

interest thereon. But while I agree with this result, I do not put that result on the same grounds as your Lordships have done.

On the 14th of June the directors resolved that there should be a call of £2, 10s. per share, "payable at the registered office in two equal instalments of 25s. each, the first instalment on Wednesday 21st July, and the second on Monday 23d August 1880." On 28th June the shares of the bankrupt were forfeited in respect, not of this call, but of former calls. At the date of the forfeiture two days only had to elapse before the twenty-one days required for the notice of the payment of the first instalment would begin to run. But no notice was given to the bankrupt, and no intimation of the call was made to him until after the first instalment had become payable, and ten days before the second fell due. Now, as I understand the view of your Lordships, this gentleman being no longer a shareholder, was no longer entitled to notice in terms of the articles of association. I cannot assent to that view. I do not think that the circumstance that his shares had been forfeited puts Mr Yuill, as regards notice, in any different position from those who remained shareholders. I think that he was entitled to the same notice. The articles of association provide — "Twenty-one days' notice at least shall be given of the time and place appointed by the directors for payment of every call." Now, if the liability of the shareholders for payment of the calls is conditional upon their getting notice, it appears to me to follow that the liability of Mr Yuill must be the same. For I cannot see that the forfeiture can take away the right to notice of calls which is the condition of the shareholder's liability. The case, therefore, seems to me to raise this question, with which I think the Court ought to deal, viz., whether the call creates a merely contingent liability dependent on due notice being given, or whether the liability is absolute although the time of payment is conditional on the shareholder having twenty-one days' notice?

Now, it is not disputed that the resolution making the call was quite in terms of the articles of association. A clear interval of twenty-one days intervened between the date of the resolution and the time fixed for the payment of the first call, and there was a month between the two successive terms of payment. Now, the effect of making a call seems to me to be to create an instant debt, and I think that this view is very much supported by the 15th article of association, which provides "that a call shall be deemed to have been made at the time when the resolution of the directors authorising such a call shall have been passed." In short, I do not think that anything of the nature of a merely conditional or contingent liability is created by the call. Take the case of a call in which notice had been given to some of the shareholders but not to others. The result of making the liability conditional on notice being given is that there would be a debt created as against the one body of shareholders who receive notice, but not as against the other who do not. This seems to me to be a very disastrous result in carrying on such a company. It is said that the directors might make a new call. But that, it appears to me, would be very anomalous. I never heard of such a thing. I think, therefore, that the call

creates an instant liability, and the only effect of not giving due notice is that a notice must subsequently be given to pay the call twenty-one days afterwards. The only difference between such a case and one in which notice has been duly given is that penal interest does not run for twenty-one days after the date of the notice actually given.

LORD DEAS—For the reasons stated by your Lordship in the chair and Lord Mure, I concur; but supposing that not to be a sufficient ground, I should then be prepared to concur in the opinion of my brother Lord Shand.

The Court refused the appeal.

Counsel for Appellant (the Trustee on the Sequestrated Estate)—Balfour, S.-G.—Jameson, Agents—J. & J. Ross, W.S.

Counsel for Respondents (Central Halls Company)—Pearson—W. C. Smith. Agents—Dove & Lockhart, S.S.C.

Wednesday, July 20.

## FIRST DIVISION.

(Sheriff of Dumfries.

FROOD *v.* EDGAR AND OTHERS.

*Road—Right-of-Way—Public Right—Servitude.*

The pursuer in this case was proprietor of the lands of Nether Locharwoods in the parish of Ruthwell and county of Dumfries. The defenders were Lord Herries, proprietor of Carloverock, and three of his tenants. The question related to a public right-of-way for carts and other vehicles, or alternatively a servitude right of leading peats, which the defenders alleged existed between two public roads on the north and the south sides of the river Lochar respectively, known as the "Annan" and the "Blackshaw" roads. The alleged road crossed the river Lochar by a ford, and passed through the pursuer's lands, which had originally been feued out to the pursuer's predecessors by the predecessors of Lord Herries, under reservation to be mentioned, and the pursuer now sought to interdict the defenders from using the road. It was admitted that there was by the road in question a public right-of-way for foot-passengers, who crossed the Lochar by a wooden bridge; and the pursuer's titles contained a reservation in favour of the Carloverock tenants of "their privilege of casting, winning, and leading their peats and turfs in the mosse and muir as formerly." On the other hand, there was another way by which the Carloverock tenants could lead their peats from the Locharmoss (to which the foregoing reservation related), but this road was admittedly circuitous. The Sheriff-Substitute (HORE) after a proof granted interdict against the defenders, finding that they had established neither a public right-of-way nor a servitude right. On appeal the Court recalled this interlocutor, finding that the evidence established the servitude of leading peats, but not the public right-of-way.

Counsel for Pursuer (Respondent)—Trayner—Harper. Agent—R. P. Stevenson, S.S.C.  
Counsel for Defenders (Appellants)—Gloag—Gillespie. Agents—Mackenzie & Kernack, W.S.

Wednesday, July 20.

## FIRST DIVISION.

[Lord Curriehill, Ordinary.]

GALLETLY OR HYNDMAN v. ROSS AND ANOTHER.

### Trust—Construction—Annuity.

A testator by his will and settlement nominated and appointed certain persons "to be my trustees; to them I give full power to see my will and arrangements fulfilled for the benefit of my heir after named and designed—First, then, dwelling-house and grounds, everything moveable and heritable to remain in the hands of the heirs of T. R., my father, in perpetuity; following up this to be my desire and will, I fix on J. M. R. . . . to be my heir of Dalling House and grounds as it now stands, heritable and moveable, subject" to certain reservations, and under burden of certain annuities. J. M. R. having made up titles, granted a bond and disposition over Dalling House. In an action of pointing the ground and of mails and duties, at the instance of the bondholder—held that whether J. M. R. or the trustees were the proper disponees of Dalling House under the foregoing will and settlement, it, at all events, imported a trust in favour of the annuitants which the bondholder was not entitled to defeat.

*Opinion (per Lord Curriehill, Ordinary)* that the trustees were the proper disponees of the subjects in question, and that the bond was null as having been granted a *non habente potestatem*.

This was an action of pointing of the ground and of mails and duties at the instance "of Mrs A. M. Galletly or Hyndman against J. M. Ross, alleged proprietor, and J. B. Wingate, tenant and occupant, of certain subjects called Dalling House, Dunoon. The title founded on by the pursuer in support of her action was a bond and disposition in security, dated 16th, and recorded in the Register of Sasines 21st September 1872, granted by J. M. Ross in her favour over the subjects in question. This bond and disposition in security was granted by J. M. Ross on the footing that he was heritable proprietor in virtue of certain holograph and probative testamentary writings by his uncle the deceased William Ross, the former proprietor, and of a notarial instrument expedite by him as general donee under the same; but his title to the property was disputed by the persons who were named by William Ross as his trustees and executors under the testamentary writings, and by the sisters of William Ross, to whom he thereby bequeathed certain annuities. After the present action was raised, an application was made to the Court for the appointment of a judicial factor on the estate of William Ross, and

T. S. Lindsay was appointed to the office, and was thereafter sisted, at his own request, as a defender.

The testamentary writings in question consisted of—(1) a holograph will said to have been written and signed by the testator on 14th June 1869, and a codicil on the same piece of paper, also holograph, but bearing to be dated Dalling House Cottage, 18th June 1869; and (2) a probative will and settlement dated 14th June 1869. The holograph will and codicil contained, *inter alia*, the following:—"I, William Ross, proprietor of Dalling House and grounds, as described by the feu-charter, feeling my health giving way every day, desirous that my affairs should be settled, do hereby nominate and appoint James Nelson, wine and spirit merchant, Glasgow, and William Ross, my nephew, residing at 184 Nelson Street, Tradeston, Glasgow, to be my trustees. To them I give full power to see my will and arrangements fulfilled. First, then, Dalling House and grounds, everything moveable and heritable to remain in the hands of the heirs of Thomas Ross, my father; following up to this my desire and will, I fix on John Macdonald Ross, now in the City Bank, Glasgow, son of Angus Ross, third son of the said Thomas Ross, my father, to be my heir of Dalling House and grounds as it now stands, heritable and moveable, subject to the following reservations—(first) That he cannot sell or borrow any money on it; (second) That the whole proceeds that can be taken out of it by letting the house and cottage after feu-duties and taxes is paid [*shall be paid to my two sisters Margaret and Jessie in the proportion of two-thirds to the former and one-third to the latter during their lives. That sister Margaret take a care of the inventory, and see that the house is cleaned thoroughly every year and the garden kept in good order for the benefit of my heirs.*]" The words italicised and within brackets were deleted by the testator, and in substitution thereof he appended the codicil of 18th June 1869:—"I have this day changed my as to the sums to be given to Jessie Ross, my sister, and my sister Margaret. I leave Margaret £40, sister Jess £20, per annum of the income to be derived from Dalling House, and to Jessie Ross, my niece, I leave £20, to be given to her of it for the whole period her life." The holograph will further dealt with a bond for £1100, as to part of the proceeds of which several directions were given, "the balance to remain in the hands of my trustees to meet any expenses that may incur by the house not letting." Various legacies were given, and then the following clause as to silver plate occurred:—"My silver plate to be locked up by my trustees till my heir comes into possession of the place; then to be handed to him that he may live like a gentleman. My heir to see that I am buried without fuss, and that the monument is newly painted, my wife's name entered in the usual way, then mine; that the grave be preserved afterwards for thirty years untouched. My heir failing to fulfil these my instructions, looses claim on which he holds the estate, and goes to William Ross, my nephew, and his heirs."

The probative will and settlement was in the following terms:—"I, William Ross, proprietor of Dalling House and grounds, as described by the feu-charter, feeling my health giving way