actions were large; on one day I observe that twenty-five horses were sold at the price of £625. There were also sales by the pursuer to the defender of other articles, as, for example, a waggonette, harness, and a lorry.

The defender does not seem to have kept accounts after a certain date, and seems to have destroyed the accounts he had kept prior to that date.

I have looked into the cases bearing on this subject, and I find in the more recent cases, and especially in the case of *M'Kinlay*, observations by the Judges to the effect that accounts of this description do not fall under the triennial prescription. That doctrine is laid down by Lord Justice-General Boyle in *M'Kinlay's* case, and the same doctrine is contained in the earlier case of *Boyes' Trustees*. I am not therefore prepared to hold that this claim is struck at by the triennial prescription.

On the proof I think that the nature of the account is more clearly brought out. It has been proved that in a number of cases where horses were sold by the pursuer to the defender, the pursuer, though not acting exactly as a commission agent, was yet paid at a fixed rate for the transaction. That is different from an ordinary sale. I think that the arrangement has been proved, by which the defender was to take the horses brought from Ireland by the pursuer at an increased cost of £2 per head. I think that these transactions were of the nature of commission transactions, and therefore on the proof I am of opinion that the claim is not struck at by the triennial prescription. I also agree that there should be a remit to an accountant for a report in regard to the account.

LORD SHAND—As this case was originally presented in the Sheriff Court, and even after it had been brought here, it was impossible to say whether the plea of prescription was applicable or not, and therefore a proof before answer was allowed. The result of that proof is, I think, to show that the plea of prescription cannot be sustained. The transactions embraced in this account are of a very mixed character, and the defender admits in his first answer "that the pursuer and defender had sundry transactions in horses between March 1876 and April 1880, in which the defender purchased horses from the pursuer, and the pursuer sold horses for the defender." That embraces two classes of cases, viz., the case of sales by the pursuer to the defender, and sales by the pursuer for the defender.

Further, an investigation shows that there were a number of articles besides horses included in the account, and among others that there was the hire, as well as a sale, of harness. If the case stood in this way, that the accounts were separate accounts, and that the parties understood the accounts were to be separate, then the triennial prescription probably would apply. But in the present case the application of that plea is excluded not only by the nature of the transactions, but also from the fact that it is plain that both parties treated these entries not as goods sold and delivered, but that both held the one set of entries should be set off against the other, and a balance struck and paid. If one looks at the deposition of the defender, he there says that he paid the balance upon the account whenever it was due, but I think it is clear upon his evidence that the transactions between him and the pursuer were properly stated in the form of an account-current. The defender depones that at one time he kept a book in which his transactions with the pursuer were entered, but that the book had been lost, and then he says—"I marked down in the book anything I bought from pursuer, and also anything he bought from me, and the balance was always brought down either for or against me. I met the pursuer from time to time, and the account was generally made up then. Probably a balance was not struck every time I met the pursuer, but very often it was. On some of these occasions I was in his office, and he checked the balances on a scrap of paper. He made up a memorandum, showing how the account stood. When that was done he said he would square the account, but I do not know whether he did so or not. On every occasion when a balance was against me I paid it up." That evidence substantially comes to this, that the parties kept an account-current for a series of mixed transactions, and upon the authorities it is clear that the triennial prescription does not apply to a case of that kind.

I further agree with your Lordships that there should be a remit in order to ascertain how far the entries in the books support the entries in the account.

LORD ADAM—The account sued on contains a variety of transactions, and there are entries of the same character upon both sides of the account. I am quite satisfied the parties intended that as the transactions occurred the one should be set off against the other, and it follows that the account was correctly set forth as an account-current. Therefore upon this short ground I am of opinion that the plea of prescription should be repelled.

The Court pronounced this interlocutor:—

"Recal the interlocutor: Repel the first plea-in-law for the defender, and remit to Mr J. A. Molleson, C.A., to examine the pursuer's books and report whether they are regularly kept, and whether and how far they support the amount sued for."

Counsel for Pursuer—Mackintosh—Gillespie. Agent—J. Stewart Gellatly, S.S.C.

Counsel for Defender—Asher, Q.C.—Guthrie. Agent—John Gill, S.S.C.

Friday, November 20.

FIRST DIVISION.

DALGLEISH *v.* LAND FEUING COMPANY (LIMITED).

Public Company—Trust—Resignation of Trustee—Transfer of Shares—Trusts Act 1867 (30 *and* 31 *Vict. cap.* 97), *sec.* 10.

Held (Lord President *diss.*) that a trustee who has resigned office under the powers contained in the Trust Acts is entitled, on intimating his resignation, to have his name deleted from the register of a public company in which the trustees hold shares, without the execution of any transfer.

This was a petition under section 35 of the Companies Act 1862 by William Ogilvie Dalgleish, of Mayfield, near Dundee, for rectification of the register of members of the Land Feuing Company (Limited), by deleting his name as a holder of shares from the register of the company.

The petitioner was one of four testamentary trustees of Mrs Margaret Magdalene Raitt or Dalgleish, of Roseville, Cupar-Fife, who died possessed of 200 shares of £10 each in the company. These shares were taken up by her trustees, and they were duly entered on the register as holders.

The petition stated that the petitioner resigned office as trustee by minute of resignation, dated 25th November 1878, intimated to the other trustees on 19th December 1878 and 4th March 1879, and registered in the Books of Council and Session 5th March 1879, in terms of sections 10 and 18 of the Trusts (Scotland) Act 1867; that on 14th July 1882 the agent for the trust, at the request of the petitioner, intimated to Mr Andrew Paterson, accountant, Edinburgh, manager of the Land Feuing Company (Limited), the petitioner's resignation, and that there was also then transmitted to Mr Paterson an extract of the registered minute of resignation by the petitioner in order that Mr Paterson might have the proper change made on the register of the company.

After various communications Mr Paterson on 7th May 1885 intimated that the company refused to remove the petitioner's name from the register. At that date all calls due upon the shares had been paid.

The Land Feuing Company (Limited) lodged answers, in which it was stated that the directors of the company did not feel justified in removing the petitioner's name from the register of shareholders.

The respondents averred that no transfer of the said shares from the trustees in whose names they were registered to the trustees remaining after the petitioner's alleged resignation had been tendered to them. They also stated that they believed the trust estate to be insufficient to meet the uncalled liability on the trust investments.

They further averred—"By the articles of association of the respondents' company it is agreed that the articles of association shall be those contained in the first Schedule, Table A, subjoined to the statute 25 and 26 Vict. cap. 89, with the following variations, viz.:—

"Transmission of Shares.

"1. No transfer of shares by a shareholder shall be effectual unless offer be first made of the same to the company at the price proposed, and the consent of the directors in writing be obtained to the transfer."

By article 8 of the regulations for the management of a company, contained in Table A of the said first schedule to the Companies Act 1862, it is provided:—

"(8) The instrument of transfer of any share in the company shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain a holder of such share until the name of the transferee is entered in the register-book in respect thereof."

The petitioner argued—No transfer was necessary. The intimation of the petitioner's resignation as trustee, under section 10 of the Trusts (Scotland) Act 1867, to his co-trustees and to the company, was enough by itself to divest the petitioner of the character of a partner in the company. The resignation of a trustee operated just like his death. This point had never been decided, but there was authority for the petitioner's contention.—*Tochetti's* Case, March 7, 1879, 6 R. 789—Lord Deas at p. 793; *Sinclair*, Jan. 23, 1879, 6 R. 571—Lord President at p. 573; *Oswald's Trustees*, Jan. 15, 1879, 6 R. 461; *Shaw*, Dec. 13, 1878, 6 R. 332; *Alex. Mitchell's* Case, Dec. 21, 1878, 6 R. 439—*aff.* May 20, 1879, 6 R. (H. of L.) 60; *Bell*, Jan. 22, 1879, 6 R. 548—*aff.* May 20, 1879, 6 R. (H. of L.) 55. A trustee could become a shareholder without any transfer by simple assumption, and the present case was just the converse. The purpose of the Trusts Act of 1867 was to enable a trustee while alive to free himself completely by resignation. According to section 10, it was only necessary deeds that were to be executed, and that only when required. Under section 35 of the Companies Act 1862 the Court, sitting as a Court of equity, could hold an intimated resignation as equivalent to a transfer. No consent of the directors was necessary—*Hill's* Case, 20 Eq. 595; *Findlay*, June 30, 1855, 17 D. 1014; *Dick's Trustees* v. *Pridie*, June 9, 1855, 17 D. 835; Lindley on Partnership, 1364.

The respondents replied—Something more than resignation was required, because when a trustee was put on the register he incurred liability not only as a trustee, but also as an individual. A transfer by the whole body of trustees to those who remained must be made. It had never been held that resignation divested a trustee of property in which he stood vested or, it might be, infeft. A body of trustees were in the same position as joint-owners, none of whom could cease to be an owner without a transfer —*Mackilligin* v. *Mackilligin*, Nov. 23, 1853, 18 D. 83; *Shaw*, Dec. 13, 1878, 6 R. 332—L. J. C. at p. 338; *Buchan's* Case, Jan. 23, 1879, 6 R. 567—*aff.* 6 R. (H. of L.) 44; *Addison's* Case, L.R., 5 Ch. App. 294; *Wishart and Others* (*Galletly's Trustees*), Nov. 12, 1880, 8 R. 74; *Cunningham, &c.* v. *Montgomerie, &c.*, July 19, 1879, 6 R. 1333; *Williams* v. *Harding*, L.R., 1 Eng. & Ir. App. 9; Companies Act 1862, secs. 24, 30, 74, and 75. Moreover, by their articles of association the directors had discretionary power in regard to transfers, and they were therefore entitled to refuse to hold this resignation as equivalent to a transfer.—Buckley, p. 32; Lindley, p. 1402; *Allen's* Case, L.R., 16 Eq. 449—Lord Selborne at p. 455; *Martin*, L.R., 7 Ch. App. 292; *Robinson* v. *Chartered Bank*, L.R., 1 Eq. 32; *ex parte Penney*, L.R., 8 Ch. App. 366; *Shepherd's* Case, L.R., 2 Eq. 564.

At advising—

Lord Mure—This application has been brought by the petitioner Mr W. Ogilvie Dalgleish to have his name removed from the register of the respondents' company, in which his name has for some years been entered as one of the trustees of the late Mrs Margaret Raitt or Dalgleish, who died in the year 1874, and it is made upon the ground that the petitioner is no longer one of the trustees of Mrs Dalgleish.

The leading facts on which the petition is rested are these—On Mrs Dalgleish's death she

left her whole property to trustees by a deed executed in 1873. Of these trustees four accepted and acted, viz., Miss Margaret Dalgleish, her daughter, James Ogilvie Dalgleish of Woodburn, William Heriot Maitland Dougall of Scotscraig, and the petitioner. At the time of Mrs Dalgleish's death part of her estate consisted of 200 shares of £10 each in the respondents' company, on which £1 per share had been paid. These shares were given up for confirmation in name of the whole of the accepting trustees and executors, who were thereafter entered on the register of the company as holding the shares as trustees and executors of Mrs Dalgleish.

No part of these shares has been sold, and since the truster's death calls amounting in all to £6, 10s. per share have been paid out of the trust estate, which, with the addition of the payment of £1 a share made by the late Mrs Dalgleish, leaves £2, 10s. per share unpaid. No calls are outstanding at present, and the company is carrying on business, but no dividend has been paid since the year 1877. Mr James Ogilvie Dalgleish died in November 1875, and the petitioner, who is his executor and heir-at-law, resigned his office as trustee in November 1878 by minute of resignation duly intimated to the other trustees, and registered in the Books of Council and Session, all in terms of the provisions of the Trusts (Scotland) Act 1867.

The death of Mr James Ogilvie Dalgleish and the resignation of the petitioner were both intimated to the manager of the respondents' company in the year 1882, with a view to the death of Mr Dalgleish and the resignation of the petitioner being entered in the company's books. This was declined at the time, on the ground that some arrears of calls upon the shares remained unpaid. Since then the calls have all been paid up, and on that being done application was again made to the respondents to remove the petitioner's name and that of the late Mr James Ogilvie Dalgleish from their register. The name of the late Mr James Ogilvie Dalgleish has now been deleted, but the respondents still decline to remove that of the petitioner, and the present application has been brought in order to have the question on which parties are thus at issue disposed of.

The facts as now stated are not, I think, disputed by the respondents, and the main grounds on which, as I understand the answers, the petitioner's application is opposed are (*first*) that no transfer of the shares from the trustees in whose names the shares are registered, to the trustees remaining after the petitioner's resignation, has been tendered to the respondents, and (*second*) that the rules of the articles of association as to the transmission of shares have not been complied with.

The questions thus raised are attended with considerable nicety, but after giving the matter the best consideration in my power the conclusion I have come to is that the petitioner is entitled, in respect of his resignation of his office as trustee, to have his name deleted from the register, and that in order to obtain this he is not bound to execute any transfer of the nature required by the respondents.

The petitioner's name was put upon that register solely because he was one of Mrs Dalgleish's trustees. As an individual he had no personal beneficial right to or interest in the shares in question, and could transfer no such right to anyone else except in conjunction with the other acting trustees. His right was simply that of one of a set of trustees who held the shares as joint-owners in trust in order to execute the purposes of the trust committed to them. As explained by your Lordship in your opinion in the case of *Oswald*, 6 R. 464, it has for long been settled law that when one of a set of trustees died, the whole trust-estate would thereafter remain vested in the surviving trustees without the necessity of having recourse to any disposition or deed of transfer of the deceasing trustee's interest to the remaining trustees. In that case reference was made to the opinion of Lord Justice-Clerk Hope in the case of *Eglinton* v. *More*, 13 D. 1385, which has a very important bearing on the question now under consideration. "There is no such thing, his Lordship says, "as a separate but *pro indiviso* right to a third in each trustee. Each has the full title along with the other two, and if they die his title carries the whole right to the exclusion of any others. If one dies the title in him as trustee becomes extinct—it is absorbed by the title subsisting in the other two. He is blotted out of the title, and the infeftment of the other two is as good and perfect as if he never had been in the title."

This opinion no doubt proceeds upon the assumption that the condition of survivorship is held to be implied in all trust conveyances—a rule which was, I conceive, introduced in order (*first*) to carry out the wish and intentions of the truster to the effect that his estate should be vested in his trustees as a body for trust purposes so long as any of the trustees were alive and willing to act, and (*second*) to obviate the expense and inconvenience, and even risks, as regards the title to heritable estate held in trust that would be incurred if on the death of every trustee, and on the assumption of every new trustee, assignations, or conveyances, or reconveyances of the trust-estate required to be made to meet the altered position of the trustees. It is impossible, I think, to read the opinion of Lord Justice-Clerk Hope in the case of *Eglinton* v. *More*, or in the later case of *Mackilligin's Trustees*, 18 D. 81, without coming to the conclusion that this was in all probability what led to the introduction of the rule.

Now, dealing with the matter in dispute as in a question relative to the management and administration of a trust-estate, and apart from any difficulty that may be raised upon the terms of the respondents' articles of association, I am unable to see any sufficient reason why the same rule as to the operation and effect of the trust title ought not to be applied in the case of the resignation, as in the case of the death of any of a set of trustees. It is just as desirable, if not necessary, to obviate risks and expense of the nature I have referred to in the case of a resignation as in the case of the death of a trustee. All trusts are now held, except where there is express provision to the contrary, under the statutory right of each trustee to resign. And that being so, I have come to the conclusion that when any one of the trustees, who are thus by the conception of the trust title joint-owners of

the trust-estate only so long as they remain trustees, and with an absolute right to resign the situation at any time, avails himself of this right, it is not necessary for the due administration of the trust, and certainly not desirable, having regard to the special and qualified nature of the trust title, that this outgoing trustee should be called upon to execute a transfer or conveyance of his trust interest in favour of the remaining trustees. That estate was already vested in them along with the resigning trustee as joint-owners in trust at the date of the resignation, and when the resignation was duly completed as here in terms of the statute, the whole trust estate in my opinion remained duly vested in the remaining trustees, as joint owners in trust, to the same extent and effect as it is held to remain vested in the surviving trustees in the case of the death of any of the trustees.

I am confirmed in this view from the circumstance that on examining the clauses of the Trust Act of 1867, by which a form of a minute of resignation of a trustee is given in the appendix, I find that form contains no words of transference by the resigning trustee of his joint interest in the trust-estate in favour of the remaining trustees, and that no provision is made to the effect that any such transference should be executed except in the case of the resignation of a sole surviving trustee. The view, moreover, which I have thus adopted is in strict consistency with that expressed by the Court in the case of *Bell*, 6 R., at p. 553, to which we were referred during the discussion, and where this effect of a deed of assumption of trustees was said to be, and that without any deed of transference, "to make the two trustees and the assumed trustees for the future the joint-owners of the shares." If therefore a transfer was not, according to the rules applicable to Scotch trust-estate, necessary, in a question between a resigning trustee and those who are still to remain trustees, to vest the whole trust-estate in the latter, that appears to me to dispose of the first part of the objection which I have read from the answers of the respondents. So that the only question which remains is as to whether the respondents can insist on their objections founded on the articles of association referred to in the answers. I am of opinion that they cannot. When the respondents agreed to accept the trustees of Mr Dalgleish as holders of the shares, they must be held to have done so in the knowledge that anyone of those trustees had a right at any time to resign. They accepted the petitioner, moreover, not as an individual, but as one of a set of joint-owners of a trust-estate, subject always to the exercise at any time of this right to resign. It was his position as a trustee which alone entitled him to ask to have his name put upon the register or entitled the respondents to insert it there, and when he has now ceased to be a trustee or to have any right to or interest in the shares in question by availing himself of his undoubted legal right to resign, I do not think that the respondents are entitled to refuse to correct the register by the deletion of his name in order that the register may be made consistent with the true position of the trust-estate.

This objection is mainly rested on the special provision of the articles of association as to the transmission of shares founded on in the answers, but I do not think that that provision has any application to a case of the present description. It deals with the proposed transfer of the property of shares by a shareholder who is the proprietor of those shares in favour of some other party proposing to purchase the shares. But that is not the position of the petitioner. As an individual he has no right of property in the shares, and could not, except in conjunction with the other trustees, have transferred them to any other party. The shares belong to the trust-estate, and were held by the trustees, of whom the petitioner was one, as joint-owners in trust, and it is not proposed to dispose of them. Since the resignation of the petitioner he has not even a trust interest in the shares, which have since then been, and are now, held by the remaining trustees. All that is proposed is, that the register should be made correct by deleting the name of the petitioner, who is no longer a trustee, and this, for the reasons I have stated, I think the petitioner is fairly entitled to require.

Lord Shand—By section 30 of the Companies Act 1862 it is provided that no notice of any trust "shall be entered on the register in the case of companies under this Act, and registered in England and Ireland." This enactment by direct implication recognised and sanctioned the practice which has long prevailed in this country of trustees who hold stock of joint-stock companies having the trust expressly entered on the register, and this practice, so sanctioned, has been found to lead to important consequences affecting the title and the transmission of shares which stand on the register in the names of trustees.

The first and most obvious effect of registration in this form is that the stock or shares are earmarked as belonging not to the persons in whose names they stand, but to the trust estate described on the register. The beneficial interest is not in the persons whose names are on the register, but in the beneficiaries whom they represent; and the necessity for proving this by the writ or oath of the trustee which exists in the ordinary case, and which has often created serious difficulties, and in some cases great injustice, is avoided by the terms of the entry on the register.

Again, where shares stand on the register in the names of persons expressly described as trustees, a newly assumed trustee does not require a transfer from his co-trustees in his favour in order to give him a title jointly with them to the shares. This was in effect decided in *Bell's* Case in the City of Glasgow Bank Liquidation, 6 R. 548, affirmed on appeal, 6 R. (H. of L.) 55. The principle on which that case was decided was that the effect of a deed of assumption, though containing no conveyance or transfer of the shares or other property of the trust, was to give the assumed trustees a right of property in the trust-estate, so that he and the other trustees had right to that estate as joint-owners in trust. It followed that this right of joint-ownership so constituted having been merely intimated to the bank, with the authority of the assumed trustee, the registration of the assumed trustee as a shareholder was effectual as completing a title to the stock, and thereby creating the liabilities of a partner. A deed of transfer by the former trustees to themselves and the assumed trustee was not necessary. The deed of

assumption duly intimated to the bank was not only clear evidence of an agreement on the part of the assumed trustees to become shareholders, but was evidence of their having acquired a right of property as trustees in the shares, and so warranted the bank officials to enter them as joint-owners in trust on the register. This could only occur in the case of a trust expressly declared on the register. It is not enough to warrant the entry of new owners or joint-owners of the stock that the bank should be satisfied that the assumed trustees had agreed to become shareholders. They are only entitled to register the assumed trustees as joint-owners of the stock on getting a sufficient title of transfer from the existing owners—clear proof of joint-ownership in the assumed trustees—and the title to the character of joint-owners is instructed in accordance with the ordinary practice which has long prevailed, by a deed of assumption only, and without any transfer or deed of conveyance.

Again, where several persons are entered on the register as the holders of stock in the character of trustees, on the death of one or more of them no right of property descends to his or their executors, but without transfer the title of the deceased accrues to the survivors. This I apprehend would not occur in the case of joint-holders of shares—that is, in the case of shares registered in the names of several persons, not as trustees, but as themselves beneficial owners—for in that case the beneficial ownership or right of property of anyone dying would descend to his representatives, and could only be taken up and transferred by them. It is an important incident and result of the trust title expressed on the register that as the shareholders have no beneficial ownership, and so nothing to transmit to executors, their title accrues to or devolves on the survivors. The key to the rule and practice (1) as to the effect of an assumption of a trustee intimated to the company, as warranting the registration of the assumed trustee as a joint-owner of shares held in the names of the other trustees, and (2) as to the death of a trustee resulting merely in his title devolving on the other trustees, is simply the elasticity of a trust title, for where there is a body of trustees the death of one leaves the others owners of the property; and again, the assumption of a new trustee gives him with the others a right of property in the trust-estate. The joint-holders of the estate may be more or less numerous but there is but one estate, and really only one title. The principle is clearly stated in the well-known cases of *Gordon's Trustees* v. *Eglinton* and *Findlay* v. *Mackilligin*, where the Court was dealing with heritable and other trust estate, and in *Oswald's* Case in the City Bank Liquidation, 6 R. 461, with reference to bank stock, and to avoid repetition I venture to refer to my opinion in that case. The decisions of Lord Cairns in the *Albert* arbitration, which are those commented on, proceed on the same principle as the authorities in this country, for his Lordship held that on the death of one of two persons who jointly held shares in trust—even though the trust did not appear on the register—the liability of one of them who died in respect of the shares ceased at his death.

The question in this case is, what is the effect of a resignation by a trustee duly intimated to the company on whose register his name stands as trustee, and I am of opinion that as his title on the register is one of several joint-owners in trust, a deed of transfer by him and his co-trustees, or by him alone to the remaining trustees, is not necessary to divest him. His resignation, admittedly competent and effectual, certainly divests him of all right of property in the trust-estate as effectually as his death would do. I see no good reason to doubt that the title accrues to the remaining trustees in the same way as in the case of death, and that on due intimation of the resignation to the company his liability as a shareholder must cease. The question arose for decision in the cases of *Sinclair* and *Tochetti* in the City Bank Liquidation. I was then of opinion that in the case of a resignation duly intimated to the bank a transfer was not necessary, but it was unnecessary then to say so, for the point did not arise for decision, the resignations in these cases not having been intimated until after the bank had stopped payment, when it was too late to alter the register. In the case of *Tochetti*, Lord Deas, whose opinion on a question of this kind relating to a title to trust property I deem to be of the highest value, indicated pretty plainly that in his view a resignation duly intimated was effectual without any transfer. His Lordship said (6 R. 793)—"There is no doubt, as I have had occasion to observe in former cases, that in holding trustees personally liable as partners we encountered this anomaly, that we could not practically carry out the principle by holding either the rights or liabilities of a partner to be transmitted to the personal representative of the trustee. It follows that the liability of a trustee may be terminated in ways which would not terminate the liability of a partner holding for his own behoof. The death of the trustee will do it without any transfer either by his personal representatives to the surviving trustees or by them to themselves, and this without even the necessity of intimation of any kind. So we have already decided. On the other hand, a deed of assumption may result in the party assumed becoming a partner without any transfer. If therefore there had been in this case distinct evidence of intimation to the bank of the petitioner's resignation, I am by no means prepared to say that this would not have been sufficient without a transfer. We have never yet decided that a transfer in such cases is necessary, and there is a good deal that goes the other way." The statute 24 and 25 Vict. cap. 84, sec. 1, authorises gratuitous trustees "to resign the office of trustee," while section 2 provided that nothing contained in the Act "shall affect any liability incurred by any gratuitous trustee prior to the date of any resignation." As the effect of resignation must be to divest the person resigning of any right of property in the trust estate, it follows (1) that he has thereafter nothing vested in him to convey, and (2) that his liability for future trust acts or management after the date of resignation must cease. It is quite true that as resignation is a private act it must be duly intimated to any company in which the trustee is with his co-trustee registered as a shareholder. But such intimation having been made, I am unable to see that any different rule or principle should apply to the case of resignation from that which has effect in the case of the death of a trustee. In both cases the right of ownership of the trust

property is at an end, just as the ownership on the other hand, is acquired by a deed of assumption, and if the title, being one expressly of trust, admits of accruing right to the other trustees, or of the title of the deceased being absorbed in the surviving trustees in the case of death because the right of property has ceased, so it appears to me the same result must follow in the case of resignation, for there the right of property in the resigning trustee has also ceased. This result in both cases arises from the fact (1) that there is a joint-ownership in trust; (2) that there is therefore what I have ventured to describe as an elastic title; and (3) that one of the several owners by death or resignation has ceased to have any longer any right of ownership in the trust-estate. I attach no importance to the provision at the end of section 10 of the statute 30 and 31 Vict. c. 97, to the effect that "any retiring trustee or trustees who may have already retired shall be bound when required, and at the expense of the trust, to execute all deeds necessary for divesting them of trust property and conveying the same to the trusters or truster or judicial factor acting in the execution of the trust." I think that enactment is one introduced *ob majorem cautelam*, and in case any deed might be required by third parties, as *e.g.*, in the transfer of consols, or rights in foreign stocks or property, or it may even be with reference to heritage in this country, where a title to satisfy the most anxious purchaser may be desired.

On these grounds I am of opinion that in the ordinary case a resigning trustee is entitled to have effect given to the resignation duly intimated to the company without executing any deed of transfer, either by himself alone or by himself and his co-trustees in favour of them. I may add that in my opinion nothing which can be regarded as authority on the subject can be found in the judgments given in the cases of the City Bank Liquidation. Earl Cairns in *Alexander Mitchell's* case spoke of a transfer, "or something equivalent to a transfer," being presented to the company, indicating that there might be a mode of terminating liability by an equivalent to a transfer, and in my opinion an intimation of resignation of office is such an equivalent. Lord Penzance no doubt indicated an opinion favourable to the respondents' argument, but his Lordship's observations were not necessary to the judgment, and were not concurred in by the other learned Lords.

But it is said that under the articles of association of both companies—the Land Feuing Company and the Heritable Securities and Mortgage Investment Association [in which company the trust was also interested]—the directors have power to reject transfers in favour of persons with whose solvency they are not satisfied, and that the provisions on this subject must be held to apply to the case of a resignation which in any view can only receive the effect of a transfer as in the ordinary case. I am of opinion that this argument is not well founded. I doubt whether the articles of association of the Land Feuing Company give the directors the power claimed. But even assuming this power to exist in both companies, I do not think it applies or can be exercised in a case in which the company has entered a trust title in favour of several persons on the register. The entry of the trust has been held to embody the condition of survivorship even though not expressed (see *Bell's* case), so that by the death of one of several trustees the company has a shareholder or obligant less than on the existing register so far as regards future liabilities, and cannot demand a new transferee. So as to resignation, the effect of the statutes of 1861 and 1867, by which gratuitous trustees may resign their office, is by direct implication to import into the entry of trustees on the register an implied condition of power to resign. Such a condition is quite as much an implied part of the entry of trustees as the clause of survivorship. Assuming this to be so, the trustee is only asking that effect shall be given to this implied condition when he presents his minute of resignation, and requires it to be noted in the bank's register in accordance with the practice which has prevailed in this country, and of which many instances occurred in the City Bank Liquidation, and I am unable to see any good answer to this demand when made. The power of a trustee to resign, and consequently to have his name removed from the register, appears to me to result from the trust being recognised on the register and from the provisions of the Trust Acts. If a joint-stock company desire to avoid this result they may provide in their articles of association that trustees shall not be entitled to be entered as such on the register, but if they accept of a body of trustees as shareholders, which certainly gives the company certain important advantages, they must accept the disadvantages which are the ordinary incidents and results of a trust title. The law is analogous to that which had been applied in the case of a superior who has given a charter in favour of an heir of entail in possession with a series of substitutes. Having by this mode of entry enfranchised the entail, he cannot therefore insist on treating an heir under the destination as a singular successor. This follows from the entry which he has thought fit to give, though not bound to do so. In the same way the result for which the petitioner here contends results from the entry of the trust on the register of the companies.

On the whole, I am of opinion that the prayer of both petitions should be granted, and I concur entirely in the views which have been expressed by my brother Lord Mure.

Lord Adam—The petitioner William Ogilvie Dalgleish was a trustee on the trust-estate of the late Mrs Dalgleish of Roseville.

The trustees who originally accepted and acted were Miss Dalgleish, Mr James Ogilvie Dalgleish, Mr Maitland Dougall of Scotscraig, and the petitioner.

Part of Mrs Dalgleish's estate consisted of 200 shares in the Land Feuing Company (Limited). The trustees confirmed to these shares, and were subsequently entered on the register of the shareholders of the company, as holders thereof, "as accepting executors" of the truster Mrs Dalgleish.

Mr James Ogilvie Dalgleish died in 1875, and his name has been removed from the register of shareholders.

The petitioner resigned office as trustee in 1879, under and in terms of the Trusts (Scotland) Act 1867. After his resignation there remained two accepting and acting trustees, Miss Dalgleish and Mr Maitland Dougall.

The object of this petition is to have the petitioner's name removed from the register of shareholders of the company. The company decline to do so, and insist that a transfer of the shares by the trustees in whose names they are registered, to the trustees remaining after the petitioner's resignation, must be tendered to them. The object of the company, no doubt, in insisting on this being that they intend to refuse to consent to the transfer, and this they would appear to have power to do, and so to keep the petitioner's name on the register.

I am of opinion that the effect of the petitioner's resignation in a question with the remaining trustees was that the whole trust-estate, including the shares in question, immediately devolved upon the remaining trustees, subject no doubt to any liability which might have been incurred by him prior to his resignation. I think that no deed, transfer, or other conveyance was necessary to vest in the remaining trustees the trust-estate which had previously been vested in them and in the petitioner. The whole estate devolved upon them by the operation of law. I think it is also clear that no debts or obligations subsequently incurred by the remaining trustees on behalf of the trust estate can affect the petitioner. The effect, it appears to me, of the death or resignation of the trustee is the same, except that in the former case the representatives of the trustee would be bound for prior obligations, and in the latter the trustee himself, there being in either case no liability for future obligations.

The petitioner being thus, as I think, altogether divested of any right or interest in the trust-estate, including the 200 shares in question, the question is, whether he is entitled to have his name removed from the register of the shareholders of the company on which he stands registered along with the remaining trustees as proprietor of 200 shares.

Now, it cannot be disputed that it appears on the face of the register that the petitioner holds these shares not for his own beneficial interest but entirely in a fiduciary capacity. What the effect of that is in the case of a trustee dying is thus described by the Lord President in the case of *Oswald's Trustees* v. *City of Glasgow Bank*. His Lordship says—"I think that it sufficiently appeared upon the face of the register that when any one of these three persons, who are there described as the trustees of the deceased Mr Clinkscales, died, his connection with the trust-estate came to an end altogether, and that the trust-estate would thereafter be vested in the two surviving trustees, so that the bank and the creditors were not entitled to rely that they should have three persons constantly bound to them for the amount of this stock, but that was subject to the contingency that upon the death of any of them the number of partners interested in that stock would be reduced to two."

I think that these words are directly applicable to this case, substituting the word "resignation" for "death." The power of resignation by a trustee is one of the incidents of a trust, and if a joint-stock company places trustees upon its register as proprietors of shares, it is not entitled to rely that these trustees shall be constantly bound to it in respect of these shares. The company must be taken to know that a trustee might at any time resign, with the necessarily accruing result that the shares would *eo ipso* devolve on the remaining trustees just as in the case of death. If a joint-stock company therefore place trustees upon its register, I do not see how it can refuse to recognise that by resignation a trustee has ceased to be a proprietor of shares in the company, or to be liable for future debts and obligations. It appears to me that *Oswald's* case applies in principle to this case.

It is said, however, that a transfer must be executed in order to remove the petitioner's name from the register. The transfer which it is suggested should be executed is one by the remaining trustees and the petitioner in favour of the remaining trustees alone. But the remaining trustees have already the sole right to the shares. Such a transfer therefore cannot be necessary for the purpose of transferring the shares or any right in or to them to these trustees. I do not see either the propriety or necessity of a transfer where there is nothing to be transferred. It appears to me that the regulations contained in the schedule to the Act of 1862, and adopted with some modifications by this company, as to the transfer of shares are intended to apply to the case where shares are actually intended to be transferred from the transferor to the transferee, and not to such a case as this, where the transfer has already taken place by the operation of law, and this, I think, was recognised in *Oswald's* case, because I do not see how otherwise a tranfer to which Oswald's representatives should be parties should not have been required to warrant the removal of his name from the register.

I think therefore that notice to the company of the petitioner's resignation, and that he has in consequence ceased to be proprietor of the shares, is sufficient to entitle him to have his name removed from the register. It may be that under the 38th section of the Act of 1862 the petitioner may still be under liabilities to the company, but the company is carrying on business and is not in liquidation, and that therefore is no reason why his name should not now be removed from the register.

Lord President—I am sorry to be obliged to dissent from the proposed judgment. I share the views expressed by Lord Cairns and Lord Penzance in the case of *Alexander Mitchell*, 6 R. (H. of L.) 60.

Lord Cairns says—"The name of the appellant having been duly entered on the register, and appearing there at the time of the winding-up, he is clearly liable to be placed on the list of contributories, unless he can show something more than his mere resignation of his trusteeship. His resignation of his trusteeship alone would not terminate his liability to the bank. He ceases to be a trustee, but it remained for him to terminate his liability in respect of the bank by a transfer, or something equivalent to a transfer, of his shares."

Lord Penzance says—"The only way in which a partner could, under the provisions of the deed of copartnery, divest himself of his share in the bank would be by a deed of transfer, the form of which is to be regulated by the directors. But no such deed has ever been executed, and although the appellant would after his resignation have a right to call upon his fellow-

trustees to concur in all necessary deeds and acts for effecting a transfer of his interests in the bank, and the bank would be bound under ordinary circumstances to give effect to such deeds and acts by removing his name from the register, the mere act of resigning his office of trustee cannot, even though communicated to the directors, properly be held to be equivalent to a transfer, or *per se* to entitle the appellant to have his name thus removed."

In this Court in *Alexander Mitchell's* case [*supra cit.*] we all reserved our opinions as to what would be the effect of a resignation by one of several trustees, intimated to the company while the company was solvent and carrying on its business. This circumstance seems to me to give greater weight to the opinions I have quoted.

The petitioner was entered in the register of The Land Feuing Company (Limited) along with three other persons as holders of 200 shares of the company, as accepting executors of Mrs Margaret Magdalene Raitt or Dalgleish. The effect of this registration was to make the petitioner and his three co-executors partners of the company as joint-owners of the 200 shares with a right of survivorship. Their description as accepting executors of a person deceased did not limit or vary in any respect their liabilities as partners of the company. In *Muir's* case [*supra cit.*] I said that the notice of a trust on the register (as practised in Scotland and sanctioned by statute) was "not for the purpose of altering the liability of the holders of such stock as compared with the other holders of stock in the same company, but only for the purpose of marking the stock as the property of the particular trust named in the transfer and the register." This passage in my judgment was quoted with marked approval by Lord Cairns (Chancellor) and some of the other noble and learned Lords who advised the House of Lords in the appeal. I cannot doubt therefore that the position of the petitioner and his co-executors as partners of this company differs in no respect from that of any other set of joint-owners of shares with a right of survivorship, entered in the register as such.

The petitioner resigned his office as trustee and executor of Mrs Margaret Dalgleish on 25th Nov. 1878. This he did, as I understand, in virtue of the power of resignation conferred on all gratuitous trustees to resign on certain conditions by 24 and 25 Vict. c. 84. But one of the conditions under which this right is conferred is (sec. 2) that "nothing contained in this Act shall affect any liability incurred by any gratuitous trustee prior to the date of any resignation." The subsequent Trust Acts of 1863 and 1867 do not in any respect alter the provision of the second section of the first Act. Even if the resignation had been made in terms of a power in the trust-deed the result would not be different, for a truster has no power to limit the liability of his trustees to third parties. Now, the liability which Mrs Margaret Dalgleish's trustees undertook when they registered themselves as partners of this company was the same as that of all the other partners, viz., to pay the portion of the unpaid capital of the company corresponding to their shares when called up in terms of the contract of partnership. It is quite settled that this obligation attaches to the partners not when the calls are made but when they become members of the company.

Much importance has been ascribed to the fact that the petitioner's resignation was intimated to the directors of the company. But what was it that was so intimated? Merely that he had resigned. But that could mean no more than that he had done an act which disqualified him from taking part in the administration of the estate as a trustee for the future, but which did not and could not absolve him from the liability which he contracted in becoming a partner of the company.

In ordinary partnerships there is no power in any partner to assign his interest to a third party, and so to get rid of his liabilities as a partner, either to his copartners or to the public. In companies formed and regulated as this is by the Companies Acts the shares are by express enactment made transferable, and but for this enactment they would not be so. But the same statutes provide for the way in which such shares can be conveyed so as to divest one person of his rights and relieve him of his liabilities as a partner and substitute another in his place. And the only way in which that can be done, as I read the Companies Acts, is by deed of transfer. The arrangements for carrying through such transfers are part of the general powers given to the directors in the management of the concern, the control vested in the directors over the right of transfer being in some companies greater and in others less.

The case of *Bell* [*supra cit.*] throws no light on this question. It is beyond doubt that if the names of persons are entered on the register of shareholders by their authority or with their consents they are thereby effectually made partners, for this is matter of express enactment by section 23 of the Act of 1862. But when a person has so become a partner, the question is how he can divest himself of the character and get rid of the liability of a partner.

In the present case the articles of association provide that "no transfer of shares by a shareholder shall be effectual unless offer be first made of the same to the company at the price proposed, and the consent of the directors in writing be first obtained to the transfer." And also that "the company shall not be bound to register the transfer" "unless the proposed transference shall have been previously approved of by the directors."

The petitioner is thus met by three difficulties —(1) He has no transfer to present to the company; (2) he has not obtained the written consent of the directors; (3) and his transferee, if he can be said to have one, has not been previously approved. So far from any such consent or approval having been obtained, the directors strongly object, and on grounds apparently not unreasonable, to the proposed change on the register of shareholders.

Whether if the directors were willing to dispense with the execution of a deed of transfer and to remove the petitioner's name from the register, leaving only his co-owners of the shares as the registered partners in respect of the shares in question, they could lawfully do so, I do not inquire. But I am of opinion that the petitioner cannot assert a right under the 35th section of the Act of 1862 to have his name removed.

This case has been likened to the case of one of several testamentary trustees and executors (who are registered as joint-owners in trust of shares in

an incorporated company) dying. But it appears to me that this is a false and misleading analogy. The effect of the death in such a case is to vest the whole joint property in the shares absolutely in the survivors, because such a joint trust-estate is either expressly or by implication given to the trustees jointly and the survivors and survivor. This was the ground of judgment in *Oswald's Trustees*, Jan. 15, 1879, 6 R. 461. No right or interest whatever can in such an event transmit or descend to the executors or representatives of the deceasing trustee, and therefore it becomes both impossible and unnecessary that any deed of transfer should be executed—impossible, because there is no one *in titulo* to make the transfer, and unnecessary because the shares are already by the operation of the original title of the trustees fully vested in the survivor.

But in the case of a trustee resigning, the shares cannot vest in his co-trustees by survivorship, and there is a living man to make the transfer. The form of the transfer would of course be by the ordinary method known in trust law. The whole trustees on the register, including the resigning trustee, will transfer the shares to the trustees other than the resigning trustee.

The reason why this course is not adopted in the present case is not far to seek. The whole circumstances suggest that the object is to deprive the company and its directors of the right to withhold their consent to the transfer, and to refuse to approve of the transferees—a right secured to them by the articles of association.

The Court granted the petition.

Counsel for Petitioner—R. V. Campbell—J. A. Reid. Agent—William Duncan, S.S.C.

Counsel for Respondents — Pearson — Low. Agents—Fraser, Stoddart, & Ballingal, W.S.

Friday, November 20.*

SECOND DIVISION.

[Sheriff of Aberdeen.

NOBLE *v.* WATSON.

Agreements and Contracts—Master and Servant—Dismissal for Fault—Forfeiture—Ship.

The owner of a vessel entered into an agreement with a master whereby the master purchased and paid for a share in the vessel, and the owner agreed to hold the share in trust for the master's share of profits, without prejudice to his (the owner) selling or mortgaging the vessel, the master on his part agreeing to take the command under the stipulation that should he be guilty of drunkenness he should be liable to dismissal, and in that event to forfeit all claim to any share of the vessel or its profits. He was justifiably dismissed for drunkenness, and the owner, founding on the clause of forfeiture, refused to transfer the share or repay the price. *Held* that the share being the master's property, and it not being proved that his misconduct had caused loss to the owner, the owner was not entitled to hold the share as forfeited by the misconduct, and that as he had refused to transfer it he must refund the price.

* Decided November 13.

In August 1883 Crawford Noble junior, the owner of a steam-trawler called the "Lightning" of Aberdeen, entered into a verbal agreement with William Watson, a shipmaster, by which he agreed for the sum of £100 to sell him seven sixty-fourth shares of the vessel. Watson paid the money and obtained from Noble's agent a receipt therefor, which was as follows:—"Received of William Watson the sum of £100 on behalf of Crawford Noble junior, for a share in the steam-trawler 'Lightning.'" At the date of the sale the vessel was already mortgaged to a bank to her full value. On the 25th October 1883 they entered into a minute of agreement by which (1) Noble, in consideration of the sum of £100 paid to him by Watson, agreed, but so long only as Watson fulfilled the obligations undertaken by him in the second place, to "hold seven sixty-fourth shares of the vessel in trust for payment to the second party (Watson), during the continuation of the agreement, of one-ninth share of the net profits earned by the 'Lightning,' without prejudice to Noble's power to sell her or mortgage or dispose of her on repayment of the £100;" (2) Watson agreed to take entire command of the vessel, to conduct the trawling operations, &c., and to be sober and attentive to his duties as captain, "and in the event of his at any time becoming intoxicated or in any way failing to fulfil the obligations hereby undertaken by him, the first party (Noble), shall be entitled to dismiss him from his employment as captain, and in that event he shall forfeit all claim to repayment of the £100, and shall also forfeit his right to any share of the vessel or of the profits thereof."

Watson entered on his duties as captain on the 14th of August. In consequence, however, of his drunken behaviour Noble dismissed him from his employment.

Watson raised this action against Noble for repetition of the £100, and averred that he had frequently applied to the latter for a bill of sale of the shares of the vessel for which the sum was paid, but the defender had refused to give it to him. He reserved all claims competent to him for damages in respect of the defender's failure to implement his engagement.

The defender averred that through the pursuer's drunkenness and neglect of duty he caused him serious loss and damage, and in particular on 6th December damage was done to the extent of £57 to the nets of a fishing-boat, for which the defender was held responsible, and a trawl-net and gear were lost on the 15th December. He also stated that the pursuer, besides having forfeited the sum of £100 in terms of the agreement, was liable to him in damages for loss and injury caused by culpable neglect of duty, and he reserved right to raise action therefor.

The pursuer pleaded—"The pursuer having paid to the defender the sum sued for, for a specific purpose, and the defender having refused to implement his part, is liable in repetition, and decree should pass against him for the principal sum, interest, and expenses as prayed for."

The Sheriff-Substitute (Brown) found, after a proof, that the pursuer was entitled to damages