

sioners elected by virtue of the new Act all the powers, authorities, and jurisdictions of whatever kind conferred upon the magistrates and council of royal burghs. If that had been the proper construction of the Act, it might, and in fact would have conferred upon the Magistrates and Commissioners of Partick as the licensing authority the right of issuing licences and so on. The other view which was presented to us was that that was not the true construction of the clause, but that it was limited by the words "for the purposes of this Act." That is why we require to go to the other clauses of the Act to see what the purposes of the Act are. If we do not find within the purview of the Act words set forth authorising and empowering the magistrates of new burghs to issue licences, then it appears to me that such power is not set forth within this 38th section. I concur with your Lordship in the construction of this clause. I think that the intention of the clause is to confer on magistrates and commissioners elected in virtue of the new Act the like rights which were possessed by the magistrates of royal and parliamentary burghs "for the purposes of this Act" and not otherwise. I think that is the only possible construction, and in my view it is the right construction. That being so, I have gone to the Act to find what the purposes of the Act are, and I agree with your Lordship that when we look to the 500 or 600 sections of this Act we find that its purpose is to confer upon the new magistrates the powers which the old magistrates of royal and parliamentary burghs had. I think that the rights, powers, and so on conferred by the Act are given for the purpose of effectuating and carrying out the purposes of the Act. That is to say, if there was conferred upon the old magistrates a power of dealing with licences, it confers upon the new magistrates for that purpose all powers and authorities necessary. That is the kind of authority which is conferred by the Act. Therefore I agree with your Lordship that the Lord Ordinary's interlocutor should be adhered to.

LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Pursuer Tennent—C. S. Dickson—Ure. Agent—James Purves, S.S.C.

Counsel for the Additional Pursuers, the Justices of the Lower Ward of Lanarkshire—Wilson. Agent—James Purves, S.S.C.

Counsel for the Defenders—Lees—Dundas. Agents—Simpson & Marwick, W.S.

Saturday, November 18, 1893.

OUTER HOUSE.

[Lord Stormonth Darling.

LIQUIDATORS OF THE EDINBURGH EMPLOYERS LIABILITY AND GENERAL ASSURANCE COMPANY v. SMITH AND OTHERS.

(See *ante*, March 4, 1892, vol. xxix., p. 518.)

Company—Liquidation—Division of Surplus in Liquidator's Hands—Companies Act 1862 (25 and 26 Vict. c. 89), sec. 109.

Section 109 of the Companies Act 1862 provides—"The Court shall adjust the rights of the contributories amongst themselves, and distribute any surplus that may remain amongst the parties entitled thereto."

A company offered at a premium and succeeded in allotting a new issue of shares. Sometime later the directors informed the new shareholders that they had discovered that the prospectus for new shares contained material misrepresentations. In the course of the liquidation proceedings the Court settled the new shareholders on the list of contributories.

Calls were made upon all the shareholders, both "old" and "new," equally, which proved to be excessive, and a considerable surplus remained in the hands of the liquidators for distribution.

The "new" shareholders claimed to be repaid out of the surplus the price of their shares and the amount of the calls made upon them preferably to the "old" shareholders, on the ground that the "old" shareholders were not entitled to retain benefit from the fraud of their agents, the directors of the company.

Held that the section above quoted did not warrant the preference claimed.

For the previous stages of the liquidation proceedings, *vide The Liquidators of the Edinburgh Employers and General Assurance Company v. Griffiths and Others*, reported March 4, 1892, vol. xxix., p. 518.

The liquidators of the company called upon the remaining fifteen shillings per share from the holders of both "old" shares, *i.e.*, shares issued prior to December 1890, and "new" shares, *i.e.*, shares issued in that month. After paying all claims there remained a surplus in the hands of the liquidators of £8036.

On 2nd June 1893 the liquidators presented a note to the Lord Ordinary praying for "audit of their accounts, direction as to the return of capital, and dissolution of the said company." No answers were lodged to the note; but a minute was lodged on 27th June by the Rev. John Anderson Smith, Free Church Manse, Newcastleton, who held four hundred shares of the new issue. The minuter was ordered to lodge a condescence, which was answered by the liquidators

and Robert Wood, one of the "old" shareholders.

Smith maintained that inasmuch as he and the other "new" shareholders had been induced to become shareholders by the false and fraudulent representations made to them in the prospectus of December 1890 by and on behalf of the company and its shareholders through the directors, they were entitled to receive preferably to all persons in right of shares issued prior to December 1890 the amount paid for their shares in the company and the amount of the calls they had been forced to pay.

The liquidators maintained that the surplus fell to be repaid to such of the contributories as had paid their calls in full, rateably according to the number of their shares, and that Smith being an ordinary shareholder, and having been duly settled on the list of contributories, and having adopted and homologated his contract to take shares, was not entitled to the preference claimed by him.

Argued for Smith—The holders of "old" shares could not benefit by the fraud of their agents, the directors—*Addie v. The Western Bank*, 1 Sc. App. 145; *Houldsworth v. The City of Glasgow Bank*, L.R., 5 App. Cas. 317. Any other division would benefit the holders of "old" shares at the expense of holders of "new" shares.

On 18th November 1893 the Lord Ordinary (STORMONTH DARLING) issued an interlocutor repelling the pleas of the Rev. J. A. Smith, and finding "that the surplus in the hands of the liquidators falls to be repaid to such of the contributories as have paid their calls in full, rateably according to the number of shares held by such contributories."

"*Opinion.*— This liquidation has now reached a stage at which all the claims of creditors have been met in full, and there is a surplus in the hands of the official liquidators of over £8000. That is of course much more than sufficient to meet the unpaid costs of the liquidation, and therefore a very substantial sum will remain to be distributed among the shareholders. The liquidators maintain that this surplus should be repaid to such of the contributories as have paid their calls in full rateably according to the number of shares held by such contributories. But the Reverend John Anderson Smith, as representing a body which has been described in this liquidation as the 'new' shareholders, has lodged a condescence claiming that they should be ranked preferably on the surplus to the effect of recovering full payment of the price of their shares, and of the calls thereon, with interest. Now, the circumstances in which he makes this claim are these. The company was formed in 1887, and prior to December 1890 there had been issued about 27,000 shares, which are now in the hands of 75 'old' shareholders. In that month a new issue was made of about 6000 shares, since reduced (as I am informed) to about 5400, which are now in the hands of 63 'new' shareholders. These shares were issued

on the faith of a prospectus which contained misrepresentations of fact so material that admittedly the new shareholders would have been entitled to rescind their contracts if the company had been a going concern. An attempt was made by the directors to have them taken off the register, but before this could be done the company went into liquidation. The new shareholders afterwards made an attempt themselves to have their names removed from the list of contributories, but this failed on the ground that they had not timeously closed with the offer of the directors, and that after the axe of liquidation fell it was impossible for them to rescind their contracts. Accordingly their names were settled on the list of contributories.

"Now, what was the effect of that in law? Clearly from that moment they became liable, under the 38th section, to contribute to the assets of the company to an amount sufficient for payment of all its debts and liabilities, and the costs and charges of the winding-up, and for payment of such sums as might be required for the adjustment of the rights among the contributories themselves. Further, there is no warrant in the statute for the liquidators making any distinction between different sets of shareholders, unless such a distinction is required by the constitution of the company, and when calls came to be made the liquidators would have been acting contrary to their duty if they had attempted to make any such distinction in the present case. What they did was to make calls to the full extent of the unpaid capital on all the shareholders both old and new, and the result has been undoubtedly to show that a larger sum has been called up than was required. Indeed, the surplus is large enough to include not only the whole value of the new shares but a considerable sum besides. Now, the argument of Mr Smith is this, that inasmuch as the surplus covers the whole amount which he and the other new shareholders have had to pay on shares which they were induced to take by fraud, they ought now to have repayment in full because any other mode of distribution would enable the old shareholders to take benefit by the fraud of their agents. But that is just in other words to say that no call ought to have been made upon the new shareholders at the beginning, and if I were to give effect to Mr Smith's contention, I should be placing them in the same position as if no call had been made upon them. Now, I have shown that the liquidators could not have acted, in that way. There is another course which they might have followed, and which would have been quite within their power. If they had been able to calculate exactly the amount of the assets and liabilities, they might have made a call upon all the shareholders to an extent considerably less than the full unpaid amount of their shares. Undoubtedly that would have been sufficient to meet the liabilities of the concern. But if that had been done, and if in that way the assets and the liabilities had exactly squared, it is plain that the old

shareholders would have derived the very same amount of benefit from the presence of the new shareholders, and yet it cannot be maintained by Mr Smith that he would have had any remedy, because the statute does not contemplate anything like a repayment by one set of shareholders to another, or any adjustment of their rights *inter se* unless there is a surplus.

"It would be a strange and anomalous result if the new shareholders were entitled to get entire repayment of all that they have paid merely through the accident of there being a surplus. That is a result which one would be very slow to arrive at on the construction of the statute, and, for my part, I am of opinion that section 109 affords no warrant for such a construction. It is under that section alone that the present question now arises, and this Court has no power to distribute the surplus except in terms of the Act of Parliament. The provisions of that section are that the Court shall adjust the rights of the contributories and distribute any surplus that may remain amongst the parties entitled thereto. If Mr Smith's contention had been correct I should have expected that the rich and varied experience of the English Courts would have afforded some example of the course which he contends for having been followed. But admittedly there is no such instance in the books. I do not say that that is conclusive, but I say, upon the best consideration which I have been able to give to the words of the 109th section, that what is there contemplated is the adjustment of the rights of contributories in their character as such. If the constitution of the company gives any kind of preference to one set of shareholders over another, that preference ought to receive effect in the final distribution, or if any sum is due to any contributory in his character as a member of this company for which he could not get credit while the outside creditors were unpaid, such sum may be taken into account at the final adjustment of the rights of contributories among themselves. But the section does not contemplate anything like an adjustment of collateral questions among the contributories. The ground upon which a preference is asked here is that the directors were truly the agents of the old shareholders, and that the old shareholders are now proposing to take benefit by the fraud which their agents committed. Now, that is a matter entirely outside the constitution of the company, and antecedent to the position of the new shareholders as contributories. I am by no means satisfied that the directors were the agents of the old shareholders. They were agents of the company, but the company has, except for purely technical purposes, ceased to exist, and I do not see that the old shareholders as individuals can be said to be responsible in law for the fraud of the directors, although the company itself while it was a going concern may have been. Both on principle, therefore, and upon the construction of the

statute, it seems to me that the course which Mr Smith proposes is altogether inadmissible, and that the mode of distribution which the liquidators propose is the proper one."

Counsel for Rev. Anderson Smith—Sym. Agents—Pringle, Dallas, & Company, W.S.

Counsel for the Liquidators—C. Scott Dickson—John Wilson. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for Wood—Ure—Guy. Agent—George A. Munro, S.S.C.

HOUSE OF LORDS.

Tuesday, March 6.

(Before the Lord Chancellor (Lord Herschell), and Lords Watson, Ashbourne, and Morris.)

THE LORD ADVOCATE *v.* BOGIE AND OTHERS (METHVEN'S TRUSTEES).

(*Ante*, February 28, 1893, 20 R. 429, and 30 S.L.R. 454.)

Revenue—Inventory Duty—Double Duties—Legacy to Deceased Person's Executors, whether Two Duties Claimable—48 Geo. IV. cap. 149, secs. 13 and 38—55 Geo. III. cap. 184, sec. 37—8 and 9 Vict. cap. 76, sec. 4—23 Vict. cap. 15, sec. 4—44 Vict. cap. 12, sec. 32.

A testatrix bequeathed the residue of her moveable estate to R M, and other two persons "equally, share and share alike, and failing all or any of them by their predeceasing me, to their several and respective executors and representatives whomsoever, whom I do hereby appoint to be my residuary legatees." R M predeceased the testatrix leaving a will by which he nominated executors and directed them to invest the residue of his estate for the life of his brother, and thereafter to divide the fee among certain charities.

On the testatrix's death her executors paid inventory and legacy-duty on R M's share of residue, on the footing that it was a direct bequest from her to his executors, but the Crown claimed the same duties from R M's executors, on the ground that the third of the residue had been disposed of by his will.

Held (aff.) the judgment of the First Division) that the one-third share of residue was not chargeable with a second duty as a legacy under R M's will, in respect that he was not empowered by the will of the testatrix to dispose of her estate.

This case is reported *ante*, vol. xxx. p. 454, and 20 R. 429.

The Lord Advocate appealed.