granted for delivery of his bond of caution as craved."

After hearing counsel for the parties the Lord Ordinary (Low) on 16th July 1892 approved of the Accountant's report—"Disallows the charge of £39, 5s., except to the extent of £7, 7s.: Finds that the petitioner is entitled to deduct from the balance of the estate retained by him the said sum of £7, 7s., and also the expenses of the present application for discharge, as the same may be taxed, with the exception of the expenses which have been incurred in regard to and in consequence of the said charge of £39, 5s.: Reserves all questions of expenses incurred in regard to and in consequence of the said charge: Finds that upon the petitioner paying to the respondent David Masterton the balance of the estate retained by him, under deduction of the said sum of £7, 7s., and the said expenses of the present application, and producing in process a receipt therefor, he will be entitled to be judicially discharged, and to obtain delivery of his bond of caution, &c.

"*Note.*—The respondent David Masterton admittedly granted a discharge to the petitioner, in which he accepted, as in full of the estate for which the petitioner was liable to account, a sum brought out after deduction of the £39, 5s. now in dispute. I lay aside altogether the explanation which the respondent gives as to the circumstances under which that discharge was granted, because the explanation is denied, and I could not assume it to be accurate without proof, but I do not think that the accuracy of the explanation is of much importance, because the fact that the respondent granted a discharge does not appear to me to be conclusive in favour of the petitioner. In the first place, I do not think that a discharge granted to his *curator bonis* by a person who has just attained majority, precludes him from subsequently objecting to what he considers to be an overcharged business account, and asking that the account should be taxed. I think that the principle which has been frequently recognised in the case of agent and client, as to the right of the client to demand taxation of business charges, notwithstanding a settlement of accounts, applies to the case of a *curator bonis* and his ward. In the second place, the petitioner comes to the Court asking a judicial discharge, and it appears to me to be the duty of the Court to see that the charges for services performed by the petitioner as *curator bonis* are adjusted and taxed according to the ordinary rules. In these circumstances I see no reason to differ from the emphatic opinion of the Accountant of Court, and I shall therefore approve of the report and give decree in terms thereof."

The petitioner reclaimed. Before hearing the matter was compromised.

Counsel for the Petitioner—James Reid. Agent—Charles T. Cox, W.S.

Counsel for the Respondent — G. W. Burnet. Agents—T. F. Weir & Robertson, S.S.C.

Thursday, October 20.

SECOND DIVISION.

[Lord Low, Ordinary.

DOUGALL *v.* THE NATIONAL BANK OF SCOTLAND (LIMITED).

Bank — Agent and Client — Company — Shares—Failure to Carry Out Client's Instructions—Damages.

A bank were the registered owners of ordinary stock of a railway company, which they held in trust for eight of their customers. The bank communicated to these customers an invitation from the railway company to apply for certain new stock. Only three of the customers—L, K, and G—instructed applications to be made for them. The bank received £33,000 of new stock, representing a certain percentage on the total amount of ordinary stock held by them, which they divided into amounts corresponding to the respective holdings of their customers.

An amount of £3750 fell to a customer—D—who instructed the bank to sell his allotment. Meantime, L, K, and G intimated a claim for the whole £33,000 to the bank, who raised a multiplepoinding, in which D was ultimately ranked and preferred to the £3750.

D sued the bank for damages, on the ground that the defenders, his agents *ad hoc*, had failed to carry out his instructions to sell for him on allotment, and thus had caused him loss.

Held that in view of the competing claims to the £33,000, the defenders were justified in continuing to hold it until the questions of right were determined.

The following narrative is taken from the opinion of the Lord Ordinary (Low)—"The facts of this case are not in dispute, and appear sufficiently from the correspondence, to which both parties referred.

"The National Bank were the registered owners of £219,840 ordinary stock of the North British Railway Company, which they held in trust for eight of their customers. Among others, Messrs Lawrie & Ker were interested in the stock to the amount of £127,000, Mr Grierson to the amount of £44,340, and Mr Andrew Dougall, the pursuer, to the amount of £25,000.

"On the 22nd November 1890 the railway company issued a circular to the shareholders, and among others to the bank, intimating that the directors were prepared to receive application at the price of £100 per cent. for the balance unissued of 4 per cent. convertible stock 1890, which had been previously allotted at the price of £120 per cent. It was stated that the allotments would bear a relative proportion to the total amount of the entire subscriptions, except in the case of existing holders of the

stock, to whom a preference would be given. The purchase price was to be payable not later than 1st December.

"On the 25th November the bank wrote to their customers for whom they held stock of the railway company, informing them of the circular which had been issued, and asking instructions in regard to an application for the new stock. Messrs Lawrie & Ker instructed the bank to apply for £30,000 of the stock on their account, and Mr Grierson instructed them to apply for £10,000 on his account. None of the other persons for whom the bank held stock instructed them to apply for an allotment. The pursuer did not answer the bank's letter.

"In these circumstances the bank sent an application to the railway company for £40,000 of the stock, at the same time intimating that as they had not heard from all the clients for whom they held stock they might send another application.

"The stock was applied for several times over, and on the 27th November the directors allotted the shares, not in terms of their circular, but at the rate of 15 per cent. on the ordinary stock standing in the names of the applicants. To the bank £33,000 of the stock were allotted, being 15 per cent. upon the total amount of ordinary stock of which they were registered holders. The bank seem at first to have taken the view—and, as I think, rightly—that the £33,000 of new stock fell to be divided proportionally among their clients for whom they held stock, and who were willing to take up the allotment. The bank accordingly exchanged the allotment letter which had been sent to them for separate allotment letters, by which £33,000 of stock was split up into amounts corresponding to the respective amounts of ordinary stock held by the bank for their customers. All the allotment letters were in favour of the officials of the bank. The amount of the £33,000 corresponding to the £25,000 of ordinary stock held by the bank for the pursuer was £3750.

"After receiving the allotment letters the bank communicated with their customers—To the pursuer they telegraphed on the 29th November in the following terms:—'No reply to ours of the 25th. Have received an allotment. Wire your instructions at once regarding it.' Upon the same day they wrote to the pursuer asking his instructions in regard to the allotment, and added:—'The amount allotted is £3750, being 15 per cent. on the amount of ordinary stock held on your account.' The pursuer says that the bank's telegram arrived in Inverness after office hours, and that he did not receive it until the morning of Monday the 1st December, when he also received the letter. The pursuer then telegraphed to the bank:—'I agree to take allotment, which please sell at best.'

"In the meantime, however, the bank had received a communication from Messrs Lawrie & Ker on behalf of themselves and Mr Grierson, intimating that as they were the only persons for whom the bank held stock who had authorised an application to be made for shares, they claimed the whole of the £33,000 of stock. The bank accordingly on the morning of the 1st December, telegraphed to the pursuer:—'Our letter and telegram sent you under misapprehension, as you made no application for stock, and allotments were only made to those who applied.' This telegram appears to have crossed that of the pursuer agreeing to take the allotment.

"Then there followed a correspondence between the pursuer and the bank to which I need not particularly refer. It is clear that the bank officials had come to be of opinion that Messrs Lawrie & Ker and Mr Grierson were entitled to the stock, but the position which they took up was that the bank had no personal interest in the matter, and was willing to deliver the stock to the party who should be found entitled thereto.

"The pursuer then raised an action against the bank for delivery of £3750 of the stock, and Messrs Lawrie & Ker also raised an action against them for delivery to them of three-fourths of the stock, the remaining one-fourth being claimed by Mr Grierson. In these circumstances the bank brought an action of multiplepoinding, to which they called as defenders all the parties for whom they held stock of the railway company. The fund *in medio* was £7125 of the new stock, being the £33,000 allotted less the amount admittedly effeiring to Messrs Lawrie & Ker, and Mr Grierson.

"Ultimately the pursuer was successful in the multiplepoinding, and was ranked and preferred to £3750 of the stock.

"The pursuer now makes the present claim against the bank, being a claim for the loss which he has sustained through not obtaining a transfer of the £3750 stock when the allotment was made. The amount claimed by the pursuer is £516. It consists (1) of the difference in the value of the stock on 3rd December 1890 and in August 1891 when the pursuer sold it after being ranked and preferred in the multiplepoinding; (2) interest at the rate of 4 per cent., which the pursuer has paid to the bank upon the price of the stock, which was paid by them; and (3) certain expenses in the multiplepoinding paid by the pursuer."

The pursuer pleaded—"(1) The defenders having obtained the said stock as the agents of the pursuer, were bound to hold and deal with the same as directed by him, and having failed to do so, are liable to make good to him the damage he has thereby sustained."

The defender pleaded—"(2) The defenders not having been entitled, *et separatim* not having been in safety, to deliver the said stock to the pursuer on 1st December 1890, the pursuer is not entitled to decree as concluded for. (4) The defenders having throughout acted *in bona fide* for the interests of all concerned, are not liable to the pursuer in damages."

The Lord Ordinary on 16th June 1892, sustained the defences and assoilzied the defenders.

"*Opinion [continued].*— . . . The ground of the pursuer's claim, as stated in his first plea-in-law, is that the defenders having obtained the stock as agents for the pursuer were bound to deal therewith as directed by him, and that having failed to do so they are liable in damages. The ground of action therefore is fault or negligence on the part of the defenders when acting as the pursuer's agents.

"In my opinion the circumstances do not disclose a case of fault or negligence on the defenders' part rendering them liable in damages to the pursuer. The delay which occurred in giving the pursuer possession of the stock appears to me to have been rather due to himself and to the action of the railway company than to fault on the defenders' part. If the pursuer had taken the trouble to answer the defendants' letter of the 25th November 1890, and to instruct them either to apply or not to apply for an allotment of the stock, no question could ever have arisen. The origin of the whole difficulty therefore was the pursuer's failure to tell the defenders what he wished them to do, and that fact seems to me to put the pursuer at the outset in an unfavourable position in regard to the claim which he now makes. Then the railway company instead of allotting the shares in terms of their circular of 22nd November, allotted them at the rate of 15 per cent. on the ordinary stock standing in the name of the applicants, and accordingly instead of making an allotment to the defenders in respect of the £40,000 of stock for which they had applied, the company allotted them 15 per cent. upon the whole stock standing in their name. The railway company, moreover, made that allotment although they knew from the terms of the defenders' application that the latter were applying only on behalf of some of the persons for whom they held stock. So standing matters, Messrs Lawrie & Ker and Mr Grierson claimed the whole stock, and the pursuer claimed a part thereof proportionate to the ordinary stock held by the defenders for him. In such circumstances I cannot affirm that the defenders were in fault in taking up the position that they would give the stock to whichever of the claimants might be found entitled thereto, but that until the question of right was determined they must continue to hold the stock. The question as to which of the competing claimants were entitled to the stock had arisen through no fault of the defenders, but partly through the pursuer's failure to answer the defenders' letter, and partly through the railway company having adopted a different principle of allocation from that which they originally proposed. The pursuer's case amounts to this, that the defenders were bound at once to make up their mind as to which of the claimants was in the right, and to transfer the shares to that claimant, at the risk of having to pay damages to the other claimant in the event of their opinion turning out to be erroneous. I do not think that any such burden was laid on the defenders. The case, indeed, might have been different if the claim of Messrs Lawrie & Ker and Mr Grierson had been so obviously frivolous and untenable that no reasonable man of business would have entertained it. I do not think however that it was a claim of that nature, and indeed the officials of the bank—presumably experienced and capable men of business—thought that the claim was well founded." . . .

The pursuer reclaimed, and argued—The bank was an agent for the pursuer. After the pursuer had intimated that he was willing to take the stock allotted to him (although it is admitted he had not at first instructed the bank to buy stock), the bank could act only as his agent. They had contracted to give him this stock, and were bound to act upon his instructions. The bank entered into a new contract by accepting an amount of stock equivalent to 15 per cent. upon its total holding and dividing that among the different ordinary shareholders for whom it held stock, and the pursuer was entitled to accept the stock. He did so; wired his instructions to the bank; it was bound to follow them; and if loss resulted from their not being followed, the bank was liable in damages. When the bank found that Dougall and Lawrie & Ker claimed this portion of the stock, they ought to have intimated to Lawrie & Ker that as the stock had been allocated to the pursuer, and he had given instructions to sell, the stock must be sold unless legal measures were taken to prevent it—*Shaw* v. *Caledonian Railway Company*, February 20, 1890, 17 R. 466, Lord M'Laren, 482. The Lord Ordinary founded on the pursuer's failure to answer the bank's letter of 25th November and the allotment by the railway company at the rate of 15 per cent. upon the whole amount held by the bank instead of a definite amount as asked for. But if the bank had taken the whole amount allocated to them as being the equivalent of the £40,000 originally asked for, no trouble would have arisen. It was the operation of the bank in making a new contract with the railway company, and in intimating to the pursuer that he was the proprietor of a certain amount of stock that had induced him to take it up. After so inducing him, the bank had failed, as his agent, to carry out his instructions, and was liable for any loss incurred.

The respondents argued—They were not liable in damages. In the first place, they had acted in good faith throughout. It could not be disputed that there was some confusion occasioned by the way in which the railway company finally allocated its shares. The respondents had doubted whether the contract was not altered. That was a difficult legal question, but it was not denied that they were acting honestly throughout. Then they were confronted by the claims of Messrs Lawrie & Ker and Mr Grierson to hand over to them all the shares allotted to the bank, because the original application had been made upon their instructions. The respondents were thus in the position of

having to decide a difficult legal question between two competitors, both customers, and they took the only course open to them when they raised the multiplepoinding.

At advising—

LORD YOUNG—I read this case and the judgment of the Lord Ordinary carefully, and the impression I formed then has been confirmed by all I have heard. That impression is that this action cannot be sustained, and that for the reasons so lucidly stated by the Lord Ordinary. His Lordship points out that this is an action for damages for misconduct on the part of the bank towards one of its customers. Without giving any opinion upon the merits of the question between the bank and its customers, I am of opinion that not only was there no misconduct on the part of the bank, but that they acted with perfect propriety. I am not sure if it would not have been a wise thing for the bank to have intimated to the pursuer the names of Lawrie & Ker, who were claiming in their own right and on plausible grounds the shares said to have been allotted to him, although he never gave any orders to have the stock bought. I think Lawrie & Ker had plausible grounds for their claim, but I think that the conduct of the bank in declining to obey the pursuer's order to sell, sent in a telegram, is irreproachable. Not only do I think that they were not bound to obey the order, but that they would have acted very indiscreetly if they had done so with the probable result of an action of damages. I think it was proper that they should not judge themselves between two competing customers, and they took the course which is one that would have been recommended by sensible advisers, and told the competitors to go into Court. For these reasons, and indeed for the reasons so clearly stated by the Lord Ordinary, I think we should adhere to this interlecutor.

LORD RUTHERFURD CLARK, LORD TRAYNER, and the LORD JUSTICE-CLERK concurred.

The Court adhered.

Counsel for the Reclaimer—Jameson—M'Phail. Agents—J. K. & W. P. Lindsay, W.S.

Counsel for the Respondent—Dundas. Agents—Mackenzie, Innes, & Logan, W.S.

Tuesday, November 1.

FIRST DIVISION.

SINCLAIR *v.* MACMILLAN.

Process—Suspension—Caution—Juratory Caution.

A suspension of a charge upon a decree of removing pronounced by the Sheriff was brought on the grounds (1) that the complainer was a crofter, and so protected from removal except for breach of the conditions enumerated in the Crofters Holdings Act 1886, and (2) alternatively, that if not a crofter, she was a tenant under the Agricultural Holdings Act, and had not received one year's notice as required by that Act. This second plea had not been stated in the Sheriff Court.

Held (1) that *prima facie* the complainer was not a crofter but tenant under an informal missive of lease granted by the proprietor; (2) that having received ample notice from the proceedings in the action of removing, she could have suffered no prejudice from the want of the statutory notice—by Lord Adam, that the subjects which she occupied appeared *prima facie* not to be a holding under the Agricultural Holdings Act, and therefore that there was nothing to take the case out of the ordinary rule, and that the complainer must find caution in common form as a condition of the note being passed.

By letter dated in April 1876 Alexander Allan of Aros, in the island of Mull, offered James Sinclair a lease of a house, smithy, croft, and grazings at the annual rent of £20 for either seven or fifteen years. Without sending a formal acceptance of this offer, Sinclair entered into possession of the subjects, and continued to occupy them at the stipulated rent until his death in July 1880. After his death his widow and son continued to occupy the subjects. In May 1891 Archibald Macmillan, who had got a lease of the subjects from Mr Allan, with his consent presented a petition in the Sheriff Court at Oban craving to have Mrs Sinclair and her son removed from said subjects at Whitsunday 1892. In defence to this petition Mrs Sinclair and her son pleaded that Mrs Sinclair occupied the subjects from year to year, and was a crofter within the meaning of the Crofters Holdings Act 1886, and could not be removed except by reason of the breach of one or other of the conditions therein enumerated. The Sheriff-Substitute, holding that Mrs Sinclair was not a crofter, granted the prayer of the petition, and on appeal his interlocutor was affirmed by the Sheriff. Upon this decree Mrs Sinclair and her son were charged to remove.

Mrs Sinclair and her son thereupon brought a suspension of the charge.

The complainers averred—"(Cond. 2) . . . Since 1882 she (Mrs Sinclair) has been sole tenant from year to year of the subjects, and in particular, she was sole tenant