Saturday, December 12.

SECOND DIVISION.

[Lord Wellwood, Ordinary.

THE GALLOWAY SALOON STEAM-PACKET COMPANY *v.* WALLACE.

Company—Articles of Association—Construction—Director—Qualification—The Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *secs.* 23. 30.

The articles of a company registered under the Companies Acts as an unlimited company, provided that any two of the directors should be a quorum, that any member holding ten shares should be eligible as a director, and that "in case any share or interest in this concern shall be held in the name of a company or firm, only one individual partner of that company shall be entitled to attend and vote at the general meetings, and to give proxy as aforesaid, whose name shall be entered in the books of the company as the ostensible holder, and no trustee on the bankrupt estate of a partner shall be entitled as such to attend any meetings or to vote by proxy at the same."

A call having been made at an ordinary meeting by a quorum of the directors who were registered individually, and as possessing more than ten shares each, a shareholder objected to their qualification, alleging that they had no beneficial right in their shares, but held them in trust for a certain company, and further that as such partners of this company only one was entitled to act.

The Court *held* that this defence was irrelevant on these grounds—(1) that as the directors were registered individually, and were therefore liable individually for all the obligations of an individual shareholder, they were entitled to all the privileges pertaining to such a character; (2) that the word "held" in the clause "any share held in the name of a company" was equivalent to "registered," and did not apply to the shares held by the directors; and that as the directors were not registered as "ostensible holders" for the company for which they were alleged to hold in trust, the restriction on persons registered as such did not apply to them; (3) that the article founded on did not affect the present case, as it applied only to general meetings.

The Companies Act 1862 (25 and 26 Vict. cap. 82), sec. 23, provides—"The subscribers of the memorandum of association of any company under this Act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company shall be entered as members in the register of members hereinafter mentioned, and every other person who has agreed to become a member of a company under this Act, and whose name is entered upon the register of members shall be deemed to be a member of the company." Sec. 30—"No notice of any trust, express, implied, or constructive, shall be entered on the register, or be receivable by the registrar in the case of companies under this Act, and registered in England or Ireland."

The Galloway Saloon Steam-Packet Company was registered under the Companies Acts 1862 to 1886 as an unlimited company on 8th June 1886. The capital of the company was finally fixed at £44,000 in £10 shares. The amount of shares finally issued was 4316, and £6, 17s. 6d. was paid upon them.

Upon 7th July 1891 the directors of the company, at a meeting attended by two (and a quorum) of the directors, who were registered individually and as possessing more than ten shares each, resolved to make a call upon the shareholders of £1 each, payable upon 1st August 1891. Andrew Wallace, solicitor, Leith, who held 804 shares, and was a director of the company, declined to pay the call. The company therefore brought this action for payment of £804. The articles of association provided, *inter alia*, "4. . . . At all general meetings the members shall have a right to vote in person or by proxy, such proxy being always a member of the company, and empowered by a proper mandate holograph of the granter, or duly attested according to the rules of the law of Scotland; and the votes of the members at said meetings shall be counted and valued, not *per capita*, but according to the number of shares held by each voter respectively, and a majority in point of value shall decide and determine every matter or question. In case any share or interest in this concern shall be held in the name of a company or firm, only one individual partner of that company shall be entitled to attend and vote at the general meetings, and to give proxy as aforesaid, whose name shall be entered in the books of the company as the ostensible holder, and no trustee on the bankrupt estate of a partner shall be entitled as such to attend any meetings or to vote by proxy at the same." "6. The business of the company shall, as aforesaid, be conducted under the superintendence of the directors before named, any two of whom shall be a quorum, and thereafter of the directors who shall be named and elected by the company as hereinafter directed at the aforesaid stated general meetings, to be held annually on the last Monday of November, and every member holding ten shares of the stock of the company shall be eligible and may be elected a director."

The defender averred—"The defender has recently learned . . . that none of those claiming to be directors, with the exception of the defender, are qualified to be directors. The whole shares standing in the said other directors' names truly belong to the said North British Packet Company or the North British Railway Company, and the said so-called directors have no beneficial interest therein, and are merely the nominees of the said North British Packet

Company or the said North British Railway Company. The shares belonging to the said North British Packet Company or the said North British Railway Company are registered in separate names in order to enable the said companies to evade the provisions of article 4 of the Galloway Company's articles of association, so as to allow them to control the management and administration of the latter company. The North British Railway Company has put forward the North British Packet Company as nominal holders of said shares, because the North British Railway Company is not entitled to hold such shares. The North British Packet Company is entirely composed of partners who are shareholders in and nominated by the North British Railway Company, and the whole capital of said Packet Company is found and contributed by the North British Railway Company."

The pursuers pleaded—"(1) The defender, in respect of the shares held by him and of the call thereon, is liable to the pursuers in the sum concluded for."

The defender pleaded—"(3) The directors who claim to have made the said call not being qualified to act as directors or to make the call, the defender should be assoilzied."

Upon 24th November 1891 the Lord Ordinary (WELLWOOD) pronounced this interlocutor—"Allows the defender a proof of his averments in his statemeut of facts so far as not admitted, and to the pursuer a conjunct probation."

The pursuers reclaimed, and argued—Proof here was unnecessary. The only question to be considered was, whether certain persons who had acted as directors of the company, and to whose actings in that capacity the defender objected, were in reality shareholders or not in the sense of the Companies Act. If they were shareholders, which was entirely a legal question, then it could not be denied that they held shares to qualify them for their position, and were legally appointed. The defender alleged that the North British Railway Company, either in their own right, or through the North British Steam Packet Company, had purchased all the shares of the company except those held by the defender, and had therefore acquired a predominating influence which they wished to exercise to the prejudice of the Galloway Steam Packet Company. It was, however, provided by the articles of association that if a company acquired any number of shares in this company they could only be represented by one person, who was registered as the "ostensible owner," although it might be that the name of the company by whom he was appointed stood in the books as the registered owner of the stock in respect of which he voted. But that was not the true reading of the articles of association. A company limited in the sense of the Companies Act 1862, could not appear on the register of a company whose liability was unlimited as the holder of stock in its own name. The name of some nominee therefore of the unlimited company appeared upon the register of the limited company as the holder of the stock, and in that way if the unlimited company chose to divide its stock among a number of persons, all these persons could be appointed to the directorate if they each held the requisite amount of stock. In fact it was merely a company doing what it was admitted it was quite lawful for an individual shareholder to do. It had been decided in England and also in Scotland, that the name of a person who appeared on the register as holder of shares must be taken as the real holder, and no proof of his fiduciary character could be allowed—*Bainbridge* v. *Smith*, May 9, 1889, L.R., 41 C.D. 462; *Muir* v. *City of Glasgow Bank*, December 20, 1878, 6 R. 392. As regarded the possibility of a shareholder dividing his share among a number of people who had no beneficial interest in them—*Pulbrook* v. *Richmond Consolidated Mining Company*, August 6, 1878, L.R., 9 C.D. 610. The ostensible owner of the stock was the person whose name appeared upon the register as owner of a certain amount of stock, and not anybody who was put forward as the representative of a company. In a matter of internal arrangement the company was not entitled to go beyond the register of its own shareholders and find out in what capacity they really held the shares.

The respondent argued—The articles of association provided that if any company should become the purchaser of shares in the appellants' company, they should only have a representative in the company. He might be a director or not according as he held the proper qualification and was appointed to the office, but there could be only one representative. There was no injustice in this, because at a general meeting, as provided by the articles, one member could vote by having proxies and in that way get the real voting power of the company expressed. But it was different in the case of directors. If a company was registered as the holder of the shares, a certain person had to be put on the register as the nominee of the company, and he was the "ostensible owner" mentioned in the articles. The quorum who authorised the call were really nominees of the North British Railway Company. If the railway company were entitled to have a representative at all, they could only have one, and it did not appear that the director who authorised the call was the "ostensible owner." It was admitted that a private individual could hold a number of shares and divide them among a number of his friends so as to increase his voting power without the assignees having any beneficial interest in the shares, but the articles of association of this company while admitting that possibility had guarded against the possibility of a company acquiring shares and doing the same thing. That was in fact the real meaning of the statements in the fourth article. The appellants were prepared to prove that the directors objected to had not a real qualification in the meaning of the articles of association.

At advising—

LORD TRAYNER—The pursuers' company is registered under the Companies Acts as an unlimited company, and the defender is a member thereof and holder of 804 shares. At a meeting of the directors of the company held on 7th July last, at which two and a quorum of the directors were present, a call was made on the capital of the company of one pound per share. Under that call the defender became liable for the sum of £804 in respect of the shares held by him, but as he refused to pay the same this action has been brought against him to enforce payment. The defender has stated in defence several objections to the validity of the call, but the only objection now maintained is that the call is invalid in respect the directors who made the same were not qualified to act as directors. By the articles of association of the company it is provided that "every member holding ten shares" shall be eligible and may be elected a director. Now, no question is raised as to the fact of the two directors in question having been elected to the office of director, and the regularity of this election is not impugned. The question therefore is, have they the requisite qualification? It is admitted that these directors are entered on the register as holders, each of them, of more than ten shares in the company. Being so registered, they must, according to the 23rd section of the Act of 1862, "be deemed to be members of the company" in respect and to the extent of the shares entered in the register as held by them. The two directors in question, therefore, according to the criterion furnished by the Act of 1862, are members of this company holding more than ten shares each; and if so, then they have the qualification for the office of director specified by the articles of association. It is said, however, that the shares held by these directors are held by them in trust for the North British Railway or North British Packet Company, and that they have no beneficial right or interest in the shares which are registered in their names. I think this is a matter which is quite irrelevant to any question affecting the rights or obligations of persons who are registered as shareholders. The statute forbids the entry on the register of any company registered under its provisions, of the notice of any trust, expressed, implied, or constructive, and I think we cannot in such a case as this go behind the register to inquire into alleged facts which are forbidden to appear there. This appears to have been the view taken in the English cases to which we were referred, and I am prepared to follow that view here. It is obviously a reasonable view. The absence of any notice of trust in the register prevents the person registered from pleading that he holds in trust as against the company or its creditors in any question which may arise inferring liability on him (the registered shareholder) for fulfilment of the whole obligations imposed on him by his being a member and holding shares. He is registered individually, and individually he is liable for all the obligations of a shareholder. I think the converse of this must equally obtain. He is registered individually, and individually he must be entitled to all the privileges or benefits arising from the fact of his being a registered shareholder.

The defender, however, relies more on the special terms of the articles of association of this company than on the terms of the statute, in support of his defence. He pleads that both of the directors in question being nominees or holders of shares in trust for a company, itself the real holder, only one of them could act or vote as for the company, and that one director could not validly make the call. I think he is right in saying that any one director could not have made the call. It required at least a quorum of the directors to make the call, and it is provided by the article that two of the directors shall be a quorum. But the article to which the defender refers appears to me to have no reference either to the qualification of a director or to anything done at a directors' meeting. That article is the 4th, and the important part of it is the last clause, which provides—"In case any share or interest in this concern shall be held in the name of a company or firm, only one individual partner of that company shall be entitled to attend and vote at the general meetings, and to give proxy as aforesaid, whose name shall be entered in the books of the company as the ostensible holder." I think that provision has no application or bearing whatever on the present question. In the first place, the words, "any share or interest . . . held in the name of a company or firm," must, in my opinion, be held to mean any share or interest registered in the name of a firm, and if that be the meaning of the words, they have no application to the case where the shares are not registered in the name of a firm but in the names of individuals. Secondly, the two directors in question are certainly not entered on the register as the "ostensible holders" for behoof of any firm, and therefore any restriction in acting or voting imposed on such "ostensible holders," registered as such, does not affect them. But, thirdly (and this is of itself a complete answer to the argument maintained by the defender), the article now under consideration provides a certain regulation to be observed in voting at general meetings of the company, and at such meetings only. The meeting of 7th July last was not a general meeting, and therefore the 4th article can have no bearing upon what was then done.

I think the defence maintained here is irrelevant, and therefore the proof allowed by the Lord Ordinary is unnecessary. The defence being irrelevant, the pursuer, in my opinion, is entitled to decree as concluded for.

The LORD JUSTICE-CLERK, LORD YOUNG, and LORD RUTHERFURD CLARK concurred.

The Court recalled the Lord Ordinary's

interlocutor and gave decree in terms of the conclusions of the summons.

Counsel for Appellant—D.-F. Balfour, Q.C. —Salvesen. Agents—Beveridge, Sutherland, & Smith, W.S.

Counsel for Respondent—The Lord Advocate—C. S. Dickson. Agent — Andrew Wallace, Solicitor.

Saturday, December 12.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

MITCHELL & BAXTER *v.* THE BANK OF SCOTLAND AND CHEYNE (DEWAR'S CURATOR).

(*Ante*, 18 R. 90, and 28 S.L.R. 85, *affd.* H. of L. 917.)

Judicial Factor—Curator Bonis—Opposition of Lunatic to Appointment—Expenses of Opposition — Bank Cheque Granted by Lunatic—Law-Agent.

The Lord Ordinary having on 15th August appointed a *curator bonis* to a lunatic, the latter reclaimed, but the First Division on 8th November adhered to the appointment, and pending an appeal to the House of Lords authorised the *curator bonis* to extract his appointment and act thereunder. The expenses were not dealt with.

On 23rd October and 6th December the lunatic granted to his law-agents certain cheques on his bankers to cover respectively the expenses of the proceedings in the Court of Session and the House of Lords. The lunatic had also in September unsuccessfully sued the *curator bonis* and others in the Sheriff Court and Court of Session for delivery of certain securities belonging to him.

In consequence of a refusal to honour the cheques the lunatic and his law-agents raised an action against the bank and the *curator bonis* for payment thereof. The curator by note to the Court desired authority to pay the law-agents their expenses incurred before the Lord Ordinary and in the Inner House as taxed, and to advance a sum on account of expenses in the House of Lords, provided the law-agents found caution to repeat the same in the event of the House of Lords disallowing expenses.

The House of Lords meantime affirmed the decision of the Court of Session, and found the agents entitled to their expenses in that House.

Held (1) that the decision of the House of Lords carried as a consequence the expenses in the Court of Session; (2) that the expenses of the Sheriff Court action could not form a charge against the estate; (3) that the cheques were invalid, as at their date the granter had been superseded by the Court in the management of his affairs.

On 15th August 1890 Lord Kincairney, Lord Ordinary on the Bills, appointed Mr Harry Cheyne, W.S., *curator bonis* to Dr James Dewar. Dr Dewar reclaimed against this appointment to the First Division, who on 8th November adhered to the Lord Ordinary's interlocutor, and pending an appeal by Dr Dewar to the House of Lords allowed Mr Cheyne to extract his appointment and act as *curator bonis*. The First Division did not deal with the question of expenses.

On 4th September Dr Dewar raised an action in the Sheriff Court of Edinburgh against the *curator bonis* and others for delivery of all documents and papers in their possession which belonged to him. This action was dismissed, and on appeal the First Division on 8th November adhered.

Meanwhile on 23rd October and 6th December Dr Dewar granted two cheques drawn on the Bank of Scotland for £300 and £700 respectively in favour of Messrs Mitchell & Baxter, W.S., his law-agents, to meet the expenses they had incurred in opposing the appointment of a *curator bonis* in the Court of Session, and those they would incur in prosecuting the appeal to the House of Lords. These cheques the Bank of Scotland, acting on the instructions of Mr Cheyne, the *curator bonis*, declined to honour, and Dr Dewar and Messrs Mitchell & Baxter thereupon, on 13th January 1891, raised an action against the bank and Mr Cheyne for payment of the cheques.

On 24th March the Lord Ordinary (WELLWOOD) dismissed the action as irrelevant.

"*Opinion.*—The defender Mr Cheyne was appointed *curator bonis* to Dr Dewar by Lord Kincairney on 15th August 1890. The application for appointment was opposed on behalf of Dr Dewar, who was at that time in Saughton Hall Asylum, and on the appointment being made a reclaiming-note was presented on his behalf to the First Division of the Court. On 8th November 1890 the First Division adhered to the Lord Ordinary's interlocutor and refused the reclaiming-note. The curator thereafter extracted his appointment and entered on the duties of his office.

"When Dr Dewar was removed to Saughton Hall Asylum there was standing at his credit, in account with the Bank of Scotland, a considerable sum of money. After the Lord Ordinary's interlocutor, and before the case was heard in the Inner House, Messrs Mitchell & Baxter, Dr Dewar's agents, applied to Dr Dewar, who was still in confinement, for a cheque to meet expenses incurred and to be incurred in opposing the appointment, suggesting £300 as a suitable sum. Dr Dewar thereupon, on 22nd October 1890, signed the cheque for £300, which is first sued on in the summons.

"After the appointment had been confirmed by the interlocutor of the Inner House, Dr Dewar on 6th December 1890 signed a cheque for £700 (second sued on) to meet the expenses of taking the case to the House of Lords.