Friday, October 31.

FIRST DIVISION.

CITY OF GLASGOW BANK LIQUIDATION—STENHOUSE — (*STENHOUSE'S CASE*) AND OTHERS (RICHTER'S TRUSTEES) *v.* THE LIQUIDATORS.

Public Company—Trust—Liability in Winding-up—Where Transfer of Stock Accepted by Trustees and Passed by Directors, but Names of Trustees not Registered.

The trustees under a marriage-contract accepted a transfer of certain stock in a banking company of unlimited liability. The transfer was prepared by the agent of the lady, she being the transferror. The agent, who was himself a trustee and agent to the trust, sent the transfer to the bank, with a request that a new certificate should be issued in favour of the trustees. This was done after a meeting of the bank directors, the minute of which bore as follows:—"Letters were read intimating the following sales of stock, subject to bank's right of pre-emption, and transfers in favour of the purchasers were ordered to be prepared, viz., £385—good causes—Agnes T. Stenhouse to her m.-c. trustees." [Then came a list of other transfers.] The bank failed, but at the date of the failure the names of the trustees had not been entered on the register of members. They were subsequently placed there, and also on the list of contributories. In a petition for rectification of the register and the list, in which the spouses compeared but did not oppose, *held* that in the circumstances the trustees were personally liable as contributories.

Macdonald Hume's case, Feb. 7, 1879, 16 Scot. Law. Rep. 290, distinguished.

By antenuptial contract of marriage entered into between Anton Frederick Richter, merchant, Newcastle-on-Tyne, and Miss Agnes Thomson Stenhouse, eldest daughter of the deceased James Stenhouse, Esq., younger of North Fod, near Dunfermline, dated 26th and 27th July, and registered in the Books of Council and Session the 20th September 1878, Miss Stenhouse conveyed to the petitioners in this case as trustees, *inter alia*, £385 of the consolidated stock of the City of Glasgow Bank. Such further deeds as were necessary for implementing the conveyance above mentioned were also to be granted. The trust purposes were generally a conveyance of the estate in liferent to Miss Stenhouse and to her intended husband, in the event of his surviving her, and in fee to children of the marriage. The trustees had power to lend out and invest the trust-funds "on such securities, heritable or personal, as they may think proper, without incurring personal liability thereby." Miss Stenhouse had acquired the stock in the City of Glasgow Bank by purchase from or through the bank. Her first purchase was of £200 stock on 23d August 1875; her second purchase was of £185 stock on 11th December 1875. Since these dates Miss Stenhouse's name stood on the register of the bank, and was returned and published officially by the bank, in terms of section 26 of 'The Companies Act 1862,' and section 13 of 8 and 9 Vict. cap. 38, as the holder of stock to the amount of £385.

On the 27th and 30th of July the following transfer was signed by the marriage-contract trustees and by Miss Stenhouse:—"I, Miss Agnes Thomson Stenhouse . . . . considering that by a contract of marriage entered into between Anton Frederick Richter, merchant, Newcastle-on-Tyne, and residing there, on the one part, and me on the other part, and executed by the said Anton Frederick Richter on the 26th day of July 1878, and by me of the date hereof, I assigned, disponed, conveyed, and made over to the trustees therein and hereinafter named, *inter alia*, the stock hereinafter assigned, and bound and obliged myself to make, execute, and deliver all deeds and writings necessary for fully implementing the conveyance therein contained, and now seeing that in pursuance of the foresaid obligation it is proper that I should grant these presents, therefore I hereby assign, transfer, and make over to and in favour of James Stenhouse [names of trustees], as trustees for the ends, uses, and purposes specified in the said contract of marriage, £385 sterling of the consolidated capital stock of the City of Glasgow Bank Company, with the whole interests, profits, and dividends that may arise and become due thereon, the said [trustees] by acceptance hereof being in terms of the contract of copartnership of the said bank subject to all the articles and regulations of the said company in the same manner as if they had subscribed the said contract; and we, the said [trustees], do hereby accept of the said transfer on the terms and conditions above mentioned," &c.

The trustees under the marriage-contract never held any meeting, and never signed any other document than this transfer. The transfer was prepared by Mr Ross, Miss Stenhouse's agent.

The marriage between Miss Stenhouse and Mr Richter took place on the 31st July.

On 4th September Mr Ross, who was also agent at Dunfermline for the City of Glasgow Bank, sent the transfer in favour of the trustees to the inspector of branches at the head office of the City of Glasgow Bank, with a letter in the following terms:—"*City of Glasgow Bank, Dunfermline, 4th September* 1878.—Dear Sir,—I enclose two certificates p. £200 and £185 of the stock of the bank in favour of Miss Agnes Thomson Stenhouse. She got married recently, and previous to her marriage transferred the stock to her marriage-contract trustees. I enclose also the transfer, and I shall feel obliged by your getting it recorded and issuing a new certificate in favour of the trustees.—Yours faithfully (signed) JOHN ROSS, agent. Wm. Miller, Esq., City of Glasgow Bank, Glasgow."

To this letter the law secretary of the bank replied in the following terms:—"*5th September* 1878.—Dear Sir,—Mr Miller has handed me your letter to him of yesterday with its enclosures. Before issuing a new certificate the transfer will require to be placed before the directors, and I will get this done next Thursday.—Yours truly (signed) ROB. J. AIKMAN. John Ross, Esq., City of Glasgow Bank, Dunfermline."

On 12th September the directors of the bank had a meeting, the minute of which bore that

"Letters were read intimating the following sales of stock subject to the bank's right of pre-emption, and transfers in favour of the purchasers were ordered to be prepared, viz., £385—good causes—Agnes T. Stenhouse to her m.-c. trustees," &c. The only letter to the bank relative to the stock in question was that of 4th September above quoted; and no transfer in favour of the petitioners was ever prepared other than that of 27th and 30th July.

Thereafter the following letters passed between the secretary of the bank and the said John Ross, viz. :—"16*th September* 1878.— . . . . We enclose stock certificate p. £385 o/a. trustees under m.-c. Mr and Mrs Richter. Please get an acknowledgment.—We are, &c. For the City of Glasgow Bank (signed) C. S. LERESCHE. P. T. O. You are debited 4s. 3d., fee registering transfer, Mr and Mrs Richter's m.-c. trustees." "17*th Sept.* 1878.—Gentlemen,—I beg to acknowledge receipt of certificate in favour of myself and others, Mr and Mrs Richter's marriage-contract trustees, for £385 of your consolidated stock.—I am, Gentlemen, your obedt. servant (signed) JOHN ROSS."

By article 34 of the bank's contract of copartnery it was provided that—"Any gratuitous assignment of any shares of the company's stock by a deed *inter vivos* shall be effectual if sanctioned by the ordinary directors, but if they see cause to withhold their sanction from such transfer, the share or shares so assigned shall be sold by the said directors in manner hereinafter provided in the case of parties becoming bankrupt, and the price obtained for the same shall be accounted for to such assignee under deduction and retention as after expressed."

By article 38 it was provided that deeds of transference "shall after being completed be recorded in a book to be kept for that purpose; but it is hereby declared that the purchaser or other assignee of or successor to shares so acquired shall be recognised as a partner until the writing constituting his title is recorded in the books of the company in manner above specified." By article 39 "the name, designation, and place of abode of every partner, together with the number of shares held by him or her, shall from time to time be entered in a book to be kept for that purpose, to be called the stock ledger; and when the name of such partner, with the number of shares held by him or her of the capital stock, shall be so made in said stock ledger, and signed by the officer of the company duly authorised so to do, . . . such entries shall be held as conclusive evidence of the partnership to the extent subscribed for and appearing by said entries." By article 40 "the person or persons, companies or corporations, whose names shall at any time stand in the said stock ledger containing the list of partners of the company, whether as original or assumed partners, shall be deemed and taken to be the proprietors of the several shares standing in the said ledger in their respective names."

It appeared that owing to the circumstances fully detailed in the case of *Macdonald Hume*, 16 Scot. Law Rep. 290, 6 R. 621, the names of the trustees had not been entered in the stock ledger in terms of article 39 at the date of the failure of the bank, but were subsequently placed there by the transfer clerk without specific instructions from anyone. Miss Stenhouse's name was still on the register when the bank failed.

The names of the trustees having been placed on the list of contributories, a petition was presented for rectification of the list and of the register of members. To this petition Mr and Mrs Richter were compearers, but they stated "That the compearers do not intend to oppose the prayer of the petitioners, but they have instructed that the proceedings therein shall be watched by agent and counsel for them on their behalf. It is maintained that Mr Richter's *jus mariti* being excluded, he is in no case liable; but it is admitted that in the event of the prayer of the petition being granted, the name of Mrs Richter, as the owner of the stock, will fall to be placed on the list of contributories."

Argued for the petitioners—(1) The present case was within *Macdonald Hume's* case, or rather that of *Myles*, for here the trustees were not bound to go on the register; they might have insisted that the stock should be sold before they accepted; and if the sending in of the transfer was evidence of an agreement to go on (assuming that Mr Ross' act was within his authority), still as Mr and Mrs Richter did not insist upon fulfilment of the agreement, they were precisely in the position of Brown's trustees in *Myles'* case, who also did not insist. Here, as there, the bank had no right to insist upon the fulfilment of a contract for which they had given no consideration. Nor had the rights of creditors intervened here, for the trustees' names had never been published. Then (2) Mr Ross was acting *ultra vires* in sending in the transfer. There had been no meeting of trustees or anything to warrant his doing that. (3) The only transfer in the case was that prepared by Mr Ross. There were none prepared by the bank officials, as was the usual practice, and as the directors by their minute of 12th September ordered. The directors consequently had neither seen nor sanctioned a transfer as their own articles required.

Authorities—*Macdonald Hume*, Feb. 7, 1879, 16 Scot. Law Rep. 290, 6 R. 621; *Myles*, Feb. 28, 1879, 16 Scot. Law Rep. 438, 6 R. 718; *Nation*, Dec. 10, 1866, L.R., 3 Eq. 77; *Shepherd*, Nov. 3, 1866, L.R., 2 Ch. Ap. 16; *Sichel*, Nov. 25, 1867, 3 Chanc. App. 119.

Argued for the respondents—The question was—Had there been a contract concluded between the trustees and the bank? Now, as regarded the trustees and Mrs Richter, the matter was really foreclosed. The trustees had accepted the trust, and they had accepted the transfer. They need not have done either, but they had done so, and the facts must be taken as they existed. That being so, the transfer was sent into the bank; it was passed by the directors, for the petitioners' construction of the minute was excessively critical; and all that remained to be done was the clerical duty of writing up the register. That could be done after the stoppage if the Court were of opinion that the trustees had agreed to become members, which they certainly had done here, in a question alike with Mrs Richter and with the bank. The argument that Mr Ross had acted *ultra vires* was unfounded. The trustees had accepted the trust and the transfer, and it was his duty, because it was theirs, to get the transfer registered.

Authorities — *Cuninghame*, July 1, 1879, 16 Scot. Law. Rep. 819; *Heritage*, Nov. 6 1869,

L.R., 9 Eq. 5; *Hughes*, 15 Weekly Notes, 476; *Payne*, Dec. 11, 1869, L.R., 9 Eq. 223.

At advising—

LORD PRESIDENT—The petitioners in this case are the trustees under the marriage-contract of Mr and Mrs Richter. They were married on the 31st of July 1878, and their marriage-contract is dated on the 26th and 27th days of that month. There were several subjects conveyed by Mrs Richter under that contract. One of them was a heritable security for a sum of £1000, and another was £385 of the stock of the City of Glasgow Bank, and another was a sum of £500 in the hands of Mrs Stenhouse, the mother of the lady, under the provisions of a trust-deed—the sum being liferented by that lady and remaining in her possession. Now, it was plainly the duty of the trustees, when they accepted office under this deed, to make up a title to those different funds which had been conveyed by Mrs Richter, so as to divest Mrs Richter of the property. That was matter of clear duty on the part of the trustees, and it was just as clearly matter of duty upon the part of their law-agent to see that carried through. Of course the mode of making up a title to each of these different subjects was different. The bond required to be registered in the register of sasines — that was the way of making up a title to that—and the assignation of the fund in the hands of Mrs Richter's mother required to be intimated to her as the holder of the fund; and in a corresponding way the stock of the City of Glasgow Bank required to be transferred into the names of the trustees. It was just as necessary that that stock should be transferred into their names as that they should make up a title to the other funds conveyed in the marriage-contract, and the only way in which they could make up a title to that fund so as to divest Mrs Richter, which it was their bounden duty to do, was to become partners of the bank. I do not mean to say that if it had been part of the design of this trust, or if it had been their intention, to convert that bank stock into a payment of money, they might not have done so without becoming partners of the bank. But it was not the contemplation of this deed that the stock should be sold. On the contrary, the contemplation of the deed was that it was to be held for the purposes of the trust thereby created.

Now, that being so, Mr Ross, who was the agent of the trustees, and had acted as agent of Mrs Richter previous to the marriage, wrote to the bank on the 4th of September 1878 a letter in which he enclosed the certificates of the stock in favour of Miss Agnes Stenhouse (Mrs Richter), and the only peculiarity in that proceeding was, that instead of getting the transfer prepared at the bank, and by the bank officials, Mr Ross got the transfer prepared himself, and he sent it along with the certificates of the stock standing in the name of Miss Stenhouse. The transfer was subsequently brought under the notice of the directors, and the minute of the meeting of directors following upon that is before us, in consequence of which another communication was made to Mr Ross intimating that the transfer had been passed.

Now, upon that evidence it is contended by the respondents that the petitioners were effectually made partners of the bank, and to judge of the effect of this it is necessary to consider what are the terms of the transfer which was accepted by the trustees, and also what is the effect, under the contract of copartnery of the bank, of a transfer being sent in to the directors and passed by them. The peculiarity of this case arises from the circumstance that the transfer was not registered in common form—that is to say, the transferees were not entered in the stock ledger of the bank as partners until after the stoppage of the bank. This arose from an accident with which we have become very familiar in the course of this liquidation—the absence of the proper officer who should have made the entry—and we have held in those cases that the entry which was made by that gentleman (Mr Wardrop) after the stoppage of the bank cannot receive effect, and that where such entries have been made, the case must be dealt with as if there had been no entry in the stock ledger; and it is in that view that I propose to deal with the present case. I assume that the transferees (the petitioners) were not registered as partners in the stock ledger of the bank. But then the question remains, whether they did not by what took place agree to become partners of the bank, and agree with the bank to become partners?

Now, in the first place, the transfer itself requires attention—not that there is anything very peculiar in this particular transfer, but it is of importance to observe what are the words of the acceptance of the transfer, and what is their true interpretation. Mrs Richter transfers to those gentlemen as trustees, and the acceptors and survivors of them, and they "by acceptance hereof, being in terms of the contract of copartnership of the said bank, subject to all the articles and regulations of the said company, in the same manner as if they had subscribed the said contract, and we, the said James Stenhouse," and so forth, "do hereby accept of the said transfer on the terms and conditions above mentioned." Now, it appears to me that there is no difficulty in understanding the meaning and effect of those words. The transferees accept of the transfer on these terms and conditions—that they are to be subject to all the articles and regulations of the company in the same manner as if they had subscribed the contract of copartnery, and that effect is to be operated by acceptance hereof. Now, it may be that until something followed upon the mere subscription of this transfer it will not have any effect in law against the transferees. Neither would the acceptance of any other obligatory instrument until it was delivered. But when an instrument undertakes an obligation in such express terms as this, and becomes a delivered deed, then I apprehend it is conclusively binding against the party who executes it. Now, what is the proceeding that is equal to delivery in this case as between the transferees and the bank? Plainly the sending in of the transfer to the bank, under the 38th article of the contract of copartnery. When they send that transfer to the bank they are addressing themselves to the bank in the words of this acceptance, and declaring to the bank that they thereby become partners of the company to the same effect in all respects as if they had subscribed the contract of copartnery. Now, then, just observe what the 38th section of the contract provides in regard to this. It pro-

vides that the production to the manager or ordinary directors for the purpose of registration shall infer the acceptance of the capital stock and the liabilities of the parties having right to the same as partners of the company. Now, I quite adopt what was said by the Lord Chancellor in the case of *Cuninghame*, July 1, 1879, 16 Scot. Law Rep. 820, that what is meant here is that this production of the transfer to the manager or ordinary directors is to infer the acceptance of the stock and to incur all liabilities as in a question between the transferee and the bank. As his Lordship very properly says, it is not between the transferror and the transferee that it is here provided liability shall be incurred, for all that has been done already by the mere execution of the deed of transfer, but it is the acceptance of those liabilities as in a question with the bank and its other shareholders.

It appears to me, therefore, that the liability of a shareholder was completely incurred by the petitioners in the present case as soon as that transfer was sent in for the purpose of registration, although it was never registered. If, indeed, it could have been said that Mr Ross was not justified in sending in this transfer for the purpose of registration, that might have exempted the petitioners upon a different ground. But it is quite impossible to listen to any plea of that kind in the circumstances of this case, because, in the first place, those gentlemen executed the transfer for the very purpose of becoming partners of the bank and could execute it for no other purpose; and, in the second place, it was the duty both of the petitioners and of their agent to have this transfer sent in for registration, because it was by that means, and by that means only, that they could perform their duty of effectually divesting Mrs Richter, who had previously stood as partner in respect of those shares.

I am therefore for refusing the petition.

Lord Mure—I am entirely of the same opinion. I think that the terms of the transfer which your Lordship has now read, coupled with the opinion of the Lord Chancellor in the case of *Cuninghame*, and the fair interpretation of the meaning of the 38th section, leads to no other result than that those parties agreed and consented to become shareholders in this bank, and therefore the liquidators are entitled to have their names placed upon the list of contributories.

Lord Shand—The peculiarity of this case is the same as that which was founded on in the case of *Macdonald Hume*, one of the earliest which arose in the liquidation, viz.—that the petitioners' names were not registered in the stock ledger of the bank at the time of the stoppage. I have given the case very careful consideration, and have come to the conclusion with your Lordship that the case is not ruled by our decision in the case of *Macdonald Hume*, but that the circumstances here are such as made the petitioners partners of the bank at the time of the stoppage.

In various cases that have occurred it has been decided that the obligations of parties as partners, or their freedom from the liabilities of partners, are to be ascertained as on the 2d of October, when the bank stopped payment, or at all events on the 5th of October, when a circular was issued calling the partners together for the purpose of winding-up. That was decided in the case of *Alexander Mitchell*, 16 Scot. Law Rep. 165, a trustee who resigned office after the 2d of October and endeavoured to take the benefit of that resignation. The same principle was decided in the case of *Tennent*, 16 Scot. Law Rep. 238, in which a partner sought to reduce the contract of sale between him and the bank by an action instituted after the 2d of October, when it was again held that the rights of parties must be settled as at the date of the stoppage of the bank. So I think we have held on the same principle that the bank officials were not entitled after the date of the stoppage of the bank, by entries which they might make in the register, to alter the obligations of parties as they stood at the date when the bank closed its doors; and accordingly I take this case on the footing that the names of these gentlemen not having been on the register at the date when the stoppage occurred, it lies with the liquidators, practically, as applicants or petitioners to have their names now placed on the register, to show cause why that should be done. But taking the case in this aspect, I have come to the conclusion that that cause has been shown. By the 23d section of the Companies Act of 1862 it is provided that every person who has agreed to become a member of a company under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company; and by section 35 it is provided that if the name of any person is without sufficient cause omitted from the register of members of any company, an application may be made to the Court, who will order the name to be registered. And I take this question as arising practically under section 35 of the statute, and to be determined upon this consideration—whether here the names of persons have been without sufficient cause omitted from the register? Now, taking the case in that aspect, the features of it which I think are sufficient to entitle the liquidators to register these names are these—

In the first place, it was according to the duty of these gentlemen to complete their title to those shares. They had accepted of this trust. They had accepted of a transfer of those very shares, and it was their duty to complete that transfer by vesting themselves in the complete title to that property. I do not say it was necessarily their duty to hold City Bank stock or any other bank stock as marriage-contract trustees. They might, if they had thought fit, have intimated to the parties that they declined to accept such perilous investments, and that they desired to have the stock sold and the money put in some other shape before they should undertake responsibility, and that they must have the proceeds put in some other investment in their names. But one thing is clear in this case, and it is this, that the parties did not take that view, for they not only knew there was such stock as a part of the trust-estate, but they applied for and obtained a transfer of it, and executed a transfer with the view of vesting themselves in the property.

The next circumstance which I think is of consequence is that the transfer so signed contained upon its face the terms of obligation to which your Lordship has referred. By the terms of that document the trustees expressly undertook to become partners of the bank. They agreed to accept the transfer and to come under all the obligations

of the contract of copartnery which that acceptance inferred.

But, in the third place, the remaining point which no doubt was necessary in order to complete any obligation on their part—and the most important step—was, that this transfer was transmitted to the bank with the request that the shares should be transferred to their names; and what I think is vital in the case is that this application was laid before the board of directors, and the board thereupon agreed to grant it. It is quite true, as has been maintained in the argument, that if this transfer had not been transmitted to the bank, the trustees might have disposed of the shares and never become partners at all. The transfer to the purchaser might have been signed by Mrs Richter and the proceeds invested otherwise. It may be that the mere transmission of the document to the bank for the purpose of registration—the transmission and receipt of that document—would not have inferred partnership. I am not prepared to say that the mere transmission of the transfer to the officials of the bank, notwithstanding the terms of section 38 of the contract, operated a complete contract with the bank. I am not prepared to hold that even after that transmission—a day or even a day or two after it—the trustees might not have withdrawn their request if in the meantime it had not been laid before the board of directors, and been made the subject of what I think was a new agreement. But in point of fact the transfer was, as we find from the minutes of the directors, laid before them, and their resolution was the acceptance of the petitioners as partners, and consequently an agreement then entered into between those trustees on the one hand, and the directors of the bank as representing the shareholders and creditors of the bank on the other. The petitioners applied to be admitted partners, and were accordingly admitted and accepted as such.

This being so, it appears to me that this case falls within the 23d section of the statute, which provides for the case in which a party had agreed to become a member of the company. It is not disputed that if before the stoppage the names had been put upon the register there could be no possible question between the parties, but if what occurred between the parties amounted to an agreement—and when I say an agreement, I mean an agreement between the bank and the petitioners that the petitioners should be admitted as partners—if such an agreement was entered into between them—there is an end of the petitioners' case. It appears to me that there was such an agreement constituted on the one hand by the transfer being sent in with an application that the petitioners should be received as partners, and by the corresponding resolution of the directors agreeing to receive them.

There have been expressions founded on the opinions in the case of *Macdonald Hume* which were very properly brought under the notice of the Court and which it is said, apply to this case. But I think that if those opinions are considered, as they must be, with reference to the particular case to which they apply, they will be found to fail in application to the present. The cases are distinguishable in all the points which I think are vital to the present decision. In *Macdonald Hume's* case the executors were under no obligation to put themselves on the register. They might quite as readily have sold the stock, as they probably intended to do, without going on the register at all; whereas here the trustees were only in the fulfilment of a duty in taking the title to themselves, and had resolved so to take the title as we plainly see. In the next place, in *Macdonald Hume's* case there was no formal or deliberate acceptance of the stock, and no acceptance in such terms as we have here undertaking all the liabilities of partners. And, thirdly, there was not in *Macdonald Hume's* case, as we have here, what I think is conclusive — an application to the directors to be admitted partners, received and agreed to, thus constituting an agreement between the bank and the petitioners that the petitioners should be made partners.

Accordingly upon these grounds I agree with your Lordship in thinking that the application in this case must be refused.

I may notice in conclusion that it was maintained on the part of the petitioners that the agent who transmitted the transfer had no sufficient authority from them to entitle him to put them on the register and take a certificate of the stock in their names. I think that argument entirely fails. There could be no possible meaning of their signing a transfer and transmitting it to their agent in this country (I think some of the gentlemen were in Ireland)—there could be no possible meaning of such a proceeding—except this, that having got such a document he should act upon it and complete their title. If he had failed to do so, and this stock had passed into other hands in consequence of his failure to do his duty, I think he would have been liable in damages. It was therefore, I think, within his power and duty to do what he did, and any objection on the ground that his act was unauthorised must also be repelled.

Lord Deas—I agree with your Lordship that this case is clearly distinguishable from the case of *Macdonald Hume*. I think it is distinguishable from the case of *Macdonald Hume* upon all the grounds that have been stated by your Lordship and gone over by Lord Shand. But I think it is particularly distinguishable in this, that in *Macdonald Hume's* case the trustees were trustees under a testamentary deed. There was no onerous transaction there which we had either the right or the duty to enforce under sec. 35 of the statute, and I observe, upon looking back at my own opinion in that case of *Macdonald Hume*, that I proceeded very much on the footing that there was there nobody who had either title or interest to ask us to bring that section into operation. I may just refer to one passage in which this was brought out:—"The liquidators as representing the bank have no title or interest to insist on that being done, and as representing creditors they have no such title, because *ex hypothesi* the names of the petitioners have never been on the register, the entry being a mere nullity and to be dealt with as virtually no entry at all. The personal representatives of Mr Macdonald Hume—the beneficiaries under his gratuitous trust settlement—neither do nor can ask that to be done. The effect of his name remaining on the register is quite different from what it would have been if Mr Macdonald Hume had

sold or agreed to sell the shares in his lifetime or if the petitioners had sold them or agreed to sell them after his death. There has been no undertaking for onerous causes by the petitioners to be registered, and consequently there is no one *in titulo* under the statute to ask that they should be registered."

Now, the present case, on the contrary, is the case of an *inter vivos* deed—an antenuptial contract of marriage—by which this lady became bound to convey those shares to trustees for behoof of the children of the marriage, and for the other purposes which are specified in that contract. She was onerously bound to fulfil her obligations in that contract. It was just as onerous as if there had been a sale by her in favour of any third party. Now, we are empowered under section 35 of the statute in a case of that kind—of onerous transaction—to rectify the register, supposing it to be not correct as it stands. And having the power to do that, it is our duty in such a case to interfere and exercise those powers conferred by that section as between onerous parties. Now here this lady had not merely become bound to convey those shares to the trustees named for behoof of the children of the marriage and other parties, but she had actually done it. She had executed a transfer in implement of the contract of marriage in favour of those trustees, and the deed bears that those trustees are in terms of the contract of copartnery of said bank subject to all the articles and regulations of the said company in the same way as if they had subscribed the said contract. And then the trustees are parties to it and sign that deed. It appears to me that that ground alone is quite sufficient entirely to distinguish this case from that of *Macdonald Hume*, and to make all the observations which I made in that case totally inapplicable to this; and the result is that I agree with the conclusion at which your Lordship has arrived.

The Court refused the prayer of the petition.

Counsel for Petitioners — M'Laren — R. V. Campbell. Agents—R. W. Wallace, W.S.

Counsel for Compearers (Mr and Mrs Richter)—Guthrie Smith—J. & A. Peddie & Ivory, W.S.

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

Friday, October 31.*

OUTER HOUSE.

[Lord Rutherfurd Clark.

EDIE *v.* RIGG.

Agent and Client—Disqualification as Agent—Where he also held a Commission as Sheriff-Clerk Depute.

O, a Sheriff Court agent, held a gratuitous commission to act as Sheriff-Clerk Depute in the absence of the Sheriff-Clerk and his paid depute, qualified by the declaration that he should not take part in any case in which he himself was employed as agent. A suspension of a charge on two decrees pronounced in an action in which O had acted for the pursuer was brought, on the ground that he held the commission above mentioned, though it was not alleged that he had acted as clerk in the process in question. The Lord Ordinary (RUTHERFURD CLARK) *refused* to suspend, and his judgment was acquiesced in.

*Decided 18th February 1879.

This was a suspension of a charge upon two decrees pronounced in the Sheriff Court of Fife.

The facts of the case and the ground of judgment are sufficiently set forth in the following note to the interlocutor of the Lord Ordinary (RUTHERFURD CLARK) repelling the reasons of suspension:—

"*Note*—This is a suspension of a charge given on two decrees pronounced by the Sheriff of Fifeshire, the one dated 29th July and the other 15th November 1878. Several grounds of suspension are stated, but the minute lodged by the suspender has limited them to one.

"The respondent was the pursuer in the Sheriff Court. Mr Osborne, a writer in Cupar, acted as his agent; at the same time he held a commission as Sheriff-Clerk Depute; but it is qualified by the declaration that he shall not act as Clerk of Court in any case in which he is himself employed as agent. It is not alleged that in the process in which the decrees in question were pronounced Mr Osborne acted as clerk. But the suspender maintains that the fact that he held a commission as Clerk of Court is sufficient to nullify the decrees.

"It has been explained—and the fact was not disputed—that the commission issued in favour of Mr Osborne was purely gratuitous and honorary, and that it was merely intended to enable him to act in an emergency when the Sheriff-Clerk and his paid depute were, as they occasionally might be, necessarily absent.

"The sole question is, whether the decrees are null? The suspender founds both on the common law and the Act of Sederunt of 1783, and he has referred to several decisions in which a breach of the common law and of the Act resulted in the nullity of the whole proceedings. But it is to be observed that in all these cases there was not only the capacity of acting in incompatible offices, but such action itself. Here it was not so, nor indeed did the form of Mr Osborne's commission admit of it.

"The Act of Sederunt does not declare a nullity, and in those cases where a violation of it has resulted in the violation of the whole proceedings, this must be due to the operation of the common law, of which indeed the Act professes to be declaratory. But it seems to the Lord Ordinary that the common law would not annul a decree unless it had been obtained in a manner which was incompatible with the fair administration of justice, or which at least suggested a doubt that justice had not or might not have been done. There is nothing in this case to indicate that the suspender has suffered or could have suffered any injustice.

"The Lord Ordinary does not wish it to be understood that he approves of a practising agent holding an appointment as Clerk of Court, even though his commission contains the qualification above noticed. He thinks that the inconvenience to which Mr Osborne owes his appointment might be remedied in some less objectionable manner. But it seems to him that the respondent should