Counsel for Defender (Respondent)—Lord Advocate (Watson)—Keir. Agent—Neil M. Campbell, S.S.C.

*Friday, March 7.**

FIRST DIVISION.

CITY OF GLASGOW BANK LIQUIDATION—(*MYLES' CASE*)—DAVID MYLES (KIDSTON'S TRUSTEE) *v.* THE LIQUIDATORS.

Public Company—Liquidation—Register of Members—Liability of Trustee in a Sequestration where not on Register.

An agreement was entered into between the trustee on a bankrupt estate and a creditor thereon that the trustee should complete a title to certain stock in a banking company belonging to the bankrupt in order to make it over to the creditor, who had a preferable right to it. The trustee sent his confirmation to the bank with the old certificate, and requested that a new certificate should be issued in his own name. The bank in reply informed him that his confirmation had been registered in the bank books. Upon the bank thereafter stopping payment, it appeared that the trustee's name had not been entered on the register of members until after the stoppage, when it was inserted by the transfer-clerk without special instructions from the directors or the manager. In a petition for the removal of the trustee's name from the register of members and the list of contributories,—*held* (1) that the entry was made after the stoppage, and could therefore receive no effect; and (2) that in the circumstances, and looking to the terms of the bank's contract of copartnery, the trustee was under no obligation to have his name entered on the register, except to the creditor, who did not seek to enforce the agreement he had made; petition therefore granted.

Observations (*per* Lord President Inglis) on the duties and liabilities of a trustee in a sequestration.

The estates of William Kidston, formerly agent in St Andrews of the Clydesdale Bank, were sequestrated on 31st May 1876, and the petitioner David Myles, accountant, Dundee, was thereafter appointed trustee. On 13th June following a claim was lodged by the trustees of the late John Brown, tailor, St Andrews, to be ranked for £600 and interest, contained in a bill granted by the bankrupt on 4th January 1871, but subject to deduction of the value of £100 stock of the City of Glasgow Bank, which they alleged they held in part security of their debt. The petitioner, however, forwarded to the bank his act and warrant of confirmation as trustee, but he was informed in answer that an assignation of the stock to Mr Brown's trustees had been intimated to the bank sometime previously, and his act and warrant was returned. It appeared that on 4th January 1871 the bankrupt had borrowed £600 from Brown's trustees, in security of which he had granted them a promissory-note, and had deposited with them, *inter alia*, the certificate of the stock in question, and had at the same time given them a letter binding himself when required to execute in their favour a formal and valid transfer. It further appeared that on 26th May 1876, five days before his sequestration, he had executed a transfer in favour of Brown's trustees which they had forwarded to the bank for registration; and that the bank had refused to recognise the transfer, as it had not been regularly prepared. Accordingly Brown's trustees, on 13th June subsequently, notarially intimated the transfer as an assignation to the bank.

Thereafter certain correspondence passed between the petitioner and Mr Grace, writer, St Andrews, agent for Brown's trustees, which was brought to a conclusion by an offer on the part of Mr Grace, dated 19th August 1878, to pay the petitioner "a sum of £30, on condition of your completing a title to the stock in question as trustee, and thereupon making over the same to Mr Brown's trustees, in such form as the constitution of the bank will admit, with all dividends which have accrued thereon." This offer the petitioner accepted, by letter of date 27th August, "on condition that all expense necessarily incurred by Mr Brown's trustees or me in making up my title to the stock, and conveying the same to them, shall be borne by the trustees." To this Mr Grace agreed, and by letter of 2d September sent to the petitioner the stock certificate, "in order that you may complete a title to it, and make over the same to my clients. When you have obtained a certificate in your own name as trustee, please send it to me, in order that I may prepare a transfer by you to Mr John Brown's trustees." On 3d September accordingly the agent for the petitioner sent this letter to the secretary of the bank—"I send herewith a certificate, No. 31,101, and dated 19th November 1869, in name of William Kidston, banker, St Andrews, as holder of £100 of the stock of the City of Glasgow Bank. I also send the act and warrant confirming Mr David Myles, accountant, Dundee, trustee on Mr Kidston's estate. Be so good as send me a new certificate in name of Mr Myles as trustee, and at the same time return the act and warrant. You will doubtless recollect that there was a dispute between Mr Myles and the trustees of the late Mr John Brown, St Andrews, in regard to this stock, and you declined to enter Mr Myles' name on the register, on the ground that a previous assignation to Brown's trustees had been intimated to you in an informal way. That dispute is now settled, Brown's trustees having agreed to pay Mr Myles a sum of money in consideration of his completing a title to the stock and then making it over to them."

Before complying with this request, the bank required the formal withdrawal of the intimation and protest lodged by Brown's trustees on 13th June 1876. This was done, and on 11th September the clerk in charge of the transfer department of the bank prepared a memorandum of transfer of the stock from the bankrupt to the petitioner, as trustee in his sequestration, and thereafter registered the transfer in the register of transfers of the bank. The law secretary of the bank also, on the same day, wrote to the petitioner's agent that he had registered the petitioner's act and warrant in the bank's books, and now returned it, and added—'I have not sent

* Decided February 28, 1879.

you a certificate, as you say the stock is to be transferred to the trustees of Mr Brown." As matter of fact, the petitioner's name as trustee was not entered in the stock ledger of the bank until after it had stopped payment. Wardrop, the clerk in charge, was absent on his holiday, and made the entry on his return without special authority, sometime between the 2d and the 18th October.

In order to carry out the agreement between the petitioner and Brown's trustees, a form of transfer had been supplied by the bank officials to Mr Grace, and a draft transfer was thereafter prepared by him and revised by the petitioner's agent, and on 25th September forwarded to the bank for approval by the directors, and to be extended. It was received by the law secretary of the bank on the morning of Thursday 26th September, but it was not laid before the meeting of directors which was held on that day—their last ordinary meeting. After the stoppage the directors refused to prepare or register any transfers.

This petition prayed the Court to order the register of members and list of contributors to be rectified by deleting the name of the petitioner, and inserting either the names of Brown's trustees or that of the bankrupt Kidston.

The petitioner contended that his name had been unwarrantably entered upon the register of members and placed upon the list of contributories, "in respect that it was not in the contemplation either of the petitioner or of the said bank that the petitioner should become a member or partner of the said bank, but only that the act and warrant in his favour should be registered as a step, and as it was thought a necessary step, in a convenient method of making up a title to the said stock in name of the said John Brown's trustees, who were the true proprietors of the said stock; that there was undue delay on the part of the said bank in completing the contemplated transfer of the said stock to the said John Brown's trustees; and that the said bank were not entitled at their own hand, after their supension of payment, or at all events at the time they did, to complete the transfer of the said stock to the petitioner by entering his name on the register of shareholders of the said bank, if they did not intend to complete, or were unable to complete, the true object of the whole transaction by transferring the said stock to the names of the said John Brown's trustees."

Brown's trustees lodged answers, in which they pleaded, *inter alia* (1) that the prayer of the petition, so far as directed against them, was not warranted by the statute; and (3) "that the proposed sale is void and of no effect in a question with the respondents, and the respondents were and are entitled to cancel and repudiate the same."

The arguments and authorities as between the petitioner and the bank were substantially the same as in the case of *Macdonald Hume's Executors, supra*, p. 290.

At advising—

Lord President—The petitioner was on 16th June 1876 confirmed trustee on the sequestrated estate of William Kidston, formerly agent for the Clydesdale Bank at St Andrews. At the date of the sequestration the bankrupt stood on the register of the City of Glasgow Bank as holder of £100 consolidated stock; but when the petitioner proposed to deal with this stock as an asset of the sequestrated estate he was informed by the law secretary of the bank that the stock had been assigned by the bankrupt in security to Brown's trustees, who were his creditors for £600 advanced by them in loan so far back as 1871. On further inquiry the petitioner found the true state of the facts to be that Kidston had granted a promissory-note for the amount to Brown's trustees on 4th January 1871, handing over to them at the same time the stock certificate of the £100 stock, and a letter binding himself when required to execute a formal transfer of the stock; that on the 26th May 1876, within five days of his sequestration, he executed in their favour a transfer of the stock, which Brown's trustees accepted and forwarded to the bank for registration, but the bank refused to register the transferees because the transfer had not been prepared by the bank officials and laid before the directors, in terms of the bank's contract of copartnership, and Brown's trustees took a notarial protest against this refusal, and intimated the transfer to the bank as an assignation.

After some negotiation an agreement was made between the petitioner and Brown's trustees, who were creditors claiming in the sequestration, which agreement was embodied in a letter by Mr Grace, as agent for Brown's trustees, to the petitioner, dated 19th August 1878, a letter by the petitioner to Mr Grace dated 27th August 1878, and a letter by Mr Grace to the petitioner dated 2d September 1878. The substance of the agreement was, that on payment of £30 by Brown's trustees to the petitioner, the petitioner should "complete a title" or "make up a title" to the bankrupt's stock in the bank, and then "make over the same to Brown's trustees in such form as the constitution of the bank will admit." To enable this arrangement to be carried into execution, Brown's trustees withdrew their protest above mentioned, and the petitioner's agent wrote to the secretary of the bank on 3d September explaining the arrangement which had been made, sending the act and warrant of confirmation of the petitioner as trustee, and requesting that a fresh certificate of the stock should be sent to him in the petitioner's name. To this the secretary on 11th September replied—"I have registered the act and warrant in favour of Mr Myles in the bank's books. I have not sent you a certificate, as you say the stock is to be transferred to the trustees of Mr Brown." Mr Grace then prepared, according to a form sent to him by the bank, a draft of transfer by the petitioner to Brown's trustees, which he sent to the bank on the 23d September; and on the 26th the secretary of the bank replied, "I am in receipt of yours of yesterday sending draft transfer, the trustee on Kidston's estate to the trustees of the late John Brown. When the transfer has been passed by the directors I shall get the deed extended and sent to you for signature." The transfer never was passed by the directors, and no further steps had been taken to complete the transaction when the bank stopped payment on the 2d of October. The statement in the secretary's letter of the 13th September that the act and warrant in favour of Mr Myles was then registered in the books of the company is

not consistent with fact if it means that the petitioner's name was entered, or in any way appeared, in the register of shareholders.

The facts as regards this part of the case are almost identical with those which occurred in the case of *Macdonald Hume's Executors*, Feb. 7, 1879, *ante*, p. 290, and some other cases recently decided by the Court. The name of the petitioner was not entered in the register till after the stoppage of the bank, at some indefinite time between the 2d and 18th October, when, without any special authority or instructions, it was entered by the clerk Wardrop.

For the reasons stated in the former cases, I am of opinion that that entry was improperly made and can receive no effect, and that the case must be dealt with as if it had never been made. Whether, in the very peculiar circumstances of this case, the petitioner would have been in law a partner of the company, even if his name had been entered in the register on the 11th September, as inaccurately stated by the secretary, I do not stop to consider, because, as he was not on the register when the bank stopped and declared its insolvency, I am opinion that there is no ground for now placing him on the list of contributories. The petitioner consented in his agreement with Brown's trustees to complete a title to the bankrupt's stock in the bank only for the purpose of enabling him to transfer the stock to them. He was under no obligation to anybody else to permit his name to be put on the register of shareholders, and most certainly it was no part of his duty as trustee in a sequestration to take such a step, and Brown's trustees did not seek to enforce their agreement with him.

The trustee in a sequestration represents both the creditors and the bankrupt. He represents the creditors, as holding the bankrupt estate in trust for their benefit, for the purpose of distribution among them, according to their several rights and preferences, and also as their official organ in the exercise of their statutory powers and the assertion of their statutory privileges in the sequestration. He represents the bankrupt, as the assignee of his estate, and of the stock as it stood in the bank; and he also stands in a fiduciary character so far as concerns any possible surplus or reversion. He represents both the creditors and the bankrupt, but he does not represent the latter in his liabilities, beyond the duty which is incumbent upon him of ranking the creditors upon the estate according to their legal rights. From this it follows that the trustee does not by his acceptance of office and confirmation and taking possession of the estate bind either himself or the creditors, *ultra valorem* of the bankrupt estate, in any continuing obligations or contracts bearing *tractus futuri temporis*, which according to their terms continue current after the sequestration has commenced.

But if the trustee, with the authority of the creditors, adopt such a contract, and takes the benefit of it for the creditors, he will either bind the creditors directly, or such of them as gave the authority, or he will bind himself personally, with relief against the creditors, to perform all the obligations of the contract. If, again, the trustee adopt such a contract without the authority of the creditors, he will render himself only personally answerable.

This is trite law, settled by a series of decisions commencing very soon after the first introductions of the process of mercantile sequestration, and receiving its most authoritative exposition in the well-known case of *Kirkland* v. *Caddell*, March 9, 1838, 16 S. 860, which was before the whole Court. These cases also imply that the purpose of adopting such contracts is not to be readily presumed, but must be evidenced by some overt and unequivocal act, or by receiving the benefit, which is under the contract the consideration of the continuing liability. The application of these principles to a partnership in which the bankrupt is engaged is sufficiently clear, whether the partnership be an ordinary trading concern or a joint-stock company. For the purpose of realising the bankrupt's interest in this concern the trustee has no occasion to become a partner of the company or incur any of the liabilities of a partner. If he does so, he is going beyond his statutory powers and duties. But every species of moveable estate is so vested in the trustee by the 103d section of the Bankruptcy Act 1856 that he can sell any portion of it without the necessity of a formal conveyance to himself, and even if a conveyance by the trustee to a purchaser of shares in a joint-stock company were objected to as insufficient, the bankrupt, who is the registered partner, would be bound to concur with the trustee in granting the necessary transfer.

But further, in the case of the City of Glasgow Bank the mode of dealing with the shares of a bankrupt partner is specially provided for by the 35th article of the contract of partnership. On the occurrence of bankruptcy the directors are empowered to adopt one or other of two alternatives, either—first, to require the bankrupt's shares to be sold within six months, and failing that being done, to sell them themselves; or, second, to retain and appropriate them for behoof of the company at the current market value; the directors in either case accounting to the creditors for the price or value, after deducting any debt due by the bankrupt to the company. Taking this provision, in connection with the right of the directors under article 34 of the contract, to reject any proposed transferee of shares, and take the shares proposed to be transferred to themselves for behoof of the company, it is clear that the petitioner could not demand as matter of right that he should be registered as a partner of the company in place of the bankrupt, and just as clear that the directors could not require the trustee to allow his name to be entered on the register as a partner. Any arrangement, therefore, by which he is in fact so entered must be purely voluntary on both sides.

In the present case the petitioner, as trustee in Kidston's sequestration, in consideration of a right or supposed right which Brown's trustees had acquired from Kidston before his bankruptcy to his stock in the bank, agreed with them that they should have this stock on paying to him, for the behoof of the creditors, the sum of £30, and that he should make up a title to the stock and immediately convey it to Brown's trustees. This was a binding agreement as between the petitioner and Brown's trustees; but the directors of the bank, if they can be said to be parties to the agreement at all, were so only for

the purpose of giving their consent to its being carried out in the particular form arranged between the contracting parties. They had no interest in its being carried out in this rather than in another, and what would have been a very legitimate and regular, form. They neither gave nor received any consideration for consenting to its being done in the form proposed. They were willing to accept Brown's trustees as transferrees of the stock, and they had no interest in the petitioner becoming for a few days or a few hours a holder of this stock for the purpose of transferring it to Brown's trustees. If, therefore, Brown's trustees and the petitioner had cancelled their agreement, the Bank had no *jus quæsitum* under it which they could have enforced. But when the stoppage of the Bank occurred without the agreement having been carried into execution, without the petitioner having been entered in the register of shareholders, without any transfer by him to Brown's trustees having been accepted or registered, the agreement between the petitioner and Brown's trustees fell to the ground; the subject of the agreement had become worse than valueless, and if the only parties having any right or interest under the agreement did not seek to enforce it the bank had no title or right to insist that it should be executed either in whole or in part.

The result seems inevitable as far as the present question is concerned. The petitioner, at the date of the stoppage of the bank, and when its hopeless insolvency was declared, was not on the register, and any attempt to put him on afterwards by the bank officials was on their part improper and illegal. Had the petitioner, then, agreed to become a member of the company? Whatever he may have undertaken to Brown's trustees, he had not so agreed either with the bank or with a seller or transferrer of shares. He had no doubt agreed with Brown's trustees to do something which, if it had been carried out, would it is said have put his name on the register; but that was an agreement in which neither the bank nor its creditors nor shareholders had any right or interest.

In my opinion, therefore, the liquidators, who represent nobody else than the bank, its creditors and shareholders, have no ground for placing the petitioner's name on the list of contributories.

Lord Deas—There are a number of special circumstances in this case. If I were to go into them I should find grounds for granting the prayer of this petition on more limited views than have been taken by your Lordship, but they would certainly remain circumstances which would lead me to the same result, and that being so I do not think it necessary to say anything but that I concur in the result.

Lord Mure and Lord Shand concurred.

The Court directed the liquidators to remove the name of the petitioner from the register and from the list of contributories.

Counsel for Petitioners — Lord Advocate (Watson) — M'Laren — H. Johnston. Agents—Morton, Neilson, & Smart, W.S.

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

Counsel for Brown's Trustees—R. V. Campbell. Agents—Maitland & Lyon, W.S.

Thursday, March 6.

FIRST DIVISION.

[Lord Adam, Bill Chamber.

TENNENT (M'MILLAN & CO.'S TRUSTEE) *v.* MARTIN & DUNLOP AND OTHERS.

Bankruptcy—Recal of Sequestration—Delay—Bar—Bankruptcy (Scotland) Act 1856, *sec.* 31.

A creditor presented a petition in the Sheriff Court praying for sequestration of the estates of a bankrupt. Two days afterwards the bankrupt, with concurrence of a creditor duly qualified, presented a petition in the Bill Chamber also asking for sequestration, which was as matter of course awarded. Following on the latter petition, a trustee in bankruptcy was appointed, meetings of creditors were held, two public examinations of the bankrupt took place, and part of the estate was realised. Thirty-six days after the second deliverance the petitioner in the first sequestration presented a petition for recal of the second. In these circumstances the Court (*rev.* Lord Adam, Ordinary) *refused* the petition, on the grounds (1) that it was inexpedient to recal the sequestration looking to what had followed upon it, and (2) that the petitioner was barred from bringing his petition after having homologated the second sequestration.

Remarks (*per* Lord President Inglis) on the cases of *Jarvie* v. *Robertson*, Nov. 25, 1865, 4 Macph. 79; *Kellock* v. *Anderson*, Dec. 14, 1875, 3 R. 239; and *Ballantyne* v. *Barr*, Jan. 29, 1867, 5 Macph. 330.

This was a petition by Alexander Tennent, trustee on the sequestrated estates of M'Millan & Co., clothiers, Glasgow, and as such a creditor on the estate of Robert Dunlop, sole partner of the firm of Martin & Dunlop, civil engineers and surveyors, Glasgow.

On 4th December 1878 the petitioner presented a petition to the Sheriff in the Sheriff Court of Lanarkshire for sequestration of the estates of Robert Dunlop. On that date the petition was ordered to be intimated to the bankrupt, which was done and an abbreviate of the deliverance was recorded in the Register of Inhibitions.

Two days afterwards, on 6th December 1878, Martin & Dunlop, and Robert Dunlop as sole partner, with the concurrence of a creditor to the amount required by the statute, presented a petition in the Bill Chamber for the sequestration of the estates of the firm, and of himself as the sole partner of the firm and as an individual. And on the same day a deliverance sequestrating the estates was, as matter of course, pronounced. Following upon this deliverance certain proceedings took place. Two meetings of creditors were held, at the first of which Mr Robert Tosh, accountant in Glasgow, was appointed trustee, and he was subsequently confirmed in office.