the thought of conveying heritable estate was in the mind of the testator, and certainly he has not used words habile to convey such subjects.

The Court recalled the Lord Ordinary's interlocutor, assoilzieing the defender from the conclusions of the summons and finding him entitled to expenses.

Counsel for Pursuer (Respondent)—Dean of Faculty (Fraser)—J. A. Reid. Agent—R. C. Gray, S.S.C.

Counsel for Defender (Reclaimer)—Balfour—M'Kechnie. Agent—Thomas Carmichael, S.S.C.

Friday, June 13.

FIRST DIVISION.

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

Public Company—Winding-up—Liability of Trustees—Authority—Acquiescence.

A and B entered into an antenuptial marriage-contract, whereby B, the wife, made over to trustees all her goods, which consisted, *inter alia*, of stock in a bank which afterwards failed. The trustees named all accepted office by minute annexed to the contract. The agents under the contract wrote, without consent of the trustees, to the manager of the bank a letter containing the following words, *inter alia*:—"We suppose you will issue and send us a new certificate in the names of the trustees." This was done. For some time the dividends were paid upon the signatures of the trustees, but C, one of the number, signed no dividend warrants. Sometime after they were paid to B on her own receipt, she being one of the trustees, under a mandate to the following effect:—"We, trustees under her marriage-contract, beg that you will arrange to make future dividends on the stock of B payable to her order at Edinburgh, and request that you will advise her to that effect." This was signed by C as well as by the other trustees. In the winding-up of the bank *held* (*diss.* Lord Shand in the case of C) that the trustees fell to be placed upon the first part of the list of contributors under the rule laid down in *Muir's* case, Dec. 20, 1878, 16 Scot. Law Rep. 139; H. of L. April 7, 1879, 16 Scot. Law Rep. 483.

Mr James Shanklie Smith and Sarah Ann Smith were married in October 1872, and of the same date entered into an antenuptial marriage-contract whereby Mrs Smith made over to James Smith, James Brown Smith, the said Mrs Sarah Ann Smith, the said James Shanklie Smith, and Peter Shanklie Smith, as trustees for certain purposes, everything then belonging to her or which might belong to her during the subsistence of the marriage, and specially a sum of £1250, being a provision secured to her by her father. James Brown Smith was Mrs Smith's brother, and all the other trustees besides herself and her husband were near relations. The trust-estate conveyed by Mrs Smith consisted, *inter alia*, of £200 stock of the City of Glasgow Bank standing in her name and acquired by her before marriage. There was no special assignation of this stock in the marriage-contract. Mrs Smith also possessed some Union Bank stock.

By minute annexed to the contract of marriage, dated in December 1872, the petitioners all accepted the office of trustee under the contract. No transfer of the bank stock was executed in their favour. On 17th Jan. 1873 Messrs Fisher & Watt, the agents under the contract, sent a stock certificate in favour of Mrs Smith to the manager of the City of Glasgow Bank. This letter was in the following terms:—

"Dear Sir—Certificate No. $\frac{29}{149}$ of £200 stock, City Bank, Miss Smith.

"We send herewith this certificate, which has been assigned by Mrs Smith in a general conveyance under her marriage-contract, also now sent. For the use of the Banking Company we send an excerpt of that deed *quoad* the general conveyance of the lady's estate, and we will thank you to notify that intimation of the assignment has been made. Be good enough to return the marriage-contract at your earliest convenience. We suppose you will issue and send us a new certificate in the names of the marriage trustees. Any fee you may have we shall remit on hearing its amount.—Yours, &c.,

"FISHER & WATT."

This letter was received at the bank, and a stock certificate was made out certifying that the above-named trustees had been entered in the books as holders of the stock. The entry in the stock ledger was in the following terms:—

"Miss Sarah Ann Smith, No. 64 St Vincent Crescent, Glasgow.

1869.	Dr.	Cr.	Balance.
June 3. By Stock from Ledger, No. 4/788.		200	200
1873.			
Jan. 18. To her Marriage-Contract Trustees, 627, . .	200		
	£200	£200	

"James Smith, Stove and Range Manufacturer, Glasgow, James Brown Smith, Stove and Range Manufacturer there, James Shanklie Smith, Chemist and Druggist Edinburgh, Peter Shanklie Smith, Chemist and Druggist there, and Sarah Ann Smith, daughter of the said James Smith, and now wife of the said James Shanklie Smith, Trustees under the Antenuptial Contract of Marriage between the said James Shanklie Smith and Sarah Ann Smith, dated 16th October, and registered in the Books of Council and Session 23d December 1872.

1873.
Jan. 18. By Stock for Sarah A. Smith, £526=£200."

For some time after the marriage the dividends on this stock were paid on the signature of three of the trustees, viz., Mrs Smith, James S. Smith, her husband, and Peter S. Smith, her father.

None of these dividend warrants were signed by James Brown Smith, Mrs Smith's brother. After a time, however, the dividends were paid to Mrs Smith herself, upon her own receipt, under a mandate in the following terms:—

"Sir,—We, trustees under her marriage-contract, beg that you will arrange to make future dividends on the stock of Mrs S. A. Smith, 1 Scotland Street, Edinburgh, payable to her order at Edinburgh, and request that you will advise her to that effect.—We are, &c.,

"Jas. Smith, *Trustee.*
"Jas. B. Smith, *Trustee.*
"Peter S. Smith, *Trustee.*
"Jas. S. Smith, *Trustee.*"

"The Manager, City of Glasgow Bank."

This was a petition at the instance of the trustees for removal of their names from the list of contributories to the bank. It was not contended by any of them that they were not aware that Mrs Smith held City of Glasgow Bank stock, but they averred that they had never authorised the bank to put their names on the register as trustees.

A proof was led, the purport of which appears from the opinions *infra.*

At advising—

Lord Deas—By antenuptial contract, entered into between Mr and Mrs Smith in October 1872, the husband provided an annuity of £100, together with his household furniture, and allowance for mournings, and interim aliment, for his wife in the event of her surviving; and in security thereof he assigned to himself and her, and to her father and brother, and to a brother of his own, or to the survivors or survivor of them, and the heir of the survivor, and their legal successors in office, as trustees for the purposes thereinafter written, certain specified policies of insurance effected on his (the husband's) own life, and on the life of a Mary M'Killop; and he bound himself to effect another insurance upon his own life for £300, and to keep up the whole policies, all to be held in security of the wife's provisions, and for behoof of his own heirs if he was the survivor; but if she was the survivor, the annual proceeds, so far as there were any, should form an alimentary income to the wife, exclusive of the *just mariti* of any husband she might afterwards marry. For which causes, and on the other part, the wife, with consent of her father James Smith, who was a party to the contract, conveyed generally the whole estate, heritable and moveable, then belonging or that should belong to her during the subsistence of the marriage to the same trustees, and specially £1250, being a provision secured to her by her father, to be invested by the trustees for the conjunct liferent of the spouses, and for the children in fee. If the wife survived, she was to have power to confer an alimentary liferent of these provisions upon any second husband she might marry, and to give the children of that second marriage a share of the fee. Powers to loan and invest, and to appoint factors and agents, were conferred on the trustees, and as no limitation in respect of time was placed upon the exercise of those powers, there is nothing in the contract to prevent the trust from subsisting in the persons of the survivors after the dissolution of the marriage, and after the death of both spouses.

It is not disputed that all the trustees accepted of the trust. Some years before the marriage the father had acquired for the daughter £200 City of Glasgow Bank stock, which at the time of the marriage she held in her own name, and which, although not specially mentioned in the contract, was of course carried to the trustees. Mr Alexander Watt, of the firm of Fisher & Watt, writers, Glasgow, had acted for all parties in the preparation of the contract, and was employed by them as agent in the trust. On the 9th of January 1873 the husband handed over to Mr Watt a certificate in the wife's name for the £200 stock in question, and a similar certificate in her name for £100 Union Bank stock, and also the various policies of insurance, of all which documents the husband was then lawful custodier. On the 17th of January 1873 Mr Watt, under the signature of his firm of Fisher & Watt, addressed the following letter to the City of Glasgow Bank—[*reads letter quoted supra*]. In consequence of this communication, the following entry, bearing to be applicable to the £200 City of Glasgow Bank stock, was made in the stock register of the bank upon the 18th of January 1873—[*reads entry*]. A certificate of this registration in terms corresponding to the above was signed by Mr Turnbull the manager, and sent to Mr Watt, who made a similar communication to the Union Bank, and obtained a similar certificate applicable to the £100 stock of that bank. Mr Watt states in his evidence that he had no special authority for registering these stocks, but that he understood it to be his duty and to fall within his general authority to do so. I can see no room for any of the petitioners repudiating the actings of Mr Watt. Three of them—viz., the two spouses and Peter S. Smith, being a quorum of the trustees—signed the warrrants and receipts for the dividends drawn on the City of Glasgow Bank stock between the date of the contract in 1873 and the 7th of May 1874, when a mandate addressed to the manager of the City of Glasgow Bank authorising Mrs Smith from and after that date to uplift the dividends was subscribed by all the trustees except Mrs Smith herself, who accepted and acted upon it by drawing dividends from that date downwards. I cannot doubt, therefore, that the whole five trustees must be held to have acted upon and adopted Mr Watt's letter to the bank of 17th January 1873, whatever may be held to have been the true import and effect of that letter. I can make no distinction in this respect between James Brown Smith and the other trustees. He was a party to the marriage contract which assigned all that his sister Mrs Smith had or might have during the marriage to him and the other trustees. He admits that he knew his three sisters, of whom Mrs Smith was one, held some City of Glasgow Bank and Union Bank stock, but how it was divided among them he says he did not know. But the mandate he signed bears to be applicable to the dividends on his sister's stock, and being addressed to the manager of the City of Glasgow Bank necessarily applies to the stock held by her, while as regards the £100 of Union Bank stock he had previously accepted as a trustee in express terms on the 29th of January 1873. They are all therefore, in my opinion, in the same boat.

But it is contended that this being a marriage

contract, and consequently an *inter vivos* deed, the sound construction of Mr Watt's letter of January 1873 is that the contract was sent to the bank for intimation merely with a view to administration, and not with a view to the trustees becoming partners of the bank. The cases of trustees under *mortis causa* deeds are therefore, it is said, not in point. Besides this special plea, the petition bears—"The petitioners further maintain that if they are members and shareholders of the bank they are only so in their representative capacity, and only liable to make the trust-estate forthcoming." The object of all this, taken in connection with the argument at the bar, was understood at the time to raise again the general question as to the personal liability of trustees, which we decided in *Muir's* case, along with the supposed specialty arising from the appointment here being by an *inter vivos* in place of a *mortis causa* deed; but as our decision in *Muir's* case has now been affirmed by the House of Lords, I presume the petitioners will be satisfied that nothing but the specialty remains. All I have to say in regard to that supposed specialty is, that I cannot distinguish between the liability of trustees registered in virtue of an *inter vivos* deed such as a marriage contract and the liability of trustees appointed under an ordinary *mortis causa* deed of settlement. Still less can I make that distinction under a marriage contract such as this, which involves, as many marriage contracts do, a testamentary trust-settlement which may fall to be carried out after the death of both of the contracting parties, and even after the death of the issue of the marriage, if it shall happen to be so.

I therefore think that this case must follow the ruling of the numerous cases which we have already dealt with, and that there is no course open for us but to refuse the petition.

Lord Mure—I have come to the same conclusion. It appears to me that the position of these gentlemen as disclosed in the evidence brings them within the principles and the rules that were laid down by this Court and afterwards affirmed by the House of Lords in some of the cases where the question was raised as to whether the conduct of the parties was to imply knowledge on their part of their names being on the register. Now, in this case they all accepted the office of trustee, and the agent for the trust, though without any direct authority it is plain, believed it to be within his authority when he sent the intimation to the bank that led to these names being placed on the register of the City of Glasgow Bank, as they were put upon the register of the Union Bank as trustees with reference to shares in that Bank belonging to the trust. The acceptance of the Union Bank stock was signed by the whole of them as trustees. There was no similar acceptance of a trust of the City of Glasgow Bank stock, but there are documents showing that the whole of the parties did in point of fact deal with the City Bank stock as stock belonging to them as trustees'; and I think there is sufficient in their conduct to show that they must be held to have been aware that they were holding that stock. In the first place, there is a mandate by the marriage-contract trustees addressed to the manager of the bank in May 1874, in which the trustees ask him to arrange to make payment in future of the dividends on the stock to Mrs Smith, payable to her order at Edinburgh, the dividends having formerly been received by the trustees. Then from February 1873, so far as the dividend warrants have been produced, all the trustees sign with the exception of Mr Brown Smith. He does not appear to have signed any dividend warrant so far as we can see, but he signs the mandate authorising the change in the mode in which the dividend was to be paid, vizt., that it was to be paid direct to Mrs Smith instead of being drawn by the trustees. The question is, whether the absence of the signature at the dividend warrants on the part of Mr Brown Smith puts him in a position to say that he must be dealt with differently from the other trustees. Now, there is certainly that distinction between the cases which is founded on the fact that he does not appear to have signed the dividend warrants, but he signed the order on the bank to pay to Mrs Smith the dividend upon the stock, and having done so, and looking to the fact that he also accepted the trust applicable to the Union Bank stock—he accepted the transfer of shares, which he says in his evidence he did not remember anything about—and must be held in law to have known that this stock of the City of Glasgow Bank was held by him as one of those trustees, I cannot put Mr Smith in a different position legally from the other trustees.

Lord Shand—This is an application at the instance of six persons as trustees claiming to be removed from the register of the bank, and while I agree with your Lordships in thinking that in regard to five of them the application must be refused, I am of opinion that one of them, vizt., the petitioner Mr James Brown Smith, stove and range manufacturer in Glasgow, is entitled to have his name removed from the register. I think the evidence shows that he was put on the register without any antecedent authority, and that there is no proof of subsequent adoption on his part of the act of the agent. Mr James Brown Smith is a brother of Mrs Sarah Ann Smith, who married her cousin James Shanklie Smith, chemist in Edinburgh; and in regard to his case—which I shall treat separately, because I think the facts are materially different—it appears distinctly that he was no party to his name being originally put upon the register. The law agent for the trust, who was examined, says distinctly—and there is no evidence to a contrary effect—that he had no authority for putting the names of the trustees on the register—no authority of any kind—and that he did it entirely at his own hand in carrying out what he conceived to be the business of the trust. I cannot think that any general authority to act as agent in a trust can authorise the agents to make persons shareholders of a joint-stock company like this without their personal sanction. It appears to me therefore that in order to establish liability against Mr J. Brown Smith it must be satisfactorily proved that he adopted the act of the agent in putting his name on the register, and the question I ask myself is, whether there is any evidence of such an adoption, and if so, is the evidence of adoption sufficient? I am of opinion that there is no evidence of adoption, and certainly so far as my judgment goes that there is no sufficient evidence of adoption. In no case that has hitherto occurred has any party been

held to be properly on the register on such slender evidence as is presented in the case of James Brown Smith, if indeed it can be called evidence, to support the conclusion which the liquidators desire. There is no doubt that Mr Smith accepted of the trust. All the trustees signed a minute accepting the office of trustees, but in the deed which conferred that trust there was no special conveyance of any bank stock, and I accept Mr Brown Smith's statement in evidence when he says that, though he was aware that his sisters amongst them had certain City and Union Bank stock, he knew nothing about the distribution of it. The single piece of evidence against Mr Smith in this case is that he signed a mandate, which we have in the print of documents, about eighteen months after the trust had come into operation—[*reads mandate*]. There is nothing in the case, parole or written, to connect Mr Brown Smith with this stock or the registration of it except this mandate. The mandate is not expressed in the terms in which we usually find such mandates are expressed. In every case that has come before us, with the exception, I think, of one,—the case of *Stott's Trustees*—in every case the mandate has borne an authority to pay dividends on the stock standing "in our names as trustees" of so-and-so. In this case the mandate signed by this gentleman is a mandate for the payment of dividends on stock not stated to be standing in the name of trustees, but on stock "of Mrs S. A. Smith, Scotland Street, Edinburgh." The basis of liability against Mr Brown Smith is that because he signed that document he must be held to have known that the stock was in the name of the trustees, and in his name amongst others. I cannot say that I think that is a reasonable inference from this document. If the document had borne that the stock was standing in the name of trustees, Mr Smith might very readily have objected and said—"I object to this trust holding City of Glasgow Bank stock to the extent of inferring responsibility against the trustees;" or he might have said—"If the stock is to be continued as a trust investment it must be put in other names; I decline to allow my name to go on the register." It is no answer, I think, to that observation to say that the probabilities are that Mr Smith would have made no such demand. He is entitled, I think, in a question of this kind, where responsibility is proposed to be laid upon him, to the benefit of every consideration, and it is no answer to say that probably he would have allowed the stock to go in his name. And so, that being as I think the sole evidence in this case of any kind against this gentleman, I hold it to be plainly insufficient.

I may remind your Lordships that there was one case in which we had a mandate before us, somewhat ambiguous in its expression, but much more like a recognition of responsibility than this—I mean the case of *Stott and Others*. The mandate was to this effect—"We request you to pay to Mr D. Speid, S.S.C., Edinburgh, the dividends and bonus due or to become due on the stock of the City of Glasgow Bank standing in our names as trustees under the trust-disposition and settlement of the late J. H. Stott." The trustees there, one after another, when under examination in the witness-box, said they understood the words "stock standing in our names" to mean "standing in our names in the trust-disposition and settlement;" and that was accepted, and none of those parties were put upon the register. Your Lordships held, even with a mandate much more specific in its character, and much more calculated to convey notice to a man who signed it that he was on the bank register, that that was not sufficient; and it appears to me *a fortiori* in the present case that Mr Brown Smith is entitled to maintain successfully that this mandate does not amount to an act of adoption of the original registration. There is another circumstance which I must also notice in the evidence in this case — It appears that this lady had some Union Bank stock, and some time before this mandate was signed, indeed in January 1873—this mandate not being signed till May 1874—Mr Brown Smith consented to his name being put on the register of the Union Bank. But how was that done? It was done by a very formal deed in which, on the narrative that he had become a trustee, and that the lady had Union Bank stock, he and the other trustees formally agreed to become partners of the Union Bank by accepting a transfer in their favour. The very circumstance that Mr Smith was thereby led to believe, or might thereby be fairly led to believe, that before he could be put upon the register of a bank he must formally agree to it by accepting a transfer, is a strong consideration in his favour in this question, when you are considering the effect of this mandate, which does not bear that he was put upon the register, and with reference to which it was not suggested that there was any antecedent deed of transfer, or anything whatever to give him information on the subject.

Therefore, differing from your Lordships in reference to the case of Mr Brown Smith, I am of opinion that he is entitled to have his petition granted. I may just say, further, that I rather fear one is apt in looking at a case of this kind to mix it up with that of the other petitioners, and to infer that the distinction is not strong enough to create a difference between the petitioners. But one should be careful in a case where you have several parties in this position—careful that there should be no prejudice to one who is in special circumstances from the fact that he has been mixed up with the others who have been in somewhat different circumstances. In regard to the other parties here, I think the case is a clear one. It is not a slight distinction I think that exists between their case and that of Mr Brown Smith. In the case of every one of them they signed not only the mandate, but before signing the mandate each of them had signed one or more dividend warrants expressly bearing upon their face that the stock was standing in the names of those trustees; and because it was standing in their names they signed the mandate to enable Mrs Smith herself to draw the dividends. That makes all the difference—a very important difference in my view—and I concur with your Lordships in thinking that the other petitioners cannot escape liability.

Lord President — I agree with the majority of your Lordships in holding that the whole of these petitioners must be put upon the list of contributories. I am not at all blind to the distinction which my brother Lord Shand has taken between the case of five of them and that of the sixth trus-

tee Mr Brown Smith, and I shall endeavour to explain in a very few words why I am unable to draw any distinction so far as the result is concerned, between his case and that of his co-trustees. It must be kept in mind that this was eminently a family arrangement. Miss Sarah Smith married her cousin, and the trustees in addition to herself and her husband were her father, two of her brothers, and a brother of her husband. The fortune which Miss Smith had was derived from her father, and among other items she received from him this City of Glasgow Bank stock and also some stock of the Union Bank of Scotland. Now, it is very difficult to suppose that all this was not quite within the knowledge of the whole of these trustees, and particularly within the knowledge of James Brown Smith, her brother, and the son of the gentleman who may be called the settler on that occasion. Accordingly, Mr Brown Smith does not disguise that he was quite aware that his sisters were entitled to some City of Glasgow Bank stock from their father, and also some Union Bank stock. He adds that he did not know how it was divided amongst them, but that he had the knowledge of the fact that among the funds settled upon his sisters were these two kinds of bank stock. He accepts of the trust by a formal minute of acceptance along with the other trustees, and assuming — I see no reason to doubt the fact — that he was not aware of what had been done by Mr Watt as agent of the trust in registering the names of the trustees as partners of the bank, the question comes to be, whether what followed is not sufficient to infer a knowledge on the part of Mr Brown Smith that the trustees were so registered, and an adoption of the registration by him as well as the others. After the acceptance of the trust, and the registration of the trustees in the stock ledger of the bank, there were three dividends drawn by the trustees, and it seems to have been thought it was enough that there should be the signature of three of the trustees to each of these warrants, but there can be no doubt in the world that it plainly showed that the persons who signed them knew that the stock was standing in the names of the trustees as partners of the bank. Now, if Mr Brown Smith was not aware that these dividends had been drawn by his co-trustees, I think he must be held to have been very rash indeed in signing the mandate of 7th May 1874, because observe how that mandate is expressed. Mr Brown Smith when he signed that mandate must have been perfectly well aware that there had been previous dividends drawn, and he must also have inferred — I do not see how he could resist the inference — that those dividends must not have been drawn by his sister, and therefore must have been drawn by the trustees under the marriage contract, because it required an authority by the trustees to enable his sister to draw them for the future. Therefore, though the mandate is differently expressed from mandates by trustees which we have seen in other cases, I cannot think that it conveyed no notion to the mind of the party signing it as to how this bank stock stood. On the contrary, I think that any sensible man of business, and above all a man who must have been intimately acquainted with the family affairs, could not fail to know that those dividends on this stock must have been drawn by his co-trustees. My brother Lord Shand makes a contrast between the way in which Mr Brown Smith came into contact with the City of Glasgow Bank stock and that in which he came into contact with the Union Bank stock. I draw rather a different inference from that from what he does. I think Mr Brown Smith, if he was not previously aware how trustees generally dealt with bank stock forming part of a trust-estate, must have been enlightened when he was asked to sign the acceptance of the Union Bank stock, for he there found quite distinctly that when part of the trust-estate consists of bank stock the mode in which the trustees take possession of that part of the estate is by becoming partners of the company. That is most distinctly shown by a document which he signed in reference to that Union Bank stock; and with that knowledge in his mind, and the terms of this mandate, it would be a very strange thing if he had concluded that he stood in a totally different position as regarded the one stock from that which he held in regard to the other. In short, taking these circumstances together, I think if Mr Brown Smith did not see and know that he had been made as a trustee a partner of the bank, he ought to have seen and known it, and must be held to have seen and known it just as much as the other trustees; and therefore I am for refusing the petition as regards all the petitioners.

The Court refused the petition, with expenses.

Counsel for Petitioners—M'Laren—Trayner. Agents—Beveridge, Sutherland & Smith, S.S.C.

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

Tuesday, June 17.

SECOND DIVISION.

[Sheriff of Lanarkshire.

M'FEAT *v.* RANKIN'S TRUSTEES.

Reparation—Implied Obligation to Fence Quarry—Injury to Person—Damages.

A workman going to his employment from his home in a row of cottages erected by his employer, strayed from a private road or path by which alone he could reach the clay-pit where he worked, and fell into an unfenced quarry belonging to the proprietors of the whole ground in question, off whom his master held a lease. The quarry had existed prior to the building of the cottages, but since that date it had been enlarged by being worked in the direction of the cottages. *Held*, upon the facts as proved, that there was an implied obligation on the owners to fence the quarry, and liability in damages inferred from their not having done so.

William M'Feat, joiner, Glasgow, raised this action against Patrick Rankin of Otter and others, trustees of the late Patrick Rankin and others, who were the proprietors of a quarry called Glenboig Quarry near Airdrie. The pursuer, who was employed as a workman by Mr James Dunnachie, the lessee of a clay-field in the neighbourhood belonging to the defenders, in January 1878 accidentally fell into the quarry when on his way to his work,