in person or by proxy, is required to pass such a special resolution as we have here; and the question is, whether it is the fact that the resolution was carried in conformity with the requirements of that section? I do not mean to pronounce any opinion as to what view I should have taken if there had been no statement as to the numbers voting, and if the minute had merely stated that the resolution was declared by the chairman to be carried. Even although it had not been so carried in point of fact, I am not sure that we should have been entitled to make any inquiry into that, or that any proof in contradiction of its terms would have been admissible.

But in the present case we have it under the hand of the chairman and upon the face of the minute that the resolution was carried by a majority of two to one, and accordingly we see that in point of fact the resolution was not carried by the requisite majority of three-fourths. Accordingly I agree that there is no voluntary liquidation.

That being so, the next question is, whether we ought to grant a judicial winding-up? I do not think it is necessary to decide what amount of debt in dispute would justify the Court in ordering a winding-up. But where we have a decree for £58 in favour of the petitioning creditor, which is admittedly well founded to the extent of £43, and where we find that in order to set it aside there must be a suspension and a reduction of a decree-arbitral, I think it is very clear that the dispute is not such as we ought to recognise. I therefore think we ought to allow the judicial winding-up.

LORD KINNEAR—I agree with your Lordships that there was no valid resolution passed to wind up the company. The question therefore comes to be, whether the case presented by the petitioner is sufficient to authorise us to order the company to be wound up by the Court. The petitioner comes to us with an extract-decree in his favour, the charge upon which has expired, and he therefore comes within section 79 of the Act. I am not disposed to say that the Court is not entitled or indeed compelled to examine the nature of such a decree if there are any valid objections to it stated by the respondents. I am inclined to think that if such examination should show the existence of a relevant case on the part of the respondents, we should not be bound to order the judicial winding-up of the company. The question therefore must be, whether such a relevant case has been shown by the respondents sufficient to justify the Court in refusing to accept the decree as good. I have come to the same conclusion on this point as your Lordships, and am of opinion that the respondents' statement is not sufficient to justify us in refusing the petition.

After their Lordships had delivered their opinions, which clearly indicated their intention to grant the petition to wind up the company, but before the interlocutor to that effect had been signed, the SOLICITOR-GENERAL tendered, on behalf of the respondents, payment in full to the petitioners Samuel Cowan & Company.

The Court accordingly indicated that upon a minute being put in to the effect that the debt had been paid in full they would dismiss the petition and find the respondents liable in expenses to the petitioners but not to the compearer Denham.

Counsel for the Petitioners and Compearer—C. S. Dickson—Burnet. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents—Sol.-Gen. Graham Murray — Campbell. Agent — Lindsay Mackersy, W.S.

Saturday, February 6.

SECOND DIVISION.

[Sheriff of Lanarkshire.

BRITISH MUTUAL BANKING COMPANY *v.* PETTIGREW.

Contract—Loan—Bond Qualified by Back-Letter—Equitable Construction.

In January 1889 a banking company lent certain persons £500 under a bond by which the debtors were taken bound to repay said sum "together with the additional sum of £131, 5s. of interest on the said advance, making together the aggregate sum of £631, 5s." at Whitsunday 1889. The lenders at the same time granted a back-letter under which the debtors were to "be allowed five years to pay off the amount of said loan, and that by quarterly instalments," which together amounted to £631, 5s. The back-letter, however, contained a stipulation that in case certain events occurred the lenders were to have power "to call up the loan or balance thereof if they think proper, and that as fully and freely as if this letter had not been granted." These events did occur, and the banking company in September 1890 called up the loan and demanded payment of the balance of the sum of £631, 5s.

Held (Lord Trayner *diss.*) that looking to the terms of the back-letter the lenders were only entitled to the balance of the loan of £500 remaining unpaid, with interest at 10 per cent. up to date, that being evidently the rate of interest upon which the calculations of the contracting parties had been based.

In January 1889 Robert Pettigrew, coal-master, Coatbridge, Lanarkshire, and others, borrowed £500 from the British Mutual Banking Company, Limited, Ludgate Circus, London, upon a bond in the following terms—"Grant us instantly to have borrowed and received . . . the

sum of £500 sterling, which sum, together with the additional sum of £131, 5s. of interest on the said advance (making together the aggregate sum of £631, 5s. sterling), we bind and oblige ourselves, jointly and severally, and our respective heirs, executors, and successors, renouncing the benefit of discussion or division, to repay to the said company, and to the assignees of the said company, at the term of Whitsunday 1889." At the same time the borrowers received from the company the following back-letter, viz.—"Gentlemen—In reference to the loan of five hundred pounds sterling, granted to you by the British Mutual Banking Company, Limited, on the security expressed in your bond and assigation in security, . . . it is hereby declared, notwithstanding the terms of your said bond, that you shall be allowed five years, from the Fifteenth day of January, Eighteen hundred and eighty-nine, to pay off the amount of said loan, and that by quarterly instalments of £37, 10s., £36, 17s. 6d., £36, 5s., £35, 12s. 6d., £35, £34, 7s. 6d., £33, 15s., £33, 2s. 6d., £32, 10s., £31, 17s. 6d., £31, 5s., £30, 12s. 6d., £30, £29, 7s. 6d., £28, 15s. £28, 2s. 6d., £27, 10s., £26, 17s. 6d., £26, 5s., and £25, 12s. 6d., sterling respectively; the first of these instalments to be paid on the 15th April 1889, and the remaining instalments on the third Monday of July, October, January, and April following, until the whole amount be paid off. It is, however, expressly understood that this declaration is to have no force or effect whatever, unless the said instalments are regularly paid as they become due: And it is hereby declared, that in case of non-payment of any of the said instalments, as they become due, or in the event of any of you dying, or becoming bankrupt, or insolvent, or unable to meet his engagements with his creditors, or going to reside beyond seas, unless with consent and approbation of the directors or others acting for the company, they shall have power to call up the loan, or balance thereof, if they think proper, and that as fully and freely as if this letter had not been granted."

Upon 1st September 1890 five of the quarterly instalments of principal and interest had been paid, in terms of the back-letter, but the sixth instalment of £34, 7s. 6d., due 14th July 1890, was past due and unpaid, while two of the co-obligants in the bond had died and one had been sequestrated. Accordingly the Banking Company called up the bond.

Pettigrew, the only solvent debtor under the bond, offered to pay the sixth instalment, and also £350, being the balance of the principal sum of £500 borrowed, with interest thereon at 10 per cent. per annum from 14th July 1890, and upon 24th September 1890 he paid £390 to account.

The Banking Company, however, in October 1890 brought an action in the Sheriff Court at Glasgow against Pettigrew for £37, 14s. 6d., as the balance still due to them, calculated upon the footing that he was bound to pay, not merely the balance of the £500 still unpaid, with interest at 10 per cent., but the balance of the lump sum of £631, 5s. stipulated for under the bond.

The defenders pleaded, *inter alia*—"(1) The pursuers having received interest on the principal sum up to 14th July last, they are only entitled to interest on the balance from then to the date on which it was paid. (3) The defender having paid up the balance of the principal sum with interest thereon when called upon by pursuers, he is entitled to absolvitor with expenses."

The Sheriff-Substitute (GUTHRIE) pronounced the following interlocutor:—"Finds that on a sound construction of the bond and back-letter, founded on by the parties, the pursuers having called up the loan in virtue of their powers under the contract, are entitled to interest at the rate of 10 per cent. on the balance due at 14th July 1890, when the sixth instalment fell to be paid, less said instalment, which has now been paid: Finds that the defender having paid the amount of the loan as called up is not liable for the instalments that would have become due if it had not been called up, so far as these consist of interest, &c.

"*Note.*—The obligation in the bond is certainly an obligation for payment of an aggregate sum consisting of principal and interest. But I do not find either in the bond or in the back-letter anything that can fairly be interpreted as requiring the obligants to continue to pay the interest upon a loan which has been fully paid up. The documents indeed are silent on that point, and I am of opinion that it could only be meant that when the loan was called up as the back-letter provides, the provision as to instalments necessarily ceased to have any effect; and the pursuers were thrown back upon their right under the bond to interest which appears, and indeed is admitted, to have been fixed at 10 per cent. The obligation in the bond to pay £131, 5s. bears on the face of it to be an obligation to pay interest, and the explanation of it is found in the back-letter. It does not seem to be a violent but a natural and almost necessary implication, although the contract is silent, that the obligation to pay this sum of interest applies only to the normal and anticipated continuance of the loan for five years, and its gradual extinction by instalments, and that it becomes inoperative if and so far as there ceases to be a balance due."

The pursuers appealed to the Sheriff (BERRY), who recalled the judgment of the Sheriff-Substitute, and found under reference to note that on a true construction of the bond and back-letter founded on in the action, the pursuers having called up the amount secured by the bond in so far as remaining unpaid, were entitled to recover from the defender the amount sued for, and decerned against the defender accordingly.

"*Note.*—The extent of the defender's liability must be determined by the language of the bond in which he is an obligant, qualified in so far as that may be by the terms of the relative back-letter granted by the pursuers.

"[*After narrating the terms of the bond and back-letter*]—On 1st September 1890 intimation was made on behalf of the company to the defender, that in consequence of default having been made in payment of the instalments, and of the deaths or bankruptcy of the other co-obligants, they required him to pay £421, 11s. 3d., that being the balance due on the assumption that the bond was one for £631, 5s., and not merely for £500, with interest to be calculated thereon at a certain rate, and with the amount of interest payable depending on the time when the bond was called up and paid.

"The pursuers maintain that the bond bears the former construction. The defender says that the latter is its true meaning and effect.

"I am of opinion that the pursuers' contention is right, and that they are entitled to succeed in this action. The undertaking in the bond is to pay at Whitsunday 1889, not £500 with interest calculated at a certain rate up to that or any other particular date, but the sum of £500, with a named sum of interest in addition, viz., £131, 5s., and that has accumulated with the principal into the specified sum of £631, 5s. It appears by calculation from the note of instalments, and indeed is admitted, that the interest has been fixed on the basis of a 10 per cent. rate, but that is an element which seems to me not to have a legitimate bearing on the question as to the extent of the defender's liability, or on the construction to be given to the bond. Willing as one might be to modify the stringency of the obligation, I think that the language used is too clear to admit of a condition being imported to the effect that a deduction should be made from the stipulated lump sum of interest, if the bond should be called up before the five years allowed for payment by the back-letter. The obligation which each of the obligants undertook was for the payment, at Whitsunday 1889 of the specified amount of £131, 5s., in name of interest, in addition to the principal sum of £500 which had been borrowed; and the conditions of indulgence allowed in the back-letter not having been complied with, the unpaid balance of the aggregate of these sums must, in my opinion, be held now to have become exigible."

The defender appealed to the Court of Session, and argued—That he was not bound to pay the interest which would have accrued upon the £500 in five years when he had only had the use of the money for two years. The contract was to repay £500 and the interest which had accrued thereon at the high rate of 10 per cent., not to repay £631, 5s. The right was to call up "the loan or balance thereof" in certain emergencies instead of having to allow it to lie for five years. That did not involve the payment of the extravagant interest of £131 for £500 for four months, which would have been the case, upon the pursuer's contention, if any of the co-obligants had died or become bankrupt immediately after Whitsunday 1889, and the bond had been then called up. If there was dubiety as to the meaning of the contract, a fair and equitable construction should be put upon it.

Argued for the respondents—Even a hard contract, if clear, must be enforced according to its terms. If the bond stood alone, there could be no doubt it was repayment of a lump sum of £631, 5s. which was stipulated for. All distinction between principal and interest had been purposely obliterated. The only condition under the back-letter was that unless certain circumstances occurred the repayment of the £631, 5s. was to be spread over five years. But these circumstances had emerged, and consequently the back-letter was to be regarded as *pro non scripto*, and the balance of the £631, 5s. could be at once called up.

At advising—

LORD JUSTICE-CLERK—This case is one of a somewhat peculiar nature. The defender Pettigrew and his friends were in 1889 under the necessity of accepting a loan from the pursuers upon very stringent terms, and for that loan they granted a bond and received a back-letter qualifying its terms. The bond bears to be for a sum of £500, and that sum, together with an addition of £131, 5s. of interest on the said advance, making together the aggregate sum of £631, 5s., the defender and his friends bound and obliged themselves to repay to the company at Whitsunday 1889. That of course is a most stringent and heavy obligation, because it amounted to paying £131 within five months for the loan of only £500. These gentlemen got £500 in loan in January, and for that, according to the terms of the bond, they would require to repay £631 at Whitsunday. But then, simultaneously with granting the bond, they got a back-letter which brings out how the sum of £631 was arrived at. That back-letter declares that notwithstanding the terms of the bond, five years were to be allowed for the repayment of the money lent, and that that was to be in quarterly instalments, and it shows that what was practically demanded was 10 per cent. interest, £631 being just £500 repaid in twenty quarterly payments, with interest at that rate added. At each quarter what was demandable was the proper proportion of the loan of £500 still unpaid with 10 per cent. interest. But then the back-letter also stipulates that this declaration is to have no force "or effect whatever unless the said instalments are regularly paid as they become due." And then comes the declaration which has led to the present case—[*His Lordship read the last sentence of the back-letter, supra*]. Upon that clause the present question arises. The banking company maintain that the circumstances there figured having occurred, they are entitled to insist upon calling up all that remains unpaid of the £631, while the appellant says that he is only bound to pay the remaining part of the loan of £500, with interest at 10 per cent. up to date. It is rather a difficult question, and I am

not surprised at the difference between the Sheriffs.

It is quite plain that if the contention of the Banking Company is sound, it amounts to this, that if one of the obligants had died three days after Whitsunday 1889 they would have been entitled to exact at once the £500, with £131 as interest for five months. Now, such would be a very extraordinary bargain. It might be made. Such a thing is conceivable; but if there is any reading of the contract possible which does not lead to so monstrous a result, without straining the terms used, I should prefer it. Let us see what under the back-letter it is in the power of the Banking Company to call up. It is "the loan or balance thereof." What was the loan? It was not £631, but £500. The interest was added to give the Banking Company full hold upon the borrowers, but the back-letter states the intention of the parties as to the working of that out. I read the stipulation in the case of the death or bankruptcy of any of the debtors to be, that instead of being bound to allow the remaining debtors to pay by instalments, the respondents were to be entitled to demand what was still due of the loan at once with 10 per cent. up to date. I agree with the opinion of the Sheriff-Substitute as expressed in his note, and I move your Lordships that we should revert to his judgment or recall that of the Sheriff.

Lord Rutherfurd Clark—I am of the same opinion. The right of the pursuers to recover is, I think, regulated by the back-letter. The debtors are to pay the loan, together with £131, 5s. as interest, in twenty quarterly instalments. An easy calculation shows that the rate of interest is 10 per cent. per annum. In the bond the £131, 5s. is stated as interest, and the instalments are calculated so as to cover principal and interest.

On the occurrence of any one of certain specified events, the pursuers are to be entitled to call up "the loan or balance thereof . . . as fully and freely as if the letter had not been granted." It is not disputed that one of the specified events has happened, and that the pursuers are entitled to exercise the right which has thus opened to them. The question is, whether the pursuers are entitled to demand the full sum of £631, 5s. less such instalments as have been paid, or so much of the capital as has not been paid, together with interest at 10 per cent. to the date of payment.

It will be observed that one of the events in which this reserve power may be exercised is the death of any one of the debtors. It is not easy to believe that it was the intention of the parties that if this event happened on the day after the loan the pursuers should be entitled to demand within four months after the loan had been made the full sum of £631, 5s., or in other words, that they should be entitled to the same interest for a period during which the money was not lent. I would certainly be desirous to avoid a construction of the back-letter which would lead to so inequitable a result. But I do not think that it is consistent with the terms of the document.

The pursuers are entitled to call up the "loan or balance thereof." The loan was £500 and no more. Interest cannot be a part of a loan; it is due only so long as the money is in the hands of the debtor. Accordingly the back-letter in its initial sentence uses the expression, "In reference to the loan of £500;" and I think that in construing the claim in question I am bound to read the same word in the same sense—which is its only natural sense. The pursuers are therefore, in my opinion, entitled to demand only the balance of the loan, or in other words of £500, remaining unpaid at the date of the action, together with interest at 10 per cent. For though nothing is said in the clause in reference to interest, I think that the pursuers are entitled to interest on the loan so long as it is outstanding, and that the interest must be calculated as the agreed-on rate.

It is said that the back-letter speaks of the bond as amounting to £631, 5s. in the clause which specifies the instalments in which it is to be paid. I do not think so. It speaks of the "said loan," which as I have shown was stated as £500. The instalments are calculated so as to include the interest. But in my opinion this fact would not justify us in holding that the interest is included in the loan as that word is used in the clause which I am now considering.

The pursuers are contending for a very harsh and inequitable construction. They are bound to make it clear that the back-letter will bear no other reasonable interpretation. I do not think that they are able to do so. They are met, besides, by this consideration, that if it had been intended that they should recover interest for a period during which the money was not in the hands of the borrower, they should have stipulated for a right to call up, not the loan, but £631, 5s., or the balance hereof remaining unpaid.

Lord Trayner—I agree with the Sheriff. Under the bond founded on there is no doubt the appellant was bound to make payment to the respondents of the sum of £631, 5s. at the term of Whitsunday 1889, and that obligation, absolute in itself, was in no way affected by any consideration as to how that sum was made up—how much of it was principal and how much of it interest.

The question therefore is, to what extent has that obligation been qualified by the back-letter granted by the respondents? By that letter the respondents agree to spread the payment of the £631, 5s. over five years, accepting quarterly payments during that period instead of insisting on full payment at Whitsunday 1889. But it is a condition of the back-letter that in the event of any of the co-obligants in the bond becoming bankrupt or insolvent, or in the event of any of them dying (both of which events have admittedly happened), then the respondents should be entitled to "call

up the loan or balance thereof if they think proper, and that as fully and freely as if this letter had not been granted." I cannot read that back-letter as meaning anything than this, that if the events (or any of them) contemplated should occur, then the back-letter and the privilege thereby conferred of postponed payment of the money due under the bond should fly off, and that the respondents should be entitled to insist on payment at once of everything due under the bond. The reason given by your Lordships for reading the back-letter unfavourably to the respondents' claim is, that by the language used it is "the loan or balance thereof" only which the respondents are entitled to call up, and in the outset of the back-letter reference is made to "the loan of five hundred pounds sterling." But the same language is used in the back-letter to designate the £500 and the £131, 5s. together, for it is provided that the co-obligants are to get five years "to pay off the amount of said loan, and that by quarterly instalments," as specified; and the specified instalments are not of £500 but of £631, 5s. The clause therefore in the conclusion of the back-letter authorising the respondents to call up "the loan or balance thereof" may just as well be read as referring to the £631, 5s. as to the £500, so far as the mere language of the back-letter is concerned. But in my opinion it is not doubtful that what was intended and understood by the parties was that on the occurrence of any of the events provided for, the respondents should then be entitled to enforce their bond just as if the back-letter had never been granted.

LORD YOUNG was absent.

The Court sustained the appeal.

Counsel for Pursuers and Respondents—H. Johnston—A. S. D. Thomson. Agent—A. B. C. Wood, W.S.

Counsel for Defender and Appellant—Dickson—Watt. Agents—J. & A. Hastie, Solicitors.

Tuesday, February 23.

FIRST DIVISION.

[Sheriff of Lanarkshire.

STEELE AND OTHERS *v.* STRATHIE.

Bankruptcy — Sequestration — Meeting of Creditors Called by Commissioner "with Notice to the Trustee"—Notice not Timeous—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 98.

The Bankruptcy (Scotland) Act 1856, by section 98, provides that "any commissioner, with notice to the trustee, may at any time call a meeting of the creditors." A commissioner called a meeting by a notice in the *Gazette*, which is published in the evening. Upon the afternoon of the day of publication he sent notice to the trustee by a registered letter, which was not delivered until the following morning.

Held that the requirement of the statute had not been complied with, as the notice to the trustee had not been timeously given.

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79) provides by section 98 that "any commissioner, with notice to the trustee, may at any time call a meeting of the creditors." . . .

Edward Cruickshank, one of the commissioners in the sequestration of R. S. Lang, manufacturer, Glasgow, inserted a notice, dated October 26th 1891, in the *Edinburgh Gazette*, published on the evening of October 27th, calling a general meeting of creditors to be held on November 4th 1891, "to, if so resolved, remove the trustee, David Strathie, C.A., Glasgow, from office."

Upon the afternoon of October 27th he sent a registered letter addressed to the trustee at his office giving notice of having called said meeting. When the postman went his rounds it was after office hours, and the letter was not delivered to Mr Strathie until the next morning.

The meeting of creditors was held upon November 4th, and a resolution for the removal of the trustee was carried.

The trustee appealed to the Sheriff to have the resolution recalled, and upon 9th December 1891 the Sheriff-Substitute (ERSKINE MURRAY), for reasons assigned in his note, recalled the resolution complained of.

"*Note.*—The Bankruptcy Act 1856 provides that a majority of creditors present at any meeting duly called for the purpose may remove a trustee. Section 98 provides that 'any commissioner, with notice to the trustee, may at any time call a meeting of the creditors.' In the present case one of the commissioners sent to the *Gazette* a notice, dated 26th October, to be published in the *Gazette* of 27th October, calling a meeting for 4th November. The *Gazette* was published on the 27th between 6 and 7 p.m. On the afternoon of the 27th the same commissioner sent by registered letter a notice to the trustee, addressed to his place of business. It was not delivered till 10 a.m. on the 28th, as, being registered, it could not be delivered after business hours on the 27th, the trustee's office being then shut.

"In these circumstances the Sheriff-Substitute must hold that notice to the trustee was not given till the 28th. But as the advertisement in the *Gazette* was published on the evening of the 27th, it must also be held that the intimation to the trustee did not precede, nor was even simultaneous with, but was subsequent to the date of the calling of the meeting, even if that date be taken to be the date of the publication of the *Gazette*. Still more so would this be the case were the date of the calling of the meeting to be held to be the date annexed to the notice in the *Gazette*, being that of the day previous, the 26th October.

"In these circumstances the Sheriff-