

able that the power is one of which Mrs Blair cannot under her father's will effectually divest herself *ab ante*.

"I am accordingly of opinion that I must sustain the defenders' first plea-in-law.

"I should perhaps notice the third alternative conclusion, viz., that Mrs Blair may exercise by postnuptial deed the power given by the settlement to create a liferent in favour of a husband by antenuptial contract. As regards a provision to her present husband, the possible second husband is not a possible contradictor. No argument, however, was presented to me in support of this conclusion, and it hardly appears to me to be maintainable. The words of the settlement are explicit and unambiguous. Moreover, it is quite intelligible that a testator might deem it proper to withhold from postnuptial disposal in favour of a husband a benefit which his daughter had refrained from conferring in her antenuptial condition of freedom.

"The interlocutor I propose to pronounce is to find the action is premature as laid, to continue the cause to allow the pursuer an opportunity of considering whether she will amend her summons, and to grant leave to reclaim.

"My reason for adopting this form is because I think that conceivably the pursuer might make a competent conclusion that subject to any right which she may create by the exercise of the powers conferred by the clause to which I have referred the fee is vested in her. I express no opinion meantime as to the competency of such a conclusion."

The pursuer having declined to amend the summons, the Lord Ordinary on 20th November 1918 dismissed the action.

The pursuer reclaimed.

At advising—

LORD JUSTICE-CLERK—[*After dealing with questions which are not reported*—With regard to the conclusion that the pursuer has full power to confer upon her husband or upon any husband she may hereafter marry a liferent of her share, I think the proper course, in accordance with what I understand to be the opinion of your Lordships, is that we should treat that conclusion as being prematurely raised, leaving it to the husband, either present or prospective, if so advised, to raise the question when it comes to be a practical one. Therefore I move your Lordships that we should assolvie the defenders from the conclusion as to the pursuer's right of fee, and that as to the conclusion regarding the husband's interest we should dismiss the action.

LORD DUNDAS—[*After dealing with questions which are not reported*—As regards the third and last conclusion, I have no hesitation in agreeing that it is premature, and that we ought not to give any answer to it. The lady may never have a second husband, and the husband she now has may die before her, and it is quite uncertain whether any question will ever arise about the matter. I do not think she is entitled to ask us now whether she could validly exercise the privilege when she desired to do

so; there are no circumstances here present demanding a decision on that question at the moment. For my own part I agree with the observation of Lord Medwyn just about eighty years ago in the well-known case of the *Earl of Galloway* (1838, 16 S. 1212), where his lordship said—"I do not admire these consultations coming upon us *ab ante*. . . . Valuable as the action of declarator is, I do not think this is a proper use of it. . . . I am against telling a party beforehand that he will be right if he do this, and wrong if he do that." I think some of these expressions underlay Lord Dunedin's decision in the case of *Smith*.

LORD SALVESEN—[*After dealing with questions which are not reported*—As regards the third conclusion, I think, for the reasons stated by Lord Dundas, that the demand of the pursuer is premature. We are not in the habit of deciding questions which may never arise, and, so far as I can see, this particular question may be merely academic.

LORD GUTHRIE—I agree.

The Court recalled the interlocutor of the Lord Ordinary and dismissed the third conclusion of the action.

Counsel for Pursuer and Reclaimer—Wilson, K.C.—Mitchell. Agents—Cadell & Morton, W.S.

Counsel for Defenders and Respondents—Chree, K.C.—R. C. Henderson. Agents—R. Addison Smith & Co., W.S.

Friday, January 17.

FIRST DIVISION.

(SINGLE BILLS.)

CRANSTON'S TEA ROOMS, LIMITED (AND REDUCED), PETITIONERS.

Company—Capital—Reduction of Capital—Procedure—Form of Prayer of Petition when Creditors' Rights not Affected—Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), sec. 49.

In a petition for confirmation of reduction of capital, where creditors' rights were not affected and there were no specialties to be dealt with, *held* that it was superfluous and inappropriate to insert a crave to give effect to the provisions of section 49 of the Companies Act 1908 in so far as they applied to creditors and to the list of creditors to be made up.

The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69) enacts—Section 49—

"(1) Where the proposed reduction of share capital involves either diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, and in any other case if the Court so directs, every creditor of the company who at the date fixed by the Court is entitled to any debt or claim which if that date were the commencement of the winding up of

the company would be admissible in proof against the company, shall be entitled to object to the reduction. (2) The Court shall settle a list of creditors so entitled to object, and for that purpose shall ascertain as far as possible, without requiring an application from any creditor, the names of those creditors and the nature and amount of their debts or claims, and may publish notices fixing a day or days within which creditors not entered on the list are to claim to be so entered or are to be excluded from the right of objecting to the reduction. (3) Where a creditor entered on the list whose debt or claim is not discharged or determined does not consent to the reduction, the Court may, if it thinks fit, dispense with the consent of that creditor, on the company securing payment of his debt or claim by appropriating, as the Court may direct, the following amount (that is to say), (1) If the company admits the full amount of his debt or claim, or though not admitting it is willing to provide for it, then the full amount of the debt or claim; (2) If the company does not admit or is not willing to provide for the full amount of the debt or claim, or if the amount is contingent or not ascertained, then an amount fixed by the Court after the like inquiry and adjudication as if the company were being wound up by the Court."

Cranston's Tea Rooms, Limited (and Reduced), petitioners, presented a petition for confirmation of reduction of capital by the cancellation of 63,000 fully paid ordinary shares of £1 each.

The prayer of the petition was in the following terms—"May it therefore please your Lordships . . . to fix the date with reference to which the list of creditors entitled to any debt or claim against the company within the meaning of section 49 of the Companies (Consolidation) Act 1908, and entitled to object to the proposed reduction of the capital of the company, shall be made up; to appoint the petitioners to make up such a list, and to lodge it in process within such period as your Lordships may fix; to fix the date on or before which the creditors of the company not entered in the said list are to claim to be entered in the list to be settled by your Lordships, or are to be excluded from the right of objecting to the proposed reduction, and to appoint advertisement thereof to be made once in the *Edinburgh Gazette* and once in the *Glasgow Herald* newspaper; to settle the said list of creditors entitled to object to the proposed reduction of capital; to find that their consents to the reduction have been obtained, or that their debts or claims have been discharged or have determined; or to dispense with the consents of those creditors whose debts or claims have not been discharged or determined and who have not consented to the proposed reduction, on the petitioners securing payment of these debts or claims in the manner provided by the Companies (Consolidation) Act 1908, section 49 (3)."

On 19th November 1918 the Court fixed a date with reference to which the list of creditors of the company, within the meaning of section 49 of the Companies (Consolidation) Act 1908, should be made up at the sight of

Sir George M. Paul, C.S., to whom the Court remitted to inquire into the regularity of the procedure and the facts set forth in the petition, and to report.

On 16th January 1919 Sir George Paul returned his report, which contained the following—"The reporter may at this stage direct your Lordship's attention to the form of the prayer of the petition.

"The provisions of the Act of 1908 as regards reduction of capital are contained in section 46 and following sections.

"Subject to confirmation by the Court section 46 authorises in general terms a company to reduce its capital by special resolution. In particular it is authorised to extinguish or reduce liability on any of its shares in respect of share capital not paid up, or where the capital is paid up a company may with or without extinguishing or reducing such liability cancel or pay off any part of it which has been lost or is unrepresented by available assets or is in excess of the wants of the company as the case may be.

"Sections 48 and 49 give directions for cases where creditors would and where they would not be prejudicially affected by a special resolution to reduce capital. Thus the general direction expressed in section 48 is to the effect that on and from the confirmation by a company of such a resolution the company shall add the words 'and reduced' to its name until such date as the Court may fix; modification is, however, allowed in cases where the resolution does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, in either of which cases the addition need only be made on and from the presentation of the petition for confirmation; indeed the Court is authorised if it thinks expedient to dispense altogether with the addition of the words.

"Section 49 safeguards creditors when the proposed reduction does involve either diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, and in any other case if the Court so directs. If any of such circumstances exist a list of creditors entitled to object, as mentioned in the section, with their names and the nature and amount of their debts or claims, is settled by the Court. The details of the procedure enjoined need not for present purposes be further referred to.

"In the present case, inasmuch as only paid-up capital is to be cancelled, creditors are in no way affected. Therefore, and seeing that there are no specialties to be dealt with, the whole of that part of the prayer which applies to creditors and to the list to be made up in terms of section 49 are against the practice of the Court and are superfluous and inappropriate."

LORD PRESIDENT—I entirely agree with Sir George Paul's criticism of the prayer of this petition, and I hope that in future the practice will be regulated accordingly.

The Court granted the prayer of the petition.

Counsel for the Petitioners—M. P. Fraser.
Agents—Andrew Gordon & Company, Solicitors.