present Act is more clearly expressed with reference to the point I am now considering. It provides that "A creditor who has a claim or a debt due shall be entitled to vote and rank for the accumulated sum of principal and interest to the date of the sequestration, but not for any interest accruing after the date of the sequestration." That is one case, and that is disposed of by the words I have just read. No more is necessary, for this Act does not require that the creditor should specify separately on oath the amount of the accumulated sum and of the interest, which was found to be inconvenient, as claims were frequently rejected on the technical ground that the authorised process had not been gone through; so that this provision is more simple than the corresponding one of 1839. But then the section goes on—"and if the debt is not payable till after the date of the sequestration, he shall be entitled to vote and rank for it only after deduction of the interest from that date, and he shall also be liable to deduction of any discount beyond legal interest to which his claim is liable by the usage of trade applicable to it." Now, that is the whole section, except what follows dispensing with the need for calculating separately the amount of the interest and of the duration. And I have come to the conclusion that the deduction of discount is applicable to the latter of the two heads only, namely, where the debt is not payable till after the date of the sequestration. The Act speaks of deducting "discount beyond legal interest," which is a perfectly intelligible expression as applied to debts coming due after sequestration, for the creditor is bound to deduct interest from these; but he cannot deduct interest from debts due before sequestration, because in that case interest is to be added up to the date of sequestration, and the Act would have required to specify whether the deduction is to be from the accumulated sum or from the principal only. I therefore read the provision as applying only to debts due after sequestration.

But I have been anxious to explain the construction only for the purpose of making clear the true grounds of judgment. I am of opinion that if a debt is due which by usage of trade is liable to a discount, that discount must be deducted for the plain reason that the true debt is the sum minus the discount. The parties contracted on that footing if there was a usage of trade; but this depends upon whether the discount is payable to the bankrupt. Is there a usage of trade? Now, looking to the evidence in this case I cannot say that there is. The custom is a very loose custom. It does not seem to be a usage which gives the debtor a right to a certain definite amount of discount within a certain time or whenever he paid. I cannot find any specification of time, or whether the discount is at the rate of 20 per cent. or 30 per cent. The true construction seems to be this. The brewer keeps the matter in his own hands, and says to his debtor—"If you pay promptly I will take so much off your account; if you pay less promptly I will take less off; but I am to be sole judge. I shall be a very favourable judge, especially if you are a good customer; and how good a customer you are I shall judge only when I come to each particular case." This does not appear to me to be a discount to which the creditor is liable, or a right to which the debtor is entitled at common law. I am therefore of opinion that this appeal ought to be refused.

LORD DEAS and LORD SHAND concurred.

The Court adhered.

Counsel for Trustee (Appellant)—Kinnear—Campbell. Agents—Campbell & Smith, W.S.

Counsel for Respondents—M'Laren. Agent—P. Morison, S.S.C.

Friday, March 7.

FIRST DIVISION.

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

Public Company—Partnership—Executor—Resignation—Intimation—Trusts (Scotland) Act 1867 (31 *and* 32 *Vict. c.* 97), *sec.* 18—*Intimation of Resignation by an Executor to a Bank where Shares held by Estate.*

One of three executors executed a minute of resignation, which was duly recorded in terms of the Trust Act of 1867, and was also intimated to his co-executors. Part of the executry estate consisted of shares in a banking company of unlimited liability, in the register of which the name of the executor was with his authority entered as member. No formal intimation of his resignation was ever made to the bank; but he ceased to sign the dividend warrants, and in a book called the dividend register, which contained memoranda regarding the payment of dividends, there was down to the resignation the 'remark' 'p. C. T. and W. M.,' but after that date it became 'p. W. M. Exr.,' C. T. being the resigning executor. The third executor never signed any dividend warrants. At the proof C. T. did not examine his co-executor W. M., who throughout took the most active part in the management of the estate.

In a petition for rectification of the register of members and of the list of contributories—*held*, assuming that executors were entitled to resign under the Trusts Act 1867, that as no intimation was proved to have been made to the bank the petition must be *refused*.

The petitioner in this case was one of the executors of the late Hugh Loag, draper, Wick, who died in April 1875. The other accepting executors were Dr Bernard, then Roman Catholic clergyman in Wick, and afterwards residing in Copenhagen, and William Miller, writer, Wick.

Mr Loag was survived by a widow and three children—one son and two daughters. By the provisions of his testament his executors were, after providing an annuity of £40 to his widow, and fulfilling certain other purposes, to hold his estate for behoof of his three children, and divide it equally among them, payment to be made to his son upon attaining the age of twenty-one, and to his daughters upon their marriage. A

small legacy was also left to each of the executors, but this was, it was averred, never taken by the petitioner.

The estate consisted of, *inter alia*, stock of the City of Glasgow Bank to the amount of £1350. Dr B. Bernard, the petitioner, and William Miller were confirmed as executors, and their names entered with their authority on the register of the bank.

By minute of resignation, dated 20th December, and recorded 27th December 1870, the petitioner formally resigned the office of executor, and on 29th December his agent intimated the resignation by formal letters, accompanied by copies of the minute duly sent to each of his co-executors. After the resignation the petitioner in no way intromitted with the executry estate. But it was admitted "that no transfer by the petitioner to the remaining trustee or trustees was executed at or after the date of his resignation of the trusteeship, nor was formal intimation of the petitioner's resignation of the trusteeship ever made to the City of Glasgow Bank, and the bank officials were never asked to make any change in the entry of the names of the trustees of the late Hugh Loag in the stock ledger or other books of the bank."

It was, however, admitted that "the warrants for payment of dividend were signed by the petitioner and William Miller, another trustee, down to the year 1870. The dividends have since been paid on the signature of William Miller alone, who held a responsible position in Wick, being town-clerk thereof. On the first occasion of the dividend warrant being signed by the said William Miller alone, viz., in February 1871, the following note was made in the dividend register of the bank in the column for 'Remarks,' opposite the entry of the dividends due on the stock held by Hugh Loag's executors, 'p. Will. Miller, Exr.' The previous entries in that column were 'p. Chas. Tochetti and Will. Miller.'" Dr Bernard, it appeared, never signed any warrants.

Argued for the petitioner—(1) The petitioner was a trustee entitled to resign. He was called an executor indeed, but the duties were those of trustees. He was entitled to get £20, but he never accepted that legacy, which was given on condition of undertaking office. He had therefore effectually resigned, and (2) was consequently within the case of *Oswald*, *supra*, p. 221. For the principle of that case was, that the title to a trust estate was inseparable from the office, and the moment the character of trustee was gone the title went likewise. There was no need for a formal divestiture. In practice, neither the whole body of trustees, nor the resigning trustee, granted any deed of such a nature. (3) In *Sinclair's* case (*ante*, p. 235) it was held that intimation was necessary. But what that case required was intimation as a matter of fact—no particular solemnity was enjoined. Now here the new form of entry in the dividend register coincided in point of time with the petitioner's resignation. That evidence might not be conclusive at first, but it grew in strength with lapse of years. It would not have done to pay to Miller only if Tochetti was necessary also; hence it was to be assumed that the bank knew of his resignation. As to Dr Bernard's not signing the warrants, the bank had probably assumed the law to be that a majority of the accepting executors was enough.

Argued for the respondents—(1) There was no effectual resignation. The petitioner was not a trustee but an executor. No doubt there were trust duties, but the appointment was one of executors. No power of resignation was conferred by the trust-deed. The power, therefore, if it existed, was purely statutory. Now, under section 18 of the Trusts (Scotland) Act 1867—31 and 32 Vict. c. 97—power was given to executors to resign where they were also trustees, but there was nowhere any power to resign conferred on those who were executors only. Then, again, the Act conferred power of resignation upon gratuitous trustees only. But here the petitioner did not hold office gratuitously. He was entitled to £20 under the deed. He was therefore not within the Act, and could not resign. But (2) assuming that he was entitled to resign, and that he had resigned, that was not enough. There must be a formal transference by him, or by the whole trustees including him, to the remaining trustees; and that transference must be formally intimated to the bank. But here there was no transference and no intimation. There was at least no evidence of either. It was said that knowledge on the part of the bank must be inferred from the change in the mode of entry in the dividend register, coinciding as it did in time with the intimation of the resignation to the other executors. That was evidence, and might create a presumption in favour of knowledge, but it did nothing more; for it might be explained in other ways. The bank might have been lax in paying to Miller alone, a man residing in the place and well-known, whereas Tochetti had left and could not be conveniently got to sign. Then it was to be remembered that there was another executor who for years had never signed because he was abroad. At best, however, it only proved knowledge, not a formal intimation. But the bank had no authority within their private knowledge to remove a man's name from the register, and it was admitted that there never had been formal intimation. If the petitioner himself had made the intimation, the same formality might not be requisite; but he made no such allegation. And it certainly must be very distinctly proved that Miller had authority to make the intimation for the petitioner before the bank were entitled to remove his name from the register.

Authorities—Stair, ii. 12, 3, and iii. 1, 2; *Martin* v. *Wight*, Feb. 3, 1841, 3 D. 485; *Gordon* v. *Eglinton*, July 17, 1851, 13 D. 1381; *Findlay*, June 30, 1855, 17 D. 1014; *Jameson* v. *Clark*, Jan. 24, 1872, 10 M. 399; *Barfoot* v. *Goodall*, 3 Camp. 146.

At advising—

Lord President—The petitioner is one of three accepting executors nominated under the holograph testament of the late Hugh Loag, dated the 3d of June 1861. Part of Mr Loag's executry estate consisted of certain shares in the City of Glasgow Bank, and the three accepting executors were duly registered as the holders of that stock on the 13th of December 1865, and their names have been continued in the stock ledger of the bank from that time down to the stoppage. It is now made matter of admission that the entry of the names of the petitioner and the other accepting executors was made on production to the bank, with the authority and on be-

half of the executors, of the confirmation to the estate of Hugh Loag, and consequently the petitioner was registered as a partner of the bank along with his colleagues by his own authority and on his application. It appears, and that also is admitted, that upon the 20th of December 1870 the petitioner executed a minute of resignation of his office of executor, and that was duly recorded in the Books of Council and Session on 27th December 1870, in terms of the Trust Act of 1867. That resignation was also intimated in due form to his co-executors.

The question has been raised whether the petitioner was entitled to resign his office of executor under the authority of the Trusts Act of 1867; but for reasons which will immediately appear I think it unnecessary to consider that question. I should assume that he was entitled so to resign. But then his resignation does not appear to have been intimated to the bank in any way. It is now admitted that no transfer by the petitioner to the remaining trustee or trustees was executed at or after the date of his resignation, "nor was formal intimation of the petitioner's resignation ever made to the City of Glasgow Bank, and the bank officials were never asked to make any change on the entry of the names of the trustees of the late Hugh Loag in the stock ledger or other books of the bank." The only circumstance which is founded on as even bringing to the knowledge of any of the bank officials the fact that Mr Tochetti had resigned his office, arises from this —that the warrants for payment of dividends were signed by the petitioner and Mr William Miller, one of his co-executors, down to the year 1870, but since that time the dividends have been paid upon receipts granted by Mr Miller alone. It would appear that Mr William Miller was a person who was resident in Wick, where the administration of this trust seems to have been carried on, and where these dividends were drawn. It is further admitted that on the first occasion of the dividend warrant being signed by William Miller alone, viz., in February 1871, a note was made in a book called the Dividend Register of the bank, in the column for remarks, opposite the entry of the dividends due on the stock held by Hugh Loag's executors, in these terms "p. William Miller, executor." The previous entries in that column were "p. Charles Tochetti and William Miller." On subsequent occasions the entry "p. William Miller" sometimes occurs in the remarks column; in others there is no such entry. Now, it happens that this entry is made very shortly after Mr Tochetti the petitioner had executed his minute of resignation, and this coincidence is very strongly founded upon by the petitioner as evidence that the entry must have been made on account of some intimation or communication made to the bank either by the petitioner or by Mr Miller on his behalf.

Now, these are the whole facts of the case, and it appears to me that it is quite impossible upon that state of the facts to remove this gentleman's name from the register. He was placed there by his own authority, and his name continued on the register down to the stoppage of the bank. It is not a matter in the discretion of the officials of the bank to remove a name from the register, nor are they entitled to do so unless they have distinct authority for doing it. We are very much accustomed in considering these petitions to think a little too much of the liabilities of parties, but to forget that, when the bank was a going concern, people were rather thinking of the rights of partners than of their liabilities, and that it would have been a very strong measure for the officials of the bank to remove any man's name from the list of shareholders without distinct authority to that effect. Now, it being admitted that the bank officials were never asked to make any change on the entry of the names of any of these executors, I do not see how it can possibly be said that they were in default, or that anybody failed to perform his duty to the petitioner in leaving his name where it was. If mere knowledge on the part of the officials of the bank that an executor or trustee had resigned his office were sufficient to justify the bank officials in making such an alteration, then the petitioner would say that there is here sufficient evidence of knowledge from that entry in the dividend ledger. But I doubt extremely whether mere knowledge on the part of the officials of such an occurrence would justify an alteration on the register. It may be made a question indeed whether something equivalent to a transfer may not be necessary, but that is a question that we have never yet had occasion to decide, and it is certainly not necessary to decide it here. At all events, I am very clear that there must, in order to justify the removal of a name from the register, be some warrant or authority to the bank officials to do so. But even if mere knowledge on the part of the bank or its officials of a resignation having been made were sufficient to justify such a proceeding, I cannot think that two words appearing upon the margin of the dividend register is evidence of such knowledge. In the first place, be it observed that the circumstance of Mr Tochetti having resigned as a trustee would never have justified the bank in paying these dividends to Mr Miller alone, because there was another executor who had not resigned—Mr Barnard—and certainly one of two executors is not entitled to draw money upon such a receipt. And yet that is the arrangement that is made apparently between Mr Miller and the bank, that he is to draw the dividends on this stock. Now, what the reason of that arrangement was, and how it was brought about, we are not informed. If the petitioner could have taken any benefit by having that matter investigated, then he had it in his power to do so, because he could have examined Mr Miller as a witness, who would have told us exactly what his arrangement was with the bank, what the reason for that arrangement was, and how far in the course of making that arrangement the bank or its officials became aware of the resignation of Mr Tochetti. But he has abstained from examining Mr Miller, and therefore we must take it for granted that no facts favourable to his contention could have been got from that gentleman as a witness. Upon the whole matter, it appears to me that this is a very clear case, and that we must refuse the petition.

Lord Deas concurred.

Lord Mure—I think this case is substantially ruled by your Lordships' decision in the case of *Sinclair*, and in which as I understand—for I was not present—your Lordships held that where there was resignation by a trustee, intimation of

that fact required to be made in some distinct manner to the bank at the time. No such intimation was there made, and the gentleman's name remained on the register, and it was held that it had been properly put upon the list of contributories. Now, on the admitted facts of this case there is no doubt that no intimation was made on the part of the petitioner to the bank officials, for the first subdivision of the admissions distinctly bears that no formal intimation of the petitioner's resignation of the trusteeship was ever made to the City of Glasgow Bank, and the bank officials were never asked to make any change in the entry of the names of the trustees in the stock ledger or other books of the bank. In these circumstances, he is just in the same position as Mr Sinclair was, and I concur with your Lordship in thinking that the mere fact of the dividend having been paid to Miller alone cannot in the circumstances be held as equivalent to an authoritative intimation to the bank of the resignation.

Lord Shand—I am of the same opinion, and I think the determination of the case really depends upon a question of fact. I assume that if notice of the resignation of the office had been given by or on behalf of Mr Tochetti to the bank, with a view to his name being removed from the register, or with a view to a marking being put on the register of the fact of his resignation, that would have been effectual to relieve him of future responsibility with reference to the shares. But I think that, upon the state of the facts, as the parties have agreed upon them in the minute of admissions, we must hold that such notice was not given. It is expressly admitted that formal intimation was not given. I confess that it would have been more satisfactory to me, instead of the admission that is given on that matter, to have had such evidence now as your Lordship has pointed at by an examination of Mr Miller, who would have given such account as he could of how it happened that he came to draw the dividends alone, and that his receipt alone was accepted, and some evidence from the officials of the bank as to the way in which entries in the transfer register came to be made, and how this particular entry came to be made in the dividend register, for without some evidence of that kind it is impossible for the Court to know what weight is to be attributed to an entry in that book at all. It is a fact that seems to favour the petitioner's case that the marking in the dividend register occurred within a short time of his resigning his office, and if the inference to be drawn from the date at which that happened had been strengthened by some parole evidence of the kind I am pointing at, even though it might not be very much, it would have had considerable weight. But the petitioner has, I think, by his admission deprived the Court of the power of drawing any inference that notice was given, because it is expressly admitted that none was given. In that state of matters, I cannot draw the inference from the marking in the dividend register which the petitioner asks we should draw. Accordingly, I concur with your Lordship in thinking that although the case is a hard one, as many others are, the petitioner has failed to make out a case entitling him to have his name removed from the register.

The Court therefore refused the prayer of the petition, and found the liquidators entitled to expenses.

Counsel for Petitioners — M'Laren—Goudy. Agents—Dove & Lockhart, S.S.C.

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

Friday, March 7.

SECOND DIVISION.

[Lord Curriehill,

LORD ADVOCATE *v.* LORD LOVAT.

Fishing—Salmon-Fishing—Barony Title—Possession—Rod Fishing.

L had a barony title to the lands on both sides of a river, dating from 1774, and also express grants of salmon-fishing of a much earlier date to certain parts of the river situated below the falls of K. He had from time immemorial exercised a full and exclusive right of fishing below these falls, *inter alia*, by means of close cruives, which caught almost all the salmon ascending the river. In consequence of the cruives and the falls, the fishing above the falls was, up to 1862, when close cruives were abolished, almost worthless. L had asserted his right above the falls for a prescriptive period (1) by protecting the river during the spawning season; (2) by exercising the right of fishing occasionally; (3) by taking his tenants bound to protect the water; (4) by preventing others from fishing. Since 1862 he had fished regularly above the falls. *Held*, in an action at the instance of the Crown, who claimed the fishings above the falls, that L was entitled to attribute his possession of the whole river to the barony title, and that under it the possession which had been had from the highest portion of the stream down to the sea had been one and continuous, and sufficient to maintain L's rights within the limits of the barony lands.

Observed (*per* Lord Justice-Clerk Moncreiff) that if a grant of salmon-fishings in a river of which the grantee has one or both sides, is extensive enough in its terms, it is sufficiently clothed with possession by the exercise of the right in any part of it.

Observed (*per* Lord Gifford) that where salmon-fishings are held on a barony-title *cum piscationibus*, possession of any part of the river is possession of the whole.

Observed (*per* Lord Justice-Clerk Moncreiff) that if letting the rod-fishing was more profitable than using net and coble, that possession was the strongest which produced the greatest amount of profit.

In this action the Lord Advocate, on behalf of the Crown, asked for declarator that the whole salmon-fishings in the rivers Affaric and Cannich and their tributaries, and in the river Glass (in which these waters combined), sometimes called the Beauly, down to the falls of Kilmorack, be-