

reserved her claim for legitim, in case her husband should be proved to have been legitimate. The trustees refused to hand over the legacy unless she gave them a discharge of all claims in respect of legitim.

*Held* that the trustees were not entitled to demand such a discharge, and were bound to hand over the legacy.

The trust-disposition and settlement dated 21st March 1889 of John Laing, Granton Lodge, Aberdeen, contained, *inter alia*, the following directions to his trustees—"I leave to my reputed son John Laing the sum of one hundred pounds, to be paid to or laid out for his benefit by my trustees at their discretion." "(Tenth) I appoint that the provisions herein contained in favour of my children, or any of them, or of the issue of my children or any of them, are and are to be accepted by them severally in full satisfaction of all claims of legitim, bairns' part of gear, and all and every claim against me and my estate at the instance severally of my said children or issue, or of the parents of such issue."

John Laing, the truster, was survived by his son, the beneficiary John Laing, who however died before the legacy bequeathed to him by his father had been paid. Mrs Elizabeth Melvin or Laing, the widow of John Laing junior, was confirmed as his executrix-dative, on 20th July 1894.

An action was raised by her in the Sheriff Court of Aberdeen against the trustees of John Laing senior, for payment of the legacy of £100 bequeathed by the truster to her late husband.

The pursuer averred that she had repeatedly demanded payment of the legacy, but that the defenders had refused to pay it.

The defenders averred that they were willing to pay the legacy if the pursuer would grant them a proper discharge; that the pursuer had intimated to them shortly after her husband's death that she declined to homologate the terms of the settlement, on the ground that she claimed that her husband was a legitimate son of John Laing senior, and that as his executrix she was entitled to a claim for legitim. They produced a letter from the pursuer's agents dated 23rd January 1894 to the above effect, and warning them that if they divided the estate it would be at their own risk.

They pleaded—"(1) The pursuer having declined to homologate the settlement of the deceased, and having set up claims antagonistic thereto, she is only entitled to payment of the legacy bequeathed to her husband in exchange for a duly executed discharge, discharging the defenders and the estate of deceased of all claims at her instance thereon."

On 9th February 1895 the Sheriff-Substitute (ROBERTSON) repelled the defences, and decerned against the defenders for payment of the legacy.

The defenders appealed to the First Division of the Court of Session, and argued—The question of legitimacy having been raised by the pursuer, they were not in

safety to pay her the legacy. They only asked her to make election, for she could only take the legacy on the footing that her husband was illegitimate.

Argued for the pursuer—The trustees were not entitled to demand anything but a simple receipt, which she was willing to give, this not being the case of a residuary legatee—*Fleming v. Brown*, February 6, 1861, 23 D. 443. She had no power in any case to discharge the children's claim. The Court could not qualify the interlocutor of the Sheriff so as to make it meet the appellants' views.

At advising—

LORD ADAM—I am of opinion that the interlocutor of the Sheriff is right, and that the trustees are bound to make payment of the legacy. It apparently is not quite clear whether the legatee was the illegitimate or legitimate son of the truster, and in the latter case his representatives would have a claim for legitim. The trustees say that his executrix is bound to make up her mind as to the course she is to pursue, and that if she will not renounce any possible claim she and her children may have for legitim, they will not pay her the legacy. I do not think that they are entitled to take up this position. They might very well take steps to have the question of the possibility of any claim arising settled, but they are not entitled to refuse to pay one debt because it may possibly turn out that another is due.

LORD KINNEAR and the LORD PRESIDENT concurred.

LORD M'LAREN was absent.

The Court refused the appeal.

Counsel for the Pursuer—Guthrie—Anderson. Agent—R. C. Gray, S.S.C.

Counsel for the Defenders—H. Johnston—Abel. Agents—Wishart & Sanderson, W.S.

Wednesday, March 20.

## FIRST DIVISION.

[Lord Wellwood, Ordinary.]

### LORD ADVOCATE v. ROBERTSON.

*Revenue—Succession—Account-Duty—Succession-Duty—Life Insurance—Policy "Kept up for the Benefit of a Donee"—Premiums Paid partly by Insurer and partly by Donee—Customs and Inland Revenue Act 1889 (52 Vict. c. 7), sec. 11; Succession-Duty Act 1853 (16 and 17 Vict. c. 51), secs. 2 and 17.*

The Customs and Inland Revenue Act 1889 by section 11 enacts that account-duty shall be chargeable upon money received under a policy of assurance effected by any person dying on or after the 1st June 1889 on his life, where the policy is wholly kept up by him, for the benefit of a donee, whether

nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit.

A father assigned certain policies of assurance on his own life upon which he had paid the premiums for many years gratuitously but absolutely to his daughter. During the seven remaining years of his life the father contributed nothing towards the payment of premiums, the policies being kept up entirely by the daughter. Upon the father's death the Crown claimed account-duty, and alternatively succession-duty, from the daughter in respect of the moneys received by her under the policies. *Held* (1) (*rev. judgment of Lord Wellwood*) that none of the money so received by the daughter was liable to account-duty, in respect that she had not been designated as donee when the father kept up the policies; and (2) that the Crown had no right to succession-duty, in respect that the assignation of the policies did not confer a "succession" upon the daughter in the sense of the Succession-Duty Act, but merely enabled her to acquire the amount of the insurance by continuing to pay the premiums during the life of the assured.

*Observed by the Lord President*—"The section as it stands pre-supposes a donation plainly intended, as by nomination, or already effected, as by assignation. There must be a donee designated in order that the keeping up of the policy may be held to be for his benefit."

On 21st February 1840 James Fleming effected a policy on his life for £300, and on 9th April 1860 he acquired right by assignation to a policy for £250, effected on his life by others on 4th December 1840. These policies were kept up and the premiums thereon regularly paid by him until 29th September 1883, when he assigned both policies gratuitously but absolutely to his daughter Mrs Elizabeth Petrie Fleming or Robertson. After that date, and until his death on 18th February 1890, the policies were kept up by Mrs Robertson who paid all the premiums as they fell due.

In July 1894 the Lord Advocate, on behalf of the Inland Revenue, brought an action against Mrs Robertson and her husband to have her ordained to deliver up a full and true account of the moneys received by her under said policies, "or of part of such moneys received by the said defender as aforesaid in proportion to the premiums paid on account of said policies by or for the said deceased James Fleming;" or alternatively to have her ordained to make payment of such sum as might be ascertained to be the amount of succession-duty, and interest payable in respect of the moneys payable under the said policies of insurance, or part thereof to which she became beneficially entitled on the death of the said James Fleming.

The pursuer pleaded—"(1) The said policies having been gratuitously assigned

and kept up by the insured for the donee, the moneys recovered in virtue of the assignation are liable, in whole or part, to account-duty, and the pursuer is entitled to decree as concluded for, with interest and expenses. (2) Alternatively the said assignation having conferred a succession within the meaning of the Succession Duty Act, 1853, the proceeds of the policies are chargeable with succession duty, and decree therefor with interest and expenses ought to be given."

The defenders pleaded—"(1) The said James Fleming having absolutely divested himself of the said two policies of assurance during his lifetime, they did not belong to him or form estate of his at the time of his death. (2) The terms of section 11, subsection (1), of the Act 52 Vict. cap. 7, being inapplicable to the circumstances of the present case, the defenders are not liable in payment of account stamp-duty and interest, as concluded for. (3) The defenders not having taken a 'succession' upon the death of the said James Fleming, in terms of section 2 of the Act 16 and 17 Vict. cap. 51, they are not liable in payment of succession-duty and interest, as alternatively concluded for."

The Customs and Inland Revenue Act 1881 (44 Vict. c. 12), sec. 38, enacts that "(1) stamp-duties at the like rates as are by this Act charged on affidavits and inventories shall be charged and paid on accounts delivered of the personal or moveable property to be included therein, according to the value thereof; (2) the personal or moveable property to be included in an account shall be property of the following description." . . . The Customs and Inland Revenue Act 1889 (52 Vict. c. 7), section 11, sub-section (1), enacts that "sub-section 2 of section 38 of the Customs and Inland Revenue Act 1881 is hereby amended as follows . . . ; the charge under the said section shall extend to money received under a policy of assurance effected by any person dying on or after the 1st day of June 1889, on his life, where the policy is wholly kept up by him, for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit."

The Succession Duty Act 1853 (16 and 17 Vict. c. 51), section 2, enacts that "Every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person in possession or expectancy, shall be deemed to have conferred or to confer on a person entitled by reason of any such disposition or devolution a 'succession,' and the term

'successor' shall denote the person so entitled, and the term 'predecessor' shall denote the settlor, disposer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived." Section 17 enacts that "no policy of insurance on the life of any person shall create the relation of predecessor and successor between the insurers and the assured, or between the insurers and any assignee of the assured, and no bond or contract made by any person, *bona fide*, for valuable consideration in money or money's worth after the death of any other person, shall create the relation of predecessor and successor between the person making such bond or contract and the person to or with whom the same shall be made; but any disposition or devolution of the monies payable under such policy, bond, or contract, if otherwise such as in itself to create a succession within the provisions of this Act, shall be deemed to confer a succession."

Upon 12th December 1894 the Lord Ordinary (WELLWOOD) pronounced the following interlocutor:—"Finds that the moneys received by the defender Mrs Robertson under the policies of assurance assigned to her by the late James Fleming are liable to account-duty, in the proportion which the premiums paid thereon by the said James Fleming bear to the whole premiums paid on the said policies: Therefore ordains the defender to put in an account, verified by oath and duly stamped, of such proportion of the said moneys: Reserves the question of expenses, and grants leave to reclaim."

"*Opinion.*—The late James Fleming, on 21st February 1840, effected a policy of insurance on his own life for the sum of £300; and on 4th December 1840 another policy for £250 was effected upon his life by David Landell and William Drummond, to which policy James Fleming acquired right by assignation in his favour, dated 9th April 1860.

"By gratuitous assignation, dated 29th September 1883, Mr James Fleming made over both policies to his daughter, the defender Mrs Robertson. It is now admitted that from that date the premiums on the said policies were paid solely by Mrs Robertson.

"The Crown now calls upon the defender to give up an account duly stamped for the moneys received by her under the said policies.—'Or of part of such moneys received by the said defender as aforesaid in proportion to the premiums paid on account of the said policies by or on account of the deceased James Fleming.' Or otherwise and alternatively, that she should pay succession-duty upon the sums received under the said policies.

"The first alternative claim, which is a claim for account-duty, is rested upon the Customs and Inland Revenue Act, 1881, section 38, as amended by section 11, subsection (1) of the Customs and Inland Revenue Act, 1889. The second and alternative conclusion is rested on the second and seventeenth sections of the Succession-Duty Act, 1853.

"In the view which I take of the case it is only necessary to consider the Crown's claim under the first alternative conclusion, because I am of opinion that the enactment founded upon, viz., 52 Vict. cap. 7, section 11 (1), was passed for the purpose of supplying what was felt to be a defect or omission in the Succession-Duty Act of 1853. If the former enactment does not strike at the moneys received by the defender, I do not think that the Crown can recover under the Succession-Duty Act of 1853.

"It is quite settled that, if a man absolutely divests himself of property during his lifetime, no claim for duty arises upon his death even although it may be perfectly clear that the object of the divestiture was to evade succession or legacy-duty—*Lord Advocate v. Galloway*, 11 R. 541; and *Lord Advocate v. M'Court*, 20 R. 488. But a policy of life assurance is a peculiar species of property. Its proceeds are not receivable until after the death of the person whose life is insured, and it requires to be kept alive, and if the premiums are not duly paid, the sum assured will not be paid. Therefore when the holder of a policy of life assurance on his own life assigns it gratuitously to another, the assignee cannot, as in the case of other kinds of property which has been gifted, obtain the full benefit of the gift until the death of the person whose life is insured. No doubt he may use it as a fund of credit or he may sell it; but the same may be said of any irrevocable right of reversion. Again, he may surrender it if the rules of the insurance company permit of this. It remains that the full beneficial interest does not accrue until the death of the assignor.

"I heard a very able argument from Mr Anderson, to the effect that by assigning the policy and ceasing to pay the premiums, the holder truly divested himself of and lost all control of that asset to all effects and purposes; and had it not been for the express terms of section 11 (1) of 52 Vict. cap. 7, I should have been disposed to sustain that argument. But it seems to me that that enactment was passed for the very purpose of subjecting gratuitous assignations of this kind to account-duty.

"The 38th section of The Customs and Inland Revenue Act, 1881, applies to three classes of property (a) (b) (c). The first (a) strikes at property taken as *donatio mortis causa*, or by voluntary disposition *inter vivos* which shall have not been transferred *bona fide* three months before the death of the deceased.

"(b) Property in which a joint interest is retained by the granter, so that the beneficial interest passes by survivorship to some other person on the death of the granter.

"And (c) to property in which a life interest is retained by the settlor, or the right to restore it to himself is reserved.

"This section was amended by the Customs and Inland Revenue Act 1889, sec. 11. I observe in passing that the heading to sections 10 and 11 is 'Amendments of law as to succession-duties and duties on accounts.' Section 10 is confined

to amendment of the law as to succession-duty. Section 11 amends the section of the Act of 1881 to which I have just referred. The leading object of these amendments is to bring into the net other gifts and dispositions not covered in terms by the Act of 1881, in which, while professedly making an out-and-out gift, the granter has reserved some kind of benefit or interest to himself or where the gift was made shortly before death. Accordingly, the three heads (a), (b), and (c) are supplemented to certain effects.

“But there is an addition to the list. The enactment with which we have to deal is that quoted on record (Cond. 6)—‘The charge under the said section shall extend to money received under a policy of assurance effected by any person dying on or after the 1st day of June 1889, on his life, where the policy is wholly kept up by him, for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit.’

“The question raised is whether the words ‘kept up for the donee’ are confined to the period subsequent to assignation; in other words, whether if the assignor pays no premiums after assignation the proceeds of the policy escape duty, or whether the words embrace the period before assignation even if the assignor paid no further premiums. I am unable to give the words the restricted meaning contended for by the defender, because to do so would defeat the object of the statute by allowing the cases of gift or assignation in which the donee or assignee receives the fullest benefit to escape duty. For instance, according to their view the assignee of a paid-up policy would not pay duty. Or, if the assignor died before another premium fell due, no duty would be exigible from the assignee. Or again, if a person who had kept up a policy on his own life for forty years assigned it *intuitu mortis*, and the assignee paid the only other premium upon it which was payable before the death of the assignor, no duty would be exigible. I think the reasonable construction of the section is that if the person whose life is insured, gratuitously assigns the policy to another, and the latter thereafter pays the premiums, or some of them, it must be held that the policy was kept up for the assignee to the extent of the premiums paid by the assignor before or after the assignation, and that accordingly duty falls to be paid on the proceeds received according to the proportion which the premiums paid by the assignor bear to the total premiums, that representing, according to the test provided by the statute, the extent of the benefit which the assignee has derived from the assignor on the death of the latter. The words ‘kept up for the donee’ are somewhat ambiguous, because it may be asked how can a policy be kept up for the donee before the donation is made? But I think that their meaning is what I have stated, and I must give effect to it.

“The result is that duty will be paid on

the amount of the sums received by the defender in proportion to the premiums paid by the late James Fleming.”

The defenders reclaimed, and argued—(1) The Crown had no claim upon anything that was not *in bonis* of the deceased at the time of his death. It was a startling proposition to say that duty must be paid on property which passed from the deceased absolutely seven years before his death. It would require a very clear enactment to bring that about; if there was ambiguity the presumption was against the tax. The deceased had retained no interest whatever in the policies and the assignee might have sold them or allowed them to lapse. If the Lord Ordinary was right, policies of insurance would be in an exceptionally unfavourable position, whereas the law had always regarded them with favour. For the Act to apply there must be a donation, and thereafter the policy must be kept up wholly or partially by the donor. After the gift here the donor had contributed nothing. A policy could not be kept up for a donee before the donation had been made. According to the argument on the other side, a policy could be kept up for a donee before even the donee was born. (2) There was plainly no claim under the Succession-Duty Act; the beneficiary took by reason of an irrevocable *inter vivos* deed.

Argued for the respondent—(1) The Act of 1889 struck at gratuitous donations, as this was, not at purchasers. There was every reason why a donee should pay. The real question to be asked was, to whose money was the payment of the policies attributable? It was the result of payments partly by the donor and partly by the donee, and therefore in proportion as the donor had contributed to the premiums the moneys received under the policies were liable in account duty. The first payment of premium contributed to the keeping up of the policy as much as the last. The donee benefited by such payment. The Act did not say that it was only payments by the donor after the assignation that were to be reckoned. All payments by the donor which as their result kept up the policy for the benefit of the donee must be taken into account. Suppose the case of a nominee whose name was left blank for years, the donor going on paying the premiums—the Act would apply. The date of assignation was immaterial. The fact that the policy had been kept up partly by the donor and partly by the donee was sufficient. Mr Norman, of the Succession Duty Office, in his “Digest of the Death Duties,” p. 258, stated the rule of the Department. He referred to the total number of the premiums paid, not to the number paid since the assignation. (2) This was a succession in the sense of the Succession Duty Act 1853, secs. 2 and 17. At any rate the sums due under the policies were partially estate of the deceased. That there might be such proportioned allocation was recognised in Hanson’s Notes on the 17th section, p. 294 of his work.

At advising—

LORD PRESIDENT—The primary plea of the Crown, on record and in debate, is founded on the 11th section of the Customs and Inland Revenue Act 1889.

The money sought to be charged was received under policies of assurance on the life of James Fleming, who died on 18th February 1890. Three other dates are to be noted. The policies in question were effected in 1840. From that year, in the case of the one of these policies which was effected by himself, and from 1860, in the case of the other which, originally effected by another person, was acquired by him in that year, down to 29th September 1883, Mr Fleming kept up the policies, by payment of the premiums. At that last-mentioned date, however, he gratuitously assigned both policies to the defender Mrs Robertson. From that time down to Mr Fleming's death, the policies were kept up, not by Mr Fleming but by the defender, who paid the premiums as they fell due.

These are the facts upon which the Crown maintains that this is a case in which the policies were partially kept up by the deceased, for the benefit of a donee, and accordingly that the charge extends to a part of the money received under each policy in proportion to the premiums paid by the deceased. The question in dispute is, whether the policies were partially kept up by the deceased for the benefit of the defender.

It was conceded in argument by the defender that the section is not confined to the case in which the last premium before the death has been paid partly by the deceased and partly by a donee; that the section takes a longer retrospect and regards a series of premiums, some of which have been paid by the deceased and some by the donee. This view of the section is supported, if not compelled, by the use (in the section) of the plural "premiums;" and at all events it was common to both sides of the bar.

There remains, however, the question whether the policy must be held to have been kept up by the late Mr Fleming during the period previous to the assignation for the benefit of the defender. In the case of the one policy this means a period of forty-three years; in the case of the other, a period of twenty-three years. Now there is nothing whatever to show that in point of fact the benefit of the defender was in Mr Fleming's thoughts when he paid his premiums during all or any part of this period; and indeed the Crown have not thought it necessary to say when the lady came into existence. The argument of the Lord Advocate was that it was enough that in the end the resulting benefit was to the donee.

I cannot adopt this view. It gives no effect at all to the words "for the benefit of the donee," and reads the clause exactly as if they were not there. The section as it stands presupposes a donation, plainly intended, as by nomination, or already effected, as by assignation. There must be

a donee designated in order that the keeping up of the policy may be held to be for his benefit. This, I think, is the fair reading of the section; and the result seems to be highly reasonable. Up to the time of the assignation the policies in question were absolutely the property of Mr Fleming; and the moneys paid by him by way of premiums were applied simply towards creating or preserving an asset of his estate. If at the date of the assignation he chose to give that asset away, as he did absolutely, *inter vivos*, I can see no reason founded on the Acts of 1881 and 1889 why any part of that gift should be charged with duty. I am therefore unable to agree with the Lord Ordinary.

In leaving this branch of the case it may be noted that the defenders did not maintain that the section founded on had no application to the second of the two policies, by reason that it was not effected by Mr Fleming on his own life, but was effected by a third party.

The Crown's claim was alternatively rested on the 2nd and 17th sections of the Succession Duty Act 1853. The argument was, and, looking to the terms of section 17, must be, that the assignation of these policies disposed of the moneys payable under them so as to create a succession within the provisions of the Act. Did the assignation, then, dispose of the moneys payable under the policies so as to create a succession? To take the case in hand, the assignation was in 1883, and the death in 1890. The assignation of itself gave no right to the moneys; it merely enabled the defender, if she chose (as she did), herself to go on paying the premiums during the life of the assured, and so to acquire the moneys. I do not think, therefore, that the claim of the Crown under the Succession Duty Act 1853 can be supported. Indeed, the manner in which that statute was made to work out according to the Crown's argument attests the unsoundness of that argument. Alive to the rather startling results of their claim to succession duty on a fund largely created by the alleged successor, the Crown have argued that succession duty might be paid on a part instead of on the whole. Now, the system of making account duty chargeable on a part of the sums in the policies in proportion to the premiums paid by the deceased was first introduced by the Act of 1889; and for the application of this proportional system to succession duty under the Act of 1853 I can discover no warrant whatever in that statute. I am aware that it is suggested in Mr Hanson's book; but I think the suggestion is to be regarded as really a hint for future legislation, which was acted on in 1889.

I am for recalling the interlocutor of the Lord Ordinary, and assollzieing the defenders.

LORD ADAM—I concur. I confess I have never been able to understand in this case how a policy of insurance could be kept up for the benefit of a donee when no donee was in existence. To my mind that is a

very clear proposition, and I therefore cannot agree with the Lord Ordinary. His view seems to be that from the moment a policy of insurance is taken out, the person who takes out the policy keeps it up not only for his own benefit, but for some possible donee at some future time, although such a donee should never be thought of or come into existence at all. That is an untenable proposition. I think, therefore, with your Lordship, and differing in that view from the Lord Ordinary, that this clause only applies where a policy is wholly or partly kept up by the donor after the date of the assignation. Now, in this particular case it is the fact that this policy, since the date of the assignation, has never been kept up by the donor at all; the whole premiums have been paid by the donee, and therefore the case does not fall within the section.

As to the latter part of the clause, the question how the proceeds of the policy are to be divided, where the premiums have been paid partly by the donor and partly by the donee, does not arise. If this matter had been open, I would rather have thought the clause did not apply to the case where the premiums were paid successively by one and by the other, but where both together mutually paid the premium. But that question does not arise here.

LORD KINNEAR—I concur.

LORD M'LAREN was absent at the hearing.

The Court recalled the interlocutor of the Lord Ordinary, and assoilzied the defenders.

Counsel for the Pursuer—Lord Advocate Balfour, Q.C.—A. J. Young. Agent—Solicitor of Inland Revenue.

Counsel for the Defenders—C. S. Dickson—A. M. Anderson. Agent—Wm. Gunn, S.S.C.

Wednesday, March 20.

## FIRST DIVISION.

**RATTRAY (LIQUIDATOR OF THE MILFORD HAVEN FISHING COMPANY, LIMITED) v. SMELLIE, &c.**

*Company—Liquidation—Memorandum of Association—Special Resolution Conferred Preference on Part of Original Capital—Ultra Vires—Companies Act 1862 (25 and 26 Vict. cap. 89), sec. 12.*

The Companies Act 1862, sec. 12, enacts that “any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorised to do so by its regulations as originally framed or as altered by special resolution . . . as to increase its capital . . . or to consolidate and divide its capital into shares of

larger amount than its existing shares, or to convert its paid-up capital into stock, but, save as aforesaid . . . no alteration shall be made by any company in the conditions contained in its memorandum of association.”

The memorandum of association of a company limited by shares provided that—“(5) The capital of the company is £12,500, divided into 625 preference shares of £10 each, bearing a cumulative preferential dividend of 6 per cent. per annum; and 625 ordinary shares of £10 each, with power to increase the same, and the share capital of the company (whether original or increased) may be divided into different classes, to be held on the terms prescribed by the articles of association of the company or by special resolution, and so that the respective classes of shares may have and be subject to such preferences, guarantees and restrictions (if any) as may be prescribed by articles and special resolution.”

After a number of shares, both ordinary and preference, had been issued, a special resolution was passed and confirmed, by which it was provided—“That the present issue of 625 preference shares authorised by article 5 of the memorandum of association of the company shall be a first charge on the property of the company, and entitled to rank in respect of dividend as well as capital in priority to the ordinary shares of the company.”

The company afterwards went into voluntary liquidation and after payment of creditors a sum remained for distribution among the shareholders which was insufficient to repay them their shares in full.

Held that the special resolution was invalid, (1) because it was inconsistent with the essential conditions of the memorandum, which provided by implication that the ultimate distribution of the original capital should be equal, and (2) because it was a violation of the contract made with the ordinary shareholders who had taken shares prior to its date.

Question whether the resolution could have received effect if it had been ratified by all the shareholders.

The Milford Haven Fishing Company, Limited, was incorporated under the Companies Acts in October 1891.

By the memorandum of association it was provided that—“(5) The capital of the company is £12,500, divided into 625 preference shares of £10 each, bearing a cumulative preferential dividend of 6 per cent. per annum and 625 ordinary shares of £10 each, with power to increase the same, and the share capital of the company (whether original or increased) may be divided into different classes, to be held on the terms prescribed by the articles of association of the company, or by special resolution, and so that the respective classes of shares may have and be subject to such preferences, guarantees, and restric-