

result of the evidence, there is no difficulty in law to be solved. I entirely concur, however, with the remarks made by Lord Adam as to the cases of *M'Keand* and *Miller*. In the later case of *Nelmes* the Lord Ordinary thinks that there were opinions expressed at variance with the views expressed in the two former cases. The difference is, I think, more apparent than real. If other similar cases arise the law to be applied will, I imagine, be very much the same as that enunciated in the two older cases, and by two of the learned Judges in the later case.

The Court adhered to the interlocutor reclaimed against, refused the reclaiming-note, and remitted to the trustee to rank the appellant as a creditor on the sequestrated estates of Marwick & Hourston for the amount of £3820, 3s. 9d., and found the appellant entitled to expenses since the date of the Lord Ordinary's interlocutor.

Counsel for the Respondent and Reclaimer—  
Asher, Q. C.—Strachan. Agent—John Walls, S.S.C.

Counsel for the Appellant and Respondent—  
Gloag—C. N. Johnston. Agent—D. Maclachlan,  
S.S.C.

Tuesday, June 12.

## FIRST DIVISION.

[Sheriff of Lanarkshire.

SHAW v. CALEDONIAN RAILWAY COMPANY  
AND ANOTHER.

Process—All Parties not Called—Company—  
Action for Registration of Transfer.

The transferee of stock in a railway company raised an action against the company to have them ordained to register the transfer. The company in defence averred that the transferor had instructed them not to register the transfer, on the ground that the transferee was "illegally disposing of" the transferor's stock, and pleaded "all parties not called."

Held that it was not necessary to call the transferor as a defender to the action, but that its dependence should be formally intimated to him, and upon this being done, and the transferor lodging defences averring fraud, the Court remitted to the Sheriff to allow the parties a proof of their averments.

On 9th November 1887 John Shaw, sharebroker, London, raised an action in the Sheriff Court of Lanarkshire, at Glasgow, against the Caledonian Railway Company, in which he prayed the Court "to ordain the defenders to register in their register of transfers a transfer at present in their hands granted by John Rayner, late of Hobburne, Christ Church, Hants, and now of 89 Hugh Street, Eccleston Square, London, S.W., in favour of the pursuer, dated the 26th day of July 1887, whereby the said John Rayner transferred to the pursuer £80 consolidated stock of and in the defenders' undertaking, and to ordain the defenders to deliver to the pursuer a certificate or scrip in his favour representing that he is now the holder of the said stock." He stated that on

26th July 1887 he wrote to the railway company enclosing the certificate for the stock in question in name of John Rayner, and transfer by Rayner in his favour, and requested them to record the transfer, but that the company refused to do so.

The defenders averred—"On 27th July 1887 the defenders received from the pursuer a transfer of said stock, which *ex facie* appeared to be granted by the said John Rayner in favour of the pursuer. The stock certificate in name of the said John Rayner was sent along with the transfer, and the defenders were requested to register the transfer in name of pursuer. At the same time the pursuer sent to the defenders' registrar a transfer of said stock by him to a Mr G. L. Payne, and requested that the registrar should certify this transfer. The said transfer was not executed by the transferee Payne, and the object of the pursuer in asking the registrar to certify the transfer was to enable the pursuer to get payment of the price from the purchaser G. L. Payne." (Stat. 2) "Simultaneously with the receipt of the transfer and stock certificate by the defenders they received from the said John Rayner, the transferor, a post-card, of which the following is a copy—'S. W., 4 Passmore St., Chester Square, London. The Secretary, &c., Caledonian Ry. Co., Glasgow. Sir,—There is a man named Shaw, an outside broker, illegally disposing of my stock; it is not to be transferred out of my name.—Yours very truly, JNO. RAYNER.'" (Stat. 3) "The registrar of the defenders sent to pursuer a copy of the above post-card on the day it was received, viz., 27th July 1887, and intimated that in the circumstances he must defer doing anything until the matter had been arranged between the pursuer and the said John Rayner." (Stat. 4) "In reply to the above letter the pursuer on 28th July 1887 wrote to the defenders, stating that he need hardly say he should be very unlikely to dispose of stocks illegally. He also intimated that the transfers, &c., were duly completed, and that there could be no question as to his title, and gave notice that Mr Rayner had transferred the £80 stock to him. Subsequently on 30th September the pursuer asked the defenders' registrar to return the transfer which he had executed into the name of Mr G. L. Payne, and this was done." (Stat. 5) "A copy of the above letter was on 4th August 1877 transmitted by the registrar of the defenders to the said John Rayner, and he was asked if he still adhered to the terms of his post-card of 26th July, and to that letter he replied on 6th August in the following terms—'I have nothing to add to mine of the 26th. Mr Shaw has no claim to my stock.—Yours very respectfully, JNO. RAYNER.' The defenders also received from the said John Rayner a post-card in the following terms—'Gand, Belgium, Oct. 13, 1887.—Sir,—I am surprised you have not sent divd. as usual; the man Shaw has no legal claim on my stock. I suppose I must take proceedings against him for its recovery.—Yours faithfully, JNO. RAYNER.'" (Stat. 6) "It is the practice of the defenders, in common with all other railway companies and other corporations, to issue in the case of every transfer received by them for registration a notice to the transferor of the receipt by the defenders of the transfer, the object of the notice being to give the transferor an opportunity of stopping the registration of the transfer. No such notice

required to be issued by defenders about the stock in question as the objection of the said John Rayner to the registration of the transfer was received simultaneously with the transfer itself." (Stat. 7) "The pursuer has not furnished to the defenders any explanation about the acquisition by him from the said John Rayner of the stock in question, nor has he produced any evidence to establish the *bona fides* of the transaction although asked by defenders to do so."

The pursuer pleaded—"(1) The pursuer being the transferee of the stock formerly held by the said John Rayner in virtue of a valid probative transfer, the defenders are bound to give effect to the said transfer, and to register the same, and issue a certificate or scrip in favour of the pursuer, all in terms of the prayer of the petition. (2) The statements of the defenders are irrelevant, and ought not to be admitted to probation."

The defenders pleaded—"(1) All parties are not called. (2) No jurisdiction. (4) The defenders being interpellated by the notices from the said John Rayner from registering the transfer of the stock in question, decree of absolvitor ought to be pronounced. (5) The pursuer having failed to satisfy the defenders of the *bona fides* of the transfer, the action is premature, and the defenders ought to be assoilzied."

No formal intimation of the action was made to Mr Rayner.

On 13th January 1888 the Sheriff-Substitute (GUTHRIE) sustained the defenders' first plea-in-law, and dismissed the action.

"*Note.*— . . . I am of opinion that the true question is between the pursuer and his transferor Mr Rayner, and that the company defending is not bound to register the transfer in the face of his interpellation. Two courses might be open here, viz. (1) to dismiss, or (2) to sist the process until either the question shall be determined in other proceedings between the pursuer and Rayner, or Rayner, on intimation, shall choose to appear in this action and have the issue between him and the pursuer determined. Rayner, however, is out of the jurisdiction, and most probably would not choose to sist himself if called upon to do so. And I do not understand that the pursuer desires to have an opportunity of intimating the dependence of the action to him with that view. I therefore think that the natural result of sustaining the defenders' first plea-in-law is the dismissal of the action.

"If both parties desired that Mr Rayner should be certified of the dependence of the action, and that if he failed to make good his objection to the transfer registration would follow, there might be convenience so far as they are concerned in adopting that course. But they do not so concur, and even if they did it might be a hardship for an Englishman to be coerced into a litigation in Scotland about matters which may involve questions very remote from this £80 of railway stock."

The pursuer appealed to the Court of Session.

Argued for the pursuer—The company ought not to be allowed to defend a man who neglected to come forward and defend himself. The transfer, which was admittedly granted by Rayner, was *ex facie* good. All the cases relied on by the defenders, in which a company had been found liable for wrongly registering a person as a shareholder, were cases of forged transfers. No such

case was averred here. There was no necessity for calling Rayner in this action; the decree sought could only go out against the company.

Argued for the defenders—The company were not the true defenders here. Possibly it was right to call them for their interest, but the transferor of the shares was the proper defender. The pursuer might have raised his action in the English courts if there was no jurisdiction against Rayner in Scotland. A company was not bound to register transfers immediately they were sent to them, particularly where the transferor objected to their doing so, as he did here. If they registered wrongly, they would be liable to the extent of the shares—*Société Générale de Paris v. Walker*, 1885, 11 L.R., App. Cas. 20, Lord Blackburn, pp. 35 and 41; *Bahia v. San Francisco Railway Company*, 1868, 3 L.R., Q.B. 584, Blackburn J., p. 596, Mellor J., p. 597, and Lush J., p. 598. Forgery was not suggested here, but they had averred enough to show that they had good reason for delaying the transfer till the truth was discovered as to Shaw's dealings with the shares.

At advising—

LORD PRESIDENT—We are all of opinion that the interlocutor of the Sheriff-Substitute cannot stand. There is no necessity for calling any person who is not already in the case as a defender. The decree requires to go out against the company, and against no one else, and we should therefore have proceeded at once to give judgment for the pursuer were it not desirable that, as there has never yet been formal intimation of this action to Mr Rayner, that should be done, and we shall therefore make an order to that effect.

LORD ADAM and LORD KINNEAR concurred.

LORD MURE and LORD SHAND were absent.

The Court on 7th March pronounced this interlocutor:—

"Recal the interlocutor of the Sheriff-Substitute of 13th January 1888: Repel the two first pleas stated for the defenders, and appoint the defenders to intimate the dependence of this process to John Rayner, the transferor in the transfer sought to be registered, and that by transmitting to him in a registered post letter a printed copy of the record in the appeal, and a copy of this interlocutor authenticated by the Clerk of Court, certifying the said John Rayner that if he fail within eight days to appear in the cause and state objections to the registration of the said transfer, judgment will be pronounced against the defenders."

On 20th March Rayner lodged defences, having been allowed by the Court to do so.

In his defences he stated—(Stat. 1) "In or about the month of February 1887 the defender John Rayner entered into a series of speculative transactions relating to stocks and shares with the pursuer, who, although not upon the Stock Exchange, is a dealer in stocks and shares in London. The pursuer acted throughout said transactions not as a broker or agent for the defender, but as a dealer with defender, and the conditions of the dealing were fortnightly settlements, payment of differences, and deposit of security by defender for such differences as

might be due by him. In compliance with the last of said conditions defender handed over to pursuer a stock certificate for £80 of Caledonian Railway Company's stock, and a deed of transfer relating to the same, partly filled up, but blank in some respects, and in particular in respect of the transferee's name. (Stat. 2) Accounts were regularly rendered and settlements carried through until the 27th June, when pursuer rendered an account showing a debit balance against defender of £67, 18s. 2d. The accuracy of this account was impugned by defender, and payment thereof refused, as upon the assumption that the accounts between pursuer and defender were made up (as it was proper they should have been) upon quoted prices, no loss had been incurred. Upon 11th July, however, the defender received a memorandum from the pursuer in the following terms:—"To J. Rayner, Esq., Wardrobe Chambers, &c. July 11th, 1887—I beg to advise having bought of you £80 Caley, at 94½, £75, 8s. (Signed) JOHN SHAW." And along with said memorandum there was sent a blank deed of transfer, with the request that defender would fill it up and sign it, to the effect of transferring the Caledonian Railway Company's stock, given as cover, to a Mr G. L. Payne. This the defender refused to do. (Stat. 3) Upon defender's refusal to fill up and sign said blank deed of transfer, the pursuer proceeded at his own hand to fill up such blanks as had been left in the original deed of transfer in his possession, which bore the defender's signature, and in particular inserted therein his own name as transferee, and thereafter forwarded this document, with the stock certificate already in his possession, to the Caledonian Railway Company, and asked them to register the transfer. This was done by the pursuer fraudulently, and was an unauthorised conversion of an inchoate deed of transfer into an actual transfer, on account of an alleged loss, the occurrence of which was denied, and which in any event did not exhaust the security pursuer sought to appropriate. The defender, learning what had been done, communicated with the Caledonian Railway Company, who accordingly refused to register the transfer."

The defender pleaded—"(1) No debt being due by defender, the pursuer was not entitled to sell said stock. (2) The pursuer, having dealt with said stock in breach of the conditions of deposit, is not entitled to have said transfer registered. (3) The deed of transfer founded on by the pursuer being the deed neither of the defender John Rayner, nor of anyone on his behalf, or legally deriving from him, is invalid as an assignment of stock, and the said defenders, the Caledonian Railway Company, should therefore be assoltied."

Argued for the pursuer—The transfer was a probative deed, and looking to the defender's admission no sufficient reason had been assigned for setting it aside. If it was to be set aside this must be formally done, and not by way of exception. The provisions of the Companies Clauses Act, 1845, and especially the provisions of section 15 relating to the transfer of shares, were incorporated in the Caledonian Railway Company's Act.

Argued for the defender Rayner—The pursuer's case was not sufficiently fully disclosed

in the light of the defender's averments, and he should be ordained to state his case more fully.

The Court after hearing parties closed the record, and of consent remitted the case to the Sheriff for proof.

Counsel for the Pursuer—C. S. Dickson, Agent—David Turnbull, W.S.

Counsel for the Defender (Rayner)—M'Clure, Agent—R. Bruce Cowan, W.S.

Counsel for the Caledonian Railway Company—R. Johnstone—Clyde. Agents—Hope, Mann, & Kirk, W.S.

Tuesday, June 12.

## FIRST DIVISION.

BURNETT v. CRABB AND OTHERS.

Church—Lapsed Trust—Parties Entitled to Funds.

By trust-disposition dated 3rd May 1739 certain lands in Brechin were disposed in trust under a declaration that the price had been "truly paid out of the money belonging to the Episcopal Congregation of Brechin, and that the lands were purchased for making a convenient meeting-house or house of worship for the said congregation." The church was erected, and a disposition to the subjects was taken in name of certain parties mentioned in the deed as security to them for sums advanced for the erection of the building. The trust created in 1739 was, by the assumption of new trustees, kept up till 1830, at which date the then trustees borrowed from the managers of the Relief Congregation of Brechin a sum of £145, and granted a wadset therefor, in which it was, *inter alia*, provided that the chapel should be used solely as a chapel for the said Relief Congregation, and for no other purpose, and that if it came to be used for any other purpose then the wadset right should cease and determine. The money thus obtained was employed in paying off the debts of the "Licensed" Episcopal Congregation.

At the date of the wadset part of the Episcopalian Congregation joined the Relief Congregation, while the remainder joined another congregation of Episcopalianism formed in Brechin about 1792. In 1847 the right of the wadsetters terminated in consequence of the formation of the United Presbyterian Church through the union of the Relief and Associate Synods. In 1875 a judicial factor was appointed on the trust, who in 1879 advanced the redemption money, and obtained a conveyance of the chapel, which he sold for £500. After payment of the expenses of the factory and the redemption price, there remained a balance of £176, 14s. 2d.

A petition having been presented by the judicial factor for the direction of the Court as to the disposal of this balance, answers were lodged for (1) the Episcopal Church in Brechin,