

Thursday, May 14.

FIRST DIVISION.

THE BALLACHULISH SLATE
QUARRIES v. MENZIES AND OTHERS.

Company—Liquidation—Debenture—Preference—Security over Uncalled Capital—Assignment—Intimation.

An attempt to create a security over the uncalled capital of a company in favour of debenture holders by debenture bonds purporting to charge the whole property of the company, present and future, including its uncalled capital, with the amount of the debentures, held ineffectual, no proper assignation of the uncalled capital having been made in favour of the debenture holders, and no proper intimation having been given to the shareholders of the company personally.

Observations by the Lord President and Lord M'Laren as to the manner in which a security over uncalled capital can be created in Scotland.

On 7th February 1908 the Ballachulish Slate Quarries Company, Limited, and J. H. Buchanan, C.A., the liquidator thereof, presented a petition under section 138 of the Companies Act 1862, as amended by section 25 of the Companies Act 1900, for the determination of certain questions in the liquidation of the Easdale Slate Quarries Company, Limited.

The Ballachulish Slate Quarries Company was incorporated on 29th December 1893, and the Easdale Slate Quarries Company on 18th January 1895. At the date of the petition both companies were insolvent.

Prior to the formation of the Easdale Company the quarries at Easdale were the principal competitors of the Ballachulish Company in the slate market, and the Easdale Company was promoted by the directors of the Ballachulish Company in order to acquire the Easdale quarries. The directorate of the Easdale Company, after its formation, was practically identical with that of the Ballachulish Company. On 24th December 1894 the directors of the Ballachulish Company passed a resolution that a sum of £3000 belonging to the company should be advanced to the Easdale Company, to be secured by debentures, bearing interest at 5 per cent., and constituting a first charge over the assets, including the uncalled capital of the Easdale Company. The said sum was duly advanced to the Easdale Company, who on 1st May 1895 granted to the Ballachulish Company a debenture bond, containing, *inter alia*, the following clauses:—“(1) The Easdale Slate Quarries Company, Limited, incorporated under the Companies Acts 1862 to 1890 (hereinafter called the company), will, on the eleventh day of November Eighteen hundred and ninety-five, or on any subsequent date, pay to the Ballachulish Slate Quarries Company, Limited, and the assignees of the said company, the sum of Three thousand pounds. . . . (3) The com-

pany hereby charges with such payment its undertaking and all its property whatsoever and wheresoever, both present and future, including its uncalled capital for the time being. (4) This debenture is issued subject to and with the benefit of the conditions endorsed hereon, which are deemed to be part of it. . . . *The conditions referred to*—(1) This debenture will have a preferential ranking on the property hereby charged, and such charge is to be a valid security. . . . (6) If at any time the unpaid capital of the company, whether called or uncalled, is less than the principal sum then owing on this debenture, such unpaid capital shall be deemed to be specially charged with the payment of this debenture, and if subsequently paid up shall be paid to the trustees to be nominated by the company, to be held in trust accordingly.”

The transaction was reported to the shareholders of the Ballachulish Company at the annual meeting of the company in June 1895; and at the first statutory meeting of the shareholders of the Easdale Company, in May 1895, the directors of that company reported that the debenture for £3000 in favour of the Ballachulish Company, secured over the uncalled capital of the company, had been executed and delivered. A copy of the report containing this intimation was sent to each of the shareholders on 27th May 1895.

At different times during the years 1895 and 1896 the directors of the Ballachulish Company lent to the Easdale Company additional sums amounting to £1350, for which sum the latter company, on 10th June 1896 granted to the Ballachulish Company a debenture bond in substantially the same terms as the bond quoted above. No formal intimation of the bond was given to the shareholders of the Easdale Company.

In June 1902 the directors of the two companies were identical, and the board had a common chairman. The shares of both companies also were practically held by the same persons. The directors of the Easdale Company being then desirous of borrowing a further sum of £3000, arranged with the directors of the Ballachulish Company that the debenture bonds for £3000 and £1350, above mentioned, should be postponed to a new series of debentures to be issued by the Easdale Company for the said sum, and on 13th June 1902 this arrangement was reported to the Ballachulish Company and agreed to. On 23rd July 1902 a prospectus was issued by the directors of the Easdale Company to the shareholders of the two companies inviting applications for an issue of £3000 first mortgage debentures secured upon the company's assets. The prospectus stated, *inter alia*, that, “at the general meeting of the shareholders of Ballachulish Slate Quarries Company, Limited, it was unanimously agreed that the existing loans granted by that company to the Easdale Company should be postponed to the present issue of debentures.” Thereafter applications for the new issue of debentures were received by the Easdale Com-

pany, and loans were accepted by them to the amount of £3000. In return debenture bonds were issued to the lenders, dated 8th September 1903, of which the material clauses were these—“(1) The Easdale Slate Quarries Company, Limited, incorporated under the Companies Acts 1862 to 1890 (hereinafter called the company) will, on the (end of lease) fifteenth day of May Nineteen hundred and sixteen, or on any other subsequent date, pay to _____, his executors, administrators, and assignees, or other the registered holder for the time being of this debenture, the principal sum of _____ (3) The company hereby charges with such payment its undertaking and all its property whatsoever and wheresoever, both present and future, including its uncalled capital for the time being. (4) The company, as beneficial owner, hereby assigns to and in favour of Robert Menzies, Solicitor before the Supreme Courts, twenty-three York Place, Edinburgh, as trustee for behalf of _____, his executors, administrators, and assignees, or other the registered holder for the time being of this debenture, all and singular the full benefits and advantages of the foregoing agreement, and all and singular the rights, easements, liberties, and privileges thereby respectively conferred or agreed to be granted, to hold the same subject to the terms and conditions hereinafter set forth. *Condition* (1) This debenture will have a preferential ranking on the property hereby charged, and such charge is to be a valid security. All already existing debentures over the property and undertaking of the company will be postponed to it and to the other debentures of the series of which it forms part.”

These bonds were not at the time of their issue intimated to the shareholders of the Easdale Company. On 17th February 1904, however, a circular was issued to the shareholders by the secretary of the Easdale Company, intimating, *inter alia*, that the directors had assigned the uncalled capital of the company (first) to Robert Menzies, S.S.C., 23 York Place, Edinburgh, as trustee for the holders of the debentures for £3000, issued on 8th September 1903; and (second) to the said Robert Menzies, as trustee for the Ballachulish Company, in security for the debentures issued to that company, dated 1st May 1895 and 10th June 1896 respectively. Attached to the circular was a form of acknowledgment of intimation, which was signed and returned by the different shareholders to whom the circular was addressed.

Both companies went into liquidation on 13th June 1907. The liquidator of the Easdale Company having called up the unpaid capital of the company, questions arose, *inter alia*, as to whether the capital had been validly assigned in security. In these circumstances the petitioners made the present application.

The questions of law submitted to the Court were:—“(1) Whether the said debenture bonds in favour of the said Ballachulish Company, dated 1st May 1895 and 10th

June 1896, for £3000 and £1350 respectively, confer a valid security over the capital of the said Easdale Company, so far as uncalled at their respective dates, to the effect of entitling the petitioner to a preferential ranking on the property thereby charged: (2) Whether the said debenture bonds issued on 8th September 1903 for £3000 in all confer a valid security over the capital of the said Easdale Company, so far as uncalled at that date, to the effect of entitling the respective creditors therein to a preferential ranking on the property thereby charged: (3) In the event of questions (1) and (2) being answered in the affirmative, there arises the further question—Whether the said debenture bonds in favour of the said Ballachulish Company rank (a) preferentially to, or (b) *pari passu* with, or (c) postponed to the said debenture bonds dated 8th September 1903.”

Answers were lodged by (1) Edward Bruce and others (holders of the 1903 debentures), and (2) Robert Menzies (trustee for the 1903 debenture holders) in which they maintained that the debenture bonds issued in 1903 constituted a valid security over the uncalled capital of the company, and that in the circumstances stated, they were entitled to a preferential ranking.

Argued for petitioners—The bonds issued in 1895 and 1896 in favour of the petitioners created a valid security over the uncalled capital. That capital had been validly assigned, *vide* condition 6 (*quoted supra*), and intimation thereof had been given by the circular of 17th February 1904. Words of direct conveyance were not necessary to constitute an assignation provided the intention to assign was clearly indicated—*Carter v. McIntosh*, March 20, 1862, 24 D. 925, at p. 933. The 1903 debentures had not “specially” assigned the uncalled capital; they had merely “charged” the undertaking and its whole assets. That was an attempt to introduce into the law of Scotland what was known in England as a “floating security.” As to the meaning of a “floating security” reference was made to *Wheatley v. Silkstone and Haigh Moor Coal Company*, [1885] L.R., 29 Ch. Div. 715. Assuming, however, that the invalidity of the 1903 bonds, if established, involved the invalidity of the bonds founded on by the petitioners, the petitioners alternatively submitted that all the bonds were invalid, and that they were entitled to a *pari passu* ranking with the other creditors. A valid security could not be created over moveables which were allowed to remain under the borrower’s control. The bonds were in English form and created no effectual security in Scotland. No formal intimation that the uncalled capital had been assigned was ever made, and therefore in any event the assignation was invalid. As to the difference between the laws of England and Scotland, *quoad* securities over moveables, reference was made to *Clark, &c. v. West Calder Oil Company*, June 30, 1882, 9 R. 1017, *per* Lord Shand at p. 1033, 19 S.L.R. 757.

Argued for respondents (the 1903 debenture holders)—The uncalled capital had

been validly assigned. That was clear from the terms of the bond—*vide* clause 3 and condition 1. Words of direct conveyance were not necessary provided the intention to assign was clear—*Carter, cit. supra; M'Cutcheon v. M'William*, March 8, 1876, 3 R. 565, 13 S.L.R. 358; *Miller v. Muirhead*, March 10, 1894, 21 R. 658, 31 S.L.R. 569. Intimation of the assignation, as well as of the fact of priority, had been effectively given to the shareholders of the company (a) by the prospectus of 23rd July 1902, which had been issued to the shareholders of both companies, and (b) by the circular of 17th February 1904. In any event the petitioners had consented to their bonds being postponed to the debentures of 1903, and were barred from claiming a preference.

Counsel for the trustee for the 1903 debenture holders stated that he adopted the argument submitted by the respondents, the 1903 debenture holders.

LORD PRESIDENT—We are asked by the liquidator to answer certain questions concerning the liquidation of the Easdale Slate Quarries Company, Limited, and these questions really resolve themselves into this. Whether the Ballachulish Company or a certain set of debenture holders—who are here represented by Mr Bruce, who was one of their number—have or have not the right to a beneficial ranking over the general creditors of the company with regard to the uncalled capital. There is also a subordinate question as between these two parties, namely, whether they being preferred against the general creditors, have any preferential rights *inter se*.

The person who has written these deeds has slavishly copied English forms, and has thus tried to introduce into Scotland forms which are here absolutely unmeaning; and we are asked to try and find out what is the effect in Scots law of a set of phrases which are not appropriate to the Scottish system at all. I do not think any doubt has ever been cast upon the law of creating a security over uncalled capital. Owing to the doctrines of our system as to creating securities over moveables, which I need not detail, it follows that practically the only way in which a security can be created over uncalled capital is to assign that uncalled capital to a named person and intimate the assignation personally to every shareholder. That will put the shareholder in the position of being *in mala fide* in paying the debt to the company, and direct him, on the contrary, to make payment to the person in favour of whom the assignation is made. Nothing of that sort was done here. What was done was that there was an English form taken, and a very familiar one, namely, a document under which what is called a "floating charge" is created. We have nothing to do with the law of England, but at the same time it is common knowledge that it is possible to create a floating charge over moveable estate in England; and if there is a proper authorisation to that effect under the articles and memorandum of

association you can make a floating charge include uncalled capital. But the whole method of creating a floating charge, which I do not propose to detail, is absolutely foreign to our law, and consequently the form which was here used was perfectly inappropriate to create a valid security over uncalled capital according to the forms of the law of Scotland. The expression "charging the property of the undertaking, including the uncalled capital," and then the expression whereby the company, "as beneficial owner, hereby assigns to and in favour of Robert Menzies, S.S.C., Edinburgh," as trustee for the holder of this debenture, "the full benefits and advantages of the foregoing agreement"—these expressions are all perfectly appropriate to anyone understanding English affairs, but are perfectly inappropriate to such a transaction in Scotland. I do not think it is necessary to piece together nonsense. The only result is that in my mind it is perfectly clear that here there was no proper assignation of the uncalled capital in favour of the debenture holders, and even if there had been, there was no proper intimation to the shareholders. The consequence is that the whole of the securities fall, and the debenture holders are mere holders of an ordinary document of debt.

LORD M'LAREN—I think it is evident on the face of the documents that what was desired was to constitute what is known in the law of England as a "floating charge" over the whole property of the company, for the clauses purport to give a general security over the undertaking. It is well known that such a floating security has no effect in the law of Scotland. As I understand the effect of a floating security, if a debtor should sell part of his works, or machinery, or real estate, and purchase others more convenient to himself, the security will take effect upon the new purchase in place of the old. In the same way, if the debtor in England calls up his invested money and reinvests it, the floating security will apply. That is contrary to the theory of rights in security as understood in our law. It may be, however, that in certain cases it would be possible to give a security over uncalled capital, provided the necessary machinery were introduced into the articles of association for making such a right effectual. But as your Lordship has pointed out, in order that there may be a good security over uncalled capital, it would be necessary that there should be an effective intimation to every individual shareholder, either by sending it by an officer or by getting an acknowledgment from each shareholder. But here I think there is an insuperable difficulty, for you never get the length of an effective assignment, because in order that there may be a good assignment the cedent must be able to substitute the assignee in his place as at the date of the assignment. Very little consideration will show that that could not be done in this case, because, supposing the interest fell into arrear and the assignee proposed to make the assignation effectual,

and called upon the shareholder to pay, the shareholder's answer would be, "You are seeking to extend my obligation. My contract was only to pay the uncalled portion of the capital due by me as and when the governing body of the company called it up. You have no power to call up my capital, and therefore your demand is incompetent." It might be possible by proper legal clauses in the articles of association to enable an assignee or mortgagee to go directly against the shareholders, but plainly in this case it could not be done. At the date of the assignment the so-called assignee was not put in the place of the cedent, and therefore I think the assignation was worthless, because it was not such an assignation of a right as the law of Scotland will recognise. The result is that these bondholders who claim a preference are in no better position than if they were ordinary shareholders.

LORD KINNEAR—I am of the same opinion. I think, for the reason your Lordship has given, that this is a case of bungled conveyancing which has not successfully created any right of security in any part of the property, either in the uncalled capital or in anything else.

LORD PEARSON was absent.

The Court answered the first and second questions in the negative.

Counsel for the Petitioners—Orr, K.C.—J. A. T. Robertson. Agents—Inglis, Orr, & Bruce, W.S.

Counsel for 1903 Debenture Holders—Blackburn, K.C.—Maitland. Agents—Macandrew, Wright, & Murray, W.S.

Counsel for the Trustee for 1903 Debenture holders—Chree. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Thursday, May 14.

FIRST DIVISION.

[Sheriff-Substitute
at Edinburgh.]

ZUGG v. J. & J. CUNNINGHAM, LIMITED.

Master and Servant (Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 4 (1)—Sub-contracting—Work "Undertaken" by the Principal.

The Workmen's Compensation Act 1906 (6 Edw. VII, c. 58) enacts—Section 4—"Sub-contracting"—(1) Where any person (in this section referred to as the principal), in the course of or for the purposes of his trade or business, contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any workman employed in the exe-

cutation of the work any compensation under this Act which he would have been liable to pay if that workman had been immediately employed by him. . ."

A, a chemical manufacturer, contracted with B to do certain tarring work on his (A's) premises. B employed C to assist him in the work and authorised him to employ a labourer D. D having been fatally injured while so employed, his widow claimed compensation from A under section 4 (1) of the Workmen's Compensation Act 1906.

Held that, as the work of tarring the premises was not work "undertaken" by A in the sense of section 4 (1), he was not liable to pay compensation.

Mrs Isabella Dickson or Zugg, widow of Alfred Dennis Zugg, labourer, claimed compensation under the Workmen's Compensation Act 1906 from J. & J. Cunningham, Limited, manure merchants, 44 Bernard Street, Leith, in respect of the death of Alfred Dennis Zugg.

The matter was referred to the arbitration of the Sheriff-Substitute (GUY) at Edinburgh, who awarded compensation, and at the request of the defenders stated a case.

The facts admitted or proved, as stated by the Sheriff-Substitute, were—(1) The appellants are manufacturers of sulphuric acid, chemical manures, and feeding stuffs at their works in Salamander Street, Leith, of which they are the owners as well as the occupiers; (2) part of said works consists of large chambers which are used in the manufacture of sulphuric acid, enclosed and protected by corrugated iron and wood; (3) it is necessary to have the corrugated iron and wood tarred over about once in every two years for the purpose of preserving them from the weather and keeping the chambers within wind and water-tight, the tarring of one half being done one year and of the other half the following year; (4) the chambers are about 20 feet in height and about 40 feet from the ground level, and the said work of tarring is done by workmen, who use a hanging scaffold; (5) the appellants have never had this work done by any of their servants, but have always contracted for it to be done at so much a square yard; (6) in the month of July 1907 the appellants contracted with James Aimers, who had had a similar contract with the appellants during the years 1902, 1903, and 1905, to do a portion of this tarring work, he being paid one penny per square yard—Aimers supplying the tackle and scaffolding and the appellants supplying the tar; (7) Aimers employed a man George Laing to assist him in the work, and authorised Laing to employ Alfred Dennis Zugg, who was accordingly employed and paid wages at the rate of 7d. per hour; (8) on 14th August 1907 a rope accidentally slipped from the hanging scaffold on which the said George Laing and Alfred Dennis Zugg were working, with the result that Zugg fell to the ground and was so injured that he died in Leith Hospital on the same day. It was also admitted or proved that the respondent was the widow of the said