

to the uses formerly made of it by the inhabitants, the primary right to the water was in Dr Bonthrone, and to divert it in this wholesale way and for entirely new purposes is wholly inconsistent with his right, and therefore I am for granting decree in terms of the first part of Dr Bonthrone's petition.

**LORD DEAS**—There is no doubt that Mr Downie has made great improvements in the burgh of Crail, and I cannot help regretting that he cannot get water for the purposes he desires, for perhaps he would make a better use of it than that to which it is to be put. The water in question is not the water in the old mill-lade; it is the water of the Bye burn, to which Dr Bonthrone only got a qualified right. In that state of matters if the magistrates had taken the use of that water or the surplus of it under their charge or administration so as to limit and superintend the use that should be made of it, and had by minute of council, or in some other way, given Mr Downie right to the water, I should have thought a great deal of the views of the Sheriff and Sheriff-Substitute as to the difference between the rights of parties to water that is within a burgh and that which is in some rural district. But Mr Downie has got no title from them, nor are they willing to give him any. What he claims is an absolute right of his own, and in that state of matters the question does not arise as to the difference between the law applicable to the use of water in burghs and in country districts.

**LORD MURE**—I agree with Lord Deas that it is not necessary here to deal with the question as to the right of persons within burgh to use water even when they are not riparian proprietors; for on the facts of this case being explained to us, I have not had any difficulty or hesitation in dealing with it. I think it is clear that the respondent is diverting water to the prejudice of an inferior heritor. The respondent admits that—"The water proposed to be taken therefrom by the pipe complained of will not be returned there. The defender explains that it is intended to use on the premises all the water taken from the burn, and the sewage will be conveyed by drain to the sea." That is clearly a diversion of the water; and it is also admitted that "for some months in the year the water in the Bye burn is very low, and then it does not rise to the top of the sluice in the burn. The water is often insufficient for the pursuer's requirements. On these occasions the defender's said pipe, if running, will lessen the pursuer's supply for his mills." Now, what has the respondent done that is to prejudice the pursuer? He proposes to put in twelve water-closets in these villas, with tanks, in which there will be a constant supply of water from the Bye burn to these houses. That will be a most material prejudice to the appellant in the use of his mills, and therefore the respondent must show very clearly that he has a right to this water. That I think he has failed to do.

**LORD SHAND**—I have great difficulty in holding that the respondent has the rights of a riparian proprietor to the water in the stream as passing his subject, for it appears that the respondent's property is not on the bank of this stream, but at a considerable distance from it. In the absence of

any system of regulation by the Magistrates, or of any authority by them to use the water, I cannot see that he can claim the benefit of being a riparian proprietor. It is, however, unnecessary to decide that question. Assuming that he has the right of a riparian proprietor, he would be only entitled to take the water of the stream for washing purposes, that being the only domestic use of which it is capable. It further does not appear that Dr Bonthrone has any right that could preclude that use, for under his title he gets his right to the water under the declaration that "Although the town has become bound not to interrupt or divert the course of the water, yet it shall be in the power of the Town Council to regulate it at the dams, as at present, so that an equal quantity shall be sent down the mill-lead and Bye burn till the opening in the stone in the lead at the West Knaps shall run full, then the rest shall be sent down the Bye burn." The title leaves the riparian proprietors a right to use the water for domestic purposes, but would preclude them, as the common law would preclude them, from diverting it. They might take it off even by pipes for washing purposes, but the right insisted in here is not a right to use the water for any such limited purpose. The respondent explains that he will use it for washing clothes, but the substantial purpose is to supply water-closets. I agree in thinking that is not a use for which he is entitled to have it. The purpose is practically that he may flush the drains belonging to his houses. For that purpose it is necessary to have a considerable body of water, and to withdraw it absolutely from the stream, for it is not to be returned; and I think that is not a use to which the respondent is entitled as a matter of right. I therefore agree in the judgment proposed by your Lordship.

The Court remitted to the Sheriff to give decree in terms of the conclusion of the petition, and to grant interdict.

Counsel for Pursuer (Appellant)—Dean of Faculty—Rhind. Agents—Adamson & Gulland, W.S.

Counsel for Defender (Respondent)—Balfour—Mackintosh. Agent—John Galletly, S.S.C.

*Thursday, December 12.*

## SECOND DIVISION.

**SYME v. BENHAR COAL CO.**

*Public Company—Companies Act 1862, sec. 85—Provisional Liquidation—Application to Restrain Decree—Debenture.*

An application was presented to the Court by the provisional liquidator of a limited company to restrain a debenture holder from obtaining decree for the amount contained in his debenture bond. *Held* that the debenture holder was entitled to have decree, the liquidator not being prepared to find security for any damages the creditor might suffer, and application refused.

Reid, a creditor of the Benhar Coal Company, had presented a petition for the judicial liquidation of the company. Upon representations by the com-

pany to the effect that they wished to investigate their affairs fully, and would require time, the Court of consent meantime appointed Mr Molleson, C.A., provisional liquidator.

In these circumstances, and Reid's petition being still in Court, Thomas Syme, a debenture holder, raised an action in the Court of Session concluding for payment of £1000, the amount contained in certain debenture bonds which he held of the company, and the provisional liquidator, with the concurrence of the company, in these circumstances presented a note to the Court applying to have Syme restrained from obtaining such decree.

The 85th section of the Companies Act 1862 was as follows:—"The Court may, at any time after the presentation of a petition for winding-up a company under this Act, and before making an order for winding-up the company, upon the application of the Company, or of any creditor or contributory of the company, restrain further proceedings in any action, suit, or proceeding against the company, upon such terms as the Court thinks fit."

Authorities—Lindley, ii., 1276, vol. i., *adenda*, 99; *In re The London and Suburban Bank*, 19 Weekly Reporter, 950; Cameron on Joint-Stock Companies, 136; *Re The Railway Finance Co. (Limited)*, 14 Weekly Reporter, 754; *Seward v. Gardner*, March 10, 1876, 3 R. 577.

At advising—

**LORD ORMIDALE**—Mr Syme here finds that his claim as it exists at present in the form of a debenture bond does not give any power of execution. What he wants is that power, and I think he should have it. He undertakes to do nothing more than to get decree for this amount, and I feel no doubt that there has not been any sufficient ground shown upon which any restraint of this application should be granted. It is always in the power of the Benhar Company to come here again if they wish.

**LORD GIFFORD** concurred.

**LORD YOUNG**—I understand that this application to restrain the petitioner from obtaining decree is to be refused by your Lordships as not being warranted by the Act. The 85th section of the Companies Act of 1862 is—[reads as quoted *supra*]. If there were any question here—for example, whether the Benhar Company was to go into liquidation or not—it might be very inconvenient to have applications presented on behalf of individual creditors for decree constituting their claims. In such a case as that the Court will order such restraint, and order it moreover upon the condition that the restraining parties find security for any damages that might be sustained by the creditor in consequence of their action. This is the usual course in England, as may be seen readily from the passage in Lindley quoted from the bar.

In the present instance a holder of the debenture bonds of a company for whose liquidation a petition has been presented, wants a decree, and he prefers to have this to the bond in its present shape; the company have not any defence whatever to the action raised on the bond, and I cannot see that they are entitled to restrain. The question was fairly put to their counsel whe-

ther they were prepared to give any undertaking to find security for damages, but they refuse to do this, and yet, notwithstanding, wish us to interdict the pursuer from the simple process of taking the decree to which he is entitled as a matter of course, and to which no defence is offered.

The Court refused the application *simpliciter*.

Counsel for Pursuer—J. A. Crichton. Agents—

Counsel for Defenders—C. J. Guthrie. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Friday, December 13.

## FIRST DIVISION.

### SPECIAL CASE — WATSON AND OTHERS (MUNRO'S TRUSTEES).

*Trust—Intention—Deduction of Liferent Interest of Heritable Subject in Estimating Division of Estate where One Share Bequeathed to Liferenter.*

By trust-disposition and settlement the truster's wife was liferented in the truster's house, and the furniture and plenishings therein. The trustees were further directed after certain payments as mentioned in the deed "to make up a state and valuation of my trust-estate, heritable and moveable, wherever situated, including that part thereof in which my said wife is liferented as aforesaid . . . and on a valuation and corresponding state being so made out showing the free amount or balance of my said trust-estate, to convey, assign, or pay over one just and equal third part or share of such free amount or balance of my said trust-estate to and in favour of my wife." *Held (diss. Lord Shand)* that the value of the widow's liferent interest in the house, furniture, &c., was a proper deduction from the trust-estate preparatory to a division thereof among the beneficiaries.

This Special Case was submitted for the opinion and judgment of the Court by William Watson and others, testamentary trustees of the deceased Alexander Munro, parties of the first part; and the accepting and acting trustees under the antenuptial contract of marriage between Mr A. C. Ponton and Miss J. R. Munro, only child of Mr Alexander Munro, on the second part.

Mr Alexander Munro died on 11th July 1877, survived by his wife Mrs Isabella Munro and by an only child by a former marriage. On 8th September 1871 Mr Munro and Mrs Isabella Munro his wife had entered into a mutual trust-disposition and settlement, the first three purposes of which were in the following terms:—"First, For payment of my just and lawful debts, death-bed and funeral expenses, and the expense of carrying this trust into effect, including the expense of maintaining and upholding in repair the heritable property hereby conveyed, and defraying the feu-duties, taxes, and other annual charges thereon. *Second*, In the event of my wife, the said Isabella Younger or Munro, surviving me, I direct the said trustees to give and allow her the liferent use and enjoyment during all the remaining years of her life thereafter of the dwelling-house,