applied in the education and maintenance of the truster's children. He has some doubt whether a sale of the subjects would not be inconsistent with the intention of the truster; but he has refused the petition, because he thinks that the rights of Duncan Weir would be prejudiced by the proceeds being applied in the maintenance and education of Samuel and Alexander as proposed. Duncan is entitled to a share of the income derived from the subjects, but if the subjects be sold, and the proceeds paid over to his two brothers, he would necessarily be deprived of his share of the income. The same objections apply to the borrowing of money on the security of the house in South Clerk Street. The Lord Ordinary was referred to the cases of *Pattison*, February 19, 1870, 8 Macph. 575, and *Hay's Trustees*, June 13, 1873, 11 Macph. 694."

After the case had been brought before the Inner House by reclaiming note, Duncan Weir's *curator ad litem* lodged a minute, in which he stated—"Duncan Weir is agreeable to the trustees being authorised to sell the two-third shares of the shop, and he would at same time sell his one-third, so as to give a complete title to a purchaser; and as the curator humbly conceives that