that he died seven years after he was last heard of. The person referred to in the petition was an Englishman, but if the petition were sustained as regards him it would equally have to be sustained in the case of an American or any other foreigner. I do not think the statute either in its spirit or its letter relates to such cases. The title is "An Act to Amend the Law as regards the Presumption of Life in Persons long absent from Scotland;" and I need not say that the words "long absent" could not reasonably be used if the person who has disappeared has never been present in Scotland. The words imply a tie to Scotland, and a previous residence in Scotland. The enacting clause contains an alternative, and provides for the case of a person who has been "absent from Scotland, or who has disappeared for a period of seven years or upwards." But here again I cannot doubt that just as the absence must be the absence of a person who once had a residence in Scotland, so the disappearance must be disappearance of a person who was at one time known to live in Scotland. I am therefore clearly of opinion that the statute does not apply to foreigners who have never been in Scotland.

The Lords refused the petition.

Counsel for Petitioner—J. Campbell Smith. Agent—Alex. Gordon, S.S.C.

Counsel for Respondent—Orr. Agents—Boyd, Macdonald, & Co., S.S.C.

Friday, December 2.

FIRST DIVISION.

RONALDSON AND OTHERS (GRAY'S TRUSTEES) v. BENHAR COAL COMPANY AND SMITH AND ANOTHER (ITS LIQUIDATORS).

Public Company—Winding-Up—Transference of Rights and Liabilities to Liquidator—Lease—Assignation—Right of Relief.

A coalmaster conveyed to a public company his right to two leases by the same landlord, but for different terms, which related respectively to an upper and an under seam in the same coalfield. Both these leases contained a clause excluding sub-tenants and assignees, except on condition that the tenant, his heirs and successors, should remain liable for the rent and other prestations in the lease. The company went into liquidation under supervision, and the liquidators were authorised by the Court to continue its business and to dispose of it as a going concern. In virtue of this authority they continued to work the upper of the two seams in question, which had been worked by the company before it went into liquidation, but they did not touch the lower, which had never been opened. The original tenant having been called on by the landlord to pay the rent due for the lower seam, sought relief from the liquidators for the full amount, in so far as it had accrued after the commencement of the liquidation. *Held* that he was not entitled to be relieved to the full amount of the rent, but merely to share in the assets *pro rata* along with the other unsecured creditors of the company.

Observations (*per* Lord Mure and Lord Shand) on the difference between the position of the trustee on a sequestrated estate and the liquidator of a public company in regard to the vesting of the bankrupt estate in each respectively.

The late George Gray of Leavenseat, by an assignation dated 6th August 1872, assigned the following subjects to the Benhar Coal Company (Limited), viz:—1. All and whole the tenant's right in a lease dated 9th January 1867, entered into between the Hon. Sir George Deas, Knight, one of the Senators of the College of Justice, on the one part, and Gray on the other part, of that seam of coal called the Benhar Coal Seam in the lands of Hartwoodhill, for the period of nineteen years from and after Martinmas 1864, with power to put an end to the lease at any term of Whitsunday or Martinmas on giving three years' notice, or paying three years' additional fixed rent, but on no other footing or pretence whatever unless the coal should be sooner wholly wrought out and exhausted. The fixed yearly rent of this lease was £300, payable half-yearly, or, in the option of the landlord, certain royalties in lieu thereof. 2. All and whole the tenant's right in certain missives of lease entered into between Sir George Deas and Gray, dated 18th and 20th July 1870, of the seams of common coal and smithy or blind coal in the same lands of Hartwoodhill, and situated underneath the Benhar Seam, for the period of eighteen years from and after Whitsunday 1870, with power to put an end to the lease at any term of Whitsunday or Martinmas on giving three years' notice, or paying three years' additional fixed rent, but on no other footing or pretence whatever unless the coal shall be sooner wholly wrought out and exhausted. The fixed yearly rent was £150, payable half-yearly, or, in the option of the landlord, certain royalties in lieu thereof. The Benhar Company and Mr Gray's trustees on 4th and 5th November 1879 gave notice to terminate this lease as at the term of Martinmas 1882.

Each of these leases contained a provision expressly excluding assignees and sub-tenants, except on the condition of Gray, his heirs and successors, remaining liable for the rents and prestations and implement of all the stipulations in the leases, on which footing he or they might assign or subset, but not otherwise.

In addition to the two leases by Lord Deas, the assignation conveyed to the Benhar Company Gray's rights under seven other leases by different landlords, and for various periods of endurance. The assignation further contained a declaration that the company should pay all liabilities and implement all obligations exigible in respect of the various leases subsequent to 1st July 1872, Gray and his heirs and successors paying all such liabilities and implementing all such obligations prior to that date.

On December 30, 1880, it was resolved to wind up the Benhar Company voluntarily, and J. T. Smith, C.A., Edinburgh, and A. W. Turnbull were appointed liquidators. Thereafter, on January 18, 1881, a supervision order was pronounced by the First Division of the Court.

In this liquidation Mr Gray's trustees presented

the present note, in which they stated that "the said liquidators entered on the duties of their office, and have since their appointment continued to carry on the business of the said company. They have, since their appointment as liquidators aforesaid, adopted the said assignation, and have as such liquidators continued the occupation of the subjects thereby assigned, and have been disposing of the minerals worked by them under the said leases for the benefit of the liquidation. Notwithstanding this, they refuse or delay to pay or perform certain of the payments and prestations due under and in terms of the said assignation. In particular, they refuse to pay in full the rents that have fallen due since the commencement of the liquidation under the lease second above mentioned, viz., the half-year's rent due at Whitsunday 1881, amounting to £75. The liquidators refuse to pay the rents that have and will yet fall due in respect of the said lease, on the alleged ground that they are not bound to pay as a preferable claim the fixed rents of those portions of the coal seams assigned to them that are not actually being worked. Mr Gray's trustees maintain that the liquidators having adopted and taken benefit from the said assignation, and being in occupation of and deriving benefit from the subjects thereby conveyed, and being in the course of actually working part thereof, are bound to make all the payments and perform the prestations due under the said assignation, and the leases thereby assigned, in full as debts of the liquidation. The trustees of Mr Gray, in terms of the stipulations of the several leases, remain liable for payment of the rents and performance of the prestations failing the Benhar Company notwithstanding the above-mentioned assignation, and they are now being called upon by the landlord to make payment of the rent due under the lease second mentioned, with interest thereon."

In these circumstances Gray's trustees prayed the Court to order the liquidators "to pay to Sir George Deas the half-year's rent of £75 due at Whitsunday 1881, under the lease second above mentioned, in full, with interest thereon at five per cent. per annum since Whitsunday last 1881 till payment; and in like manner at or after Martinmas 1881 to pay to Sir George Deas the like sum of £75 falling due at that term under the said lease, in full, with interest on the said sum at said rate from the said last-mentioned term until payment; and generally to pay and perform all the payments and prestations that have become or may yet become due under the said assignation and the leases thereby assigned during the currency of the liquidation."

The company and its liquidators lodged answers, in which they stated—"The respondents, upon application to your Lordships, were authorised by your Lordships to continue the business of the Benhar Coal Company in order to dispose of the same as a going concern. Accordingly they have continued to work the minerals let to the Benhar Company by certain leases. In all such cases they have paid, or given a guarantee to pay, in full the rent or lordship effeiring to the period during which they have retained possession for the purposes of the winding-up, leaving the landlords to claim in the liquidation for all rent and lordships effeiring to the period antecedent to the liquidation. They have not, however, worked, or attempted to work, the minerals let by the missives of lease referred to between Sir George Deas and the late George Gray, which lease was assigned by the late George Gray to the Benhar Company, being the subject described under head second of the assignation before referred to. They have not adopted, and do not intend to adopt, the said missives of lease. No possession has ever been taken or retained by the respondents of the subjects thereby let. They are willing to allow the applicants to claim in the liquidation for whatever sums the Benhar Company may be due them in respect of their failure to implement the prestations of the said missives of lease, and upon the said claim to pay such dividend or payment as the assets of the company when realised will allow; but they refuse to pay the applicants in full, as to do so would, in the event of the assets of the company not turning out sufficient to pay all debts in full, be to give them a preference to which they are not entitled over the other creditors of the company." The respondents therefore submitted that the prayer of the note fell to be refused.

Argued for Gray's trustees—The assignation was a *unum quid*, and the respondents were not entitled to take advantage of what they deemed the profitable part and reject the rest. Gray's trustees were therefore entitled to receive the entire rent accruing after the liquidation, not only for the seam that was being worked, but for the other seam.

Replied for respondents—A liquidator under the Companies Acts was in a different position from the trustee on a sequestrated estate. The estate of the company was not vested in him as that of the bankrupt was in his trustee—Compare Companies Act of 1862, sec. 95, with Bankruptcy (Scotland) Act 1856, sec. 102. But further, in the present case the assignation was not a *unum quid*, to the effect of bringing into application the doctrine of approbate and reprobate as had been contended by Gray's trustees. The leases were perfectly distinct in all their characteristics, and as matter of fact the liquidators never had had possession of the seam of coal in question; that would have been *ultra vires*, seeing that they were only entitled, under the authority of that Court, to work what the company had previously been working. The liquidators therefore could not be held to have adopted the lease.

Authorities—*North Yorkshire Iron Company*, January 19, 1878, L.R., 7 Chan. Div. 661; *Lundy Granite Company*, March 10, 1871, 6 Chan. App. 462; *South Kensington Co-Operative Stores*, April 2, 1881, 17 Chan. Div. 161; Bell's Prin. 1938; Lindley on Partnership, 1278; Buckley on the Companies Acts, 3d edit., pp. 188, 190.

At advising—

Lord President—The late George Gray of Leavenseat was apparently an extensive coalmaster, and in 1873, being possessed of nine different leases of coalfields held under different landlords, at different rents and with separate terms of endurance, he assigned the whole to the Benhar Coal Company by assignation, dated 6th August 1872. It appears that as regards some of these leases there was a clause inserted "excluding assignees and sub-tenants, except on condition of me, the said George Gray, my heirs and successors, remaining liable for the rents and prestations and implement of all the stipulations in

the said lease, but not otherwise." Two of these leases were held under Lord Deas, one dated 9th January 1867, and conveying a seam of coal called the Benhar Coal Seam, in the lands of Hartwoodhill, for a period of nineteen years from Martinmas 1864, at a fixed rent of £300, or, at the option of the landlord, for certain royalties therein specified; and the second is a lease, also from Lord Deas, dated July 1870, letting the seams of common coal and smithy coal in the same lands of Hartwoodhill for a period of eighteen years from Whitsunday 1870, at a rent of £150, or, as in the former lease, for certain royalties at the option of the landlord. These two leases, therefore, though granted by the same proprietor, are of different dates, for different periods, at different rents, and of different seams of coal, although the seams are in the same lands. These are the leases to which our attention has been more particularly directed in this case, and it is really unnecessary to examine any of the others falling under the assignation by Mr Gray. They both contain the clause already mentioned regarding the exclusion of assignees and subtenants.

The present application has been presented in the liquidation of the Benhar Coal Company, who are Mr Gray's assignees, and it is stated that the Benhar Company "refuse or delay to pay or perform certain of the payments and prestations due under and in terms of the said assignation. In particular, they refuse to pay in full the rents that have fallen due since the commencement of the liquidation under the lease second above mentioned, viz., the half-year's rent due at Whitsunday 1881, amounting to £75." And further, that "they refuse to pay the rents that have and will yet fall due in respect of the said lease, on the alleged ground that they are not bound to pay as a preferable claim the fixed rents of those portions of the coal seams assigned to them that are not actually being worked." And Mr Gray's trustees maintain, in opposition to this view, "that the liquidators having adopted and taken benefit from the said assignation, and being in occupation and deriving benefit from the subjects thereby conveyed, and being in the course of actually working part thereof, are bound to make all the payments and perform the prestations due under the said assignation, and the leases thereby assigned, in full as debts of the liquidation."

Now, it is stated in answer by the liquidators that "they have continued to work the minerals let to the Benhar Company by certain leases. In all such cases they have paid, or given a guarantee to pay, in full the rent or lordship effeiring to the period during which they have retained possession for the purposes of the winding up, leaving the landlords to claim in the liquidation for all rent and lordships effeiring to the period antecedent to the liquidation. This they have done under the sanction of the Court upon special application for power to carry on the business of a coal company, but they state that "they have not worked, or attempted to work, the minerals let by the missives of lease referred to between Sir George Deas and the late George Gray, which lease was assigned by the late George Gray to the Benhar Company, being the subject described under head second of the assignation before referred to. They have not adopted, and do not intend to adopt, the said missives of lease. No possession has ever been taken or retained by the respondents of the subjects thereby let." Now, these last averments apply to the second lease from Lord Deas, and I understand that they are not seriously disputed on the part of Mr Gray's trustees. In short, the liquidators are carrying on the business in so far as the coalfields were being actively worked before the company went into liquidation, but as regards the second seam of coal, it has never been actually worked or opened up, and the liquidators have no authority from the Court to work that seam, and accordingly they have abstained from doing so. No possession has been had of it, and no steps taken to open it up.

In that state of facts the prayer of the petition is for an order on the liquidators "to pay to Sir George Deas the half-year's rent of £75 due at Whitsunday 1881, under the lease second above mentioned, in full, with interest thereon at five per cent. per annum since Whitsunday last 1881 till payment; and in like manner at or after Martinmas 1881 to pay to Sir George Deas the like sum of £75 falling due at that term, under the said lease, in full, with interest on the said sum at said rate from the said last-mentioned term until payment; and generally to pay and perform all the payments and prestations that have become or may yet become due under the said assignation and the leases thereby assigned during the currency of the liquidation."

Now, this is undoubtedly a very novel kind of application. It is a singular thing for a party to ask for an order on a liquidator, or any other manager on an insolvent estate, to pay some one else, but still I can imagine circumstances in which such a remedy might be competent. It is necessary, therefore, to consider carefully the position of the parties making the present application.

By the granting of the assignation of 1872 Gray's trustees were entirely divested of all right under the lease. Their remaining liable to Lord Deas did not carry or reserve to them any right under the leases. To all practical effects, and in strict law, the Benhar Coal Company became tenants, and the only tenants, under these leases. The continuing obligation of the original tenant is nothing but a personal obligation in favour of Lord Deas. As regards Gray's trustees, Lord Deas could not use any of the ordinary remedies peculiar to a landlord. It is impossible to use these remedies unless the tenant is in possession, which Gray's trustees are not, and consequently there is against them nothing but a personal obligation in favour of the landlord. Thus it appears very clear that Gray's trustees as against the Benhar Coal Company have nothing but an obligation of relief. The proper debtors in the rent and other prestations are the assignees to whom the lease has been transferred, and if they do not pay, and Gray's trustees are obliged to pay, then of course there arises a right of relief against the tenant who ought to have paid, in the same way as if under the lease Gray's trustees had been cautioners for the rent. Such appears to me to be the relation between the different parties. It may very well be—and I assume for the purposes of this action that it is the case—that Lord Deas prefers to take the rent from the original tenant, but that does not prevent the assignation from having its legal effect. He has consented to the assignation by

allowing the tenant to assign and sub-lease on condition of remaining liable for the rent, and whether he takes the rent from the assignee or the cedent will not alter the relation of parties, which has arisen in virtue of the assignation granted by his authority.

Now, in these circumstances Gray's trustees are maintaining a right to a preference in this liquidation, because if the liquidators are ordained to pay the full half-year's rent Gray's trustees are thereby relieved of their obligation to its full extent. But what ground of preference they have I cannot see. They are personal creditors, and like other personal creditors must take their share of the assets. They have no lien in virtue of the assignation. Therefore, whatever might be the case if Lord Deas chose to exercise his right as a landlord—and as to that we have no occasion to inquire—this is merely the case of an unsecured right of relief without any preference.

It has been suggested in the course of the argument that if the two seams of coal, which are let under different leases, had been contained in one lease, and the liquidators had proposed to enter into possession of one of the seams only, being the best and most profitable, that there might have been a very different result; and so perhaps there would have been, at all events in a question with the landlord, because it may be doubted whether a person is entitled thus to adopt one part of a lease and repudiate another at his convenience. But here there are two separate leases, relating to separate seams of coal, at different rents, and for different terms of endurance. They have nothing in common except the circumstance that the seams of coal happen to lie between the surface and the centre of the same piece of ground. That does not seem to me to be a connection sufficiently strong to raise the question which has been suggested; and on the whole matter I am for refusing the petition.

Lord Mure — I concur. The form of this application is certainly peculiar, but I do not understand that any objection has been taken to its competency. The defence is put on the ground that the respondents as liquidators have never availed themselves or taken possession of the seam of coal, the rent of which they are now asked to pay over to Lord Deas. They admit that they have taken possession of the seam let by the lease of 1867, but they allege that they have had no possession under the later lease of 1870. They further maintain that in a question of this sort a liquidator under the Companies Acts is not in the same position as a trustee in bankruptcy.

Upon the second question I do not give any opinion, but I see that there may be important differences in questions of this kind between the position of the trustee in a sequestration and a liquidator. There is no such transference of property in the case of a liquidator as there is of the bankrupt's estate to his trustee. But the question here turns upon the consideration whether or not there has been possession of the seam in question in such a sense as to make the liquidators responsible for payment of the rent as a preferable claim in the liquidation.

Now, as I understand the facts, the seam in dispute has never been begun to be worked. It is in the same area as the seam in the lease of 1867 which was being worked when the liquidators entered into possession, and if these two coalfields had been let under the same lease, at the same rent, and for the same period of endurance, and if the tenant had worked the upper seam and had abstained from working the under, I am not prepared to say that the liquidators would not have been liable, not only for the rent applicable to the seam which it suited them to work, but also for the rent applicable to that which they did not work. They would then have been taking advantage of the lease by working one seam, while for their own purposes they abstained from working the other. But here the leases are distinct and of different dates, and, as I understand, nothing has been done to work the coal under the second lease, or to sink the workings of the upper seam down to the lower. That being so, I do not think that there has been any such possession on the part of the liquidators as to make them liable for the rent of the lease of 1870. If there had been, I think the case would have fallen within the principle of the case of *Gibson* v. *Kirkland & Sharpe*, 6 W. and S. 340, where it was held that a trustee upon a bankrupt estate entering into possession of a lease was liable in the prestations due to the landlord.

Lord Shand—I am also of opinion that Gray's trustees are not entitled to have the prayer of their petition granted. The case presented by them is that the liquidators since they were appointed have adopted the assignation, and have been taking advantage of it for the benefit of the liquidation, and it is said to follow from that fact that the liquidators are bound to pay rent, not only for the subjects which they are actually working, but for the subjects which they have allowed to remain idle.

This position has been supported on the ground of an analogy which is supposed to exist between liquidators and trustees in bankruptcy. I think we have heard enough to show that there would be very great difficulty in holding that there is any such analogy. A trustee in bankruptcy taking up a lease does so on a new title, which is conferred by statute. He has the option of renouncing or adopting leases, but if he adopts them, it has long been settled that he is liable for the prestations under them. A liquidator takes under no new or independent title of property. He is simply an administrator, and the right of property remains in the company for which he is administering. And accordingly, should a question such as the present arise with the landlord, it will be matter of serious consideration how far the position of a trustee in bankruptcy presents any analogy on this point to that of a liquidator under the Companies Acts.

But I agree with your Lordship that the present is not a case of this sort. The fundamental defence to the demand of Gray's trustees is that they are not in the position of landlords, as they are no longer tenants. They have thought fit to divest themselves entirely of all right under these leases, and they have improvidently neglected to insert a provision in the assignation to the effect that in the event of the Benhar Company ever being unable to meet the obligations under the leases the right of Gray's trustees should revive. I can quite understand that a clause might have been inserted that in the event of the Benhar Company being unable

to fulfil the obligations of the lease it should be in the power of Gray's trustees to resume possession. They would then have been in a different position. They would have had the same powers and position as a landlord, for it is at the root of a landlord's peculiar right that he should have the power to resume possession. But Gray's trustees have reserved no such right. They are merely personal creditors with a right of relief, but with no power of resumption.

The Lords refused the note.

Counsel for Gray's Trustees—Jameson. Agents—J. L. Hill & Co., W.S.

Counsel for Respondents—D.-F. Kinnear, Q.C.—Graham Murray. Agents—J. & F. Anderson, W.S.

Friday, December 2.

FIRST DIVISION.

SPECIAL CASE—THE OAKBANK OIL COMPANY (LIMITED) *v.* CRUM.

Public Company—Articles of Association—Payment of Dividend where some Shares fully Paid-up and others not—Companies Acts 1862 *and* 1867 (25 *and* 26 *Vict. c.* 88, *and* 30 *and* 31 *Vict. c.* 131).

The articles of association of a limited public company provided that "the directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to their shares." The articles also provided that the word "capital" should mean "the capital for the time being of the company," and the word "shares" the "shares into which the capital is divided." The capital consisted of 60,000 shares of £1 each. Two-thirds of these were fully paid up, but on the remainder 5s. per share only had been paid. *Held* that under the terms of the articles of association the dividends were to be paid in proportion to the nominal, and not in proportion to the paid-up, capital held by each member.

Opinions that it was in the power of the company, under the 24th section of the Companies Act of 1867, to alter its regulations by special resolution so as to provide that the dividends should be paid in proportion to the paid-up capital and not the nominal capital.

The Oakbank Oil Company (Limited)—a joint-stock company limited by shares, and having its registered office in Scotland—was incorporated, under the Companies Acts 1862 and 1867, on 2d March 1869. The nominal capital of the company, under its memorandum of association as registered, was declared to be £20,000, in 400 shares of £50 each. On 16th November 1869 this capital was, in terms of the articles of association, increased by the issue of new shares of the aggregate amount of £20,000, divided into 400 shares of £50 sterling each. Thereafter by special resolution, passed at an extraordinary general meeting on 21st February 1873, and confirmed at an extraordinary general meeting on 14th March 1873, it was, in accordance with section 21 of the Companies Act 1867, resolved that the capital of £40,000 should be divided into 40,000 shares of £1 each, which was accordingly done. The whole of the capital as thus constituted was fully paid up. But on 6th July 1875 a further issue of shares was made, of the aggregate amount of £20,000, divided into 20,000 shares of £1 each, and on these shares a call to the amount of 5s. per share only was made. The capital of the company therefore consisted at the date of the present proceedings of 40,000 shares of £1 each on which the full amount had been called up, and of 20,000 shares of £1 each on which 5s. per share had been called up.

By the 71st of the articles of association it was provided that "the directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to their shares." And the interpretation clause defined the word "capital" to mean "the capital for the time being of the company," and the word "shares" as "the shares into which the capital is divided."

Both prior to the issue of shares in 1875, and since that issue, the company at each of its general meetings, on the report of the directors recommending a dividend to be paid, sanctioned by resolution the payment of dividend at the rate of so much per cent. on the paid-up capital, and dividends were declared and paid accordingly. The minutes of these meetings were in terms of which the following is a specimen:—"That a dividend be paid from the profits of the past year's working equal to seven and a-half per cent. per annum, free of income-tax, upon the paid-up capital of the company, at the rate of $3\frac{3}{4}$ per cent. payable on 15th July, and $4\frac{3}{4}$ per cent. payable on 16th December next, at the registered office of the company, 54 Miller Street, Glasgow,—which was carried unanimously." This practice continued down to and inclusive of the year 1880. Shortly thereafter H. Brown Crum purchased fifty shares of the 1875 issue, on which 5s. per share has been paid up, and prior to the meeting of the company, on 17th May 1881, he intimated to the directors that he intended to challenge the principle on which dividends had hitherto been allocated on the 5s. paid-up shares, and to maintain his right to have the dividend declared and paid on the whole shares of the company in proportion, not to the amount paid up on the different shares held by each member, but in proportion to the number of shares held by each member, irrespective of the question whether such shares were fully or only partially paid up. The directors intimated that they could not assent to these views, and that they intended to recommend to the general meeting of the company, to be held on 17th May 1881, payment of a dividend at the rate of $7\frac{1}{2}$ per cent. on the paid-up capital of the company. At that meeting accordingly the directors recommended, and the company in general meeting assembled unanimously passed a resolution in the usual terms, that a dividend of $7\frac{1}{2}$ per cent. on the paid-up capital of the company should be paid. Crum not having been at that time entered in the register as proprietor of his shares, was not entitled to take part in the proceedings of a meeting of shareholders, and accordingly he was not present and did not vote at the said meeting. It was, however, prior to the meeting agreed