name was there, but I knew that the 30 shares were registered in the names of Mr and Mrs Fyfe's trustees. I signed the warrant as one of Mr and Mrs Fyfe's trustees." He was a trustee, he signed as a trustee, and he knew that the shares were registered in the names of the trustees. My Lords, I can readily believe that Mr Ker, being at a distance from Greenock, may have subsequently forgotten much about this; but unfortunately the facts cannot be got over, and they appear to me clearly to establish both his trusteeship and his assent to the transfer of the stock into his name.

It was attempted to be argued that in 1868, after the death of Mr Fyfe, the appellant by letter of the 4th of April 1868, resigned the trust, and that the other trustees afterwards acted as if they were the sole trustees. I should doubt whether the letter in question bore the formal character of a resignation of the trust; but even supposing it to have been a resignation, it was not in any manner intimated to or acted upon by the bank, and the case in that respect comes under the authority of the previous decisions of your Lordships.

On the whole, I have to move your Lordships that the interlocutor appealed from be affirmed, and the appeal dismissed with costs.

Lord Hatherley—My Lords, after the decisions which have already been come to by your Lordships, there is really no question of law remaining for decision in this case. The facts are plain and conspicuous. I am of opinion that the appellant became a trustee, and that he sanctioned the entry of his name upon the register as the owner of the shares.

Lord O'Hagan—My Lords, this is a peculiarly hard case; but the decisions at which your Lordships have already arrived appear to me conclusively to establish the appellant's liability.

It would be idle to repeat the full statement of all the facts which has been made by the Lord Chancellor. They result in this, that although the settlement of Mr Fyfe was not executed by the appellant, he was named in it as a trustee, described himself as such under his own hand, acted as such in accepting the transfer of railway stock, and by the dividend warrant of the 7th August 1856, at once demonstrated his knowledge that the bank shares had been vested in him and his co-trustees, adopted the acts by which they were vested, and assumed all the responsibility arising from the possession of them. That document seems decisive against him, unless he subsequently got rid of the responsibility of which it was the evidence. But he never got rid of it. He never resigned the trust which he had accepted. He seems to have desired to resign it, and to have suggested his resignation, but the desire and suggestion were not carried into effect; and the correspondence shows, in its reference to the proposed meeting of the trustees and otherwise, that he did not regard himself as relieved from this trust. Even if there had been a resignation, it was not, confessedly, communicated to the bank; it was not used to remove his name from the register, so that creditors and shareholders might know of the loss of such security as it had afforded them; and it would have been ineffectual to nullify that security. I do not rely on the effect of his position as agent at Greenock, which appears to have been regarded in the Court of Session as strengthening the case against him; but, on the grounds that he accepted the transfer, and by no subsequent act denuded himself of the liability that they imposed upon him, I feel reluctantly obliged to concur in the proposal of my noble and learned friend.

Lord Selborne—My Lords, I agree.

Lord Gordon—My Lords, I concur.

Interlocutor appealed against affirmed, and appeal dismissed, with costs.

Counsel for Appellant — Higgins, Q.C. — M'Learn. Agent—Andrew Beveridge, Solicitor.

Counsel for Respondents—Kay, Q.C.—Benjamin, Q.C.—Davey, Q.C.—Kinnear. Agents—Martin & Leslie, Solicitors.

Tuesday, May 20.

(Before Lord Chancellor (Cairns), Lord Hatherley, Lord Selborne, and Lord Gordon.)

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

(In Court of Session, Jan. 22, 1879, *ante*, p. 238.)

Public Company—Partnership—Reduction of Contract—Fraud—Recission of Contract—Commencement of Winding-up—Act 25 *and* 26 *Vict. c.* 89 (*Companies Act* 1862), *secs.* 18, 38, 84, 130.

A shareholder in a joint-stock bank, which was registered under the Companies Act of 1862, raised an action of reduction of his contract, alleging that he had been induced to purchase stock through the fraudulent misrepresentations of the directors and the manager. The summons was served on the day before that on which it was resolved to wind-up voluntarily, but after the bank had stopped payment, and after the directors had published a notice summoning a meeting of shareholders for the purpose of passing a resolution to wind up voluntarily, and also after certain men of business, who had been appointed by the directors to make an investigation into the affairs of the bank, had published a report which showed that there was a deficit of over £5,000,000.

In a petition by the shareholder to have his name removed from the register of members and the list of contributories, and to stop calls—*held* (*aff.* judgment of Court of Session) that after the advertisement of the notice of meeting the directors were not entitled to make any alteration in the *status* of the shareholders, whether by a transfer or by a repudiation of shares which would affect the rights of creditors of the company.

Observed by the Lord Chancellor (Cairns) that the question whether a contract to take shares in a company can be rescinded on the ground of fraud up to the date of the commencement of a winding-up must always de-

pend upon the particular circumstances of the case.

This was an appeal at the instance of Mr Hugh Tennent against a judgment of the First Division of the Court of Session refusing a petition at his instance, in which he sought to have his name removed from the list of contributories of the City of Glasgow Bank. The circumstances of the case are sufficiently narrated in the report of the case in the Court of Session, *ante*, p. 238, and in the opinions of their Lordships in the House of Lords *infra*.

At delivering judgement—

LORD CHANCELLOR—My Lords, the facts of this case lie in a very narrow compass.

The appellant is the holder of £6000 stock in the bank, £5000 of this stock he bought in the years 1872 and 1873 from trustees who held it for the bank, and £1000 was allotted to him by the bank in 1873. After the bank stopped payment, as your Lordships have heard in the other cases, the directors employed accountants to make a report upon its affairs. This report was made on the 18th of October 1878, and was on that evening sent by post to the shareholders. The appellant received his copy of the report on the 19th of October, and thereupon he discovered, as he alleges, that he had been induced to take the stock in the bank by fraudulent misrepresentations of the directors. The 20th of October was a Sunday, and on the 21st of October he commenced an action in the Court of Session for reduction of his contract as a shareholder with the bank. The resolutions to wind up the company voluntarily were passed on the following day — the 22d of October—and on the 13th of December, the name of the appellant having been put by the liquidators on the list of contributories, he presented a petition to have his name removed, which petition was refused, and hence the present appeal.

My Lords, I ought to assume, and will assume for the present purpose, that whatever difficulties arising from lapse of time and other circumstances might—as between the appellant and the bank—lie in the way of his succeeding in the action of reduction he has instituted, he would have been entitled, had the bank been a going concern, to have succeeded in the action. The question is—Can he succeed in rescinding his contract after the bank has stopped payment?

The Lord President states that the law upon this subject is contained in three propositions. In the first place, a contract induced by fraud is not void, but only voidable at the option of the party defrauded. Secondly, this does not mean that the contract is void till ratified, but it means that the contract is valid till rescinded; and thirdly, the option to void the contract is barred where innocent third parties have, in reliance on the fraudulent contract, acquired rights which would be defeated by its recission.

Upon the two first of these propositions there cannot, I should think, be any dispute; and none was raised in the argument at your Lordships' bar. Nor was there any dispute as to the principle of the third proposition. The only question was as to its precise wording, and the extent and mode of its application.

The case of *Oakes* v. *Turquand* (L.R., 2 Eng. and Ir. Apps. 325) in this House has established that it is too late, after a winding-up has commenced, to rescind a contract for shares on the ground of fraud. This, no doubt, is on the grounds stated by the Lord President, that innocent third parties have acquired rights which would be defeated by the recission. The case of *Oakes* v. *Turquand*, however, while it decided negatively that a contract could not be rescinded on the ground of fraud after a winding-up had commenced, did not decide affirmatively the converse proposition, that up to the time of the commencement of a winding-up a contract to take shares could be rescinded upon the ground of fraud. Whether it can or not be so rescinded up to that time must, I think, depend upon the particular circumstances of the case.

In an ordinary partnership not formed on the joint-stock principle, it is impossible, as a general rule, for a partner at any time to retire from or repudiate the partnership without satisfying or remaining bound to satisfy the liabilities of the partnership. He may have been induced by his copartners by fraud to enter into the partnership, and that may be a ground for relief against them; but it is no ground for getting rid of a liability to creditors. This is the case whether the partnership is a going concern or whether it has stopped payment or become insolvent. In the case of a joint-stock company, however, the shares are in their nature and creation transferable, and transferable without the consent of creditors; and a shareholder, so long as the company is a going concern, can by transferring his shares get rid of his liability to creditors either immediately or after a certain interval. The assumption is, that while the company is a going concern no creditor has any specific right to retain the individual liability of any particular shareholder.

It is on the same or on a similar principle that so long as the company is a going concern a shareholder who has been induced to take up shares by the fraud of the company has a right to throw back his shares upon the company without reference to any claims of creditors. He would have a right to transfer his shares without reference to creditors. The company is a going concern, is assumed to be solvent and able to meet its engagements, and to have a surplus; and, the company being solvent, its duty to pay the repudiating shareholder what is due to him, and to take the shares off his hands, is an affair of the company and not of its creditors.

But if the company has become insolvent, and has stopped payment, then, even irrespective of winding-up, a wholly different state of things appears to arise. The assumption of new liabilities under such circumstances is an affair not of the company but of its creditors. The repudiation of shares which, while the company was solvent, would not or need not have inflicted any injury upon creditors, must now of necessity inflict a serious injury on them. I should therefore be disposed in any case to hesitate before admitting that after a company has become insolvent and stopped payment, whether a winding-up has commenced or not, a recission of a contract to take shares could be permitted as against creditors.

But in the case before your Lordships the facts are extremely peculiar, and I do not think that your Lordships in affirming the judgment of the Court of Session will find it necessary to lay down

any general rule extending beyond the particular facts of the present case. The bank stopped payment on the 2d of October, and never resumed business, its stoppage being caused by its insolvency. It is admitted that the Directors knew at the time of the stoppage that the insolvency of the bank was irretrievable. On the 5th of October the directors convened an extraordinary general meeting of the shareholders by advertisement for the 22d, for the purpose of considering, and, if thought fit, passing extraordinary resolutions under the Companies' Act for the purpose of winding-up the bank voluntarily by reason of its insolvency. These were steps taken by the directors of the bank as the agents and representatives of the shareholders, and there was imposed upon the shareholders whatever responsibility may fairly be inferred from the steps so taken. Now at this time, and for several days after, indeed, until the 21st of October, the appellant was to all intents and purposes a shareholder in the bank, not having taken any steps to disaffirm his contract, and the directors during this time were, and were acting as, his agents.

I have already had occasion to point out to your Lordships in other cases what appeared to me to be the necessary consequence of the steps which the directors thus took. The bank having stopped payment, and its insolvency being well known, it was scarcely within the bounds of possibility that, if nothing had been done by the directors the creditors, or some one creditor, should not, within a few days after the 2d of October, have presented a petition for the winding-up of the bank, and with the presentation of such a petition the winding-up of the bank would have commenced, and the repudiation of any share would, according to the case of *Oakes* v. *Turquand*, have become impossible. It was the action of the directors taken in the interest of the shareholders, including the appellant, and taken under the authority of the 46th article of the deed of the company, which, by holding out to the body of creditors the prospect of a voluntary winding-up, stayed the hands of the creditors from proceeding to a compulsory winding-up; and, in my opinion, it became impossible, after the advertisement of the 5th of October, for the body of shareholders in the company, whose agents the directors were, to make any alteration in their *status*, whether by a transfer or by a repudiation of shares, which would affect the rights of creditors in the company.

This consideration alone seems to me to be sufficient to dispose of the present appeal, and I have to move your Lordships that the appeal be dismissed, with costs.

Lord Hatherley—I agree, my Lords, in the statement of facts which has been made by my noble and learned friend, and in the conclusions he has drawn from them.

Lord Selborne—My Lords, I entirely agree.

Lord Gordon—I concur.

Interlocutor appealed against affirmed, and appeal dismissed with costs.

Counsel for Appellant—

Counsel for Respondents—Kay, Q.C.—Benjamin, Q.C.—Davey, Q.C.—Kinnear.

Tuesday, May 20.

(Before the Lord Chancellor (Cairns), Lord Hatherley, Lord O'Hagan, Lord Selborne, Lord Blackburn, and Lord Gordon.)

CITY OF GLASGOW BANK LIQUIDATION—(*NELSON MITCHELL'S CASE*)—NELSON MITCHELL, PETITIONER *v.* THE LIQUIDATORS.

(In Court of Session December 21, 1878, *ante*, p. 155.)

Public Company—Sale of Bank Stock—Registering Sale after Stoppage of Company—Companies Act 1862, *sec.* 35.

A sale of bank stock was made upon a stock exchange on 28th and 30th September, the settling-day being the 16th October. Before the settling-day the bank, who were the purchasers of the stock, suspended payment. On the 16th October, the bank having previously declined to execute a transfer of the stock, a transfer was tendered to them, but they declined to accept or register it. On the 22d a winding-up resolution was passed, following upon a notice of motion to that effect issued to the shareholders by circular on the 5th.

In a petition at the instance of the seller to have his name removed from the list of contributors in respect that the bank was real proprietor of the stock — *held* (*aff.* the judgment of the Court of Session) that in the circumstances the directors were neither bound nor entitled to make the required alteration upon the register, and there was thus no ground for the contention that there had been "default" or "unnecessary delay," under section 35 of the Companies Act 1862, in respect of their neglect to do so.

Opinion reserved as to the effect of the 1st section of Leeman's Act (30 Vict. cap. 29) upon the validity of the sale of stock in question, it having been averred that the brokers' contract did not "set forth the person or persons in whose name or names" the stock stood as registered proprietor at the date of the sale.

This was an appeal at the instance of Mr Nelson Mitchell against a judgment of the Court of Session, who had refused a petition at his instance praying to have his name removed from the list of contributories to the City of Glasgow Bank. The circumstances are sufficiently detailed in the report of the case in the Court of Session, *ante*, p. 155, and in the opinions of their Lordships in the House of Lords (*infra*).

At delivering judgment—

Lord Chancellor—My Lords, the appellant in this case sold on the Glasgow Stock Exchange certain stock belonging to him in the City of Glasgow Bank. The sales were made on the 28th and 30th September 1878, the settling-day being the 16th of October. The brokers who bought for the bank—and there is no doubt that the bank had authority to buy their own stock under their