

*Blyth Hall Trustees v. Assessor for Fifeshire*, 24th February 1883, 10 R. 659, 20 S.L.R. 433; *Barony Parochial Board (Woodilee Asylum)*, 2nd April 1877, 4 R. 1149; *Banffshire District Lunacy Board*, 2nd July 1870, 11 M. 982. Counsel also referred to Armour on Valuation, p. 259.

Argued for the respondent—The Assessor was willing to take the valuation at £140, which in the circumstances was moderate. The proper principle to adopt here was percentage on cost of erection, and 4 per cent. was the proper rate. The figure brought out by this method corresponded in amount with a valuation on the basis of the number of beds, taking a rate of £2 per bed. The valuation of the building on this principle had been allowed to stand for twenty years without objection.

LORD LOW—It is plain that so long as this convalescent home is held and administered in terms of the feu-disposition it cannot be let to a tenant. That, however, is no reason why the annual value should not be ascertained for valuation purposes. I agree with the opinion expressed by Lord Fraser in the case of the *Blyth Hall Trustees* (10 R. 659) that, in circumstances such as those with which we are now dealing, restrictions imposed by a private individual in regard to property which he has placed in trust, and which prevent the use of the property being a remunerative occupation, must be disregarded in ascertaining the annual value.

Now if the Home in question were put in the market I see no reason why a tenant should not be readily enough obtained. The premises, I imagine, would be suitable for a sanatorium or a hydropathic establishment, or some use of that kind.

What, then, is the rent for which the Home might be expected to be let? There is one circumstance which appears to me to be material, and that is that the Home was entered, apparently without objection, in the valuation roll for twenty years as of the annual value of £120. There was then accommodation in the building for sixty-four patients, and the value fixed was a little less than £2 per bed. That is a common basis for the valuation of subjects the profits from which depend upon the accommodation for patients or guests, and £2 per bed appears to be a moderate estimate. There is another method by which the valuation may be checked, and that is by taking the interest upon the cost of the building. The building in this case cost £3000, so that the valuation of £120 was just 4 per cent. upon the cost, which does not strike one as being more than a moderate return upon the capital expended.

The occasion of the present appeal was that an addition was made to the Home at a cost of £750. The result of the addition was that the accommodation was increased from sixty-four to seventy-one patients, and the committee of the County Council have raised the valuation to £140 per annum. That is entirely in accordance with the principle upon which the subjects were valued before the addition, because the

amount fixed is still a little less than £2 per bed, and is as nearly as possible 4 per cent. upon the cost of erection.

I am therefore of opinion that there is no reason to interfere with the determination of the committee.

LORD DUNDAS—I agree with your Lordship, and I do so all the more readily that the Committee have come to this decision with a full local knowledge, and had all the facts before them.

The Court were of opinion that the determination of the Valuation Committee was right,

Counsel for the Appellants—Graham Stewart. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Respondent—Pearson. Agents—Pearson, Robertson, & Findlay, W.S.

## COURT OF SESSION.

Saturday, January 27.

### SECOND DIVISION.

[Sheriff Court of Lanarkshire  
at Glasgow.]

BAIRD (LIQUIDATOR OF DAVID GILLIES & SONS, LIMITED) v. GILLIES AND OTHERS.

*Arrestments—Debt Due by Company in Liquidation—Proper Method of Arresting—Arrestment in Hands of Liquidator as Individual Ineffectual.*

An arrestment “in the hands of you, A, accountant, Glasgow,” of “the sum of . . . due and addebted by you to B . . .” the schedule of arrestment in no way indicating that the debt was due by A in any other than a private capacity, held ineffectual to attach a sum to which A as liquidator of a limited company had ranked B in respect of a debt due by the company to him.

*Per* Lord Stormonth Darling—“The proper way to arrest the funds of a company in liquidation is to arrest the debt as due by the company itself and the liquidator as such.”

The firm of David Gillies & Sons, smiths and engineers, Bonnybridge, of which Archibald C. Gillies was a partner, became incorporated as a limited company under the Companies Acts. The company subsequently went into liquidation, and John Baird, accountant, 173 St Vincent Street, Glasgow, was appointed liquidator thereof. Archibald C. Gillies lodged a claim in the liquidation for sums, partly preferable, due to him by the company, and the liquidator having admitted him to a ranking, he became entitled by way of dividend out of the company's estate to the sum of £40, 18s. 10d.

In 1897 the firm of David Gillies & Sons, and the individual members of the firm, had

granted a bond and disposition in security for £500, to which bond James Henry Burns, solicitor, Falkirk, had in 1900 acquired right to the extent of £420. At his instance letters of horning were passed on the said bond against the said firm and against the partners as partners and as individuals, and on 11th June 1904, by virtue thereof, Burns used an arrestment in the hands of Baird of sums due by him to Archibald C. Gillies and to the other partner of the firm of David Gillies & Sons, as partners and as individuals. The schedule of arrestment was in the following terms:—"I, William Brownlie, messenger-at-arms, by virtue of letters of horning on bond and disposition in security, dated and signeted the sixth day of June nineteen hundred and four years, raised at the instance of James Henry Burns, solicitor, Falkirk, complainant, against David Gillies & Sons, smiths and engineers, Bonnybridge, and . . . and Archibald Cowie Gillies, both smiths at Bonnybridge, the individual partners of said firm, jointly and severally, in His Majesty's name and authority, lawfully fence and arrest in the hands of you, John Baird, accountant, 173 St Vincent Street, Glasgow, the sum of four hundred and seventy pounds sterling, more or less, due and addebted by you to the said . . . and Archibald Cowie Gillies, both as individuals and as partners of the said firm of David Gillies & Sons; together also with all goods and gear, debts, sums of money, or any other effects whatever lying in your hands, custody, and keeping, pertaining or in any manner of way belonging to the said . . . and Archibald Cowie Gillies, both as individuals and as partners of the said firm of David Gillies & Sons, or to any person or persons for their or either of their use or behoof, all to remain under sure fence and arrestment at the instance of the said James Henry Burns aye and until he be completely paid and satisfied of the sum of four hundred and twenty pounds."

On 13th October 1904 Patrick J. Stirling, solicitor, Glasgow, a creditor of A. C. Gillies, having obtained decree for his debt, used arrestments in the hands of Baird as liquidator for £25, having also already on the preceding 30th July arrested on the dependence of his action. And another creditor of Gillies, Alexander Harper, tailor, Falkirk, on 5th August 1904 also used arrestments in the hands of Baird as liquidator for his debt of £4.

In these circumstances Baird, the liquidator of David Gillies & Sons, Limited, as nominal raiser, and Stirling as real raiser, brought an action of multiplepoinding in the Sheriff Court at Glasgow, in which the fund *in medio* was the £40, 18s. 10d. due to Gillies (the common debtor) out of the company's estate. Burns, Gillies, Stirling, and Harper lodged claims, Gillies, Stirling, and Harper pleading that the arrestments by Burns were inept.

On 30th May 1905 the Sheriff-Substitute (BALFOUR) found Burns' arrestments invalid to attach the funds in the hands of Baird as liquidator.

"Note.—This is an action of multiplepoinding connected with the liquidation of David Gillies & Sons, and the first question which has to be decided is whether the arrestment used by Mr James Henry Burns in the hands of the liquidator is valid to attach the funds in Mr Baird's hands as liquidator. Mr Burns' arrestment is the first in point of time used in the liquidator's hands. The execution of arrestment bears that the arrestment is laid in the hands of John Baird, accountant, Glasgow, and it attaches sums of money, &c., belonging to William Rennie Gillies and Archibald Cowie Gillies, both as individuals and as partners of the firm of David Gillies & Sons. There is no reference whatever made to the firm being in liquidation or to the arrestment being used in Mr Baird's hands as liquidator, and the effect of the arrestment is to attach funds in Mr Baird's hands as an individual belonging to the two Gillies's. This appears to be quite clear from the authorities, and I refer to Graham Stewart on Diligence, p. 107, where it is stated that where the defender occupies two positions, arrestment of funds belonging to him in one capacity is of no avail in an action against him in another capacity, so in actions against trustees in their trust capacities, arrestment of the private funds of the trustee is incompetent, the arrestee being due nothing as trustee, and, on the same principle, where the arrestee occupies two capacities, the character in which he is alleged to be debtor must be correctly set forth. I refer to the cases which are cited in Mr Stewart's book, particularly the case of *Graham v. Macfarlane & Company*, 7 Macph. 640. The case of *Carron Company v. Currie & Company*, 33 S.L.R. 578, does not introduce a different principle, because the point decided there was that an arrestment in the hands of shipbrokers who had the entire management of the affairs of a shipping company competently attached the cargo of one of its ships which was under the control of the shipbrokers in harbour."

Burns appealed to the Sheriff (GUTHRIE), who on 6th July 1905 reversed the judgment of the Sheriff-Substitute, found Burns' arrestment to be effectual, and remitted the cause back for further procedure.

It appeared that the judgment of the Sheriff was based on a misapprehension of the facts of the case, and it was subsequently admitted at the bar that the grounds upon which it proceeded could not be upheld.

The Sheriff-Substitute having thereafter, by interlocutor of 18th July 1905, sustained the claim for Burns and repelled those for Gillies, Stirling, and Harper, Gillies and Stirling appealed, and argued—The claim for Burns should be repelled, as his arrestment was bad in two respects; (1) it was used in Baird's hands as an individual and not as liquidator of the company, whereas the fund arrested was due by him in the latter capacity—Companies Act 1862 (25 and 26 Vict. cap. 89), sec. 94. Misdescription of the arrestee was fatal to the validity of an arrestment—*Graham v. Macfarlane &*

*Company*, March 11, 1869, 7 Macph. 640, 6 S.L.R. 424; *Hay v. Dufourcet & Company*, June 19, 1880, 7 R. 972, 17 S.L.R. 669. (2) It described the debt as due to Archibald Gillies as partner of the firm of David Gillies & Sons, which firm in point of fact no longer existed.

The respondent (Burns) argued—The respondent's arrestment was valid. (1) The arrestment in Baird's hands as an individual was good, because he, as liquidator, having ranked Gillies on the company's estate, and having declared a certain dividend as payable to him, became liable to Gillies as an individual for the sum thus earmarked—*Ritchie v. M'Lachlan and Others*, May 27, 1870, 8 Macph. 815, 7 S.L.R. 500; *Hamilton v. Kerr*, November 23, 1830, 9 S. 40. (2) The fund was described as due to Gillies both as an individual and as a partner of the firm. Accordingly, if the first part of the designation was correct it did not matter if the second was bad. It was quite competent in one schedule to arrest in the hands of one arrestee two sums due to two separate persons.

LORD KYLLACHY—I am of opinion that this arrestment is hopelessly bad, and it is hardly necessary to go into particulars. The arrestment is, I think, bad on the ground expressed by the Sheriff-Substitute. And it is also bad on the separate ground urged by Mr Morison, viz., that it is impossible to read the schedule as applying to two separate and unconnected debts due by the company to the two individuals named. What was sought to be attached plainly was some sum supposed to be due to those two persons jointly by a private firm which the arrester supposed was still existing and was being wound up by Mr Baird.

LORD STORMONTH DARLING—I cannot doubt that the proper way to arrest the funds of a company in liquidation is to arrest the debt as due by the company itself and the liquidator as such. This arrestment fails in that essential particular, and is also open to the objection which Lord Kyllachy has indicated. But it is enough to say that it is entirely inept to constitute a preference in favour of the person who has used it, and that we must remit the case to the Sheriff accordingly.

LORD JUSTICE - CLERK and LORD LOW concurred.

The Court sustained the appeal, repelled the claim for Burns, and remitted to the Sheriff to proceed.

Counsel for the Appellants—Morison—A. Mackenzie Stuart, Agents—Macpherson & Mackay, S.S.C.

Counsel for the Respondent—Graham Stewart—Macmillan. Agents—Cowan & Stuart, W.S.

Tuesday, January 30.

## SECOND DIVISION.

ELSMIE & SON v. TOMATIN SPEY DISTRICT DISTILLERY, LIMITED, AND ANOTHER.

*Company — Winding-up — Supervision Order or Winding-up Order—Wishes of Creditors and Shareholders—Companies Act 1862 (25 and 26 Vict. cap. 89), sec. 149.*

On January 4 a creditor to the extent of £152, 7s. 8d. brought a petition to have a company wound up compulsorily. On 13th January an extraordinary general meeting of the company was held, at which a resolution was passed that as the company by reason of its liabilities could not continue its business it be wound up voluntarily, and that A be appointed liquidator, with instructions to place the liquidation under the supervision of the Court.

A note was accordingly presented which set forth the resolution, and stated that a majority of the creditors approved of the voluntary winding up and of the liquidator appointed, and a mandate stating the approval of creditors to the extent of £3176, 7s. 9d., who were a majority in number and value, was lodged in process.

The petitioning creditor contended that the shareholders had no *locus standi* to oppose his petition; that no creditor opposed the petition and the mandate produced was not sufficient; that out of eight creditors for whom the mandate was lodged five were or had been directors of the company, and so had other interests than those of creditors; and that the liquidator appointed was the nominee of one of the directors.

Held that as the majority of the creditors as well as the shareholders desired the voluntary winding-up to be continued under supervision, and as there was no suggestion that the petitioners would be prejudiced by the liquidation commencing at a later date than if the petition for compulsory winding-up were granted, or in any other way, a supervision order should be made and the liquidation be continued with A as liquidator.

In *re West Hartlepool Iron Works Company*, 1875, L.R., 10 Ch. 618, approved and followed.

*Expenses—Petition for Winding-up Order—Resolution of Company to Wind-up Voluntarily under Supervision—Refusal of Winding-up Order—Expenses of Petitioner.*

Where the Court, giving effect to the wishes of a large majority of a company's creditors, and taking into consideration the whole circumstances of the case, refused the petition of one creditor for a winding-up order, and decided that the voluntary winding-up