

## COURT OF SESSION.

Friday, June 11.

### FIRST DIVISION.

[Lord Lee Ordinary.]

GIRVAN AND PORTPATRICK JUNCTION  
RAILWAY COMPANY v. LAMOND AND  
OTHERS.

*Process — Multiplepoinding — Competency — Res  
judicata.*

A railway company were by Act of Parliament authorised to issue debenture stock to an amount not exceeding £82,000 to such of their general creditors as should demand the same, to be accepted by them in discharge of their debts. Creditors to the extent of £935 thereafter raised an action to have the company ordained to issue to them debenture stock to the amount of their debt, in which decree was pronounced. Decrees were afterwards obtained by other creditors ordaining the company to issue such stock to an extent much exceeding £82,000. The company then raised a multiplepoinding to have it found and declared that they were only bound to issue stock to the amount of £82,000, and that to the persons having best right thereto, and calling the persons who held decrees against them as defenders. The pursuers in the previous action, who were called as defenders, pleaded that the action was incompetent in respect of the judgment they held. *Plea repelled.*

*Observed* that the question whether or not the decree entitled the holders of it to a preference would be determined in the competition in the multiplepoinding, and would depend on the terms of the Act of Parliament.

The Girvan and Portpatrick Junction Railway (Arrangement) Act 1882, by section 13 provided that the company should create and issue debenture stocks of several classes, and by subsection 3 it was provided that the C debenture stock should not exceed in amount the sum of £82,000, and should rank as a charge upon the revenues of the undertaking next after the B debenture stock, and should be issued at par in exchange and substitution for such Lloyds' bonds as are due from the company, and interest thereon at a rate not exceeding 2½ per centum per annum to the 11th day of November 1882, and also for equal amounts of other general debts to any general creditor who should demand the same, and should be accepted by such creditors in full discharge of all monies due to them from the company, and all interest due thereon.

An action was raised against the company by Henry Lamond and Robert Peel Lamond, writers in Glasgow, to have the defenders decerned and ordained to issue in name of the pursuers debenture stock of the class C to the amount of £935, being interest and dividends in terms of the Act.

On 9th December the Lord Ordinary (TRAYNER) decerned in terms of the conclusions of the summons.

*Opinion.*—The pursuers are admitted creditors of the defenders, and hold a decree against the company constituting their debt, amounting

to £935, of date 21st July 1880. They now demand that in return for their decree the defenders shall issue to them C debenture stock for the amount of their debt, and interest thereon at 2½ per cent from the date of their decree till 11th November 1882 in terms of section 13, subsection 3, of the Girvan and Portpatrick Junction Railway (Arrangement) Act 1882.

“The pursuers are in the position of general creditors of the company, and entitled to demand such debenture stock under the provisions of the Act referred to. But the defenders plead that they are only entitled to issue C debenture stock to the extent of £82,000, and that their debts to general creditors and others entitled to the debenture stock in question far exceed that sum. They therefore decline to comply with the pursuers' demand.

“No C debenture stock has yet been issued to anyone, and it appears to me that the defence stated by the defenders is untenable. The Act referred to does not create any new rule of priority according to which the C debenture stock is to be issued. The conditions of such issue simply are that creditors entitled to the C debenture stock shall demand it, and of course subject also to this, that the issue of such stock has not already reached the statutory limit.

“Since the discussion took place before me a minute has been lodged by the defenders stating that other creditors have demanded C debenture stock. I do not regard that minute as affecting the pursuers' claim, which claim I consider on its merits as at the date when the summons was raised. In my view the pursuers were entitled to what they ask at the date of their demand, and that they are entitled to it now.

“I should observe that the other condition on which the issue of C debenture stock depends, namely, the raising of a certain sum of money, has been fulfilled.”

After the discussion in the above-mentioned case demands were made upon the company by other creditors for C debenture stock to the amount of £162,322, and after decree was pronounced in that action, decrees were obtained ordaining the company to issue such debenture stock to that amount or thereby.

This was an action of multiplepoinding at the instance of the Girvan and Portpatrick Junction Railway Company, pursuers and real raisers, against Henry Lamond, writer, Glasgow, and Robert Peel Lamond, writer there, trustees for the firm of H. & R. Lamond, and against the other creditors, defenders, to have it found and declared “that the pursuers are only liable to issue debenture stock of the class C to an amount not exceeding the sum of £82,000 of and in the undertaking of the pursuers' company under The Girvan and Portpatrick Junction Railway (Arrangement) Act 1882, and that to the person or persons who shall be found to have best right thereto, for determining which the said several persons, creditors, or pretended creditors foresaid, and all others pretending right thereto, ought to produce their respective grounds of debt and diligences thereon, or other interests in and to the said stock, and dispute their preferences thereto.”

Defences were lodged by the Lamonds in which they pleaded—“(3) The present action is incompetent at the instance of the real raisers, in re-

spect of the judgment by the Lord Ordinary in the action brought by the present defenders.”

The Lord Ordinary (LEX) on 19th May 1886 pronounced this interlocutor:—“Sustains the third plea-in-law stated for the defenders; dismisses the action as incompetent so far as directed against the defenders H. and R. P. Lamond, and decerns; *quoad ultra* supersedes further consideration of the cause until the pursuers shall have had an opportunity of considering the procedure, if any, to be proposed by them as against the absent defenders.

“*Opinion.*—The defenders Messrs Lamond hold a decree *in foro* ordaining the pursuers to issue in their names debenture stock of the class C, under the Girvan and Portpatrick Junction Railway (Arrangement) Act 1882, to the amount of £935, and to deliver forthwith to them a certificate for such stock.

“This decree was given by Lord Trayner in an action in which the railway company had full opportunity of pleading, and actually pleaded, that their power of issuing such stock was limited in amount to £82,000, and that the claims against them greatly exceeded that sum.

“It is therefore *res judicata* that the defenders are, notwithstanding the circumstances alleged by the pursuers, entitled to demand the issue of such stock in their names to the amount of £935, and to obtain delivery of a certificate to that effect.

“To what extent other creditors are entitled to demand payment of their debts in the form of such debenture stock I am not at present called upon to say. The only parties who have lodged defences are the Messrs Lamond. They maintain that the present action is incompetent and untenable as against them, and I am of opinion that their defence must be sustained.

“I am bound to assume that the judgment and decree pronounced by Lord Trayner are well founded, and I see no difficulty in such assumption. The contention of the railway company in this case, as in the action at the instance of Messrs Lamond against them, is that because the total amount of Lloyds' bonds and general debts due by them exceeds £82,000, they are not bound to issue any debenture stock of class C until it is ascertained, in a process of the nature of a multiplepounding, who are the persons who have best right thereto. If that contention were well founded the judgment of Lord Trayner must be bad. But it was not reclaimed against, and it is final. It is also perfectly intelligible that the Act of Parliament should limit the issue of C debenture stock without importing any limitation of the debts, to the extinction of which such stock was to be applied. That is the point which was raised in the action at the instance of Messrs Lamond, and which was decided against the present pursuers. But the pursuers now ask that it should be declared that they are only liable to issue C debenture stock to an amount not exceeding £82,000, and that to the person or persons who shall be found to have best right thereto, and they call upon the creditors pretending right thereto (including the Lamonds) to produce their respective grounds of debt and diligences thereon, or other interests in and to said stock, and dispute their preferences thereto. This is manifestly an attempt to get Lord Trayner's judgment overturned after it has

been allowed to become final.

“I think that the action must be dismissed as incompetent so far as the present defenders are concerned.”

The pursuers reclaimed, and argued that the multiplepounding was competent because they could only issue debenture stock to the extent of £82,000, and decrees had been pronounced against them to the extent of £160,000.

The defenders argued that matters were then just in the same position as when Lord Trayner pronounced his judgment, with this exception, that claims only had been made then, whereas decrees had afterwards been pronounced. The creditors could only get stock according to priority of application. The matter was *res judicata*.

At advising—

LORD PRESIDENT—I have no doubt that the plea which has been sustained by the Lord Ordinary is a bad plea, for the sustaining of that plea has this effect, that the Messrs Lamond are put out of the process. Now, the fund which has been thrown into Court is debenture stock of the class C amounting to £82,000, which the railway company are entitled and bound to issue under their Act of Parliament. If, then, that is the fund *in medio*—and the Messrs Lamond never could object that it was not the fund *in medio*—it would fail to be distributed among the claimants who lodged claims. How the Lamonds are to get any benefit by this interlocutor I do not see. How they are to enforce their decree otherwise than by lodging a claim in this action I do not see. If Lord Trayner's judgment is pleaded by the Lamonds in this multiplepounding in support of a preference, then it will be competent to determine whether it entitles them to a preference or not. If it does not entitle them to a preference then they will not get it. The question is one for discussion in the multiplepounding, and if they do get a preference it will be because the statute gives them such a preference in virtue of the judgment they hold.

LORD MURE concurred.

LORD SHAND—If this process had been raised by one of the other claimants on the ground that he was claiming stock which the Lamonds were demanding, it would have been quite competent. But instead of there being merely claims at the instance of other persons, they now hold decrees, so that there is clearly double distress. The question in the multiplepounding will be, whether Lord Trayner's judgment gives the Messrs Lamond any preference, and that question will be discussed on its merits. But before discussing that question I think all the parties interested ought to be asked.

The Court recalled the interlocutor reclaimed against, repelled the third plea stated for the defenders, and remitted to the Lord Ordinary.

Counsel for Pursuers (Reclaimers)—D. F. Mackintosh, Q.C.—Reid. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for Defenders (Respondents)—R. V. Campbell—Ure. Agents—W. & J. Burness, W.S.