which made it indispensable that cautionary obligations should be in writing, clearly implied that the person to whom the obligation was given should be named. The cases on this subject under the corresponding section of the English Statute of Frauds were therefore applicable—*Williams* v. *Lake*, 2 Ellis and Ellis, 349; *Duncan's Trustees* v. *Shand*, July 19, 1872, 10 Macph. 984 (opinions of Lords Neaves and Benholme); Act 1696 c. 25; Act 19 and 20 Vict. c. 60; Mercantile Law Amendment Act (Scotland) 1856; Ersk. iii. 2-6. The evidence showed that the debtor had not been so well looked after by the creditors as they had undertaken to do by the clause in the obligation (assuming it to be a good obligation), which related to fortnightly payments. That was a stipulation inserted in the defender's interest.

The pursuers' counsel was not called on.

At advising—

LORD JUSTICE-CLERK—I am unable to see any ground for recalling the Sheriff's judgment. As to the constitution of the obligation, the appellant's counsel did not maintain that the English Statute of Frauds applied to Scotland, but he said that by the Mercantile Law Amendment Act such obligations must be in writing. This one is in writing. But then he says it is blank in name of the creditors under it. That is a mistake. It is not so. It is quite clear who is creditor under it. The case cited from English law is a totally different case. I think that under the Mercantile Law Amendment Act this is a good cautionary obligation, and that there can be no doubt as to who the persons are on whom it constitutes a right. On this matter I may refer parties to the note of the Editor in M'Laren's edition of Bell's Commentaries, vol. i. 402, *et seq.*

As to the appellant's second point, I am unable to read the obligation as imposing on the creditors the duty which it is said was laid upon them. I am for adhering to the judgment of the Sheriffs.

LORD YOUNG and LORD CRAIGHILL concurred.

The Court adhered.

Counsel for Appellant — Campbell Smith — Rhind. Agent—W. Officer, S.S.C.

Counsel for Respondents—Ure. Agents—Cairns, M'Intosh, & Morton, W.S.

Wednesday, July 20.

FIRST DIVISION.

[Sheriff of Lanarkshire.

CENTRAL HALLS COMPANY (LIMITED) *v.* FERGUSON (YUILL'S TRUSTEE).

Public Company — Calls — Right to Notice of Call in terms of Articles of Association where Shares have been Forfeited but Liability for Call remains.

The articles of association of a public company provided—"Twenty-one days' notice at least shall be given of the time and place appointed by the directors for payment of every call;" provision was also made for penal interest where calls remained unpaid, and for the forfeiture of the shares of parties in default of payment. On 14th June a call was made, payable in equal instalments on 21st July and 23d August. On 28th June the shares of a shareholder were duly forfeited in respect of the non-payment of former calls. No notice of the call of 14th June, in terms of the above provision, was sent to the shareholder in question, and the first intimation he received was a demand for payment made on 13th August. On his sequestration, *held* that the company were entitled to rank on his estate for the amount of the call, but not for penal interest—*per* Lord President (Inglis) and Lord Mure, on the ground that having ceased to be a shareholder more than twenty-one days before the day appointed for the payment of the first instalment of the call, he was no longer entitled to the twenty-one days' notice provided by the articles of association—*question* as to his position had he remained a shareholder; *per* Lord Shand, on the ground that even as a shareholder all that he was entitled to was twenty-one days' actual notice before being called on to pay the call; *per* Lord Deas, on the ground stated by the Lord President and Lord Mure, but *opinion* that in the absence of that ground his Lordship was prepared to concur with Lord Shand.

The articles of association of the Central Halls Company (Limited) contained the following provisions with reference to the making of calls—"12. The directors may from time to time, but subject to the directions hereinafter mentioned, make such calls on the shareholders, in respect of all moneys unpaid on their shares, as the directors think fit; and every shareholder shall be bound to pay the amount of every call to the persons, and at the time and place, appointed by the directors. 13. Twenty-one days' notice at least shall be given of the time and place appointed by the directors for payment of every call. 14. At least one month shall intervene between the time appointed for the payment of two successive calls. 15. 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. 16. If any call payable in respect of any share is not paid on or before the day appointed for payment thereof, the holder for the time being of such share shall be liable to pay interest for the same at the rate of 10 per cent. per annum from the day appointed for the payment thereof to the time of the actual payment."

With reference to the forfeiture of shares the articles contained the following further provisions—"25. If any shareholder fails to pay any call on the day appointed for payment thereof, the directors may, at any time thereafter, during such time as the call remains unpaid, serve a notice on him requiring him to pay such call, together with interest and any expenses which may have accrued by reason of such non-payment. 26. The notice shall name a further day on or before which such call, and all interest and ex-

penses which may have accrued by reason of such non-payment, are to be paid. It shall also name the place where payment is to be made, and state that in the event of non-payment at or before the time and at the place appointed, the shares in respect of which such call was made will be liable to be forfeited. 27. If the requisitions of any such notice, as aforesaid, are not complied with, any share in respect of which such notice has been given may at any time thereafter, before payment of all calls, interest, and expenses due in respect thereof, be forfeited by a resolution of the directors to that effect. 28. Any share so forfeited shall be deemed to be the property of the company, and may be disposed of in such manner as the directors think fit. 29. Any shareholder whose shares have been forfeited shall notwithstanding be liable to pay to the company all calls owing on such shares at the time of the forfeiture, and the interest, if any, thereon. 30. A written certificate, under the hands of two directors, and countersigned by the manager or secretary, that a share has been duly forfeited in terms of these presents, and stating when it was forfeited, shall be conclusive evidence of such forfeiture. 31. The directors may at any time accept the surrender of any shares from and by any member desirous of surrendering them, on such terms as the directors may think fit."

J. C. Yuill was a shareholder in this company to the extent of 210 shares. On the 14th June 1880 the directors made a call of £2, 10s. per share, payable at the registered office of the company, in two equal instalments of 25s. each, the first instalment on Wednesday, 21st July, and the second on Monday, 23d August 1880. A fortnight afterwards, on the 28th June, the shares held by Yuill were duly forfeited in respect of the non-payment of previous calls and penal interest thereon. No notice of the proposed call, in terms of the articles of association, was sent to him, nor did he receive any intimation of it until a demand for payment was made on the 13th August, ten days before the day fixed for the payment of the second instalment. Yuill's estate having been sequestrated, the Central Halls Company lodged claims in the sequestration for £169, 7s. 9d. and £723, 6s. 6d., being the amount of calls and penal interest (including the call of 14th June and penal interest thereon) alleged to be due on 10 and 200 shares respectively. The trustee rejected the claims "in respect, *inter alia*, by the articles of association of the appellants' company it is provided that calls can only be made subject to the directions contained in said articles; and it is further provided that twenty-one days' notice of the time of each call shall be made, whereas, in breach of said articles, no notice of the call was given to the bankrupt until after his shares had been forfeited, and after the time for payment of said call had come, or at least within twenty-one days of the said time. The call therefore fell."

The company appealed.

The Sheriff-Substitute (Erskine Murray) pronounced this interlocutor:—"Finds (1) that the main question at issue is, Whether the appellants, The Central Halls Company, are entitled to be ranked on their claim for a call of £2, 10s. per share on shares in their company held by the bankrupt, but forfeited as per resolution of 28th June 1880?—Finds (2) that it appears that this call was made by resolution on 14th June 1880, and that by article 15 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: Finds (3) that while under the resolution in question the call was to be paid in certain instalments—and article 13 provides that 'twenty-one days' notice at least shall be given of the time and place appointed by the directors for payment of every call,'—the bankrupt's shares were on 28th June, a date previous to that on which by article 13 the twenty-one days' notice required to be sent, declared to be forfeited under article 27, in respect of the non-payment of previous calls, &c., and the bankrupt's name being struck off the register of shareholders no notice was sent to him of the £2, 10s. call: Finds (4) that article 104 declares that in suing 'any shareholder to recover any debt for any call, it shall be sufficient to prove that his name is on the register as the holder of the shares, and that notice of the debt was duly given to him:' Finds (5) that in these circumstances, it is contended by the respondent (the trustee) that the appellants have lost any right to insist on the call in respect of their failure to send notice: Finds in law that this contention is ill founded as regards the £2, 10s. call itself, and that the appellants are entitled to be ranked on the estate for the £2, 10s. call on the bankrupt's shares, but not for the penal interest thereon: Reserving to pronounce further."

He added this note:—"On consideration of the various clauses in the articles, and the authorities that have been referred to, the Sheriff-Substitute has come to be of opinion that the giving of the notice mentioned in the 13th article is not an absolute condition of liability on a call in the case of already forfeited shares. The clause is directory rather than imperative; and even if imperative as regards existing shareholders, the case of one who has ceased to be a shareholder is very different. For the object of the notice in question is manifestly to prevent a shareholder falling into a position as regards arrears that might entail forfeiture. But when he has already forfeited his shares, the only possible good of the notice to the former shareholder is to prevent his incurring the penal interest stipulated for non-payment. To that extent, therefore, and to that extent only, the Sheriff-Substitute considers the effect of the want of notice to apply. The call itself became an existing debt on the 14th June, though it was not payable till the dates of payment. As long as Yuill remained a shareholder he was entitled to the privilege of one, but not after, through his own default, he had ceased to be one."

The trustee appealed, and argued—The call had not been well made, because no notice had been given. [Lord President—Not exactly. The call may be well made, but it may not be enforceable if no notice has been given. Have you a second point—that the resolution making the call is in itself objectionable?]—No, not apart from the want of notice.

Argued for the respondent—The call was well made, and was a debt due from the day it was made—*Dawes'* case. The want of notice did not take away the debt, even as regards shareholders, and bankrupt had ceased to be a shareholder.

Authorities—*Newry and Enniskillen Railway*

Company v. *Edmunds*, Feb. 5, 1848, 2 Excheq. (Welsb. Hurls. and Gord.) 118; *Stocken's* case, Jan. 16, 1868, L.R. 3 Chan. App. 412; *Dawes'* case, June 4, 1869, 38 Law Jour. Chanc. 512.

At advising—

Lord President—It appears that the bankrupt in this case was a shareholder in a company called the Central Halls Company (Limited) to the extent of ten shares as regards one affidavit made in his sequestration, and to the extent of 200 shares as regards the other affidavit. He allowed the calls on each set of shares to fall greatly in arrear, so that at his sequestration he was owing in respect of the ten shares an aggregate sum of £169, 7s. 9d., and in respect of the 200 shares an aggregate sum of £723, 6s. 6d. The company claim to rank in his sequestration for these sums, and it appears to me that the controversy is now limited to one call only on the shares in question, namely, a call made on the 14th June 1880. The Sheriff-Substitute has given effect to the claim of the company, and has found them entitled to rank for that call along with the other sums which they claim, and I think that the Sheriff-Substitute has done rightly. But as the point is one both of novelty and importance, it is necessary to see exactly how the facts stand.

In consequence of the calls having fallen so deeply into arrear, the shares of the bankrupt were forfeited on the 28th June 1880, *i.e.*, the date of the resolution of the company declaring the shares to be forfeited. It is not contended that any informality or invalidity attaches to this forfeiture. It was carried out exactly in terms of the articles of association. But the call was made on the 14th June, just a fortnight before the forfeiture of the shares, and the 29th article of association provides that "Any shareholder whose shares have been forfeited shall notwithstanding be liable to pay to the company all calls owing on such shares at the time of the forfeiture, and the interest, if any, thereon." In virtue of this clause of the articles of association it is not doubtful that the company have a good action against shareholders whose shares have been forfeited, or any calls made and owing at the date of the forfeiture. Now, where a resolution making a call has been passed, the call becomes a debt of the shareholder. But it is contended that to make the call effectual it is necessary that there should be intimation in terms of the 13th head of the articles of association. The 12th head provides—"The directors may from time to time, but subject to the directions hereinafter mentioned, make such calls on the shareholders in respect of all monies unpaid on their shares as the directors think fit; and every shareholder shall be bound to pay the amount of every call to the persons and at the time and place appointed by the directors." And the 13th head provides—"Twenty-one days' notice at least shall be given of the time and place appointed by the directors for payment of every call." Now, the resolution of the directors not only imposed a call but appointed a time and place when and where the call was to be paid, and at the date of the forfeiture there had been no failure to give notice, because there was plenty of time after the 28th June, the date of the forfeiture, to give notice of the time and place of payment, the first instalment of the call being payable on the 21st July, and the second on the 23d August. Consequently on the 28th June there had been no failure of duty on the part of the company or its directors to intimate the time and place of payment of the call. But on the 28th June the bankrupt ceased to be a shareholder through the forfeiture of his shares, and the question therefore is, Whether the company were under an obligation to give him twenty-one days' notice in terms of the articles of association?

It appears to me that the twenty-one days' notice is a privilege of the shareholders, and a very important privilege. For if they had not twenty-one days' notice of the time and place of the call, they might incur the risk of forfeiture by failure to make payment at the time and place appointed, and they might also be found liable in payment of penal interest. It is therefore clearly a privilege to which they are entitled. Now, what the precise effect of failure to give notice would be in the case of a shareholder whose name is still on the register I do not think it necessary here to determine. It is a point of some difficulty. But the question here is, whether one who has ceased to be a shareholder is entitled to that privilege which belongs to existing shareholders? and I think with the Sheriff-Substitute that at the date of the forfeiture there was a debt due, not only for calls then payable, but also for calls of which the terms of payment had not arrived. They were debts due by the bankrupt, but due by him not as a shareholder, but as having been a shareholder. At the same time, whether or not one who has been a shareholder is entitled after the forfeiture of his shares to notice in terms of the articles of association, he is certainly entitled to some notice. Every man is entitled to some notice as to when and where he is to pay his debts. And notice of this kind the bankrupt has had. On 13th August a circular was sent to him intimating that a call had been made, payable in equal instalments on the the 21st July and the 23d August, and requiring payment. That is not notice in terms of the articles of association, but it is a perfectly sufficient intimation to any ordinary debtor, and having ceased to be a shareholder the bankrupt is just in the position of an ordinary debtor. Therefore I am of opinion that this is a debt due by the bankrupt, or rather a debt on his sequestration, which may be enforced in the ordinary way.

Lord Mure—The argument of the Sheriff-Substitute is that the provision relating to notice was no longer applied to the bankrupt after he had forfeited his shares through failure to pay the calls. I think that the Sheriff-Substitute is right in that view. What may be the effect of want of notice in the case of one who continues to be a shareholder I do not think it necessary to inquire. At anyrate, the bankrupt here had ceased to be a shareholder.

Lord Shand—I have come to the same result as your Lordships in holding that the Sheriff-Substitute is right in saying that as regards the £2, 10s. call itself "the appellants are entitled to be ranked on the estate for the £2, 10s. call on the bankrupt's shares, but not for the penal

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 Carlaverock, 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 Carlaverock tenants of "their priviledge of casting, winning, and leading their peits and turfes in the mosse and muir as formerly." On the other hand, there was another way by which the Carlaverock tenants could lead their peats from the Locharmoss (to which the foregoing reservation related), but this road was admittedly circuitous. The Sheriff-Substitute (HOPE) 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.