deed—were the purchasers. Before the settling-day came, the bank, as your Lordships know, stopped payment. On the 16th of October a deed of transfer of the stock was tendered by the appellant to the bank, of course without any expectation of receiving from the bank the purchase-money for the stock—the bank refused to accept or register the transfer, and the name of the appellant was put on the list of contributories.

Two questions were raised in the appeal—*first*, Whether there was a valid contract for the sale of the stock, having regard to the provisions of the 30th Victoria, chapter 29; and *secondly*, was the company in default for not accepting and registering the transfer? The Court of Session has decided both points against the appellant.

My Lords, on the first point, viz., the effect of the 30th Victoria, chapter 29, I have not been satisfied by the arguments of the appellant, either during the first argument or during the further argument which has taken place to-day, that the decision of the Court of Session was erroneous; but it appears to me unnecessary to decide that question, because I have no doubt that on the second point this case is not materially distinguishable from those already decided by your Lordships, and that, for the same reasons which were given in them, it would have been improper for the bank to have accepted or registered the transfer on the 16th of October, and therefore that the name of the appellant rightly remains upon the register, and was rightly included on the list of contributories. I propose to move in this case that the appeal be dismissed with costs.

With regard to the suggestion now made, that the admissions entered into between the parties are erroneous in stating that the whole sum of £2500 stock was registered in the appellant's name on the 2d of October, whereas the transfers to the appellant of £500, part of the said sum, were not registered or recorded until some days after the 2d of October, I express no opinion whatever as to what ought to be the consequence of that fact, if it be a fact; but your Lordships may perhaps be disposed to say that the dismissal of this appeal should not prejudice any applications which the appellant may make to the Court of Session on this score.

Lord Hatherley—My Lords, I quite concur in the motion which has been made by the noble and learned Lord on the woolsack.

Lord O'Hagan—I agree.

Lord Selborne, Lord Blackburn, and Lord Gordon concurred.

Interlocutor appealed from affirmed with a declaration, and appeal dismissed with costs.

Counsel for the Appellant—Higgins, Q.C.

Counsel for the 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, and Lord Gordon.)

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

Public Company—Winding-up—Trustees and Executors—Liability of Executor where Part of Executry Estate Consists of Shares in Joint-Stock Company—Personal and Representative Liability.

In the case of a testator holding shares in a joint-stock company, his executor may (1) have the shares transferred to his own name, and thereby become a partner in the company, or, in the event of his not desiring them so transferred, he may (2) have a reasonable time allowed him to sell the shares and to produce a purchaser who will take a transfer.

Opinion (*per* Lord Selborne) that where an executor merely produces his confirmation for the purpose of having it recorded in the books of a joint-stock company in which the testator held stock, and receives it back again with a certificate describing him as holder of the shares in terms having reference to his character of executor, he does not thereby necessarily incur personal liability, whatever entries may have been made in the company's books, and notwithstanding the subsequent receipt of dividends by him for a series of years.

Opinion (*per* Lord Selborne) that trustees have not, in any proper sense of the word, a representative character, but that executors have.

Robert Gibson, cooper in Peebles, under his trust-disposition and settlement appointed Walter Thorburn, Thomas Spalding, and William Turnbull trustees and executors of all his estate, including £540 City of Glasgow Bank stock. By codicil, dated 31 May 1851, William Turnbull, one of these trustees, having died, he appointed the present petitioner, John Buchan, writer in Peebles, trustee in his stead, but did not nominate him executor. Gibson died on 30th May 1854, and after his death, the petitioner and the other parties named were confirmed as trustees and executors, and their confirmation was expede. The agent of the trust, Mr John Bathgate, on 2d November 1854 sent the confirmation to the City of Glasgow Bank, with this letter—"I send you confirmation in favour of the trustees of the late Robert Gibson, and will thank you to transfer the sixty shares of your stock standing in his name to that of the trustees." They were accordingly entered in the stock ledger of date the 3d November 1854 as "Walter Thorburn, merchant, Peebles, Thomas Spalding, nurseryman there, and John Buchan, writer there, executors of the late Robert Gibson, Peebles, as per confirmation at Peebles 12th October 1854." Thorburn died in 1867 and Spalding in 1871, and on 20th March 1872 the petitioner assumed two other trustees along with himself, who continued to act until 22d October 1878, on which date the petitioner executed a

minute of resignation of his office of trustee. That minute was intimated to the other trustees and recorded, and this was a petition brought by him praying the Court to order the removal of his name from the list of contributories to the bank, "on which it had been placed as an executor of the late Robert Gibson."

It was averred that the petitioner had effectually resigned his trusteeship, and that he had never been entitled to act, and never had acted as executor of the deceased.

It appeared that the petitioner had drawn the dividends upon the stock, and had signed the warrants for uplifting these as a trustee and executor from 1854 downwards. It was not alleged in the petition that the agent had acted without authority in obtaining transfer of the stock, and neither he nor the petitioner appeared to give evidence at the proof which was led.

The First Division of the Court of Session unanimously refused the petition, commenting upon the total absence even of averment of want of authority.

The petitioner appealed to the House of Lords.

At delivering judgment—

Lord Chancellor—My Lords, by a deed of trust-disposition dated the 10th July 1840, three persons—Thorburn, Spalding, and Turnbull—were appointed trustees and executors by Robert Gibson and Janet his wife, of all their estate, which included £540 Glasgow Bank stock. By a codicil dated the 31st of May 1851, Gibson, the truster, taking notice of the death of Turnbull, one of the trustees, nominated the appellant in his stead, and granted and disponed to him all his real and personal estate in trust, as mentioned in the original deed, and with the same powers conferred on the other trustees. After the death of Gibson the appellant was treated as one of the executors as well as trustee; the confirmation included his name, and he himself signed the oath before the Commissary on giving up the inventory of the estate, in which he stated he and the others had acted as executors. He subsequently signed with the others dividend warrants of the bank stock, adding the description "executor and trustee," and after the death of the others described himself as "sole surviving executor." The transfer of the stock was made in the stock ledger on the 3d of November 1854 from the name of Gibson into the name of his executors. This was done on the authority of the law-agent John Bathgate, in a letter to the manager of the bank dated the 2d November 1854. The certificate of stock is in the name of the appellant and his co-trustees, and this certificate, as well as the letter of Bathgate, came out of the custody of the appellant. The dividend warrants included the name of the appellant up to 1872—that of the 1st of February 1872 is signed by him, with the description "sole surviving executor." Since 1872 they are signed by him along with two new trustees assumed in that year. My Lords, to this I have to add that neither the appellant nor the law-agent Mr John Bathgate is examined to rebut or in any manner qualify the inference naturally to be drawn from the facts which I have mentioned.

It appears to me impossible to say, looking to these facts, that the appellant did not authorise the placing of his name on the register, or that he did not agree to become a partner of the bank.

I do not think it necessary to enter into an examination of the question whether the appellant ought properly to have been described as "executor" or "trustee." I rest the conclusion at which I arrive, not upon any question of form, but upon the substance of the case, namely, that the appellant upwards of twenty years ago had the stock transferred into his name, and has ever since been upon the register of the bank as a partner, and that this state of things is, upon the principles laid down by this House in *Muir's* case, *ante*, p. 483, inconsistent with any conclusion but that of personal liability.

I am the more anxious to point out the grounds upon which I base the conclusion at which I have arrived in the present case, inasmuch as it is easy to suppose circumstances in the case of an executor whose testator held shares in the Glasgow Bank which might not be covered by the decision in the case of *Muir*.

An executor whose testator has held shares in a joint-stock company has generally one or two courses open to him. He may have the shares transferred into his own name, and become to all intents and purposes a partner in the company. He may, on the other hand, not wish to have the shares transferred into his name, and he ought to have a reasonable time allowed him to sell the shares and to produce a purchaser who will take a transfer of them.

The 38th section of the deed of the Glasgow Bank provides that 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, transfers, assignments, and confirmations shall be delivered or returned to those in right of the same after having marked therein a certificate of the registration thereof, and that the production of such writings to the 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.

This article, if construed literally, would rather seem to imply that it was impossible for an executor to produce to the bank his confirmation as executor without being held thereby to authorise a transfer of the shares into his own name. In the particular case before your Lordships I cannot doubt that the appellant did authorise this transfer to be made, that he knew that it was made, and that he, for twenty years and upwards, acted with the knowledge and upon the assumption that it was made. But I have no doubt that your Lordships would require, in any case in which the bank transferred the shares of the testator into the name of his executor, to be satisfied that this transfer had been authorised by a distinct and intelligent request on the part of the executor that the shares should be dealt with in this way, and that reasonable opportunity was afforded to the executor to transfer the shares to a purchaser in the ordinary course of administration of the estate if he did not wish to have them placed in his own name.

A further question was argued as to the effect of a minute of resignation of the office of trustee

on the 22d of October 1878, when the winding-up began. It is unnecessary to consider whether this was or was not valid as a resignation of the trusteeship. It was not intimated to the bank before the winding-up; and even if it had been, the decisions of your Lordships in the previous cases show that no transfer of the shares could have been made by the bank. I would move your Lordships that this appeal should be dismissed with costs.

LORD HATHERLEY—My Lords, I concur in the view which my noble and learned friend has taken of this case. It is one of the cases which I allude to in the few words I addressed to your Lordships upon the first case decided by the House to-day. As I then said, there is a difference between it and *Muir's* case, to the extent of Buchan being described as "executor," or "executor and trustee," instead of being described simply as "trustee."

I have had an opportunity of perusing the opinion which will be delivered to your Lordships presently by my noble and learned friend opposite (Lord Selborne), and I observe that he entertains some doubt as to whether there be not a difference in position between an executor and a trustee, the character of trustee being the character given in *Muir's* case, and the character of executor being the character given in this case. I have made particular reference to a case which my noble and learned friend pointed out to me in his opinion—a case reported in 2 Johnson and Hemming 229, and decided by myself—namely, *re Phenix Life Insurance Company* (*Hoare's* case), in which I say that there may be a difference between the simple case of a trustee and the case of a person representing *in toto* a deceased testator. The case of *Hall* (1 Macnaghten and Gordon 307) was referred to in the case of *Hoare*, and that was a case decided by Lord Cottenham. These are cases upon English Acts of Parliament and upon English deeds, where, generally speaking, there are distinct provisions pointing out what steps are to be taken by persons who succeed to what is called in Scotland an 'inheritance,' including bank shares, or what is called in England 'personal estate,' including bank shares—pointing out the steps to be taken as between them and their company, in order to relieve them from the holding of shares on the part of the deceased, and to enable them to transmit them to others who will undertake the responsibilities.

The case before Lord Cottenham was a remarkable case, and indicates better what I intended to say in *Hoare's* case than perhaps the simple reading of *Hoare's* case itself might do. It was a case in which it was sought to remove from the list of contributories a gentleman who had married a lady who was entitled to shares, but although he had become interested in her shares there was nothing compelling him to register himself as a proprietor, and he had not registered himself as a proprietor. Lord Cottenham expressed an opinion upon two or three points of evidence as to whether or not he had made himself a partner by the acts he had done, which indicated an opinion on the part of Lord Cottenham that he might have made himself a partner, and if he had accepted the position of a partner that would have led to his being put upon the list of contributories. The facts of that case were very curious indeed when one came to look into them. There were irregularities in the register; at one time the wife was registered as proprietor in her single name, and afterwards she was registered as wife, and the last entry of all, I think, was "Mrs Elizabeth," or whatever her christian name was, so and so. She was put in the list of the shareholders as the proprietor in fact of the shares, and then her husband's name was added with the word "trustee." Then, again, there was this fact in the case, which would of course put an end to all question of resting upon that, if it could otherwise be rested upon, when we are dealing with the case of an executor, namely, that the word "trustee" was added by a clerk in the office without any distinct direction. But it was held by Lord Cottenham that there was nothing whatever to show that the husband had ever accepted the transfer into his name, because the shares remaining in the wife's name, and the fact only being added that he, the husband, was acting as trustee for her, did not make the shares shares standing in his name as proprietor; it only indicated to the company that they were to pay the dividends, not to the lady, but to the husband. Accordingly, the dividends were paid to the husband during the lady's life, and it was upon those payments to the husband that it was sought to make him a proprietor. Now he had never accepted the proprietorship. Lord Cottenham simply had these facts before him; it was by no means a very clear or precise transaction, the entries being made in this imperfect way; but what was held to be the real substance of the entries was that the wife was the proprietor, and that the gentleman was her trustee, and never intended to be in any shape or way the proprietor.

Now, in the case before us, whatever steps might have been taken by the appellant as executor, he certainly first of all, it appears to me, through his solicitor or agent Mr Bathgate, desired his name to be entered upon the list of proprietors, and although he was placed upon it as executor, this entry continues throughout the 22 or 23 years upon the register. He receives all the dividends payable upon the shares so registered, and I ask, if he was not a shareholder, who could be? Nobody else held the shares, nobody else received the dividends, nor is there any evidence given, as has been observed by my noble and learned friend on the woolsack already, by Mr Bathgate or anyone else, to show that in truth those dividends were only received by him as the hand to receive them, just as a banker might receive dividends and deal with them afterwards according as his client's interests required. There is nothing to show that these dividends were received as part of the testator's estate, and dealt with by the executor as part of the property which had to be administered by him.

But more than that, if the appellant was not the proprietor of the shares, there was nobody entered at all upon the register who could be held to be liable in respect of them, because he took the step, which has been referred to by the Lord Chancellor, of requiring himself to be entered in such a way as necessarily to exclude anyone else. One of the rules of the company itself provided that when anyone came and produced the probate, and caused himself to be entered upon the register as executor, he was so entered upon the

register that nobody else could be deemed to be the owner of the shares. There was a rule which said that anybody so entered should receive all the benefits, and should be liable for all the debts and liabilities of the concern. Every share is or ought to be appropriated to somebody or other in the share register, and any creditor must search and look at the share register, which is to be his guide, in order to find in the share register whom the creditors are to apply to in case a necessity should arise for a contribution in consequence of their money not being paid. The creditors do that, and the other shareholders do that too. Now, in the share register no other name appears than that of the appellant, because I apprehend that nothing that the creditors had seen in the register would authorise them in saying that any claim upon the shares so held should be paid out of the assets of the testator. In *Muir's* case, no doubt, if the trustees were called upon to make any payment in respect of the shares they held as part of the trust-estate, they would be entitled to an indemnity from the trust-estate if that estate was able to give it. But if an executor, instead of selling shares, receives dividends upon them for twenty-two years, I apprehend it is much too late to say that he is not a shareholder. Having made a choice, and having taken the position in which he received the benefit of being placed on the share register, he must bear the burden of that position towards creditors of the copartnership and towards other shareholders in the company. It is much too late for the appellant to say now that he ought not to continue upon the list of contributories, as being the owner of the shares, of which nobody is the owner if he is not, of which he caused himself to be entered as the owner, according to the instructions given to Mr Bathgate, and in respect of which he has consequently been paid dividends for this long time.

Lord O'Hagan—My Lords, it appears to me that your Lordships' ruling in the case of *Muir* is fully applicable to this case also. The question in it is mainly one of evidence, and I cannot say I have any doubt, upon a consideration of the facts already stated by the Lord Chancellor, of the liability of the appellant as a registered transferee of stock, who authorised the registering of it, and exercised dominion over it for years by signing many dividend warrants, in one instance at least as 'sole surviving executor' of Robert Gibson. The proof given and the proof withheld equally justify this conclusion; and I see nothing in the position of the appellant to prevent the application to him of the principles on which your Lordships' judgment affirmed the liability of *Muir*, as having been, with his own knowledge and assent, a registered holder of shares. There is a difference in the designations of the shareholders in the two cases, but the substantial grounds of liability ascertained by the judgment in *Muir's* case appear to me to be equally applicable to both. I concur with the Lord Chancellor as to the reasonable conditions of an executor's liability in such a case as this, and I think they are fulfilled in it.

The appellant's resignation of his trusteeship cannot affect our decision, whether it was valid or ineffectual. The bank had nothing to do with it, and had no notice of it until after the 22d of October. The name of the appellant remained in the register, and, according to the judgments already pronounced by your Lordships, could not have been properly removed, and he therefore continued to bear the burden of his liability. Thisap peal also must, in my opinion, be dismissed.

Lord Selborne—My Lords, if this had been the case of an executor merely producing his confirmation to the officers of the bank for the purpose of having it recorded in their books and receiving it back again with a note that it had been registered, and with a certificate describing him as holder of his testator's shares, in terms which might have had reference to his character of executor, I should have been of opinion that he did not thereby become personally liable, whatever entries might have been made in the company's books, and that the subsequent receipt of dividends even for many years would have made no difference. The distinction admitted by this house in *Lumsden* v. *Buchanan*, 4 Macq. 950, between the case of Dr Andrew Buchanan and that of the other respondents, is very much against any inference of personal liability from the mere form of entries in the company's ledger, or even of the stock certificates issued by them (though brought to the knowledge of the person sought to be charged, and acted upon by him in the receipt of dividends), unless some sufficient foundation for it had been previously laid in the title, whether by allotment or by transfer, to which those entries and certificates ought to have related. On this point the English authorities of *Armstrong* (1 De Gex and Smale 565), *Blakeley's* case (13 Beaven 133 and 3 Macnaghten and Gordon 726), and *Hall* (1 Macnaghten and Gordon 307), would have appeared to me material if the present case could not be satisfactorily distinguished from them. The 33d clause of the deed of copartnership of the City of Glasgow Bank expressly provided that the shares of the several partners in the capital stock should "transmit and descend as personal property to their executors or representatives by testament;" and the 36th clause appears to me to exclude the supposition that it was intended to keep the rights which should so "transmit and descend" upon the death of a shareholder in suspense until some novation of the title of the deceased shareholder took place, because it enabled the company to sell or appropriate the shares of a deceased shareholder only in two cases—(1) if an attachment of a creditor by diligence of confirmation "*qua creditor*" should not be removed; and (2) if within twelve months after the death no party should choose "to represent such deceased shareholder by confirming executor, or otherwise assuming his estate"—words which in the case of an executor taking confirmation certainly do not require more than the assumption of a representative character, involving a representative and not a personal liability. In conformity with the natural construction of these clauses, the 24th section of the statute, passed eight years after the date of the transfer to the appellant and his coexecutors (the provisions of which have since that time been applicable to this bank) expressly declares that the legal personal representative of every deceased shareholder in a company registered under that Act may transfer the shares held by the deceased, although he may not himself be a "member" of the company.

The case of trustees who take a transfer of shares into their names differs in principle from that of executors who merely intimate their title as executors to a company in order to claim and exercise the rights which belong to them as the legal representatives of their testator. That distinction was pointed out by Lord Hatherley, when Vice-Chancellor, in the English case of *Hoare* (2 Johnson and Hemming, 229), where he said—"A person who is a shareholder is absolutely liable, although he may be bound to apply the proceeds of the shares upon a trust. The case is not the same as that of an executor, who may be a contributory as representing the testator's estate." Trustees have not, in any proper sense of the word, a representative character, but executors have; and when both the liability and the interest of the testator is transmitted to them by virtue of their testator's contract, contained in such a deed as this, it must retain its original character until there is a forfeiture or a transfer, which ought not to be presumed from any equivocal acts. Having representative rights, it is impossible that they should not be entitled to produce the legal evidence of them to the company, for the purpose of having their title in some way recorded and recognised, without making themselves personally liable. This would be a necessary preliminary, even to the exercise (since 1862) of the statutory right of transfer.

The anxiety which I have felt to avoid error or misconception upon a subject of such general importance as this, as well as the unusual (and to me perplexing) form of the 38th clause of this deed, led me for some time to feel doubts as to the proper mode of disposing of this appeal. That clause mixes up the case of confirmation to the testamentary disposition of a deceased shareholder with that of any ordinary transfer, as if there were no difference between them. Every document produced under it is equally to be returned, having marked thereon a certificate of the registration thereof. It seems to assume that the terms in which it describes the consequences to follow from the production and registration of any description of title to which it applies are such as would in all cases be equally efficacious and appropriate, which could hardly be as to an executor standing upon his confirmation only, without understanding them in a sense applicable to representative as well as personal liability. I have never had any doubt that the letter of Mr Bathgate, dated the 2d November 1854, and everything since done with respect to the shares in question, was known to and fully authorised by the appellant. My difficulty has been only as to the effect of what was so done, having regard to the legal position of executors and to the peculiar form of this deed —the 33d and 36th clauses on the one hand, and the 38th, 40th, and 6th clauses on the other.

It being, however, clear that it is competent for executors to transfer their testator's shares in such a company as this, and the liability of the transferees when they have done so being personal and unlimited, there can be no reason why executors, if they choose to transfer their testator's shares to themselves instead of to a third person, should not take the transfer with the same consequences of unlimited personal liability which would have attached to those shares in the hands of any other transferee. It cannot be said that executors (at all events when, as in this case, they are also disponees in trust) have not the power to transfer their testator's shares to themselves. The question whether such a transfer has in effect been made or not, has always been the test as between personal and representative liability in the English cases of the same class with the present, though no doubt in those cases there were better deeds, clearly giving notice to the executor that he must choose, under peril of forfeiture, between a transfer of the shares to a third party and the assumption of a personal liability, and pointing out how he was to proceed in either alternative. The imperfection and obscurity in this respect of the present deed caused me for some time to hesitate as to the construction which ought to be placed upon the direct request contained in Mr Bathgate's letter of the 2d November 1854 for a transfer of Robert Gibson's shares into the names of his trustees. But after fuller consideration, and after having had the benefit of knowing the opinions formed by other noble and learned Lords, I am now satisfied that for my hesitation on this point there was no sufficient ground. Such a request for a transfer made by executors who were also trustees, and who had full power to transfer as they think fit, followed by an actual transfer in the stock ledger and the issue of stock certificates in accordance therewith, and acted upon afterwards (as in this case it has been for 24 years), cannot, I think, be satisfactorily distinguished, as to its legal effect, from any other transfer to trustees. And it seems right to observe that the appellant himself in his petition to the Court of Session did not rely upon the distinction between representative and personal liability. He denied that he ever was executor, or ever authorised what Mr Bathgate and the other executors did, and he asked that his name should be wholly removed from the list of contributories. I cannot discover from the opinions delivered by the learned Judges in the Court of Session that any question arising out of the peculiar character of the title of an executor was argued before them, and even at your Lordships' bar that question (though distinctly raised by the last 'reason' in the appellant's case) was argued by the appellant's junior counsel only, and by him not so fully as might have been expected, if it had not been felt that it was practically excluded by the facts of the case.

I cannot, therefore, withhold my assent from the judgment proposed by my noble and learned friend on the woolsack.

LORD GORDON—My Lords, I concur.

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

Counsel for the Appellant—Higgins, Q.C.—Trayner—Reid.

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