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.

Two public examinations of the bankrupt were also held, and an order for a third was pronounced; it was also admitted that part of the estate had been realised.

On January 11, 1879, thirty-six days after the deliverance in the Bill Chamber, a petition was presented by Mr Tennent, opposed by Martin & Dunlop and Mr Tosh, praying for recal of the Bill Chamber sequestration. He submitted that it was "incompetent and illegal in respect that at the date of its presentation there was a pending process of sequestration which still remains undisposed of; further, in respect the estates craved to be sequestrated under both petitions are one and the same, and further, because it will alter the true date of the sequestration, and preferences may be acquired in consequence."

The respondents Martin & Dunlop and Robert Dunlop and their trustees submitted in answer *inter alia*—"(3) The sequestration process against the said Robert Dunlop has not been insisted in, but has practically been departed from, and has been superseded by the sequestration of Martin & Dunlop and Robert Dunlop; (5) the petitioner homologated the sequestration process of Martin & Dunlop, and by his actings, and also by failing within due and reasonable time to take action, has barred himself from objecting thereto; (6) the whole creditors of the said Martin & Dunlop and Robert Dunlop, with one or two exceptions, concur in desiring the present sequestration to continue."

The Lord Ordinary on the Bills (Adam) pronounced this interlocutor—"The Lord Ordinary having heard counsel for the parties, Recals, in *hoc statu*, the interlocutor pronounced on the 6th December last, under the petition of Martin & Dunlop, civil engineers, architects, and surveyors, Glasgow, and Robert Dunlop, the only partner of said firm, and as an individual, with concurrence of John Service, measurer, Glasgow: Appoints the judgment of recal to be entered in the Register of Sequestrations, and on the margin of the Register of Inhibitions, all in terms of the 31st section of the Bankruptcy (Scotland) Act 1856: Remits the said petition to the Sheriff of Lanarkshire: Finds no expenses due to or by any party.

"*Note.*—[*After narrating the facts*]—The Lord Ordinary thinks that the course which should be followed here is that which was followed in the case of *Jarvie* v. *Robertson*, Nov. 25, 1865, 4 Macph. 79, and *Kellock* v. *Anderson*, Dec. 14, 1875, 3 R. 239, and that the sequestration awarded in the Bill Chamber should be recalled in *hoc statu*.

"The Lord Ordinary does not think that the petitioner is barred from insisting in this petition, in respect of his having appeared in the sequestration, which has now been recalled, or in respect of any of his proceedings therein—*Ballantyne* v. *Barr*, Jan. 29, 1867, 5 Macph. 330; but he has not allowed him expenses, because of his delay in having had recourse to the present proceedings."

The respondents reclaimed, and argued—(1) The petitioner was barred from bringing this petition, as he had homologated the second sequestration, and (2) even if he were not barred, the matter being one for the discretion of the Court, considering all that had taken place, it would not be expedient to grant the petition. *Ure* v. *M'Cubbin*, May 28, 1857, 19 D. 758.

The petitioner rested his case on the authorities quoted in the Lord Ordinary's note, and stated, but without showing any ground for the statement, that the two days between the two deliverances had been used by the bankrupt to give a preference to certain unspecified creditors.

At advising—

Lord President—In this case Mr Tennent, as trustee on the sequestrated estate of Messrs M'Millan & Co., presented a petition to sequestrate the estate of Mr Dunlop the sole partner of the firm of Martin & Dunlop, Glasgow, and in that petition a deliverance was pronounced on 4th December 1878 granting warrant to cite Mr Dunlop to show cause why sequestration should not be awarded. This was intimated to the debtor, who two days after that himself made an application in the Bill Chamber, with concurrence of a creditor to the amount required by the statute, praying for sequestration. The usual deliverance awarding sequestration was pronounced in that petition. No *inducice* are required, and if the matter stood there the case would have presented the same kind of question as those of *Jarvie* and *Kellock*. But there is a peculiarity. In this case while nothing had been done under the first petition except to record the abbreviate, under the Bill Chamber petition much had been done. There had been an election of a trustee, and he had been confirmed; there had been two statutory meetings and two public examinations of the bankrupt, and there was an order for his further examination, but I do not know whether that ever took place. All these proceedings took place before the 11th of January, when the present petition was presented by Mr Tennent for recal of the second sequestration. Mr Tennent was present at some of these proceedings, and took part in some of them, but whether he took part in them or not he at least knew of them. Now, he asks to have the sequestration recalled, and the Lord Ordinary has granted his prayer.

I do not agree with his Lordship, and think that he has in some measure been misled by the authorities he quotes in his note. In the cases of *Jarvie* and *Kellock*, which he quotes, no proceedings had followed upon the sequestration which was sought to be recalled, and therefore a question was presented for the discretion of the Court in which the circumstances enabled the Court to give effect to the first petition, and to allow the sequestration to proceed under it without inconvenience. As there had been no proceedings in those cases it was easy to recal the sequestration and to award it anew on the conjoined petitions; but if we in this case were to recal the second sequestration, we should in effect destroy and wipe away all that has taken place, a course attended with great inconvenience and delay, and with great expense. That being so, unless very strong reasons were shown I should be unwilling to grant this petition.

Now, what are the reasons assigned? It is said that during the course of the two days between the deliverance in these two petitions certain things may have been done to create a preference to some creditor. If it could be shown that there was any reasonable apprehension of that having been done, I should be disposed to give great effect to it. But the petitioner cannot give

any good account of his grounds of suspicion, and cannot point to any particular creditor who is likely to have got a preference, and therefore the suggestion loses much weight; for, considering how far the sequestration has advanced, it is probable that if there had been such a case something would have been heard of it by this time. But further, I am not prepared to say that he has not barred himself from bringing this petition. I should not have been disposed to give effect to this consideration if he could have shown that he was acting for the interest of the general body of shareholders. But he has failed to do that. He has let things go very far before presenting this petition; and here again I think the Lord Ordinary has been misled by the case of *Ballantyne;* for in that case the objection that the petitioner was barred was sufficiently answered by showing that the sequestration had been incompetent from the beginning—a very different state of matters. No creditor can waive his right to ask to have an incompetent sequestration recalled, for everything that has followed on such a sequestration is worth nothing. But there is nothing like that here, and therefore I think that the conduct of Tennent in making this delay and allowing proceedings to go on is a good ground for refusing a remedy. I differ from the Lord Ordinary, and think the petition ought to be refused.

Lord Deas and Lord Mure concurred.

Lord Shand—I concur. The Bankruptcy Act no doubt allows forty days to ask recal of a sequestration, but it is a matter in the discretion of the Court, and in my opinion the determining element of this case is the conduct of the petitioner, who, though in full knowledge of the proceedings that were going on, lay by till nearly all those days had expired, and then asks recal. This distinguishes the case from those quoted by the Lord Ordinary, and I think in the circumstances the petition ought to be refused.

The Court therefore recalled the Lord Ordinary's interlocutor, and refused the prayer of the petition.

Counsel for Pursuer (Respondent)—Millie. Agents—J. & A. Hastie, S.S.C.

Counsel for Defender (Reclaimer)—Mackintosh—J. A. Reid. Agents—Ronald & Ritchie, S.S.C.

Friday, March 7.

FIRST DIVISION.

[Lord Young, Ordinary.

SMITH *v.* SMITH.

Right in Security—Back-Letter—Declarator of Expiry of the Legal.

A father disponed *mortis causa* certain heritable subjects to his son on condition that the son should make payment to his brother of a sum of £300 in three annual instalments, the sum to be a real lien and burden on the subjects so disponed. This arrangement was part of a family transaction between the father and his eldest son, the disponee. After making up a title to the subjects on his father's death, the son inadvertently burdened them in favour of a third party to such an extent as seriously to diminish their value as a security for payment of the £300. In consequence he made them over to his brother by a disposition *ex facie* absolute, the brother granting a back-letter in which he stated that "the said disposition, though a full and effectual transference of the present right of said property, is truly intended as betwixt us only legally to secure me in my said appointed provision, I do hereby bind and oblige myself, my heirs and successors, on occurrence of the death of our mother, when the estate of our late father falls to be finally wound up, or at any time within the space of one year thereafter, if required by you or your heirs, to reconvey to you or them the said property," &c. The mother died in 1862. In 1877 the disponer requested his brother to reconvey the property, which the latter declined to do. *Held* that the disposition was in security merely, and as there had been no declarator of expiry of the legal the disponer was entitled to reconveyance on payment of the debts.

The pursuer in this case was the eldest son of Robert Smith senior, hardware merchant in Johnstone, who died on 15th May 1837, possessed of, *first*, certain subjects on the north side of the High Street of the town of Johnstone; *second*, certain subjects on the south side of Houston Square in Johnstone; and *third*, certain subjects at Floors, in the town of Johnstone. By contract and deed of settlement, dated 17th March 1832, entered into between the pursuer and his father, it was agreed that the pursuer should make up titles to all of these subjects in the event of his surviving his father, and should dispone the second of them to his brother Robert, and the third to his brother James, the defender, at all events within six months of his father's death. The entry of the three brothers to their respective shares was declared to be the first term of Whitsunday or Martinmas after the death of their mother, who was liferented in Robert's portion; and the rents of the other two subjects were to be accumulated and at that date divided between the three brothers.

By the third purpose of the settlement the pursuer bound himself, in order to equalise the value of the heritable subjects destined to him and his brothers, to pay his brother James £300, in instalments of £100 yearly at the three first terms of Whitsunday occurring after their mother's death, if she survived her husband, "which sum shall be a real lien and burden on the subjects on the north side of the High Street first above described."

In 1834, after his father's death, the pursuer completed titles to the three subjects, and in 1852 he executed dispositions in favour of his brothers of the properties which were destined to them respectively.

The property in High Street, Johnstone, which was left to the pursuer, was burdened by Robert Smith senior in May 1820 with a bond and disposition in security for £300, and after the death of his father the pursuer borrowed another sum of £300, for which he granted a further bond and