ment pronounced against Fraser in the suspension as a defence to the present action upon the authority of the case of *Gray* v. *M'Hardie*, 24 D. 1043, referredto at the discussion. I am therefore of opinion that this appeal should be sustained.

The Court recalled the Sheriff's interlocutor and assoilzied the defender.

Counsel for Pursuer—Gloag—Shaw. Agent—A. Newlands, S.S.C.

Counsel for Defender — Comrie Thomson — Kennedy. Agents—Macpherson & Mackay, W.S.

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*Friday, December* 17.

## FIRST DIVISION.

### SHARP (BELL'S TRUSTEE) *v.* COATBRIDGE TIN-PLATE COMPANY (LIMITED).

*Public Company—Lien of Company over Shares under Articles of Association, Effect of, against Trustee of Bankrupt Shareholder.*

The articles of association of a public company provided that "the company shall always have a first and permanent lien on the shares of each member for all the debts, liabilities, and engagements to the company of such member, solely, or jointly with any other person." . . . They also provided that the trustee in bankruptcy of a shareholder should be entitled to be registered as the holder of the bankrupt shareholder's shares. The Court *refused* an application by the trustee on the sequestrated estate of a shareholder who had incurred debt to the company in excess of the value of his shares, to have his name substituted on the list of shareholders for that of the bankrupt, *holding* that the company had a lien over the shares under the articles of association, that the trustee was subject thereto as the bankrupt would have been, and that the only object of the application was to endeavour to defeat the lien.

This was an application by Robert Sharp, iron merchant, Coatbridge, under sec. 35 of the Companies Act 1862, by which he sought to have the register of the "Coatbridge Tin-Plate Works (Limited)" rectified by the registration of his name therein as the holder of 248 shares of the company.

The petition was presented in the following circumstances — The petitioner had, upon 6th June 1884, been appointed trustee on the sequestrated estate of Edward Mather Bell, who prior to his sequestration had been the manager of the Coatbridge Tin-Plate Works. Bell had upon various occasions purchased shares of the company, and at the date of his sequestration 248 shares stood in his name in the register of shareholders. These shares were, in all, of the nominal value of £12,400, but were really of much less value. The 20th article of the articles of association provided that "Any person becoming interested in a share in consequence of the death or bankruptcy of any shareholder, or by any lawful means other than by transfer, in accordance with these presents, may, upon producing such evidence as the board think sufficient, either be registered himself as the holder of the share, or elect to have some person nominated by him, and approved by the board, registered as such holder, and if he shall elect to have such nominee registered, he shall grant to his nominee a transfer of the share, and until such transfer be registered, he shall not be freed from any liability in respect of the share." The petitioner averred that he was now, as trustee, in right of the said 248 shares, and was entitled to be entered in the register of shareholders as holder thereof. He further averred that he had requested the secretary of the company to register his name as the holder of Bell's shares, but that he had declined to do so. He prayed the Court to order that the register of the company be rectified by the registration of him (petitioner) as holder of 248 shares.

Answers were lodged by the company, in which they averred that between January 1879 and January 1886 Bell had drawn and used on his own account various sums of money belonging to them, and further, that he had had various transactions in goods with them, which resulted in his being due and indebted to them at the time of his sequestration the sum of £7038, 2s. 9d. They alleged the market value of Bell's shares to be £4216, and they averred that his indebtedness to them had frequently been recognised and admitted by the petitioner, his trustee, and especially that in a claim made by them to rank on Bell's sequestrated estate for the debt of £7038, the petitioner, as trustee, had admitted their claim to the extent of £1038, but had rejected it *quoad ultra* in respect that the claimants (the respondents) held a security over a part of the estate of the bankrupt valued at the sum of £6000. The security referred to was the respondents' lien over the 248 shares held by and standing in the name of the bankrupt, and to which this petition referred.

They founded on article 11 of the articles of association of the respondents' company, which provided—"The company shall always have a first and permanent lien on the shares of each member for all the debts, liabilities, and engagements to the company of such member, solely or jointly, with any other person, and the company may refuse to register the transfer of any shares by any member who may then be indebted, or under any liability to the company, whether solely, or jointly with any other person on any account whatever, and the company may at any time call upon such of the shareholders who may be indebted to the company to pay such debts and engagements, and interest and expenses thereof within one month from the date of the notice thereof, and should they fail to pay the same at the time and place fixed upon in the said notice, the company may at any time thereafter absolutely sell and dispose of the shares of any member who may refuse or neglect to pay such debts, liabilities, and engagements, and whether such member be the sole or joint holder of such shares, and apply the proceeds of such sale, so far as the same will extend, in discharge or satisfaction of all debts, liabilities, or engagements from such member of the company, and upon such sale the company shall without any further or other consent from the holder

or holders of such shares, transfer the same in the books of the company to the purchaser thereof."

On 29th February 1884 the company had written to Bell calling upon him for payment of his debt to them within one month, and informing him that failing payment the company would proceed to sell and dispose of his shares, and apply the proceeds in payment of their debt under section 11 of the articles above quoted.

The respondents also stated that Bell died on 24th May 1886, and that article 19 of their articles of association provided—"The executors or administrators of a deceased shareholder shall be the only party recognised by the company as having any title to his share." The respondents in these circumstances therefore objected to the order for rectification craved being granted, and they submitted that the petition should be refused, in respect the petitioner had no sufficient title or interest; all parties interested were not called; the petitioner's statements were irrelevant, and, in so far as material, were unfounded in fact, and, in any event, the petition should not be granted without payment being made, or sufficient security being given for the payment of the indebtedness of Bell to the respondents by the petitioner as representing him. In any view, they submitted that the petition should only be granted subject to such conditions as would preserve their lien, and to all pleas competent to them against Bell.

Argued for petitioner—The petitioner's right to be entered on the list of shareholders was absolute. He took by transmission, and not by simple transfer. This point was settled by *in re Bentham Mills Company*, L.R., 11 Ch. Div. 901. The company might refuse to transfer but not to transmit. The petitioner as trustee was entitled to reconsider his deliverance if its terms were pleaded against him. The matter was in no sense *res judicata*.

Authorities—*Monkhouse M'Kinnon*, January 28, 1881, 8 R. 454; *Henderson* v. *Auld & Guild*, July 6, 1872, 10 Macph. 946.

Replied for respondents—The prayer of the petition could not be granted to the effect of registering the trustee without destroying the company's lien over their shares, as the petitioner, if once registered, could sell the shares in open market. In the case of *in re Bentham* there was only a passive lien, so it did not apply to the present case. The articles of association gave the company the right which they here claimed, and it could not be defeated, but could only be got over by payment of the debt.

Authorities—Buckley on Companies Acts, p. 412; *Harrison*, L.R., 26 Ch. Div. p. 522; *in re Lewis*, 1871, L.R., Ch. App. 818; *Hotchkis* v. *Royal Bank*, 3 Pat. App. 680; *Burns* v. *Lawrie's Trustees*, July 7, 1840, 2 D. 1348.

At advising—

Lord President—Here the trustee on the estate of the bankrupt Edward Mather Bell claims to be registered on the roll of shareholders in place of the bankrupt in terms of article 20 of the company's articles of association. The petitioner produces his confirmation as trustee. The answer made by the company is, that at the date of his bankruptcy the bankrupt was indebted to them, the respondents, in a sum larger than the value of the shares held by him, the highest valuation put upon the shares held by him not being more than £6000, while his debt to the company was as much as £7000.

In these circumstances it is maintained by the company that they have a lien over the shares of the bankrupt in security for his debt to them in accordance with article 11 of the company's articles of association. By this article three things are provided—1st, That the company shall have a first and permanent lien over the shares of each member for his debts to the company; 2d, that the company may refuse to register the transfer of any shares by a member who may then be in the debt of the company; and 3d, the article provides a mode by which the lien may be worked out by notice and sale. At first the parties seem to have been pretty much of one mind, and the lien claimed by the company was then recognised by the trustees. But having changed his mind, or acting on other advice, the trustee presents the present petition for an order that he shall be registered on the company's roll of shareholders as holding the shares originally held by the bankrupt. The petitioner further says that he is no ordinary transferee to be refused at the discretion of the company, but that having become entitled to the shares in virtue of a bankruptcy the company must register him as a shareholder. But if the lien of the company is good it can be of no service to the trustee to be registered as a shareholder, because he is subject to the same lien as the bankrupt formerly was.

In terms of article 11 of the articles of association the company in February 1884 gave notice to the bankrupt prior to his bankruptcy that failing payment of his debt they would proceed to exercise their rights under that article, and therefore they can now sell his shares if their lien is good. The question therefore comes to be, whether the lien is good, and I think it is. Such a lien is in accord with the law laid down in the case of *Hotchkis* v. *The Royal Bank of Scotland* [*supra cit.*], prior to the Companies Acts with which we are now familiar. In that case the right of retention is recognised as good at common law. In regard to this right an incorporated society such as the present is on the same footing as a private trading company, and this matter is well brought out in the opinion of Lord Moncreiff in the case of *The Central Banking Company*, 2 D. 1348. This case and the case of *Hotchkis* are both authorities on the present question, and even apart from this right at common law such a lien is a perfectly legal stipulation for a company to make in their articles of association.

I come to the conclusion therefore that the company have a good lien, and are entitled to retain the shares. The trustee can have no object in being registered except to defeat that lien, and as it is indefeasible he cannot be registered.

Lord Mure—I am of the same opinion. I think this lien is good both at common law and by the articles of association. The trustee, if registered, must necessarily take the same position as the bankrupt had; that is, he must be under the burden of the company's lien. His object in endeavouring to get on to the register is evidently to strengthen his position in attempting to defeat the company's lien.

Lord Shand—The debt due by the bankrupt to the company was £7000 at least, and the shares are not worth more than £6000. The trustee asks to have the shares transferred to him in order to get rid of the lien. To this he is not entitled. By their articles the company have a first lien over the shares. Therefore they have a right and interest to decline to put the trustee on the register. If article 11 stopped before the words "and the company may refuse to register the transfer of any shares," &c., there would be no room for the petitioner's argument. And I cannot read the words which follow as at all limiting the way in which the company may enforce its lien. The *Bentham Mills Spinning Company's* case seems to be the trustee's ground for the petition. Even, however, if that decision be right, it is not in point in the present case, for there is in the articles of association of the present company clear provision for a first lien.

Lord Adam concurred.

The Court refused the petition.

Counsel for Petitioner—Asher, Q.C.—Ure. Agents—Fodd, Simpson, & Marwick, W.S.

Counsel for Respondents—Balfour, Q.C.—Graham Murray. Agents—J. & A. Hastie, S.S.C.

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*Friday, December* 17.

## FIRST DIVISION.

[Sheriff of Lanarkshire.

## JACK AND OTHERS *v.* THE NORTH BRITISH RAILWAY COMPANY.

*Minor—Minor without Curators—Discharge.*

Minor children were found entitled to a sum of £50 each as reparation for the death of their father, who had been killed in an accident. They had no curators. *Held* that as the sums which they had recovered were not large sums suitable for investment, but, on the other hand, such as would be required to be immediately expended in their maintenance and education, the minor children could themselves grant a discharge for them, and that the party found bound to pay would be in safety to take such a discharge.

*Observations* on *Kirkman* v. *Pym*, M. 8977.

*Pupil—Guardian—Guardianship of Infants Act* 1886 (49 *and* 50 *Vict. c.* 27).

*Held* that, in respect of the Guardianship of Infants Act 1886, a mother could validly discharge on behalf of her pupil children a sum of damages to which they had been found entitled.

The late John Jack was killed by the bursting of an engine-boiler belonging to the North British Railway Company, at Balloch, on 5th July 1884. He left a widow and seven children. The two eldest were minors, the other five pupils.

This action was raised by the seven children, John B. Jack, and others, to recover damages for his death. They sued for £2100, in the proportion of £300 to each. The railway company denied fault.

The action was settled by the defenders offering, and the pursuers (to whom a curator *ad litem* and tutor *ad litem* had been appointed) accepting, a sum of £350 in full of all claims, or £50 to each child.

On motion being made for decree in terms of the joint-minute, a difficulty was raised as to the sufficiency of the discharge to be given to the defenders. The two minor children had no curators. They offered a discharge signed by themselves.

It was maintained with regard to the children that their mother might discharge the defenders of the debt in respect of the Guardianship of Infants Act 1886. Section 2 of that Act provides—"On the death of the father of an infant, and in case the father shall have died prior to the passing of this Act, then from and after the passing of this Act the mother, if surviving, shall be the guardian of such infant, either alone, where no guardian of such infant has been appointed by the father, or jointly with any guardian appointed by the father." . . . . . Section 8 provides that in the application of the Act to Scotland the word guardian shall mean "tutor," and the word "infant" shall mean pupil.

Argued for the railway company—All that the company wanted was a valid discharge. They were ready to pay the money to any parties to whom the Court should direct them. It was for the Court to decide whether this case was a case in which the company were in safety to pay to the minor children upon their own discharge. The practice in such cases was shown by *Pratt* v. *Knox*, June 28, 1855, 17 D. 1006; *Anderson* v. *Muirhead*, June 4, 1884, 11 R. 870; *Kirkman* v. *Pym*, M. 8977; *Sharp* v. *Pathhead Spinning Company*, January 30, 1885, 12 R. 574.

Replied for the children—The statute 49 and 50 Vict. c. 27, altered the old law, and now the mother after the death of the father became the guardian of her pupil children. The difficulty arose as to the two children in minority; but it could not be necessary that in order to receive so small a sum as £50 for each they should be at the expense of getting curators appointed.

At advising—

Lord President—This cases comes before us under an issue in which the children of the late John Jack claim damages, which are laid at £2100, for the loss of their father, the sums claimed being £300 to each of the seven children.

The case did not go to trial, but was settled by joint-minute, in which the pursuers accepted of a sum of £350 in all, or £50 to each child. The case now comes before us to apply this settlement, and to grant decree for the sum tendered and accepted. Five of the children are in pupillarity and two are in minority, and the question of difficulty which arises under the case is, how are the defenders to obtain a valid discharge? As regards the pupil children, all difficulty with reference to them is at an end, because by the provisions of the recent statute the mother is empowered to act as tutor or guardian to her pupil children, and now possesses the same rights as were formerly enjoyed by the father. The matter is not so clear, however, with regard to