Counsel for the Pursuers (Reclaimers)—Asher —Mackintosh. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Defenders (Respondents)—Balfour—Robertson. Agents—Webster, Will, & Ritchie, S.S.C.

Friday, March 14.

FIRST DIVISION.

CITY OF GLASGOW BANK LIQUIDATION—

(DALZIEL'S AND WISHART'S CASES) —

JAMES WISHART AND GEORGE DALZIEL *v.* THE LIQUIDATORS.

Public Company—Winding-up—Fee and Liferent—Liability of Liferenters and Fiars both Standing on Register.

Where two parties who were in right of stock in a bank of unlimited liability, respectively as liferenter and fiar, both signed the transfer, and the names of both were placed on the stock register accordingly—*held*, upon the failure of the bank, that both being partners they fell to be placed on the list of contributories.

Married Women's Property (Scotland) Act 1877 (40 *and* 41 *Vict. c.* 29)—"*Antenuptial Debt.*"

Where a party married a wife who held stock in a bank, there being no antenuptial marriage contract between the parties—*held*, upon the failure of the bank within a month subsequent to the date of the marriage, that under the provisions of the Married Women's Property (Scotland) Act 1877 the liability following upon the possession of the stock was an "antenuptial debt" within the meaning of the Act, and that the husband was not liable further than to the amount of property brought to him by his wife.

James Wishart, Kirkcaldy, presented a petition to have his name removed from the list of contributories of the City of Glasgow Bank, on which it had been placed in respect of £200 consolidated stock of the bank.

On September 19, 1878, the petitioner had married Jane Skinner, daughter of Peter Skinner of Drunzie. There was no marriage-contract. Some time before the marriage Mr Skinner had acquired two shares in the City of Glasgow Bank, which were then entered, and at the date of the bank's suspension on 2d October 1878 remained entered in the share register in these terms:—"Peter Skinner of Drunzie, Strathmiglo, in liferent, and Miss Jane Skinner, Strathmiglo, in fee." The petitioner had no shares in the bank, nor did his name appear on the register, and it was not till after the suspension that he heard that his wife's name was so entered, or that she had any interest in the bank. The liquidators, however, put his name on the list of contributories in respect of the stock so held by his wife.

The petitioner maintained that he was not liable for the calls made upon him for the stock, as the case came under the Act 40 and 41 Vict. cap. 29 (the Married Women's Property (Scotland) Act 1877), this being a debt contracted by his wife before the marriage, he having received with her only a sum of about £72 and a few articles of household furniture, and nothing since the marriage. That Act provided—"In any marriage which takes place after the commencement of this Act the liability of the husband for the antenuptial debts of his wife shall be limited to the value of any property which he shall have received from, through, or in right of his wife at or before or subsequent to the marriage, and any Court in which a husband shall be sued for such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, and value of such property."

Petitioner's authorities — *Matthewman's Case*, 1866, L.R. 3 Eq. 781; *Ex parte Canwell*, Mar. 16, 1864, 4 D.G., J., and S. 539; *Williams* v. *Hardie*, 1866, L.R. 1 Eng. and Ir. App. 9; *Reid* v. *Moir*, July 13, 1866, 4. Macph. 1060.

Respondents' authorities—*Ex parte Luard*, 29 L.J. Chan. App. 269; *Sadler's Case*, 3 D.G. and S. 36; Buckley on Companies Acts, p. 66; Lindley on Partnership, 1356.

After counsel had been heard on the above point, leave was granted by the Court to the petitioner to amend his petition to the effect of putting in a plea that his wife, who was the fiar of the shares, her father still holding the liferent at the time of the failure of the bank, was not a partner of the bank, and so was not liable to contribute. It was argued that the shares were bought by Mrs Wishart's father, that he drew the dividends, and that the bank failed before the liferent terminated. Such a divided interest in the stock of joint-stock companies as liferent and fee had long been recognised—*Rollo*, M. 8282, 4 Pat. App. 521; *Thompson* v. *Lyell*, Nov. 18, 1836, 15 S. 32; Bell's Prin. secs. 1037 and 1050. This was not the ordinary case of liferent and fee, but the shares were only intended to come to the daughter at the death of her father, and therefore the interest of the daughter should be treated as a successive interest, and not as a joint interest—*Hill's Case*, 20 L.R. (Eq.) 585; Lindley on Partnership, 1077, 1364.

Argued for respondents that Mrs Wishart had actually signed the transfer, which bound her as much as signing the contract, and that in the contract there was no provision for such an interest as that ascribed by the petitioner. Further, following *Rollo's* case, the lady had really a present interest in the stock, as if a bonus had been given to the shareholders it would have come to her and not to the liferenter. She and her father were really in the position of having a joint interest in the stock.

The Rev. George Dalziel also presented a petition for removal of his name from the list of contributories of the City of Glasgow Bank, in which he had been placed in respect of £100 stock of the bank.

The stock referred to in the transfer was acquired by the petitioner himself, and was thereafter entered in the stock ledger of the said bank under the following heading, viz.:—"The Rev. George Dalziel, 3 Leven Street, Edinburgh, and Mrs Helen Lindsay or Dalziel, his wife, and the survivor of them in liferent, and Miss Margaret Helen Dalziel, their daughter, in fee, excluding

the *jus mariti* of any husband she may marry;" and a stock certificate was issued by the bank in the same terms.

The petitioner maintained that as he had only a liferent of the stock he never was a member of the bank within the meaning of the Companies Act 1862. The transfer was made out by the bank to the petitioner as a liferenter, a perfectly competent proceeding, and the right of property was therefore truly in the daughter, being only subject to the burden of the liferent. There was no provision in the contract of copartnery which provided for the case of any person being put on the register in any position short of a proprietor, but here the daughter was the true proprietor, and not the petitioner, as a liferenter is short of property—Bell's Lectures, ii. 832; *Eaglesham* v. *Grant*, July 15, 1875, 2 R. 960; *Todd* v. *Moorhouse*, Dec. 14, 1874, 19 L.R. (Eq.) 69.

Argued for respondents—The contention of the petitioner was at variance with the relationship of partnership, for if a person, as in the case of the petitioner, took the benefit of profits, he must also share the losses—that was, must be a partner. Further, it was contrary to the medium of reasoning through which the conclusion of the case of *Lumsden* v. *Buchanan* was reached, for the petitioner's argument involved the proposition that there could be two distinct kinds of partners with varying liability. Further, the petitioner and his daughter by signing the transfer had, in terms of the contract of copartnery, put themselves in the same position they would have been in if they had signed the contract itself.

These petitions — Dalziel and Wishart — were heard in connection with one another, and were advised together.

At advising—

Lord President — There are two petitions before us which are very nearly connected with one another as regards the nature of the questions raised, and they may very properly be disposed of at the same time; but I shall take, in the first place, the case of Wishart, because I think the judgment which I propose your Lordships should pronounce in that case will rule the other.

Mr Wishart is a manufacturer in Kirkcaldy, who on the 19th of September 1878, married Miss Jane Skinner of Drunzie. He married her without any marriage-contract, it appears, and soon after the marriage, the City of Glasgow Bank having stopped payment, he found that his wife was upon the register of that bank as a shareholder; and he has presented this petition for the purpose of having his name taken off the list of contributories, upon which it has been put by the liquidators in respect of the liability which they say attaches to him because of the shares held by his wife. Now, there are two grounds upon which the petitioner contends that he is not liable as a contributory. The first is, that his wife was not a partner of the bank, and the second is, that supposing her to be so, he is relieved from liability under the Married Women's Property Act of 1877, except in so far as he got a fortune with his wife; and on that alternative view he offers to surrender all that he got as a condition of his being discharged from liability. The first question of course is, whether Mrs Wishart was a partner at the date of her marriage to the petitioner and at the date of the stoppage of the bank, and that raises a question of considerable importance. The way in which Miss Skinner, now Mrs Wishart, became connected with the bank was this—Her father Mr Peter Skinner bought stock in the bank to the extent of £100 in April 1875, and it seems to have been arranged between himself and his daughter that he should retain for himself a life interest in this stock, but that it should be settled upon his daughter in fee. All this we gather from the transfer which was afterwards taken by Mr Skinner and his daughter. Whether this was a simple donation by Mr Skinner to his daughter, or whether there was any particular onerous cause or other cause specially moving him to make this arrangement, we are not informed, and it does not appear to me material to inquire. The substance of the arrangement is this, that Mr Skinner was to have right to the stock during his life, and that his daughter was not to have a right of succession merely, but was to have a present right to the fee in that same subject. Now, it is quite obvious that these two parties under that arrangement had then a very important interest in the subject—the one an immediate beneficial enjoyment, and the other a prospective enjoyment but a present right; and in these circumstances it required to be considered in what way their right and interest were to be represented on the register of shareholders of the bank. If one of the two parties only were entered as partner in respect of these shares, then the person so entered would hold as trustee for the other party who was not so registered; but the person so entered would have *ex facie* of the register the entire control of the stock, and could dispose of it and convey it to a purchaser by deed of transfer without any consent on the part of the other. So that if both parties were to have a control over this stock in respect of their several interests in it, it was necessary that both should be put upon the register. I do not suppose that as between the father and the daughter there was any want of confidence whatever; but one can easily suppose a case in which stock being taken to one person in liferent and to another in fee, the fiar and liferenter would not have any mutual confidence, and neither would be disposed to trust the other; and in that case I do not know how they could be safe except by both being registered as shareholders.

Now, whatever the motive may have been in this particular case, they were *de facto* both registered as shareholders, and whether it was a want of mutual confidence or anything else that led them to take that step, that step was taken, and the way in which it was brought about was this—The transfer was taken as a transfer to both from the seller, bearing no doubt that the money had been paid by the father, but transferring the shares to father and daughter for their respective rights of liferent and fee; and the father and daughter accept of that transfer for their respective rights and interests, and do so upon the terms and conditions above mentioned—that is to say, that they shall be in terms of the contract of copartnership of the bank subject to all the articles and regulations of the said company in the same manner as

if they had subscribed the said contract. Now, it was under this transfer that the father and daughter were both registered as partners.

The contention is in this case that the only partner is the liferenter; the contention in the case of Dalziel is that the only partner is the fiar. Of course there is a third view of the case, which has also been contended for by the liquidators; and that is that they are both partners; and I am humbly of opinion that that last view is the sound one. I do not see how it is possible for anybody having an undoubted right and interest in the stock accepting a transfer for his right and interest in that stock, and engaging to become a partner of the company, and subject to all the liabilities of such in the same way as if he had signed the contract of partnership, afterwards to say that he is not a partner of the company. To say that the only partner of the company is the fiar would lead to this very extraordinary result, that the one party (the liferenter) would be entitled exclusively to all the profits accruing to the shares, and the other party (the fiar) would be liable exclusively to all the losses. Now, that is a kind of partnership that I never heard of, and which certainly does not seem to be a possible partnership under any of the provisions of the Joint-Stock Companies Act. On the other hand, it seems just as anomalous to say that the liferenter is the sole partner. He might very easily have been made so if the transfer had been taken to the liferenter; and if the right of the fiar had stood upon separate agreement, and the liferenter had been registered as the only partner undoubtedly he would have been the only partner in respect of liability, whatever right of recourse he might have had against the fiar in respect of the separate arrangement by which the two interests were created. But in the present case that is not what has been done. They are both registered, they have both become partners, and they have both become partners for their respective presently existing right of liferent and fee, and have undertaken in these characters all the liabilities of partners. And as in the case of the fiar therefore I think equally in the case of the liferenter it is impossible to hold that there is not a partnership created.

Now, that, I think, disposes of the first question which is raised in the petition of Wishart, and disposes also of the question raised in the petition of Dalziel.

I only desire to say in conclusion, on this first question, that I do not think this case is ruled in any way, or indeed affected in any way, by any judgments we have pronounced in cases between husband and wife. It is impossible that the relation of husband and wife can bear any analogy whatever to any other case. And further, I desire to say that I am quite satisfied that in the case of *Wishart* the fee which is given to the daughter in these shares cannot be dealt with as a proper provision, even if that would have been of any avail, because a proper provision by a father to a child is personal to the child; but here, on the contrary, this stock is given in fee to Miss Skinner and her heirs and executors. So that upon the very face of the transfer, and therefore by the arrangement of parties in the event of her dying before her father, her executors would have as good a right to the fee as she herself.

Then with regard to the second question—the relief from liability by Mr Wishart in respect of the provisions of the Married Women's Property Act of 1877—the question is, whether a liability of Mrs Wishart in respect of her registration as a partner of this company is within the meaning of the words of the statute an "antenuptial debt" of hers, for which her husband is by the enactment not to be liable? Now I do not know that "antenuptial debt" is a very happy expression. I am not aware that it has been used before this time in any Act of Parliament or by any law-writer, but I think it can admit of only one meaning. It means debts contracted by the wife before marriage, and therefore the question comes to be, whether this debt—the debt contracted by Mrs Wishart by becoming a partner of this company—was contracted before marriage? It was contended that the debt was not contracted till after the marriage, because it was only the stoppage of the bank that created the debt, that there would have been no debt if the bank had been successful and prosperous, and the debt arose only out of the insolvency of the bank. But I am satisfied that is not a sound view of the nature of this debt. The obligation was contracted by Mrs Wishart by becoming a partner of the company. No doubt the obligation was not prestable except when the bank or its creditors required it to be performed, but it was contracted at that date unquestionably, and if I am right in holding that "antenuptial debt" means debt contracted before marriage, then I think this debt was contracted before marriage—namely, at the date when this lady became a partner of the bank; and it appears to me therefore that Mr Wishart is entitled to be relieved of the obligation for this debt of his wife upon surrendering any sum of money or other valuable consideration which he obtained upon the occasion of the marriage.

Lord Deas—In both of these cases the stock was purchased with the money of the father, without any consideration from the daughter, who was living in family with him. Now, I have no doubt that the father by being entered in the register, although in the character of liferenter only, became a partner of the bank, because I think the transaction was one at his own pleasure, and substantially for his own behoof. But the very ground upon which I have no doubt of the father becoming a partner is what raised in my mind a doubt with reference to the position of the daughter. I have no doubt she did just what she was told to do, and if a proof of the circumstances had been asked on the part of these ladies, I should have been clear for granting that proof, so as to ascertain all the facts and circumstances under which they were put upon the register, with a view to the question whether it could be held that they or either of them had assented to becoming a partner of the bank. I think that was the doubt and difficulty in the case. But no proof was asked by either of them, and no argument to that effect was substantially maintained by either of them. If that course had been taken, and that argument had been before us, I should not have been prepared to say with your Lordship that the cases of husband and wife had no bearing. I think they would have had a very material bearing, and would have gone a long way in the question

what was the nature and effect of the arrangement between the father and the daughter. I think it would then have been an important question whether this was a provision for the daughter? and though a daughter is not by any means in the same position as a wife, still there would have been an important question whether this was not to be taken as the provision of the daughter, and still more clearly an important question whether in all the circumstances this transaction *inter familiam* could be held to have made the daughter a partner with her own consent. But that course not having been taken, and the case being put before us very much in the same position as if in place of putting his daughter on the register he had put some third party on the register, and upon the assumption that the daughter must be held to have assented to what her signature seems to show she consented to, I am not prepared to dissent from the judgment of your Lordship, although I have still great hesitation about it. But I content myself by expressing my doubts upon the subject.

Lord Mure—I concur with your Lordship in both cases. As regards the case of Wishart, I will only say that from the time that I examined the terms of the transfer I had not much difficulty in making up my opinion that both these parties had made themselves, by the terms of the transfer, shareholders of the bank—because they expressly undertook to become partners as liferenter and fiar just as if they signed the contract of copartnership. If they had signed the contract making themselves shareholders for their respective interests of liferenter and fiar, I am unable to see on what ground either of them could successfully maintain that they were not shareholders. The terms of the deed are express, and upon that single ground I am of opinion with your Lordship that Mrs Wishart became a partner of the company.

As regards the point whether or not it was a provision by the father to the daughter, I do not think it is raised here, and I do not think it necessary to give any opinion on what would have been my view if it had been raised. It appears to me that the answer made by the counsel for the liquidators on the terms of the transfer is conclusive, viz., that *ex facie* of the transfer there was no provision made—because if it had been merely a provision to the daughter it would fall by the predecease of the child; but this is a gift out-and-out, and by the terms of the deed it is given to Miss Skinner, her heirs and successors, so that whether she had survived her father or not the fee of it would have gone to her heirs and successors under the terms of the deed. But then the clause of the Act of 1877 frees Mr Wishart to a very considerable extent, and restricts his liability to the value of any property that he may have succeeded to through his marriage, and although by the clause in the Act of 1862 he is liable to be put on the list of contributories, I agree with your Lordships in holding that, having reference particularly to the English decisions, this is an antenuptial debt of his wife, and that he is entitled to be relieved from all claims for contribution beyond the amount that he succeeded to by his marriage.

Lord Shand—I also am of opinion that the prayer of both of these petitions must be refused, and the ground of my judgment is that by the transaction of purchase (the form in which the parties took the conveyance) each of them—the liferenter on the one hand and the fiar on the other—acquired a present legal right and interest in the stock, in respect of which interest each of them agreed to be put upon the register as a partner of the bank and was registered accordingly. In regard to the liferenter, his right and interest are evident from this, that he has the claim to the profits as long as he lives. That is a claim which necessarily he acquires as a partner of the bank, and it gives him a most material right and interest as such partner. In regard to the fiar I think an equally material right and interest arises. It was represented in the argument that the right of a fiar was prospective only—somewhat of the nature of a right of succession—and if that were so in truth and substance I think there would be considerable ground for this application. But I am satisfied that that is an unsound view. The fiar of this stock is truly the proprietor of it. The right to the profits is merely suspended. She takes the right to the profits as soon as the liferenter's life ceases. She would have a right to anything that could be represented as a proper bonus — a payment from accumulations which might be regarded as being part of the capital—and I do not doubt that the right and interest which may be in a large amount of stock, and may be of great value, may form the subject of a present conveyance either *mortis causa* or *de presenti*. So it appears to me that each of the parties has a right and interest in the stock. And accordingly we find in the transfers that each of the parties for their respective rights and interests accept the stock—which is, in other words, that each of them agrees to become purchaser. In the view that I take of the case, as I have now explained it, I do not think this decision would be affected in any way by any question as to where the money came from with which the stock was purchased. The price might have been advanced by the fiar, or by the liferenter, or by a stranger making a gift to both. The determining element is that the parties accept the stock so given to them. It being immaterial from what source the price comes, they accept the stock for their respective rights and interests, and in respect of that stock agree to become partners of the bank. Accordingly, in the view I take of the case my decision would be the same whether you regarded this as intended between the parties as a provision from the father to the child or a provision from a stranger anxious to benefit a third party, the result of the thing done being an acceptance of a right and interest in a share in the joint-stock company, and that makes the person who so accepts it a partner.

There remains only in the case of Wishart the point to which your Lordship has adverted, arising on the husband's application that his obligation should be restricted to the measure of the estate which he acquired through his wife, and I agree with your Lordship in the result at which you have arrived upon that point. In determining that question I think it is material to notice that this marriage took place on the 19th of September, that the lady was then the contributory, and that on the 2d of October—within a fortnight of the marriage—the bank stopped payment. The case

is not one in which it can be represented by the liquidators that the husband became a partner by acting in any way that would make him a shareholder. Such a case I think might arise after the lapse of months or years after the marriage, and this might produce a different result, because it might then be represented that the husband had by his actings become a partner, and that the debt was therefore no longer the debt of the female contributory. But I think there is no room for that contention here. Indeed the husband's explanation that he was not even aware that his wife was possessed of this stock at all was not disputed, I think, on the part of the bank. The case is therefore one in which the lady is the contributory, and the provision of the Married Women's Property Act of 1877 limits the liability of the husband for the antenuptial debt of his wife to the means which he may acquire through his wife. I agree with your Lordship in holding that this is plainly an antenuptial debt, the date of the contraction of which is truly the date when the lady accepted the transfer of the stock and became a partner of the bank.

Lord Deas—It is right, I should explain, with reference to the question of husband and wife upon the statute, that I have no doubt about it. I agree entirely with your Lordship. Assuming the lady to have become a partner of the bank, the debt by her to the bank drew back to the time when she became a partner, and therefore it is a prior debt.

The Court accordingly, in the petition of *Wishart*, found that he was entitled to have the prayer granted upon his surrendering any estate he had obtained from his wife at marriage; and in that of *Dalziel* refused the prayer.

Counsel for Petitioner (George Dalziel)—Trayner—Strachan. Agent—Alex. Gordon, S.S.C.

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

Counsel for Petitioner (James Wishart) — Dean of Faculty (Fraser) — Guthrie Smith. Agents—Mitchell & Baxter, W.S.

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

Tuesday, March 18.

FIRST DIVISION.

[Exchequer Cause.

GLASGOW COAL EXCHANGE COMPANY (LIMITED) *v.* INLAND REVENUE.

Revenue—Inhabited House Duty Act (48 *Geo. IV. c.* 55), *Sched. B, rule* 5—*Customs and Inland Revenue Act* (41 *Vict. c.* 15), *sec.* 13, *subsec.* 2—*Exemption of House Occupied for Purpose of Calling of Profit.*

The Customs and Inland Revenue Act of 1878, sec. 13, subsection 2, provided that "Every house or tenement which is occupied solely for the purpose of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, shall be exempted from the duties by the said commissioners upon proof of the facts to their satisfaction, and this exemption shall take effect although a servant or other person may dwell in such house or tenement for the protection thereof." *Held* that a company whose premises were principally occupied as an exchange, in which coalmasters, coal merchants, coal brokers, and others met, for membership in which a money subscription was payable, and whose premises were on occasions let for such temporary purposes as balls, bazaars, and soirees, were entitled to exemption from house duty under that section.

The Glasgow Coal Exchange Company (Limited) had appealed to the Commissioners under the Property and Income Tax Acts, &c., for Lanarkshire, against an assessment of £1660 made upon them for inhabited house-duty, at the rate of 9d. per pound, for the year 1878-79. The assessment was made in respect of the appellants' hall and side-rooms, including hall-keeper's house; and the admitted facts were—as stated in the case presented by the Commissioners—"That the Glasgow Coal Exchange Company (Limited) is a proprietory limited company formed for the purpose of profit or gain, and the halls and adjoining rooms on which they are assessed are occupied principally as an exchange and pertinents thereto, in which coalmasters, coal merchants and coal brokers and others meet, the membership subscription being one guinea and ten shillings and sixpence respectively. Further, the said buildings are let for temporary purposes, such as balls, soirees, church bazaars, and entertainments of various kinds, but have never been occupied for such purposes for more than an evening at a time, except in the instance when a church bazaar occupied the halls and ante-room for three days, and for such temporary lets money is paid to the company—they are further occupied daily by subscribers, who are supplied with newspapers and other periodicals, which is covered by the said annual subscription."

The question of law for the opinion of the Court was—"Whether the facts set out in the foregoing statement are such as (having in view rule 5 of Sch. B to the Act 48 Geo. III. cap. 55) would bring the premises assessed within the terms of the exemption contained in section 13 and subsection 2 of 'The Customs and Inland Revenue Act 1878?'"

The Act 48 Geo. III. cap. 55, Schedule B, rule 5, provided that "Every hall or office whatever belonging to any person or persons, or to any body or bodies, politic or corporate, or to any company that are or may be lawfully charged with the payment of any other taxes or parish rates, shall be subject to the duties hereby made payable as inhabited houses, and the person or persons, bodies politic or corporate, or company, to whom the same shall belong, shall be charged as the occupier or occupiers thereof."

The Customs and Inland Revenue Act 1878 (41 Vict. c. 15), sec. 13, subsec. 2, provided that "Every house or tenement which is occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, shall be exempted from the duties by the said commissioners upon proof of the facts to their satisfaction, and this exemption shall take effect although a servant