allegations that the pursuer had been obliged to leave her husband in consequence of his great cruelty to her. It was raised on the 5th September, and decree was pronounced against the defender by the Sheriff-Substitute (HALLARD) "in respect of no defences," on the 6th December. Defences were lodged the same day.

The Sheriff (DAVIDSON) on appeal adhered, adding the following note:—

"*Note.*—The defender entered appearance to defend the action on the 14th of September. If for any good reason a prorogation of the statutory time for lodging defences was desired, application for such a prorogation should have been made to the Court within the time allowed for lodging defences. The Sheriff is not prepared at present to hold, and it is not necessary to determine the point here, that although it is not competent '*of consent of parties*' to prorogate the statutory enactment as to lodging defences, it is incompetent for the Sheriff on sufficient cause shown to grant a prorogation. It may not, however, be so held. In this instance no application was made. Nothing seems to have been done in the case between the 14th September and the 6th December, when the interlocutor appealed against was pronounced. That was an *ex parte* proceeding apparently. The interlocutor seems in the circumstances to have been inevitable; and supposing the Sheriff to have the power to recall it, he has heard no good reason for doing so."

The defender appealed to the Court of Session. It was admitted that the delay had been caused by a proposal to compromise the case, which had been rejected by the defender after being approved by his agent. He had, however, in the meantime offered to take back his wife. The Sheriff ought therefore to have reponed in the circumstances. He had power to do so. The late Sheriff Court Act did not apply, and the procedure was regulated by the Act of 1853.

Argued for respondent—It was admitted that the Sheriff had power to repone in a case of decree in default of defences, and also that the Act of 1853 governed the procedure in regard to that. It was also admitted that the Sheriff had power to prorogate, and the Act of 1876, sec. 19, did not deprive him of that power—(*Observed per cur.* That is undoubted). But in this case this did not arise, for no prorogation was asked. The policy and reason of the Act of 1876 was to put a stop to the dilatoriness and remissness of agents, and the consequent delay in Sheriff Court procedure—Lord President in *M'Gibbon* v. *Thomson*, July 14, 1877, 4 R. 1085. In that case it was held that the Court had no doubt power to repone, but it was also held that the Sheriff was more likely to be conversant with the facts of the case than the Court, and that the Court would not lightly interfere with the Sheriff's decision. It was submitted that the present was a case exactly falling under the rule laid down in the case of *M'Gibbon*, and the Sheriff having found that there were no grounds for reponing, the appeal should be dismissed.

Authorities—Sheriff Court Act 1876 (39 and 40 Vict. c. 70); Sheriff Court Act 1853 (16 and 17 Vict. c. 80); *Robb* v. *Eglin*, May 18, 1867, 14 Scot. Law Rep. 473; *Vickers & Son* v. *Nibloe*, May 19, 1877, 4 R. 729; *Robertson* v. *Barclay*. November 27, 1877, 5 R. 257; *M'Gibbon* v. *Thomson*, *supra*.

At advising—

LORD JUSTICE-CLERK—The object of the Sheriff Court Act of 1876 was to prevent cases hanging on from week to week, and even from year to year, in consequence of the indolence or inattention of those conducting them. But it appears to me that when the parties were *bona fide* engaged in endeavouring to bring about a settlement with a view to stop litigation, it would be too stringent a construction of the Act that one of the parties should have decree given against him by default and be foreclosed from any remedy merely because he was late in lodging his defences. And in point of fact I cannot say that, looking to the facts of the case, the appellant here was not right in refusing to incur the expense of lodging defences till it should be seen what was the result of the negotiations. But there is further this question—When the compromise was broken off, was it right in the circumstances of this case to preclude the husband from all relief by giving decree against him when he had in the meantime offered to take back his wife, the pursuer? I cannot hold this, and therefore I think we should remit the case back to the Sheriff to repone the defender upon payment of such sum of expenses as we may decide on.

LORD ORMIDALE—I concur. I do not want it to be understood, so far as I am concerned, that the Sheriff-Substitute having pronounced a decree in default of defences being lodged, which he was quite entitled to do, could recal it the next day and repone the party in default. But I think the Sheriff on appeal is entitled to do this if he should think fit. I think the action of the Sheriff-Substitute in this and similar cases is a proper check upon the dilatoriness of parties, and the necessity of going to the Sheriff and paying a sum of expenses before they can get redress is another very wholesome check upon people who will not lodge defences in time, or who apply for a prorogation of the time for lodging them.

LORD GIFFORD—I am of the same opinion. I think this is a fair case for reponing the defender. I am to some extent moved by the fact that this is a consistorial action, and that the husband has made an offer to take the wife back.

Appeal sustained, and remit made to the Sheriff to repone the appellant upon payment of £3, 3s. of expenses.

Counsel for Pursuer (Respondent)—D. Robertson. Agent—Alexander Clark, S.S.C.

Counsel for Defender (Appellant)—Kennedy. Agent—John Macpherson, W.S.

Friday, January 24.

FIRST DIVISION.

CITY OF GLASGOW BANK LIQUIDATION —(*KER'S CASE*) ALAN KER (FYFE'S TRUSTEE) *v.* THE LIQUIDATORS.

Public Company—Winding-up—Circumstances from which Authority to Register inferred.

The name of a trustee under a marriage-contract was by the instructions of the agent to the trust entered along with the names of

his co-trustees in the register of members of a joint-stock company. The trustee himself never by any formal writing accepted office, nor did he directly authorise his name to be placed upon the list of shareholders. He, however, shortly after the marriage signed as trustee a warrant authorising payment of the dividend, and he accepted in the same capacity the transfer of some railway stock belonging to the trust. On more than one occasion he expressed a wish to resign, but without actually resigning. On the dissolution of the marriage he sent a formal declaration of office, which was accepted and acted upon by the other trustees.

Held that in the circumstances as proved he had by his actings accepted the office of trustee, and must be held to have known that he was entered in the books of the bank as a shareholder in his individual capacity.

Public Company—Trustee—Presumption arising from the Actings of the Agent to the Trust.

Observed (*per* Lord President) when a man's name is found upon the register of shareholders of a joint-stock company, and he held a title which would enable him to be entered in that character on the register, and the entry had been made by some person who was acting on behalf of the trust in which he was concerned, there was a *prima facie* presumption in favour of the register.

The petitioner was one of the antenuptial marriage-contract trustees of Mr William Holborn Fyfe, ship chandler in Greenock, and his wife, under a contract dated 2d October 1855. The shares in question, thirty in number, of a stock value of £270, formed part of Mrs Fyfe's estate before her marriage, and were made over to the trustees by the marriage-contract. The transfer to trustees was effected by the agent to the trust sending to the bank a declaration under the Companies Consolidation (Scotland) Act 1845; and in consequence the petitioner Mr Ker's name was entered in the register of members of the company as a holder of the stock along with his co-trustees. He denied that this entry had been made with his authority.

At a proof Mr Ker stated—"I never by any formal writing accepted the office of trustee under their marriage-contract. I never attended a meeting of their trustees. [Shown dividend warrant, dated 7th August 1856]—My signature is adhibited to this document. I don't recollect signing it. Most likely it would be brought to the bank for payment, and I would probably be asked to put my name to it. I was still agent for the bank. I was in the habit of paying dividends to the shareholders at the bank." Mr Ker was at that time agent for the City of Glasgow Bank in Greenock. The dividend warrant referred to was in these terms:—

"*Glasgow, 7th August* 1856.

"Pay to Mrs W. H. Fyfe or bearer nine pounds two shillings sterling, being dividend declared 2d July 1856 on 30 shares of the City of Glasgow Bank standing in name of trustees for Mr and Mrs William H. Fyfe, Greenock, under marriage-contract.

WILLIAM NEILSON, *Trustee.*
JAMES HALL, *Trustee.*
JAMES WELSH, *Trustee.*
ALAN KER, *Trustee.*"

In addition, Mr Ker accepted on 21st March 1856 the transfer of some railway stock belonging like the bank stock to Mrs Fyfe, and transferred by her to the marriage-contract trustees. By this transfer he became bound to hold the railway stock upon the same conditions in all respects as the transferor Mrs Fyfe had done. Shortly after the marriage Mr Ker went to reside in Liverpool, and ceased to take any active part in the management of the trust. On two separate occasions he expressed a wish to resign the office of trustee, but that wish was never carried into effect. Mr Fyfe died on the 17th February 1868. On the 20th of that month the petitioner wrote to Mr M'Clure, the agent to the trust, as follows:—

"Dear Sir—I am very sorry to hear from Mr W. H. Fyfe's son of the death of his father.

"He says you wish to have a meeting of the trustees under the marriage settlement to-morrow. I regret, however, that I cannot go north at present.—Yours truly, ALAN KER."

And on the 4th April of the same year he sent this declinature of the office of trustee—

"Gentn.—I, Alan Ker, sometime merchant in Greenock, now sugar refiner in Liverpool, hereby decline the office of trustee conferred on me by the antenuptial contract of marriage entered into between the late William Holborn Fyfe, ship-chandler in Greenock, and Mrs Marjory Walker or Bogle, then residing at Barrhead, dated 2d October 1855.—Your obedt. servt., ALAN KER.

"Messrs M'Clure & Macdonald,
"Writers, Greenock."

This declinature was acted upon in subsequent trust transactions. A mandate addressed to the manager of the bank, dated 31st August 1870, authorising the bank to pay the dividends to Mrs Fyfe was granted by James Welsh, James Hall, and William Neilson, "the accepting trustees acting under the antenuptial contract of marriage," &c.

Argued for the petitioner—The petitioner was no longer a trustee; even if he ever was one, he had declined office, and the declinature had been accepted by the other trustees. Whether he was still a shareholder depended upon whether he had held himself out as a trustee. Now he had never authorised registration, and his single trust act was signing a dividend warrant. But (1) the receipt of dividend by a person in a fiduciary capacity did not *per se* infer partnership. *Armstrong*, 1 De Gex and Sm. 565; *Ness* v. *Armstrong*, 4 Exchcq. Rep. 21, 18 L.J. Ex. 473; *Southwaite*, 3 MacN. and Gord. 187, 20 L.J. Chanc. 188. (2) One act of an unimportant nature did not make a man a trustee if followed by competent declinature—*Blair* v. *Paterson*, Jan. 28, 1836, 14 S. 361; *Bannerman* v. *Bannerman*, Dec. 1, 1842, 5 D. 229; *Watson* v. *Crawcour*, Feb. 17, 1844, 6 D. 687. The mandate of August 31, 1870, made the bank aware that the petitioner was not at that date a trustee.

Argued for the liquidators—Mr Ker acted as a trustee, and had never competently resigned. The mandate of 31st August proved nothing. It was not its object to make the bank aware of Mr Ker's resignation, and it was a good mandate without his signature. His name could never have been removed from the register on such an authority.

The transfer of railway stock to their trustees, including Mr Ker, was not founded upon at the argument, but was subsequently produced at the suggestion of the Court.

At advising—

LORD PRESIDENT—The petitioner Alan Ker and three others were registered as joint-owners of £300 stock in the City of Glasgow Bank, in the stock ledger of that company, on the 6th of March 1856, and the four joint-owners are described there as being trustees nominated and appointed under the antenuptial marriage-contract of the late William Holborn Fyfe, ship chandler in Greenock, and his wife Mrs Marjory Walker or Bogle, dated 2d October 1855. The lady, Mrs Fyfe, was a widow at the time of her marriage, and had some property of her own, and by this contract the husband on the one side comes under an obligation to provide a certain sum of money and place it in the hands of the marriage-contract trustees; and on the other hand, the lady conveys to those trustees directly all her estate in general terms, but particularly and without prejudice to the said generality, the estate which she then actually possessed, which consisted of thirty shares of the City of Glasgow Bank, four shares of the stock of the Clydesdale Banking Company, twenty shares of the original stock of the Glasgow, Dumfries, and Carlisle Railway Company, now stock of the Glasgow and South-Western Company, a small building in Hamilton, sundry articles of household furniture, and a certain policy of insurance. The bulk of the lady's fortune seems to have been invested in the shares of the two banks and one railway company. Now, the trustees under this disposition were regularly entered as partners in the stock ledger of the company in the terms I have already mentioned, and the only question which is raised here is whether Mr Ker is to be taken as having been duly put on the register with his authority and sanction—whether the evidence of that authority and sanction is to be found in a previous mandate given by him to the agent in the trust, or is to be gathered from his subsequent conduct? It is not said that there was any direct mandate given by him, or at least there is no proof of any direct mandate, either written or verbal, and Mr Ker now suggests, without very distinctly saying so, that he did not in any way accept of the trust or act as trustee, and he says still further, that even if he is held as having acted as trustee he gave no authority whatever, and was not aware that he was registered as a partner of the bank along with his co-trustees.

Now, this is entirely a question of fact, and depends upon the evidence of this particular case, and I think involves no principle of law, unless it be when a man's name is found upon the register of shareholders of a joint-stock company, and he held a title which would enable him to be entered in that character on the register, and the entry has been made by some person who was acting on behalf of the trust in which he was concerned there is a *prima facie* presumption in favour of the register. I do not say that that creates any great *onus* upon the one side more than on the other, but certainly it is something to start with in a question of this kind, and it remains to be considered whether Mr Ker has got the better of that presumption, whatever the weight of it may be, by the evidence in this case.

He says himself, when examined as a witness, —"I never by any formal writing accepted the office of trustee under the marriage contract, and I never attended a meeting of the trustees;" but he does not say, so far as I can see, very distinctly that he never acted as a trustee in any way, and indeed he could hardly very well say that, because there is one, if not two, occasions on which he did act as a trustee. With regard to the shares he says—"I did not know that I was registered as the owner along with my co-trustees of these shares, but I knew that the thirty shares were registered in the names of Mr and Mrs Fyfe's trustees. I signed the warrant"—which I shall speak to immediately—"as one of Mr and Mrs Fyfe's trustees." Now, it is quite obvious therefore that he knew he was a trustee, and he knew that the shares in this bank were registered in the name of the trustees, and therefore that they must have been transferred to them. He says he did not know that they were registered in his name as an individual, or, in other words, that the names and designations of the trustees were there as partners of the bank, and not merely a general entry of the trustees under such and such a deed.

The way in which the registration was brought about was that Mr M'Clure, the agent of the trust, put himself in communication with the bank for the purpose of having the shares transferred from Mrs Fyfe to the trustees. He did not go about it in a very regular way certainly, for he prepared a declaration under the Companies Act of 1845, which was quite plainly inapplicable to the case he was dealing with. But that really does not matter much, because he accomplished the registration at all events by intimating to the bank that the shares were transferred by the contract of marriage to those trustees, and they were registered accordingly. It is of some importance, however, to note the date of that declaration which Mr M'Clure got prepared; it is 5th March 1856, immediately after the celebration of the marriage apparently. Now, what Mr M'Clure says in his evidence is this:—"(Q) Does what you have said in your evidence with regard to the authority you obtained from Mr Hall for the preparation of the declaration also apply to Mr James Welsh?—(A) I am not so sure of that. I was seeing him very often. I have no recollection on that matter, however, beyond what is in the documents. (Q) Have you any recollection of getting any authority from him to prepare the declaration?—(A) I think it was very likely that he was consulted, but I cannot say that he was. I know that Mr Welsh and Mr Ker subscribed a document with reference to other things about the same time, and I think it is very likely that they were consulted on the subject." Now, I am not going to hold that this is direct evidence against Mr Kerr that he was consulted upon the subject of this declaration, but it is important to observe that Mr M'Clure says that he and Mr Welsh about the same time subscribed another trust document, and on referring to Mr M'Clure's account we have a distinct clue to what that document was, for we have entries under date 15th March of charges for a transfer of railway stock, and under date 21st March there is an entry of "trouble in getting the signature of

Messrs A. Ker and J. Welsh, and giving explanation." We have now got the transfer to which these entries apply, and it is a transfer by the lady who was married and who conveyed these shares—Mrs Marjory Walker or Bogle, now Fyfe—a transfer by her to the four trustees named in her marriage-contract of the shares which she held in the Glasgow and South-Western Railway Company, and the trustees, including Mr Ker, do expressly accept of the transfer of these shares of the Glasgow and South-Western Railway Company, and they are to hold them upon the same conditions in all respects as she had held them before. Now this appears to me to be a very important piece of evidence in the case, because it shows, in the first place, that Mr Ker was acting as a trustee, and acting as a trustee almost immediately after the trust was created, because this is subscribed upon the 21st of March, which corresponds with the entry in M'Clure's account—subscribed, I mean, by the trustees accepting the transfer—and it shows also that Mr Ker and the other gentlemen who signed the acceptance were quite aware of the nature of that property which had been conveyed to them by Mrs Fyfe in her marriage-contract—shares of a joint-stock company which required to be transferred to them and to be accepted by them, and the acceptance of which by them bore that they were thenceforth to hold these shares and stock exactly upon the same conditions as the individual shareholder who transferred them to them and held them beforehand. He knew therefore, in the first place, that he was a trustee. He took it upon him to act as a trustee. He saw what was the nature of the property which was embraced in the trust—shares in joint-stock companies which required to be transferred to the trustees, and which the trustees were thenceforth to hold as partners of these companies.

Now, all that having taken place at the very commencement of the trust, certainly creates a very strong presumption that Mr Ker as well as the other trustees knew quite well about the other shares. They did not in the case of the City of Glasgow Bank receive a transfer from Mrs Fyfe, or accept of that transfer. That was not found to be necessary, but their agent got them registered in place of Mrs Fyfe as the holders of those shares. Mr Ker says—"I did not know that I was registered as the owner along with my co-trustees of these shares. I did not know that my individual name was there." But he had seen in the case of the Glasgow and South-Western Railway that his name required to be there, that the transfer required to be made to the whole trustees *nominatim*, and that they *nominatim* required to accept the transfer, and I think his inference that the trustees could be registered in any other way in another joint-stock company was certainly without foundation.

But, then, still further, there is a document signed by this gentleman with reference to the bank which it is very difficult to get over. It is dated 7th August 1856, and is a dividend warrant, or rather the receipt upon a dividend warrant, which the trustees required to sign in order to get payment of the dividend upon those City of Glasgow Bank shares—[*His Lordship here read the document quoted supra*]. The whole four trustees sign this document, and Alan Ker adds to his name, as all the others have done, the word "trustee." Now, all the explanation that he can give of this is that he was aware that these shares did stand in the name of the trustees, but he had some vague notion that their names as individuals were not there. I am afraid that is too narrow a ground to enable the Court to say that he was not perfectly aware that those trustees were registered in the usual way as parties to the transfer.

As to his continuing to act in the trust, that is a matter of comparatively small importance. There is no doubt that after the first year or two of the existence of the trust he did not act. He left Greenock, where the trust fell to be administered, and went to Liverpool, and it was most natural that he should cease to act as a trustee thereafter. But however that might be, I think there are some things even after he left Greenock that go to show pretty clearly that he knew quite well that he was still a trustee, and vested with all the duties and liabilities of a trustee, though he had ceased to take any direct interest in the management, for upon two occasions he expressed a desire to get out of the trust, and to be relieved of it. One of these was on the occasion of a conversation he had with Mr James Welsh, which, he says, was after he removed to Liverpool, and upon that occasion Mr Welsh said to him—"Now that Fyfe is dead there is no use of your being on the trust, or of my being on it; we run no risk, but we may as well be off it." That was not acted upon at the time. Upon another occasion, and I rather think an earlier one, it would appear that he expressed the same wish to Mr M'Clure, the agent, for he says—"Some time after the marriage I met Mr Ker in Greenock, and I think he expressed a wish that he should resign his office as trustee." Now, on both these occasions it is quite plain that Mr Ker was conscious he was still one of the trustees under the marriage-contract, that he had accepted that office and had acted, and his actings in regard to the two portions of this lady's estate taken together, I think, very plainly show that he was fully alive to the nature of the subject of which that estate consisted, and to what was necessary to be done in order to transfer those subjects—shares in joint-stock companies—into the names of the trustees so as to vest them with all right and interest in the trust property.

In these circumstances, I cannot see that Mr Ker has done anything to get the better of this registration. I do not think he has shown that it was made without authority, and I think it has been shown against him that whether he gave any direct authority *ab initio* to put his name on the register along with the other trustees he knew quite well afterwards that it was so, and acted upon that knowledge, and I am therefore for refusing the petition.

Lord Deas—This marriage-contract of Mr and Mrs Fyfe was entered into upon the 2d October 1855. Under that marriage-contract Mr Ker was named one of the trustees. Part of that estate consisted of those shares that are now in question, and upon 7th August 1856 a dividend warrant was presented to him for his signature, and signed accordingly. Now, that document bears distinctly that those particular shares stood in the register under the name of the trustees, and then, as your Lordship pointed out, that mandate is signed "Alan Ker, trustee." Upon

the face of it, therefore, it imports distinctly both that he was a trustee—that is to say, that he accepted the office of trustee—and that he knew that as trustee he was one of the parties registered for those thirty shares. It is therefore proof both of the acceptance of the trust and of his knowledge that these shares stood in name of those persons. It would be very difficult for anybody to get over that, but it is particularly difficult for Mr Ker, because he tells us that at the time when that document was presented, and when he put his name to it, he was agent in Greenock for the City of Glasgow Bank, and in fact he had been very instrumental in establishing that agency. Well, that document goes to the bank, and they act upon it; they act upon it, and upon the registration from that time downwards. He went to live at Birkenhead not very long after this, and he naturally ceased to attend the meetings of the trustees, or to take any active interest in the management of the trust, which was managed by those who were present. Well, then, even supposing he had forgotten all about this document, it would be very difficult to say that because a man chooses to sign a document like this and to forget that he has done it, he is therefore to be relieved from the obligations which that document imports.

But, as your Lordship has pointed out, that is not his position, because he does things long after that which show not only that he was acting as a trustee, but that he must have recollected quite well what he had done, and in particular, in the year 1868, there occur those communications about the propriety of his ceasing to be a trustee as he was not resident in a locality where he could act as such. It occurred to me at first that it might be possible to gather out of those communications an actual resignation. It is quite plain that that construction will not do, because there was no resignation, and the moment it turns out that those communications and negotiations did not amount to a resignation it necessarily follows that they are evidence against him, and that he knew even in 1868 that he stood then on the register as trustee, and that he had not resigned that office. There were likewise those other circumstances which your Lordship has pointed out, all of which go to show that the excuse that he had forgotten all about this—though I do not see how even that could be accepted—is not consistent with the fact. In that state of the case it is out of the question to think that we can take him off the register.

Lord Shand—The stock in question stood in the stock ledger of the bank in the names of Mr and Mrs Fyfe, or rather of Mrs Fyfe under her former name, until March 1856; and at that date—twenty three or twenty-four years ago—it was transferred to the names of the trustees under the marriage-contract. It appears that the entry of the trustees' names took place in a somewhat unusual way, but I do not think that that makes any difference on the question now before us. It was usual, and as we find in accordance with the contract of this bank, that the deed of transfer, or the trust-deed, or whatever it might be, conveying the stock, should be sent to the bank, and seen by the bank officials, and form the warrant upon which the change of entry took place. That did not occur here, for Mr M'Clure, the agent, instead of sending the marriage-contract itself, sent a solemn declaration in regard to the contents of it, upon which the bank (dispensing with the production of the deed itself) thought fit to act in making the change of entry. I cannot doubt that, in any question such as we have here, entries following a declaration of that kind are just as good as if they had followed upon the deed itself, provided it appears upon the evidence that the entries were authorised, or were made with the knowledge of the person whose name appears upon the register; and upon that question, which is a question upon the evidence, I am of the opinion that your Lordships have expressed.

The proof, I think, makes it clear that Mr Ker accepted of this trust, and acted as a trustee. His own evidence, as I read it, does not dispute that. Your Lordship has already pointed out a passage in which, while he states that he never signed any formal document directly accepting the trust, he does not say that he had not acted as a trustee; and he speaks in his evidence of desiring, sometime after the trust had been in operation, to have his name "removed" from the trust. But beyond that, we have, in the first place, the fact that, in the character of trustee, in March 1856, he accepted a transfer of the Glasgow, Dumfries, and Carlisle stock, which was conveyed by the marriage-contract to the trustees; that in August of the same year he signed a dividend warrant upon this stock, again in his character of trustee, for he appends the description of "trustee" to his signature; and in addition to this evidence, as showing that he deemed himself a trustee down to a much later date, I may refer to his letter of 20th February 1868—twelve years after the trust had been in operation—in which, writing to Mr M'Clure with regard to a proposed meeting of the trustees, he says—"I regret, however, that I cannot come north at present." He mentions that he has had notice of the meeting of trustees, plainly indicating that if he could he would be present at the meeting. And, indeed, he says as much in his evidence on this subject. So that one thing is quite clear—that Mr Ker was a trustee, and acted as a trustee.

The question that remains is the narrower one, Whether it must not be held in the whole circumstances that he knew that he was entered in the books of the bank as holder of the stock, which was part of the property of one of the spouses which had been conveyed to the trustees? Now, I think here again by his evidence that Mr Ker really substantially admits that he knew that the lady had City of Glasgow Bank stock, and he knew that that had been conveyed by the marriage-contract. He says in his evidence—"From having signed the warrant I conclude I must have known that there was City of Glasgow Bank stock under the marriage-contract, but it had escaped my memory." Well, then, in the first place, he knew that that stock was entered in the books of the bank in name of the trustees, for he expressly says so in the cross-examination for the liquidators, and the dividend warrant which he signed expressly bears with reference to the stock that there were thirty shares of the City of Glasgow Bank "standing in name of trustees for Mr and Mrs William Fyfe, Greenock, under marriage-contract."

The ground of the application comes really to be reduced to the extremely narrow one, as I must call it, that Mr Ker had some notion that the stock was merely entered in the general name of marriage-contract trustees, without any individual or personal name being registered, or at least without his name being registered. But, in the first place, supposing it was quite clear that this was so, I should entirely doubt whether that would be enough to relieve this gentleman. But then, as Lord Deas has remarked, we are here dealing with one who held the position of agent of the bank, and who must be held to have known both its practice and its contract, and he says—"I knew that the bank kept a list of the persons to whom the stock belonged, and that the dividends were paid to the persons to whom the stock belonged." Knowing that the stock must be conveyed to the trustees to be held by them for a period of time, it was matter of direct inference that for purposes of administration it must be transferred to the names of the trustees. The only way in which that could be avoided, as he as a man of business must be held to have known, would be by some special arrangement under which the stock should be transferred to other names than his own if that were desired to be done, and his co-trustees would agree to the arrangement. Accordingly, even if we had not the transfer of the railway stock, which Mr Ker accepted in the full knowledge, to be inferred from the acceptance, that to be made effectual as a transfer the names of the trustees must be on the register, I think it is enough that he knew that the title to this stock had been transferred to the trustees, and I am of opinion therefore, looking to the fact that he acted upon this knowledge, himself signing one of the dividend warrants recognising his right as a trustee to the profits of the bank, that he cannot be relieved.

As to the argument founded upon the alleged resignation by Mr Ker of his office of trustee, and what followed upon that, it must be observed that it only occurred in 1868, the letter of declinature having been dated on the 4th of April of that year. The first observation I make is, that I do not think he had the power by a document of this kind of resigning a trust in which he was already acting. That must be done in a different way by a proper formal resignation. In the next place, however, it appears that the true effect of that resignation was to enable him, not to resign the office of an acting trustee under the *inter vivos* trust which was then in existence, but to "decline" to take the position of a trustee on an executry estate, which was a different matter, and that was given effect to. And in addition to that, it must be noticed that even if there had been a good resignation here the case so far as founded upon this is ruled by the case we had yesterday (*Sinclair's* case, *ante*, p. 235), in which a notice was not given to the bank, and in which therefore the resignation was held to be ineffectual.

The mandate of August 1870 by Welsh, Neilson, and Hall, as accepting trustees, authorising payment of dividends was also founded upon. But that was a perfectly good mandate, signed by three trustees as an authority for the payment of future dividends. I cannot see that it could be held as notice to the bank that one of the trustees had ceased to act.

On the whole, I am of opinion that the petition must be refused.

LORD MURE was absent.

The Court refused the petition, and found the liquidators entitled to expenses.

Counsel for Petitioner—M'Laren—Shaw. Agents—Duncan & Black, W.S.

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

Friday, February 7.

FIRST DIVISION.

CITY OF GLASGOW BANK LIQUIDATION—(*MACDONALD HUME'S CASE*) J. H. A. MACDONALD AND OTHERS (MACDONALD HUME'S EXECUTORS) *v.* THE LIQUIDATORS.

Public Company — Winding-up — Transference of Shares—Act 25 and 26 Vict. cap. 89 (Companies Act 1862), secs. 23, 24, 35—Personal Liability of Executors where Confirmation had been Transmitted to the Bank Company, but no Entry was made on the Register prior to Resolution to Wind-up.

The executors-nominate under a trust-disposition and settlement, part of the funds included in which consisted of stock in a bank of unlimited liability, sent the confirmation to the bank through their law agent, who was one of their number, and at the same time requested that the stock should be transferred to their names. In return they received from the secretary of the bank the usual stock certificate bearing that the entry had been made in the books of the company. A fortnight afterwards the bank stopped payment, being irretrievably insolvent. It appeared that the names of the executors, although inserted in certain subordinate books, had not at the date of the stoppage been entered in the register of members, but had been subsequently engrossed there by the transfer clerk at his own hand, and after the directors had refused to register transfers. And in certain other respects in the execution of the transfer the terms of the bank's contract of copartnery had been departed from.

In a petition by the executors for removal of their names from the register of members, and for rectification of the list of contributories to the effect of deleting their names from the "first part," and inserting them in the "second part" as being representatives of others—*held* (1) that the entry of their names in the register of members after the stoppage of the bank was unwarrantable, and could have no legal effect; and (2), the case of executors therein differing from that of transferees or allotees, that they had never come under any obligation or agreement which could be enforced either under sec. 35 of the Companies Act 1862 or under the bank's contract of copartnery, to the effect of placing them in the list of contributories.

Held by Lord Shand that a general authority by an executor to the law agent of the