

Counsel for the Pursuers and Respondents—The Dean of Faculty (Asher K.C.)—Cooper. Agent—James Watson, S.S.C.  
Counsel for the Defenders and Appellants—Clyde, K.C.—Hunter—Mercer. Agents—J. & A. Hastie, Solicitors.

Saturday, July 2.

SECOND DIVISION.  
LIQUIDATOR OF THE MELVILLE  
COAL COMPANY v. CLARK

*Company—Winding-Up—Scheme of Arrangement—Arrangement Sanctioned by Court—Modification of Arrangement in Case of Individual Shareholder—Joint-Stock Companies Arrangement Act 1870 (33 and 34 Vict. cap. 104), sec. 2—Companies Act 1900 (63 and 64 Vict. cap. 48), sec. 24.*

An arrangement was made by a company in liquidation for the sale of its business to a new company, each shareholder in the old company being entitled to certain allotments of shares in the new company. The agreement of sale entered into for the completion of the arrangement provided that any shareholder of the old company who failed to apply within a specified period after the arrangement was sanctioned by the Court for shares in the new company should have no interest in the assets of the old company or claim for shares in the new. Circumstances in which the Court sanctioned the agreement of sale subject to a modification in the case of an individual shareholder whereby the period during which he should be entitled to apply for shares in the new company was extended.

The Joint Stock Companies Arrangement Act 1870 (33 and 34 Vict. cap. 104) enacts:—Section 2—“Where any compromise or arrangement shall be proposed between a company which is . . . in the course of being wound up, . . . and the creditors of such company, or any class of such creditors, it shall be lawful for the Court, in addition to any other of its powers, on the application in a summary way of any creditor or the liquidator, to order that a meeting of such creditors or class of creditors shall be summoned in such manner as the Court shall direct; and if a majority in number, representing three-fourths in value of such creditors or class of creditors present either in person or by proxy at such meeting, shall agree to any arrangement or compromise, such arrangement or compromise shall if sanctioned by an order of the Court be binding on all such creditors or class of creditors as the case may be, and also on the liquidator and contributories of the said company.”

The Companies Act 1900 (63 and 64 Vict. cap. 48) enacts:—Section 24—“The provisions of section 2 of the Joint Stock Com-

panies Arrangement Act 1870 shall apply not only as between the company and the creditors or any class thereof but as between the company and the members or any class thereof.”

The liquidator of the Melville Coal Company, Limited, was authorised at an extraordinary general meeting of the company to enter into an arrangement for the sale of its business to a new company.

The arrangement was agreed to at meetings held in obedience to orders of the Court obtained on the liquidator's application in terms of section 2 of the Joint Stock Companies Arrangement Act 1870; and an agreement of sale was adjusted.

To the liquidator's application to have the agreement of sale sanctioned by the Court, answers were lodged by James Clark, Westbourne Villa, Eskbank.

The respondent averred—“The respondent is a shareholder in the said company. His holding consists of—(a) 20 preference shares of £10 each, and (b) 181 ordinary shares of £10 each; all fully paid up. From the opening of the company's colliery seven years ago till about October 1903 he acted as their managing director. On said latter date he resigned, and shortly thereafter went abroad. He returned to this country on 20th June 1904. . . Prior to his leaving this country he executed a factory and commission in favour of Archibald Menzies, S.S.C., Edinburgh, which is herewith produced. Under said factory and commission the said Archibald Menzies, in addition to the usual powers in general terms, was specially authorised to sell, assign, and transfer the ordinary and preference shares of the said Melville Coal Company, Limited, held by the respondent. The said factory and commission was intimated to the company on 13th January 1904, and was exhibited on 7th June 1904, in order that it might be registered in the company's books. In virtue of said factory and commission, the said Archibald Menzies, as representing the respondent, went to the meetings of the ordinary and preference shareholders appointed by the Court to be held on 8th June 1904, but the petitioner, who was chairman of these meetings, ruled that he was not entitled to attend or vote, ‘on the ground that he was not qualified to represent a shareholder, he not being himself a member of the company, and further, that the factory and commission had not been registered in the company's books.’ Thereafter, and within seven days of said meeting, in terms of section 161 of the Companies Act 1862, a written note of dissent against the resolution carried at said meetings was lodged with the liquidator on behalf of the respondent. No notice of said dissent has been taken by the liquidator. The respondent objects to the proposed sale to the new company. The second article of the proposed agreement of purchase and sale provides that the purchase price shall be £30,000; further—(a) that each preference shareholder of the old company shall be entitled to receive an allotment of ten 6 per cent. cumulative

convertible preference shares of £1 each, of which 10s. shall be held to be paid up, of the new company in respect of every preference share held by him in the old company; and (b) that the ordinary shareholders of the old company shall be entitled to receive an allotment of 10 ordinary shares of £1 each, 10s. per share held to be paid up, of the new company, in respect of every share held by him in the old company. The seventh article of said proposed agreement provides that any shareholder of the old company who, within the period of two weeks after this scheme is sanctioned by the Court, or within such extended period, if any, as the new company may allow, fails to apply for his shares in the new company, shall have no interest in the assets of the old company, or any claim whatever for shares in the new company. The respondent, while he acted as manager, put his whole capital into the said company, and he has now no means to meet the proposed call of 10s. per £1 share. Therefore if the said proposed agreement is sanctioned it will mean a total loss to him of £2010. A favourable report as to the value and capabilities of the colliery belonging to the said Melville Coal Company has been obtained from John Gemmell, a well-known and eminent mining engineer. According to the petitioner's own statement, the company is not, if its assets were realised, in an insolvent state. Even taking it at its worst, the respondent believes that if the liquidation were proceeded with in the ordinary way there would be, after payment of the creditors, a considerable sum available for division among the shareholders. The respondent submitted, as a dissenting shareholder, that the proposed agreement of purchase and sale ought not to be sanctioned, or alternatively that it should not be sanctioned until the liquidator had purchased the interest held by the respondent in terms of section 161 of the Companies Act 1862."

Argued for the petitioner—The hardship complained of by the respondent could be remedied by the allowance of additional time, to which the petitioner was willing to consent. The agreement should be sanctioned in terms of the Act—*English, Scottish, and Australian Chartered Bank* (1893), 3 Ch. 385; *London Chartered Bank of Australia* (1893), 3 Ch. 540; *Nicholl v. Eberhardt Company* (1889), 59 L.T. 860, and 61 L.T. 489.

Argued for the respondent—The case was one for the intervention of the Court, in respect of the hardship imposed on the respondent. The agreement should only be sanctioned on the undertaking of the liquidator to take over the respondent's shares, which he was willing to assign at 2s. a share—*Canning Jarral Timber Company* (1900), 1 Ch. 708; *Burdett Coultts v. True Blue (Hannan's) Gold Mine* (1899), 2 Ch. 616. At least the respondent was entitled to an allowance of additional time.

At advising, the Court (LORD JUSTICE-CLERK, LORD YOUNG, and LORD TRAYNER),

without delivering opinions, pronounced an interlocutor in the following terms:—

"Approve of the agreement of sale set forth in the petition, and sanction the same, but subject to this modification, viz., that the period of two weeks stated in the seventh article of said agreement shall not be held as applying to the said respondent James Clark, and that the said respondent shall be entitled to apply for his shares in the new company within the extended period of three months from this date, and decern."

Counsel for the Petitioner—Salvesen, K.C.—Graham Stewart. Agents—T. F. Weir & Robertson, S.S.C.

Counsel for the Respondent—Wilson, K.C.—J. W. Forbes. Agent—Archibald Menzies, S.S.C.

Tuesday, July 5.

## FIRST DIVISION.

[Lord Kyllachy, Ordinary.]

MORE (SOMERVELL'S TRUSTEE) v. SOMERVELL.

*Entail—Right in Security—Bonds and Dispositions in Security Granted by Heir of Entail in Possession—Substitution of New Entail for Old Entail—Effect of New Entail on Rights of Heritable Creditors under Bonds Granted during Earlier Entail.*

The heir of entail in possession under a deed of entail dated in 1823, granted in 1882 bonds and dispositions of the entailed estate in security of certain advances. In each bond there was a proviso that the bond should not affect the lands or rents in any way or to any extent inconsistent with the deed of entail, and that the bond should be null and void so far as inconsistent with the deed of entail, so that no irritancy might be incurred by granting the bond. The power of sale in the bond was "only to the extent of my own right and interest" in the lands, "and of my power to sell the same." In 1899 the heir of entail, with the consent of his pupil son's curator, executed a new deed of entail, which included certain subjects not within the former entail, and conveyed the lands to a different series of heirs to those in the former entail.

Subsequently the trustee on the sequestrated estate of the heir of entail brought an action of declarator that the deed of entail of 1899 evacuated the destination to heirs contained in the deed of entail of 1823, and sopped and extinguished the conditions, provisions, and clauses prohibitory, irritant, and resolute or other fetters of entail contained in said deed of 1823, and therefore that the bonds and dispositions in security granted in 1882 now