ference of stock, in questions as to the effect of the death or resignation of one or more of a body of trustees—a view which has been the subject of argument in other cases during the last two days." I had formed no conclusive opinion at that time as to whether that observation might be well founded, because the matter was not then under argument. But we have now had the argument, and it appears to me that the clause of the statute which allows notice of trusts is not only useful in this country in ear-marking the property as belonging to the trust, but is also of use in such questions as we have now before us, in showing that the property being held by the owners of the stock jointly, not as the beneficial owners for themselves, but in trust for others, there is necessarily an accrual of the title on the death of one of the trustees in favour of the others. The difficulty that occurred in the case before Lord Cairns, of having to go behind the register to ascertain whether there was beneficial ownership or not is avoided here, because a trust ownership is expressly entered upon the register as allowed by the statute.

I have only farther to say, that I do not think that this decision in the slightest degree trenches upon the decision we have already pronounced in the case of the petition *Muir*, or in the previous case of *Lumsden* v. *Buchanan*. I hold that persons who enter their names on the register of a bank, though describing themselves as trustees, are personally responsible for the debts of the bank incurred during their lives, but it is not in the least degree inconsistent with the view that they are personally responsible, and jointly and severally responsible for the debts of the bank, to hold that that liability ceases upon death. The liability ceases for this reason, that the title and interest in the stock is thereby transferred to the other joint holders of the stock. It is worthy of remark that the case of *Kirby* is the the same with the present in this respect. Lord Cairns proceeded on the view in *Kirby's* case, that there was joint and several liability of both persons on the register so long as they lived, which is precisely the position in which we have held trustees to be. He nevertheless held that although there was personal liability, and joint and several liability during the life of these joint owners of the hares, upon the death of one of them that liability came to an end so far as any continuing obligation was concerned, and that is precisely the view on which we have proceeded in the decision in the present case.

I may farther say, that I do not think it makes any difference whether the death had been intimated to the bank or not. I take it that having on the face of the register a title of this kind, in which the parties are entered as joint owners in trust, if one of the body of trustees dies, that is a public fact of which the bank is bound to have knowledge, just as I think in the ordinary case of partnership, creditors and partners are bound to have knowledge of the death of a partner who is liable under the contract.

On the whole, I am of opinion with your Lordship that these petitions ought to be refused.

Lord President — I think it right to explain, in consequence of what has fallen from my brother Lord Deas, that I should come to the same result here although there had been no notice of this trust upon the register. The three trustees might have been registered as joint owners of these shares without any notice of the trust at all, and if it had appeared in point of fact that they held that estate as joint owners with the condition of survivorship, precisely the same result I think would have followed.

The Court directed the liquidators to remove the names of the petitioners from the list of contributories, and appointed them also to make an entry in the register of shareholders of the date of the death of the late Robert Oswald.

In another case (*John Cochran's* case), where the only difference was that the death of the trustee had been more than a year before the date of the stoppage of the bank, the Court ordered the name to be deleted from the register of shareholders.

Counsel for Petitioner—M'Laren—G. R. Gillespie. Agents—Waddell & Mackintosh, S.S.C.

Counsel for Respondents—Kinnear—Asher—Lorimer. Agents—Davidson & Syme, W.S.

Wednesday, January 15.

FIRST DIVISION.

CITY OF GLASGOW BANK LIQUIDATION—(*BIGGART'S CASE*) BIGGART AND SPOUSE *v.* THE LIQUIDATORS.

Husband and Wife—Jus mariti *and Right of Administration—Partnership—Joint-Stock Company—Validity of Wife's Obligation, and Husband's Liability where* jus mariti *and Right of Administration Excluded.*

A married woman, after her marriage, and with funds from which the *jus mariti* and right of administration was excluded, purchased shares in a joint-stock banking company of unlimited liability, registered though not formed, under the Companies Act 1862. She bought part of the shares in 1855, (these were afterwards converted into stock), and she accepted an allotment of new stock in 1864. She always drew the dividends, and transacted with the company in her own name, and in entire independence of her husband. He adhibited his signature to the acceptance of the transfer of the original shares, but he was not a transferee, and his signature was not tested. The fact that the shares were held exclusive of his *jus mariti* and right of administration did not appear upon the register of the company, nor was his name entered therein. On the liquidation of the company the names of both husband and wife were placed in the first part of the list of contributories containing the names of contributories in their own right.

Held (1) that the wife's name was rightly placed there, and that she was bound to contribute to the extent of her separate estate; but (2) that the husband's name ought to be removed, he being in no way liable in respect of his wife's shares.

The petitioners in this case were Mr and Mrs Biggart, Kirkland House, Dalry. There were two petitions, one at the instance of Mrs Biggart,

with consent of her husband, and the other at the instance of Mr Biggart himself. Both petitioners were placed by the liquidators of the bank in the first part of the list of contributories as contributories in their own right, Mrs Biggart as holder of £570 stock, and Mr Biggart "in respect of the holding of stock of Mrs Biggart his wife," and they prayed that their names should be removed. They were married in 1831, and had lived together ever since. No marriage-contract was entered into between them, but shortly after the marriage Mrs Biggart's father died, leaving *mortis causa* deeds by which he conveyed to his daughter certain lands and subjects in the parish of Beith, yielding over £100 a year of rental, and a legacy of £200, and the same, along with the rents and profits accruing thereon, were declared by the deeds of conveyance thereof to be exclusive of the *jus mariti* and right of administration of her husband. Certain small portions of the said lands have been conveyed to the Caledonian and Glasgow and South-Western Railway Companies for part of their branch line from Lugton to Beith, and the price of the portions so sold, and the rents and profits of the subjects and legacy, so far as accumulated, were held by Mrs Biggart as her separate estate.

In 1855 Mrs Biggart purchased in the open market thirty shares of £10 each of the capital stock of the bank, and paid for them out of the accumulated rents and profits of the estate left to her by her father, which she had retained in her own hands and under her own administration, and she was thereafter entered as proprietor of these in the books of the bank. There were two sets of sellers, and the transfers and acceptances were in the following terms:—

"We . . . in consideration of the sum of £275 sterling now paid to us by Mary Biggart, wife of Thomas Biggart, Dalry, hereby sell, assign, transfer, and make over to and in favour of the said Mary Biggart, her heirs, executors, and successors whomsoever, twenty-five shares of the capital stock of the City of Glasgow Bank Company of £10 sterling each, of which £10 sterling has been paid up, with the whole interests, profits, and dividends that may arise and become due thereon, the said Mary Biggart by acceptance hereof being, in terms of the contract of copartnership of said bank, subject to all the articles and regulations of the said company in the same manner as if she had subscribed the said contract. And we consent to the registration hereof," &c.

"I, Mary Biggart, above designed, do hereby accept of the above transfer on the terms and conditions above mentioned.—In witness whereof I have subscribed these presents, which, in so far as not engraved, are written by Hugh Fraser, clerk in the City of Glasgow Bank, Glasgow, at Dalry the 2d day of June 1855 years, before these witnesses, James Muir, clerk at Bridgend Mills, Dalry, and John Gow, worsted spinner, Dalry.

"Mary Biggart.
"Tho. Biggart.

"James Muir, *witness.*
"John Gow, *witness.*"

The resolutions to convert the shares of the bank into stock were passed at a special meeting of the shareholders of the bank held on 4th July 1860, and thereafter the certificate held by Mrs Biggart for the original shares was given up, and in lieu thereof she obtained a certificate dated 25th July 1860, in the following terms:—"These certify that Mrs Mary Biggart, Dalry, has been entered in the books of this company as the holder of two hundred and seventy pounds consolidated stock," that being the equivalent of her 30 shares.

In the year 1864 Mrs Biggart applied for and obtained an allotment of the new stock of the bank, which was then issued at the price of £130 for £100 of stock. The letters of application were signed by Mrs Biggart alone, and the certificate for the stock, which is dated 12th October 1864, was in the following terms:—"These certify that Mrs Mary Biggart, Kirkland House, Dalry, has been entered in the books of this company as the holder of three hundred pounds consolidated stock." The new stock was entirely paid for out of her own separate estate.

Mrs Biggart was entered in the bank's stock ledger, which since 1862 had been the only register of members kept by the bank in terms of the Act of 1862, as "Mary Biggart, wife of Thomas Biggart, Dalry," and the warrants for dividends were made payable to her personally, and the dividends were paid to her on her own receipt. There was no declaration that the shares were held exclusive of the *jus mariti* and right of administration of Mr Biggart.

The petitioners pleaded on behalf of Mrs Biggart that she, being a married woman, could not and did not in point of law validly contract to undertake any obligations or liabilities as a partner or member of the bank, and that the liquidators thereof were not entitled to call on her to make payments of any calls made by them, and that she ought to be removed from the list of contributories.

Mr Biggart pleaded on behalf of himself that Mrs Biggart was a married woman at the time she purchased the shares and stock, and as such was disabled from becoming a partner in a banking company, and could not bind herself nor her husband to the effect of rendering either of them liable for partnership debts and obligations. The petitioner himself never agreed to become a member or partner of the bank and never held any of the stock or shares. The liquidators were therefore not entitled to put his name on the list of contributories or to call on him to make payment of calls made by them as liquidators of the bank.

Argued for the petitioners—I. *Wife's Case.* (1) A married woman was incapable of entering into a contract of copartnery, and binding herself or her husband in partnership obligations. This was an instance of the general law regarding the obligations of married women, viz., that all personal obligations undertaken by a married woman were null and void *ipso jure.* This rule was recognised in a long series of decisions in every variety of case. It proceeded upon the ground, not that the wife's personal obligations were voidable in the view of being a protection to her which she might waive if she pleased, but that her personality was sunk in that of her husband as the *dignior persona.* She could not contract, because the law said that in the management of their affairs one, and one alone, should be entitled to grant obligations—Stair, i. 4, 9; Erskine, i. 6, 20-25; *Birch* v. *Douglas*, January 14, 1663, M. 5961; *Fisher* v.

Ker, January 27, 1665, M. 5963; *A.* v. *B.*, July 5, 1675, M. 5965; *Menzies* v. *Gillespie's Creditors*, December 8, 1761, M. 5974; *Watson* v. *Robertson*, December 10, 1772, M. 5976; *Lennox* v. *Auchinloss*, May 19, 1821, 1 S. 22; *Sandilands* v. *Mercer*, May 30, 1833, 11 S. 665; *Earl of Strathmore* v. *Ewing*, 5 Scot. Jur. 5, and 6 W. and S. 56; *Farquharson* v. *Stott*, June 11, 1841, 3 D. 1006; *Macara* v. *Wilson*, February 15, 1848, 10 D. 707; *Russell* v. *Russell*, November 14, 1874, 2 R. 93. (2) Later times had introduced exceptions, and the fiction about the wife's person being entirely sunk in that of her husband had been made to yield to necessity, humanity, and expediency. But the cases in which the Court in the exercise of its equitable jurisdiction had modified the common law might be reduced to one or two heads, none of which included the present case. First, in cases of necessity for the salvation and well-being of the wife herself—*Churnside* v. *Currie*, July 11, 1789, M. 6082; *Orme* v. *Diffors*, November 30, 1833, 12 S. 149; *Ritchie* v. *Barclay*, June 5, 1845, 7 D. 819. Second, where the contract was *in rem versum* of the wife—*Nairnie* v. *Mercer*, November 17, 1785, M. 5860; *Lessels* v. *Richardson*, December, 1686, M. 6078; *Brown* v. *Grahame*, May 28, 1830, 8 S. 834; *Gray* v. *Wyllie*, June 26, 1840, 2 D. 1205; Bell's Principles, sec. 1612. Third, she would have been held liable for her obligations if she had been guilty of fraud, as by holding herself out to be a married woman. Again, the wife's separate estate might be attached for debts contracted before marriage, and for fines imposed on her for a delict—*Spence* v. *Reynolds*, 1729, Elchies' Annotations, 26 — or where the obligation was not to take effect till after her death — *Miller* v. *Angus*, February 3, 1859, 21 D. 577. The Conjugal Rights Act 1861 (24 and 25 Vict. cap. 86), sec. 6, introduced another exception, viz., that where a decree of separation had been pronounced, or an order of protection granted, then "a wife, while so separate, shall be capable of entering into obligations, and be liable for wrongs and injuries, and be capable of suing and being sued as if she were not married." (3) Nor had any change been made by Act of Parliament. It might be said that some change was introduced by section 78 of the Companies Act 1862—"If any female contributory marry either before or after she has been placed on the list of contributories her husband shall during the continuance of the marriage be liable to contribute to the assets of the company the same sum as she would have been liable to contribute if she had not married, and he shall be deemed to be a contributory accordingly." That section applied to the case, and to the case only, of a female contributory who, while unmarried, could enter into such a contract, and who married while in possession of the shares—Lindley on Partnership, ii. 1356. This favoured the petitioner's argument, because the statute recognising the common law made no provision for a woman becoming a partner in her married state. The contract of copartnery of the bank contained provisions to the same effect—see secs. 14 and 39. It was said that under 40 and 41 Vict. c. 29 (Married Women's Property Act 1877), sec. 3, a married woman's separate estate must be made liable. But that section imposed no liability upon a married woman. It gave her certain rights over her wages and earnings, but it did not increase the liabilities of the common law upon her. And further, that Act applied to wages or earnings acquired after the commencement of the Act, whereas the property with which this stock was bought was acquired in 1855, and was excluded not by the operation of this statute from the *jus mariti* of the husband, but by the operation of the deed under which the wife obtained it. (4) As regarded the English cases, it was to be remarked that there was no portion of Scotch law not strictly feudal that had less in it of the law of England than the law of matrimonial rights. The only well-defined rule in common between the laws of the two countries was that common to all nations that arose on the downfall of the Roman Empire, viz., the subjection of the wife to the husband, and the consequent inability of the wife to grant a personal obligation. But granted the authority of the English cases, their effect was no more than this—That in certain circumstances the Court held the separate estate of the wife liable if it were expressly bound —*Hume* v. *Tennant*, 1 White and Tudor, 521; *Ness* v. *Angus*, 18 L.J. (Exch.) 470; *Angus'* case, 1 De G. and S. 560; *Luard's* case, 1 De G. F. and J. 533; *Johnson* v. *Gallocher*, 30 L.J. (Chan.) 298; *Shattock* v. *Shattock*, L.R. 2 Eq. 182; *Matthewman's* case, L.R. 3 Eq. 781; *Butler* v. *Compston*, L.R. 7 Eq. 16; *Wainford* v. *Heyl*, L.R. 20 Eq. 324; *Ex parte Rhodes*, 7 Weekly Reporter 510. Then the English law with regard to separate investment was contained in the Married Women's Property Act 1870 (33 and 34 Vict. c. 93), sec. 4, which provided that a married woman could only invest her savings in certain ways—among others, in a joint-stock company with fully paid up shares, and to the holding of which no liability was attached. That was the only length to which the statute had gone. (5) The question, however, came to be this—Whether there was here a case in which the Court ought to establish a new equitable exception. It did not fall under any of the recognised exceptions. It was not a question of benefiting the married woman, for if put on the list of contributories both she and her husband would be ruined. It was distinguished by no necessity arising from the position of the husband or his wife. The husband and wife lived together; he supported her, and there was no complaint that she must rely on her own exertions for her livelihood. She had done nothing to bring her within the category of fraud. Everything had been done openly, and the bank took her as a shareholder on the footing that she was a married woman knowing the restrictions that the law put upon such persons. The Court could add another to the equitable exceptions that already existed, but this did not seem to be a case for doing this, as the obligations of a partnership were pre-eminently unsuitable for a married woman.

II. *The Husband's Case.*—In the accepting clause of the transfer the only person who accepted was Mary Biggart. The signature of Thomas Biggart was not a proper signature to the transfer. Mr Biggart was not referred to at all in the testing clause, and the deed of transfer bore nothing more than this, that Mary Biggart accepted these shares. There was no accession by Thomas Biggart to the contract of copartnery. It therefore came to this, that Mr Biggart was not a party to the transfer, but simply signed the document to show that he was not unwilling that

his wife should invest her money in this way. The signature did not import any obligation on his part to become a partner in this company. It was maintained that Mr Biggart was liable, but in what capacity it was not stated. It was not an ante-nuptial debt which the law imposed on him—it was a debt which the wife contracted during marriage; and why should the husband be responsible for that? He was responsible for everything she did as his agent. So long as a wife acted within her household her husband was responsible; but he was responsible solely on the ground that in acting as she did she was merely his agent. When she entered into transactions which could not be brought within the category of the domestic *prepositura*, the agency must be proved; it looked like a legal impossibility to give *prepositura* to a wife to manage her own estate where the *jus mariti* was excluded. The whole course of the argument for the respondents was, that if a husband saw his wife doing certain things he was liable for it. There was no authority for this. The law settled by the cases was that such a signature as the one in question implied nothing more than that the husband was willing, for any interest he had, that his wife should do as she thought fit. Then, again, Mr Biggart had never been entered on the register. The bank never put his name on the register. He was never held out to the public in the only authentic record under the Act of 1862 as being a person on whose credit the bank was entitled to rely; he never got any notice from the bank that he was a member, and in short never had anything to do with it till now, when he was put on the list of contributories.

Argued for the respondents—I. *The Wife's Case.*—If the argument of the petitioners was well founded, it was clear that married women and their husbands were in a very advantageous position; because their contention was that a married woman having separate estate might hold shares in a joint-stock company for more than twenty years, drawing all the profits that arose during that time like any other partner of the company, without having any liability whatever that could affect her own separate estate, if she had any, or her husband's. That was highly inequitable. No doubt the petitioners' view of the common law was sound, but what had to be considered was really a question of the equitable relaxation of the original rigid rule of law, by which a wife was prevented from contracting any obligations of any sort. If the principles of equity were at all applicable, there must be liability either upon the husband or the separate estate of the married woman. It was said that a married woman could not be a member of a partnership. Now it was quite true to a certain effect that Mrs Biggart had become a partner in a trading company, but the reason which would prevent her from becoming a partner in an ordinary trading copartnery did not prevent her taking shares in a joint-stock company. It might very well be that she could not enter into a joint copartnery for the purpose of carrying on a trade, because she would then be undertaking to contract a great variety of obligations of different kinds which it might be impossible for her validly to do. That did not apply here, because the shares which she bought of the joint-stock company differed from the right she had in an ordinary copartnery by being transferable at pleasure. It did not affect the constitution of the joint-stock company, even if the partner became bankrupt, or that he or she married or died. By becoming a member of the association she did not become a trading partner in any sense. She could not directly create any obligation either for herself or anybody else, and if she and the other shareholders ultimately became liable, it was not because the obligations were created by themselves; they were obligations contracted by the corporation through its properly constituted authority. The creditors of the corporation were not directly her creditors, nor was she directly their debtor, and the case of *Matthewman* was a direct authority. There was no principle for maintaining the incapacity of a married woman to buy shares in a company. Indeed, it would be very inconvenient if there were.

II. *The Husband's Case.*—It was a well settled principle that a married woman being incapable of undertaking personal liability so as to bind herself, was his agent while she lived with her husband, and was permitted to trade with his consent. Mr Biggart's signature did not make him transferee, but it evidenced in the most solemn way that he knew what his wife was doing and did not object. Further, there was no evidence to show that Mrs Biggart was contracting with her separate estate. On these grounds, therefore, Mr Biggart ought to be held liable.

At advising—

Lord Deas—In this case it appears that the two petitioners, Mr and Mrs Biggart, were married in 1831. There was no marriage contract, but after the marriage Mrs Biggart's father died, leaving a deed of settlement by which he conveyed to Mrs Biggart, her heirs and assignees, certain subjects, as to which he provided that "the *jus mariti* and right of administration of the said Thomas Biggart, the husband of the said Mary Biggart, and of any future husband she may have, are hereby expressly excluded as well from the whole subjects above disponed as from the rents and profits thereof, and that neither said lands and others nor the rents and profits of the same shall be liable for the debts or deeds of her said present or future husband, nor be subject to the attachment of the diligence of their creditors in any manner of way." With the accumulated rents of these subjects Mrs Biggart purchased certain shares of the City of Glasgow Bank in 1855, and the transfers bear to be in consideration of a price paid by her, and to be in favour of her, her "heirs, executors, and successors whomsoever." These shares, I may mention, were converted into stock. At a subsequent date, in 1864, the bank issued additional stock at £130 per cent., and Mrs Biggart by letter accepted her portion of that additional stock, equivalent to a holding of £270 of stock, for which a stock certificate had been granted in 1860, bearing that the stock was her property. The additional stock amounted to £300. The whole of these shares are entered in the register of the bank as being Mrs Biggart's. There is no mention in the transfer or in the allotment either of the exclusion of the *jus mariti* or right of administration, but there is no doubt at all that the whole of these shares having admittedly been acquired with her money, *i.e.*, with the produce of her separate estate, the exclusion

of the *jus mariti* and right of administration attaches.

Now, Mrs Biggart as well as her husband has been put upon the list of contributories, and they both apply to have their names taken off that list.

The petition of Mrs Biggart naturally comes in the circumstances to be first considered; and that Mrs Biggart must remain upon the list I have no doubt at all. I shall notice some of the authorities bearing upon this subject; the first and leading question—if it be a question—being whether the *jus mariti* and right of administration of the husband are effectually excluded. Upon that subject Lord Stair says (book 1, title 4, sec. 9):—"The right of the husband in the goods of the wife is so great that hardly can it be avoided by the paction of parties, whereby if anything be reserved to the wife during the marriage to be peculiar and proper to her, excluding the *jus mariti*, the very right of the reservation becoming the husband's, *jure mariti*, makes it elusory and ineffectual, as always running back upon the husband himself, as water thrown upon an higher ground doth ever return." It is added, however, in the foot-note (Brodie's Ed.), that the *jus mariti*, and right of administration may both be excluded by any contract, whether antenuptial or postnuptial, if the postnuptial contract be not *in fraudem* of the creditors." That this exclusion by a marriage-contract may be effectual was first decided in the case of *Walker* v. *her husband's creditors*, 23d June 1730, Mor. 5841. The exclusion there was by marriage-contract. The same thing was afterwards decided in a number of cases, including the case of *Keggie* v. *Christie*, decided on 25th May 1815, F.C., where the renunciation was in a different kind of deed, viz., a deed of separation. In that case it was held to be settled law that the right of administration as well as the *jus mariti* might be effectually excluded. Now, this law of ours, holding the wife and the wife's property to be so absolutely under the control of the husband, was, as we all know, quite different from the Roman law, by which all the wife's goods remained at her own disposal except the tocher. Bankton, 1, 5, 4, treats of the subject, from sub-section 65 to sub-section 102, both inclusive. He mentions—what there is no doubt about—that the power or right of administration in the husband results from his being the wife's curator, and he lays it down generally that she cannot subscribe deeds *inter vivos* without her husband's consent. He states however various qualifications upon this, and also in the end of sub-section 79 he says that the husband's interest in his wife's estate, apparently including the curatory, may be excluded by a contract of marriage; and in sub-section 84 he lays it down that if bonds or rights are granted to the wife with powers expressly excluding the husband's *jus mariti*, "they will not fall under it nor be subject to the husband's creditors, because one may qualify his own free gift as he pleases." Mr Erskine treats of the same subject, Book I., title 6, from section 12 to section 29, both inclusive. He lays it down generally that all beneficial rights and subjects belonging to the wife, not being of a permanent nature, such as heritable subjects and so on, of which the husband has only the rents or annual income, are carried to the husband *jure mariti*, and subject to his right of administration, arising from his being his wife's curator, so that all deeds done or granted by the wife without his consent are in themselves null, though they should relate to her property. That is in section 22, and he says explicitly in section 25 that all obligations by the wife arising from contract without the husband's consent are *ipso jure* void. But immediately afterwards he states a most important exception—"But where the wife gets a separate *peculium*, or stock, either from her father or a stranger, for the maintenance of herself and children, which is by the grant exempted from the *jus mariti*, she can lawfully charge or burden that stock and bind herself for sums of money in so far as it extends;" and for that he refers to the case of *Neilson*, 23d February 1672, Mor. 5984. In that case the wife sought to suspend a bond granted by her on the ground, first, "that she was clad with a husband at the time of the granting thereof. It was answered that she had a *peculium* and estate settled upon her by her father in these terms, that her husband should have no interest therein." The report bears that the Lords found the letters orderly proceeded, that is to say, they refused to suspend the charge. There is a report of this case by Lord Stair, on the same page, which brings out more clearly that the objection was that the bond was null, and that the answer was that it had been granted by her for her own behoof, viz., for the price of furniture for the use of herself and her children, and that she had *proprium patrimonium* constituted by her father, "wherefrom her husband was excluded," which answer, the report bears, "the Lords found relevant." The expressions used in the father's deed in *Neilson's* case were obviously broad enough to exclude the husband's administration as curator as well as his *jus mariti*. And that Mr Erskine recognised the competency of excluding the right of administration as well as the *jus mariti* properly so called, appears evident from the way he states what may be called the counterpart of the nullity in the commencement of section 27—"All obligations granted by a wife, either charging or even alienating any estate or subject of which she retains the property exclusive of the *jus mariti*, whether proper heritage or bonds bearing interest, are effectual, provided the husband, as curator, consent to them."

But it would be superfluous to discuss at any length the views either of Bankton or of Erskine on this subject, because the law was settled, and has been ruled ever since, by a case of which neither of them could have had any knowledge when their respective works were published, because it had not then been decided, and my acquaintance with that case dates back to the session 1820-21—now more than 58 years ago—when I had the benefit of attending the lectures of one of the most learned lawyers of his day, who had by that time been, I think, some 40 years or thereby a teacher of the law of Scotland, and who had been employed all that time collecting materials for his prelections. I mean of course the late Baron Hume, who, as I find recorded in my notes, stated the law that we are now dealing with in one short sentence thus—"A wife continues capable after marriage of holding a real estate, and a legator may make her a bequest in such a manner as to exclude the husband's *jus mariti* and his curatorial power" from which last, of course, arises his right of adminis-

tration. For this doctrine he cited the case of *Annand and Colquhoun* v. *Chessels*, 4th March 1774, F.C. and M. 5844, but the fullest report of which, at least as regards the terms of the deed, and the terms of the judgment of this Court, is to be found in 2 Paton's Apps. 369, under date 24th March 1775, being in Lord Mansfield's time, when the judgment was affirmed. In that case, Chessels by his deed of settlement left his whole estates real and personal to his daughter the wife of James Scott, merchant in Edinburgh, in trust for herself in liferent and her children in fee, declaring that "in the event of the said James Scott his insolvency, I hereby seclude and debar him the said James Scott his *jus mariti* and him from the administration and management of my said estate, heritable and moveable hereby disponed, and the rents, annual-rents, and other produce and profits of the same . . . and I hereby declare the same shall be neither liable nor subjected to the payment of his debts, implement of his deed nor affectable by the diligence of his creditors." Scott became bankrupt, and the question commenced by his creditors poinding a parcel of timber in the possession of Scott, valued at £248, which Mrs Scott alleged had belonged to her father, and then belonged to her under her father's deed. Mrs Scott presented a suspension, and arrestments having been afterwards used, a multiplepoinding was raised in which the effect of the exclusion of the husband's rights came eventually to be tried. It will be observed that the exclusion was contingent on his becoming insolvent. That was one great question, but the main question was the effect of the exclusion itself. This Court found that the heritable subjects, and also the executry funds, including the timber and the rents and the annual rents, were not affectable by James Scott or his creditors; that the rents of the heritable subjects and interest of the executry funds down to the date of the insolvency fell under Scott's right of administration, but that that right ceased upon his bankruptcy, so far as they accrued subsequently thereto, and they remitted to the Lord Ordinary to proceed accordingly. Very eminent and well-known counsel—well-known to us even now—were engaged for the parties respectively, both in this Court and in the House of Lords, and Mr Paton's report bears—"It was ordered and adjudged that the interlocutor be affirmed."

Now, Bankton's work had been published—the first volume in which he treats of the subject, in 1751, the other volumes in 1752-3, more than twenty years before the above case was decided; Erskine's Principles were published in 1754, also twenty years previously, his larger work was published in 1773, likewise before the decision in this Court and sometime after his death. So that, as I have indicated already, neither of these writers could know that such a judgment would be forthcoming to affect the law and to supersede the whole of the older cases which on this occasion have been brought up, as it were, from their grave, to entertain—I fear I can hardy say to enlighten—your Lordships. For my own part, ever since I wrote the manuscript volume which contains the above sentence, and on which there might be inscribed with little inaccuracy the well-known title of "It is sixty years since," I have never doubted that the law I was then taught was the settled law of Scotland, and I never till now heard it doubted by anyone else.

That being the law, the only question that remains is, What does it imply? Clearly it implies that Mrs Biggart may deal with her own separate estate just as if she were a single woman. It did not occur to me for consideration whether there could be any peculiarity in respect that what she purchased with her own separate estate consisted of shares in a banking company. I have not been able to discover the slightest ground for holding that she could not purchase and hold shares in a banking company, just as she could purchase and hold any other kind of property. This kind of property might yield large profit, or it might be attended with some loss. That can equally well be said of many other kinds of property, even of heritable estate, of which fact we had illustrations not long ago in the Aberdeen cases, where the burdens upon the heritable estate far exceeded the produce or value of the property. But that those shares are the exclusive property of Mrs Biggart, and that she stands properly and legally upon the register as the proprietor really of those shares, after full consideration I have no doubt whatever. I do not think it necessary to refer to the law of England upon this subject. I do not think it is so safe to refer to the law of England as to refer to our own law, where our own law is so clear and explicit.

Upon these two grounds, therefore, I am of opinion that Mrs Biggart stands rightly upon the register and upon the list of contributories.

It seems almost to follow as a matter of course, she being the exclusive proprietor, that her husband cannot be the proprietor, and cannot have anything to do with these shares, from which his right of administration and *jus mariti* are excluded.

It is not in the least necessary that the exclusion should appear upon the face of the particular writing or writings which vest the property in Mrs Biggart. What is necessary is that we should be able clearly to trace that the purchase of that property was with her own separate estate, and that has not only been proved here, but has been admitted. I observe that the husband put his name on two writings relative to some of these shares—his name, and his name only. That certainly did not make him a proprietor. I do not think it gave him a right to interfere with them at all, and it would be a very strong thing to say that that made him liable for the consequences of his wife's acquiring the property. There is no explanation in these writings of why he signed them, and I do not think it would have made any difference—I mean it would have inferred no liability in him—if he had signed as consenting, he being the husband. His consent was not necessary, but his consent, if it had been given in that express form, certainly could neither have changed the nature of her property nor inferred any liability whatever against her husband who had given his consent.

I am therefore humbly of opinion that Mrs Biggart must remain upon the list of contributories, and that her husband's name must be struck off the list.

Lord Mure—I concur; and in a case of this description, where there is not only separate estate in the wife, but an express exclusion both of the *jus mariti* of the husband and also of all right of administration on his part as regards that estate, I have not felt much difficulty in coming to that conclusion.

There is no doubt in this case that the *jus mariti* was effectually excluded. It is done in express terms in the disposition by which the property was settled by her father on Mrs Biggart, and on that point I shall not occupy your Lordships' time by adding anything to what has fallen from Lord Deas. The main ground, as I understood the argument, on which it was contended that Mrs Biggart's name should be removed from the list of contributories is that a married woman cannot undertake or incur any personal obligation, and cannot therefore engage in trade or become a partner or shareholder in any company which necessarily involves the undertaking of such obligations.

Now, that may be quite true as regards cases where the wife has no separate estate. But I am not aware of any case, and we were not referred to any direct authority, to show that the rule had ever been applied in a case where, as here, the wife had a separate estate from which all right of administration of the husband had been excluded. Even where that has not been expressly done, there are decisions to the effect that a wife living separate from her husband may engage in trade, and when so doing may incur obligations as a trader. This was distinctly so laid down in the case of *Churnside*, 1789, M. 6082, and in the later case of *Orme* v. *Diffors*, Nov. 30, 1833, 12 S. 149, where the decision in the case of *Churnside* was under the notice of the Court for the purpose of considering whether it should be adhered to, and where the First Division, after duly taking into account certain doubts that were raised by the late Lord Moncreiff, came to the unanimous conclusion that that was the law of Scotland and must be adhered to. And accordingly Mr Bell in his Principles, sec. 1612, in laying down what he calls exceptions from the general rule as to married women not being able to incur personal obligation, refers to these cases as settling the law. He says generally with reference to these exceptions, as to cases where diligence had been authorised to proceed against the woman—"This has been allowed more especially when she is living separate from her husband. And, above all, such remedies have been given when the wife living separate is engaged in trade for herself. She may grant mandates and other deeds relative to her separate property, but not to the effect of binding her person. Even personal obligations to sell or dispone her heritable estate or to infeft a creditor may be considered as imperfect dispositions competent to sustain an adjudication in implement though not to authorise a demand or diligence against the person, and her procuratories or precepts are effectual to validate infeftments."

Upon that last point, which is of material importance in the question, Mr Bell refers to the case of *Watson*, 1802, Hume 208.

Now, that being the undoubted law as regards a wife living separate from her husband, the only question here to be decided is, Whether, where she is not living separate from her husband, but has a separate estate which must be administered to all intents and purposes by herself personally, she cannot incur personal obligations with reference to it. In this particular instance she has become a shareholder in a banking company, and for a series of years by means of this personal estate, which she herself administered, she has drawn the profits applicable to her shares in that banking company without question. She has placed herself in a position of realising very considerable profits from the concern, and I can see no ground either in law or in equity—certainly none in equity—why in such circumstances she should not be put in the position of being obliged out of her separate estate to meet the demands made upon her with reference to the losses of the bank. I think there is no direct authority in the law of Scotland on the subject. In equity it is very clear that she ought to be so liable, and on the broad ground that this estate belonged to herself, that her husband's *jus mariti* was excluded, and that he had no right of administration, and following the principle laid down in *Churnside* and *Orme*, the name of Mrs Biggart ought to remain on the list of contributories.

As regards Mr Biggart's name, I concur with Lord Deas in thinking that in the circumstances it ought to be removed.

Lord Shand—We have to deal here with two applications, one at the instance of Thomas Biggart, the husband, and the other at the instance of Mrs Biggart, his wife. In regard to the husband, it is to be observed that his name was not upon the register of the bank at the time when the bank stopped, or at the date when it was resolved voluntarily to wind up. The stock ledger is the register of the bank, and Mrs Biggart's name alone stood there. The question then as between the liquidators and Mr Biggart is whether they were entitled, although his name was not upon the register of the bank, to put him on the list of contributories. The proceeding has been justified by the liquidators in the argument which was addressed to us on the ground that Mrs Biggart must be held to have acted for her husband as well as for herself in taking the stock and in drawing the dividend, and that in so far as she acted for her husband she was her husband's agent, and therefore bound him as a partner of the bank. I think that argument entirely fails. I think there is no ground whatever upon which it can in reason be maintained that Mrs Biggart acted as her husband's agent and bound him.

In the first place, it is admitted that the funds which were invested were her exclusive property; in the next place, it is admitted that the stock was put in her own name at her own request, and with reference to property of which she had the sole management; and, in the third place, the whole dividends were drawn by her in her own name. In such circumstances, I can very well understand that the husband might have become his wife's agent in drawing the dividends or acting otherwise on her behalf, but how she, dealing with her own property, of which she had not only the exclusive right, but also the exclusive administration, could be the agent of her husband, who had no right either of property or administration in it, I am quite at a loss to conceive. It is a fact no doubt that the husband signed his name to the two transfers; but that proves no more than that he was aware of his wife's investments. The mere knowledge of his wife's investment of her funds, which she was entitled to invest in a way contrary to his wishes if she thought fit, can have no effect whatever in making him a partner to the contract. I therefore think that so far as Mr Biggart is concerned the petition must be granted.

As regards the petitioner Mrs Biggart, it is to be observed, however, that the stock in question stands in her name in the register or stock ledger of the bank, and has always done so in consequence of her acceptance of transfers and of her applications for allocations of additional stock, and that for a number of years she has taken all the advantages of an ordinary partner in obtaining her share of the profits in the form of dividends. The liquidators have therefore only given the usual effect to the entries in the company's register of shareholders in placing her name on the list of contributories, and the question now is, whether she is entitled to have her name removed, or whether it must remain on the list to the effect which is maintained of subjecting her separate estate to liability?

If this question were now to be determined, apart from previous authority as to the effect of personal obligations by married women, I have no hesitation in saying that, in my opinion, reason and expediency combine to support the view that although a married woman be protected during her marriage from diligence against her person for the enforcement of ordinary contracts entered into by her, yet if she enter into trade with her separate estate that estate should be liable for the losses she may sustain. Assuming that she alone has the exclusive right in her property, and the entire control and administration of it, it appears to me to be obviously inequitable, alike in a question with creditors and with fellow-partners, that she should be entitled to earn and draw her share of the profits, it may be for a number of years, and that even her separate estate should be free from liability to contribute to the losses. It is a benefit that in the administration of her property she should be allowed to employ it in trade, but if this benefit be allowed it is only just and reasonable that her separate estate should be liable for obligations thus incurred. It is maintained, however, that according to the law of this country the personal contracts or obligations of a married woman are null, and that consequently the obligation to contribute arising from the petitioner having become a member of a joint-stock company cannot be enforced even against her separate estate. The law thus pleaded in the argument is too broadly stated. I do not think there is any established rule that the personal obligations of a married woman possessed of separate estate are null and ineffectual even to the effect of binding that estate. I am not prepared to concede that a married woman may not even by a cautionary obligation affect her separate estate where it appears she contracted such an obligation with special reference to her own estate. I think there is no authority to that effect as yet in our law, and I see reasons of great force against any rule or principle which would restrict married women possessed of separate property from entering into contracts and obligations with reference to such property, and thus obtaining the full benefit of it. There are, however, many cases in which the obligations and acts of a married woman have been held to be effectual against her separate estate. It is unnecessary to enumerate or classify these cases. They were cited and fully discussed in the argument, and are collected and commented on in Fraser on Husband and Wife, vol. i. p. 535, and subsequent pages. There is no decision or authority directly applicable to the particular question to be decided, and it was fairly conceded in the argument for the petitioner by the learned Dean of Faculty, who has so intimate and complete an acquaintance with this branch of law, that as considerations of equity, of convenience, humanity, and reason had already in many instances led to a relaxation of the older rules of the Scotch law, which, to the great hardship of married women, deprived them in many circumstances of the power of granting obligations even to secure great present benefits, so the same considerations might warrant the Court in holding, now that the question has arisen, that a married woman may render her separate estate liable to contribute for payment of the debts of a joint-stock company, and may thus obtain the benefit of membership in such companies. I am not satisfied in holding, as I do in this case, that the obligation of the petitioner Mrs Biggart as a member of the company is effectual against her separate estate, that this really involves any further relaxation of older rules of law than has already taken place; but even if it were so, my judgment would still be against the petitioner on the considerations of reason and expediency which I have already stated. These considerations must have all the greater force from the fact that recent statutory provisions for the benefit of married women, and particularly the Married Women's Property (Scotland) Act 1877, recognise the right of a married woman to engage in trade or business in her own name, and to earn profits from such business, which shall be her exclusive property, and I am confirmed in the view I have now expressed by the fact that in England it has been held, after full consideration of the same arguments which have been addressed to us in this case, that married women may become partners of joint-stock companies, and that on grounds of expediency and justice, and indeed in order to give to married women the benefit of becoming shareholders of such companies, which otherwise they could not do.

It appears to me, however, that the case falls within a class in which the obligations of a married woman have been held effectual to the extent here contended for, of being good against her separate estate, viz., where the contract has been *in rem versum* of the wife. The petitioner on becoming a member of this company contracted to obtain for herself and in respect of her separate estate all the advantages of a partner of the company. She has taken the benefit of the contract, and has secured for her own behoof for many years the advantages for which she stipulated, and it would be obviously unjust and inequitable that her separate estate should be free from liability to contribute for the losses which she and the other members of the company have incurred to creditors, or that her partners should have to bear her share of the loss, which could be met from her own property. I am therefore of opinion that the application of Mrs Biggart to have her name removed from the list of contributories ought to be refused.

Lord President—I am of the same opinion with all your Lordships, and I think as soon as one completely realises the position and powers of a married woman possessing a separate estate, with an exclusion of the *jus mariti* and right of

administration, all the apparent difficulty of the case disappears. She is not only entitled to the exclusive beneficial enjoyment of her separate estate, but she has the uncontrolled management and administration of it. She not only does not require the consent of her husband to any act of administration, but her husband's consent even if given is utterly valueless. Nay, she may act in direct opposition to his advice and wishes.

Now, observe what is involved in the administration of an estate. There is not only the collection of the income and the disposal of it, but there are a great many incidental acts connected with the administration of estates, and particularly of heritable estates, which carry along with them the necessity of contracting obligations and incurring risks, and all that is necessarily involved in the position of a married woman situated as Mrs Biggart is. She is also entrusted necessarily with the investment and reinvestment of funds, and it is impossible to doubt that in transactions of that kind risks must be incurred of a greater or less kind. In short, it appears to me that my brother Lord Deas has perfectly well described the position of a married woman in reference to her separate estate when he says her position is just the same as that of an unmarried woman. But not universally. She is protected as a married woman except in so far as concerns her separate estate. Personal obligations contracted altogether unconnected with her separate estate will not bind her. Cautionary obligations, for example, in which she becomes surety for some person or other that he shall either pay a sum of money or faithfully perform the duties of an office would not be obligatory upon her merely because she had a separate estate. But whatever obligations she incurs in the enjoyment and administration of that separate estate itself are, in my opinion, binding upon her just as if she were an unmarried woman.

It has been contended that her powers must be limited to the extent that she cannot embark in contracts of risk of such a nature that not only the funds which she invests in these contracts may be lost, but also her whole separate estate. I can only say with my brother Lord Mure that I know of no authority for such a proposition, and I think it is founded neither in law nor reason.

It is said that this is a contract of great risk into which this lady entered. It is so undoubtedly, as the result has proved; but why she may not embark her funds in the purchase of shares in a joint-stock company as much as in any other kind of investment I am quite unable to see. Unless it can be held that the contract of partnership into which she entered is on the part of a married woman situated like her an absolute nullity, I do not see very well how it is possible to resist the conclusion that the contract is absolutely binding upon her. It would be a very strong thing indeed to say that in investing a portion of her separate estate in this particular form she has done a thing which cannot bind her merely because the risk involved is considerable. And yet, unless the act which she then did is absolutely null, how can she escape the consequences of it? She has become a partner of this bank unless the act is a nullity, and in becoming a partner of this bank she must bind somebody to meet the liabilities of the bank *pro rata*. She certainly did not bind her husband by what she has done, because it may be done, as I said before, not only without his consent or knowledge, but against his express desire; and therefore I am very clear that she could not bind her husband in doing it. But if she could not bind her husband, does it not of necessity follow that she must have bound herself? and if so, there is an end of the question. I think there is a great deal of force in what has been suggested by my brother Lord Mure, that there is substantially no distinction between the case we are dealing with and the case of a married woman engaging in trade who is living separate from her husband. Why is it that a woman living separate from her husband may engage in trade, and may bind herself in regard to trade obligations? It is not merely out of consideration for her destitute condition, as was argued on the part of the petitioner. That is one consideration no doubt,—that she must turn her attention to earn her living somehow;—but it also proceeds upon this, that the husband being from his absence incapable of exercising his curatorial power, and the wife being entirely deprived of his advice and assistance, must act for herself as an independent person. She must for the time, and while the separation lasts, be considered to be *sui juris*. Any distinction in principle between that and a woman who having a separate estate in the management and disposal of which her husband cannot possibly interfere, I think there is not; and what she does in reference to that separate estate must be dealt with just upon the very same principle as what she does in the way of engaging in trade when living separate from her husband.

I should not have thought it necessary to add anything to the very able judgments which your Lordships have given had the case not been treated, and very justly treated, as one of great practical importance, but I am bound to say that after the fullest consideration I do not entertain the slightest hesitation in concurring with the judgment proposed.

The Court accordingly directed the name of Mr Biggart to be removed from the list of contributories, and refused the petition for Mrs Biggart and husband.

Counsel for Petitioner — Dean of Faculty (Fraser)—Jameson. Agents—Ellis & Blyth, W.S.

Counsel for Respondents—Kinnear—Balfour—Asher—Lorimer. Agents—Davidson & Syme, W.S.

Saturday, January 18.

FIRST DIVISION.

CITY OF GLASGOW BANK LIQUIDATION —(*ROBERT COCHRAN'S CASE*) ROBERT COCHRAN *v.* THE LIQUIDATORS.

Public Company—Winding-up—List of Contributories—Circumstances not inferring Liability of a Party Assumed as Trustee.

By an informal deed of assumption C was assumed as additional trustee by S, the sole