upon the pursuer's own argument part of the whole has been exclusively appropriated by use for purposes of interment. *Ex concessis* assessments cannot be imposed upon what is *de facto* occupied, and as there are no materials in the case for ascertaining what part is exempt, it would not be possible to give an operative decree under the conclusions of this action.

The LORD PRESIDENT, who was present at advising, gave no opinion, not having heard the case.

The Court adhered.

Counsel for the Pursuer—M'Lennan, K.C. —Kemp. Agents—R. Addison Smith & Company, W.S.

Counsel for the Defenders—Murray, K.C. —D. Anderson. Agents—Nisbet, Mathison, & Oliphant, W.S.

Saturday, July 13.

SECOND DIVISION.

PAUL'S TRUSTEE *v.* THOMAS JUSTICE & SONS, LIMITED.

Company—Capital—Lien of Company for Debts Due to it—"Holder" of Shares.

By its articles of association a company had a lien "on all shares . . . for all moneys due to it from the holder or any joint-holders thereof." A shareholder, who was indebted to two banks, transferred to and registered in the name of nominees of the banks certain shares standing in his own name, and purchased and registered in the same names certain other shares which had never been registered in his own name, all in security of the debt due by him to the banks. On the shareholder's death his estates were sequestrated. The banks having obtained payment of their debt out of other securities, admitted that they held the shares for the deceased's trustee, and were ready to transfer them to him, but the company claimed a lien on them in respect of a debt due by the deceased to it. On a special case being brought to decide whether the company was entitled to the lien, *held* that the expression "holder" of shares in the articles meant "registered holder" of shares, and since the deceased's trustee was not the registered holder of the shares, although he had the radical right to them, the debt due by the deceased was not a debt due by the "holder" of the shares, and the company was not entitled to the lien.

The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), enacts, sec. 24—"(1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration shall be entered as members in its register of members. (2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, shall be a member of the company." Section 27 —"No notice of any trust, expressed, implied, or constructive, shall be entered on the register, or be receivable by the registrar, in the case of companies registered in England or Ireland."

On 9th December 1911 a Special Case was presented to the Court by Stephen Mason Rae, C.A., Dundee, trustee on the sequestrated estates of the deceased George Brodie Paul, solicitor, Dundee (*first party*), and Thomas Justice & Sons, Limited, Dundee (*second parties*), to decide as to the right of the second parties to a lien over certain shares in their company belonging to the said George Brodie Paul.

The Case stated—"1. The estates of the deceased George Brodie Paul, sometime solicitor in Dundee, were sequestrated on 29th July 1911, and the said Stephen Mason Rae, the party of the first part, was appointed trustee thereon. . . . The parties of the second part are creditors upon the estate of the said deceased George Brodie Paul, and have lodged a claim thereon, amounting to £3854, 8s. 3d. The said George Brodie Paul died on 23rd January 1911.

"2. At the date of the death of the deceased George Brodie Paul he held the following shares in Messrs Justice & Sons, Limited, namely (1) . . . (2) . . . (3) . . . (4) . . . With the exception of the shares under head 4 above mentioned, the whole other shares referred to were, during his lifetime, assigned by the said George Brodie Paul in security of advances made to him, or obligations undertaken by him, to the Bank of Scotland, Dundee, and the British Linen Bank respectively. The shares under head 1 were originally acquired by the deceased Mr Paul, and were registered in his name, but on 22nd January 1909 they were transferred by him to certain nominees of the Bank of Scotland, and at the date of the sequestration they stood registered in the names of these nominees. At the date of the sequestration the shares under heads 2 and 3 stood in name of certain nominees of the British Linen Bank, Dundee. [Certain of these shares] were originally acquired by Mr Paul and registered in his own name, but they were transferred by him to the said bank's nominees on 7th September 1906. The other shares under these two heads were acquired by Mr Paul but were never registered in his name, the transfer having been taken direct from the seller to the bank's nominees. The shares under head 4 have all along been registered in Mr Paul's name, and they was so standing at the date of the sequestration and no question arises as to them.

"3. In addition to the above-mentioned shares the Bank of Scotland and the British Linen Bank held assignations of insurance policies over Mr Paul's life and certain other securities. After Mr Paul's death the said banks realised the said insurance policies and other securities, which produced sufficient sums to meet

all the obligations for which Mr Paul was liable to them. They did not require to realise the shares in Messrs Justice & Sons, Limited, and these shares still stand registered in the names before mentioned. The said parties, though still on the register, admit that they hold the said shares for the first party, and are ready to transfer the same to him.

"4. By article 27 of the articles of association of Justice & Sons, Limited, it is provided as follows, viz.—'The company shall have a first charge or paramount lien on all shares (and such lien shall extend to all dividends and bonuses from time to time declared thereon) for all moneys due to it from the holder or any of the joint holders thereof, either alone or jointly with any other person, including all calls, the resolutions for which shall have been passed by the directors, although the times appointed for their payment may not have arrived.' By the said articles of association it is further provided that such lien may be made available by the sale of all or any of such shares, and that in case of such a sale the directors shall apply the clear proceeds (after payment of any expenses) in or towards the satisfaction of such debt, and the residue (if any) shall be paid to such holder. By article 35 of the said articles of association it is further provided—'The instrument of transfer of any share in the company shall be executed by both transferor and transferee, and the transferor shall be deemed to remain the holder of the shares until the name of the transferee is entered in the register of members in respect thereof.' . . . After Mr Paul's death and prior to the date of the sequestration, the trustees under Mr Paul's disposition and settlement gave up an inventory of the deceased's estate in which the shares held by him in Thomas Justice & Sons, Limited, were included. The trustees paid duty upon and were duly confirmed to the said shares, and the confirmation in their favour was marked as 'exhibited' by Thomas Justice & Sons, Limited."

[Article 39 of the articles of association of Justice & Sons, Limited, was referred to in argument, and was as follows—"39. The Board may in their discretion, and without assigning a reason therefor, refuse to register the transfer of any share to any person whom they shall not approve of as transferee. . . . The Board may also refuse to register any transfer of shares on which the company has a lien."]

The *question of law* was—"Are the second parties entitled to a lien in terms of their articles of association over the shares held by the deceased George Brodie Paul in their company, so far as these shares were transferred to and held by nominees of the said banks at the date of the sequestration of the deceased George Brodie Paul?"

Argued for the first parties—The company was not entitled to the lien in question, because article 27 of the articles of association gave it a lien only against the "holders" of the shares. But the "holders" of the shares meant the persons in whose names the shares stood in the register, viz., the two banks, against whom the company had no claim of debt. It was true that the nominees of the banks merely held the shares in security, yet these nominees were the only persons who, so far as regards any question with the company, had any rights or liabilities in connection with the shares. Although in Scotland notice of a trust might be entered in the register, whereas in England by section 27 of the Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69) no such notice could be entered, the entry in the register was merely for the purpose of earmarking the shares as the property of the trust, and it made no difference to the liability of the persons whose names were entered. In both countries they were personally liable—Buckley on Companies Acts (9th ed.), pp. 74-5. Moreover, the company was safeguarded by article 39 under which they could refuse to register any transfer. The following cases were referred to—*Muir* v. *City of Glasgow Bank*, December 20, 1878, 6 R. 392, *per* Lord President at p. 403, 16 S.L.R. 139, *per* Lord President at p. 149, *affd.* 6 R. (H.L.) 21, 16 S.L.R. 483; *in re Perkins ex parte Mexican Santa Barbara Mining Company*, 1890 L.R., 24 Q.B.D. 613, *per* Lord Coleridge at p. 615, and Lord Esher at p. 617; *Gillespie & Patterson* v. *City of Glasgow Bank*, February 27, 1879, 6 R. 714, *per* Lord President at p. 715, 16 S.L.R. 473, *per* Lord President at p. 474, *affd.* 6 R. (H.L.) 104, 16 S.L.R. 815.

Argued for the second parties—The company was entitled to the lien in question, because article 27 of the articles of association gave the company a lien against the "holders" of the shares. Section 24 of the Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69) defined the members of a company as the persons whose names were entered in the register, but the expression "holders" in article 27 was wider than "members," and included the person in whom the radical right remained. In the case of the *Mexican Santa Barbara Mining Company* (*cit.*) the articles expressly restricted the lien to one against registered holders. In this case if "holders" meant registered holders there was no reason for article 35. Admittedly the company had waived its lien against the security holders except for their own personal debts to it, but at common law the company had a well-recognised lien against the person in whom the radical right emerged after the security right had fallen off, as had happened in this case—*Lindsay* v. *London and North-Western Railway*, January 27, 1860, 22 D. 571. This was also shown by the fact that the company, both at common law and under article 39, could refuse to register the first party if he tried to get on to the register, for the existence of the lien would take away his right to be registered—*Bell's Trustee* v. *Coatbridge Tinplate Company, Limited*, December 17, 1886, 14 R. 246 (*per* Lord President at p. 249), 24 S.L.R. 209 (*per* Lord President at 210). The cases cited by the first party with reference to the per-

sonal liability of trustees were inapplicable, as this was a question regarding the radical right of the truster himself.

At advising—

LORD GUTHRIE—The late Mr George Brodie Paul, solicitor, Dundee, at the date of his death on 23rd January 1911, stood on the register of Thomas Justice & Sons, Limited, as the owner of certain shares in that company. Certain other shares, which had been acquired by him and which had been registered in his name, had been transferred by him to nominees of the Bank of Scotland and the British Linen Bank, in security of sums due by him to these banks respectively and at the date of his death these shares stood registered in the names of these nominees. Certain other shares were acquired by Mr Paul, but were never registered in his name, the transfers having been taken direct from the sellers to the bank's nominees.

After his death Mr Paul's estates were sequestrated on 29th July 1911, and the first party to this Special Case is the trustee on his sequestrated estates. Thomas Justice & Sons, Limited, are the parties of the second part.

At his death Mr Paul was indebted to the second parties. Their claim in the sequestration amounts to £3854, 8s. 3d.

The question relates to an alleged right of lien over certain of the shares mentioned in the case claimed by the second parties for all moneys due to them by the late Mr Paul. The first party claims these shares as part of the bankrupt estate, to be distributed by him among Mr Paul's creditors.

The banks are not parties to the case, because it is admitted that Mr Paul's obligations to them have been liquidated out of other estate of his held by them in security. Their nominees admit that they hold the shares for the first party, and are ready to transfer them to him.

So far as regards the first set of shares above mentioned, namely, those standing at Mr Paul's death in his name on the company's register, the first party admits that they are covered by the second party's lien. The dispute is confined to the other two sets of shares, namely, those which, at one time registered in his name, had been transferred by him to the banks' nominees in security of his obligations to the banks, and those which, though equally acquired by him and equally held at the time of his death by nominees of the banks in security of his obligations to the banks, were never registered in his name, the transfers having been taken direct from the sellers to the banks' nominees.

Something was said about the second parties' common law right of lien over their shares, but the argument was confined to the right of lien, if any, created in their favour by article 27 of their articles of association. By that article they obtain a right of lien on their shares for all moneys due to them from a "holder" or "joint-holders" of the shares. The first party maintains that the word "holder" is equivalent to "registered holder," and he, accordingly, as above mentioned, makes no claim to the shares standing registered in Mr Paul's name at his death. On the other hand, if, as the second parties maintain, the word holder means or at least includes the person having the radical interest in the shares, whether registered or not, the first party admits that the second parties will have a lien equally over the shares which are actually in dispute.

Therefore the only question in the case is whether the word "holder" in article 27 of the articles of association includes owners of the shares—those having the radical right, whether registered or not—at the date when the question arises, or at any time.

I think the question of law falls to be answered in the negative—that is to say, in favour of the first party, first, on a construction of article 27 taken by itself, and second, on that article when read along with other articles in the articles of association.

The word "holder" does not seem to me applicable in any sense, either popular or technical, to the late Mr Paul, in regard to shares, which were either never registered in his name, or which, having been at one time registered in his name, had been subsequently registered in the names of others. In the one case he never held the shares; in the other case he had ceased to hold them. In the one case his membership of the company in respect of the shares had ceased, and he had no longer a holding in the company; in the other case his radical right in the shares or their value never made him a member of or gave him a holding in the company. It would not even be correct or proper to call him, without qualification, in either case, the owner of the shares. He was not either the nominal or the true holder. Nor was he the apparent or nominal owner. He was the true owner—that is, the owner of the radical right to the shares or their value.

This view is strengthened by reference to the other articles. It is admitted that wherever the word "holder" occurs, as it frequently does, in other articles, it is always used in the sense of "registered holder." Reference may be made to the preceding article, and to the succeeding article 35.

But the second parties argued on the alleged hardship resulting from the first party's construction. It might be sufficient to say that the question is one of construction of a contract, and that there is no room in such a case for equitable considerations except as affording a presumption where the expressions used are ambiguous, which they do not seem to me to be in this case. But apart from this view, and the consideration that there may be equities both ways, article 39 disposes of any question of hardship, because under that article the second parties could have refused to remove Mr Paul's name from the register, and could at their own hand have retained the right of lien against

him which they thus chose voluntarily to give up.

The case of the *Mexican Santa Barbara Mining Company*, 1890, 24 Q.B.D. 613, quoted by the first party, is instructive, although it is not directly in point. The Mexican Company sought a bankruptcy order against their debtor Perkins. He had obtained judgment against Dickey, a registered holder of the company, to the effect that he (Dickey) was a trustee of some of the shares registered in his name for Perkins. The company founded on one of their articles of association giving them "a first and paramount lien on all shares for all moneys due to the company from the registered holder thereof or other the persons for the time being entitled thereto as against the company." The Court held that the company had no title to petition for Perkins' sequestration, in virtue of their lien over the shares belonging to him but registered in Dickey's name. They negatived the contention that Perkins being in equity the owner of the share of which Dickey, the registered holder, had been declared to be a trustee for him, the articles gave the company a lien over that equitable interest for the debt which Perkins owed them. But in that case the expression "registered holder" made impossible the argument which the second parties maintained before us. The company had to found on the later phrase "or other the persons for the time being entitled thereto as against the company"—words which seemed to lend some colour to their contention. I think the reluctance which the Court showed to give these words the meaning contended for by the company shows that, had the clause before them been expressed in the terms of article 27 in this case, they would have required much stronger grounds than any that have been stated to us for holding that Mr Paul, who had only the radical right, was in the sense of that article the holder of the shares.

I therefore think the question should be answered in the negative.

LORD DUNDAS—I am of the same opinion. It was, I think, conceded—it is at all events, in my judgment, clear—that if "holder" in article 27 means "registered holder," and that the case for the second parties is gone. The registered holders of the shares owe them no debt in respect of which a lien could be asserted. I do not know whether Mr Paul was in fact indebted to the second parties when the transfers were taken in favour of the nominees of the banks. But it is immaterial to inquire into that, for if the relation of debtor and creditor did then subsist between Mr Paul and the second parties, the latter missed the opportunity, which they had, of refusing to register the nominees, and thereby lost their lien in a question with Mr Paul; and if the relation did not subsist, the second parties cannot plead that any advances they subsequently made to Mr Paul were made upon the faith or on the security of shares held by him in their company. Now it seems to me to be quite plain that "holder" in article 27 does mean "registered holder," and that the word cannot, in any reasonable sense, or upon any stateable ground, be held to apply to or include a person who may have the radical right to shares, but whose name does not appear upon the company's register as holding them. I think the question must be answered in the negative.

Something was suggested during the argument as to possible future difficulties, if the result of our decision should be adverse to the second parties. I do not see that any difficulty need necessarily arise, and there is no occasion to anticipate or speculate upon anything of the sort. I apprehend that the second parties' power under their articles to refuse to register transferees of shares is one which must be exercised by them in a reasonable manner.

The LORD JUSTICE-CLERK and LORD SALVESEN concurred.

The Court answered the question in the negative.

Counsel for the First Party—D. Anderson—W. L. Mitchell. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Second Parties—Horne, K.C.—W. T. Watson. Agents—Wallace & Begg, W.S.

Friday, July 12.

FIRST DIVISION.

BUTTER *v.* FOSTER.

Sale—Sale of Heritage—Assignation of Rents—Legal and Conventional Terms—Pastoral Farm—Titles to Land Consolidation (Scotland) Act 1863 (31 *and* 32 *Vict. cap.* 101), *sec.* 8.

The Titles to Land Consolidation (Scotland) Act 1868, sec. 8, enacts that a clause of assignation of rents in the statutory form, viz., "And I assign the rents," "shall, unless specially qualified, be held to import an assignation to the rents to become due for the possession following the term of entry, according to the legal and not the conventional terms, unless in the case of forehand rents, in which case it shall be held to import an assignation to the rents payable at the conventional terms subsequent to the date of entry."

A pastoral farm on the estate of F. was let with entry to the houses and grass at Whitsunday 1895. The first half-year's rent was payable at Whitsunday 1896, and the second half at Martinmas thereafter. The estate was sold with entry at Martinmas 1910 under a disposition containing an assignation of rents in the statutory form. The seller having claimed that he was entitled to the rent conventionally payable at Martinmas 1911, the purchaser disputed his right thereto