Friday, January 28.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

STEWART *v.* JAMES KEILLER & SON, LIMITED.

Company—Articles of Association—Power to Directors to Refuse Registration of Transferee on Finding Purchaser — Valuation of Shares—Power of Court to Review Decision of Directors — Corruption.

The articles of association of a limited company contained the following articles:—"33. The Board may decline to recognise or register any transfer of ordinary shares or ordinary stock made to any person who in the opinion of the directors should not be admitted as a member of the company, or who being a member of the company should not in the opinion of the directors be allowed to acquire or possess more ordinary shares or stock, but they shall only be entitled to exercise this power of declinature on condition that they name a person or persons willing to purchase the shares or stock at the price at which they were valued under article 113." "113. On the occasion of every (annual) balance the directors shall . . . value the ordinary shares . . . of the company and report such value to the meeting, and all questions as to the value of such shares . . . shall be fixed, determined, and regulated by such valuation until a re-valuation is made." "36. The executors or administrators of a deceased member . . . shall be the only persons recognised by the company as having any title to his shares;" . . . "37. Any person becoming entitled to a share or shares in consequence of the death or bankruptcy of any member or the marriage of any female member may be registered as a holder of such share upon such title and evidence being produced as may from time to time be required by the company . . ."

The widow of a shareholder, the bulk of whose estate consisted of his shares in the company, having elected to claim her legal rights, called upon her husband's executors, who were registered as holders of the shares belonging to him, to transfer to her one-third of said shares in satisfaction of her *jus relictæ*. Questions having arisen as to the right of the executors to account for the *jus relictæ* in shares, and as to the right of the widow to be registered by the company, the executors by agreement executed a transfer of a single share in favour of the widow. The directors of the company having refused to register the transfer, the widow raised an action against the company, concluding to have them ordained to register the transfer.

The pursuer maintained that she was entitled to registration *de plano* under article 37, and alternatively, that if her rights depended upon article 33, the directors' refusal to register was corrupt and fraudulent, and the condition on which the defenders were entitled to refuse registration had not been implemented, in respect that the valuation made by them was illusory and much below the value of the shares.

Held that the pursuer was not entitled to the decree sought by her, in respect (1) that her rights were regulated by article 33 and not by article 37; and (2) that as the directors in refusing to register her transfer had acted in what they intelligibly conceived to be the best interests of the company, and as the valuation, though somewhat low in view of the company's present earning capacity, was not unreasonable looking to the nature of the business and the restrictions upon the negotiability of the shares, the pursuer had failed to prove that the directors' refusal and the valuation were either corrupt or capricious; *diss.* Lord Moncreiff, who held that in the circumstances proved the directors' action was not a fair exercise of their powers under articles 33 and 113, and that consequently the pursuer's contentions were well founded.

This was a sequel to the case of *Stewart* v. *Bruce's Trustees*, June 10, 1898, 25 R. 965, 35 S.L.R. 780.

In that action Mrs Stewart (the pursuer of the present action) sought reduction of a deed whereby she had accepted the provisions in her favour contained in the settlement of her former husband Mr William Keiller Bruce. Decree of reduction was pronounced on 10th June 1898, and the trustees thereafter by order of the Court lodged a note of the *jus relictæ*.

In this note the amount of the moveable estate was stated to be £18,368, made up chiefly of 1249 shares in James Keiller & Son, Limited, which the trustees estimated at £15,612, or £12, 10s. per share, and the amount of the *jus relictæ* was consequently brought out at £6122.

The pursuer lodged objections to this account and averred that the shares were worth £50 each, and that the *jus relictæ* amounted to £21,733. The pursuer offered to accept a transfer of one-third of Mr Bruce's shares in payment *pro tanto* of her *jus relictæ*, but questions were raised as to the right of the trustees to pay her otherwise than in money, and also as to the pursuer's right to be registered as a shareholder.

With the object of having these questions determined it was agreed that the trustees should transfer one share to the pursuer to account of her *jus relictæ*, and the Lord Ordinary of consent of parties pronounced an interlocutor ordaining the trustees to transfer to the pursuer one ordinary share in the company. In pursuance thereof the trustees delivered to the pursuer on 25th March 1899 a transfer of a single share.

The directors of the company, as stated in their minutes of 4th April 1899, "unanimously decided to decline to register the above transfer in accordance with the powers held by them through article 33 of the articles of association, and Mr James Boyd, the chairman, having intimated his willingness to purchase the said share at the price at which the ordinary shares have been valued under article 113 of the articles of association, viz., £20 sterling, the board duly appointed him as purchaser of the said share."

Mrs Stewart was already registered as a shareholder, being one of the original shareholders of the company.

The pursuer raised the present action against James Keiller & Son, Limited, in which she concluded for decree ordaining the defenders to register the said transfer dated 25th March 1899.

The summons contained certain alternative conclusions, the nature of which sufficiently appears from the first opinion of the Lord Ordinary, *infra*.

The pursuer contended that the defenders were bound under articles 36 and 37 (quoted in the rubric) to register the transfer *de plano*, and that article 33 had no application to such a transfer. She averred further—"(Cond. 8) Even on the assumption that article 33 of the defenders' articles of association applied to the transfer in the pursuer's favour, the directors did not exercise the power thereby conferred upon them in good faith or for the benefit or supposed benefit of the company. The pursuer was already a member of said company, and there was no reason why she should not have been permitted to acquire a single share more. In passing the resolution of 4th April 1899 the directors abused the fiduciary power said to be vested in them under said articles 33 and 113, for no other reason than to enable one of their own number to acquire the said shares at an illusory price." With reference to the valuation of the shares the pursuer averred that the value of each share was at least £50, and that the defenders' valuation of £20 was illusory and fictitious and bore no relation to their real or intrinsic value, and that the defender's valuation involved a fraud on the rights of the pursuer and her children to the extent of £37,000.

The pursuer pleaded—"(1) It being the duty of the defenders James Keiller & Son, Limited, to register the transfer of one share specified in the summons, decree against them should be pronounced in terms of the first conclusion of the summons. (2) The defenders are not entitled to found upon the pretended valuation of said shares, in respect that (*a*) the said pretended valuation is illusory and fictitious and bears no relation to the real and intrinsic value of the shares. . . . (3) The resolution of the said directors of 4th April 1899 not being the result of a *bona fide* exercise of the directors' powers under the said articles of association, but of a device on their part to enable one of their own number to acquire the said share at an illusory price, the said resolution is illegal."

The defenders pleaded—"(2) The directors of the defenders' company having power by their articles of association to decline to register any transfer of the ordinary shares of their company, and having competently refused to register the transfer in favour of the pursuer, are entitled to absolvitor. (3) Standing the report of the directors fixing the value of said shares, which was duly laid before the meeting of the company, and the minute of the directors declining to register the transfer in pursuer's favour, the action cannot be maintained. (4) The directors having in good faith valued the said shares, and their proceedings being in order, the defenders are entitled to absolvitor from the conclusions of the summons."

On 20th March 1900 the Lord Ordinary (KINCAIRNEY), after hearing parties in the procedure roll, pronounced an interlocutor whereby he repelled the third plea-in-law for the defenders; found in point of law that article 33 of the articles of association applied to the question as to the registration of the share, and that article 37 did not apply, and allowed the pursuer a proof of her averments in regard to (1) the refusal of the company to register the transfer in her favour, and (2) the valuation of the shares under article 113.

Opinion.—"The pursuer Mrs Stewart was widow of William Keiller Bruce, who died on 19th March 1895 survived by two children who at present are minors. He left a trust-disposition by which he made provision for his widow, and directed his trustees to hold the residue of his estate for his children until the death or second marriage of his wife and until his youngest child should attain majority. The pursuer has married again, and she has elected to claim her legal rights, and is therefore now entitled to her *jus relictæ* out of her husband's moveable estate. That estate consists in part of sums in policies of insurance on his life, of the value of his furniture and other items amounting to between £6000 and £7000, under deduction of debts exceeding £4000. But the bulk of his estate consists of 1249 ordinary shares in the firm of James Keiller & Son, Limited, which he empowers his trustees to retain unrealised and to hold as investments under his trust.

"The amount of the pursuer's *jus relictæ* has not yet been ascertained, and an important difference exists between her and the company as to the value of the shares. The pursuer avers that the intrinsic value of each share is £50, while James Keiller & Son will allow no more than £20 per share. According to the one estimate the total value is £62,450, and according to the other £24,980. The difference is £37,470, making a difference in the *jus relictæ* of above £12,000. Mrs Stewart is of course desirous to secure the benefit of the higher valuation, and to that end she desires either (1) to be entered in the register of the company as holder of one-third of her husband's shares; or (2) that Mr Bruce's trustees should hold them for her; or (3), as I suppose, that her *jus relictæ* should be computed on the footing that the value of each

share is £50. But she in no case wishes the shares realised.

"She has, however, encountered these difficulties—(1) That the trustees hold that she is not entitled to demand from them her *jus relictæ* in the form of shares, and that they are not bound and not entitled to pay her *jus relictæ* except in money; (2) that even if they do pay her in shares the company have refused or will refuse to enter the transfers to her in their register; and (3) that the value of the shares is at present fixed under certain provisions in the articles of association at £20.

"I understand that this action is an attempt to solve these difficulties or some of them. It relates in fact to one share only. But the pursuer's idea was that a decision as to one share might possibly apply to the whole of the *jus relictæ*, an idea which I fear is hardly well founded.

"Mr Bruce's trustees, shortly after his death, made up a title to the shares by confirmation, and on 22nd June 1895 they were registered in the books of the company as owners of them, and by arrangement they transferred one share to the pursuer, which the company have declined to register, and which enables her to raise this action. The conclusions of the action are that the company should be ordained to register this transfer, or alternatively to pay the pursuer £50 or the value of the share, as it may be determined, or as the damage arising from refusal to register, or otherwise the action concludes for decree of declarator that Mr Bruce's trustees hold this share for the pursuer.

"My judgment cannot travel beyond these conclusions and must be confined to the single transfer which has been granted. The action does not raise, at least directly, the question whether the pursuer is entitled to receive her *jus relictæ* or the greater part of it in the form of shares; and while it does raise the question whether the company are bound to register this one transfer, it is possible that that may not determine their obligation to register transfers of 416 shares, which is the number she claims. Strictly speaking, perhaps, there is no other question raised by this action except the question whether the company are absolutely bound to register this transfer, as appears from the consideration that if the company should agree to do so no question would remain in the action.

"After careful consideration of the argument I think this is the only question which can be decided without enquiry. But it is a question of importance, and I think it will be convenient that I should decide it so as to enable the parties to obtain the judgment of the Inner House upon it. It depends on the articles of association, and there are four articles—33, 36, 37, and 113—which are of importance. Article 33 provides, *inter alia*, that the board of directors may decline to register any transfer 'made to any person who in the opinion of the directors should not be admitted as a member of the company, or who, being a member of the company, should not in the opinion of the directors be allowed to acquire or possess more ordinary shares or stock.' The 36th section provides that the executors or administrators of a deceased member shall be the only persons recognised by the company as having any title to his shares; and article 37 provides that 'any person becoming entitled to a share or shares in consequence of the death or bankruptcy of any member, or the marriage of any female member, may be registered as a holder of such shares upon such title and evidence being produced as may from time to time be required by the company.'

"The pursuer maintains that it is section 37 which applies to this case, and that under it she has an absolute right to registration, and that the company has no power to refuse registration. The company contends that article 33 applies, and that the company is thereby empowered to refuse to register at its discretion. The question is of considerable difficulty, but I have formed the opinion that it is article 33 and not article 37 which applies. Article 33 applies to the registration of transfers, which is this case; and construing it according to the natural meaning of the words, it applies to all transfers without regard to the nature of the transferee's title. I think it must necessarily be construed as applying to the transfer in question, unless some exception to its general terms is introduced by article 37. Articles 36 and 37 apply where there are no transfers; article 36 applies to the case of the death of a shareholder, which is also this case, and it seems to give a right of registration to the shareholder's executor or administrator. Now, that section has received effect and has been exhausted by the registration of Mr Bruce's trustees, and the declaration that the executors or administrators of a deceased shall be the only persons recognised by the company as having any title to his shares seems to negative any obligation on them to recognise anyone else in that case, such as a beneficiary, or children in right of legitim, or a widow in right of her *jus relictæ*. Article 37 certainly applies to an executor, who is a person becoming entitled in consequence of death, but the right to registration in that case being conferred by article 36 cannot be held to be also conferred by article 37. I read article 37 as, in the case of the death of a shareholder, referring to the evidence of title to be produced to the company. I think it does not refer to anyone else but an executor as becoming entitled in consequence of death, and cannot do so consistently with article 36, unless indeed article 37 be read as permissive or empowering, which is a possible construction, but which would not assist the pursuer.

"The contention of the pursuer on this point was that the right of a widow to her *jus relictæ* was not of the nature of a succession—which may be admitted—but rather of a right of property dormant during marriage but coming into active and separate existence at its dissolution—which must, I think, be denied; but it was contended that the widow might properly be said to become entitled to her share of

the goods in communion on her husband's death. It was, as I understood, contended that *jus relictæ* differed from *legitim* as partaking more of the nature of property and less of a right of credit. The pursuer's counsel referred to Stair i., 4, 21, and iii. 4, 24; Ersk. iii., 9, 15, 19, 30; *Breadalbane*, May 26, 1844, 4 D. 1259; *Ross* v. *Masson*, February 3, 1842, 5 D. 483; *Dalhousie* v. *Crokat*, May 26, 1868, 6 Macph. 659; and *M'Intyre's Trustees* v. *M'Intyre*, July 9, 1865, 3 Macph. 1074. But I have not been able to discover in these authorities any satisfactory distinction in this respect between *jus relictæ* and *legitim*, and considering that each is a third of the moveable estate I do not think there can be any—see M'Laren on Wills, vol. i. 133, note 9—and I think it now well settled that the children and the widow are alike creditors of the executor for their several rights of *legitim* and *jus relictæ*. The more important decisions have referred to *legitim*, but they apply in principle to *jus relictæ*.—See *Fisher* v. *Dixon*, April 6, 1843, 2 Bell's App. 63; *M'Murray* v. *M'Murray's Trustees*, July 17, 1852, 14 D. 1048; *Dalhousie* v. *Crokat*, May 26, 1868, 6 Macph. 659; *Ross* v. *Ross*, June 16, 1896, 23 R. 802; and Fraser on Husband and Wife, 976. The pursuer founded somewhat specially on the opinion of Lord Cowan in *M'Intyre's Trustees* v. *M'Intyre*, where *jus relictæ* is spoken of as a right of property. But I think that his Lordship merely desired to distinguish the right from a right of succession, and if it was meant to designate the right as one of absolute property over the whole or any part of the moveable estate I venture to think that the accuracy of the expression may be questioned.

"I have, however, been considering the pursuer's argument only in its application to article 37 of the articles of association, and all I mean to decide is that that argument does not seem to me to displace the grounds of my opinion that article 33, not article 37, applies.

"I am far from affirming that either *legitim* or *jus relictæ* can never be paid except in money, or that in this case it is necessary to realise the estate in order to pay the *jus relictæ*. If it be true, as probably at this stage of the argument and before inquiry is to be provisionally assumed, that a share is worth £50 or thereby, it may be that the trustees would be entitled, possibly would be under obligation, to pay the widow's *jus relictæ* in large part by a transfer of shares, and I do not at present see that it would injure the children to do so. There is not a great deal of authority on this point in our decisions, but it is referred to by Lord Fraser in *Tait's Trustees* v. *Lees*, July 8, 1886, 13 R. 1104, at 1107. But I have made these remarks only to prevent misunderstanding and to reserve my opinion; for, as I have already said, the question is not really raised, the trustees having granted the transfer to which this case relates.

"Had I been able to hold that article 37 applied there would of course have been no more to be said. But as I have not been able to do so, it becomes necessary to consider the pursuer's right under article 33; and as to that there arise two questions—first, in regard to the extent to which the resolution of the directors to refuse to register can be examined; and secondly, as to the fulfilment of the condition attached to their right. On the former point I have to observe that the power of the directors does not seem to be absolute, but that the ground of rejection must apparently be something personal to the transferee. It is debateable that the reason for which rejection is admitted is not a reason connected with general policy or management, but rather a personal objection, although I do not mean to express a final opinion on that point. The company gives no reason either in their minutes or on record for the rejection. I do not say it was bound to do so. But having regard to the view which has always been held, at least in English cases, that such a power must be exercised fairly and reasonably, and not to the unnecessary injury of the transferee and having regard to the averment of the pursuer as to the value of the shares, I think inquiry on this point is necessary if the company is to continue its declinature—*Penney* re *Gresham*, 1872, 8 Ch. Ap. 446; *Bell Brothers, Limited*, October 1891, 7 T.L.R. 689, 65 L.T. 245; Buckley, Companies Act, 1862, Par. 22.

"The condition which qualifies the power of refusal to register conferred by article 33 is this—that they shall only be entitled to exercise this power of declinature 'on condition that they name a person or persons willing to purchase the shares or stock at the prices at which they were valued under article 113.' It is averred that they have not fulfilled this condition, inasmuch as there was no fair valuation carried out as the articles of association direct. I do not find the averments on this point very satisfactory, but I think they cannot safely be set aside without inquiry.

"I therefore propose to find in point of law that article 33, and not article 37, applies to the question as to the registration of the transfer; and further, to allow the pursuer a proof of her averments in regard to the refusal of the company to register the transfer, and as to the valuation of the shares of the company under section 113."

Proof was thereafter led. With reference to the defenders' refusal to register the transfer, James Boyd, managing director of the company, a witness for the defenders, was asked in cross-examination to state the reasons why the directors refused to register the transfer. He at first declined to do so, but the Lord Ordinary ruled that he was bound to answer the question. Mr Boyd then deponed—"(A) I may mention that when Mrs Bruce was admitted to the membership of the company she was the wife of a respected director. Very shortly after her husband's death she married, and in our opinion her husband had no interest in the business of the company. Moreover, she brought an action which exposed the whole affairs of the company, much to its prejudice, in my

opinion, in the eyes of the public. That is to say, the whole private affairs of the company through this action were brought out. Moreover, she wanted to purchase shares through her trustees with the view to selling them to the public, and thus further increase the membership, a thing which was against the idea of the vendor and those who bought the shares. In fact her whole object appears to be to try and get the company made a public company, and thus defeat the object of the vendor. There is another thing; in making a transfer we must consider whether the transferee is to be of some advantage to the company. Now, in my opinion, with all deference, a married lady is very likely to be very little help in the management of the company. Moreover, she herself signed the articles of the company, and now she apparently wants to defeat those very articles. It appears to me that if she were to get a further increase there would be a constant agitation to get the company thrown on to the public at its inflated value. My idea is that if we do make a transfer it should be to someone who is to help in the management of the company; and I believe that was the only reason why my sons were admitted as shareholders of the company. I think that is all I have to say. (Q) Have you now stated all the interests of the company which would be affected in your opinion? (Question objected to.)—(A) Yes. (Q) Were these the grounds in respect of which you refused to registration of the transfer? (Question objected to.)—(A) These are the main grounds. (Q) Are there any others which you can state? (Question objected to.)—(A) I don't think so; there might be others if I were to think over them, but these are sufficient."

With regard to the valuation of the shares it appeared from the proof that the directors had annually, in pursuance of article 113, valued the shares of the company, and that the valuation had been increased year by year, from £10, at which it was fixed in 1894, to £20, at which it had been fixed in 1899. The valuation for 1899 was the valuation applicable to the transfer in dispute.

Mr John Scott Tait, C.A., Edinburgh, a witness for the pursuer, deponed that in his opinion the true value of a share was £50, having regard to the profits earned by the company. The company had paid an average dividend of 14 per cent. Their profits would in his opinion have justified them in paying a dividend of 29 per cent.; but he reached this result without making allowance for reserve, for depreciation or fluctuation in the price of raw material, and without taking into account the restriction on transfer of the shares under article 33. Other witnesses for the pursuer concurred with Mr Tait.

Mr Richard Brown, C.A., Edinburgh, a witness for the defenders, deponed that in his opinion the valuation made by the defenders, viz. £20, was a fair valuation, having regard to the character of the company's business and to the restriction upon transfer of its shares. Similar evidence was given by other witnesses for the defenders.

On 30th September 1901 the Lord Ordinary pronounced this interlocutor:—"The Lord Ordinary having considered the proof, productions, and whole cause, Finds (1) that on 25th March 1899 the executors of the deceased William Keiller Bruce, who were shareholders in the firm of James Keiller & Son, Limited, executed a transfer of one ordinary share in said company in favour of the pursuer Mrs Stewart; (2) that the pursuers transmitted said transfer to the said James Keiller & Son, Limited, in order that it might be entered in the register of said company; (3) that on 4th April 1899 the directors of the said company declined to register the said transfer, and the defender Mr James Boyd then intimated his willingness to purchase said share at the price of £20 per share; (4) that said declinature to register and said intimation by said James Boyd bore to be in compliance with the powers conferred on said directors by the 33rd article of the articles of association of said company and with the provisions of said articles: (5) Finds that the pursuers have failed to prove that the said declinature was corrupt or fraudulent, or that it was not within the powers conferred by said article: and (6) Finds that the condition annexed to the power of declinature by said article was implemented: Repels the first, second, and third pleas-in-law for the pursuer: Sustains the second and third pleas-in-law for the defenders James Keiller & Son, Limited; assoilzies the defenders the said James Keiller & Son, Limited, from the first conclusion of the summons, and decerns: Reserves expenses, and appoints the cause to be put to the roll for further procedure: Grants leave to reclaim."

Opinion.—[*After stating the facts*]—"The pursuer contended that the questions depended on article 37 of the articles of association. But in my previous judgment I repelled that contention and found that article does not apply, and I do not therefore require to refer to it. In my opinion the powers of the directors depend primarily on articles 35 and 113."

These articles are as follows. [*His Lordship quoted the articles.*]

"There are two observations which may be made at the outset on these articles—the first is that they are contained in the contract embodied in the articles of association, to which contract the pursuer Mrs Stewart, as an original shareholder, was and is a party. The second is that the shares of a joint-stock company are moveable property, *prima facie* transferable, unless the contrary is provided by the contract by which the shares are created.

"The first and chief question is, whether the refusal by the directors to register the transfer was in *bona fide* and done honestly and without any corrupt motive within their powers, and the second question is whether, if it was so, they fulfilled the condition provided at the close of article 33. To solve these questions it is necessary to

consider very carefully the true construction, object, and effect of section 33. I have found these questions, except the question as to the good faith of the directors, to be of extreme difficulty. The cost of this litigation must have been very great, and I cannot but regret that a compromise has been found impossible.

"The 33rd section is very peculiarly, perhaps unfortunately, expressed, and requires to be considered with attention. It is divisible into three parts, of which the first relates to transferors or shareholders, the second to transferees. The power of refusal to register on account of considerations relating to the transferors is by no means absolute, but is on the contrary distinctly defined and limited. The power in the second clause in reference to the rejection of transferees is much more general; and the third and concluding clause seems introduced in order to mitigate the severity of the second clause by providing that a transfer shall not necessarily fail because of refusal to register the transferee, but may be completed in favour of some other transferee on specified terms. This is a clause in favour of transferors, that is shareholders, towards whom the relation of the directors is fiduciary, and not of the transferees, with whom as such the directors had no such relations. One would not go far wrong if it were surmised that one of the chief objects of this article was to enable the directors to preserve the private and domestic character of the company.

"The provision immediately in question is this, that the directors may decline a transfer in favour of any member of the company if in the opinion of the directors such member should not be allowed to acquire or possess more shares. The power is not exactly absolute, but it is limited only by reference to the opinion of the directors.

"Now the directors have professed to exercise this power, and the question is whether this proposed exercise of their power should not receive effect. If the act of the directors was within their power and was honestly done, it must receive effect—and if it was not, the Court will declare it *ultra vires* and ineffectual. If it appears that the directors rejected the transfer because they were of opinion that Mrs Stewart should not hold more shares, then their rejection will hold good, whatever idea may be entertained of their opinion; but if it appeared that they rejected the transfer not for that reason but for some other and different reason, then the transfer must be supported.

"I think it appears from some of the English cases which were quoted that the onus in this question is on the pursuers challenging the act of the directors, and that their power will be held to have been duly exercised unless the contrary be proved.

"But there is a preliminary question, because the defenders argued that their rejection was final, and that the reasons could not be examined, and that the directors were entitled to refuse to give their reasons. In support of this contention reference was made to *Pentland* v. *Brand & Co.*, November 9, 1865, 4 Macph. 10; *Houldsworth & Brand's Trustees*, May 18, 1875, 2 R. 683; *Breadalbane* v. *Whitehead*, November 16, 1873, 21 R. 138; *Guild* v. *M'Lean*, November 20, 1897, 25 R. 106; and Bell's Comm. i. 74. These authorities related to questions between landlord and tenant as to the landlord's consent to an assignation or sublease or to the landlord's dissatisfaction with the tenant's conduct. In such cases the decision of the landlord has been held absolute and conclusive. But it appears to me that these cases cannot be safely applied to a question about the transfer of personal property, the transference of which cannot be readily interfered with. The defenders referred to another class of cases which related certainly to joint-stock companies. These were *Penney*, December 30, 1872, 8 Ch. 446; *Coalport China Co.*, 1895, 2 Ch. 404; and *Hannan*, November 23, 1898, 14 T.L.R. 314. But these were cases of a different kind from the present. They were applications under section 35 of the Companies Act 1862 for rectification of the companies' registers, and I think that all that they decided is that in such applications the onus of showing that the entries in the registers were wrong lay on the applicants, and that in the absence of proof to the contrary they must be presumed to be right. I think there was no proof led in these cases.

"In this case the question as to the obligation of the directors to give the reasons for their decision came up in the evidence of Mr Boyd. I allowed the examination. There is no provision to the contrary in the articles as there has been in some of the other cases. Mr Boyd submitted himself as a witness, and it was not easy to see how he could avoid cross-examination, and he had already entered on the question in his evidence in the previous action, and it seemed necessary that if his reasons were given at all they should be complete. Further, the averments of the pursuers on record are such as to render some investigation into the matter imperative.

"I think, however, that the directors' grounds for their decision can be examined only to a limited extent. What has to be ascertained is only whether the grounds of rejection were legitimate, and not whether they were well-founded and satisfactory and in themselves conclusive, and I could not disregard the directors' decision merely because I differed from it. The power to decide as to registering a transfer is given to the directors, not to the Court.

"On this point the pursuers, as I understood, maintained that the only ground on which the decision of the directors could be maintained under the articles was that they were of opinion that Mrs Stewart should not possess more shares, and they maintained that that was not and could not have been their opinion. No one, it was said, could possibly have held an opinion so absurd as that a lady who held one share should not hold a second, seeing that an additional share could not affect her position. But I think that that seems hardly

to treat the matter fairly. It is true that I cannot deal at present with anything but this one share, but I do not think that the directors in considering the situation were in the same position. I think they were entitled to look beyond this single share and deliberate on the footing that the granting of the transfer of a single share savoured of a device which might be repeated, and that it was reasonable in them to regard the pursuer's application as if it referred to the 416⅔ shares which she had claimed from the trustees. Further, they might think it debateable that if a transfer of 416⅔ shares was objectionable a transfer of one share was objectionable also although in a less degree.

"The pursuers have averred not only that the directors did not act on the reason suggested, but that they acted on another and totally different reason. The pursuers aver in Condescendence 8 that 'the directors abused the fiduciary power vested in them under said articles 33 and 113 for no other reason than to enable one of their own number to acquire the said shares at an illusory price.' Now, that was certainly a most relevant statement, which absolutely necessitated a proof, and perhaps necessitated the evidence of Mr Boyd. If it had been proved the decision of the directors would have been disregarded as utterly corrupt and *ultra vires*. But the singular thing is that the pursuers, after having made this formidable averment, closed their proof without having led a word of evidence about it, and having heard the whole evidence I have no doubt that it is quite unfounded. It is possible that Mr Boyd may derive some small advantage from this transaction. Perhaps he may not. I do not know. But I feel sure that the prospect of any such advantage formed no part of his reason for declining to register the transfer.

"The pursuers maintained on this point that the power of the directors was a fiduciary power conferred on the directors by the company and its shareholders, and that they were bound to exercise it fairly and with due regard to the interests of the company. I agree that that was so, and that the directors in dealing with the transfer were acting as trustees or agents of the company and its shareholders, including Bruce's trustees, the transferors. But neither the company nor Bruce's trustees are challenging the act of the directors. Bruce's trustees as a body have not, except by delivering the transfer, supported the pursuer's case. I do not see that in this transaction the directors acted as trustees or agents for the transferee as such, and I cannot see that the circumstance that Mrs Stewart was a shareholder makes any difference.

"I am satisfied on the proof that the directors, when they declined to register the transfer, did not do so from any dishonest or corrupt or merely personal motives. I am equally satisfied that their reason was not any personal objection to Mrs Stewart. They said nothing against her. What then were their motives? They may have acted without very clear reasons, but not without a motive. I believe that they had the opinion that it would injure the business if her holding were increased. It may be matter for regret that they held that view. Perhaps it was. Not improbably if they had agreed to register her share and any others which the trustees might allot to her they would have found that no harm had been done. But they were wedded to the view that the privacy of the company should be retained if possible, and they deprecated any considerable influx of new shareholders. They held that the management required to be in few hands and in experienced hands. There were trade secrets. The business, it was thought, was of a very delicate character and might suffer greatly from any change of policy or change in management. They thought, besides, that if they were to transfer the shares of a business man like Mr Bruce they ought if possible to have a man of business or influence in his room who would strengthen the company. These or some such reasons seem to have moved the company to reject Mrs Stewart's transfer. I am not saying that they were good reasons, only that I have great difficulty in thinking that they were not reasons which the directors might consider without going beyond their powers, and on the whole I incline to think that I have not heard reasons sufficient for disturbing the directors' decision.

"There was quoted for the pursuers a case having a considerable resemblance to this, in which Justice Chitty, in a motion to enforce the registration of a transfer which had been rejected by the directors of the company, sustained the motion to enforce the registration. The judgment of Justice Chitty is very elaborate and important, but the case was in many particulars very special and complicated. There seems to be no doubt about the soundness of the judgment, because it was clear that the conduct of the directors or of some of them had been undoubtedly corrupt. At the same time, having studied the opinion, I confess that there are passages in it which I would have great difficulty in adopting,

"On the whole matter I am of opinion that the pursuers have not succeeded in proving that the directors were not within their duty in refusing to register.

"But the section requires that when directors refuse to register a transfer they must name a person willing to purchase the shares. What the minute bears is, that Mr Boyd having intimated his willingness to purchase the shares the board duly appointed him as purchaser. That is not expressed in the same language as the section, which speaks only of a person willing to purchase and not of a purchaser, but I suppose that this minute was not intended to constitute a contract of purchase and sale binding the trustees, but to submit to the trustees an offer which it was open to them to accept.

"The pursuers say that this offer and minute did not amount to due implement of the condition required by article 33,

under which alone the directors were empowered to decline to register the transfer, that therefore the declinature was altogether bad, and that the pursuers were entitled to insist on registration. This consequence is not perfectly obvious, but I will assume it to be sound.

"The pursuers' objection is two-fold. First, they say that Mr Boyd was disqualified as an offerer, and secondly they say that the valuation at £20 was illusory and fictitious and at least much under the true value. There has been an immense amount of skilled evidence on the latter point, with which I think it impossible to deal with any advantage in this opinion, already too long; and I think it will be sufficient to indicate my opinion with much greater brevity. Although the first point, namely, that Mr Boyd was disqualified as a buyer because he was a director, and *qua* such a trustee was fully argued, I do not find any plea applicable to it. As before noticed, if he was a trustee he was a trustee for the transferors, not the transferee. The transferors have not taken the objection that Mr Boyd cannot purchase, and indeed it was out of the question to suggest that there was any doubt or difficulty about a director of a joint-stock company purchasing shares in it. It is done every day, and no doubt if the trustees should accept his offer there will be no difficulty about completing the transaction. It is said that there was an antagonism between Mr Boyd's trust duty and his individual interest. His trust duty, it is said, was to consider the application for registration without bias or prejudice. His interest was to refuse to register, because then he might get the shares for himself at an illusory or favourable price. This last alternative seems unsound, because the refusal to register gave him no right except the right to offer. Possibly it might have been as well, although it would have been the same thing practically, had the directors put forward some other nominee. But what was done was precisely what the articles required, and I think there was no illegality or breach of duty in the transaction. If it could have been shown that Mr Boyd was influenced in his judgment as a trustee by his expectation of getting this single share there might be something in the argument. But that suggestion is preposterous, and short of it there seems to be no ground for the objection, and, as already noticed, there is no plea.

"The pursuers' next objection is more complicated; it was that the condition was not fulfilled, and could not be, because there had been no true valuation of the shares under article 113. The objection is a head of the objection under article 33. *Prima facie* there is no doubt that the condition was implemented in its terms, because his offer was to pay the price at which the shares were valued under article 113, and there had certainly been a valuation or what purported to be so. I am disposed to think that that offer was sufficient implement of the condition if there had been a *bona fide* valuation, whether it was right or wrong, whether the calculations were correct or incorrect, and whether the principle of valuation was sound or not. But the pursuers have maintained that they can displace the valuation, and that if they do so they will get rid of Mr Boyd's offer.

"A number of formal objections to the valuation are stated on record, but I think that the only objections insisted in were these:—(1) That the valuation was not made by the directors but by the auditors; (2) that it proceeded on a wrong principle; and (3) because in any case it was totally erroneous, and the price of £20 put on the shares was totally inadequate.

"There is no direct evidence at all in support of the first point. No witness affirms it or can possibly affirm it. It is positively denied by Mr Monfries and Mr Boyd. Of course they relied very much on the reports of the valuators; but if they are to be believed, and I believe them, they carefully considered the question themselves. They were very familiar with the business and quite able to do so. It is clear, therefore, that this first objection is not proved, all the evidence being the other way.

"The second objection is that the valuators and directors went wrong in point of principle. I do not know that it matters whether they did or not, because their valuation, whether sound in principle or not, was what the articles provided for.

"The point is this. In consequence of the clauses restricting the freedom of sale of the shares it was impossible to get the company put on the Stock Exchange, and it was said that that was a disadvantage which, by narrowing the market, reduced or tended to reduce not the value of the shares but their market price. The valuators and the witnesses for the defenders admitted that in making their valuations they considered that these restrictions were disadvantageous, and that they made allowance for the disadvantage and valued the shares at a lower sum than they would have reached had there been no such restrictions. Counsel for the pursuers insisted that this was wrong and that they ought to have ascertained what the pursuers called the 'intrinsic' value of the shares, whatever that might mean, on the assumption that there had been no such restrictions. The defenders maintained that the principle on which the auditors had proceeded was sound; that the only intelligible meaning of value was value for sale or market value; and that it was right to value the shares as they were, with whatever disadvantages might arise from any of the conditions of the articles of association. I entirely assent to the defenders' view on this question, and think that a valuation in the manner suggested by the pursuers would have been false in principle, and probably erroneous in result. I am of opinion that the defenders' contention was correct.

The third objection to the valuation was that, in any view, it was grossly under the true value, whether the intrinsic or market value.

"Here again I think it would have been sufficient to say that the valuation was *bona fide* whether it was right or wrong. The pursuers' case seems to be that the valuation was so far wrong that it could not have been *bona fide*, but was fictitious; and if the pursuers had made out that, which is their case on record, they might perhaps succeed. It is to this part of the case that the greater part of the evidence has been directed, and accountants of the highest reputation have been examined on both sides, with the usual result of expert evidence.

"I cannot think that it would do any good at all to discuss this expert evidence (it is chiefly evidence of experts) in this note. I think that no such discussion would assist any court of review, and I must leave the matter over for verbal debate, to which I can give no real assistance should the case go further. My own impression is for the defenders, and I will content myself by making one or two observations of a general, not a technical, kind. Firstly, I do not think it would be sufficient for the pursuers to prove only that the shares were or ought to have been valued at a rate higher than £20. They must prove that the valuation was not a real one, or at least that the error was very gross. The chief elements in the calculation seem these two—(1) the earning power of the company, and (2) its stability, which latter is matter for speculation and conjecture, and which cannot depend only on the previous history of the company, but on various facts, circumstances, and considerations, commercial and political, as to which an accountant has no special knowledge. The gradual annual increase in the valuations impresses me with the conviction that they have been annually and carefully considered, and I do not see any reason to think that these successive valuations were prejudiced or were made with the intent to show an under-valuation. It can hardly be doubted that in this case the defenders' witnesses have much the better knowledge, although it may be suggested that they are not so impartial. No witness on the pursuers' side can possibly be nearly so familiar with the affairs of the company as the auditors must have been, and nobody examined by them can be nearly so able to forecast its chances in the future as these auditors and Mr Boyd and Mr Monfries. I admit that on this point the evidence led by the pursuers has been forcible, weighty, and plausible. It has been met by evidence which may be described in the same language, and I cannot think it sufficient to disprove the valuation by the auditors and directors, and it seems altogether absurd to speak of these valuations or any of them as fictitious or illusory. I think the valuation on which Mr Boyd's offer proceeded must be regarded as a *bona fide* valuation.

"I am therefore of opinion that the case of the pursuers as regards this condition fails, and that the decision of the directors must therefore be sustained, and that the defenders must be assoilzied from the first conclusion.

"I think it better to decide nothing more at present until I am informed as to the views of the parties. Nothing, I think, was said at the debate about the second conclusion, and of course nothing was or could have been said about the third, because the action has been sisted against the trustees, against whom that third conclusion is directed."

The pursuer reclaimed, and argued—1. The Lord Ordinary was wrong in holding that article 37 did not apply to the case of the pursuer. She was "entitled to a share or shares in consequence of the death of a member," and therefore under article 37 the directors were bound to register her. That consequence followed from the nature of *jus relictæ*, in virtue of which she claimed. Where the bulk of the estate could be divided without realisation, which was the case here, the widow's right was to a third of the *corpus* of the estate, and was not a mere claim of debt against the executor—Stair i. 4, 21, iii. 4, 24; Ersk. Inst., iii. Tit. 9, 15, 19, 30; Bell's Prin., 1591; Fraser, Husband and Wife, 973, 982; *Ross* v. *Masson*, February 3, 1843, 5 D. 483; *M'Intyre* v. *M'Intyre's Trustees*, July 9, 1865, 3 Macph. 1074; *Tait* v. *Lees*, July 8, 1886, 13 R. 1104, *per* Lord Fraser, at p. 1106, 23 S.L.R. 782; *Naismith* v. *Boyes*, July 28, 1899, 1 F. (H.L.) 79, *per* Lord Watson, at p. 82, 36 S.L.R. 973. Although the executors here were registered as holders of the shares, they were under no obligation to go on the register — Companies Act 1872, section 75. They might instead have conveyed the shares directly to the pursuer and her children, according to their respective interests; surely then the pursuer would have been entitled to demand to be registered—*Bentham Mills Spinning Company*, (1879), 11 Ch. D. 900. 2. But assuming that the pursuer was not entitled to registration under article 37, and that her right depended on article 33, the directors were bound to exercise their right to refuse registration fairly and not corruptly. The directors occupied a fiduciary position not only towards the company but also towards the transferor and transferee. It was clear from the evidence of Mr Boyd that the directors had acted solely in the interests of the company and without regard to the pursuer's interests; and further, that the reasons assigned for their refusal to register the pursuer's share were in truth vindictive and therefore corrupt—*Penney* (1872), L.R. 8 Ch. 446; *Moffatt* v. *Parker*, (1878), 7 Ch. D. 591; *Coalport China Company* (1895), 2 Ch. 404; *Hannan* (1898), 14 T.L.R. 314; *Bell Brothers* (1891), 65 L.T. 214; *Huntington Copper Company* v. *Henderson*, January 12, 1877, 4 R. 294, *per* Lord Young, at p. 299, 14 S.L.R. 219. 3. Further, the condition on which the defenders were entitled to refuse registration had not been implemented. The valuation made by the defenders was grossly inadequate. Looking to the profit-earning capacity of the company, they could have declared an average dividend of 29 per cent. instead of 14 per cent.; and further, they had made a large and quite illegiti-

mate discount in respect of the restriction upon the transfer of shares. While that might affect their market value, it was not a fair element in the valuation of the shares as between partners in the company.

Argued for the defenders and respondents—The Lord Ordinary was right. 1. Article 37 conferred no right on a person in the pursuer's position; articles 36 and 37 both had reference to the case of executors, whom alone the company were bound to recognise; and article 37 dealt merely with the production of an executor's title. The pursuer's argument, founded on the alleged right of a widow to claim a third of the *corpus* of the estate, was ill-founded. Her right was no more than that of a creditor for a third of the realised estate, and was not different in its nature from *legitim*—Fraser, Husband and Wife, 976; M'Laren on Wills, 133; *Dalhousie* v. *Crokat*, March 26, 1868, 6 Macph. 659, at p. 666, 5 S.L.R. 406; *M'Murray* v. *M'Murray's Trustees*, July 17, 1852, 14 D. 1048; *Gilchrist* v. *Gilchrist's Trustees*, July 19, 1889, 16 R. 1118, 26 S.L.R. 639; *Ross* v. *Ross*, June 16, 1896, 23 R. 802, 33 S.L.R. 765; *Maben's Widow* v. *Maben's Executor*, March 20, 1901, 8 S.L.T. 390; *Inglis* v. *Inglis*, January 28, 1869, 7 Macph. 435, *per* Lord President Inglis, at p. 437, 6 S.L.R. 271. The doctrine maintained by the pursuer would be unworkable where the estate consisted of shares in many companies or of pictures, &c. 2. If the pursuer had no right under article 37 then her claim must be dealt with under article 33. Under that article, which was a condition of the pursuer's contract with the company, for she was already a shareholder, the directors had an absolute right to refuse registration. No doubt they must have formed the opinion that the pursuer ought not to possess more shares, but the Court could not inquire whether that opinion was well founded—*Houldsworth* v. *Brand*, May 18, 1875, 2 R. 683, 12 S.L.R. 450; *Guild* v. *M'Lean*, November 20, 1897, 25 R. 106, 35 S.L.R. 97. The pursuer must not only aver but prove corruption before she could call on the defenders to give their reasons for refusing to register—*Penney, supra.* But the reasons had been given, and they were legitimate reasons for the defenders' refusal. 3. The pursuer's attack on the defenders' valuation of the shares had failed. The question of valuation was eminently a matter of opinion. The valuation of the pursuer's witnesses was vitiated by the admission that they took no account of the restriction upon transfer. The only sound principle was to endeavour to ascertain what was the market value of the shares, and it was obvious that shares that were subject to such a restriction had a much lower market value than shares that could be freely exchanged. But even if the valuation had proceeded on a wrong principle the Court could not review it.

At advising—

LORD TRAYNER—The present reclaiming-note brings under review two interlocutors of the Lord Ordinary dated respectively 20th March 1900 and 30th September 1901. Both of these interlocutors deal with the question raised under the first conclusion of the summons (and its alternative), and that question is, whether the defenders Keiller & Company are bound to register the pursuer as the owner of one share in the defenders' company in respect of the transfer in her favour dated 25th March 1899. The decision of that question depends upon the view which may be taken of the rights of parties under the articles of association of the defenders' company.

The pursuer in the first place bases her right to have her transfer registered on the 36th and 37th articles of association. I am of opinion that the 36th article has nothing to do with the registration of transfers, and confers no right such as the pursuer now claims. That article is a declaration that in reference to the shares of a deceased shareholder the company will recognise no one as having any title thereto except the executor or administrator of the deceased, the purpose of which declaration I take to be that the company will not consider any competing title to a deceased member's shares, but will admit and recognise only the title vested in the deceased's executors. In that view of it the 36th article has no bearing upon the question before us. Nor, in my opinion, does the 37th article warrant the pursuer's demand to be registered. It provides (so far as it can in any view be made applicable to this case) that any person becoming entitled to a share in consequence of the decease of a member may be registered on producing such title as may be required by the company. The pursuer endeavours to bring herself within the provisions of this article thus—she says that as widow she is by law entitled to a third of the *corpus* of her deceased husband's moveable estate, that this estate consisted, *inter alia*, of shares in the defenders' company, and that she has become entitled to the share now in question (as well as others) "in consequence of the death" of a member of the defenders' company. The defenders answer this by saying that the pursuer as widow is not entitled to claim a share of the *corpus* of the deceased's estate, but has only a money claim for the value of one-third of the estate as it stood on her husband's death, and that therefore she has not succeeded or become entitled *jure relictæ* to any of the shares held by her deceased husband. Whether a widow's right is to a third of the *corpus* of her deceased husband's estate or only a claim of debt for the money value of such third need not now be determined, because I think the pursuer is precluded from maintaining here that she has become entitled to the share now in question in the defenders' company "in consequence" of her husband's death. That phrase, I think, covers only such persons as take by way of succession to or gift from a deceased member, *ex. gr.* a legatee or executor. It was urged by the pursuer that it could not include or mean an executor, as that was already provided for in article 36. It is not so according to my view, which I have already explained. Article 36 makes no

provision with regard to the registration of anyone, while article 37 provides, I think clearly, for the registration of executors, who take up shares "in consequence of the death" of the shareholder. But the case we have here to deal with is the case of a person who presents a transfer in ordinary form granted by persons who are the present registered owners of the share transferred. The share is transferred by a deed *inter vivos* and not in respect of any provisions in a *mortis causa* deed. Coming therefore as an ordinary transferee, and in no other character, I think the pursuer's right to be registered in respect of her transfer cannot be founded on article 37.

Failing her argument based on articles 36 and 37, the pursuer maintains, in the second place, her right to be registered in respect of her transfer as in ordinary course, and that the defenders' refusal so to register is not warranted by the articles on which they found their right to do so, or that at all events they have not validly and legally exercised the right which those articles confer. This leads to a consideration of articles 33 and 113.

By article 33 it is provided that the directors may decline to recognise or register any transfer of ordinary shares made to any person who, "being a member of the company" (which is the pursuer's case), "should not in the opinion of the directors be allowed to acquire or possess more ordinary shares." There is nothing illegal in this provision, and in many aspects of it it is reasonable. The pursuer can take no exception to it, for it is on that condition she is at present a shareholder—it is part of her contract with the company. But the directors must exercise the power so conferred on them fairly and reasonably; they must not act in the exercise of that power capriciously or corruptly. I may say at once that in my judgment there is no room in the present case for saying that the directors of the defender's company in refusing to register the pursuer's transfer acted corruptly. The averment to the effect that they had so acted is not proved. But for the very distinct averment made by the pursuer on this subject I should have refused to allow the pursuer any inquiry into the reasons which induced the directors to refuse to register this transfer. The power given to the directors to "decline to recognise or register any transfer" is absolute—it is not a power to be exercised only on cause shown, or a power the exercise of which must be justified by reasons sufficient in the judgment of the transferee or of the Court to which the transferee appeals. An inquiry into the directors' reasons for refusing to register the transfer in favour of the pursuer was allowed (I think properly) by the Lord Ordinary in respect of the pursuer's averment, and these have accordingly been given. The pursuer refers to them as showing that the directors were actuated by vindictive feelings and did not act upon any ground which took the interest of the pursuer or the company into consideration. The reasons assigned by the directors for their action are given by Mr James Boyd (one of their number) in the proof. The first of these and the one on which the pursuer charges the directors with having acted vindictively towards her is this — that in an action which she had previously brought against the executors of her late husband she had "exposed the whole affairs of the company much to its prejudice, in my opinion, in the eyes of the public." That, says the pursuer, is as much as to say — You brought an action into Court in which you exposed our affairs, and we will pay you back for doing so by now refusing to register your transfer. I think that is not a fair reading or representation of Mr Boyd's evidence. It appears to me rather that what Mr Boyd's statement amounts to is this—The pursuer in the action which she raised in pursuit of her own interests was quite unmindful of the interests of the company; and in disregard of its interests exposed it's affairs to the public, to it's prejudice. The directors might very well consider that what the pursuer had (in their opinion) done once she might do again, and that in the case of such a person it was not desirable to increase her holding in the company, which might enable her to repeat what she had done with greater influence and more effect. This may or may not be considered a good or sufficient reason, but it is not vindictive. Mr Boyd gave as another reason, that in considering whether a transferee should be accepted the directors had to consider if that transferee would be of any advantage to the company—that is, as I understand, whether the new transferee was likely to bring new business or aid in the management of the existing business. In neither of these regards was the pursuer likely to aid the company as the directors thought. With regard to this the pursuer says, that if this was a reason for refusing to accept the pursuer as a transferee it would equally have told against accepting Mr Boyd as the transferee (he was the company's nominee put forward to take the pursuer's place), because Mr Boyd's whole time and energies were already engaged in the service of the company, to whom he could give no further aid than he was already giving. But that objection leaves out of view that although Mr Boyd acquired the pursuer's share or shares it was not necessary that he should continue to hold them. Once acquired by him they were at his or the directors' disposal to transfer them when opportunity offered to any person whose capital, business connection, or business capacity made him desirable as a member of the company. In that way the interest of the company might be advanced. I do not think it necessary to consider farther the reasons assigned by Mr Boyd for the directors' action. They all appear to me to have a bearing upon the interests of the company, and such as might quite reasonably affect the minds of the directors in coming to the conclusion that the pursuer should not

be allowed to increase her holding in the company. Whether the reasons assigned by the directors for what they did are such as we should consider satisfactory or sufficient is not the question. I think that the directors did not act corruptly or through mere caprice; and that being so, the reasons which the directors considered sufficient for their action must, I think, be regarded by us as sufficient. The directors' opinions and reasons are not subject to our review.

There remains one other point to be considered which was presented in the argument for the pursuer. By the 33rd article of association of the defenders' company it is provided that the directors shall only be entitled to exercise their power of declining to register a transfer "on condition that they name a person or persons willing to purchase the shares or stock at the prices at which they were valued under article 113." Under article 113 the directors are required on the occasion of every balance to value the ordinary shares and report the same to the meeting at which the balance is submitted, "and all questions as to the value of such shares and stock shall be fixed, determined, and regulated by such valuation until a re-valuation is made." In pursuance of these provisions the directors of the defenders' company on 20th March 1899 fixed the value of the ordinary share at £20, and when they declined to register the pursuer's transfer they named a person willing to purchase the pursuer's share at that price. The pursuer declines to accept £20 as the value of her share; she says its value is at least £40. On this part of the case I agree so entirely with the views of the Lord Ordinary that I feel I cannot usefully add anything to what he has said. I may, however, add a word or two on the comparative value (as it appears to me) of the evidence adduced by the parties on the subject of value. On this subject the pursuer has adduced three witnesses, who agree in saying that the pursuer's share is worth £40. But all of them reach this figure by disallowing in their calculation the right of the directors to decline to recognise or register any transfer presented to them. Indeed, the evidence of Mr Wallace may I think be discounted entirely; it deals with circumstances essentially different from those presented by the case before us. He says himself—"It is certainly no part of my evidence to consider a case where registration could not be secured." The evidence of Mr Fowler again cannot be considered of weight as independent testimony. He accepts the data of Mr Tait, and therefore agrees with Mr Tait's conclusion. Mr Tait is really the only witness for the pursuer as to value whose evidence needs to be considered. And on consideration it satisfies me that his conclusion is erroneous. To get the value of £40 per share he takes not the dividends paid by the company but the whole profits earned, which he regards as available for division. When cross-examined he admits that to support his view it is necessary that the company should keep nothing as a reserve and write off nothing for depreciation, while he takes no account of fluctuations in price of raw material and makes no allowance for changes in the market. This view is repudiated by all the defenders' witnesses, and I think rightly so. Then Mr Tait values the share at what he calls its "intrinsic" value, and as a share on the transfer of which there is no restriction whatever. But the shares in the defenders' company are not of that character, and I should regard the value of the share as being just that which with all its restrictions it would bring when offered for sale. I entertain no doubt that a share of the defenders' company would bring £40 so long as a 20 per cent. dividend was paid on its par value if the share could pass from hand to hand without the transfer being subject to the directors' veto. But that restriction necessarily reduces the market value; for such a share there are few purchasers and can be no competition. That necessarily results in keeping down the price. The defenders, on the other hand, produce a body of evidence which I cannot resist. That evidence shows that the directors have valued the shares fairly and honestly. I give particular weight to the evidence of Mr Brown. In the view I have stated it is not for the Court to inquire whether the shares might be valued at something more than £20. It was left by contract to the directors to fix a value which should determine and regulate all questions as to the value which might arise, and having done that fairly and honestly according to their own judgment (supported as that is by experts of skill), I am of opinion that we cannot review or alter that determination.

The result is in my judgment that the interlocutors reclaimed against should be affirmed.

LORD JUSTICE-CLERK—I have felt this case attended with great difficulty and considered it time after time with great care. I have come to the conclusion at which Lord Trayner has arrived, and on the same grounds.

LORD YOUNG—We had a long and interesting argument from both sides in this case. I have given that argument, or these arguments, the best consideration I could. Since we made avizandum with the case I have read very carefully, indeed more than once, the judgment of the Lord Ordinary—I mean not only his formal judgment but his note stating his opinions upon the various matters which the case presented and the grounds of them, and I have also had the advantage of reading before to-day the judgment which Lord Trayner has just delivered—for he was good enough to let me have a perusal of it—and I may say at once that I concur in that opinion, and also assent to the opinion of the Lord Ordinary, I think, in all particulars.

I cannot say that after a consideration of the argument and of the Lord Ordinary's judgment, and reading as I did carefully the opinion of Lord Trayner which he has just read, I have thought the case attended with any difficulty, and the few, I fear

superfluous, observations which I have to make I do make only because I have a recollection of having interposed observations with the view of eliciting information in the course of the debate before us which might be interpreted as indicating views of my own adverse to the defenders' contention. I will state in a very few words a short view which I take of the case without at all qualifying my assent which I have already expressed to the Lord Ordinary's opinion and to the judgment which Lord Trayner has just delivered.

The shares which have given rise to the whole discussion here are 1249 shares which belonged to a partner, a Mr Bruce, who died in the year 1895. These shares on his death passed to his executors, and I think—I do not need to give any reasons for so thinking, they have been expressed already—the directors of the company acted properly and in accordance with the articles of association in recognising these executors as the holders of the shares, and in registering them accordingly. I think this is the effect of clause 36 of the articles of association, and Mr Bruce, who was the holder of the shares and therefore a partner of the company and a party to the articles of association, knew, and we are told that he knew, that his shares would be registered in the name of the executors, who alone were recognised by the company under the articles of association as the holders of the shares. This case relates to one of these shares which the executors had transferred to Mr Bruce's widow—properly, I assume, transferred to Mr Bruce's widow. She is therefore a transferee of the share in question, and it is upon that transfer that she makes a claim which we have now before us, which the Lord Ordinary has disposed of, and which we have now to dispose of.

She could have no other right in the view that the executors of her deceased husband could alone be recognised as the holders of the shares and registered in respect thereof. She has all the right which a transfer by the registered holder of the share could give her and no more. I do not think she is in any other position than any person to whom, in the discharge of their duty, the executors had sold the shares and transferred them would be; but it is quite plain on the articles of association that such a transfer could not be registered unless the directors chose. They were entitled to what is called a power of declinature, and they declined to register; but that power of declinature which is given by the articles of association is upon a condition—that condition being that they shall find a purchaser from the transferee whom they decline to accept as a partner, and to register accordingly at the price fixed by the directors as the value of the ordinary shares—that is, under clause 113 of the articles of association. Now, I shall perhaps put my brief, I hope clear, view of the rights of parties best by saying that a transferee of the executors of the deceased is in no better or worse position or different in any respect in position from what a transferee upon a transfer by Mr Bruce in his lifetime would have been. Mr Bruce in his lifetime could transfer any one or all of the 1249 shares which he held, but subject to the directors' power of declinature to admit the purchaser or purchasers. Indeed no one but a shareholder could transfer, and the power of declinature of the directors would apply clearly and distinctly, or would have applied, I should have said, clearly and distinctly to a transferee from Mr Bruce; for example, his widow. If he had transferred one of his shares to his widow the directors might have exercised their power of declinature, saying "We shall find a purchaser from her at the price fixed by the directors under clause 113, but we exercise our power upon that condition;" and Mr Bruce could not have objected to that, for he was a party to these articles of association and knew that he could not transfer except subject to the power of declinature of the directors, and this power of declinature was given by the articles of association for what appears to me to be a very intelligible reason. They thought it was in the interests of the company that the company should be protected against being invaded by shareholders—it might be overwhelmed by shareholders—whose presence as shareholders of the company at meetings thereof might bring the whole affairs of the company into a very unpleasant and unprofitable condition. For example, if Mr Bruce could have alienated one share to his wife or to anybody he could have alienated each of the 1249, one to each of 1249 individuals. Now the company desired to protect themselves against that, which they did by providing this power of declinature upon the condition of finding a purchaser from a transferee of any share at the price fixed under clause 113. Now I point out, and I think it is worthy of consideration, with regard to Mr Bruce and the others, the seven original shareholders, that they were practically the managers of the company. There were only seven of them altogether, and they were all aware of these articles of association and of the purpose of them, and of the limitation of their individual powers thereby created of alienating their shares. So that the question comes to be just this—Did the directors of the company proceed fairly under clause 113? Now, neither Mr Bruce nor any of those seven shareholders could have been heard to say that they did not, for they were themselves parties to it. I agree with Lord Trayner in thinking that the evidence here would not have been allowed at all—we would not have allowed a proof—unless there had been strong allegations of corruption which we thought it would be better should be cleared away before disposing of the case. I think we would not have allowed a proof to inquire into the grounds on which the directors proceeded—the views on which they proceeded—in fixing the value of the shares from time to time under clause 113 for all purposes. But taking the evidence here, I am of opinion that there is no

corruption established or anything off the straight, and that the directors may be held and must be held to have proceeded on reasonable and allowable views as to what was in the best and fair and legitimate interests of the company and of the shareholders thereof in fixing the value as they did.

I am therefore of opinion that these articles of association ought and must have effect given to them as the conditions upon which the company was formed and existed, with a view to the business carried on by it; and that being so, I agree with the Lord Ordinary and with the judgment of Lord Trayner in thinking that there are no grounds of complaint on the part of the present pursuer and that the directors are not at all bound to register the transferee—the widow, now the wife of a successor to her first husband—as a shareholder, but that they have exercised their power of declinature upon the fair condition to which I have adverted and to which they are prepared to give effect.

LORD MONCREIFF—I have the misfortune to differ from your Lordships and the Lord Ordinary. I do so with diffidence and after repeated consideration, and I need not apologise for giving my reasons in some detail.

The only question which is in the meantime submitted for our decision by this reclaiming-note is one between the pursuer and the defenders James Keiller & Son, Limited, viz., whether those defenders are bound to register the pursuer Mrs Stewart as owner of one ordinary share in the said company which was transferred to her by the defenders, the executors and trustees of her husband the late William Keiller Bruce, on or about 25th March 1899. There is at present before us no question between the pursuer and William Keiller Bruce's trustees.

The case is represented, at least by the defenders, as being a test case. I should be glad to think that a final decision in this case would settle all disputes. In the meantime, however, we must decide whether James Keiller & Son are entitled to refuse to register this one ordinary share. That is the question put to us; but in deciding it is inevitable that we should consider the wider aspects of the case.

Before considering the pursuer's grounds of action, it will be convenient to state shortly how this question arises. The female pursuer was the widow of William Keiller Bruce, who died on or about 18th March 1895. He was a shareholder and director of James Keiller & Son, Limited.

The free estate which he left consisted almost entirely of shares in that company. This, in my opinion, is a material fact in the case, as the pursuer's *jus relictæ* must be satisfied out of those shares either by transfer to her or by sale. Under his trust-disposition and settlement his widow, if she married again, forfeited all the conventional provisions therein made in her favour. The pursuer at first elected to take under her husband's will, but afterwards, being anxious to marry again, she sought to set aside her election and claimed *jus relictæ*. This was strenuously opposed by her co-trustees. They were Mr J. M. Keiller, who had a preponderating influence in the limited company, and Mr W. Stephen, who was also a shareholder in the company. Not content with taking the judgment of the Lord Ordinary, who held that the pursuer was not bound by her election, the trustees reclaimed to this Division of the Court, who affirmed the Lord Ordinary's interlocutor, holding that the pursuer had been unduly pressed to make her election, and that she had been led to do so without receiving independent advice and without due consideration.

It was plain from the evidence and correspondence in that case that the defence to the pursuer's action was to a great extent (perhaps unconsciously) influenced by the dread that if the pursuer were allowed to take her legal rights and thereafter married she might demand to be put on the register as holder of some of her first husband's shares in the company, and that thus in some way the interests of the company would be injuriously affected.

That was certainly my impression when the case was before us, and the evidence of Mr James Boyd, the managing director of the company, in this case shows that that impression was well founded.

I am satisfied, from a perusal of the evidence and correspondence in this case, that the one desire of the pursuer and her advisers has been to get the fair benefit in one way or another of her interest in the valuable shares of which her first husband died possessed, which on the defenders' own figures are now worth twice as much as in 1895 and yield a return of at least 18 per cent. But every proposal to effect this met with uncompromising opposition. At last, under pressure, Mr Bruce's trustees consented to the Lord Ordinary making an order upon them to transfer to the pursuer one ordinary share in the company to account of the *jus relictæ* in order that she might apply to the defenders' directors to have the transfer registered.

The application was considered at a meeting of the directors held on 4th April 1899, at which there were present Mr James Boyd, his two sons, Mr Wm. and Mr Just Boyd, who had recently been elected directors, and Mr Monfries, the former secretary, and representative of the estate of Mr J. M. Keiller, who died in January 1899. The meeting unanimously declined to register the transfer.

The pursuer rests her case alternatively upon the 37th article of association and the 33rd and 113th articles.

1. The question on the 37th article is, whether in the sense of that article she is entitled to the share in question "in consequence of the death of a member of the company."

On consideration of the authorities which were referred to I do not think that as a general rule a widow claiming *jus relictæ* is entitled to the *ipsa corpora* of any particular assets of her deceased husband's

estate. It may be that the executors of the deceased, if they hold shares, for instance, may be compelled in satisfaction of the *jus relictæ* to transfer some of them to the widow instead of realising them at a loss and paying her in cash. But that may be said to be a matter of trust management.

Again, the 37th article seems to refer primarily to a specific bequest of shares, in which case the executors of the deceased would simply transmit the shares to the beneficiary, which they might do under section 24 of the Act of 1862 even without going on the register.

On the other hand, it may be said that the pursuer is in a wider and not a strained sense entitled to some of the shares in consequence of her first husband's death, because her claim for *jus relictæ* cannot be satisfied without transferring or realising some of the shares. And this share, it is to be observed, was transferred to account of the *jus relictæ*. There is no other free estate, and the trustees as regards the pursuer are therefore on the register merely for the purpose of distributing the deceased's estate. They hold for the pursuer *inter alios*. In consequence of their registration they may or may not remain liable to the company under article 36 and the proviso at the close of article 37, but that does not affect the question.

I do not, however, find it necessary to express a decided opinion on this ground of action, as on other grounds I am of opinion that the pursuer is entitled to decree in terms of the first alternative conclusion of the summons.

2. Even although the pursuer cannot compel the defenders to register the transfer under the 37th article, the provisions of that article are not without an important bearing on the other branch of the case, because they contemplate the registration of outsiders, who become entitled to shares in consequence of the death, bankruptcy, or marriage of a member, which is against the idea entertained by the directors that they have an absolute right to prevent the entry of outsiders. It must be remembered that although these articles of association contain restrictive conditions the company is not a private company; it is a joint-stock company, and the proceedings of the directors must be considered in that light, subject always to the special articles of association which they have adopted.

The pursuer's case upon the 33rd and 113th articles is this—The 33rd article gives the board of directors power to decline to register a transfer "to any person who in the opinion of the directors should not be admitted as a member of the company, or who, being a member of the company, should not in the opinion of the directors be allowed to acquire or possess more ordinary shares or stock." But this power is subject to the condition that the directors shall name a person or persons "willing to purchase the shares or stock at the prices at which they were valued under article 113," that being an annual valuation made by the directors themselves prior to the ordinary general meeting.

It will be observed that the power of declinature and the condition annexed to it to a certain extent depend on each other. The board is not entitled to decline to register the transfer unless they name a person willing to purchase at the valuation fixed under the 113th article, and if they do not do so, or if the valuation is shown to be radically erroneous, the directors will be bound to register the transfer, the condition not having been fulfilled.

But, on the other hand, even although the valuation is unimpeachable and the directors name a person willing to purchase at that price, it does not follow that they will be entitled to decline to register a transfer. The terms of the power imply that there shall be a fair consideration of each individual case; and if it is shown that the board's declinature has proceeded not upon such fair consideration but upon an arbitrary and capricious determination not to accept the transferee, their declinature will not be sustained. As Lord Justice Rigby says *in re Coalport China Co.*, L.R., 1895, 2 Ch. 409—"Even though in terms the power is absolute it is a fiduciary power; it is to be exercised for the benefit of the company and with due regard to the rights of the transferee." I would add, "and of the transferor." I assume in favour of the defenders that when articles of association contain such restrictive conditions directors cannot be called upon to give the reasons of their determination, unless some evidence is adduced to show that *prima facie* they have not acted in *bona fides* in declining to register the transfer. I further assume in their favour that in order to set aside their declinature it will not be sufficient to show that the reasons assigned by them are what the Court might consider erroneous or insufficient. I agree with the principles laid down by the learned Judges *in re Gresham Life Assurance Society, ex parte Penney*, L.R., 8 Ch. App. 446. Lord Justice James says (p. 449)—"No doubt the directors are in a fiduciary position both towards the company and towards every shareholder in it. It is very easy to conceive cases, such as those cases to which we have been referred, in which this Court would interfere with any violation of any fiduciary duty so reposed in the directors. But in order to interfere on that ground it must be made out that the directors have been acting from some improper motive or arbitrarily or capriciously." Lord Justice Mellish's opinion (p. 452) is to the same effect.

Those principles were given effect to in later cases, and in particular *in re Coalport China Company* and *Moffat* v. *Parker*, L.R., 7 Ch. Div. 591. I may also refer to Lindley on Partnership, vol. i. p. 702.

Perhaps the most satisfactory and complete statement of the law is to be found in the opinion of Mr Justice Chitty in the case of *in re Bell Brothers*, 1891, 65 L.T.R. 245.

In many respects, which I do not stop to point out, the case closely resembles the present. The directors' powers of declinature were wider than those in article 33—

"The directors shall have an absolute discretion as to accepting or rejecting any transfers of shares . . . and they shall not be bound to give any reason for rejecting any such transfer."

The only reason for declining to register which was assigned was that the directors desired to keep the shares of a deceased member in the family. The Court held that to be an improper reason and ordered registration.

Mr Justice Chitty said (p. 245)—"According to the constitution of this company every shareholder is entitled to transfer his shares to any person not being an infant, lunatic, married woman, or under any legal disability. This right, which is a right of property, is subject to the discretionary power conferred on the directors by articles 18 and 34 of approving of the person to whom the transfer is made, and of rejecting the transfer on the ground that they do not approve of the transaction. The discretionary power is of a fiduciary nature and must be exercised in good faith, that is legitimately, for the purpose for which it is conferred. It must not be exercised corruptly or fraudulently or arbitrarily or capriciously or wantonly. It may not be exercised for a collateral purpose. In exercising it the directors must act in good faith in the interest of the company and with due regard to the shareholder's right to transfer his shares, and they must fairly consider the question of the transferee's fitness at a board meeting. When the Court once arrives at the conclusion that the directors have in good faith rejected a transfer on the ground that the transferee is not a fit person to become a member of the company it will not review the directors' decision. The directors are not bound out of Court to assign their reasons for disapproving. If they decline to do so, or if their decision is challenged in Court and they refrain from giving evidence upon which a cross-examination may take place as to their reasons, or if giving such evidence they refrain from stating their reasons, the Court will not merely on that account draw unfavourable inferences against them. In those articles there is an express provision protecting the directors against any liability to disclose their reasons. They are, however, at liberty if they think fit to disclose them, and if they do the Court must consider the reasons assigned with a view to ascertain whether they are legitimate or not; or, in other words, to ascertain whether the directors have proceeded on a right or a wrong principle. If the reasons assigned are legitimate the Court will not overrule the directors' decision merely because the Court itself would not have come to the same conclusion. But if they are not legitimate—as, for instance, if the directors state that they rejected the transfer because the transferor's object was to increase the voting power in respect of his shares by splitting them among his nominees—the Court would hold that the power had not been duly exercised. So also if the reason assigned is that the transferee's name is Smith or is not Bell. Where the directors do not assign any reason it is still competent for those who seek to have the transfer registered to show affirmatively if they can by proper evidence that the directors have not duly exercised their power."

These being the principles upon which such restrictive clauses should be considered by the Court, I now proceed to consider the defenders' attitude and reasons for declining to register the transfer. A perusal of the whole of the evidence and correspondence has led me to the conclusion that the refusal is primarily traceable to the opinions and great influence of the late Mr J. M. Keiller, an influence which has survived him. He was practically the founder of the limited company, and held a preponderating interest in it, viz., 4999 ordinary shares out of 9600, which enabled him to control it. Besides, he manifestly exercised a great personal influence over the opinions and actions of his fellow-shareholders and directors. It is fair to him and to Mr Stephen to say that it appears from their letters that before the pursuer went back upon her election they seem to have behaved with great kindness to the pursuer and her family, but when she expressed her intention to marry again and to claim her legal rights they seem to have been utterly unable to appreciate her position and interests. They resented what they considered her disrespect to the wishes of her late husband and of Mr J. M. Keiller; they anticipated and dreaded a claim on her part to be registered as holder of a third of her husband's shares, and from the first they were determined that if she was allowed by the Court to claim her legal rights those rights should be restricted to her being paid out in cash on the footing of the shares being only worth £12, 10s., the amount of the valuation under article 113 in 1895, the year of Mr Bruce's death.

Mr J. M. Keiller's views in regard to articles 33 and 113 as applied to the pursuer were distinctly stated in the evidence which he gave in the previous case, passages from which are quoted in Mr Clark's evidence. From those passages it appears that in his opinion those clauses were inserted with a view of wholly excluding outsiders from the company, although this is a joint-stock company limited by shares. The evidence is correctly interpreted by the company's agent, Mr John Kidd, who, in writing to Mr Monfries on 1st April 1898, says—"I have got from Messrs Ferguson & Stephen copies of the evidence given by Mr Keiller and Mr Boyd in that case. You will notice from the copies which are sent herewith that both Mr Keiller and Mr Boyd are quite decided that they will not have Mrs Bruce Stewart as a shareholder for any of the shares which belonged to her husband."

Mr Boyd's evidence in this case is quite to the same effect. I gather from those passages that the directors of Keiller & Son believed that they were entitled arbitrarily to refuse to register any outsider. If that were sound it would be an extremely simple ground of judgment. But in their

evidence and during the discussion they did not quite take up that position. They profess to have considered the pursuer's claim to be put on the register and to have declined to register her for specific reasons and simply in the interests of the company. For a long time Mr Boyd, when under cross-examination, declined to state the directors' reasons, and I am not much surprised that he withheld them as long as possible. The Lord Ordinary was of opinion (I think rightly, for reasons which I have indicated) that a *prima facie* case had been presented, and he (at last) compelled Mr Boyd to answer, which accordingly he did. The reasons which he gives for declining to register the shares are precisely those which I should have expected; and in my opinion they are not only insufficient but illegitimate.

"The first reason is thus stated—'Very shortly after her husband's death she married, and in our opinion her husband had no interest in the business of the company.' That surely is not a legitimate reason. The 37th article contemplates the marriage of a shareholder and the substitution of a husband or marriage-contract trustees for a female member of the company. If the female pursuer at the date of her second marriage had been possessed of this share and had conveyed it to her second husband in her marriage-contract the directors would have been bound to register him. Here, however, as I understand, the share was transferred by the trustees to the female pursuer, not to her husband, and therefore all that the defenders are asked to do is to register her for a second share, she already possessing one and being on the register.

"The next reason is still more objectionable—'Moreover, she brought an action which exposed the whole affairs of the company, much to its prejudice, in my opinion, in the eyes of the public. That is to say, the whole private affairs of the company through this action were brought out.' In my opinion this reason, in a legal sense, is a corrupt one and lies at the root of the defence. It comes to this, that the defenders refuse to register the pursuer to punish her because, in order to enforce her legal rights, she raised an action in the course of which she was compelled by the obstinate defence stated by her trustees to give a certain amount of publicity to the company's affairs. She could not have properly presented her case and she could not have won it without doing so. In my opinion this reason taints the whole of the declinature.

"The next reason is that the pursuer wanted to purchase shares with the view to selling them to the public. The only excuse for this statement is that, as one of the many attempts to conciliate her trustees and the company, the pursuer's agent offered to purchase the whole of the 1248 shares which belonged to Mr Bruce at £40 per share. But as this would have involved a very considerable sum, it was proposed in connection with that offer that the pursuer should be allowed to transfer some of those shares in order to raise the price required.

"But the directors have the remedy in their own hands, and no such question could arise if the pursuer received a transfer of a third of the shares as representing her *jus relictæ* and agreed, as she is willing to do, to retain them.

"Another reason given is that the pursuer 'being a married lady is very likely to be very little help in the management of the company.' What bearing has this on the question? The pursuer is already on the register both in her own right and as trustee, and she would give just as much or as little help in the management of the company if she were registered for another share or 400 other shares.

"Finally, Mr Boyd says that if the pursuer were to get a further increase 'there would be a constant agitation to get the company thrown on to the public at its inflated value.' There is no warrant whatever for this suggestion. On the contrary, the pursuer undertook through her agent that if she were registered she would not interfere in the affairs of the company. Mr Boyd concludes by saying that the only outsiders who were permitted to enter the business were his own sons, and that was because it was thought they would be of use in the management.

"These are the whole reasons. In my opinion none of them are legitimate. The directors were acting in a fiduciary capacity, and they were bound to consider not only the interests of the company but those of the pursuer, especially as she is not a mere outsider. In addition to being already a shareholder in her own right, she is beneficially interested to the extent of one-third in the estate of Mr Bruce, which is wholly sunk in shares in the company, some of which must be sold to pay her unless they are transferred to her as she proposes.

"The defenders are in this dilemma. If the only question raised in this action is whether the pursuer is to be registered as the transferee of one share, no stateable objection can be urged, the pursuer being already a member of the company. If, again, this is to be regarded as a test case, it must be assumed as in a question with these defenders that the pursuer is entitled to receive and will receive from Mr Bruce's trustees a transfer of 416 shares in Keiller & Son, and that she is desirous of being registered as owner of these shares for the purpose of holding them. It is not for the company to inquire the terms on which the pursuer obtains the shares. The case must be disposed of on the footing that the pursuer will come to the directors with transfers for 416 shares (or other number representing her *jus relictæ*) in her hand. On this assumption, have the defenders stated any solid or legitimate ground for depriving the pursuer of the full benefit of the shares to which *ex hypothesi* she is entitled?

"I am of opinion that they have not. It is only too clear that the pursuer's present claim was finally prejudged (honestly, I quite believe) some years ago by Mr J. M.

Keiller and Mr Boyd, who had absolute power in the company. They resolved that she should not be registered as the owner of any more shares than one which she possessed. This might not have mattered if the reasons for so deciding had been sound and remained good. But, as I think I have shown, they are not; the reasons being partly to punish the pursuer for insisting in the former action, and partly to continue the traditional policy of reserving the company exclusively for the family of Mr J. M. Keiller and those whom he thought fit to admit.

"Therefore, even if the price which Mr Boyd is willing to pay for the share in question were its true value, I should be prepared to hold that the defenders are not entitled to refuse to register the share.

"3. But the case does not stop there. We have to consider whether the defenders have complied with the conditions specified in the 33rd article, more particularly whether the sum which Mr Boyd now tenders as the value of the share transferred to the pursuer has been properly fixed in terms of the 113th article.

"In regard to this article, as in regard to the 33rd, I fully recognise that a valuation made by the directors must not be too closely scrutinised or lightly disregarded. I see no reason to think that the valuation of £20 put upon the shares in 1899 was fixed with special reference to the pursuer's claim, because I observe that there has been a gradual increase in the valuations from £12, 10s. in 1895 to £24 at the present time. Again, if it had been necessary to decide at present the precise value of the shares in 1899, I should have had some difficulty in doing so, because the defenders have adduced a formidable body of skilled evidence to show that the pursuer's estimate of £50 or even £40 is much too high, and although I may think that the estimate of £40 a share, backed as it is by a firm offer to purchase the whole of the shares at that price, is justified on a 5 per cent. basis, I should have hesitated to hold that value so clearly proved as to warrant decree for that sum.

"But the question is, whether the sum of £20 tendered can be justified. I am of opinion that it cannot, because apart from other objections it is admitted that in arriving at it a considerable deduction (we are not told how great) was made in respect of the restrictive clauses. Mr Palmer, the defenders' accountant and principal skilled witness, says, 'In our valuation we gave *very considerable* effect to those restrictions, but I am afraid I cannot tell you the exact percentage of depreciation that would mean. It is a thing which you cannot work out actuarily, *but it did very seriously depreciate the value of the Keiller shares*, because you could not sell them readily; and what a man cannot sell readily cannot be of as much worth to him as shares which he could go into the market with and sell entirely.'

"The defenders' position is (to take a hypothetical case), that although the shares may be worth say £30 to hold they are not worth more than £20 for transmission, because, in view of the directors' power of rejection, no one would give more than £20 for them in the market. If there was a market for those shares I apprehend that the defenders would be the first to say that in valuing the shares under the 113th article they were in no way bound to accept the market price, which might be so inflated as to make the working of the 33rd article impracticable.

"But in point of fact there is no market for the sale of those shares. The directors have of set purpose made this impossible. This might not prejudice the transferor if a value were put upon the shares which fairly represented their earning power. But the directors refuse to admit any outsider, and then, having practically reconverted this into a private company, they say to the shareholder, 'If you wish to realise your shares you must sell them to one of us at a reduction of a third of the value' or whatever the reduction may be.

"They have the shareholder at their mercy, because *they* fix the value on the footing of an imaginary market price, and *they* are the only possible purchasers. In other words, they first depreciate the shares and then they offer to buy them at the depreciated value.

"In my opinion this is not a fair exercise of the directors' powers under these articles. It may be conceded that the power of valuation under article 113 enables the directors to prevent an inflated value being put upon the shares. But, on the other hand, it does not warrant them in depreciating the shares to the prejudice of the shareholders and to their own advantage. I have no reason to think that Mr Boyd's object or that of the other directors is to make profit out of the transaction. I think their principal if not their only object is to prevent the pursuer acquiring more shares and to exclude all outsiders. But the result would be to enable them to make a profit at the pursuer's expense in what I consider not a legitimate way.

"I am therefore of opinion that the price, £20, tendered is insufficient, and that therefore the condition on which alone the directors are entitled to decline to register the pursuer has not been fulfilled. In my opinion the pursuer is entitled to declarator in terms of the first declaratory conclusion of the summons."

The Court refused the reclaiming-note, and adhered to the interlocutor reclaimed against, with this correction, that the Court sustained the fourth plea-in-law for the defenders James Keiller & Son, Limited, instead of the third plea-in-law sustained by the Lord Ordinary.

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