

"The petitioner having given up the question of damage in this petition, and the lease being so nearly at an end, it does not seem expedient to allow a proof to be gone into about the fences, houses, and whins. The petitioner has delayed too long in making this complaint if the respondent has been as much in fault as is alleged, and besides, if the question of damages is to be raised at the expiry of the lease, these matters will be gone into then in a different action. The respondent has an opportunity before then of fulfilling any obligation incumbent upon him, and perhaps no further proceedings will then be thought necessary by the landlord.

"The petitioner having given up so much of his case, and the interdict as to the burning of heather proceeding upon a report that more burning is not expedient, and not that the burning hitherto has been contrary to the lease, as set forth in the petition, it seems proper that the petitioner should pay modified expenses."

The petitioner appealed to the Sheriff (NAPIER), who adhered to his Substitute's judgment, and dismissed the appeal.

The petitioner further appealed.

FRASER and JOHNSTONE for him.

JOHN MARSHALL and M'KIE in answer.

The Court, without calling on the counsel for the respondent, unanimously dismissed the appeal, with costs. The Court expressed a strong opinion that a tenant should not be harassed with actions of this nature.

Agent for Appellant—James Stewart, W.S.

Agents for Respondent—Scott, Bruce, & Glover, W.S.

Wednesday, July 13.

FIRST DIVISION.

JAMIESON (BONTINE'S CURATOR BONIS).

Curator bonis—Lunatic—Shareholder—Company.

A party who was a shareholder in a quarrying company became a lunatic. His curator applied to the Court for power to make his ward a shareholder in a new company formed for the same purpose as the old, on the ground that the new company was limited, likely to be prosperous, and that the change would be greatly to the benefit of his ward's estate, and unattended with risk. The Court granted authority to the curator, as the doing so was absolutely necessary for the judicious management of the ward's estate.

On 17th June 1865 Mr W. C. Bontine, of Gartmore and Ardoch, became proprietor of three shares in the Drum Slate Quarry Company. Having become a lunatic, Mr George Auldjo Jamieson, C.A., was appointed *Curator Bonis* to him. Mr Jamieson on various occasions applied to the Court for special powers, which were granted. In a note for special powers presented in November last, he *inter alia* craved that power should be granted to him—(1) To concur with the other present partners in the Drum Slate Quarry in assigning their interest to the proposed Llynnydrym Slate Company (Limited), or to another company, with limited liability as therein mentioned. (2) To accept fully paid up stock in the new company in lieu of the present interest of Mr Bontine in the existing adventure; and (3) To sign on behalf of Mr Bontine the memorandum of the articles of association,

and to agree on his behalf to postpone to such extent as he may think right the dividend payable on the shares assigned to Mr Bontine to the dividend payable on the new stock to be issued for the purpose of completing the development of the quarry." In his note to the Accountant of Court, to whom the matter had been remitted for inquiry, the curator made the following statement as to the reasons for granting the special powers asked for:—"From the assignment in favour of Mr Bontine, which is now produced, it will be seen that he paid to Mr Morgan Lloyd £500 on 1st July 1865 as part of the consideration money for 3-20th shares in that quarry; and under the authority conferred upon him by the Court, the curator has since paid the following sums under the obligation undertaken by Mr Bontine:—

1868. August 3, of this date,	£1799 17 4
1869. March 2, do.,	98 17 0
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	£1898 14 4

making in all, with interest added at 5 per cent., an amount of £2612 which has been defrayed by Mr Bontine on account of this adventure.

"The curator has been advised that, in terms of the arrangement made between Mr Bontine and Mr Morgan Lloyd, he is bound to concur with the other partners in this concern in defraying the necessary expenses of developing and working the undertaking.

"As explained in his former report, immediately after his appointment, and when Mr Morgan Lloyd first intimated his claim in respect of this undertaking, the curator procured a report from a mining engineer as to the nature and capabilities of the quarry, and that report he now again submits to the Accountant. More recently, as Mr Robert Bell, with whom the curator was acquainted as a mineral tenant on estates under his charge in Scotland, and who has himself a slate quarry in the Isle of Man, was going into the North Wales district, he asked him to examine this quarry and to report confidentially his opinion upon it, and that report the curator now begs also to lay before the Accountant.

"By the deed of assignment in favour of Mr Bontine it is provided 'That the said William Cunninghame Bontine, his executors, administrators or assigns, shall on the first day of November next' (Eighteen hundred and sixty-five), 'pay to the said Morgan Lloyd the said sum of Five hundred and fifty pounds, together with interest thereon at the rate of 5 per cent. per annum from the said first day of July (1864) until payment, and shall from time to time duly contribute three-seventeenth' (should be twentieth) 'portions of the costs, charges, and expenses of performing, and observing the terms and covenants of the said lease, and of working the said quarry, and of all matters incident thereto, including the sum of Sixty-six pounds two shillings, being his proportion of the said expenses from the said first day of July to the present time, and that, until some further arrangement be made, the said quarry shall be carried on under the management of the said Morgan Lloyd, his executors or administrators, and that he, the said William Cunninghame Bontine, his executors, administrators or assigns, will consent to the proprietors of the said quarry being registered as a limited company for working the same.'

"The curator was satisfied from the first that the best course that could be taken for Mr Bon-

tine's interest, and the only course by which that interest could be realised to any advantage was to have a joint-stock company established, by means of which sufficient capital could be procured for the development of the quarry, and Mr Bontine be thus relieved from the obligation under which he lay to contribute further towards that purpose. The curator was the more satisfied as to the propriety of adopting this course because he early ascertained that the capital at the command of the co-adventurers was not sufficient of itself to develop, otherwise than very slowly and insufficiently, the resources of the quarry, if they existed; while he perceived that there was great danger of Mr Bontine being called upon to contribute year after year towards expenses which might ultimately prove quite unproductive. He has therefore urged very strongly on Mr Lloyd, and on the other parties interested, the propriety, and indeed the necessity, of having such a company established; and in consequence very much of his urgency in this matter, a company has now been projected on a basis which seems to the curator to be satisfactory. A memorandum of the articles of association of this company, which is to be called 'The Llynndrum Slate Company (Limited),' with a copy of the prospectus and the agreement which it is proposed to make between the present shareholders and the holders of the new stock, are herewith submitted to the Accountant.

"Under this arrangement it will be seen that it is proposed to convert the present stock of the company into 3000 shares of £10 each fully paid up, of which three-twentieths, or £4500, will be assigned to Mr Bontine, as representing his interest in the concern. It is then proposed to issue new stock to the extent, at present, of £10,000, and ultimately perhaps to £10,000 more; and in order to induce parties to contribute to this new fund, it is proposed that the present shareholders shall give a preference to the new stock to the extent of postponing two-thirds of their dividend until 10 per cent. has been paid on the new shares. Considerable progress has been made in the constitution of the company, and there seems to be no doubt that if the curator can join with the other parties interested in carrying this scheme into effect it will speedily be accomplished.

"The curator is very sensible that the circumstances of this case are peculiar; but he ventures to submit the matter to the Accountant, in the hope that he will be able to report a decided opinion that the arrangement proposed is so advantageous for the ward that authority should be given to the curator to enter into the arrangement contemplated.

"It will be observed that at present Mr Bontine is a partner of a company of unlimited liability, and that he may be called upon indefinitely to contribute towards the speculative expense of developing an undeveloped quarry. Under the proposed arrangement he will be relieved of all liability, and he will not be called upon to contribute anything more than he has already paid. The curator, in submitting the matter to the Accountant, attributes no importance whatever to the prospect or chance of the quarry proving so successful as to return to Mr Bontine any part of the capital which has been invested in it. It is not as an adventure, or as a means of making profit, that the curator ventures to request the accountant to report favourably on this application; it is simply because it seems to him to be the only possible method by

which his ward can be relieved from an indefinite and perhaps profitless expenditure; and by which he may convert into property without any liability what is at present nothing more than liability without any property."

The Accountant of Court reported as follows:—

"The position of the ward in regard to this quarry in North Wales was formerly reported to the Court. It was then explained how the ward was a partner of a private company who were engaged in working the said slate quarry at considerable risk. The present application is for authority to the factor to concur with the other partners of the Slate Quarry Company in making over their respective interests to a joint-stock company 'limited;' to accept fully paid-up stock in the new Company in exchange for present interests; to sign on behalf of the ward the articles of association or deed of partnership of the new company; and to postpone payment of any dividend that may accrue on the stock of the new company so acquired for behoof of the ward to the effect of giving a preferable dividend to certain new stock which it is intended to raise for the purpose of providing additional capital for the greater development of the works.

"The Accountant is satisfied that, under the arrangements proposed, the ward would be secure from the possibility of any loss beyond the amount of capital he has already advanced, and as the concern has been paying no dividend, and with present prospects is not likely to be worked to profit, the chances of a dividend eventually would be better if the undertaking were transferred to a joint-stock company, with larger capital available than the present holders can command. At the same time, this is a most unusual application, and the Accountant is not aware of any precedent. He can only, therefore, report that the facts appear to him to be fairly and correctly stated, and leave the matter for consideration of the Lord Ordinary."

The Lord Ordinary (MURE) reported the case.

The Court having ordered a fuller statement on certain points, the curator gave in a minute in which he, *inter alia*, stated the following circumstances:—"In the year 1863 Mr Morgan Lloyd, barrister-at-law, who is connected by marriage with Mr Bontine (they having married sisters) purchased an old lease which had only a few years to run of the lands after-mentioned. This lease he surrendered, and on 8th March 1865 he obtained from the Crown a new lease of all and singular the quarries, works, and beds of slate and stone, and all mines, minerals, and mineral substances whatsoever within, under, or upon a tract or parcel of land, containing 220 acres or thereabouts, situated in the parish of Festiniog, within the Manor or Lordship of Penllyn, in the county of Merioneth, and which is delineated on the plan drawn on the margin of the lease. This lease is to endure for thirty-one years from 18th October 1864. The rent payable is £1 per annum. The royalty is 1-15th of all mineral substances gotten during the first three years, and 1-12th of all mineral substances gotten during the remainder of the term. The minimum royalty is £10 per annum during the first three years, £20 per annum during the next two years, and £50 per annum during the remaining years of the lease." Thereafter the quarry was cleaned out, the company created, and shares assigned to Mr Bontine. "The money expended by Mr Lloyd and the other partners in the adventure, in providing tools and

machinery, making roads, and otherwise in the development of the quarry from the year 1863 to the 16th November 1869, amounted, with interest, to the sum of £10,418, 5s. 10d., conform to accounts thereof herewith produced and referred to. It would further appear from accounts produced by Mr Lloyd that the outstanding liabilities of the concern at that date amounted to the sum of £188, 11s. 11d.

"The *Curator Bonis* having been advised that, in terms of the arrangement between Mr Bontine and Mr Lloyd, he was bound to concur with the other partners in defraying the necessary expenses of developing and working the quarry, paid, after due inquiry and under the authority of the Court, the following sums to Mr Lloyd:—

1868, August 3, . . .	£1799 17 4
1869, March 2, . . .	98 17 0

£1898 14 4

This included the sum of £550, part of the purchase price of the shares. It would appear that a further sum of £75, 10s. 3d. is due by Mr Bontine as at 16th November 1869, being his share of the expense of working the quarry, &c., to that date." "The curator became extremely desirous to free Mr Bontine's estate from the liability of contributing year after year indefinitely towards the expense of developing and working this quarry. He therefore urged on Mr Lloyd and the other partners the necessity of having a joint-stock company (limited) established, as appears to have been originally contemplated by the partners, by means of which sufficient capital could be procured for the development of the quarry, and Mr Bontine relieved from the liability under which he lay to contribute further to that purpose." The joint-stock company was accordingly founded and registered. The old company was to receive 3000 shares of the new company's shares. "The *Curator Bonis* believes that if he were authorised to concur, and did concur, with the other owners of the quarry in assigning their interests therein to the new company, accepting in lieu thereof fully paid up shares in that company, Mr Bontine's estate would be entirely free from any future liability in respect of the said quarry, or of the said shares in the new company. He herewith produces the copy of a release and indemnity which Mr Lloyd, in the event of the foresaid proposed arrangement being carried out, is ready to grant."

SOLICITOR-GENERAL and ADAM for the petitioner.

The Court granted the petition. It was unprecedented in its nature, and could only be granted where it was absolutely necessary for the judicious management of the ward's estate. This was such a case; and the application was to be viewed the more favourably that the curator was a director of the new company.

Agents—A. & A. Campbell, W.S.

Friday, July 15.

BROWN, PETITIONER.

Amendment—Citation—Messenger's Execution. Clerical error in messenger's execution of a citation allowed to be amended.

James Brown having presented a petition for the custody of his children, the Court pronounced an interlocutor ordering the requisite intimation. A certified copy of this interlocutor was written on

the petition by the Assistant Clerk of Court. The messenger's execution was on the third page of the petition, and referred to it, but omitted to state that the citation proceeded in virtue of the delivrance of the Court.

GRANT, for the petitioner, maintained that, this being a clerical error, made *per incuriam*, and not affecting the citation itself, amendment should be allowed.

The Court allowed the amendment, as the blunder was not in the body of the deed, but was a clerical error in the description of the warrant.

Agent—James Barton, S.S.C.

Friday, July 15.

NORTH BRITISH RAILWAY COMPANY v.

CARTER.

Railway Clauses Consolidation (Scotland) Act 1845, section 90—Tolls—Demand for Payment—Service of Petition. By section 90 of the Railways Clauses Consolidation (Scotland) Act 1845 it is enacted, "if on demand any person fail to pay the tolls due in respect of any carriage or goods, it shall be lawful for the company to detain and sell such carriage, or all or any part of such goods, or if the same shall have been removed from the premises of the company, to detain and sell any other carriages or goods within such premises belonging to the party liable to pay such tolls, and out of the monies arising from such sale to retain the tolls payable as aforesaid, and all charges and expenses of such detention and sale, rendering the overplus, if any, of the monies arising by such sale, and such of the carriages or goods as shall remain unsold, to the person entitled thereto; or it shall be lawful for the company to recover any such tolls by action at law." Two firms carrying on different businesses under the same name became bankrupt; and at the date of bankruptcy they owed a considerable sum to a railway company for carriage of goods. Without making any formal demand for payment of the tolls due, the railway company presented a petition for a warrant to sell goods in their possession belonging to the bankrupts, under the above statute. *Held* (Lord Deas diss.) that service of this petition was a sufficient demand for payment of the tolls in the sense of section 90.

This was a petition presented to the Sheriff of Edinburgh in virtue of section 90 of the Railways Clauses Consolidation Act 1845, at the instance of the North British Railway Company against F. H. Carter, C.A., trustee of the sequestrated estates of J. & G. Pendreigh, grain merchants in Edinburgh and Leith, and also of the firm of J. & G. Pendreigh, brewers, Abbeyhill, Edinburgh. The petitioners alleged that they had been largely employed by the bankrupts as carriers; and that at the date of their sequestration the bankrupts owed the petitioners £852, 2s. 2d., while there was in their possession, at their stations and stores, a considerable quantity of goods belonging to both bankrupts' firms. They accordingly craved a warrant of sale of these articles in virtue of section 90 of the above Act.

The trustee pleaded—"(1) The 90th section of the Railways Consolidation (Scotland) Act 1845