cerned to see and to object. So at this time another opportunity was allowed to the burgh to raise the question, but they did not do so; they lay on their oars till 28th December last, when the scheme was made final. When this is done, they now come before us and cry—"Let us in yet; we are going to raise an action of proving of the tenor." Such an abuse of process is not to be allowed, and I am for refusing the application.

LORD DEAS and LORD MURE concurred.

LORD SHAND concurred, and added—I may say that I think this case is one of some importance. There is no difficulty in disposing of it, but it may be of advantage in drawing the attention of members of the profession to the fact that there is no difficulty in preventing delay in the carrying through of localities. We have seen cases in which great hardship arose from such delay. The remarks I made in the case of *Sinclair* v. *Fletcher's Trs.* July 18, 1877, 14 Scot. Law Rep. 662, are directly applicable here.

The Court refused the motion.

Counsel for Burgh of Kinghorn (Reclaimers)—Balfour—Mackay. Agents—Dundas & Wilson, C.S.

Counsel for Common Agent—Kinnear. Agent—William Montgomery, W.S.

Thursday, January 17.

SECOND DIVISION.

CONSOLIDATED COPPER COMPANY OF CANADA *v.* PEDDIE AND OTHERS (DIRECTORS' CASE).

(*Vide ante*, November 10, 1877, p. 81).

Public Company—Settlement of List of Contributories—Liability of Nominated Directors for Qualifying Number of Shares.

In the winding-up of a limited company it was sought to put the original directors who had been nominated in the articles of association upon the list of contributories to the extent of thirty shares, under this clause in the articles—"No person shall be eligible to or shall continue in the office of director unless he be the holder in his own right of shares representing at par the nominal sum of £300 in the capital of the company." *Held* that the original directors, although they had acted as such, could not be put upon the list of contributories to the qualifying amount, in respect that the clause could not be so read as to apply to directors nominated by the articles of association, but merely to those who might be afterwards formally elected by the company.

Observed per Lord Ormidale, that persons nominated to the directorate in the articles of association of a limited company do not require to hold stock for the purpose of qualifying themselves.

Expenses—Winding-up of a Limited Company—Liability of a Liquidator.

Where a number of parties who had substantially the same interests were called as respondents in a petition to settle the list of contributories brought by the official liquidator of a limited company, and where the latter was unsuccessful in his contention, the Court found the respondents entitled to expenses, but declined to allow more than one set of these to be charged against the petitioner.

This was another question arising out of the winding-up of the Consolidated Copper Company of Canada, already reported in the former question in regard to the shareholders (*ante*, November 10, 1877, p. 81).

It related to the liability of four of the directors of the Company — viz., Messrs H. B. Crum, John Miller, Thomas Dickson, and D. P. Mackenzie — under the 18th article of the articles of association. These gentlemen with several others were unconditionally nominated directors in the 17th article of association. The 18th article was in the following terms—"No person shall be eligible to or shall continue in the office of director unless he be the holder in his own right of shares representing at par the nominal sum of £300 in the capital of the Company." The 3d article, "dealing with the applications for shares in the concern," was as follows—"An application signed by or on behalf of the applicant for any share or shares in the Company, shall, if an allotment of any share or shares be made thereon, and information of such allotment be given to or received by the applicant, be an acceptance of the share or shares so allotted; and every person to whom such allotment shall be so made, and whose name is on the register, shall be a member for the number of shares so allotted." It was admitted that these gentlemen had attended several meetings as directors of the Company, and that they were applicants for shares to a large amount. The petitioner sought to have it found that they must be ranked as contributories to the extent of thirty shares each. The shares were £10 each.

Argued for the petitioner—By the articles of association there was an obligation on the directors to hold thirty shares, or they could not continue in office. The gentlemen in question acted as directors, and continued to act till the dissolution of the Company; besides, three of them (Mr Dickson did not) signed the memorandum and articles of association, and these three expressed themselves willing to be put upon the list for a share each. It was therefore a legal possibility and an admitted fact that the directors could have shares allotted to them. They must therefore be held to be contributories to the extent of thirty shares, the qualifying number.

Authorities—*Karuth*, L.R., 20 Equity, 506; *Miller*, L.R., 3 Chan. Div. 661 (and *Brown's* case there referred to); *Kincaid*, 11 Equity, 192; *Forbes*, 19 Equity, 353; *Harward*, 13 Equity, 30 (and *M. of Abercorn* there referred to); *Fowler*, 14 Equity, 316; *Leake*, 6 Chan. Appeals, 469; *Brown's* case, L.R., 9 Chan. Appeals, 102.

Argued for the directors—The directors could get shares no sooner than the public. The Court had held that the allotment to the public was conditional; it must therefore have been conditional to the directors. It was enough for them that they were not under an obligation to take shares from the Company, and the Company was not bound to give them shares. In these circum-

stances they could not be partners. The obligation in the articles of association to hold thirty shares did not apply to the original directors; they were merely provisional, for the purpose of floating the Company. If the petitioner's construction of this article were correct, the nomination of directors was void immediately after it was made.

Authorities—*M. of Abercorn*, 13th May 1862, 31 L.J. Chancery, 828; *Brown*, quoted *sup.*; *Chapman*, 2 Equity, 567; *Stocks*, 33 L.J. Chan. 731; *Forbes*, 8 Chan. Ap. 768 (Lord Selborne, 773-6).

At advising—

Lord Justice-Clerk—This case was formerly before us on the question whether certain parties, against whom the liquidator was proceeding, and whose names he proposed to put on the list of contributories, were or were not shareholders of the Company? and the result at which we arrived on that question was, that as there had never been any allotment to these parties, or indeed to any persons, save under a condition which never was satisfied, the persons against whom the liquidator did proceed were not partners of the Company, and never had been partners of the Company, and were therefore not to be put on the list of contributories.

The question which now arises is in regard to four of these, to whom the principle of our former decision clearly applies. They were persons who had applied for shares and who had received letters of allotment, but subject to the express condition which we gave effect to in our former judgment. But it is now said that these four gentlemen acted as directors of the Company, and that, in consequence of a clause in the articles of association relative to the qualification of directors, they must be held to have been partners to the extent of the number of shares necessary to qualify them for the position of directors. The article to which I refer is the 18th article—"No person shall be eligible to or shall continue in the office of director unless he be the holder in his own right of shares representing at par the nominal sum of £300 in the capital of the Company." That provision follows immediately after the 17th article, in which certain parties are nominated to be the original and first directors, and the parties I have alluded to are all named there. It is said that the effect of the 18th article is, that if any person acts as director without having the qualification of £300 nominal capital in the Company, he shall be held to be a partner to the effect of being liable to be put on the list of contributories for the Company's debts. It is conceived, I think, in a somewhat vicious style grammatically. The real meaning of it is not that no person shall be eligible unless he be a holder of the shares, but that any person shall be eligible if he is the holder of the shares; and the substance of it is simply this—that any shareholder shall be eligible as a director provided he holds £300 capital in the Company, and that if he shall lose or part with his shares he shall cease to be a director of the Company. That is the simple nature of the provision. If a person under a clause of this kind is elected a director, and acts as one without having the requisite qualification in point of shares, it has been held that he must be considered to have acquired the shares in the question of contribution. I do not mean to go back upon that, but I must fairly own that I think that is a matter which is left in some obscurity by the English decisions. It does not quite well appear why, because a man is elected, if he is not entitled to be elected, he shall be held to have had a qualification which he never had; on the contrary, the natural result of his being elected would be that his election was null and void, and that that is the meaning of it there can be no doubt. In a question *inter socios*, the Company being solvent and not in liquidation, if the point had arisen as to the right of one of the directors to continue in office, and it turned out that he did not possess the qualification required, the result, and the only result, would be that he would not be entitled to act as a director, and his election would be utterly null. If he had acquired the shares afterwards, that would not be sufficient in the case of challenge to sustain the election which took place at a time when he was not qualified to be elected. But it is not necessary for the decision of the matter now before us that we should go much into that.

The real question raised here may be divided into two branches—the first, whether the 18th section applies in any respect whatever to a director nominated in the articles; and the second, whether it can be extended in this case so as to make the persons in question responsible, and liable to be put on the list of contributories. In regard to the first question, whether such a clause as this is applicable to directors nominated in the articles of association, the decisions in England leave the question very open. It has been held, for instance, that such a clause does not apply to a person who has been nominated a director but who has never acted. It has been held, in the second place, that it does not require a person who has been so nominated, to obtain his shares from the Company, and that if he obtained paid-up shares from third parties that would be quite sufficient to qualify him under this clause. In *Stocks'* case, if I do not mistake, it was found that where the words only were, "No person shall be eligible unless he shall have the specified amount of stock," such a clause would not apply where the party in question was a nominated director; and in the last case the Master of the Rolls expresses very considerable doubt whether a clause of this kind applies at all to a nominated director, or, at least (as he qualifies it), unless he has had a reasonable time to obtain such a qualification. That was the case of *Karuth*, in which case the Master of the Rolls found that the party had not had time to obtain the qualification, and therefore he found it unnecessary to decide the question, whether the clause applied to a nominated director? In that state of matters, no doubt it is impossible to give a very dogmatic opinion on such a question, but I have come to the very clear impression—and I am quite prepared to give effect to it—that the 18th clause in these articles of association does not apply, and cannot apply, and never was intended to apply, to a nominated director.

In the first place, there are two things to be observed in the 18th clause—first, that no person shall be eligible to the office of a director unless he be the holder of shares. That applies of course to an election to take

place under the terms of the articles of association; and if it is to be applied according to its terms, it cannot apply to a director who never was qualified. But suppose it is said that "eligible to" means "be nominated to" the office of director, that is the only way in which that clause can be applied to a nominated director. But how can that be the meaning of the clause, when we look at clause 17, which makes the nomination without qualification at all—all the more that it was quite certain, from the very terms of the memorandum of association and the articles of association that the persons who are there named were not the holders of £300 stock in the capital of the Company; but, on the contrary, the memorandum of association expressly bears that they were contributories for one share, and one share only. Therefore I think it is impossible to hold that the nominated directors fall under the words "no person shall be eligible to the office."

But then it is said that there are words to the effect that no person shall continue in the office; and what is the effect of that? Why, that although the directors are well nominated in the 17th section, they must instantly cease to hold office. That quite clearly is not the state of matters. It was intended that these directors should be of some service, and consequently I think it clear that they were entitled to continue in office although they had no stock excepting the one share for which the memorandum of association shows that they had subscribed. But when we look into the question, it is perfectly manifest that that 18th clause never was intended to apply to the nominated directors, for this simple cause, that by the third clause, under the division of the contract shares and capital, there is pointed out the only way in which stock in the Company is to be acquired by anyone—[*reads as above*]. That shows that down to the period when the shares are allotted there cannot by any possibility be the qualification which is required in the 18th clause. But prior to the period of the allotment of shares there must be a direction, otherwise the shares never could be allotted; and accordingly the question that arises here is, Whether these persons, by acting as directors down to the period of allotment—for I think there is nothing after that—were disqualified from so acting by reason that they had not got £300 of stock prior to the period when the Company resolved to allot the stock? I am of opinion that there is no ground whatever upon which that view can be maintained, and that consequently these directors were entitled not only to be nominated, but to act, to the effect, at all events, of allotting as they did allot shares, and that their actings up to that date did not and could not infer that they were in point of fact partners of the Company.

And if that is followed out to its ultimate result, the second ground comes out quite clearly; for what is to be said in regard to directors where there is a qualification of holding stock, if it be quite manifest on the face of the whole proceedings that the stock never was allotted, that there never were any shares, and that the Company was in point of fact proceeding upon a provisional footing, as was beyond all doubt the case, intending to take up the shares and allot the stock if the sale of the minerals went through and the Company became the purchasers, but intending to contribute no stock at all in the event of there being no sale. That was no doubt the footing on which the whole of these proceedings went on. They were tentative from first to last; and as no shares ever were allotted except under a condition that was not fulfilled, and as the whole of the scheme went off as if it had never been started, it seems to me perfectly manifest that, even applying the doctrine of the Master of the Rolls in the case of *Karuth*, the time within which a director was to qualify himself began to run when the purchase of the mines was complete, because before then not only was the director not bound to qualify, but he had not the means of qualifying, for the association itself had refused to grant any letters of allotment except letters depending on a fact which never occurred; and therefore, even in the strictest view—and taking the view that the Master of the Rolls did in the case of *Karuth*—the directors were only bound to qualify after it turned out that the Company was to go on and the shares were to be allotted. In point of fact, they did all that they could possibly do, for they all applied for shares, and they all received the letters of allotment subject to the condition.

In these circumstances I am of opinion that these directors never were partners of this Company for thirty shares, and that being so, as this is a question *inter socios*—the liquidator simply representing the Company as against the individual partners—I am of opinion on both grounds—first, that the 18th section does not apply at all to nominated directors—nay, more, that they were entitled to have continued during the whole period for which they were nominated without qualification, for I think that is the meaning of the articles of association; and, in the second place, that in the circumstances of this case there is no ground at all for saying that they were in any respect in *mora* or delay in obtaining the qualification if it had been necessary. On these grounds, I think the liquidator must fail, and that these parties are not to be put on the list as contributories.

I have a very strong impression that the real solution of this case with creditors is simply that those persons who signed the memorandum of association may be liable—I don't say they are, for we have not heard that discussed—but they may be liable in respect of their being truly the persons incurring the debts and obligations that were incurred—but that as shareholders they cannot be put on the list as contributories.

Lord Ormidale—The question which we have to dispose of at present relates to the four respondents alone, and these respondents stand in precisely the same position, with the exception of Mr Dickson. The other three signed the memorandum of association, and they became shareholders on their own showing to the extent of one share, and to that extent they have been already entered on the list. But then it is maintained on various grounds that, independently of that altogether, these four respondents ought to be entered on the list of contributories in respect, first, that they were directors and acted as directors, and at anyrate that they had come under an agreement or contract with the Company to take the qualifying shares referred to in article 18 of the articles of association. It is not said that

beyond the one share which each of the three respondents held from the beginning as signatories to the memorandum of association they have ever been the holders of any shares of the Company. If they had, then to the extent to which they held shares they would fall to be entered on the list of contributories. But they do not hold shares except the three to which I have alluded. Therefore we may lay aside that as a ground for putting them on the list of contributories. But I think the result of the English cases referred to at the debate is this, that if a party is nominated or elected as a director, and acts as a director, he must thereby be held to have contracted or agreed with the Company to take the necessary qualifying shares.

In this case if these directors had, under the 18th article of association, been elected directors, and therefore acted even to the extent to which it appears they did act, I am not prepared to say that they would not be held responsible as being under a contract or agreement with the Company to take the necessary number of qualifying shares. It will not do to say that they merely then forfeited their position of directors, and that that was the only result of their not getting shares, for we are not here in a question between the Company and these directors—whether they are directors and whether they should be allowed to continue as directors? We are dealing in a question with creditors in a winding-up. They could no longer continue as directors. We must here have regard to the question of creditors, because I take it that the liquidator has the interest of creditors as well as the interest of the Company to attend to. The very object of making up the list of contributories is that these contributories, when the list is completed, may be answerable for the whole debts of the Company to whomsoever these debts are due. There will be an equal division, and they must pay so far as their means enable them to pay. Keeping that in view, therefore, I can quite understand the principle of law, that if parties have acted as directors, which they were not entitled to do without having a sufficient number of shares, they will be held bound in respect of shares. But in the present case it is quite unnecessary to give effect to that, because that is not the footing on which these four respondents are to be dealt with; for I agree with your Lordship that they are nominated directors in the articles of association, and being nominated directors and not elected directors, the 18th clause, which relates entirely to qualifications, does not apply to them, and very much upon the grounds which your Lordship has stated. I perhaps go a little further in the result I have arrived at from a consideration of the decided cases. There is *Stocks'* case and *Forbes'* case and *Karuth's* case, notwithstanding the doubt which seems to have been expressed by the Vice-Chancellor in that last case; and I think the result of the whole of these is, that persons nominated to the direction do not require to have stock to qualify them at all. In the present case they are expressly nominated in the 17th article to act as the first directors, and they are so nominated without any condition whatever as to their requiring to hold shares. There is nothing of that kind. From the very moment they are so nominated they are directors. It seems to me a question whether the 18th article does not infer that they should within a reasonable time after such nomination obtain shares if they can obtain them. But I think it is clear that the first part of the 18th article—"No person shall be eligible to the office of a director unless he is the holder of so many shares in his own right"—cannot apply to the nominated directors, for they are already nominated without condition. There is no question about their eligibility. These English cases were decided by very eminent Judges, and that seems to be the result according to my reading of them.

But it was said that the 18th article had been framed for the very purpose of avoiding the application of the precedents of the case of *Forbes* and the case of *Stocks*. In these cases that portion of the 18th article, "shall continue in office," does not appear to have been included; and therefore it is said that whether the first part "shall be eligible" is to be held to apply to nominated directors is of little consequence, because the subsequent part of it, "or shall continue in office," clearly does apply. I do not think that is a reasonable construction of this clause. I think the whole of it must be taken together—that no person 'shall be eligible' or 'shall continue.' In order to make a person eligible for election one can understand that he might have to purchase shares, for there are subsequent articles relating to his election, which is to be gone very formally about; there is a day appointed for election, and there is notice given previously by the individual who is to be a candidate, and in that notice he would probably intimate that he is the holder of the necessary qualifying shares in order to comply with the first part of the 18th article. As to the other part of it, "or shall continue," I take it that that means this and no more—that supposing he is the holder when he is elected to the directorate, of the necessary number of shares, he is not when elected to sell these shares, but is to continue to hold them, because if he does not he may be turned out of the directorship. That appears to me to be the fair meaning of the 18th article.

And if I am right in that, it is sufficient to determine this case, and I would be disposed not to go further, because if I were to hold this clause to be applicable alike to nominated directors and to elected directors, I would have some little hesitation in holding that there were no shares to be got here, and therefore that they cannot be held to have come under any agreement with the Company to take the necessary qualifying shares. I would have some hesitation in doing that, because it might be a question, By whose influence was it that the Company came to the condition in which no shares were to be allotted except the additional shares which the Court held in November last to be no shares at all? These very four directors and none other. Now, I am not prepared to say that they are entitled to found upon their own conduct, so as to show that they cannot be the holders of these shares, assuming that under the 18th article they are comprehended. If they were so, I would have some hesitation in thinking that they may not be barred from founding on these minutes of the Company, they being the parties who brought about the state of things in which there were no

shares in this Company till a certain event occurred which never did occur.

LORD GIFFORD—I am entirely of the opinion expressed by your Lordship in the chair on both points, and I have nothing to add.

The Court therefore found that the respondents did not fall to be put upon the list of contributories.

J. D. Peddie and others, the shareholders, respondents in the branch of the case reported *ante*, p. 81, then moved for expenses against the liquidator personally.

Argued for them—The liquidator was in the same position as a trustee in bankruptcy, and was personally responsible. He was here the representative of the creditors as well as the Company.

Authority—*Ferraro's* case, 9 L.R., Chan. 355.

Argued for the liquidator—The liquidator was here merely as representing the Company, and had nothing to do with the creditors. His position was not at all the same as that of a trustee in bankruptcy, who was the representative of the creditors for collecting debts. The liquidator was a functionary of the Court, assisting the Court to wind up the Company, and he required power from the Court to do the simplest things. In these circumstances he could not be personally liable in expenses.

LORD JUSTICE-CLERK—We are quite satisfied to find the liquidator liable in expenses, and say nothing more about it.

Counsel for J. D. Peddie and others and Thomas Allan and others both moved for their expenses, in respect that there was not an identity of interest or argument.

The liquidator argued that he must only pay once, and quoted *Burrell* v. *Simpson*, 14 Scot. Law Rep. 667.

LORD JUSTICE-CLERK—It is a wholesome rule that there should be only one award of expenses against the unsuccessful party. It might be different if there were different interests, but here the interests are identical, and therefore only one account of expenses ought to be charged against the liquidator. As regards the first discussion (shareholders), the allotment will be that Mr Asher's clients get three-fourths of the account, and Mr Campbell's one-fourth. In regard to the second discussion (directors), Mr Asher's clients will get their full expenses.

LORD ORMIDALE—I agree with your Lordship, but I think it is impossible to lay down a broad rule in regard to questions of this sort, for persons in the same class may in some cases have different interests.

LORD GIFFORD concurred.

On 17th January 1878 John D. Peddie and others, respondents, objected to the Auditor's report. The note annexed to the report, which explained the nature of their objection, was as follows:—

"*Note.*—This account and the account No. 140 of process (lodged by the respondents Thomas Allan and others) have been treated as if Messrs Drummond & Reid, W.S., had acted for the whole respondents. On that footing, while all charges and fees in respect of the appearance of separate agents and counsel, as stated in the account No. 140, have been disallowed, allowance has been made for additional length of copies and prints of papers and other charges included in the No. 140, which would necessarily have been incurred had the whole respondents been represented by the same agents and counsel.

"At the audit the agents pressed strongly upon the notice of the Auditor their claim for an allowance in name of 'instructions' to conduct the case, and 'session fee' greatly in excess of the amounts sanctioned by the table. In this account £3, 3s. (being the maximum) in name of 'instructions,' at the outset of the account, and £21 at the end of last summer session, and £21 at the close of the account in name of 'session fee,' have been charged; and in the account No. 140 of process £3, 3s. in name of 'instructions' and two charges of £7, 7s. each in name of 'session fee' have been stated.

"The Auditor has allowed one fee of £3, 3s. in name of 'instructions' and two charges of £3, 3s. each in name of 'session fee' (being the maximum charges) in this account, the charges in No. 140 being wholly disallowed, holding himself precluded by the provisions of the table from allowing any sum beyond the maximum. He notes this matter at the request of the agents, in order that it may be considered whether, having regard to the very large number of parties called as respondents, any exceptional allowance should be made for trouble in arranging for representation by the same agents and counsel, and for communications with the clients during the proceedings, and intimation of the result at the close."

The Court repelled the objection, on the ground that their intention was to give one set of expenses as between party and party, and that if they allowed the charges claimed no limit could be put to them in such cases as the present. The fact of there being expense connected with bringing the parties together was an incident in the case which the parties when agreeing to come together must take into consideration.

Counsel for Petitioner — Balfour — Alison. Agent—T. F. Weir, S.S.C.

Counsel for Respondents, John D. Peddie and Others, and also for directors—Asher—Mackintosh. Agents—Drummond & Reid, W.S., and J. & A. Peddie & Ivory, W.S.

Counsel for Respondents, John Allan jun. and Others—R. V. Campbell—Pearson. Agents—Mitchell & Baxter, W.S.