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.

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

the two children who are in minority, for they have no curator, and it is maintained by the defenders that they are not in a position by themselves to grant a valid discharge. This is quite a new point in questions of this kind, although there are three previous cases which came before the Court upon applications similar to the present. The first of these was the case of *Pratt* in 17 D., in which the Court refused to hold as sufficient a discharge by the person who had been appointed curator *ad litem*, and decided that there must be a formal application in the usual way. That decision is obviously of no use to us in the determination of the present question. The next case was *Anderson* v. *Kidd* in 1881, which is unreported. There a widow and her children were the pursuers of the action, and the Court refused to grant decree until a factor *loco tutoris* was appointed, because the mother declined to hold the sum awarded by the jury in trust for herself and the children subject to the orders of the Court. In *Anderson* v. *Muirhead*, June 4, 1884, 11 R. 870, which was an action at the instance of minor children, no demand was made by the pursuers to obtain a decree in their own names. They evidently considered that they ought to have a guardian, and proceedings were delayed until he had been appointed, In the present case the demand is made by the minors that they are entitled to have the decree granted in their own names. Upon this matter Erskine says (lvii. 33)—"Every deed of a minor who has no curators is as effectual as if he had curators, and had acted with their consent." Now, if this *dictum* is to be held to be of universal application, then of course there is an end to all difficulty with regard to the present application. But there are exceptions to this rule, and the measure of the powers of minors without curators is thus stated by Professor More (Lectures, vol. i. p. 110)—"When minors have no curators they may act by themselves, and payments made to them by their debtors will be valid and effectual. But the Court of Session will not in every instance compel a debtor to pay to a minor who has no curator without his giving security to keep the debtor indemnified." The case upon which the qualification mentioned by Professor More rests is that of *Kirkman* v. *Pym*, reported in Morison, 8977, and referred to by Lord Fraser in his work on Parent and Child, the circumstances of which show very clearly the kind of case in which the exception noticed by More arises. There Pym, the debtor, was due a large sum of money to Kirkman, who died and was succeeded by his son, who when a minor in his seventeenth year, and without curators, demanded payment of the debt, which was a large sum of money secured by heritable bond. Pym objected that "as he (Kirkman) was without curators payment could not be made to him with safety," but expressed his willingness to pay "if he was secured by the Court *causa cognita* against the hazard of being obliged to make payment a second time." The Court observed there that a distinction was to be taken between cases which related to the payment of a principal sum and those in which the interest only of money or the rents of subjects was claimed —"those ordinary acts of administration which might be necessary for a minor's support. Accordingly the Lords were of opinion that as the debtor could not, even by making full money, be secure against future challenge, unless the money were to be afterwards profitably employed for the minor's behoof, so the Court ought not to interpose their authority in order to compel him to do an act which would subject him to that hazard." Now, the distinction there taken between a large capital sum which fell to be invested, and income, whether in the shape of interest or rents, is very important, and it is in applying that doctrine to the present case that the only difficulty arises. Now, it appeared to me that the sum of money which each of these minors proposes to discharge without the intervention of a curator cannot be described as a large sum for investment. It is a sum which the law has given these children to repair the loss they have sustained upon the death of their father, and it appears to me that the loss which they have sustained upon the death of their father is just the liability which the father would have been under to maintain and educate them, and if the sum which comes in place of his paternal care and administration is that sum of £50, that seems rather a sum which goes to satisfy the immediate charges—that is to say, charges for the maintenance and the education of these minors. I think therefore that as it falls within that category, and not within the category of a principal sum or large amount which ought to be invested for the minors, these minor children have a good title to discharge that sum.

LORDS MURE, SHAND, and ADAM concurred.

The Court decerned for payment of £50 to each of the minor children, and on a minute being lodged sisting the mother as tutor to the pupil children, decerned for payment to her of their sums of £50 found due to each of them under the settlement.

Counsel for Appellants—Ure. Agents—Dove & Lockhart, S.S.C.

Counsel for Respondents—Graham Murray. Agents—Millar, Robson, & Innes, S.S.C.

Friday, December 17.

OUTER HOUSE.

[Lord Trayner.

FORBES *v.* CALEDONIAN RAILWAY COMPANY AND PAROCHIAL BOARD OF DENNY.

Entail—Petition to Uplift and Apply Consigned Money—Expenses—Lands Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 9) *—Apportionment when Money Consigned by more than one Party.*

Two bodies had under statutory powers taken parts of an entailed estate for their undertakings, and consigned the respective sums payable by them, which sums were unequal in amount. *Held*, in a petition to uplift and apply the consigned money, that the expenses of the proceedings fell to be paid by the two bodies equally, and not in the proportions which the respective sums consigned bore to each other.

Mr Forbes of Callendar was the heir of entail in possession of the lands and barony of Herbert-