

that is a question with which the defenders have no concern. I do not think, therefore, that there is any substance in this contention, and I am of opinion that the Lord Ordinary's interlocutor ought to be adhered to.

The LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuers—H. Johnston—Burnet. Agents—A. & G. V. Mann, S.S.C.

Counsel for the Defenders—Graham Murray—Salvesen. Agents—Graham, Johnston, & Fleming, W.S.

Wednesday, July 1.

## SECOND DIVISION.

PARTICK, HILLHEAD, AND MARYHILL GAS COMPANY, LIMITED v. TAYLOR.

*Company—Sale of Undertaking—Reserve and Depreciation Fund—Distribution of Price.*

The articles of association of a company provided, that the directors should have power to set aside out of the profits a reserve fund and a depreciation fund, to be invested on such securities as the directors should think proper; that the reserve fund should be applied to such purposes as paying off debts, equalising dividends, and meeting contingencies; and the depreciation fund to the repair and renewal of the buildings and plant of the company. The directors from time to time carried part of the profits to these funds, but instead of investing them, and without having obtained the authority of the shareholders, applied the whole of the funds to the extension of works, and other capital purposes of the company. The company's undertaking having been sold, a question arose between the preference shareholders, who had always received their full dividend, and the company, as to the mode in which these funds should be dealt with.

*Held* that the ordinary shareholders were entitled to both funds, and that they should be deducted from the price of the works before a distribution among all the shareholders was made.

*Company—Sale of Undertaking—Expenses of Parliamentary Proceedings.*

A gas company incurred considerable expenses in Parliamentary proceedings, which finally resulted in an arrangement under which the company's undertaking was sold.

*Held* that these expenses should not be charged against the revenue of the year preceding the sale, but against the price obtained for the undertaking.

The Partick, Hillhead, and Maryhill Gas Company, Limited, was incorporated under the Companies Acts 1862 and 1867 on 2nd May 1871, with a capital of £50,000.

By article 6 of the company's articles of association power was given to the shareholders "to increase the capital of the company by the creation of new shares, whether ordinary, preferential, or special." By resolution passed on 29th October 1872 the ordinary share capital was increased to £100,000. On 22nd August 1873 the shareholders resolved to further increase the capital of the company "by the sum of £30,000, to be issued in 6000 preference shares of £5 each, these shares to be entitled to a preferential dividend" of 5½ per cent., and thereafter these preference shares were issued. From the date of the issue till 30th June 1890 the dividend of 5½ per cent. was duly paid on the preference shares, the average dividend paid on the ordinary shares during the same period being rather over 3½ per cent.

By the articles of association the directors were authorised to set aside a reserve fund and a depreciation fund, the clauses authorising these funds being as follows:—"13. Any part of the profits of the company may, at the discretion of the directors, be set apart as a reserved fund to be applied at their discretion—(a) For paying off debts of the company; (b) for equalising dividends; (c) for meeting contingencies; (d) for any other purposes of the company. 14. The reserved fund shall not at any time exceed in the whole £10,000. 15. Any part of the profits of the company may, at the discretion of the directors, be set apart as a depreciation fund, to be at their discretion applied to the repair and renewal of buildings, erections, vessels, plant, works, and other property of the company. 16. The depreciation fund shall not at any one time exceed 25 per cent. of the original cost to the company of the property, buildings, and machinery in respect of which that fund is formed. 17. The moneys carried to the reserve fund and the depreciation fund respectively shall be invested in the company's name on such securities as the directors think proper, and the income arising from such fund shall be added thereto until it reaches its limit, and shall thereafter be deemed earnings of the company."

The application of the earnings of the company was provided for by article 18, which was in these terms—"18. All the earnings of the company, including all their receipts properly carried to the account of revenue, shall every year be applied as follows—(1st) In payment of all taxes, rates, and rents, and other preferable charges payable in respect of the company's landed property or works, and all arrears, if any, thereof; (2nd) in payment of all management, working, and other current expenses of the company, and all arrears, if any, thereof; (3rd) in payments to the reserved fund and the depreciation fund; (4th) in payment to the preferential shareholders, if any, of their dividends, according to their respective priority; (5th)

in payment of a dividend on the ordinary shares.”

In 1890 the Corporation of Glasgow promoted a bill for the extension of their boundaries, so as to include a considerable portion of the area supplied by the Partick, Hillhead, and Maryhill Gas Company, and the directors of the company, thinking that the passing of the Corporation's bill would have a fatal effect upon the prosperity of the company, with the approval of the shareholders, opposed the Corporation's bill, and also promoted a bill of their own. The preambles of both bills were in 1890 found not proved, and the proceedings on each side were resumed in the following year.

In March 1891, in accordance with resolutions passed by the shareholders of the company, an agreement was entered into between the company and the Corporation of Glasgow for sale to the latter of the company's undertaking at the price of £202,500 with entry at 1st July 1891.

Questions thereafter arose between the company and its preference shareholders as to the sums available for distribution when the sale of the company's undertaking should be completed, and a special case was presented in order to obtain the opinion of the Court on the following questions—“(1) Are the ordinary shareholders entitled to the reserve and depreciation funds, and must these funds be taken out of the price of the works before a distribution is made, or do these funds, in whole or in part, fall to be included in the capital fund available for distribution among all the shareholders? (2) Should the parliamentary expenses, referred to in Stat. 11 hereof, so far as those have not been already charged to revenue, be charged in whole or in part against the revenue of the year 1890-91 before paying a dividend to the preference and ordinary shareholders, or should they be charged against the capital fund to be distributed among all the shareholders?”

The parties to the case were (1) the company, and (2) Robert Taylor, as representing the preference shareholders.

It appeared from the case stated that at 30th June 1890 the amount of the reserve fund was £205, and of the depreciation fund £14,228; that the whole amount of these sums would, had the directors not applied the same to form a reserve and a depreciation fund, have been available for payment of increased dividends to ordinary shareholders, and might have been so applied; that the funds had not been invested separately, but had been entirely used for extension of works, and other capital purposes of the company; that all the work of repairs or renewals had been charged to revenue account; and that the works were then in a good and efficient condition. It further appeared from the case that during the proceedings in Parliament in 1890 and 1891 expenses to the amount of £5000 had been incurred, of which £1000 had been charged against the revenue of 1890 (Stat. 11); that in addition to the capital raised by the issue of

shares, the company had raised money by the issue of debenture stock and terminable debentures, and were due to the holders of such stock the sum of £81,990; that the revenue of the year ending June 30, 1891, after meeting all charges for interest on debenture stock and borrowed money, would show a considerable surplus; and that the price of £202,500 to be paid by the Corporation would not be sufficient, after payment of the parliamentary expenses and of the other debts of the company, to repay to the shareholders the whole par value of the share capital, it being anticipated that the deficiency, if spread rateably over the whole share capital, would amount to about 10 per cent. thereof.

There was no statement in the case to the effect that the shareholders had authorised the application of the reserve and depreciation funds to capital purposes.

Argued for the first parties—(1) The depreciation and reserve funds would not, owing to the sale of the company's undertaking, be required for the purposes for which they were intended, and as they had come out of profits which would otherwise have been available for the payment of dividends to the ordinary shareholders, these shareholders were entitled to them, and their right could not be defeated by the unauthorised conduct of the directors in applying these funds to capital purposes—*Mills*, 5 Ch. App. 621. (2) The parliamentary expenses had been incurred in defence of the whole property of the company, and had led to the arrangement with the corporation. They should therefore be charged against capital.

Argued for second party—(1) The depreciation fund was intended to prevent depreciation of the company's plant and works; that was, its capital, and as a matter of fact had been spent on capital purposes. It could no longer, therefore, be looked upon as profits, but fell to be included in the capital fund available for distribution, and the reserve fund must be similarly dealt with—*Bridgewater Navigation Company* 1891, 1 Ch. 155. (2) The whole or at least a part of the parliamentary expenses should be charged against the revenue of the year 1890-91. If the company had continued as a going concern, they could not have been charged against capital, but must have been dealt with as current expenses. An indication that the Legislature intended such expenses to be dealt with in this manner was to be found in the schedule to the Gasworks Clauses Act 1871.

At advising—

LORD JUSTICE-CLERK—The first question is one of importance, and requires careful attention. It appears that in the case of this company, a course was taken by the directors which is unusual, and which is quite beyond their ordinary duties. They, having put aside money which they represented to the shareholders as forming a reserve and depreciation fund, from time to time, and, as I understood was admitted by counsel, without consulting the shareholders, spent these funds upon erecting

new works. At all events, it is not stated in the case that they had any such consent when they appropriated these funds to the construction of new works. Now, it is admitted by Mr Guthrie—and he could not help admitting it—that that money could only be held by them to have been borrowed for that purpose, and that it would need to be restored. The question which the ordinary shareholders ask is, whether they are entitled to the amount of these reserve and depreciation funds, as they existed in the accounts at the time when the company came to an end, and my opinion is that they are. It is to be kept in view that, as regards the capital price of the works, it must be held to have been increased by the amount of the value of those new works upon which the reserve and depreciation funds were spent. There is, therefore, no loss to anybody else in taking the amount necessary to replace those funds, and dividing it as what it really was—profits put aside to meet contingencies, which in the circumstances that have occurred—viz., the company's ceasing to exist on 30th June 1891—those funds cannot now be spent in meeting. I think, therefore, that the first alternative of this question must be answered in the affirmative.

The second question is more difficult, because it relates to matters about which there is very little authority, and it is peculiar in that it has to do with the entirely exceptional expenses incurred in opposing and promoting bills in Parliament. Now, in so far as such expenses were charged to revenue in the year 1890, I understand that no question is raised. The question relates to a considerable sum, amounting to about £4000, which was expended in connection with the proceedings both in 1890 and in 1891, and which proceedings have resulted in the arrangement by which this company is bought up by the Glasgow Corporation. We do not have to inquire whether the bargain has been a good one or a bad one; we have only to deal with the question whether the expenses of the proceedings which resulted in that arrangement are expenses properly chargeable against capital—whether they ought to be deducted from the amount obtained from the Corporation for the works. I think that they do form a charge against the amount obtained from the Corporation for the works, and that therefore we must answer the first part of this question in the negative.

LORD YOUNG, LORD RUTHERFURD CLARK, and LORD TRAYNER concurred.

The Court answered the first alternative of the first question in the affirmative, and the first alternative of the second question in the negative.

Counsel for the First Parties—Lorimer—Younger. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Second Party—Guthrie—Mark Davidson. Agents—Bruce & Kerr, W.S.

Saturday, July 4.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.]

RUTHERFURD v. MACGREGOR & COMPANY.

*Bankruptcy—Sequestration—Sale—Purchase by Agent—Bankruptcy Act 1856 (19 and 20 Vict. c. 79), sec. 120.*

An agent employed by the trustee in a sequestration having purchased certain sequestrated effects exposed for sale by the trustee, an unsuccessful bidder brought an action for reduction of the sale, averring that the price of the subjects sold was the sole asset which the agent had to look to for payment of his account against the trustee, as he had arranged not to hold the latter personally liable for payment; that the value of the subjects in question did not exceed the amount of said account, and that the agent was thus the sole party interested in the result of the sale. The Court *repelled* the reasons for reduction.

*Opinion* by Lord Kyllachy that an agent employed by the trustee in a sequestration was in respect of his account a creditor in the sequestration in the sense of the 120th section of the Bankruptcy Act 1856.

*Observations* on this point by Lord Justice-Clerk, Lord Young, and Lord Rutherford Clark.

On 17th December 1890 Richard Brown, trustee on the sequestrated estate of J. Young Guthrie, exposed for sale by public roup the book debts, books, papers, and accounts belonging to the sequestrated estate. The only parties who bid at the sale were MacGregor & Company, W.S., Edinburgh, who had been employed by Richard Brown, the trustee, as law-agents, and James Rutherford. The subjects were ultimately knocked down to MacGregor and Company at the price of £23.

James Rutherford thereafter brought an action against Brown and MacGregor & Company for reduction of the sale, for declarator that the said subjects had been purchased by him at the upset price of £5, which had been first offered by him, and for decree ordaining Brown on payment of said sum to deliver to him an assignation of said subjects.

The pursuer averred—(Cond. 3) That the defenders MacGregor & Company had unpaid accounts against the trustee amounting to upwards of £200, for services rendered by them as law-agents on his employment. . . . "There were no assets available for the payment of those accounts, but the price which might be obtained for said book-debts, books, accounts, papers and others exposed for sale as aforesaid. The trustee had an arrangement with his said agents that he should not be personally liable for their accounts, but should be liable only for the amount of assets in his