

Wednesday, January 22.

FIRST DIVISION.

CITY OF GLASGOW BANK LIQUIDATION
(TENNENT'S CASE) HUGH TENNENT V.
THE LIQUIDATORS.

Public Company—Partnership—Reduction of Contract—Fraud—Commencement of Winding-up—Act 25 and 26 Vict. c. 89 (Companies Act 1862) secs. 18, 38, 84, 130—Date after which a Shareholder is Barred from Repudiating his Shares on the Ground of Fraud.

A shareholder in a joint-stock bank, which was registered under the Companies Act of 1862, raised an action of reduction of his contract, alleging that he had been induced to purchase stock through the fraudulent misrepresentations of the directors and the manager. The summons was served on the day before that on which it was resolved to wind-up voluntarily, but after the bank had stopped payment, and after the directors had published a notice summoning a meeting of shareholders for the purpose of passing a resolution to wind up voluntarily, and also after certain men of business, who had been appointed by the directors to make an investigation into the affairs of the bank, had published a report which showed that there was a deficit of over £5,000,000.

In a petition by the shareholder to have his name removed from the register of members and the list of contributories, and to stop calls—held (1) that at common law, after a company had closed its doors and declared its insolvency the rights of creditors had attached, and it was too late for a shareholder to seek reduction of his contract on the ground of fraud; and (2) that the Companies Act of 1862 introduced no other rule. Petition therefore refused.

The petitioner in this case, Mr Hugh Tennent, was the registered owner of £6000 stock of the City of Glasgow Bank, which he acquired at three different times. In December 1872 he purchased £2500 worth from a Mr Thomas Matthew; in July 1873 he purchased a like amount from a Mr Dugald Bell; and lastly, when the company issued additional stock later in the same year, he took his share of it to the extent of £1000.

The stoppage of the bank occurred on the 2d October 1878, and on and after that date was notorious throughout the United Kingdom. It was caused by the insolvency of the bank, which it was admitted the directors knew at the time to be irretrievable. On the same day a special meeting of the directors was held, of which the following was the minute:—"The directors having taken into consideration the present position of the bank, resolved to ask the attendance at the meeting of Mr William Anderson, C.A., and of Mr A. B. M'Grigor, writer, Glasgow. These gentlemen were accordingly sent for, and attended. It was then resolved, in terms of the contract of copartnery, to call a special meeting of the shareholders on the earliest possible day, for the purpose of submitting to them a balance

of the books of the bank as at 1st instant, and with this view to instruct Messrs Kerr, Anderson, Muir, & Main, C.A., and Messrs M'Grigor, Donald, & Company, writers, Glasgow, to examine the books, securities, &c., of the bank, and to make up a balance as at the 1st inst." The appointment of these gentlemen was published in the newspapers, and was notorious throughout the United Kingdom on and after 3d October 1878. The general result of their investigations was communicated orally by Mr M'Grigor to the directors about three o'clock on the afternoon of 18th October 1878, and a printed copy of the report and balance-sheet was handed to Mr Leresche, the secretary of the bank, about half-past seven o'clock in the evening of the same day. Printed copies were on the same day despatched by post to all the shareholders of the bank, including the petitioner, and were also inserted on 19th October 1878 in most of the newspapers in Scotland published on that day. The report and balance-sheet disclosed that the bank as a corporation was hopelessly insolvent, its debts being so large and its assets so small that after exhausting the capital and rest it appeared that upwards of five millions sterling would require to be made up by the shareholders. On 5th October 1878 the directors of the bank convened an extraordinary general meeting of the shareholders by advertisement in the following terms:—

"(CITY OF GLASGOW BANK.)

"Notice is hereby given, that an extraordinary general meeting of the City of Glasgow Bank will be held within the City Hall, No. 90 Candleriggs, Glasgow, on Tuesday, the 22d inst., at two o'clock in the afternoon, for the purpose of considering, and, if thought fit, passing as extraordinary resolutions, pursuant to sub-section three of section one hundred and twenty-nine of 'The Companies Act 1862,' the subjoined resolutions, and of appointing liquidators, and fixing their remuneration.

"RESOLUTIONS.

"That it has been proved to the satisfaction of this meeting that the City of Glasgow Bank cannot by reason of its liabilities continue its business, and that it is advisable to wind up the same.

"That the City of Glasgow Bank be wound up voluntarily.

"R. S. STRONACH, *Manager.*

"Dated Glasgow, 5th October 1878."

At this meeting on the 22d October the resolution to wind-up voluntarily was carried, and four liquidators were appointed. The voluntary liquidation was subsequently on 27th November continued, subject to the supervision of the Court.

On the 21st October, the day before that on which it was resolved to wind-up voluntarily, the petitioner raised an action in the Court of Session against the City of Glasgow Bank, and also against Matthew and Bell, concluding for reduction of the various transfers, entries in the bank books, and stock certificates in his favour as a holder of bank stock. The summons in this action was served on the bank prior to the passing of the resolution to go into liquidation.

In this action the petitioner averred that he had been induced to enter into these contracts for the acquisition of stock by the fraud of the bank. He alleged that not only the £1000 stock allotted to him in 1873, but also the two larger parcels, had in reality been acquired from the bank, and

not from the nominal sellers—Matthew and Bell—who were truly trustees for the bank, and were in the habit of allowing their names to be so used for the fraudulent purpose of concealing the fact that the bank was a large holder of its own stock. He averred further that he had purchased on the faith of the false and fraudulent balance-sheets issued by the directors, and also in consequence of the direct misrepresentations to himself personally made by Mr Alexander Stronach, the late manager of the bank.

This petition was for the removal of Mr Tennent's name from the register and the list of contributories, and also to stay calls. The liquidators contended that although the action of reduction was served on the bank prior to the resolution to wind up voluntarily, it nevertheless came too late to entitle the petitioner to reduction on the ground of fraud, seeing that it was raised after the stoppage of the bank through irretrievable insolvency.

Argued for the petitioner—The only point of time to be regarded in a question of this sort was the commencement of the winding-up. That was clear in principle and on the authorities. If this had been a question between the petitioner and the company only—had no interests of creditors intervened—it would have been immaterial when the action was brought. It might have been brought even after the winding-up had commenced. That was the inference to be drawn from *Addie v. The Western Bank*, March 4, 1864, 2 Macph. 809; June 9, 1865, 3 Macph. 899; *rev.* May 20, 1867, 5 Macph. (H. of L.) 80, and L.R. 1 Sc. App. 145. For there, but for special circumstances which did not occur here, the pursuer would have been entitled to his remedy. At common law a trustee in bankruptcy had no higher right in a question with creditors than the bankrupt himself had—*Ewart v. Latta*, May 5, 1865, 4 Macq. 983; *Fleeming v. Howden*, July 16, 1868, L.R. 1 Sc. App. 372. What, then, was the principle upon which creditors had in this matter higher rights than the company itself? It was to be found in sections 18 and 38 of the Companies Act of 1862 (25 and 26 Vict. c. 89). Under these sections the creditors' rights attached whenever the winding-up commenced, not sooner. Now, by section 130 a voluntary winding-up was to "be deemed to commence at the time of the passing of the resolution authorising such winding-up." In the present case the resolution authorising the voluntary winding-up was passed on the 22d October, and Mr Tennent's action of reduction was brought on the previous day, the 21st. He was thus outside section 18 of the statute, and his name ought therefore to be removed from the register of members and the list of contributories. As regarded the decisions, there was at one time a tendency to hold that even after the winding-up had commenced creditors had no higher rights than the company. That appeared to be Lord Cairns' view in *Smith v. The Reese River Company*, June 6, 1867, L.R. 2 Ch. App. 604; March 18, 1869, L.R. 4 Eng. and Ir. App. (H. of L.) 64. But *Oakes v. Turquand* corrected this—Feb. 9, 1867, L.R. 3 Eq. 576, and (H. of L.) L.R. 2 Eng. and Ir. App. 325. *Oakes* was followed by *Kent v. The Freehold Land and Brickmaking Company*, June 3, 1868, L.R. 3 Ch. App. 493; but there was no case in which an earlier date than the commencement of the winding-up had

been fixed on. *Nelson Mitchell's case*, *supra*, p. 155; and *Alexander Mitchell's case*, *supra*, p. 165, no doubt appeared contrary. The petitioners there, however, were admitted by shareholders, and they sought to transfer their shares. It was held that they were too late after the 2d, or at least after the 5th, October. Here, on the other hand, there was no proper contract, owing to fraud. The cases were therefore quite distinct.

Argued for the liquidators—The application of the petitioner to have his name removed from the register was made under the 35th section of the Act of 1862, on the ground that he was a person whose name had without sufficient cause been entered on the register. But that form of procedure was inapplicable here. To bring a case within that section there must be something in the facts by which the petitioner could readily show either that his name was put on without sufficient cause, or that there had been default or delay in taking it off. Here the petitioner's name was put on at his own request as regarded part of the shares six years, and as regarded the remainder five years, before the bank failed; and he did not aver delay or default in taking it off. This, therefore, was not a case which section 35 contemplated. But apart altogether from that, the question came to be—Was Mr Tennent, in the admitted state of matters which existed on the 21st October, when he raised this action, entitled on the ground of fraud to rescind the contracts by which he took these shares? The liquidators' position was that the action was too late. They contended that the winding-up was not the first period at which the right to rescind a contract entered into through fraud was barred, but that it was equally barred when the company had stopped its business, proclaimed its insolvency, and declared that it could no longer go on. This action was not brought until the 21st October—after the investigator's report had shown that there was £5,200,000 to be made up—so that not only had insolvency been declared, but unhappily it had been made too clear and undoubted. The petitioner's argument assumed that but for section 18 of the Act of 1862 creditors would not have been in a better position than the company or the members of the company. But it was not because of the provisions of section 18, or because of any statutory provisions, that the right of rescission was barred by the winding-up; for it was a matter of general law and equity that after a trading body had declared itself to be insolvent it was not entitled to put away any of its assets or to permit any of its assets to be withdrawn. If they let out a partner from the liability to contribute, they would let away so much of its assets, and if they gave him back the purchase price, that would be directly giving away part of its assets. The period of the commencement of the winding-up was important only because it was a conclusive declaration of insolvency—it was not the only period. If the contention on the other side was correct, there could not have been a judgment on the point prior to the Act of 1862, but there were such judgments. The leading case was *Henderson v. Royal British Bank*, January 30, 1857, 7 Ellis and Blackburn, 356, 26 L.J. (Ch.) 112; and there were also *Mixer's case*, July 16, 1859, 4 De Gex and Jones, 575, 28 L.J. (Ch.) 879; *Clarke v. Dickson*, April 26, 1858, Ellis,

Blackburn, and Ellis, 148. The principle of these cases was that when a trading body had stopped payment and become insolvent it was too late for persons who had been defrauded into taking shares to set aside their contracts and get out, because they had been relied on and trusted by the creditors in dealing with the company. The Act of 1862 made no difference in that principle. It assumed and did not supersede the existing law of partnership. The general rights and liabilities of companies and their partners remained although the means of getting at the partners were restricted. *Oakes v. Turquand*, *supra*, proceeded on and adopted *Henderson* (Lord Chancellor's observations) L.R. 2 Eng. and Ir. Ap. (H. of L.) 348; and *Oakes* was followed by *Kent*, *supra*, and in the case of companies being wound up voluntarily, by *Stone and Collins v. The City and County Bank*, Nov. 27, 1877, L.R. 3 Com. Pleas, 282. There was but one case in which the action was raised timeously, and that was *Smith v. Reese River Company*, *supra*. But there the plaintiff filed his bill on the 6th February 1866, while the petition for the winding up of the company was not presented till 27th April, and the winding-up order was not made until 21st May. The real controversy in that case was—At what point of time was the contract to be regarded as having been voided? Not till the petitioner got decree? Then *Smith* was too late, because he did not get decree till after the winding-up began. Or were they to look to the 6th of February, when he said, by a judicial proceeding, that he wanted to be free? The Court decided that the point of time was not when he got decree, but when he commenced proceedings. But if at that date the company had been in a state of declared insolvency, there was no suggestion of a doubt that he would have been bound. The test was, Whether the action was raised or the claim made at such a time that the directors, being satisfied that the allegation was good, would have been entitled and bound to remove the petitioner's name from the list. In *Smith* it was held that they would have been so entitled and bound, whereas in this liquidation it has already been decided, in *Nelson Mitchell's* case, *supra*, p. 155, that they were neither entitled nor bound to alter the register after the 2d, or at least after the 5th October, to the effect of diminishing the assets of the company. That case ruled the present.

On a subsequent day the Court intimated that they desired further argument on the question, How far rescission of the contract had been made impossible by the petitioner's inability to give *restitutio in integrum*? The liquidators were called on to lead.

Argued for the liquidators—The general doctrine was that a purchase of shares induced by fraud was not in itself void and null, but that it was voidable at the option of the defrauded person. It followed from this that the defrauded person might be deprived of his right to rescind if the position of matters was so altered, while the contract was still standing, as to make it impossible to restore them to the state in which they were when the contract was executed. That might happen in various ways, and one of the ways—that on which they founded in the first part of the argument in this case—was that where the rights of third parties had intervened there was

no rescission at the instance of the defrauded person. Another case was where the interests which the person defrauded took under the contract had been so dealt with as to make it impossible for him to restore what he received. In that case he could not have rescission, because he could not give restitution. That was the position of the petitioner here. When he became a shareholder there was still three-fourths of the capital intact, although the whole of the reserve fund was gone. Now the entire capital was lost, and in its place there was a debt of over five millions. This change was the result of the mismanagement of those for whom the petitioner, equally with the other shareholders, was responsible. He was therefore not entitled to rescind, because he could not restore what he had received—*Addie v. Western Bank*, *supra*; *Clarke v. Dickson*, *supra*, *Mackay v. Commercial Bank of New Brunswick*, March 14, 1874, L.R., 5 P.C. 394, was not a case of partnership.

Argued for the petitioner—When the shares were bought the bank had already lost one-fourth of its capital and its entire reserve fund. Had this been publicly known the shares would have been worthless, and they could not be worse than that now. There was nothing to give back, because in fact nothing had been received. That, however, was taking the law as the other side stated it. The question did not turn upon the market value of the shares, but upon their identity from a legal point of view. If the petitioner could give back the same thing in legal estimation as he had received, and did not in addition gain some unwarranted advantage, he was entitled to be free, provided there was no *laches* on his part. Now it could not be said that there had been any *laches* here—that was one difference between this case and *Addie's*. Again, he had not reaped any advantage which he was not willing and able to restore, *e.g.*, the dividends. And lastly, he could give back the very shares which he had received. They were worthless, no doubt, but still they were legally the same shares. Here again there was a difference between this case and that of *Addie*. There the Judges in the House of Lords, especially Lord Cranworth, repudiated the principle of mere deterioration in value, and they went on this ground, that the shares had become different in kind owing to the *Western Bank* having been converted, for purposes of winding-up, from an unincorporated into an incorporated company; and further, that this change was carried out with the assent of Mr *Addie*. But there was nothing of that sort here. The English cases, at least in equity, proceeded on the same grounds, that exact restoration in value was not necessary, provided the thing itself was given back without *laches* or any undue advantage on the part of the person defrauded—*Maturin v. Tredinnich*, 2 New Reports 514, and 4 *ib.* 15; *Rausen v. Estate Investment Company*, Nov. 20, 1866, L.R. 3 Eq. 122; *Blake v. Mowatt*, 21 Beavan 603; *Rawlins v. Wickham*, 3 De Gex and Jones, 304; *Venezuela Railway Company v. Kisch*, L.R. 2 H.L. Eng. and Ir. App. 99; *Baker v. Lever*, 23 American Reports 117.

At advising—

LORD PRESIDENT—This petitioner, Mr Hugh Tennent, is the registered owner of £6000 stock of the City of Glasgow Bank, acquired at three different times. In September 1872 Mr Tennent

purchased £2500 stock from a person of the name of Matthew, and accepted a transfer, which was duly registered. In like manner, in July 1873 he purchased a like sum of £2500 stock from a person of the name of Bell, accepted a transfer, and was duly registered upon that stock. Then, lastly, when the company issued additional stock in the year 1873, the petitioner took his share of it to the extent of £1000, and upon that additional stock he was registered also. It is averred that the sellers in regard to the first two lots of stock—Matthew and Bell—were in reality trustees for the bank, and that therefore the purchases might be taken upon that averment to be purchases from the bank of stock belonging to them, and thus the whole three parcels of stock were acquired by Mr Tennent from the bank. The averments of the petitioner are very broad and distinct, that he was induced to enter into these contracts for the acquisition of the stock by the fraud of the directors of the bank. It is not necessary to enter into the details of these averments which are found in this petition, and which also form the ground of a separate action of reduction brought by Mr Tennent for the purpose of setting aside these three transactions. If these averments are true, the petitioner under ordinary circumstances would be clearly entitled, on coming to the knowledge of the fraud, to be relieved of his contract; but the question is, whether in existing circumstances, and looking to the time when the challenge of these contracts was first made by the petitioner, he is entitled to such relief?

It appears to me that the law upon this subject may be stated in three propositions. In the first place, the contract induced by fraud is not void but only voidable at the option of the party defrauded; secondly, this does not mean that the contract is void till ratified, but it means that the contract is valid till rescinded; and third, the option to void the contract is barred where innocent third parties having reliance on the fraudulent contract acquired rights which could be defeated by its rescission.

Now, the important facts in the present case bearing directly upon these legal principles are these—that Mr Tennent's name appeared on the register of shareholders from the years 1872 and 1873 down to the stoppage of the bank; that till that time Mr Tennent took no steps to relieve himself of any one of these three contracts; that the stoppage of the bank occurred upon the 2d of October last; that it became immediately notorious throughout the whole United Kingdom; and that this stoppage was caused by what turned out to be, and what was known at the time to the directors to be, the irretrievable insolvency of the bank. Three days afterwards the directors issued a circular to the shareholders of the bank calling a meeting for the purpose of passing an extraordinary resolution to wind up the bank voluntarily, and that circular in its terms amounted to a declaration of insolvency. Still further investigations having been made by accountants and law-agents employed for that purpose by the directors, it was ascertained, on or before the 18th of October, and reported and published in the newspapers on the 19th of October, that this insolvency of the bank was of the overwhelming character of which everyone now knows it to have been. Now, it is not until two days afterwards—viz., the 21st of October—that Mr Tennent raises

VOL. XVI.

his action for the purpose of reducing and setting aside these three contracts by which he acquired his shares, on the ground of fraud. That is, no doubt, one day before the shareholders of the bank passed the extraordinary resolution to wind up the company voluntarily, but it is two days after these other events I have mentioned—after, following upon the bank's stopping payment, it had been ascertained beyond the possibility of a doubt that the insolvency was of so overwhelming a character. The question comes to be, whether, in consistency with the principles I have just stated, Mr Tennent can now be relieved from the contracts into which he has entered, and from his liabilities as a shareholder, or whether his challenge comes too late.

The propositions which I have stated as embodying the law upon this subject are founded on the soundest principles of equity. They are deeply seated in our law, and they may be illustrated by a variety of examples. Our action of rescission on the ground of fraud is borrowed from the Roman Prætor's edict, *de dolo malo*, of which Lord Stair says (i. 9, 10) "it was personal, and so reached no further than the person committing the fraud, and not *in rem*, reaching the thing, if lawfully it came to any other not partaking of the fraud; *dolus auctoris non nocet successori nisi in causa lucrativa*. So that the deed done thereby"—that is, by the fraud—"was not rendered null as in extortion, but reparation given to the injured." In some cases which occurred in the course of the last century expressions are used by the Court, apparently in contradiction of this doctrine, to the effect that the *vitium reale* attached to the things the possession of which is fraudulently acquired; but while these observations did not pass without incurring the disapproval of two of the greatest lawyers and judges of the time, I mean Kilkerran and Elchies, it will be noticed that in the case to which I am now referring (*Christie & Co. v. Fairholms*, 2 Elchies 162) the competition was between the defrauded person seeking the remedy of rescission of the contract and the creditors of the person committing the fraud, who could not allege that they had acquired any right before the defrauded person exercised the option to rescind the contract. The true doctrine, however, has been recognised in many subsequent cases, of which it is sufficient to cite as examples the *York Buildings Company v. Mackenzie*, 3 Paton's App. 378; *Fraser v. Hankey*, 9 D. 415; and *Wardlaw v. Mackenzie*, 21 D. 940.

But the leading authority in the application of this doctrine to cases like the present is undoubtedly the case which occurred in the liquidation of Overend, Gurney, & Co., under the name of *Oakes v. Turquand*, 2 H. of L. Eng. and Ir. App. 325. In that case, as here, the contributory had acquired his shares by contract with the company, and he was induced to enter into the contract by the fraud of the company. He did not repudiate his shares or seek to be relieved from the contract till after an order had been made for winding up the company, and the result of the judgment was to find that the shareholder was too late in repudiating his shares, and to keep his name on the list of contributories. Both parties rely on this authority, the liquidators contending that it determined conclusively that the proposal to rescind such a contract comes too

NO. XVI.

late if it be made for the first time after the bank or other company has stopped payment and closed its doors; the petitioner contending that the judgment of the House of Lords has fixed a *punctum temporis*—the winding-up resolution or the presentation of a petition to wind up—(Companies Act 1862, secs. 84, 130)—after which no rescission can be admitted, but before which any shareholder may repudiate his shares on the ground that he has been induced to take them by the fraud of another.

I am of opinion that it was not the intention of the House of Lords to fix any such *punctum temporis*, or to introduce any new rule.

The only question of novelty in the case was, whether the ordinary rules applicable to such cases were rendered inapplicable by the provisions of the Act of 1862? and this question being resolved in the negative, the noble and learned Lords who gave judgment reverted to principles already well settled in a series of cases determined both in the Equity and Common Law Courts of England. The leading case in that series appears to me to be *Henderson v. The Royal British Bank*, 26 L. J. Q. B. 112, in which one Goddard, having been induced to take newly issued shares of the bank by the fraudulent representations of the directors, continued to hold the shares till the bank stopped payment. On this state of the facts Lord Campbell, then Lord Chief-Justice, said (p. 114)—“It would be monstrous to hold that Goddard, having become a partner, and having held himself out to the world as such, and having so remained till the concern stopped payment, could turn round and say, ‘I am no longer a shareholder, because I have been defrauded,’ and thus by his own act get rid of all liability to the creditors of the bank. That would be a great injustice, and contrary to all principle.” In *Oakes v. Turquand* the Lord Chancellor (Chelmsford) quotes the words of Lord Campbell as applicable to the circumstances of the appellant in that case, and Lords Cranworth and Colonsay proceed upon the same grounds of judgment.

The commencement of the liquidation no doubt presents an insuperable obstacle to the rescission of such a contract on the ground of fraud—but why? Because by that time the creditors have acquired a clear interest to enforce the personal liability of every shareholder on the register. But precisely the same reason applies when the bank has stopped payment and declared its insolvency. If any sound distinction could be drawn between these two points of time—the stoppage of the bank and the commencement of the winding up—as to their effect in barring such repudiation of shares, it would operate most injuriously as a discouragement to voluntary winding up. A considerable period must obviously elapse after the declaration of insolvency before an extraordinary resolution of the company to wind up voluntarily can be passed, and if in the interval all the shareholders who have been induced to take shares by the fraud of the company or its directors could repudiate those shares, and so escape liability as contributories, the company or its creditors would in every case be driven, immediately on the declaration of insolvency, to present a petition for winding up by the Court. I think that the case of *Oakes v. Turquand* is clearly applicable in principle to the present, and that this petition ought to be refused.

LORD DEAS—I am entirely of the opinion expressed by your Lordship, and I think it would be quite superfluous in me to go over the same grounds. I think the whole matter is substantially solved by keeping in view that which is undoubted, that a contract induced by fraud is not void; it is only voidable. But what is more is, that it is the party defrauded who has the option either to void the contract or not to void it, as he thinks proper. Now, it is quite obvious that that gives him an immense advantage, which might very easily be abused. He might know quite well of the fraud and of his powers to void the contract, but he may not choose to do it until he sees how things turn out—whether it is to be for his advantage or not to void the contract. Now, that being his position, it is very clear that where the interests of third parties are concerned he might have it in his power to do very great injustice in not declaring whether he was to stand by the contract or to reject it until he saw plainly whether the results were or were not for his advantage. I think that is the principle that lies at the bottom of the whole thing, and it is obviously a very sound principle.

As regards the question, at what particular date his right to void the contract expires, I entirely agree with your Lordship that although the Act of 1862 declares that matters must stand as they are from and after the resolution to wind-up, it does not follow from that that there may not be an earlier date at which things come to the position that there can be no longer any change made. I think that clause in the Act was not meant to supersede our common law, as I may call it—our usual law of bankruptcy—which fixes the date altogether apart from the clause of the statute. I had occasion already in another case in the course of this liquidation to deliver my opinion on this point. In that particular case—whether an earlier date could be taken or not—the date of the 5th of October, when the publication in the newspapers was made, was held to be, at all events, a date subsequent to which no changes could be made one way or other in the position of the shareholders and creditors. And this case, the summons in which was not executed till the 23d October, is therefore too late. On these grounds, I concur in the refusal of this petition, which is undoubtedly one of very great importance.

LORD SHAND—I am also clearly of opinion that this petition must be refused, and I concur in the grounds of judgment stated in the opinions your Lordships have now delivered.

The petitioner, on his own statement, was the holder of £6000 stock of the bank for a period of five years prior to the stoppage of the bank in October, during which period there was a very large business carried on, and obligations necessarily incurred to a great number of persons, resulting in very heavy losses, and ultimately in the judicial winding-up, with the disastrous results of which we have evidence every day in this Court.

I assume, as your Lordships have done, without expressing any opinion on the relevancy of the statements of the petitioner, for the purposes of this petition, that if this action had been raised while the company was a going company, with its business still proceeding, the petitioner might have been entitled to the remedies which he now

asks; but the application to have his name removed from the register, and consequently from the list of contributories, was presented only in December, nearly two months after the liquidation had commenced; and the action of reduction upon which his claim to have his name removed from the register is rested was not raised until the 21st October, being nearly three weeks after the bank had stopped payment in consequence of insolvency, and I may say, on the very eve of winding-up, for it was raised within a few hours of the resolution to wind up the company. If such a result as the petitioner here desires could be attained in the case of a company no longer going on, but avowedly bankrupt, and unable to meet its obligations, it is obvious that it would be a most grievous injustice to the creditors who have been dealing with the company during the time when the petitioner was a partner; for even assuming that he has a remedy against those who have done him wrong, innumerable transactions have in the meantime occurred, in which it must be assumed that creditors have relied, as I think they were entitled to rely, on his credit as one of the partners of the company with which they were dealing.

If the case of an ordinary copartnership, as distinguished from a joint-stock company, be taken, the injustice of giving effect to such an application as the present is almost too plain to require observation. A person having been induced by fraud to enter a copartnership consisting of two or three partners, goes on thereafter to trade with the public for several years, and incurs large obligations, himself and his firm, in the course of business. It would plainly be most unreasonable and unjust that on the company becoming insolvent or bankrupt he should be able to say to those with whom he has been trading that he was not liable for the debts the company has incurred to them, because he himself years before had been induced by fraud to become a partner of the company; and I think it would be very unfortunate that because this is a joint-stock company in place of an ordinary partnership any different rule or principle should receive effect.

It has already been determined in the cases of *Nelson Mitchell* and of *Alexander Mitchell* that stoppage of the business of the bank inferred, as the directors very properly held it to infer, the closing of the register of the bank, and it appears to me that the considerations which are given fully in the judgment I pronounced in these cases, and at least in that of *Nelson Mitchell*, apply forcibly to the present case. Indeed, the present case is if possible even stronger against the possible petitioner, because after the stoppage of the bank, and after the directors had called the shareholders together by the circular of 5th October for the purpose of resolving that the bank should be wound up voluntarily, the directors put the books and papers of the bank into the hands of two gentlemen to report upon them, and upon the 19th October a report was published which showed beyond all possible doubt or question that it was hopeless to expect that the shareholders of the bank could pay their debts without enormous contributions being made by them. It is admitted in this case that upon the 19th October a report was published in which it appeared that there was a deficiency of £5,000,000 net. The petitioner was one of the partners who had contracted to meet the obligations thus incurred, and I must say it

would appear to me—to use the words of Lord Campbell in the case of *Henderson v. The Royal British Bank*—to be a monstrous injustice if having incurred these obligations, and that being the state of the bank, he should be entitled two days thereafter, by an action against the company, or an application of this kind, to get rid of his obligations which he had incurred to third parties entirely innocent of any fraud.

The case involves the proposition that the directors on the evening of the 21st October, after this action was raised, and on the eve of winding up, should have taken this gentleman's name off the register, and, indeed, should recognise him, not as a debtor to the creditors, but as a creditor of the bank for the sum which he had originally paid for his shares. But the resolution to stop, with the avowed insolvency and known bankruptcy of this bank, necessarily inferred that the directors should no longer either acknowledge or make payment of any debts, nor discharge anyone who was under obligations to the bank. The proposition of the petitioner, however, is, that he is under obligations to the bank, and although the bank had stopped payment and was avowedly insolvent, the directors ought to have discharged his obligation, and so freed him from his liability to the creditors. I repeat the opinion I expressed in the case of *Nelson Mitchell*, that no proceedings subsequent to the 2d of October on the part of anyone who was then truly under liability to the creditors of the bank could change his rights and liabilities as they were fixed at that date. Before this application could receive effect of course it would be necessary to have proof of the petitioner's statements, but upon the views I have now stated, and as it is clear that the interests of creditors had become involved and the company had stopped payment, I am of opinion that the application was too late.

The argument of the petitioner has been mainly rested on the view that the resolution to wind up was the point, and indeed the decisive point, which determined the time at which an application of this kind could be made; but I agree with your Lordships in holding that although the resolution to wind up certainly precluded such an application as this, it would equally be precluded by the avowed insolvency of the bank. I think that is clearly the result of the case of *Henderson v. The Royal British Bank*, which I take to be the leading authority on this question. It is true that decision was pronounced before the Act of 1862, but I observe that when Lord Chelmsford came to deal with the question—I think substantially the same question which we have here—in the case of *Oakes v. Turquand*, he says, p. 348—“The case of *Henderson v. The Royal British Bank* being supported by such a weight of authority”—his Lordship having referred to several subsequent cases—“will materially influence my opinion upon the present case, unless I can be satisfied that the Companies Act of 1862 has placed creditor and shareholder in a different relation to each other from that in which they previously stood.” His Lordship accordingly held that the principle of the case of *Henderson* must apply to companies registered under the Act of 1852, unless he could find something in the Act of 1862 which shews clearly that that principle would not apply to such companies. But the result of his Lordship's ex-

amination of the provisions of the Act of 1862, concurred in by the other learned Lords who dealt with the case, was to show that there was nothing in the Act of 1862 which precluded the application of the broad general principle laid down in the case of *Henderson*, and accordingly, in substance, the decision in the case of *Oakes v. Turquand* is an affirmation of the law laid down in the case of *Henderson*, applying that law to companies registered under the Act of 1862.

The only other observation I have to make is one upon the case of the *Reese River Company*, upon which the petitioner mainly relied. That was a company registered under the Act of 1862, and in that case no doubt the petitioner was held entitled to have his name struck off the register, because he had shown that his shares were bought in consequence of the fraud of the company, and because he proved that the company as it was carried out was not formed upon the same lines or basis which had been mentioned to him in the prospectus and communications to him. But the simple and conclusive answer to the case of the *Reese River Company* is this, that it was the case of a going company. I have assumed, in the view I have now stated, that if this petitioner had been fortunate enough to discover that he had been fraudulently dealt with by the bank—if he had discovered that while the bank was still carrying on its business, and had brought his action against a going company—he would have been entitled to the remedy he asks. But the turning point of this case is that it was not until after the stoppage of the bank—a stoppage caused by avowed insolvency—that he even made the discovery of the fraud or claimed his remedy. By that time the rights and interests of creditors had arisen directly; and the creditors of this insolvent company having relied upon him as a partner, he was too late in attempting to get rid of liability. Upon these grounds I concur with your Lordships in holding that this petition should be refused.

LORD PRESIDENT—I am authorised by Lord Mure to state that he concurs in this judgment.

The petition was therefore dismissed, with expenses.

Counsel for Petitioner—Scott—Mackintosh.
Agents—Drummond & Reid, W.S.

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

Friday, January 31.

FIRST DIVISION.

CITY OF GLASGOW BANK LIQUIDATION— (THOMAS CASE) THOMAS AND SPOUSE V. THE LIQUIDATORS.

Husband and Wife—Reasonable Provision—Partnership—Liability of Husband and Wife where Stock stands in name of Wife, with consent of Husband, and derived from his Means.

A married woman succeeded to certain stock in a joint-stock bank of unlimited liability. The terms of the bequest did not exclude the *jus mariti* and right of administration of her husband, and no claim for a reasonable provision under section 16 of the Conjugal Rights (Scotland) Act 1861 in respect thereof, was made by the wife. She accepted the transfer of the stock, with consent of her husband. The entry in the register of members was in her name only, as was the stock certificate, and she received and signed the dividend-warrants. The dividends were, with the knowledge and approval of her husband, used in the ordinary household expenditure. There was no antenuptial or postnuptial contract.

Held that the husband only fell to be placed on the list of contributories, as (a) the wife was merely acting as agent for her husband in accepting the transfer and in drawing the dividends of what was in law his, and (b) assuming that the husband intended to make a reasonable provision for his wife by means of this stock, the effect of such a provision was merely to give her a right to the capital sum at the dissolution of the marriage, contingent upon her survivorship.

Observations upon the cases of *Galloway v. Craig*, June 22, 1860, 22 D. 1211, and July 17, 1861, 4 Macq. 267; and *Rust v. Smith*, Jan. 14, 1865, 3 Macph. 378.

This was a petition by the Rev. David Thomas and his wife to have their names removed from the list of contributories.

The deceased Matthew Blackwood, sen., grandfather of the petitioner Mrs Thomas, died on 28th April 1870, leaving certain trust-dispositions and deeds of settlement, and relative codicils, under one of which (dated 13th September 1867) his testamentary trustees were directed to dispose a share of the residue of his estate to his granddaughter, who had been married in 1866 to the other petitioner Mr Thomas. There was no exclusion of the *jus mariti* or right of administration. The total value of the share (which was moveable estate) was £1600. The trust-estate included £370 of the consolidated capital stock of the City of Glasgow Bank.

In October 1870 it was arranged between the trustees and the petitioners that this £370 stock should be transferred to Mrs Thomas, as being included *inter alia* in her share of residue. Accordingly a transfer was executed and recorded, in which the acceptance was as follows:—“And I, the said Mrs Agnes Blackwood or Thomas (with consent of my said husband, and for all his right