[*8th April* 1834.]

ROBERT ALLAN and SON, Appellants.—*Rutherfurd.* No. 14.

ALEXANDER TURNBULL for the Edinburgh and Leith Glass Company, Respondent.—*Attorney General* (*Campbell*).

Partnership — Assignation — Right in Security.—A partner of a joint stock company assigned to bankers certain shares of the company ex facie absolutely, and they intimated the assignation to the company: Held, in a question with the company, (affirming the judgment of the Court of Session,) that the bankers, as assignees, were liable as partners; and that it was not relevant to free them from this liability to allege that the assignation was granted in security of payment of debt, and that certain forms prescribed by the contract of partnership as to transferring shares had not been observed.

2D DIVISION.
Lord Medwyn.

MR. JAMES STUART of Dunearn held 150 shares of the capital stock of the company called the Edinburgh and Leith Glass Company, formed in 1824, and on which, prior to April 1828, he had paid three instalments, under calls made by the Directors. On the 12th of that month he executed, in favour of the appellants, Robert Allan and Son, bankers in Edinburgh, an ex facie absolute assignation of 100 of his shares, in these terms:—"I, James Stuart, Esq., of Dunearn, "hereby assign, transfer, and make over to and in "favour of Thomas Allan, Esq., of Lauriston, and

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" Alexander Wight, Esq., bankers in Edinburgh, indi-
" vidual partners of the company carrying on business
" under the firm of Robert Allan and Son, bankers in
" Edinburgh, and to the survivor of them, and the
" heirs of such survivor, in trust for behoof of them-
" selves and such other person or persons as may be
" for the time sole partner or the partners of the said
" company or firm of Robert Allan and Son (under
" whatever name, title, or firm they may be for the
" time known), and to the assignees or disponees of the
" said trustees or survivor of them, 2,000*l.* of the capital
" stock of the Edinburgh and Leith Glass Company,
" which belong to me, and are entered in my name in
" the books of the said Edinburgh and Leith Glass
" Company, with the whole profits and dividends that
" now are or may hereafter become due upon the said
" capital stock of the said company; with full power
" to the said trustees, or survivor of them, or their or
" his foresaids, to procure the same transferred to their
" or his own names or name in the books of the said
" company; and also to uplift, discharge, and convey
" the same, and the profits and dividends arising
" therefrom, in the same manner as I might have done
" before granting hereof, or as the other proprietors
" of the said company are entitled to do by their contract
" of copartnery; and I oblige myself to warrant this
" assignation from all facts and deeds done or to be
" done by me in prejudice hereof. In witness whereof,"
&c.

This assignation was qualified by a back bond granted to Mr. Stuart, whereby it was declared, by Allan and Son, to have been made in security of the debts owing by Mr. Stuart to them, and they became

bound to redispone the shares; "but that only in case "the whole" of the debts, &c., "are paid by the said "James Stuart or his foresaids to the said Robert "Allan and Son, at or preceding the term of Martin- "mas next," declaring, that if not so paid, "the full "and absolute right of property" of the shares should remain with Allan and Son, who should then be entitled to sell by public roup, but under an obligation to account to Mr. Stuart for the proceeds.

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By the deed of copartnery it was provided, inter alia:—"9. That the partners shall be at liberty to sell "and dispose of the whole or any number of the "shares held by them, and that either gratuitously or "for any onerous consideration, inter vivos or mortis "causa. But declaring always, that in case of sale or "conveyance inter vivos, for an onerous consideration, "an offer of the share or shares shall be first made in "writing to the ordinary directors for behoof of the "company; which offer the ordinary directors shall "have full power to accept in manner after mentioned, "and three lawful days shall be allowed them to con- "sider of the same; and if such offer shall be declined "or not accepted of by the ordinary directors within "the said period of three days, then and after the "lapse thereof the partner making the offer shall be "entitled to make a sale or sales of such shares to "any person or persons he thinks proper, at or above "the price demanded for the same from the company, "but he shall not be entitled to make such sale to "any person at a lower price, until a new written "offer at such lower price shall first have been made "to the ordinary directors, and declined or not ac-

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" cepted of by them, in the same manner as was " necessary with regard to the first offer.

" 12. That where the share or shares of any partner " are transferred, conveyed, or sold in terms of the " above articles, and that either by the partners or " ordinary directors, the assignation thereof shall be in " the following terms:—

" ' I, A.B., in consideration of paid " ' to me by C.D., do hereby sell, assign, convey, " ' transfer, and make over to and in favour of the " ' said C.D. the sum of capital stock " ' of and in the Edinburgh and Leith Glass Com- " ' pany, being one share (or so many shares, as the " ' case may be, numbers) in the said " ' undertaking, to be held by the said C.D., his execu- " ' tors, administrators, and assignees, subject to the " ' rules, orders, and restrictions that I held the same " ' under immediately before the execution thereof; " ' and I, the said C.D., do hereby agree to take and " ' accept the said capital stock, subject to the same " ' rules, orders, restrictions, and conditions. In wit- " ' ness whereof we have subscribed these presents. " ' Written by at the " ' day of before these witnesses.'

" And on every such sale the said deed of convey- " ance, being executed by the seller or sellers, and the " purchaser or purchasers of such share or shares, shall " be kept by the purchaser or purchasers for his, her, " or their security, after the officer of the company " appointed by the directors for that purpose shall have " entered, in a proper book or books to be kept for that " purpose, a copy or memorial or specification of such sale

" or transfer, and have testified the entry of such copy " or memorial on the said deed of conveyance, for " which a fee of 2*s.* 6*d.* per share on the amount of " stock transferred, or such other commission as the " ordinary directors may fix, shall be paid by the pur- " chaser or assignee, to be applied for the benefit of " the company as the ordinary directors may think " fit; and the officer so appointed is hereby required " to make such entry of such copy or memorial or " specification, and grant such certificate thereof, with- " out any undue delay.

" 14. That the said ordinary directors shall and " they are hereby required to cause the names and " designations of the several persons who shall be " entitled to shares in the said undertaking, with the " number of the shares, and also the proper number " by which every share shall be distinguished, to be " fairly and distinctly entered in a book to be kept in " the company's office for the purpose, and after such " entry to cause the same to be signed by the chairman, " deputy chairman, or any of the ordinary directors, " or such officer as they may empower and appoint to " do so; and shall also cause a certificate, signed by " one of the ordinary directors, or officer so autho- " rized, to be delivered to every proprietor, on " demand, specifying the share or shares to which " he, she, or they is or are entitled in the said under- " taking.

" 15. That the bodies politic, corporate, and colle- " giate, and all and every person and persons whose " names shall at any time hereafter stand in the said " register book or list of proprietors of the said com- " pany, either as proprietor or proprietors of one or

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" more share or shares in the said undertaking;
" whether as subscribers, or as successors, executors;
" administrators, or assignees of subscribers, shall be
" deemed and taken to be the proprietors of the
" several shares standing in the said book in their
" respective names, and shall be subject and liable to
" the payment of every call or calls made and to be
" made thereon, and to all actions, suits, forfeitures,
" and penalties to which original proprietors of shares
" in the said undertaking are made subject and liable
" by this contract; and that all notices hereby required
" to be given shall be given to the party appearing by
" the said register book of the said company to be
" such proprietor or proprietors, or their representa-
" tives, or left at his, her, or their last or most usual
" place of abode, and shall be in all respects good, suffi-
" cient, and conclusive; and all payments of interest and
" dividends due and to become due on such shares
" shall be made to such persons as by the said books
" of the said company shall so appear to be a proprie-
" tor or proprietors thereof; and that no assignment,
" transfer, conveyance, or sale of any share or shares,
" or other instrument giving title to any share or shares,
" which shall not have been enrolled or registered as
" directed by this contract, shall be admitted as evi-
" dence, either to defeat any action or suit brought
" or to be brought by the said company of proprietors
" to recover the said calls, or to entitle any person to
" recover any share or shares forfeited to the said
" company of proprietors, or to make the said com-
" pany of proprietors liable in the payment of divi-
" dends, or to found any other claim whatever against
" the said company, or to any other person than such

" as appear from the said book to be proprietors of
" the said shares; but that in all cases the said book
" shall be considered as sufficient and conclusive evi-
" dence of the proprietorship of the said shares, de-
" claring that until each respective proprietor shall
" have been enrolled as such for the space of at least
" fourteen days he shall have no right to vote, or
" attend at any meeting of the company of proprietors,
" or otherwise interfere in the business thereof."

On the 7th of August 1828, intimation was made by Allan and Son to the Glass company, under form of notarial instrument, of the assignation in their favour, of which a copy was furnished to the Company, but no communication was made to them as to the existence of the back bond. This intimation was inserted in the company's journal of transfers on the same day on which it was made, and the names of Robert Allan and Son were subsequently entered in the register of stockholders, but not until after the 20th of August, by which time Mr. Stuart had become bankrupt and left the country. None of the other requisites were complied with. Thereafter, certain additional calls were made by the directors, and Allan and Son were required to pay them. For some time they did not positively refuse, or deny their liability, though they avoided any acknowledgment to that effect, but the Glass company ultimately turning out unprosperous, they maintained that they were not partners, and were not subject to any responsibilities as such. The Glass company then raised an action before the Court of Session, concluding to have it declared, " that the said Thomas Allan and " Alexander Wight, as trustees foresaid, and the said " firm or company of Robert Allan and Son, and the

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"said Thomas Allan and Alexander Wight, the individual partners thereof, are partners of and in the said "Edinburgh and Leith Glass Company, and holders "of the foresaid 100 shares of the capital stock thereof, "and as such liable for all calls made or to be made "by the ordinary directors under and in terms of the "said contract of copartnery;" and that they should be decerned to make payment of the amount of the several calls on these shares remaining unpaid.

Allan and Son pleaded in defence that no effectual transfer had, in terms of the rules of the Company, been made in their favour, and at all events, as it was clearly established that the assignation was granted, not as an absolute transfer, but merely as a right in security, and as they were willing to renounce all right to the shares, they could not be made responsible as partners.

The Lord Ordinary, on the 16th of February 1831, decerned in terms of the libel, but found no expenses due, and referred to the case of the East Lothian Bank v. Turnbull, 3d June 1824.* Allan and Son having reclaimed, the Court appointed a hearing in presence by one counsel on each side, and the back bond having not hitherto been produced, they granted diligence for recovery of it. After hearing counsel they ordered the question to be argued in Cases, and thereafter appointed them, with the record, to be laid before the other Judges, and requested their opinions "as to "whether the Lord Ordinary's interlocutor ought to "be adhered to, or not; and, if not, what alteration "ought to be made thereon." The following opinions were thereupon returned:—

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* 3 S. & D., 95. (new ed. 63.)

Lords President, Craigie, Gillies, and Balgray. — " We are of opinion that the Lord Ordinary's interlocutor in this case ought to be adhered to, without any alteration.

" All the clauses in the contract of copartnery founded on by the defenders, either do not apply to this case, or are clauses solely in favour of the company; which, if the company does not think it necessary to enforce, no other person is entitled to found on."

Lords Medwyn, Corehouse, and Fullerton. — " The shares of the stockholders in the Edinburgh and Leith Glass House Company were assignable, both at common law, and by the express provision of the contract of copartnery. On the 12th of April 1828 Mr. Stuart granted a disposition and assignation, ex facie absolute, of 100 shares of his stock in that company to Allan and Son, the defenders. The assignation was completed by an intimation to the manager on the 7th of August following, and of the same date it was entered in the journal of transfers, kept in terms of the 12th article of the contract. The question has arisen, whether the defenders by that conveyance became shareholders of the company, and as such liable to all the obligations of partners? The Lord Ordinary has decided in the affirmative, and we are of opinion that his interlocutor ought to be adhered to.

" Messrs. Allan and Son rest their defence on two grounds. They plead, first, that the transfer in reality was not absolute, but granted in security of a sum which they had lent to Mr. Stuart; and, secondly, that in consequence of the nonobservance

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" of certain provisions in the contract relative to the " transfer of shares, the assignation, considered as an " absolute conveyance, was inoperative.

" 1. With regard to the first plea it may be ob- " served, that the assignation did not bear, either ex- " pressly or by implication, that it was granted in " security. On the contrary, it imported an absolute " transfer of all right that was in the cedent to the " shares in question. It is true that the conveyance " was qualified by a back bond, by which the defenders " consented to re-dispone to Mr. Stuart, if he repaid " the debt at or before Martinmas 1828. But that " obligation was not communicated to the company " for a period of many months after the assigna- " tion had been intimated,—after the bankruptcy of " Mr. Stuart,—after repeated calls had been made on " the defenders for payment of their instalments as " partners,—and after it appeared, even by the terms " of the back bond itself, that the term of redemption " had expired. We are of opinion, therefore, that " this latent obligation can have no effect whatever " upon the question at issue.

" 2. There are provisions in the contract, that a " partner desiring to sell all or any of his shares shall " previously make an offer of them to the company, " which may be accepted of within three days; that " the assignation, when granted, shall contain an obliga- " tion, subscribed by the assignee, to hold the shares " under the conditions and subject to the rules of the " company, and that the transfer shall be recorded in " the register of stockholders,—regulations which, it is " admitted, were not complied with in this instance. " But the company having received intimation of the

" conveyance, and entered it in the Journal of Transfers, " without stating any objection, either at the time or " afterwards, must be held to have virtually waived the " right of pre-emption which might otherwise have " been competent to them. In the next place, though " they were entitled, if they thought fit, to require the " assignees to subscribe an express obligation to conform " to the rules of the company, and fulfil the duties of " partners, they were at liberty, if they chose, to dis- " pense with that form, and to rely on the common " law obligation, which the defenders undertook, by " accepting of and intimating a conveyance to the " shares. Lastly, as the company had obtained an " effectual warrant from both parties interested, to enter " the transfer in their register book, and as they had " entered it in their Journal of Transfers, we think they " were entitled to make the first-mentioned entry " quandocunque, even though the bankruptcy of " Mr. Stuart had intervened."

" The decision in the case of the East Lothian Bank " against Turnbull, cited by the pursuer, appears to us " a precedent, à fortiori, in the present question. In " that case it was provided in the contract, that every " transfer should be made and accepted in presence of " two directors, who should subscribe the deed of " acceptance. But the East Lothian Bank, after the " transfer had been intimated to them, so far from " waiving that provision, gave notice to the purchaser " that it was incumbent upon him to attend at the bank, " that the ceremony might be performed. Yet the " Court, notwithstanding, held that by the intimated " assignation the transfer had been completed,—that " Turnbull was a partner,—and that the regulation

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" above mentioned being made for the benefit of the " company, they were entitled to dispense with it if " they saw fit to do so. We do not think that the " comment of the defenders on this case is well founded. " The circumstance that Turnbull might have been " liable in damages to Wetherley for not implementing " his bargain, as in a question between these two parties, " did not infer, as in a question between Turnbull and " the bank, that he had become a partner, if any form " essential to the conveyance had been omitted. " Accordingly, the Court did not put their interlocutor " on the ground stated by the defenders; but, on the " contrary, upon another and different ground, namely " that nothing was essential to the completion of the " transfer but an intimated assignation, and that the " bank had power to dispense with the form of accep- " tance which the contract prescribed.

" If these views be correct it is quite immaterial " that, as in a question between the defenders and " Stuart, the right to the shares was redeemable. It is " admitted in the record, that the defenders did not " communicate that condition of the agreement to the " pursuers at the date of the intimation; and it is not " averred that the pursuers were in the knowledge of " the fact. But although they had known it they were " bound to receive the defenders as partners, and to " enter them as such in the register; for there is no " rule of law, or provision in the articles of the co- " partnery, that a person holding a share subject to a " right of redemption shall not be a partner while it " remains unredeemed. It is equally immaterial, that " the pursuers had the privilege of refusing to acknow- " ledge the defenders as partners till the form of

" registration was gone through, that being a personal
" privilege of which they alone were entitled to avail
" themselves. There is no anomaly in the result, for it
" is of daily occurrence, that an individual shall be held
" as a partner of a company, and subject to its respon-
" sibilities in a question with one party, and the reverse
" in a question with another party. The case of
" Turnbull proceeds expressly on the ground, that the
" East Lothian Bank had the option of taking the
" cedent or the assignee as their partner, and might
" have availed themselves of that option, exactly as it
" suited their interest to do. Here, as in other cases
" arising out of bankruptcy, there is undoubtedly an
" appearance of hardship; but the pursuers, as well as
" the defenders, are certantes de damno vitando, and all
" property would be insecure if the general rules of
" law were suffered to bend to considerations of that
" nature."

" *Lord Moncreiff.*—This case appears to me to be
" attended with very considerable difficulty; and at
" present I am not satisfied that the interlocutor of the
" Lord Ordinary is right.

" The facts as they appear from the record are few
" and simple. Allan and Son having in April 1828
" advanced a large sum of money to Mr. Stuart,
" obtained from him a deed of disposition and assigna-
" tion of 2,000*l.* of the capital stock of the glass com-
" pany, of which he was a partner to that nominal
" extent. The deed was absolute in form, but qualified
" by a back bond, which, as between these parties,
" certainly rendered it, both in fact and law, an assigna-
" tion in security only. It does not appear on the

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" record of what date the back bond was executed,
" though it is stated in the case for the defenders that
" it was on the 4th August. But the assignation was
" not intimated to the company till the 7th August;
" and though it is not admitted in the record, it is not
" denied that the reality of the transaction was an
" assignment in security only. Before the assignation
" was intimated Mr. Stuart had left Britain.

" The intimation of the assignment took no notice
" of the back bond, or of the qualified nature of the
" right, but it stated the terms of the assignation
" itself. That deed bore an obligation to execute a
" regular transference of the shares in terms of the 12th
" article of the condescendence. It was entered in a
" book called the Journal of Transfers, of its date
" the 7th of August; but no entry was made in the
" register of stockholders, as provided by the 15th
" article of the contract, till after Mr. Stuart's bank-
" ruptcy on the 20th August.

" After the intimation, the pursuers made a demand
" of two instalments of stock, amounting to 400*l.*,
" against the defenders; and the record bears, that
" 'they have failed to make payment of the same.' It
" does not appear from the record at what time these
" calls were made, or when the back bond was first
" made known to the pursuers; but all that took place
" was posterior to the 7th August.

" In this state of the facts, the question is whether
" the pursuers are entitled to hold the defenders as
" partners of the company, to the effect that, whether
" they make any demand on their assignation other
" than that expressed in the intimation and protest or

" not, they must be liable to the calls made, in terms
" of the contract, of the capital stock corresponding
" to the shares previously held by Mr. Stuart.

" Unless there were a demand made for investigation
" and evidence, I must hold it as a fact upon this
" record, that, whatever may be the effect in regard
" to the pursuers, the real transaction between
" Mr. Stuart and the defenders was for an assignation
" in security only, with a power of redemption. And
" it is to be observed, that according to the terms of
" the back bond the defenders were only to be entitled,
" even after the term of redemption, to hold the shares
" with a power to sell them by public roup, and to
" account to Mr. Stuart for the proceeds. There was
" no price fixed by the assignation; and the back bond
" referred only to the debt in security of which it was
" given.

" This being the nature of the transaction, it is clear
" that if Mr. Stuart had continued solvent he could
" never have compelled the defenders to become
" partners of the glass company in his place; and that
" the intimation of the assignment could not have had
" the effect of entitling him to do so.

" On the other hand, though the assignment was
" absolute in form, and the intimation took no notice
" of the back bond, it seems to be equally clear that
" as no transfer was executed in terms of the contract
" of copartnery, and for this reason, probably, the names
" of the defenders were not entered in the register as
" partners,—neither Mr. Stuart nor the defenders
" could have compelled the pursuers to receive the
" defenders as partners, discharging Mr. Stuart of all
" responsibility, and extinguishing his rights as a

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" partner. If, after such an intimation the defenders " had become bankrupt instead of Mr. Stuart, it could " not, in my apprehension, have been maintained by " Mr. Stuart, that the defenders had become the " partners, and that he had ceased to be under any " obligation to the company. And supposing again, " that the company's stock had been highly valuable, " certainly the creditors of the defenders could never " have drawn more than the debt in security of which " the assignation was given, or such part of it as might " not be satisfied from other sources.

" It appears then,—1. That as between Mr. Stuart " and the defenders, the defenders were not partners; " 2. That as between Mr. Stuart and the pursuers " he was still the partner; and, 3. That as between " the pursuers and the defenders, the defenders were " not partners, if it had been for the interest of the " pursuers to maintain that they were not.

" But I am of opinion that the transaction could not " possibly so stand that both Mr. Stuart and the " defenders should be partners of the company, upon " the same stock and at the same time. And neither " do I think it possible to hold, that the pursuers had " an option, according as it should suit their interest, " to take either Mr. Stuart or the defenders as their " partner. And yet, if I do not entirely misapprehend " the case, this last is the proposition which the pur- " suers must make out, in order to support their " claim.

" The case of the East Lothian Bank against Turn- " bull, 3d June 1824, differs from the present case in " the fundamental fact, and must therefore depend on " different principles. In that case both the original

" partner and the assignee were solvent; and the Court
" had held and decided, that as between them there
" was a completed contract of sale for a price. Then
" the question arose with the creditors, or rather the
" other partners of the bank, (which was bankrupt as
" a bank,) whether the assignee was liable to them
" as a partner. The transfer had been executed in the
" books of the company, in the form required by the
" contract; but the assignee had not signed an accept-
" ance of it in presence of two directors, as the contract
" provided. He had, however, distinctly acknowledged
" it in writing, and pledged himself to appear and sign
" the acceptance. The question, therefore, in that case
" appears to me to have been, whether the bank were
" not entitled to stand on the reality of the transaction
" as between the cedent and the assignee, and the per-
" sonal engagement for completing it, notwithstanding
" that the particular provision for their own protection
" had not been complied with. It was quite clear,
" after the decision of the question between Wetherly
" and Turnbull, that the assignee must at last bear the
" loss; and the Court simply held, that in that state of
" the matter, as I should understand the case, he was
" bound directly to the bank by his personal acts.

" In the present case, if the pursuers were to stand
" on the actual transaction, they must fail in their
" demand, unless it could be maintained that the
" holder of an assignment of a partner's share in a
" company, in security only, becomes actually a partner
" of the company, by intimating the assignment. This
" cannot be maintained; and therefore they must rest
" their case on very different ground from that on
" which the East Lothian Bank stood in that case.

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" They rest it on this, that the assignment was appa-
" rently (though not really) absolute, and that the
" back bond was not intimated.

" If there were any facts in the case from which it
" could be inferred that the pursuers were in any
" respect misled or deceived by the absolute form of the
" assignation, and that they suffered injury thereby, I
" should think that they were clearly entitled to redress;
" but there is no such averment in the record; and it
" would be a case to be tried in a different manner.
" I humbly think that the very form and substance of
" the deed of assignation must have made them aware
" of the nature of the transaction;—made, as it was, in
" April, when, from the calls then in cursu, the stock
" was evidently at a discount,—made without any price
" stipulated, unless the precise nominal value of the
" stock were held to be the price,—no transfer having
" been executed,—no intimation given till the 7th of
" August, after Mr. Stuart had left Britain, and that
" intimation containing no demand to be received as
" partners, but merely a prohibition to pay to other
" parties, as in the common case of intimation as a
" diligence. And it is rather to be inferred from the
" circumstance of the entry in the register not having
" been made till after the actual bankruptcy of
" Mr. Stuart, that the pursuers were not, in fact, in
" any doubt as to the nature of the assignment.

" The great difficulty, therefore, which I feel in the
" case is, that as the assignment was, in fact, taken only
" as a security, and the intimation of it was evidently
" intended merely to take such security as the shares
" afforded (whether competent to be so done, or not);
" and further, as there was not, in fact, any transfer

" which could either have bound Mr. Stuart on the
" one hand, or the company on the other,—to find the
" defender liable to a positive loss upon these shares of
" stock would be to decide contrary to the clear inten-
" tion and bona fides of the transaction out of which
" the claim arises, and to give the pursuers an unjust
" advantage upon the bankruptcy of Mr. Stuart, for
" which they never bargained, and which they are only
" attempting to obtain, in consequence of an act of the
" defenders, which was not and could not be intended
" to place them in the situation from which alone it
" could legally arise. The claim has too much both of
" the appearance and of the substance of an undue
" catch, contrary to the truth and justice of the case.

" At present, therefore, I am inclined to think that
" the pursuers have failed to establish their claim
" against the defenders, and that the interlocutor of
" the Lord Ordinary ought to be altered, and judgment
" of absolvitor pronounced in favour of the defenders."

Lord Mackenzie.—" I concur in the above opinion."

On advising these opinions, the Court, on the 1st of March 1833, adhered to the interlocutor of the Lord Ordinary.*

Allan and Son appealed.

Appellants.—From the facts of this case, it is clear that the purpose of the transfer was not to divest Mr. Stuart, and to confer an absolute right to the shares in favour of the appellants, but merely to give to them an effectual security for repayment of the money which

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* 11 S. & D., p. 487.

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Mr. Stuart owed to them. Although it was clothed with the forms of a sale, it was, in truth, merely a pledge; and it is not pretended that a party who has got a transfer merely in security is responsible as a partner. In the case of the East Lothian Bank, Turnbull intended to acquire the shares, not as a security, but in absolute property; and in an action brought against him by the seller, to complete the transaction in terms of the bargain, by taking a transfer agreeably to the provisions of the contract, the Court held that he was bound to do so. He thus stood in the position as if a proper formal conveyance, under the contract of sale, had been made, so that when the action was brought against him by the East Lothian Bank as the partner, substituted in place of the seller, he had obviously no defence. But in the present case, the contract made with Mr. Stuart was not one of sale; and he never could have insisted in an action against the appellants to the same effect as the seller maintained his action against Turnbull. Besides, as the right of the appellants' action was incomplete, as not being made in terms of the contract of the company, Mr. Stuart cannot be held as divested, and consequently they cannot be regarded as substituted in his place. They are liable to account to Mr. Stuart, as his trustees, for any reversion which may remain after payment of their debt, so that he is the true proprietor; whereas, if the doctrine of the respondent be correct, that the appellants are also liable, the anomalous consequence would take place, that two parties having separate and distinct rights are proprietors of the same stock.

Respondent.—Although the present transaction, when fully investigated, turns out to be of the nature of a

security, yet it by no means follows that the appellants have not incurred the personal responsibility of partners. The decision of the question depends upon the mode and form in which they presented themselves to the company. They acquired, ex facie, an absolute assignation to the shares, and intimated their acquisition of them by a formal intimation, without giving the slightest notice of the existence of any back bond. That document may be available as between Mr. Stuart and the appellants, but it can have no effect whatever as between the appellants and the company. The question, therefore, comes to be, whether there is any relevancy in the plea of the appellants, that they did not observe the precise form of conveyance prescribed in the contract of copartnery. It is not disputed that that form has been complied with in substance, although not in its precise words; and such being the case it is obviously not competent for the appellants to found any plea on this circumstance. It is in the power of the company, either to enforce the observance of the form, or to dispense with it altogether. The form was made for their benefit, and cannot be pleaded against them. This principle was recognised and established in the case of the East Lothian Bank v. Turnbull.

LORD DENMAN.—My Lords, this case appears to me to resolve itself into points which are of no great difficulty. Mr. Stuart wás a member of the Leith Glasshouse Company, under a deed of copartnery which authorized the assignment of shares, and under that deed he made an assignment, in terms as large as language could supply, to the gentlemen who are now the appellants before your Lordships. Those gentlemen inti-

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mated that assignment to the Company, and thereby represented themselves to have become the assignees of those shares. The question is, whether they are now liable, not only to all the future claims which may be made upon the members of that Company, but also to be declared members of that Company, in consequence of the act which they have done? The able argument on the part of the appellants, to show that they are not so liable, has rested altogether upon two points; one of which is, that in point of fact they were not assignees, but that they possessed only a security upon those shares; that they held them as mortgages, and were liable to account for them to the mortgager; and consequently that they could not be considered as altogether assignees of the property. I confess, that it appears to me that it does not lie in their mouth to make that defence; because, after having fully represented themselves to the Company as being in the situation of assignees (unless something can be shown which shall convince your Lordships that the situation of the parties has been altered by the mode in which the assignment has taken place), I do not see how it is possible for them to deny that they are assignees to the full extent of the language in which they have so described themselves. I have not been inattentive to the observations of that high authority, Lord Moncreiff, upon this subject, particularly the security; and I must own, that if it were not for the deference with which I must regard every thing that falls from that learned person, I should say, that the argument by which he seeks to show that the Company knew that the appellants were mortgagees, would not be entitled to so much weight as every thing that falls from his Lordship is; but I think, notwithstanding, that there

is nothing to make it apparent that this Company did not fully believe that they were dealing with the appellants as assignees, and I think that the nature of their dealing together is that which defines the relation in which they stand to one another. There are certain forms which it is said have not been complied with. In the first place, the ninth clause of the deed of the Company imposes upon any member parting with his share the duty of offering it to the Company first of all, that they may purchase it, if they think proper, and it does not appear that that was done on the present occasion; and I understand, that in point of fact it was not done. But it appears to me, that the answer given at the bar to that objection is quite satisfactory—that that is a privilege reserved for the Company for their own benefit, which privilege they were at liberty to renounce, if they thought proper; and I think that what passed between the parties can be taken in no other light, than that they did, in point of fact, renounce it, because they received intimation of the assignment, and they made no objection to these gentlemen holding the place that had been formerly held by Mr. Stuart. Then, under the twelfth clause, a particular form of assignment is described, and no doubt it is convenient for the Company, and for all who are members of the Company, that that particular form should be followed, but that is a mutual convenience which either party is at liberty to waive, and which I take it that both parties have waived on the present occasion. It was ingeniously urged, that the appellants were misled by the statement being conveyed in the manner in which it was, and that if it had been brought to their notice, on the form being tendered to them for their execution, that they were expected to

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become partners, in that case they would have thrown back the bargain they were about to make, and would have refused to become purchasers; but I think that that is rather an ingenious than a solid observation, because, if they were purchasers, they were to state themselves as assignees, and to claim all the right which assignees could have, and which rights, in fact, constitute the beneficiary partnership. I think it would be too strong to suppose that they would for a moment have hesitated to execute that form of transfer, if it had been submitted to them. I therefore think, that in all those respects, they have on all sides waived the particular advantage which the deed provided for each party, and that they must be taken to have put themselves in the same situation as if they had complied with all those forms. The case which has been referred to, of Weatherly v. Turnbull, clearly turns upon the point, which I think ought to be excluded from the present consideration; whether the defender in that case was a vendee, or merely a mortgagee; and the Court having held that he was a vendee found, that as between the parties all the consequences must follow. Then in the following case of the Bank of East Lothian against the same gentleman, the question was, whether that defender should pay up the instalments due upon the shares, and should also become a partner and member of the Company. The Bank having brought the action against Turnbull, as a partner, to make a certain advance on the shares purchased from Weatherly, and he having set up the defence, in the first place, that he was a mortgagee, and, in the second place, that the forms had not been complied with, the Lord Ordinary found that the three shares of the said Company belonging to David Wea-

therly were neither transferred by him, nor accepted by the defender, in the presence of one of the directors; the said defender, by the transaction founded on, was not fully constituted a member of the said Banking Company, or considered liable for the debts and obligations due and contracted by them. But the Court unanimously altered, and decerned in terms of the libel; that is, they held not only that he was bound to pay the share then due, but also that he was, to all intents and purposes, a member of the Company. It seems to me that is a case quite in point; and although there is certainly in this case an apparent intention to be a mortgagee, and not to be a vendee, yet as the representation made by the appellants to the Company was that they were assignees, in the most absolute and unconditional terms, the Company had a right to act upon that statement; and I therefore humbly recommend to your Lordships that the decree should be affirmed; and I beg leave at the same time to add, that it seems to me that the judges in refusing costs have acted in a very prudent manner, because it certainly is desirable on the part of the public, that the Company should comply with all such forms as their own deeds require, and also, considering the weighty doubts entertained in the Court below, it would not probably appear to your Lordships proper that the judgment should be affirmed with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed.

A. DOBIE—GEORGE WEBSTER, Solicitors.