representative, but when he has once got the qualification he is not in any different position from the other commissioners. Once having obtained a qualification, a factor is entitled to vote as a commissioner, but he is not entitled to vote in any other manner than the other commissioners, neither more nor less. I think the Lord Ordinary has come to a right conclusion.

Lord Ormidale—I am also of opinion that the Lord Ordinary has decided rightly.

One of the qualifications of commissioners of supply—that created by the recent Act—is being factor of a proprietor infeft in lands of the yearly value of £800 or upwards. That is the qualification, and so long as the factory exists the party holding it is, in the absence of the proprietor, entitled to act as a commissioner of supply as fully and independently as any other commissioner however qualified. He does not attend meetings of commissioners or act as a mandatory or proxy. The Act contains nothing to that effect. He is a commissioner of supply, and entitled to act as such so long as he holds the requisite qualification. The proprietor for whom he is factor cannot control him or interfere with him at all, except, it may be, by recalling his factory.

In regard to the question whether the factor so long as he holds his qualification is entitled to a plurality of votes, that is to say, one in virtue of every factory he may happen to hold, and one also in respect of property belonging to himself, I am very clearly of opinion that he is not. He must in this respect conform himself to what I have always understood to be the general, if not the invariable, practice. And independently of the practice I am satisfied that on principle, and having regard to the nature of his office, and the duties he has to discharge—these being partly judicial as well as administrative—a plurality of votes is quite inadmissible. Were it otherwise, the same individual might argue and vote in one way or direction for himself, and in another way for the proprietor whose qualifying factory he might happen to hold, and that too in questions of a judicial nature. It is impossible, I think, consistently with reason and propriety, to hold that a commissioner of supply has any power warranting such a course of proceeding.

Lord Gifford—I am of the same opinion. At first sight the case presented some nicety, but ultimately the difficulty has entirely disappeared.

The point is, whether a commissioner of supply having several qualifications may vote in right of each? Mr Edmond, who is qualified to vote in his own right, claims to vote also as factor for Mr Shireffs Gordon and Mr Craigie. Now, I take it as quite clear from the statutory construction of the office of commissioner of supply that when a person, whether with one or with ten qualifications, is placed on the commission, he is simply entitled to one vote. Other cases might be put by way of illustration. Suppose, for instance, that Mr Edmond was the heir-apparent to another property worth £400 per annum, this would not give him a second vote. The simple question is, whether or not a person is entitled to vote as a commissioner of supply? and if this question be answered in the affirmative, it is of no consequence whether his qualification be represented three or four or a hundred times over; he can be placed only once on the roll as a commissioner, and can exercise only one vote. Now, there is here no question whether Mr Edmond is or is not a commissioner of supply. He no doubt is so; but the fact of his being entered three times can give him no right to vote three times. It would be a possible case that a man possessed of three property qualifications should sell the subject of one of them, yet his right to vote as a commissioner would be neither more nor less than it was before. The analogies from voting by shareholders of a company or by creditors of a bankrupt seem to fail entirely, for in the case before us the vote is not according to the value of the subject, but is simply a question of qualification. The case of voting for a member of Parliament is much more in point.

On the whole matter, therefore, I concur with your Lordships in affirming the judgment of the Lord Ordinary.

The Court adhered.

Counsel for Pursuers (Reclaimers)—Balfour—Keir. Agents—Morton, Neilson, & Smart, W.S.
Counsel for Defenders (Respondents)—Kinnear—Begg. Agents—Baxter & Burnett, W.S.

Tuesday, October 21.

FIRST DIVISION.

CITY OF GLASGOW BANK LIQUIDATION—(*GORDON'S CASE*)—JAMES GORDON AND OTHERS (GORDON'S TRUSTEES) *v.* THE LIQUIDATORS.

Public Company — Winding-up — Trustees and Executors — Where Confirmation sent to Company, and Executor has not Resolved to Sell the Stock within a Definite Time, and has Drawn Dividends for Several Years.

A truster died in 1874 leaving, *inter alia*, £3200 stock in a banking company of unlimited liability. In his trust-deed he directed his trustees and executors to sell and dispose of his whole estate, heritable and moveable, as soon after his death as convenient, and to re-invest it in certain specified classes of security; and the trustees resolved to sell, and in part did sell, the stock in the bank in question accordingly. In 1878, however, when the bank failed, £1900 worth of stock still formed part of the trust-estate. The names of the trustees and executors, which were previously on the register of members, were placed on the list of contributors as liable in their own right in respect of this £1900 stock; and they presented a petition for rectification of both lists. On a proof it appeared that the agents of the trust had requested the secretary of the bank to "transfer the stock to the names of the executors and send us new certificates therefor;" that certificates were sent accordingly, which it was shown were subsequently brought under the notice of the petitioners; that portions of the stock had been sold by the petitioners, the transfer being signed by

them, but within a year from the truster's death; and that the petitioners had signed half-yearly dividend warrants down to the failure of the bank. It further appeared that the petitioners had executed transfers to themselves of certain other stock belonging to the trust-estate, and had drawn dividends thereon; but that another banking company, stock of which belonged to the trust-estate, declined to pay dividends to the trustees because they would not accept a transfer of the stock. *Held* that in the circumstances of the case the petitioners were rightly placed on the list of contributories as liable in their own right.

The petitioners in this case were the trustees and executors of the late John Gordon, manufacturer, Lochee, and they prayed to have their names removed from the register of members and list of contributories of the City of Glasgow Bank as liable in their individual capacity in respect of £1900 stock of the bank. The truster died on the 15th September 1874, and the petitioners were confirmed executors conform to testament-testamentar granted by the commissary of the county of Forfar on 27th October 1874, and sealed with the seal of the principal registry of Her Majesty's Court of Probate in England 7th November 1874.

The following were the material averments of the petition:—"Amongst the personal estate and effects left by the said John Gordon, to which the petitioners confirmed as executors aforesaid, were £3200 capital stock of the City of Glasgow Bank which had been held by the truster. By the eighth purpose of the said trust-deed the trustees are directed, as soon after the truster's death as convenient, to sell and dispose of his whole estate, heritable and moveable, and to re-invest the same in the manner therein stated. The greater part of the testator's estate consisted of stocks in public companies, which the petitioners have been engaged in realising from time to time as opportunities occurred of selling out. At the first meeting of the executors, which was held a few days after the testator's death, the agents were instructed to inquire and report as to the best time for disposing of the stocks, and at the second meeting, which was held on 9th December 1874, a committee was appointed to dispose of them. In pursuance of the testator's direction, the petitioners sold and executed transfers of £1300 of the said £3200 stock, as follows, viz., on 7th May 1875 they executed transfers of two lots, one of £150 and another of £350; on 21st May 1875 they executed a transfer of £500 of the said stock; and on 16th July 1875 another transfer of £300 thereof. On 9th August 1878 they resolved to sell the remaining £1900 of the said stock, and their resolution to do so is recorded in the minutes of that date. Before this was done, however, the said bank suspended payment. . . . The petitioners never intended to hold the stock of the City of Glasgow Bank as a permanent investment, and their only instructions to their agent regarding it was to take steps to realise it, with a view to the investment of the proceeds in safe securities. . . . The petitioners never agreed to become partners of the said bank. They gave no authority to put their names on the register of the bank. On confirmation being expede, Mr James Carlisle, clerk to Messrs J. & J. Ogilvie & Reid, writers, Dundee, who had acted as agents for the truster, and thereafter acted as agents in the executry, forwarded the confirmation to various companies of which the deceased was a partner, and amongst others to the City of Glasgow Bank. This he did for the purpose of intimating the petitioners' title to the bank, and of having it noted, in order that their title to dispose of the stock might be known and recognised. The petitioners, however, did not give him instructions to do so. The minutes of the trust do not bear that any such instructions were given, nor that any report was made to the petitioners that their confirmation had been forwarded to the bank; neither do the minutes contain any approval of what Mr Carlisle had done. . . . It is the fact that the bank would not in practice recognise a sale by executors, or transfer stock from them to their assignees, until the executors had notified their title, as required by the company's regulations. Such notification was not in practice regarded as an acceptance of stock by executors; and in the present case there was no such acceptance. . . ."

In these circumstances the petitioners submitted that their names should be removed from the first part of the list of contributories and transferred to the second part thereof, so as to appear in the said list as liable for calls only in their representative capacity.

The 36th section of the contract of copartnery of the City of Glasgow Bank provided—"In case the shares or interest of any partner shall be arrested in the hands of the company, such partner shall be obliged to loose every arrestment so used within twenty days after being required so to do by letter from any officer of the company; and in like manner, in the event of the shares or interest of any partner deceasing being attached by the diligence of confirmation *qua* creditor, his representative, if he any have, shall be obliged to remove the attachment within the like period of twenty days, after being required so to do by letter as aforesaid; otherwise, and in case of failure to comply with such requisition, and also in case a partner deceasing, although no diligence had been or should be used against his estate, and of no party choosing to represent such deceased partner by confirming executor, or otherwise assuming his estate within twelve calendar months after his decease, it shall be in the power of the said ordinary directors of the company either to sell or dispose of the shares so arrested, attached, or not taken up by a legal title on the lapse of the said respective periods of twenty days and twelve months, or to retain and appropriate the same to the use of the company, in like manner and as fully and freely in all respects, and subject always to the same claims of deduction and retention as are herein provided with regard to the shares of bankrupt partners—the creditor arresting or confirming having only right to the price of the said shares if sold, or to the said value thereof if appropriated as aforesaid, but always under deduction and retention as herein mentioned."

The 38th section provided—"The said deed of transference, as also every assignment of shares in security or *mortis causa*, and confirmations thereof by right of succession, shall, after being completed, be recorded in a book to be kept for that purpose, and such deeds, transference, assignments, and confirmations shall be delivered or returned to those in right of the same after having marked thereon a certificate of the regis-

tration thereof: And it is hereby declared that the production of such writings to the said manager or ordinary directors for the purpose of registration shall *ipso facto* infer the acceptance of the capital stock therein specified, and the liabilities of the parties having right to the same as partners of the company; but it is hereby declared that no purchaser or other assignee of or successor to shares so acquired shall be recognised as a partner until the writing constituting his title is recorded in the books of the company in manner above specified."

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

Argued for the petitioners—The present case was not ruled by that of *M'Ewen,* for there the petitioners resolved from the first not to sell the stock, as they were entitled to do under their trust-deed. The petitioners here had come to no such resolution; they were bound to sell and intended to sell. But the trust-deed did not oblige them to sell within any limited time; nor did the contract of copartnery, the 36th article of which applied only to cases in which the executors did not confirm. Lastly, signing transfers and dividend warrants was, in the case of executors, no absolute proof of partnership—*Armstrong's, Hall's,* and *Blakelay's* cases, and particularly Lord Selborne's opinion in *Buchan's* case. *Wishart's* case ruled the present.

Authorities—*Buchan,* May 20, 1879, 16 Scot. Law Rep. 512; *M'Ewen,* July 18, 1879, 16 Scot. Law Rep. 771; *Wishart,* July 19, 1879, 16 Scot. Law Rep. 808; *Armstrong,* Jan. 16, 1849, 1 De Gex and Smale, 565; *Hall,* Nov. 10, 1849, 1 Macnaughten and Gordon, 307; *Blakelay,* Aug. 6, 1850, 13 Beav. 133—H.L. Feb. 26, 1852, 3 Macnaughten and Gordon, 726.

Argued for the respondents—The petitioners seemed from their minutes to have shown a distinction between the English and the Scotch securities belonging to the trust. They intended no doubt to sell both classes ultimately, but the English stocks they proposed to dispose of at once, while the Scotch they thought they were entitled to hold indefinitely until they could find suitable securities for re-investment. In consequence they signed transfers to themselves of the Royal Bank stock and of the tramway shares which formed part of the trust-estate; and there could be no doubt that they would have done the same in the case of the City of Glasgow Bank stock had they been asked, because they intended to hold all these stocks for an indefinite time. On the other hand, they would not accept a transfer of the Union Bank of London stock, because they were going to sell it at once. The mode in which the dividends were treated corroborated this. For the Union Bank declined to continue paying dividends unless the petitioners consented to become shareholders; whereas in the case of all the Scotch stocks the dividends were paid without objection, thus showing that in the one case the petitioners were not registered as owners, in the other that they were. Then there could be no doubt on the evidence that the transfer certificate sent by the secretary of the City of Glasgow Bank to the law-agent of the trust was brought under the notice of the trustees, who had also signed transfers of part of the stock and eight dividend warrants which bore that the stock stood in the names of the executors. The case was within *M'Ewen's* case, for to resolve not to sell and not to resolve to sell within a definite and limited period, probably twelve months, were the same thing. The bank were entitled to have shareholders on their register after the executors had had a reasonable time to settle what to do.

At advising—

Lord President—The petitioners here are the executors and the trustees of the late John Gordon, who died on the 15th of September 1874. They were appointed by a trust-disposition and settlement dated in 1865, and they were appointed to realise and convert into money the whole estate left by the testator, and then to reinvest the funds in a prescribed class of securities, and hold the same in trust for family purposes. They were thus clothed with a double character—the character of executors for the purposes of realising and converting the estate, and the character of trustees under a trust which was contemplated to endure for a very considerable period. The personal estate of the testator amounted to about £12,000, and of that not less than £10,000 was invested in the stock of joint-stock companies in Scotland. The petitioners were directed to realise these stocks, as well as certain English securities of the same kind, as soon as convenient after the death of the testator, by which I understand that they were to sell these stocks and convert them into money as soon as possible, consistently with a judicious and discreet management of the estate. They were not of course to sell instantly to the effect of sacrificing any of the stocks at too low a price, but just as little were they to hold on in the prospect of making these stocks more available for family purposes for any considerable time.

Now, that being generally the nature of the trust committed to these petitioners, it is to be observed, in the first place, that the first minute of the trustees, dated the 26th of September 1874, shows distinctly what the estate consisted of. That was brought clearly before them at that meeting, and they then appointed Messrs Ogilvie & Reid to be agents for the trustees. At another meeting held on the 9th of December following they appointed Mr Colville, one of their own number, to be factor of the trust, and they also appointed a committee to realise immediately certain English stocks—stock in the Union Bank of London, and stock in the London and African and the European Banks. Then the agents who had been appointed, Messrs Ogilvie & Reid, proceeded upon the 14th of November—in the interval between these two meetings—to communicate with the City of Glasgow Bank, in the stock of which a considerable portion of the trust-estate was invested, and that letter is signed by a gentleman now unfortunately dead, he being a confidential clerk of the firm of Ogilvie & Reid charged with the business of this trust. The letter is addressed to the secretary of the City of Glasgow Bank, and is thus expressed—"We enclose the certificates of stock, &c., noted on the other side, that you may transfer the stock to the names of the executors and send us new certificates therefor. We shall be glad to supply any further information you may require to enable you to do so. In the meantime be good enough to own receipt;" and then there is a specification

of several separate certificates of stock amounting in all to £3200 of stock. Along with these certificates this gentleman, Mr Carlisle, also sends the confirmation in favour of the executors, and a certified copy of the inventory of the personal estate. The answer to that letter by the secretary of the bank is as follows:—"We beg to enclose certificate in favour of John Gordon's executors for £3200 consolidated stock of this bank standing in their name, and will thank you to sign and return the annexed acknowledgment therefor." Now, the certificate so sent by the secretary to the agents of the trust certifies that the executors of the deceased John Gordon have been entered in the books of this company as the holders of £3200 consolidated stock, and then on the back of that certificate as usual the names of the executors are endorsed. That certificate was received by the agents, and was afterwards certainly made known to the trustees, as we shall see as we go on. Now, all this was done by the law-agents of the trust in conformity with the 38th article of the bank's contract of copartnery. The confirmation was sent and duly recorded and sent back, and a certificate of the stock made out in name of the trustees in place of the deceased as holders of the stock. There is no evidence that the trustees gave any express authority to their agents to do this. If Mr Carlisle had not been dead, we should, no doubt, have had more satisfactory evidence upon the question whether any such authority was given. In the meantime the trustees themselves, when examined as witnesses, expressly state that they did not give such authority. But although that may be so, the trustees knew perfectly well that of this £3200 of stock in the City of Glasgow Bank which was left by the testator they continued to hold the amount of £1900 down to the stoppage of the bank. They sold several portions, and they executed four different transfers for each portion of the stock of the bank which they sold in favour of purchasers. I do not say that that proves conclusively that they knew that they were registered as partners of the company in respect of the shares so transferred, because probably executors transferring shares under the 24th section of the Company's Act of 1862 might adopt the same form of transfer that registered partners would, and so the transfers are certainly not by any means conclusive evidence that they knew that they had been registered as partners. But it is very important to keep in mind that while they sold these different portions of stock, they still retained £1900, more than one-half of the stock which had been left to them by the testator, and that they kept until the stoppage of the bank. The reason they give for keeping this stock is rather a remarkable one. It is not that they were unable to sell it to advantage, because the stock was bearing a very good price in the market, and they got very good prices for what they did sell, and it is not said that they could not have sold the rest of the stock to the same advantage. But they say that they kept this stock or did not sell it because they had not ready a suitable investment for the money which would have been realised by its sale. Now, that may or may not be a good reason for not proceeding to sell the stock in terms of the instructions in the trust-deed, but at all events it was certainly not in their character of executors nor with a view to the performance of any duty of executors that they retained this stock; it could only be in their character of trustees, because it was with a view to securing a better permanent investment than they could command at the time that they kept on the stock. If they had been executors only, they could not consistently with their duty have kept on this stock; it would have been their imperative duty certainly to have sold it and realised it. But being trustees they seem to have thought themselves entitled to keep it on, notwithstanding the direction to sell, until they could get what they thought a favourable investment for the money.

Now, during this period, in the interval of four years, the petitioners drew the dividends upon this stock—they drew eight different half-yearly dividends—and the warrants for these dividends all bear that the stock on which the dividends were payable was standing in the names of the executors of John Gordon. These are the very words of the warrant. Now, it is very hard to believe that when they read, as they must have done, and signed the receipts upon these warrants, and drew the dividends in respect of them, they did not see and understand the statement that the stock was standing in their names as executors of John Gordon. And yet what they say in their evidence is that either they did not notice this statement, or if they did, that they did not understand it. It is of some importance to observe that with regard to the other stocks of which this estate consisted they do not seem to have been in any doubt or had any difficulty in understanding their position. There was, for example, some stock of the Royal Bank of Scotland which formed part of the estate, and with regard to that they were certainly made perfectly aware that they were entered in the books of the bank as partners in respect of that stock, for they signed an acceptance of it, in which it is stated that they "have now right to the said sum of stock" which stood in the name of the testator, and "having now credit given them in the books of the said Royal Bank of Scotland for the said sum of £1000 of the stock of the said bank which belonged to and stood in name of the said John Gordon, do hereby declare their acceptance thereof," and so undoubtedly they were registered partners of the Royal Bank in respect of that stock. Then there was another stock—the Edinburgh Street Tramways Company; in that case also they were registered as partners. They emitted a declaration—for that is the way in which the thing is done in that company—in which they state that that stock has been transmitted, and now belongs to and should now be registered in the names of James Gordon of Dundee, and so forth, naming the trustees, and in respect of that they were registered as partners of the Tramways Company. In the case of the stock of the Union Bank of London—a bank standing precisely in the same position as the City of Glasgow Bank, registered under the Act of 1862—they were made aware by the correspondence with the officials that they could not be allowed to draw dividends from that stock beyond the first dividend without becoming partners. This is stated to them in the most explicit terms in a letter by the secretary of the bank, dated 8th October 1875, addressed to the agent of the trust

in which he says—"I send warrant of the July dividend on shares of the late John Gordon. It is contrary to our rules to pay more than one dividend after the death of a proprietor, so that before January next the trustees must either sell or take the shares in their own names." That was so far relaxed afterwards that they were allowed to draw a second dividend as a matter of favour without being registered, upon their representation that they were going to sell the stock immediately. But it was not sold for some time, and the dividends thereafter were not paid, and were not paid because the trustees would not permit themselves to be registered as shareholders of the bank. The same kind of information they had with regard to the London and African Bank, and so, with regard to the stocks generally, which formed the great bulk of this estate, they were made very clearly aware that the only way in which they could deal with them was either to sell them immediately or to register themselves as partners, with this result, if they did neither the one or the other, that they could not draw the dividends upon these stocks. Now, with regard to the City of Glasgow Bank stock, they did continue to draw the dividends, and they drew the dividends during the whole period continuously from the time that the trust came into operation until the stoppage of the bank. And certainly it is very difficult to understand how they could reconcile that with the statements which they had made to them with regard to all the other stocks—stocks of the same description.

But then, still further, we have some evidence of a later period which goes very strongly to confirm the impression derived from the facts that I have already mentioned, that these gentlemen were perfectly aware that they had been registered as shareholders in this bank. There is, on 9th August 1878, a minute of a meeting of the trustees which bears that a "statement of the trust investments was read over at the meeting, and the factor and agents exhibited the whole certificates and securities of the said investments, with the exception of that of the Union Bank of London stock, which it was explained still remained in the hands of the secretary of the bank waiting a direct transfer to a purchaser as formerly proposed." Now, this is a very remarkable statement. In the first place, the trustees who were present at that meeting saw and examined the whole certificates of the stock which they held, and they saw, among other things, the certificate of the City of Glasgow Bank stock, which bore in express terms that that stock stood in their names. Then again, an explanation is made of the absence of a certificate of the Union Bank stock, which is very important as contrasted with the other stocks. The certificate of the Union Bank stock is retained in the hands of the secretary of the bank, and why? Because they are going to sell it immediately, it is waiting a direct transfer to a purchaser, and therefore there was no occasion to register them as shareholders. The other stocks are all in a different position—the certificates are in the hands of the trustees, because they are not waiting a direct purchaser, but, on the contrary, have been already transferred to the names of the trustees. The minute goes on further—"The trustees next took into consideration the advisability of disposing of the City of Glasgow Bank stock and the Union Bank of London shares, and it was resolved to sell and reinvest the same. A committee consisting of . . . . was appointed to see to the sale. The proceeds of the sales were in the meantime directed to be lodged in name of the trustees in the National Bank of Scotland, the account to be drawn upon as necessity occurred by the committee above named." Now, all the trustees are present at that meeting, and the account which was exhibited to the meeting was on the following day docqueted by the trustees, and the docquet bears that they have examined the accounts of their factor, and "having compared the same with the vouchers and instructions thereon, including the securities for the trust investments at the close of the accounts," they have found them to be correctly stated and satisfactorily vouched, "with exception of the Union Bank shares, the scrip for which, it was explained, was in the hands of the secretary of that bank." Now, it is impossible to take off the hands of these gentlemen the statement that although they signed the docquet and were present at that meeting they did not see the certificate of the City of Glasgow Bank stock—did not know what it meant—and did not understand the difference of the position of that stock and the stock of the Union Bank of London. The thing is perfectly clear upon the face of it. The reason why the Union Bank stock is not certified and the certificate produced to them is because they are dealing with that stock in an exceptional manner—in a different manner from that in which they are dealing with all the other stocks which belonged to the trust-estate.

Still further, in connection with this matter, in 1878 we have a most important letter written by Mr Colville, who was present at the meeting and docquets the account, and was acting as factor for the other trustees. That letter is dated the 13th of August—that is to say, three days after the docqueting of the account—and it is addressed to Messrs Ogilvie & Reid, the law-agents. Mr Colville says—"I have received your favours of yesterday's date, and the following documents therein mentioned, which I retain in safe custody on behalf of the trustees;" and then there follows a description of the certificates of the Royal Bank stock, of the City of Glasgow Bank stock, of the Edinburgh Street Tramways Company's stock, and of some other investments which it is unnecessary to mention. Now, in describing the certificates of the shares held in these three companies it is very important to observe how completely identical is the description of the three separate stocks—the Royal Bank, the City of Glasgow Bank, and the Tramways Company—bearing in mind that they certainly knew that they were partners in respect of the stock in the Royal Bank and in the Tramways Company. The first is a certificate of £1000 stock of the Royal Bank of Scotland in name of the executors, dated 11th December 1874; the second, a certificate of £1900 City of Glasgow Bank stock transferred to names of executors, dated 16th July 1875; the third, a certificate of ten shares of Edinburgh Street Tramways Company (Limited) in name of executors, dated 17th December 1874. Now, that is not a description of the certificates written by the law-agent; it is not a catalogue of the certificates written by anybody else than the writer of this letter, Mr Colville, one of the trustees, and the factor, and he describes

these certificates as being of that nature. He himself writes that the certificate of the City of Glasgow Bank stock bears to be stock transferred to the names of the executors.

Now, it certainly is somewhat remarkable, as compared with that letter to look at the evidence that Mr Colville himself gives upon this subject. He says—"I continued to be factor for the trust down to the stoppage of the bank. I was so in August 1878. The statement in the minute of 9th August 1878, to the effect that a statement of the trust investments was read over and the certificates of securities of the investments were exhibited by the factor and agents is correct. I must have seen the City Bank stock certificate on that occasion. I cannot say that I paid any attention to its terms. I regarded it as a sufficient voucher. I understood a certificate of bank stock to certify that a certain amount of stock was in existence belonging to certain parties. (Q) Certifying that they have a title to it?—(A) Yes. (Q) And that it stands in the books of the bank in their names?—(A) I did not know. I know we never authorised our names to be put on. (Q) But you saw the certificate?—(A) I understood we had a title to that stock as representing John Gordon. (Q) You saw the stock stood in your name in the books of the bank?—(A) Well, I never inquired into what was the meaning or effect of that." Now, that in the mouth of a gentleman who himself with his own hand describes the certificate as being a certificate of stock transferred to the names of the executors is certainly, to say the least of it, very remarkable evidence; and it throws a great deal of light upon the rest of the parole proof that we have before us, because if Mr Colville can make up his mind to say that he really did not know the meaning of what he himself wrote as a description of the certificate, it makes one very cautious indeed in giving much effect to those general statements which are made by the trustees as witnesses to the effect that they did not think of these things; they did not understand them; they must have seen the words, but paid no attention to them. I think the answer to all that is what has been made in a good many of these cases in the course of this liquidation, that if people engaging in business, whether as trustees or in any other capacity, choose to act with such culpable carelessness as that implies, they must take the consequences. Upon the whole matter, I do not in the least doubt that these gentleman were perfectly well aware, or ought to have been perfectly well aware—which comes to the same thing—that they were registered as the owners of this stock in the books of the bank, just as they had been registered as the owners of the stock in those other companies the stock of which belonged to their trust; and I am therefore for refusing this petition.

Lord Deas—This is another of those very hard cases of trustees which results from the judgment we have had to pronounce as to the general liability of trustees with reference to this stock.

The truster Mr Gordon died upon the 15th September 1874 leaving a trust-deed and settlement by which the petitioners were appointed trustees and executors. They expede confirmation of the various stocks held by Mr Gordon upon the 27th of October 1874. They were entered in the stock ledger of the City of Glasgow Bank as holding in their character of executors the stock that belonged to the deceased in that bank upon the 14th of November 1874; and a certificate to that effect was issued to them upon the 17th of the same month. They sold a good many of the stocks which belonged to Mr Gordon, the deceased, and, *inter alia*, they sold from time to time very considerable amounts of the City of Glasgow Bank stock which he had held. They, however, retained £1900 of that stock, and held it at the time when the failure of the bank took place; and the liquidators have placed them upon the list of contributories as the holders of that £1900, and made calls upon them accordingly. The trustees state two objections to that—in the first place, that they never gave authority for that registration in the stock ledger of the bank being made; and, in the second place, that the stock ledger imports there that they held that stock only in the character of executors of the deceased.

The only specialties alleged to distinguish this case from other cases that we have decided in favour of the liability of trustees or executors are, in the first place, that they say—and I do not see any reason whatever to doubt it—that they continued to hold this stock for the length of time that they did with a view to the benefit of the executry estate. They had sold considerable amounts of that stock from time to time as they had opportunity, and they all along intended likewise to sell this £1900 of stock, and not to hold it. Now, I have no doubt of these two facts. I have no doubt that they held on this stock with a view to the benefit of the executry estate, and I have no doubt of that other fact that they all along intended not to hold it permanently, but to sell it. They say that while they were directed by the trust-deed to sell these stocks, they were only directed to do that as soon after the death of the truster as convenient, which they construe to mean as convenient for the benefit of the estate, implying two things — in the first place, a favourable market to sell, and, in the next place, a favourable opportunity to invest the proceeds in some of the other ways which are authorised by the trust-deed. I can quite well understand that as regards another investment it might be very difficult to find at once such an investment as would be considered to be the best in the exercise of those powers contained in the trust-deed. It is quite well known that there is often great difficulty, or may be great difficulty, in obtaining good landed security, because the great companies which now exist both in Scotland and England and elsewhere generally monopolise all the best securities, if not the whole securities of that description. And then as regards house security, it is equally well known among those who seek for investments that there have been for several years such fluctuations in the value of such securities as to make it right for trustees to hesitate in investing in that kind of heritable security. I can understand all these difficulties, and I have no doubt that they operated with these executors, and that they all intended to sell and re-invest whenever a good opportunity occurred. The question is, in the first place, whether they did not give the authority for the registration? and, in the second place, whether these reasons, supposing them to be of some weight, are sufficient for holding that

they are not liable in a question with the creditors and other shareholders of the bank? and whether they are sufficient to relieve them of the obligations incumbent upon those who stand upon the register as partners of the bank? As regards their acceptance of the office of executors, there is no room for doubt at all; and then as to their registration as holders of the stock, although it is quite true what your Lordship has said, that there is no evidence of antecedent authority to take it over and get it registered, yet I think with your Lordship that there is abundant evidence by subsequent actings that they did give that authority. It is impossible to look at this series of dividend warrants given to the trustees, and to think that they had signed them without knowing that they were registered in the books of the bank as the proprietors of this stock. Therefore there are acknowledgments by themselves, under their own hands, that they had authorised the agents to do what they did, and we have held in other cases that it is not necessary that the authority should be antecedent, but it can be proved by subsequent actings that they must have known and authorised the execution of the transfer. We have proof of that here in those warrants and receipts for dividends, and in the docquet of 10th August 1878, as well as in various letters that we have before us. And then if there be evidence of that, I do not see any sufficient reason for holding that, simply because they were registered as executors, and not as trustees, and coupled with this, that they all along intended to sell, these facts make any sufficient distinction in this case from other cases where the question whether they are not liable as partners has been raised. I cannot in this case impute any blame to the trustees as between them and the beneficiaries of the estate. In the general question I do not see any grounds for holding that they were to blame; indeed, I should be disposed to think that as in a question between the beneficiaries they were doing their duty towards them to the best of their ability; but in a question with third parties, being found upon the register, I do not think that that is a sufficient answer, and therefore I am compelled to come to the conclusion, in the first place, that they must be held to have given authority for the registration, and secondly, that the registration has the effect of making them liable. I do not think the mere fact that they were registered as executors only, coupled with the other fact that they continued to hold the stock for four years until the failure of the bank had taken place, is a fact that makes a sufficient distinction, any more than the fact that they had all along not intended to hold the stock, and therefore I concur in the result arrived at by your Lordship.

Lord Mure—I regret that I am obliged to come to the same conclusion, for I have no doubt that the petitioners acted with good intentions in the way in which they administered this trust; but looking to the terms of the trust, and to the delay that occurred on their part in realising this stock, I think that they have acted contrary to the directions of the truster. The directions of this truster, who held this bank stock in considerable quantities, are very express, that they are to realise as soon as convenient with a view to re-investment, and having invested a part of his fortune in what are called speculative stocks of this description, it was evidently his intention that they should be realised without much delay and the money re-invested in securities of a permanent description, and perfectly free from all the difficulties arising from trade or speculation. Nothing can be more express than that clause. The trust came into operation in October 1874, but in October 1878, when the City of Glasgow Bank stopped, these petitioners had not disposed of the stock of that bank which they had been so directed to sell. Now, on the evidence I think it must be held that they knew that they had been registered as partners of the bank as the executors or trustees of Mr Gordon, and I do not think it necessary to recapitulate the evidence upon which this opinion is grounded. That has been already very distinctly and fully explained by your Lordship, and in your exposition of that evidence I entirely concur.

The question then comes to be—Are they to be held as parties who were dealing with this stock merely with a view to transfer it on a sale—on an immediate sale, which is what executors or trustees under such a direction are bound to do—or are they to be held as parties who have been holding it as trustees in the ordinary course of the administration of a trust which was evidently intended to be of some duration? I am of opinion that it was in the latter capacity that they had been registered as partners of that bank, and had signed the certificates and drawn the dividends for the stock, and that being so I see no ground upon which they can be freed from the responsibility which attaches to trustees who were registered as partners of the bank. It was their duty to realise that stock in terms of the direction as soon as they possibly could; and no satisfactory reason has, in my opinion, been given as to why they did not do it. In so holding it they have exposed this trust-estate to the risks attendant on holding all such stock, although it would have been quite easy to have sold it during any part of these four years; and in these circumstances I think the reasons they give for not having disposed of it are not sufficient to warrant me in holding that they should be freed from the present claim.

Lord Shand—I am of opinion with your Lordships that the petitioners have failed to show any sufficient ground for having their application granted to have their names removed from the register.

We have been referred in the course of the argument to the observations which fell from their Lordships in the House of Lords in the case of *Buchan*, 16 Scot. Law Rep. 512, with reference to the position of executors in relation to the stock of joint-stock companies belonging to their author—a position which is, no doubt, to some extent peculiar; but I think it unnecessary to deal with the argument so submitted, because already, in the case of *Wishart and Others*, which was decided on the 19th of July, 16 Scot. Law Rep. 808, the Court after very full discussion on the subject took occasion to express their opinion as to the peculiarities arising in the case of executors, and I refer to my opinion in that case.

The question in all such cases is really one of fact, whether the executors authorised the application to have the shares of the deceased trans-

ferred to their own names, or by their subsequent actings adopted and approved of any application to that effect made by the agent for the trust. If it be shown, as is frequently the case, that the executors had the intention to sell the stock immediately in place of holding it, certainly that circumstance is *prima facie* against the idea of their becoming partners and desiring to have their names placed on the register of the bank. But while that consideration is *prima facie* against such an idea, I must observe that in a case like this the presumption to that effect is not only weakened, but I think I may say is almost destroyed, when you find that the executors have held the stock for a period of four years, and where any intention to sell is without a distinct or definite limit in point of time. I think the facts of this case show, I shall not say that the executors authorised the application to transfer these shares to their names—for that, I think, is not proved—but that the executors adopted the act of their agent, who asked that the shares should be so transferred. And in noticing the facts, which I shall do very briefly, I do not think it necessary to refer to any dealings with reference to other stocks or parts of this executry estate, for I think the dealing of the trustees and executors with regard to this particular stock are quite sufficient for the decision of the question.

The material facts appear to be these—The executors held the shares from the 15th of September 1874 until October 1878, when the bank failed—a period of four years. The confirmation which was obtained shortly after Mr Gordon's death was sent in to the bank with an express request made by the agent for the trust that the stock should be transferred from the name of the deceased to the names of the executors. New certificates were applied for and were got, bearing that the stock stood in the name of the executors. Thereafter four transfers of different parcels of the stock were executed by the trustees in the course of the year 1875, within twelve months of the death of the truster. The executors signed no less than eight dividend warrants, extending over the period of four years during which they held the stock; and it appears that at least on one occasion, if not more, a certificate of the stock showing that it stood in their names was laid before the executors. I have already said that I think there is here no proof of antecedent authority, and I lay out of view the transfers of certain portions of the stock which were sold by the executors, because as these transfers were executed very shortly after the death of the truster, it may very properly be said that the trustees had no reason to know at that time that the stock had been transferred to their names. But there remain, nevertheless, these important facts, that they signed the dividend warrants to which I have referred, each of which bears on its face that the stock stood registered in the names of the executors, and that in addition to this the certificates of these stocks were brought directly under their notice. It would, I think, be going back upon a great deal that we have done in this liquidation if we were to hold that these facts were not sufficient to infer adoption of the act of the agent. We have parole evidence here in which one after another of the executors speaks to a certain amount of ignorance as to what had been done with regard to this stock, but for my part I think a great deal of that evidence must be disregarded. I should say that I think these gentlemen to a considerable extent must have forgotten facts which are proved by writings under their hands. For example, take the case of Mr Colville, who, by two letters dated so recently as July and August 1878, expressly recorded in his own writing that he held the certificates of this stock in the names of the executors, he being one of them and the factor of the trust. Take, again, the case of Mr Joseph Gordon. We find in the minute of meeting of 9th August 1878 these words:—"Mr Joseph Gordon stated that he had gone carefully over the accounts, compared it with the vouchers, and found it correctly stated and sufficiently vouched;" and one of these vouchers for one of the most important items in the estate was a certificate with reference to this very stock, showing that it stood in the name of the executors. And I think it is scarcely possible to distinguish the case of this gentleman from the others, because in the minute from which I have just quoted, these words follow:—"And some of the other trustees present stated that they too had gone over the said account and had found it correct." There follows upon this account the docquet which your Lordship has read, and taking the dividend warrants, the certificate of stock, the correspondence, this minute of meeting, and the docquet, I cannot resist the conclusion that these trustees were aware that the agent in the execution of the trust had required that these shares be transferred to the executors' names, and that the executors took the benefit of the registration by drawing the dividends and so acting as partners of this bank; and so, upon that ground, I am of opinion that the application fails.

But I must add that I think there is a second and independent view which is sufficient for the decision of this case, and that it is substantially ruled by the case of *M'Ewen* and others which was decided on 18th July last, 16 Scot. Law Rep. 771. I rather thought in the case of *M'Ewen* that the trustees who had acted for a considerable time did not in fact know that their names were on the register, but it appeared they had given a general authority to the agent to act in the trust, including a mandate to draw dividends, and that acting on that general authority the trustees' names or executors' names had been registered and dividends had been drawn over a period of years, and in these circumstances I was of opinion they were barred from maintaining right to have their names taken off the register. It appears to me that in such circumstances the rights of third parties have become involved to such an extent that trustees and executors are not entitled to undo an act of this kind, and have their names as partners of the bank removed from the register. The rights of creditors are certainly equal to those of partners. The partners of the bank are no doubt, under the terms of the contract, bound to submit to having an executry estate only upon their register for a certain time after the death of a partner in respect of the stock which such partner held. I am rather disposed to think that the effect of section 36 of this contract is to point out as the limit of that time a period of twelve months, but whether that be so or

not, either at the end of twelve months or at the end of a reasonable time thereafter, or a reasonable time after the death of the testator, the partners of the bank are entitled to have living shareholders on their register in place of the name of a deceased shareholder with his executry estate only standing there to meet the liabilities. And if executors put the management of an executry into the hands of an agent, and are aware that stock is being held for a period of years, I think they must be also held to be aware that there may be liabilities in the course of being incurred in the carrying on of such a bank business for which they may be becoming personally responsible. I hold that they are bound to make themselves to some extent acquainted with the provisions of a contract of copartnery of a company of which the deceased was a member, and particularly in relation to the footing on which they can for a period of time retain an interest with the other partners in the concern. To take the present case, if these executors had not been put on the register at the time they were, it may be presumed, I think, that at the end of twelve months, or within a short time thereafter, those in the management of the bank would have required either that the shares should be sold or that the executors should themselves become partners and so go on the register. But as the executors were already on the register and were each half-year recognising their position as shareholders by signing dividend warrants for the profits becoming due, those in the management of the bank were precluded from requiring that anything further should be done with regard to these shares. They could not require the shares to be sold, because the executors had taken them up. In that way, relying on the fact that the executors were upon the register, the other shareholders went on dealing with them, and creditors of the bank were entitled to rely upon the same circumstance. That being so, it appears to me that apart altogether from the facts, which I think here go clearly to show that these executors knowingly adopted the act of their agent—apart altogether from that—and looking to the general authority which the agent had—looking to the fact that the agent did put these gentlemen on the register, and that dividends were drawn for a period of years—I am of opinion that they are now barred, in a question with the shareholders or creditors of this bank, from demanding that their names shall be removed from the register.

It is said here that because of the intention to sell, which becomes very clear from the terms of a minute dated a few months before the bank failed, there should not be responsibility. But if a mere intention to sell were held to be sufficient to take off the effect of such acts as I have referred to, there seems to be no limit as to the time for which that might go on. In this case it was for four years. It might just as well be for eight or ten years, the trustees always waiting for a proper investment. I think it would be out of the question to say that executors should be so entitled to deal with stock.

It appears to me that this case raises no question between the trustees and the beneficiaries, but I think it right to say that I could scarcely concur with what has fallen from my brother Lord Deas as to the responsibilities of the trustees in that respect. I think under the eighth provision of this deed, which required that these trustees should as soon after the death of the testator as convenient proceed to realise the estate as it was left by the deceased and put it upon a safe class of securities, it would be very difficult to say that they had fulfilled their duty or obeyed the instructions of the truster.

The Court refused the prayer of the petition.

Counsel for Petitioners—M'Laren—Jameson. Agents—Carment, Wedderburn, & Watson, W.S.

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

Friday, October 24.

FIRST DIVISION

[Lord Rutherfurd Clark, Ordinary.

ADDIE & SONS *v.* HENDERSON & DIMMACK.

Arbitration—Disqualification—Where Arbiter also Referee.

A & H entered into a minute of agreement in 1872, whereby, *inter alia*, H was allowed to work minerals within a certain area, subject always to the opinion of G, a civil engineer, as arbiter. In 1878 G (who acted as standing engineer to A) advised him in an action against H in regard to coal workings in a distinct but neighbouring area. H subsequently having objected in 1879 to G acting as arbiter under the agreement of 1872, *held* that G was not disqualified in the circumstances from so acting.

This was a suspension and interdict raised by Messrs Robert Addie & Sons, ironmasters at Langloan Iron-works, Coatbridge, against Messrs Henderson & Dimmack, coal and ironmasters, Drumpellier, Coatbridge, who were tenants under Mr Buchanan of Drumpellier of certain coal and other minerals situated in the vicinity of the Langloan Canal and basin.

On 10th May 1872 the parties to this cause had entered into a minute of agreement with a view of settling certain litigations then in dependence between them. The second article of the agreement was as follows:—"The respondents (Messrs Henderson & Dimmack) shall have right to work the coal and other minerals, if any, let to them by said lease, beyond said area, and within the red lines marked G H I K L M N O on said plan, being a portion of the area which forms the subject of the second of said processes of suspension and interdict, subject to this restriction only, that they shall not be entitled to remove any of said coal and other minerals which in the opinion of Mr John Geddes, mining engineer, Edinburgh, whom failing Mr James M'Creath, mining engineer, Glasgow, will have the effect of injuring the Langloan Canal and basin or banks thereof, delineated on said plan, so that the same, or any of them, cannot be restored to such a condition as to be as available for use by the complainers as they respec-