Friday, June 2.

FIRST DIVISION.

MASON *v.* BENHAR COAL COMPANY AND LIQUIDATORS.

Public Company—Agreement to Take Shares—"Willingness" to Take Proposed New Shares if Issued—Allotment.

A company which was in financial difficulties issued a circular to its shareholders stating that it was proposed, if the principal creditors would agree, to raise additional capital by the issue of new preference shares, and enclosing a schedule for replies, in these terms—"I hereby express my willingness to take of the proposed new preference shares." The circular intimated that a meeting of the company would be held on a day named, to decide whether the company should issue the proposed new preference stock or should go into liquidation. M, a shareholder, who was also a creditor of the company, filled up this schedule for 50 shares. Thereafter at the meeting intimated in the circular it was decided to issue the new shares, and a second circular was sent out inviting the shareholders to subscribe for them, and enclosing a schedule for replies, in the form—"I hereby apply for shares of the new preference stock." This circular was sent to M, but having changed his mind as to taking shares he took no notice of it, and did not fill up the schedule for replies. He was, however, allotted by the directors the 50 shares mentioned in his reply to the first circular. It was doubtful whether an allotment letter was received by him, but call letters were admittedly received by him, of which he took no notice. In the subsequent liquidation of the company it was sought to make him liable as a contributory for the 50 preference shares. *Held* that the first circular was merely tentative, and that there had been no agreement by him to take shares.

Offer and Acceptance—Acceptance by Post.

Opinion (per Lord Shand) that where an acceptance of an offer is said to have been sent by post, it is not sufficient proof to bind the offerer that the acceptance is proved to have been posted, without proof that it reaches him.

This was a petition by Mr Samuel L. Mason for removal of his name from the register of the Benhar Coal Company, in which he had been entered as holder of 50 preference shares of the company. The company went into voluntary liquidation on 30th December 1880, and the liquidation was placed under the supervision of the Court on 18th January 1881. The name of the petitioner was placed on the register by the liquidators. They lodged answers to the petition, and submitted that the petitioner's name should be retained on the register. The facts as disclosed in a proof which was led before Lord Shand were as follows:—The petitioner was an ordinary shareholder to a large extent from the commencement of its business in 1872 to the date of the liquidation, and he took from the first a considerable interest in the affairs of the company. In respect of some business transactions which he had with it he also became a considerable creditor of it, and in the year 1878 its debt to him amounted to at least £6500, while he contended that he was really a creditor to the amount of £8000. In December of that year the company was in considerable financial difficulties, and various expedients were considered for continuing the business without having recourse to liquidation. A general meeting of the shareholders was held on the 27th of that month, when two motions were laid before the meeting. One of these, moved by Mr Harrison, was in favour of winding up the company, while the other, moved by Mr Forrest, embraced a scheme for continuing the business of the company by an arrangement between the company and its creditors, by which the creditors should delay pressing for payment of their claims in consideration of the proposed raising of funds by the company by the issue of new 7½ preference stock under conditions embodied in a memorandum. For further consideration of these proposals the meeting was adjourned till 6th January, and meantime on 30th December a circular was issued which set forth the two motions and gave a copy of the proposed agreement and memorandum of conditions of the proposed issue of new shares. This circular (which will be found fully quoted in the opinion of Lord Shand) stated that the board of directors approved of the arrangement proposed in Mr Forrest's motion, and recommended its adoption rather than the adoption of the disastrous course of a winding-up. The circular went on to "request shareholders and creditors to favour them with an early reply, shareholders stating how much of the new stock they will take, and creditors stating how far they will accede to the proposed agreement in regard to their claims, and how far they wish new stock in payment. Schedules for these replies are herewith sent, and replies are requested as long as possible before the meeting on 6th January. It is understood that the allotments of new stock will not be made until the arrangements otherwise are regarded as satisfactory." This circular was issued with the concurrence of the petitioner, who was deeply interested in the company, as already stated, both as a shareholder and as a creditor. The schedule for replies appended to it was in these terms:—"I hereby express my willingness to take of the proposed new preference shares."

The petitioner filled up one of these schedules expressing his willinguess to take fifty of the proposed new preference shares. His four daughters, who were also shareholders, filled up similar schedules sent to them, expressing their willingness to take three shares each. A large number of other shareholders expressed their willingness to take the proposed new shares before the meeting on 6th January. At that meeting the motion of Mr Forrest was carried, and it was decided to issue the stock. The resolution creating it was embodied in a second circular, which was issued on 8th January, and by which the new stock was offered to the shareholders, and the last paragraph of which ran thus—"The board will be obliged by shareholders intimating at the earliest possible date the amount of their subscriptions, and by its being borne in mind that the opportunity and the means now afforded of retrieving the company's credit and of saving its property are final. The

only alternative to the subscription of the capital is immediate recourse to official liquidation." Annexed to the circular was a schedule for replies addressed to the board, and which ran thus—"I, , hereby apply for shares of £5 each of the new preference stock of your company, having the rights, priorities, and special privileges expressed in the resolution of the meeting of the company held on 6th January 1879; and I agree to take the said number, or any less number that may be allotted to me." A copy of this circular, with schedules annexed, was sent to Mr Mason, and a copy was also sent to each of his daughters. His daughters filled up their schedules for "two additional shares" each, and sent them in. This was done with the knowledge of the petitioner. He himself did not fill up the schedule, and made no response whatever to the circular. He assigned as his reasons for not filling up the schedule that he was dissatisfied with the treatment he was receiving from the company in not admitting as a debt to him the sum of £1500 which he claimed in addition to the £6500 for which he was admittedly a creditor, and that he was dissatisfied with some of the gentlemen proposed as new directors in the reconstructed board of directors of the company. Thereafter on 12th May a meeting of the directors was held, at which, *inter alia*, fifty preference shares were allotted to the petitioner, and five to each of his daughters. Allotment letters were sent out to those to whom the shares were allotted, but the proof was conflicting as to whether any such letter had reached the petitioner. He himself deponed that he had never received one. Thereafter, however, call letters were sent out to the shareholders making certain calls on their shares, and these he admittedly received. He never answered these letters. In his evidence he gave as his reason for this that he considered that he had not applied for shares, and that the sending of call letters to him was simply a "try-on." The company did not before going into liquidation take any steps to enforce payment of these calls. The reason of this was explained by the secretary to be that the petitioner was a large creditor who had given delay to the company, and that it would have been in the circumstances unfair to press him for his calls. The annual return of shareholders lodged with the Registrar of Joint Stock Companies did not contain the petitioner's name.

Argued for the petitioner — The circular answered by the petitioner was only tentative. The object of it was to see what hopes the company had of being resuscitated, and the expression of the shareholders' "willingness" to take new preference stock was plainly dependent on the other answers received showing the company's prospects. It was also dependent on the creation of the stock, for it had not yet been created, and on the satisfaction of the proposed shareholders with the new board and the state of the market. The answer sent in only expressed the attitude the petitioner had at the time of writing it towards the proposal to give the company a fresh start. And so the company must have thought, for otherwise the second circular would never have been issued. This second circular was distinguished from the first by being (as the first was not) in the terms ordinary and appropriate to an application for shares. Assuming the petitioner to be held to have applied for shares by his mere expression of "willingness" to take them, he was proved never to have received an allotment letter, and therefore there was no contract between him and the company. The company's own conduct in the omission of the petitioner's name from the return made to the Registrar of Joint Stock Companies showed their own view of the position—*Pellatt's* case, April 13, 1867, 2 L.R., Ch. App. 527 (opinion of Lord Justice Cairns); *Gunn's* case, November 14, 1867, 3 L.R., Ch. App. 40. Authorities as to the effect of actings of the company—*Browne* v. *Freeth*, June 23, 1829, 9 B. and C. 632: *Mackenzie* v. *British Linen Company*, June 4, 1880, 7 R. 836—*rev.* February 11, 1881, 8 R. (H. of L.) 8.

Argued for respondents—There was here an agreement to take shares. This gentleman, who was actively engaged in promoting the affairs of the company, stated his willingness to take fifty shares of the proposed preference stock, and thereby agreed to take them, subject only to the condition that they should be issued. The proof showed that he had got an allotment letter, and he certainly got call letters, which he never repudiated. The only reason for the different wording of the two circulars was that at the date of the first the new stock had not been created, while at the date of the second it had—*Jackson* v. *Turquand*, 4 L.R., Eng. and Ir. App. 305; *Addinell's* case, November 17, 1865, L.R., 1 Eq. 225; *Macdonald's* case, February 7, 1879, 6 R. 621. Mere denial that the allotment letter had been received would not free a person who had applied for shares, and if the posting of it was proved, as was the case here, the contract was to be held complete — *Wall's* case, November 9, 1872, 15 L.R., Eq. 18; *Higgins & Sons* v. *Dunlop, Wilson, & Company*, July 2, 1847, 9 D. 1407—*aff.* Feb. 24, 1848, 6 Bell's App. 195; *Household Fire Insurance Company* v. *Grant*, July 1, 1879, 4 L.R., Ex. Div. 216. No doubt the petitioner's name was omitted in the public return of shareholders, but that was proved to be due to an erroneous opinion on the part of the secretary that no names should be entered in that return except the names of shareholders who had paid for their shares.

The Lords made avizandum.

At advising—

Lord Shand — The Benhar Coal Company (Limited) went into voluntary liquidation on 30th December 1880, and the liquidation was on 18th January 1881 placed under the supervision of the Court. The liquidators have placed the name of Mr Mason, the petitioner, on the list of contributories, not only in respect of certain ordinary shares, but also in respect of fifty preference shares which were issued at a late period in the company's history, and the question is, Whether he agreed to become a shareholder in respect of these shares? The liquidators say that he applied for them, that they were allocated to him, and that intimation thereof was made to him. Mr Mason denies that he applied for them, or ever received intimation of allocation. It appears that in December 1878 the company was in considerable difficulties, and on the 27th of that month a general meeting of the shareholders was held, at which two motions were proposed—one by Mr Harrison that the company be wound up, and the other by Mr Forrest that an attempt be made to carry on the company under a joint management of share-

holders and creditors; and as a condition of the last proposal it was explained by Mr Forrest to the meeting, and afterwards explained by the circular to the shareholders and creditors, to which I am about to allude, that two conditions would be required—First, that the principal creditors should postpone payment of their debts; and next, that new stock should be created to raise means to pay the smaller creditors, and those of the larger creditors who might refuse to wait for their money, and to provide means for carrying on the company. The new stock was to be 7½ per cent. stock, and to be subscribed for by the shareholders or by the public. At that meeting it was agreed that there should be an adjournment to give time for consideration of the motions proposed, and it was therefore adjourned to the 6th January 1879. Meantime, a circular to the principal creditors and to the shareholders was sent out, in which the former were asked if they were willing to postpone payment, and the latter were asked whether they would subscribe to the new stock if created. This circular, which is dated 30th December 1878, is very important. It explains the two motions which were made at the meeting on 27th December, and then goes on to say with reference to liquidation—"It is obvious that the time during which a liquidator might carry on the business would much depend on the forbearance of creditors, and it is therefore better to make at the outset arrangements having due regard to both interests. The board think that the agreement referred to in Mr Forrest's motion presents a fair basis of arrangement between shareholders and creditors, and it has been approved of by creditors to a considerable amount. Besides asking creditors to accede to this arrangement, it is thought that a certain amount of preference stock should be created. Some of it may be issued as fully paid-up to creditors for a discharge of a corresponding amount of debt, or it may be issued to shareholders or others with the option of paying up the amount either at once or by calls not earlier than fixed dates. Creditors taking shares would have a stock which they could retain or put on the market when it suits them. The conditions and priorities which (subject to the shareholders) it is thought may be attached to the preference shares are embodied in the memorandum hereto annexed. It may be shortly described as 7½ per cent. preference stock, participating in higher dividends when these are earned, and also ranking preferably to the existing shares on the capital of the undertaking." Then (I pass over a paragraph) the circular goes on—"The board request shareholders and creditors to favour them with an early reply—shareholders stating how much of the new stock they will take, and creditors stating how far they will accede to the proposed agreement in regard to their claims, and how far they wish new stock in payment. Schedules for these replies are herewith sent, and replies are requested as long as possible before the adjourned meeting on 6th January. It is understood that allotments of new stock will not be made until the arrangements otherwise are regarded as satisfactory." Accompanying this circular there were schedules for replies, and it is on the terms of one of these that the present question turns. The schedules were of two classes, one for the creditors and one for the shareholders. That for the shareholders was in these terms:—"*Reply by Applicants for the Proposed New Preference Shares. January* 1879. —I, , hereby express my willingness to take of the proposed new preference shares." The schedule for creditors was in similar terms. It is not disputed that Mr Mason sent in one of these shareholders' schedules expressing his willingness to take 50 of the proposed new preference shares. The date does not appear to have been filled up by him, but it was of course before the date of the adjourned meeting on 6th January 1879. The next matter is the meeting which subsequently took place on 6th January. A number of replies to the circular had been received, and Mr Forrest's motion was carried, and it was agreed that the proposed preference stock should be created, and the necessary resolutions were passed creating it. It is obvious, then, that the parties had in view the replies of the creditors and shareholders, and the amount of encouragement they had received. This resolution of the meeting was also communicated to the shareholders by circular from the board of directors dated 8th January, and I must notice two passages in that circular and the terms of the schedule appended to it. After stating the resolutions come to, it goes on—"The board would point out that a shareholder subscribing the proposed new stock, not only obtains what is obviously a sound investment yielding a good rate of interest, but he thereby secures his existing investment against otherwise almost certain total loss, and raises it immediately in market value." Then the last paragraph is—"The board will be obliged by shareholders intimating at the earliest possible date the amount of their subscriptions, and by its being borne in mind that the opportunity and means now afforded of retrieving the company's credit and of saving its profit are final. The only alternative to the subscription of the capital is immediate recourse to official liquidation." Then annexed to this circular were the terms of the proposed agreement with creditors, and a form of application for shares. The terms of that form are materially different from those of the other which I previously quoted. It is indeed the usual form in which such applications are made. The form runs—"I hereby apply for shares of £5 each of the new preference stock of your company, having the rights, priorities, and special privileges expressed in the resolution of the meeting of the company held on 6th January 1879; and I agree to take the said number or any less number that may be allotted to me." One of these was sent to Mr Mason, and it is admitted that he made no reply, although the other shareholders or many of them did. The company say that notwithstanding Mr Mason's having given no reply they went on in May to allocate shares to him in consequence of the schedule sent in by him in answer to the first circular. Assuming that the stock was not only allocated to him, but that a letter intimating the allocation reached him, which he denies, the question is whether this answer of his to the first circular can be accepted as a direct application on which the company is entitled to act. After full consideration I have come to be of opinion that the schedule signed by Mr Mason was not a direct application for shares, such as on being accepted by the company can bind him. It appears to me that we must look at the terms of the schedule, not only with reference

to the position of the company, but also with reference to the statements contained in the schedule when issued. The whole arrangement then contemplated was tentative. The stock was not yet created, though its creation was contemplated. The creditors were not arranged with. Unless the arrangement was satisfactory to all parties it was to fall through. But what was wanted on 6th January was an intimation of what the shareholders were willing to do in the event of satisfactory replies being received from the creditors. The language of the schedule confirms that view; such words as are used in it would be a most unusual way of applying for shares, and when we look to the surrounding circumstances, the application to creditors, the new board which was to be formed, the necessity that a sufficient number of creditors should accede to the proposals made to them, I think that the fair reading of the circular is—"If there shall be satisfactory answers from a sufficient number of creditors and shareholders, we shall issue new forms of application for the new shares, and it will be for the shareholders then to say whether they will take them."

In these circumstances I think that Mr Mason was not bound as an applicant for shares, and was entitled when the subsequent circular was issued to consider whether he was satisfied as to the position of the creditors, the number of shareholders who were willing to take the new stock, the new directors, and so on. I will even say that I think that if in the meantime he found that he was not in a position any longer to apply for shares, from any cause, he was not bound to take them in consequence of his answer to the first circular. I am very far from saying that the words "I hereby express my willingness to take 50 shares" might not in other circumstances have been held a sufficient offer to take shares. For example, if the proposed stock had in point of fact been created, and the company had sent out a circular saying that they had a quantity of it on hand and were offering it for sale, and this gentlemen had then sent in an answer that he was willing to take so many shares, that would probably have been held an application for them. But the peculiarity here is, that accompanying the schedule for replies was a circular which informed the person to whom it was sent that the whole matter was tentative, and that the issuing or not issuing the stock was to be resolved upon at a future meeting, and that when the meeting was held and the resolution creating stock had been passed, a circular having annexed to it a schedule in the usual form for replies making application for stock was sent out. I think Mr Mason is entitled in law to say that he did not make application for the new preference shares, and that he cannot be put upon the register.

This view is strengthened by the conduct of the company themselves in not including the name of Mr Mason as a holder of preference stock in the statutory returns of shareholders made by them. They themselves acted in the view that he was not bound.

As to the question whether notice of allotment was received or not, there is considerable difficulty. There is evidence that such notice was despatched to him by post, and the jury question as to whether it was received is not an easy one. One point against the petitioner, who says he did not receive it, is that he received call letters and never repudiated them. But it is not necessary to decide the question. I shall only say, that assuming the delivery not to be proved, I should not be prepared to hold that the contract was completed by the mere posting of the notice of allotment. I should concur on that matter in the opinion of Lord Justice Bramwell in the case of the *Household Fire Insurance Company*, which was referred to at the debate. But, for the reason I have stated, that matter does not require to be decided.

The Lord President and Lords Deas and Mure concurred.

The Lords granted the prayer of the petition.

Counsel for Petitioner—J. G. Smith—Guthrie. Agents—Drummond & Reid, W.S.

Counsel for Respondents—J. P. B. Robertson—Murray. Agents—J. & F. Anderson, W.S.

Friday, June 2.

OUTER HOUSE.

[Lord Kinnear.

LAUGHLAND *v.* LAUGHLAND.

Process—Citation—Divorce—Judicature Act 1825 (6 *Geo.* 4. *cap.* 120)—*Conjugal Rights (Scotland) Amendment Act* 1861 (24 and 25 *Vict. cap.* 86).

A defender had left his residence in Scotland for less than forty days, and left no information as to where he had gone. *Held* (*per* Lord Kinnear, Ordinary) that the Judicature Act creates no presumption that in such circumstances the defender is still resident in Scotland, and therefore that citation in a consistorial cause must, in terms of the Conjugal Rights Act of 1861, be made upon him personally.

This action was brought by Mrs Isabella Laughland against her husband for divorce on the ground of his adultery. The defender had a house at Bearsden, Glasgow, where he had been living till within a few days of the 20th of February 1882, but when a messenger-at-arms went there on that day to serve the summons upon the defender the house was shut up and the defender not to be found; the messenger-at-arms therefore served the summons by affixing and leaving a copy of the summons, with a copy of citation attached, "in the lock-hole of the most patent door of the dwelling-house."

The Lord Ordinary allowed a proof of the adultery, but reserved the question as to the sufficiency of the citation on the defender.

Argued for pursuer—The Judicature Act (6 Geo. IV. cap. 120), sec. 53, provides that "Where a person not having a dwelling-house in Scotland, occupied by his family or servants, shall have left his usual place of residence, and have been absent therefrom during the space of forty days without having left notice where he is to be found in Scotland, he shall be held to be absent from Scotland, and be charged or cited according