young men and not for boys; and the period of life is shown by the fact that the students must either be graduates of a university, or at least must have passed through a university course of arts, or have some similar equipment in literature and philosophy.

Well now, in ordinary language I do not think that anyone would call a theological college a public school. Of course the word "school" in a literary, and still more in a rhetorical sense, is applied somewhat widely. But the phrase we have to construe is "public school," and we have to look to the context of this statute. Now, the Act, in the immediately preceding paragraph, has occasion to consider universities and colleges for the purpose of conferring an exemption on certain colleges. But if the argument of the respondents be sound, this was entirely superfluous, for on their construction of the words "public school," the colleges so exempted are at least as much "public schools" as is the Free Church College. Accordingly, the statute contains within itself clear evidence that the words "public school" are used with no greater latitude than is accorded to them by popular use.

I am for reversing the determination of the Commissioners and sustaining the assessment.

LORD ADAM—I quite agree. I think although it may not be easy to define what a public school is, it may not be difficult to say what is not a public school. In this particular case it appears to me from the narrative given of the nature of the appellant's institution, that it is neither more nor less than an institution primarily for the purpose of educating or preparing persons for entering the Free Church as ministers. In my opinion that is not a public school in any sense, and I agree with your Lordship that there can be no doubt that this is not a public school in the sense of the Act.

LORD M'LAREN—This case raises only a question of construction of the exemptions in the taxing statute, and I agree with your Lordships that the Free Church College does not come within the exemptions relating to public schools. I do so on the ground that in the consideration of taxing statutes, the true canon of construction is to take the primary sense of the words used, and that shade of meaning which is in ordinary use, avoiding all secondary meanings. The principle so applied is one which generally operates in favour of the taxpayer, because it avoids bringing in persons who might fall within the taxing words in a remote or analogical sense. But of course the principle must be applied consistently to clauses of exemption as well as to taxing clauses; and in this case confining the words "public school" to the meaning with which we are familiar in ordinary use, it leads to the failure of the plea of exemption which has been set forth.

LORD KINNEAR concurred.

The Court reversed the determination of the Commissioners and sustained the assessment.

Counsel for the Surveyor of Taxes—Sol.-Gen. Dickson, Q.C.—A. J. Young. Agent—Philip J. Hamilton Grierson, Solicitor of Inland Revenue.

Counsel for the Trustees of the Free Church—Macphail. Agents—Cowan & Dalmahoy, W.S.

Thursday, January 28.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

ASSETS COMPANY, LIMITED *v.* SHIRRES' TRUSTEES.

Appeal to House of Lords—Leave to Appeal—Interlocutory Judgment—Title to Sue—City of Glasgow Bank Liquidation Act 1882 (45 *and* 46 *Vict. cap. clii.*)

The Court having sustained the title of the Assets Company, Limited, to sue a reduction of a compromise entered into between the liquidators of the City of Glasgow Bank and a contributory, the defenders moved for leave to appeal to the House of Lords on the ground that if such appeal were sustained there would be no necessity for further inquiry.

The Court *refused* leave.

Fraud—Reduction—Restitutio in integrum—Mora.

The liquidators of the City of Glasgow Bank in 1879 compromised a claim against a contributory of the bank with the sanction of the Court, upon a declaration by him that he had disclosed his whole assets, and on condition that he surrendered any rights as a contributory of the bank. The right to the assets of the bank was subsequently transferred to the Assets Company, Limited, by the City of Glasgow Bank Liquidation Act 1882, and in 1895 they raised an action against the executors of the deceased shareholder, concluding for reduction of the compromise on the ground of fraudulent concealment of assets, and for payment of the balance of calls, or otherwise for damages. The defenders pleaded (1) that the action was incompetent in respect that it was now impossible to give *restitutio in integrum* to the rights of solvent contributories as regards any possible assets of the bank; and (2) that the defenders were barred by *mora* from insisting in the action. The Court (*aff.* the judgment of the Lord Ordinary) *allowed* a proof before answer.

Process—Proof—Diligence for Recovery of Documents—Scope of Diligence in Case of Fraud.

The liquidators of a bank compromised claims for calls due by a contributory. In a reduction of the com-

promise brought sixteen years subsequently, on the ground that assets had been fraudulently concealed by the contributory, the pursuers specified certain assets amounting in value to about £3000, and averred generally that he had failed to disclose other property to the value of £40,000. At the date of the compromise the contributory was a man of 67 years of age. In his declaration, upon which the compromise proceeded, he stated that the property disclosed was, to within a few hundreds, the entire property owned by him; that he had retired from business, and was not capable of earning an income. Sixteen years later he died leaving £43,000, the greater part of which, according to the pursuers' averments, he had owned at the date of the compromise. The defenders averred that the money left by the deceased had been acquired by the rise in value of certain shares in ships mentioned in his declaration.

The Court (*rev.* the judgment of the Lord Ordinary) *granted* the pursuers a diligence for the recovery of documents directed to the establishment of the general averments, and including, *inter alia*, excerpts from the books of all the Scottish banks.

This was an action at the instance of the Assets Company, Limited, against the testamentary trustees of the deceased William Shirres, formerly manufacturer in Aberdeen. The summons concluded (first) for reduction of (1) an interlocutor of the First Division dated 10th June 1879, whereby the Division sanctioned the liquidators of the City of Glasgow Bank carrying out, *inter alia*, a certain arrangement for compromise with the said William Shirres, and discharging him of all his obligations to the said bank or liquidators thereof; and (2) the said agreement and discharge entered into between Mr Shirres and the liquidators, and dated 27th June and 1st July 1879; (second) for an accounting by the defenders as to their intromissions with Mr Shirres' estate, or failing production of an account, for payment of the sum of £28,498, 10s. 11d. to be held in that case as the balance of their intromissions; or alternatively for payment of the said sum of £28,498, 10s. 11d.

The pursuers averred — "(Cond. 1) Mr William Shirres, manufacturer, Aberdeen, was on 22nd October 1878 a holder of £1200 of the capital stock of the City of Glasgow Bank. The said bank went into liquidation on 22nd October 1878, and William Shirres was placed upon the list of contributories as a holder of the above stock. He thus became liable for calls amounting to £33,000, to account of which he paid £17,250. (Cond. 2) The said William Shirres represented to the liquidators that he was unable to pay the said calls in full, and he emitted a declaration . . . under which he declared that his whole property and estate were truly and correctly disclosed in the answers which form part of said declaration. The property thus disclosed consisted of"—[Then followed a schedule showing 1. heritable property; 2. Surrender value of life policy; 3. Shares of companies; 4. Shares of ships; 5. Household furniture, per valuation, the total value amounting to £20,351, 0s. 10d., which, less preferable debts amounting to £9142, left a nett value of £11,210, 0s. 10d.] "In reliance upon the said answers and relative declaration, the liquidators, on or about 5th June 1879, presented a note to the Court in which they craved the Court to sanction their carrying out, *inter alia*, a compromise with the said William Shirres in respect of payments which he had made amounting to the said sum of £17,250, and discharging the said William Shirres of all his obligations to the said bank or liquidators thereof. . . . In the said note and relative list and memorandum it was represented that the said William Shirres had made a complete surrender of his estates. On or about 10th June 1879 the Court sanctioned the said compromise, and thereafter, viz., on or about the 1st July 1879, in reliance upon the said answers and relative declaration, and in respect of the said payments amounting to £17,250, the liquidators executed in favour of the said William Shirres the agreement and discharge now sought to be reduced, whereby, on the basis and on condition of the truth, accuracy, and completeness of the said statement of his affairs, means, and property, they discharged the said William Shirres from all calls made or to be made by them upon the contributories of the said bank. . . . (Cond. 3) The said declaration and relative answers did not contain a true, accurate, and complete statement of the said William Shirres' affairs, means, and property. The said William Shirres 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 held the following estate and effects, or the proceeds thereof, which were so concealed by him," viz.—[Then followed a list of property consisting of heritage in Bon Accord Square, Aberdeen, two bonds due by Charles Walker and John Muill respectively, and a list of shares in companies, six in number, valued in all at the sum of £3282. In the case of the shares in companies the allegation was, except as regards two items, that the deceased had understated his holdings.] "In addition to the assets above specified, the said William Shirres concealed other assets belonging to him and money in his possession to the extent of at least £40,000. The said William Shirres was well aware of the existence of the foresaid assets, or some of them, at the time when he emitted the said declaration and made the foresaid settlement with the liquidators. Explained that the property in Bon Accord Square, Aberdeen, remained vested in the said William Shirres till 19th October 1878, and that he did not account for or hand over to the liquidators either (1) the said property or the proceeds thereof, or (2) the sum contained in the said bond for £350. (Cond. 5) . . . Neither the liquidators

nor the pursuers became aware or had any means of informing themselves that the said William Shirres had concealed means and estate as aforesaid until shortly after his death. The pursuers then became aware of the fact that he had left estate of the value of upwards of £40,000. This led to inquiries being made, and these inquiries resulted in the present action being instituted within a few days of the pursuers becoming aware of the fact that estate of great value had been concealed. . . . (Cond. 7) The pursuers are now in right of the whole assets of the City of Glasgow Bank under and in virtue of the City of Glasgow Bank (Liquidation) Act 1882, and relative discharge by the liquidators thereof in their favour dated 12th October 1882."

The pursuers pleaded—"(4) *Separatim.* —The said William Shirres 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.

The defenders averred—"Denied that the deceased fraudulently concealed any part of his estate. With reference to the particular items condescended on, the pursuers having raised no question until after the death of the said William Shirres, it is impossible for the defenders to give complete and detailed explanations, but they have ascertained the following facts." Then followed certain detailed explanations as to the various items referred to by the pursuers, in which they averred that the dwelling-house in Bon Accord Square, Aberdeen, had been sold by Mr Shirres previous to the liquidation; that with regard to one of the bonds, it was of no value, and with regard to the other, that it had been paid and discharged prior to the date of the declaration. They admitted that certain shares standing in the deceased's name had not been entered in the schedule to the declaration.

In answer 4 they set forth various circumstances as to the transactions in shares of ships and the rise in the value of property, explanatory of the fact that though penniless in 1879, Mr Shirres died worth £43,000 in 1895, his prosperity being chiefly traced to certain shares in ships mentioned in the schedule to his declaration. They averred that from these shares, and from a further sum of £3000 also invested in ships, he received during that period nett profits amounting in all to over £30,000, and also that he made considerable sums by share transactions in recent years. They further averred (answer 5) that the liquidators did not settle in reliance on deceased's statements, but made independent investigations through William Milne, C.A., who satisfied himself of the correctness of the state of affairs, and reported accordingly; that all the property concealed appeared in the records as public documents, but that the pursuers purposely delayed proceedings for setting aside the discharge until after Mr Shirres' death, so that the defenders might be deprived of evidence and explanations in regard to the declaration. They denied (answer 7) that the pursuers had a title to sue the present action, and averred that the bank was dissolved in 1883, and it was impossible for the pursuers to put the defenders in the position in which Mr Shirres was at the date of the discharge, or to give him the rights conferred by the City of Glasgow Bank Liquidation Act 1882 upon solvent contributories (*see infra*).

The defenders pleaded, *inter alia*—"(1) No title to sue. (2) The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons. (3) The pursuers not offering and it being impossible for them to give *restitutio in integrum*, the defenders are entitled to be assoilzied from the reductive and accounting conclusions of the summons. (5) The pursuers not having relevantly averred, and not having, in fact, sufferred any damage by the acts of the defenders' author, the defenders should be assoilzied. (10) *Mora.*"

The declaration made by Mr Shirres, and referred to above, was to the effect that his answers to certain questions prefixed to the declaration were true to the best of his knowledge and belief. Of these questions and answers the pursuers specially founded on the following—"(4) What is your regular or average annual income, and from what source is it derived? (Ans. 4) My annual income previous to the bank's failure was about £1200, derived from the property now surrendered by me, but that is now gone. Having retired from business some years ago, and being now deprived of all my capital, I am without the means of earning an income, and am thus ruined. (6) Have you any expectation of funds or property of any kind coming to you by succession or otherwise? If so, state its nature and probable value. (Ans. 6) None. . . . . I am now penniless at sixty-seven years of age, with a family of seven children, one of whom is in feeble health and unable to support himself, and three are still at their education. (9) What sum or other consideration do you offer for a discharge in full of all claims by the liquidators against you as a shareholder of the City of Glasgow Bank; and in what manner do you propose it shall be secured or paid? (Ans. 9) Many of my shares of companies and ships are at present unrealisable excepting at a great sacrifice, especially as my local stocks are also held largely by other Aberdeen shareholders of the bank, who have now to surrender. Most of the friends who might have helped me are involved with the bank, but if the sum of £11,000 were accepted by the liquidators, I am hopeful that I should get friends to help me by advancing that sum, payable at one, four, and six months. They would do so in the expectation that if an improvement in the prices of my stocks shall occur, there will be a small balance for me, but looking to the probability of local stocks still falling, my friends are unwilling to undertake the risk of lending me the money

on the shares at higher prices than those stated in my schedule."

The agreement and discharge of which reduction was sought proceeded on the narrative that Mr Shirres had made the declaration above referred to, that the liquidators had agreed to accept the payment to be made by him as a compromise of the claims against him, and that the Court had interponed authority to the agreement, and exonered and discharged him from all calls made (so far as unpaid) and to be made; Mr Shirres on the other hand assigning to the liquidators "his whole interest in the capital stock of the said bank, and in particular without prejudice to the foresaid generality, all claims competent to him on any eventual surplus of the assets of the said bank, or of the calls made or to be made by the liquidators of the said bank .... and renouncing all right which he, as a partner or contributory of the said bank, or his heirs, executors, or successors, has, have, or may have to participate in any benefits arising out of the assets of the said bank, or in virtue of the aforesaid assignation, or in any way connected with the said bank."

The City of Glasgow Bank (Liquidation) Act 1882, 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 . . . And whereas many of the contributories and of the creditors of the bank are under legal disability to invest in or contribute to the shares of the company, or to accept or take debentures of the company, and it is desirable that power should be given to persons under such legal disability to acquire and hold the shares or the debentures of the company, and so not only to assist in expediting the conclusion of the liquidation, but to share in such benefit as may be derived from the ultimate realisation of the assets,"—enacts, *inter alia*, as follows:—"1. In this Act . . . 'The assets' shall 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 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 the 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. 2. The agreement is hereby confirmed."

The agreement forming the second schedule to the Act, 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,"—provided, *inter alia*, as follows:—"*First*, In the event of the said company being formed and carried out, the second parties [*i.e.*, the Assets Company] hereby undertake that it shall pay to the first parties, 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, dispone, 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. . . . *Eighth*, It is hereby agreed that the first issue of the capital of the said company shall be £500,000 sterling, and that in issuing the same the shares shall be offered thus—(1) to the solvent contributories of the bank; (2) to the surrendering contributories, and (3) to the public. . . . And it is also agreed that the first issue of debentures of the said company shall be in total amount £580,000 sterling, and that they shall be offered thus—(1) to the creditors of the bank; (2) to the solvent contributories; and (3) to the surrendering contributories, and thereafter to the public. . . .

Fifteenth, In respect the winding-up of the said City of Glasgow Bank is carried on under the supervision of the First Division of the Court of Session, this agreement shall not be binding on any of the parties hereto unless and until the same is sanctioned by the said Court upon the application of the first parties. And in the event of this agreement not being adopted by the company as it now stands, no alteration shall be binding upon the first parties unless and until the same is likewise sanctioned."

Appended to the agreement was a state of the affairs of the City of Glasgow Bank showing liabilities amounting in all to £1,338,116, 6s. 9d.; and assets under the heads (1) cash due by bankers and cash on 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, amounting in all to £1,508,698, 12s. 1d.,—showing an estimated surplus of £170,582, 5s. 4d.

After hearing counsel in the Procedure Roll the Lord Ordinary (KYLLACHY), by interlocutor dated 10th January 1896, allowed the parties a proof of their averments, and the pursuers a conjunct probation.

Thereafter the pursuers lodged the following specification of documents for recovery of which they craved a diligence:—"1. The whole books of the said William Shirres, and all balance-sheets, memoranda, jottings, or other writings found in his repositories, that excerpts may be taken therefrom (1) of all entries relating to his affairs from 1st January 1878 to 1st June 1880; and (2) of all entries relating to the matters mentioned in the averments in articles 3 and 4 of the condescendence, and in the answers to said articles, between 1st January 1878 and 1st January 1895. 2. The certificate or certificates of all stock, shares, or debentures of the public companies mentioned in condescendence 3, and the following, viz. [then followed a list of 18 companies, none of which were mentioned on record], in name of the said William Shirres as an individual or for behoof of others, together with all transfers by or to the said William Shirres of the said stock, shares, or debentures, and warrants for payment of dividends thereon between 1st January 1878 and 1st January 1895. 3. The certificates, bills of sale, and mortgages of ships or shares of ships, and generally of all books or documents showing or tending to show (1) the extent of the said William Shirres' rights or interests in the ships named in the answer to condescendence 4; and (2) the dividends or other payments received by him in respect of his said interest between the last-mentioned dates. 4. The books of the said public companies and of the companies or individuals who were owners or part-owners or agents of said ships, or any of them, that excerpts may be taken therefrom of all entries relating to said stock, shares, debentures, rights, or interests, and dividends or other payments thereon between the last-mentioned dates. 5. The books of (then followed the names of all the Scottish Banks) including those kept at the several branches of said banks, that copies may be taken therefrom of the accounts between the said banks or any of them, and the said William Shirres, together with all deposit-receipts, cheques, counterfoils of cheques, bank drafts or letters of credit drawn by or in favour of the said William Shirres between 1st January 1878 and 1st June 1880. 6. The title-deeds of all properties belonging to the said William Shirres between 1st January 1878 and 1st June 1880, including Dungeith, 5 Rubislaw Place, Bon Accord Crescent, Bon Accord Square, with all heritable or other bonds or obligations, or securities granted in his favour, including the two bonds specified in condescendence 3 and discharges thereof. 7. All letters, accounts, memoranda, I O U's, cheques, counterfoils of cheques, bank drafts, or other documents showing or tending to show what sums of money were lent or remitted by the said William Shirres (1) to Charles Shirres, his son, (2) David Shirres, his son, or any of his other sons, or by any of the said sons to him, between the last-mentioned dates, and the books of the said William Shirres, that excerpts may be taken therefrom of all entries relating to said sums of money, all between the last-mentioned dates. 8. All inventories or other documents showing or tending to show what books, documents, and writings were in the deceased's repositories, 9. The books of (1) the said Charles Shirres, (2) David Shirres, (3) Charles Walker, and (4) John Muill, mentioned on record, that excerpts may be taken therefrom of all entries, letters, or other writings relating to money passing between them or any of them and the said William Shirres, together with all letters passing between or among them in relation thereto, all between said last-mentioned dates.

On 18th November the Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary having heard counsel on the specification as amended for the pursuers, and considered the same, Finds that the pursuers are only entitled to recover documents relative to the specific investments said to have been concealed by the deceased, and are not entitled to recover documents for the purpose of prosecuting a general inquiry as to the completeness otherwise of the disclosures made in the deceased's declaration: Therefore refuses diligence in terms of the said specification, reserving to the pursuers to move for diligence in terms of a restricted specification, if so advised: Further, on the motion of the pursuers, the defenders not objecting, grants leave to reclaim."

The pursuers reclaimed, and the defenders took advantage of this to lodge a reclaiming-note against the interlocutor of 10th January allowing a proof.

Argued for the defenders—(1) The pursuers had no title to sue. In *Blair* v. *Assets*

Company, May 15, 1896, 23 R. (H.L.) 96, the title of the Assets Company was assumed. In *Liquidators of the City of Glasgow Bank* v. *Assets Company Limited*, February 27, 1883, 10 R. 676, the question of title to sue was not decided, and the opinions on that question were *obiter*. Under the City of Glasgow Bank Liquidation Act 1882, all that passed to the Assets Company was the property detailed in the state of affairs appended to the agreement. Claims upon contributories who had obtained a settlement by means of fraud were not included in the state of affairs, and therefore did not pass to the company. That this view was sound appeared from an examination of the statute. The objects of the Act were two—(1st) To enable the assets mentioned in the state of affairs to be advantageously realised, and (2nd) to enable persons under disability to take shares in the company. From article 15 of the agreement, taken with the fact that no alteration was sanctioned by the Court, it appeared that the operation of the Act was limited by the agreement. The agreement, again, was limited by the state of affairs. In the narrative the assets mentioned in the state of affairs were referred to as the total assets of the bank, and in the clause setting forth the purpose of the agreement only assets capable of being converted into money and mentioned in the state of affairs were referred to. From the first article of the agreement it appeared that the liabilities of the company were limited by the state of affairs. Why then not also the assets? From the second article it appeared that only income-producing assets were intended to be conveyed. The item in the state of affairs "10. Amount estimated as recoverable from contributories," referred to arrears only, and not to rights of action. (2) Reduction was incompetent, for *restitutio in integrum* was impossible. Mr Shirres gave up all his rights as a contributory in consideration of his discharge, and these could not now be restored to him, as the bank had ceased to exist, and he could not be restored to his position as a shareholder — *Western Bank of Scotland* v. *Addie*, May 20, 1867, 5 Macph. (H.L.) 80, *per* Lord Cranworth at p. 89, approved in *Erlanger* v. *New Sombrero Phosphate Company*, 1878, 3 App. Cas. 1218, *per* Lord Blackburn at p. 1278. See also *Adam* v. *Newbigging*, 1888, 13 App. Cas. 308. This case was *a fortiori* of *Addie*, for there the change was only from an unincorporated to an incorporated company, whereas here the old company had ceased to exist, and a new company had taken its place. Even if the pursuers had been in a position to give the defenders now the preferential right to share in the Assets Company, to which, apart from the discharge, Mr Shirres would have been entitled if he had been a solvent contributory at the date when the Assets Company was formed, that would not have been sufficient on the authority of *Addie*, and also on principle, because the surplus assets in the hands of the company with an interest to realise rapidly, were not the same as if they had been in the hands of the bank. But the pursuers were not even able to give such a preferential right to shares in their company, and could only allege that the defenders could purchase such shares in the market. That was quite insufficient. (3) As to the claim for damages—There was no relevant averment of damage. There was no relevant averment of misrepresentation and concealment. As regards the particular items alleged to have been omitted from the schedule to the declaration, the fact that the title to the house was in Mr Shirres' name was not inconsistent with the beneficial interest being no longer his. As to the other property apart from the bonds and items (4) and (6), the allegation amounted to this, that though the deceased had admitted ownership of shares in certain companies, he had understated his holding, and that though full inquiry had been made, the liquidators had failed to discover the true extent of his holding. This was extravagant. Items (4) and (6) were not worth £300 together. The general averment was irrelevant. Especially after such a long lapse of time, a pursuer making a charge of fraud must aver the particulars of the fraud charged very specifically. All that was alleged here was that in 1879 the deceased was penniless, and that in 1895 he died worth £43,000. It was against the most elementary principles to lay down, as must be done if this general averment were held relevant, that when this man was dead, and most of the evidence originally available was lost through lapse of time, unless his representatives were able to explain how he made his money, he was to be branded with the stigma of fraud. (4) Where the defence had been prejudiced by delay, as was the case here—for all the witnesses who could have given explanations were dead—the pursuer was bound to give some proper explanation of his delay. No such explanation had been afforded here, and the plea of *mora* should therefore be sustained—*Cook* v. *North British Railway Company*, March 1, 1872, 10 Macph. 513. As regards claims which require constitution, such as the present, mere delay was sufficient of itself to support a plea of *mora*. See *per* Lord Benholme in *Cook* at p. 516. (5) On the specification of documents—This specification was not directed to the purpose of proving frauds properly alleged, but to the purpose of obtaining information of fraud which the pursuers were not in a position to aver specifically. The register of shipping was public, and the pursuers were not entitled to a diligence to enable them to obtain information which could be found in the register. Apart from that they were not entitled to a diligence to enable them to discover what property he had. Generally this was a mere fishing diligence, unprecedently sweeping in its terms, and it ought not to be granted.

Counsel for the pursuers were not called upon as to the plea of no title to sue.

Upon the questions of relevancy and the specification of the documents they argued —(1) As regards the specific allegations,

they were clearly relevant. As to the general averment, it disclosed a *prima facie* case of fraud, but the details could not be known without access to books and documents. In 1879 the deceased said that £11,000 was his all, that when he had paid that sum to the liquidators he would be practically penniless, and that he was an old man, had retired from business, and was without means of earning an income. It was averred that he got nothing in the interval by way of succession or gift. When it was found that in spite of this he died worth £43,000 sixteen years later, especially when taken with the specific averments as to property not disclosed, a strong presumption arose against the deceased, and a case was made out for a general inquiry into all the pursuers' averments, both specific and general. (2) It was impossible, however, that this inquiry could proceed without the diligence craved. The defenders had made averments by way of explanation in answers 3 and 4, and the diligence was necessary to test the accuracy of their statements. In the special circumstances of this case, a *prima facie* case of fraud being made out, the diligence though somewhat wide ought to be granted.

At advising—

LORD JUSTICE-CLERK—We had an argument stated to us on the first plea-in-law for the defenders that there was no title to sue. We did not call for a reply to that. It appears very clearly, I think, on the agreement and the Act of Parliament which followed upon it, that the assets of the bank, as regards any claim which the liquidators might have against any person who was a contributory to the liquidation, passed to the Assets Company, and that they could make it good. Now, that the liquidators in the liquidation would have a title to reduce a compromise made between them and a contributory, on the ground of fraudulent misrepresentation and concealment, seems to me to be clear. And I have no doubt that the Assets Company being in their shoes would have the same right, and therefore I think the first plea-in-law for the defenders is properly repelled.

In regard to the relevancy of the action, I think it relevant; but we are not in the position at present of disposing of that matter finally at all, because we are only dealing with an interlocutor in which the Lord Ordinary has before answer allowed a proof. I do not think the judgment on this point ought to be interfered with.

The only remaining question is the question about this diligence. A great deal of what Mr Balfour has said, and which was also said by Mr Guthrie, is very forcible in the ordinary case, but this case is certainly peculiar in many respects, and in material respects. The case is, as stated in the record, that the late Mr Shirres having given up a statement to the liquidators of all he was worth, and represented that if he gave up the whole of that he became a penniless man at 67 years of age, and out of business, and that they ought to compromise with him on the footing of that being all that he possessed, now the company discover on his death that in the inventory of his estate given up is certain property which was in his possession at the date of his statement, and which was not disclosed at the time of the compromise which was made with the liquidators, and they say that they are therefore entitled to recover proof of their averments from his repositories and from his books, if such exist. Of that I think there is no doubt whatever. The other articles of the specification are for the purpose of clearing up matters in regard to this property which he is alleged to have possessed at the time of the compromise. I think that is a specification which in the special circumstances of this case ought to be allowed.

LORD YOUNG—I do not mean to decide anything more in this case, neither do I think it at all necessary to decide anything more, than that upon the record before us we cannot dismiss this action, but must allow an inquiry, and I do not see how it can in the legitimate interests of both parties be more safely allowed than the Lord Ordinary has done, as in allowing a proof at large before answer. I think there must be an inquiry, and that that is the most legitimate and reasonably safe mode of making the inquiry.

As to the diligence, I think the pursuers are entitled to the diligence which they ask in the circumstances of the case, but I desire to add this on the whole matter, that every thing is quite open except that the action is competent at the instance of a party having a title to sue, and that it is relevant, and that there must be an inquiry; all the observations which were made by Mr Guthrie upon what is necessary to be established in order to warrant the reduction of such a deed as that which was executed in 1879, is quite open to contention between the parties upon the ascertained facts.

LORD TRAYNER—I agree. There are two reclaiming-notes before us, the first for the representatives of Mr Shirres, under which it was maintained that this action ought now to be dismissed and the proof which the Lord Ordinary has allowed refused. That was maintained chiefly on the ground that the pursuers have no title to sue the action at all. That is a prejudicial plea, which if sustained would exclude all inquiry. I do not know if it was argued before the Lord Ordinary, but he takes no notice of it. On that point I agree with your Lordships that there is title in the pursuers, and that the defenders' plea should be repelled and the Lord Ordinary's interlocutor allowing a proof adhered to. In doing this nothing more is determined than that the case which the Assets Company have competently brought is one in which inquiry should be held, and that the proper form of that inquiry is as the Lord Ordi-

nary has allowed it, proof before answer. That leaves open every possible argument, either as to competency of proof when tendered or sufficiency of proof when concluded.

The second reclaiming-note is for the pursuers, against the Lord Ordinary's interlocutor refusing the diligence asked by them. I agree with your Lordships that this diligence is of a very sweeping kind, but in the peculiar circumstances of this case I think it is only justice to the pursuers, and only justice to the defenders, that the fullest inquiry should be made into the facts on which the action is based; such inquiry cannot be made unless the pursuers are granted a diligence such as they propose. I think the pursuers are entitled to the diligence they have sought, and therefore that the Lord Ordinary's interlocutor refusing it should be recalled.

LORD MONCREIFF—I agree to the course which your Lordships propose to take, on the understanding that everything is open except the questions of title and competency.

The Court pronounced the following interlocutors:—

"The Lords having heard counsel for the parties on the reclaiming-note for the defenders against the interlocutor of Lord Kyllachy dated 10th January 1896, Refuse the reclaiming-note, adhere to the interlocutor reclaimed against, and repel the first plea-in-law for the defenders, and remit to the said Lord Ordinary to proceed in the cause as accords: Find the pursuers entitled to the expenses of this reclaiming-note, and remit the same to the Auditor to tax and to report to the said Lord Ordinary, to whom grant power to decern for the taxed amount thereof."

"The Lords having heard counsel for the parties on the reclaiming-note for the pursuers against the interlocutor of Lord Kyllachy dated 18th November 1896, Allow the pursuers to amend their record, and in order thereto open up the record, and the amendment having been made, of new close the record and recal the interlocutor reclaimed against: Find that the pursuers are entitled to a diligence in terms of their specification No. 28 of process: Therefore grant diligence in terms thereof: Find the pursuers entitled to the expenses of this reclaiming-note and remit the same to the Auditor to tax and to report to the Lord Ordinary to whom remit the cause to proceed therein, with power to him to decern for the taxed amount of the expenses now found due."

On 26th January 1897 the defenders moved for leave to appeal to the House of Lords, chiefly on the ground that it was proper to have the question of title to sue settled finally before any further procedure should take place in the case, as in the event of the defenders' view of that matter being ultimately sustained all the further procedure in the case would be useless.

On 28th January the Court refused leave to appeal.

Counsel for the Pursuers—D.-F. Asher, Q.C.—Sol.-Gen. Dickson, Q.C.—Salvesen. Agent—J. Smith Clark, S.S.C.

Counsel for the Defenders—Balfour, Q.C. Guthrie—J. J. Cook. Agent—Alex. Morison, S.S.C.

Friday, January 29.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

BURGER AND ANOTHER ("TALISMAN") *v.* TAYLOR ("TYNE"), *et e contra.*

Shipping Law—Collision—Order of Harbourmaster — Negligence of Master in Carrying out Harbourmaster's Order—Half Damage Rule.

The screw steamer T was coming up the harbour of Leith towards a lock leading into the Albert Dock, when on entering a basin between the outer harbour and the lock, two paddle steamtugs were seen coming out of the lock. The T stopped and reversed, and was ultimately brought to a stationary position about 30 feet from the mouth of the lock, which was 60 feet broad, her starboard-bow being 12 feet from the south wall of the basin, which was a prolongation of the south wall of the lock, and her port-bow being about 85 feet from the end of the north wall of the lock. In remaining in this position the T had the approval of the harbourmaster. The tugs were of the same dimensions, and were 36 feet wide at the paddle-boxes. The first tug came out and passed clear, but only with 10 or 15 feet to spare. The master of the second tug, thinking there was not room to pass, stopped in the lock, but was ordered to come ahead by the harbourmaster, whose orders he was bound to obey. The harbourmaster immediately before had ordered the T to go astern with the view of keeping her in a stationary position, as the tide and wind were both causing her to drift nearer to the mouth of the lock. Both these orders were carried out, the T putting her engines astern sufficiently to keep her stationary, and the tug coming ahead. The tug in coming out of the lock struck the port-bow of the T with her port-sponson with such violence as to do considerable damage.

Held that it was proved that there was room for the tug to pass out safely, that the collision was due to the unskilful manner in which the harbourmaster's order was carried out by the tug, that the T was not to blame, as her only duty was to re-