

Friday, March 17.

FIRST DIVISION.

SMITH AND ANOTHER (LIQUIDATORS OF
THE BENHAR COAL CO., LIMITED) v.
BRYCE AND OTHERS.*Public Company—Liquidation—Decree—Directors' Calls—Notice—Companies Act 1862 (25 and 26 Vict. cap. 89), secs. 101 and 121.*

Where the liquidators of a public company seek decree under the 101st section of the Companies Act of 1862 for payment of calls made by the directors prior to the commencement of the liquidation, it is necessary that notice, though not necessarily formal service, should be given to those against whom decree is sought.

This was a note by the liquidators of the Benhar Coal Company (Limited), which was being wound up subject to supervision. The resolution to wind-up the company voluntarily was dated 30th December 1880, and the supervision order was pronounced on the 18th January following. By special resolution, passed on 6th January and confirmed on 5th February 1879, the capital of the company was increased by the sum of £100,000 by the creation of 20,000 preference shares of £5 each. The amounts due on these shares were called up in calls of £1 each between 12th May 1879 and 13th October 1880. Among the members of the company, holders of these shares, there were seventeen who had not paid all their calls at the date of the liquidation. The liquidators included the names of these persons in the list of contributories, and thereafter, founding on the 101st section of the Companies Act 1862 (quoted in the opinion of the Lord President, *infra*), presented this note, in which they prayed the Lord President "to move the Court to pronounce an order upon the persons named and designed in the list hereto appended, and here held as repeated *brevitatis causa*, decerning and ordaining the said persons to make payment, within the space of six days after the date of the said order, to the liquidators within the registered office of the said Benhar Coal Company (Limited), 4 York Buildings, Edinburgh, of the sums certified in the said list to be due by the said persons respectively, with interest from the dates therein specified, at the rate of 5 per cent., till payment; or to make such other order as to their Lordships should seem just."

Counsel for the liquidators asked that decree should be pronounced without intimation or notice to the contributories.

Authorities—*Lumsden*, December 14, 1858, 21 D. 110; *Mitchell*, July 16, 1863, 1 Macph. 1116.

At advising—

LORD PRESIDENT—This is a note presented under the 101st section of the Companies Act of 1862 by the liquidators of the Benhar Coal Company for payment of what may be termed directors' calls—that is to say, calls made prior to the commencement of the liquidation, and the suggestion made to us on the part of the liquidators is, that decree should be granted without any intimation or notice to the contributories, exactly in the same way as in cases under the 121st sec-

tion. There is, however, a very material difference between such cases and the present. The decree under the 121st section is to be pronounced against the contributories "in the same way and to the same effect as if they had severally consented to registration for execution, on a charge of six days, of a legal obligation to pay such calls and interest, and such decree may be extracted immediately, and no suspension thereof shall be competent except on caution or consignment, unless with the special leave of the Court or the Lord Ordinary." Now, under that section it was held by both Divisions of the Court in the case of *Lumsden* that it was not necessary to give any notice or intimation to the contributory, and a strong opinion was expressed that even if the contributory appeared he could not be listened to, because of the very peculiar terms of the 121st section. But the section under which we are here is very different. It provides—"The Court may at any time after making an order for winding up the company make an order on any contributory for the time being settled on the list of contributories, directing payment to be made, in manner in the said order mentioned, of any moneys due from him or from the estate of the person whom he represents to the company, exclusive of any moneys which he or the estate of the person whom he represents may be liable to contribute by virtue of any call made or to be made by the Court in pursuance of this part of this Act; and it may, in making such order, when the company is not limited, allow to such contributory by way of set-off any moneys due to him or the estate which he represents from the company on any independent dealing or contract with the company, but not any moneys due to him as a member of the company in respect of any dividend or profit: Provided that when all the creditors of any company, whether limited or unlimited, are paid in full, any moneys due on any account whatever to any contributory from the company may be allowed to him by way of set-off against any subsequent call or calls." These two sections were brought under the notice of the Court and contrasted in the case of *Mitchell* in 1863. There the petition, which was in a voluntary liquidation, was presented under the 121st section for payment of directors' calls, but it was very clearly pointed out that the 121st section did not apply to calls of that class at all, and in consequence the petition, having been presented under the wrong section, was refused as incompetent. The case of *Mitchell* also shows that the decree to be pronounced by the Court under the 101st section is not the same in kind as a decree for calls under the 121st section. The 101st section provides a summary process for obtaining payment of an ordinary debt, but a decree under it is not declared to be equivalent to a decree of registration for execution. It appears to me that the parties against whom the liquidators desire to have decree are entitled to appear and to have an opportunity of stating any objections which they may have to the liquidators' claims. I do not see that they are in any way shut out from that privilege. Indeed the statute itself contemplates that the plea of compensation may be stated as an answer to the liquidators' demands. No doubt there is nothing here to suggest such an answer, but the provisions of the section with reference to compensation appear to me suffi-

ciently to show that the statute did not contemplate that decree should be pronounced without notice of any kind to the persons concerned. There must therefore be some intimation, although there need not be formal service. I am rather inclined to suggested that a registered post-letter will be sufficient.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

Counsel for the Liquidators—Murray. Agents—J. & F. Anderson, W.S.

Saturday, March 18.

SECOND DIVISION.

[Sheriff of Forfarshire.

LYELL'S TRUSTEES v. FORFARSHIRE ROAD TRUSTEES.

Property—Statutory Right to Take Stones from "Lands" for Road Purposes—1 and 2 Will. IV. c. 43, sec. 80 (General Turnpike Act 1831)—41 and 42 Vict. c. 51 (Roads and Bridges (Scotland) Act 1878).

The General Turnpike Act 1831, by sec. 80, makes it lawful for road trustees to take stones for the purposes of repairing the roads under their care from "lands," both "open uncultivated land" and "enclosed lands." Held (1) that "lands" include the beds of rivers, but (2) that on a construction of that section, the privilege conferred on the trustees is intended to be "*innocua utilitatis*," and that the stones cannot be taken away to the detriment of the estate, or so as to defeat the right of the landlord who requires to use them for his own purposes.

The Act 1 and 2 Will. IV. cap. 43 (General Turnpike Act 1831) provides, by sec. 80, that the trustees of any turnpike road, or any person authorised by them, may search for, dig, and carry away materials for making or repairing such road "from any common land, open uncultivated land, or waste;" and also makes it lawful for such trustees, or other persons authorised by them, "to search for, dig, and carry away any such materials in or out of the enclosed lands of any person where the same may be found, and to land or carry the same through or over the ground of any person (such materials not being required for the private use of the owner or occupier of such land, and such land or ground not being an orchard, garden, lawn, policy, nursery for trees, planted walk or avenue to any house, nor enclosed ground planted as an ornament or shelter to a house, unless where materials have been previously in use to be taken by the said trustees), making or tendering such satisfaction for stones to be used for building, and for the surface-damage done to the lands from whence such materials shall be dug and carried away . . . as such trustees shall judge reasonable." This section of the General Turnpike Act is to be read as incorporated with and forming part of the Roads and Bridges Act of 1878 (41 and 42 Vict. cap. 51).

In June 1881 Miss Caroline and Sophia

Georgiana Lyell, trustees of the deceased Charles Lyell of Kinnordy, presented a petition in the Sheriff Court of Forfarshire, craving the Court to interdict the Forfarshire Road Trustees and those in their employment "from lifting, removing, and taking or carting away from the beds of the rivers Prosen and Esk, or the banks thereof *ex adverso* of the lands of Inverquharity, in the parish of Kirriemuir, belonging to the pursuers, as trustees aforesaid, or from any other part of the pursuers' said property, boulders, stones, or other material, and to grant interim interdict, as craved; reserving always to the pursuers their right to have the defenders ordained to restore to the beds and banks of said rivers *ex adverso* of the pursuers' lands as aforesaid, the boulders, stones, and other material unwarrantably and illegally removed by them, as well as all claims competent to them for damages or otherwise, as also to grant decree for expenses.

The Prosen and Esk flow through the lands of Inverquharity, which are part of the lands of Kinnordy. The pursuers averred that during the month of June then current the contractor under the Road Trustees had unwarrantably and illegally lifted and removed from the beds and banks of the Prosen and Esk, *ex adverso* of their property, large quantities of stones and boulders, and had carted them away without the pursuer's consent or authority. The pursuers maintained, with reference to sec. 80 of the General Turnpike Act 1831, above quoted, that the beds of rivers are not "lands" within the meaning of that Act. They averred that the defenders could easily get stone suited for their purpose without taking stones from the Prosen and Esk; that the stones in the beds of these rivers were required for use on the estate; and that the removal of them in large quantities by the Road Trustees was doing damage to the banks of the rivers. They denied that there was any custom of taking stones for the Road Trustees' purposes from the beds of rivers. The Road Trustees defended the action, and maintained that the taking of the stones from beds of rivers was legal, and was warranted by sec. 80 of the General Turnpike Act. They alleged a custom of taking them, and denied that any damage was being done by their operations, or was likely to result from them.

After a proof the Sheriff-Substitute (ROBERTSON) pronounced this interlocutor:—"Finds it proved that the County Road Trustees have been in the practice for many years of taking stones from the banks and beds of the rivers Prosen and Southesk, as material for metalling the roads in the neighbourhood: Finds that they have done so without challenge from the proprietors of the estate of Kinnordy, through which estate these rivers flow: Finds in law, that although this may not constitute a prescriptive right, it places the Trustees in the favourable position referred to in section 80 of the General Turnpike Act: Finds that under a sound interpretation of this section the Trustees are entitled to search for and carry away such stones for road purposes without payment, under the condition that they shall be liable for surface damage done to the lands: Therefore recalls the interim interdict formerly granted; assoilzies the defenders from the whole conclusions of the petition, and decerns."

He added this note:—"The powers given to road trustees to enter lands and take materials for