account incurred to them by the late Mr Brewis as judicial factor on the estate of Mrs Hope. Mr Brewis died on 11th February 1900, and the claim is now made against the defender, who was appointed factor in succession to Mr Brewis on 11th April 1900.

"Such a claim, if not sued for within three years from the last item of the account, falls under the triennial prescription. The last item in the account as originally sued on is dated 11th May 1900, and as the summons is signeted on 5th November 1903, the defender pleads the prescription as limiting the mode of proof. The pursuers, in order to elide the plea, desire to add certain items to their account, and if the items proposed to be added were truly incurred in the course of the employment so as to be proper additions to the business account I see no objection to this being done.

"As I have said, the interval which the pursuers have to bridge over is from 11th May 1900 to 5th November 1903. They propose doing so, (1) by adding an item of 6s. 8d. as 'agent's fee for audit' under date 31st July 1900, and (2) by adding an item of 3s. 4d. for 'writing Mr John Macmillan, S.S.C., with our account and for payment,' under date 23rd July 1903. Unless both these items are added there is still a gap of more than three years, and the prescription applies.

"As to the first item, 6s. 8d.—[*His Lordship dealt with this item, and concluded that probably the pursuer was entitled to add it to the account*]. Assuming this to be so, however, the pursuers must still show some item incurred between 31st July 1900 and 5th November 1903. To this end they have rectified the account sued on by adding at the end of it, under date 23rd July 1903, the item of 3s. 4d. already mentioned for writing to Mr John Macmillan, S.S.C., rendering this account and demanding payment. They add other entries to the same effect in September and October 1903, but these are not required, and without the entry of 23rd July they would be of no avail. The defender admits that these four letters were written and duly received, and that the pursuers' business books contain corresponding entries under these dates, though no charges are entered against the items, and that the entries are immediately followed in the ledger by entries relating to the raising of the present action. I take it, therefore, that the items cannot be regarded as fictitious, or as entered otherwise than in good faith. But then the nature of the entries is such that it is impossible to regard them as a continuation of the account, or as incurred on the employment of the factor. I assume in the pursuers' favour that the change in the factory is immaterial. But I do not see how a demand for payment of the account can be regarded as a continuation of it or as an item of the employment. I therefore hold that the plea upon the statute must be sustained."

Counsel for the Pursuers—Jameson, K.C.—M. P. Fraser. Agents—Tait & Johnston, S.S.C.

Counsel for the Defender—George Watt, K.C.—Macmillan. Agent—John Macmillan, S.S.C.

Friday, October 28.

SECOND DIVISION.

BLACK *v.* UNITED COLLIERIES COMPANY, LIMITED.

Company — Winding-Up — Petition for Winding-up Opposed by Creditors and Majority of Shareholders — Petition Refused without Intimation and Advertisement—"Just and Equitable"—Companies Act 1862 (25 *and* 26 *Vict. c.* 89), *sec.* 79, *sub-sec.* 5.

Section 79 of the Companies Act 1862 enacts:—"A company under the Act may be wound up by the Court as hereinafter defined, under the following circumstances (that is to say) . . . (5) whenever the Court is of opinion that it is just and equitable that the company should be wound up."

Shareholders representing one-thirteenth of the capital of a company presented a petition for the judicial winding-up of the company under the above sub-section. The company was in financial difficulties, but its assets if valued as for a going concern were sufficient to meet its liabilities. The petitioners averred that by the creation of a series of debenture bonds the control of the affairs of the company had to a large extent already been, and if a proposed new issue of further profit debentures were made would entirely be, handed over to a syndicate holding the majority of the bonds, to the complete exclusion of shareholders from any share in future profits. They also averred that the directors had been guilty of gross mismanagement and extravagance.

Minutes craving that the petition should be refused *de plano* were lodged by (1) the company, (2) the holders of the various debentures, (3) shareholders representing more than one-half of the capital of the company, and (4) almost the whole trade creditors of the company. These minutes explained, *inter alia*, that the issue of the debentures was the only method of saving the company from financial ruin, that the liquidation proposed would so depreciate the assets of the company as to cause serious loss, and that even the intimation and advertisement of the petition would injure all interests.

The Court *refused* the prayer of the petition without ordering intimation and advertisement, holding that the winding-up would be seriously detrimental to the interests of all concerned.

The Companies Act 1862, section 79, enacts—"A company under this Act may be wound up by the Court as hereinafter defined under the following circumstances (that is to say)—(1) Whenever the company has passed a special resolution requiring the company to be wound up by the Court; (2) whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year; (3) whenever the members are reduced in number to less than seven; (4) whenever the company is unable to pay its debts; (5) whenever the Court is of opinion that it is just and equitable that the company should be wound up."

On September 8, 1904, a petition for an order to wind up the United Collieries, Limited, was presented under the Companies Act 1862 to 1900. The petitioners were thirteen shareholders of the company holding 141,878 shares fully paid up of £1 each, out of a total issued capital of £1,800,572. Two of the petitioners whose holdings were of the value of £5390 disclaimed the petition by letter the day after its presentation.

From statements in the petition it appeared that the company was incorporated on 10th March 1898 with the object of acquiring and working a number of colliery concerns. In June 1902 the company entered into an agreement with the Collieries Consolidation Syndicate, Limited, by which it acquired for £2,444,945, 5s. 7d. certain properties belonging to the latter, including options to purchase coalfields, leases, plant, waggons, and machinery, the price being paid partly in cash and partly in shares of the United Collieries, Limited.

The company at the same time created debentures for the sum of £1,000,000, bearing interest at 5 per cent., and by subsequent agreements the whole of these debentures were made over to the vendors, the Collieries Consolidation Syndicate, Limited, as part of the purchase price, a trust deed embodying the arrangements of purchase being executed in July 1902. On 28th July the firm of Messrs J. S. Morgan & Company, who were largely interested in the Collieries Syndicate, issued a prospectus inviting applications from the public to take up the debentures, but the greater portion of these debentures were not taken up by the public and remained in the hands of J. S. Morgan & Company and the persons associated with them in the Collieries Syndicate.

The petition further stated—"In virtue of the large holding of debentures and shares acquired through the said sale, the said syndicate and those represented by the said syndicate obtained a control over the board of directors of the company and over its management. The financial affairs of the company were recklessly managed, and larger sums than the resources of the company warranted were expended." The directors of the company proceeded accordingly to borrow large sums of money. They obtained large advances from their bankers, the sums advanced at times exceeding £150,000, and Messrs J. S. Morgan & Company also advanced money to the company, in particular in October 1903 a sum of £75,000 bearing interest at 6 per cent. It was, *inter alia*, a condition of the loan that the lenders should have the right of nominating a director of the company, and that no director should be elected in addition to or substituted for any of the present directors of the company without the consent of the lenders, and that so long as any part of the loan or interest remained unpaid the company and directors should declare no dividend on preference or ordinary shares, and should exercise none of their borrowing powers except by way of bank overdraft without the previous consent in writing of the lenders. The £75,000 it was arranged was to be paid to the trustees for the debenture holders, to be applied partly for the purpose of a debenture trust sinking fund, partly for meeting the interest due on the debentures. "Although ostensibly entered into for the purpose of equipping the company with additional working capital, the said agreement had no such effect. Its practical result was that the company were thus enabled to meet debenture interest and sinking fund charges, and this by contracting further debt at a higher rate of interest and on terms which involved further surrender of the freedom of the directorate to the lenders, who practically represented the debenture holders."

In December 1903 a further borrowing agreement, resulting in the creation of second debenture stock, was entered into between the company on the one part and Messrs J. S. Morgan & Company, the lenders, on the other. The agreement provided that the company should create £350,000 of second debenture stock bearing interest at 6 per cent., ranking after the already existing issue of first debentures. Messrs Morgan & Company, in discharge of the company's debt of £75,000 already mentioned, agreed to take £83,333 of debenture stock, being the equivalent of that debt, taking the debenture stock at 90 per cent. of its par value. The company also came under obligations to pay certain sums of money to Messrs Morgan & Company for the better security of the obligations it had incurred to the trustees for the first debenture holders under the trust-deed of July 1902. A deed of declaration of trust was executed in reference to this second issue of debenture stock, under which the general assets of the company were conveyed to the trustees for the debenture-holders who might in their discretion, without any consent on the part of the company or its assignees, enter upon or take possession of the trust-estate, and when the security thereby constituted became enforceable, at their discretion and without consent sell any part thereof.

Between January and March 1904 four bonds of £25,000 each and one for £10,500 were granted by the company to Messrs J. S. Morgan & Company, and on 9th May 1904 a bond was granted to two of the directors for £10,000. Those bonds appeared

to have been discharged by the issue of the remainder (or nearly so) of the second debenture stock of £350,000. "None of the said second debenture stock was issued to the shareholders or to the public. It was taken up by private arrangement by the said firm of J. S. Morgan & Company and those acting with them, and by the directors and their respective nominees. By its issue no money was made available to the company for trading capital, and as it was issued at £90 for every £100 of stock the debts of the company were at once increased by one-ninth, or upwards of £38,600."

In May 1904, as the result of various agreements between the trustees for the first and second debenture-holders and the company, £30,000 of prior lien debentures (ranking prior to all existing debentures) were created. This sum of £30,000 of prior lien debenture stock was advanced (on terms) by Messrs J. S. Morgan & Company, and the company granted a disposition and assignation in security in favour of two of the partners of that firm. "The said prior lien debenture stock of £30,000 was used to enable the company to pay the interest assured on the prior lien debentures and on the other debts in which the directors and Messrs Morgan & Company and their clients were interested up to May 1904. As the result of the various transactions and agreements before mentioned the money obligations of the company were enormously increased, while the administration of the company had become more completely subject to the control, and its whole available pledgible assets (other than waggons) had been conveyed or assigned, or attempted to be conveyed or assigned, to those representing the debenture-holders, and to Messrs Morgan."

In May 1904 a meeting of the first debenture-holders was held, at which they appointed a committee to consult with the directors of the company as to its financial position. As a result of this the directors of the company convened a general meeting of the company in August 1904 for the purpose of creating a stock called income debenture stock to the amount of £200,000. The resolution which was passed was in the following terms—"That income debenture stock of the company to the amount of £200,000 be constituted and secured in terms of the draft deed of declaration of trust submitted to this meeting and identified by the signature of the chairman of this meeting, expressed to be made between the company of the one part and persons to be named therein as trustees of the other part; that said income debenture stock carry cumulative interest at the rate of 6 per cent. per annum, payable out of the net income of the company which shall remain after paying out of the gross income all rents, royalties, taxes, rates, wages, salaries, repairs, insurance, and other outgoings, but without making any allowance for depreciation, and after paying and providing for the first debenture interest, the first debenture sinking fund payments, and the second debenture stock interest, and also confer right on the holders of said income debenture stock for the time being, issued in proportion to the amount of the income debenture stock held by them respectively, to nine-tenths of the whole surplus net income aforesaid which shall remain after paying the interest as aforesaid on the said income debenture stock for each year, and which would otherwise have been divisible as profits of the company; that the directors be and they are hereby authorised to execute, under the seal of the company, a deed in the form of the said draft deed of declaration of trust, and to nominate trustees for the purposes thereof; that the existing shareholders of the company be invited to subscribe for the said income debenture stock to a minimum extent of 1s. 6d. for each share held by them respectively in the capital of the company, but that the directors be empowered to give to the preference shareholders special consideration in allotment; and as regards any income debenture stock not subscribed for by the existing preference and ordinary shareholders, that the directors be and they are hereby authorised to issue same to such persons, and on such terms as they think fit."

At the meeting the passing of the resolution was opposed by preference shareholders holding upwards of £330,000 of the preference stock of the company, but it was passed by the aid of the proxies of those interested in the first and second debentures of the company. By the deed of declaration of trust adopted for the issue of the proposed income debenture stock, it was, *inter alia*, provided that the trustees might in their discretion, without any consent on the part of the company, enter upon or take possession of the trust estate, and it was also provided that the committee of the first debenture holders were to be at liberty to call on the company to procure the resignation or removal of a clear majority of the directors and to appoint as directors such persons as the said committee should nominate, and that the said committee, by notice in writing to a majority of the directors, might remove them from office and appoint other directors in their place, or at any time remove any individual director objected to. Of the money to be raised by the new income debenture stock, a large proportion had to be applied to payments to Messrs J. S. Morgan & Company and in payment of other debts, and the balance, if any, remaining would, the petitioners averred, be quite insufficient to enable the company to carry on its undertakings with a prospect of success. "The result of the administration of the company during the short period which has elapsed since its acquisition of the colliery concerns before mentioned, is accordingly this, that a heavy debt has been incurred by the company, and that its whole available assets of every kind have already been, or attempted to be, hypothecated to those who have, as before stated, obtained complete control of the company's administra-

tion and management. In the event of the proposed issue of income debenture stock being carried out on the terms mentioned the result will be to hand over in addition to the same parties practically the whole income of the company and to permanently extinguish the beneficial interests therein of the whole body of shareholders."

The petition proceeded especially upon section 79, sub-sections 4 and 5, of the Companies Act 1862 quoted above.

In the narrative of the petition it was further averred that the company was unable to pay its debts, but at the debate it was admitted that the last balance-sheet of the company showed that it was solvent if its assets were valued as those of a going concern.

On 15th October minutes submitting that the petition should be dismissed *de plano* were lodged by (1) The United Collieries, Limited; (2) The Collieries Trustee Company, Limited, trustee for the first debenture holders, representing £942,900; (3) Lord Belhaven and Stenton and others, trustees for the second debenture holders, representing £348,241; (4) all the company's trade creditors, with a few insignificant exceptions, and 513 shareholders holding among them more than half of the whole issued capital of the company, viz., £1,054,467 out of £1,800,572. These minutes set forth in detail the various reasons which rendered it inexpedient that the petition should be granted, and on certain points contradicted or gave a different complexion to the facts set forth by the petitioners. Their general contention was that the issue of the various debenture stocks and the proposal to issue the new income debentures had been made with a view to promoting the best interests of the company as a whole, and constituted the only means for saving a valuable commercial undertaking from financial ruin; that the liquidation of the company would so depreciate the value of its available assets, which consisted largely of goodwill and mineral leases containing clauses excluding sub-tenants and assignees, as to cause serious loss, and that intimation and advertisement of the petition would cause injury to the interests alike of the creditors and shareholders of the company.

On 18th October counsel for the petitioners moved the Court for an order for intimation and advertisement.

Counsel for the minuters opposed the motion, and moved that the petition should be dismissed *de plano*. They argued—The fact that the petitioners represented only £136,488 out of £1,800,572 of capital, and that they were opposed by practically everyone else interested in any way in the company, was in itself a sufficient ground for dismissing the petition. The petitioners, however, founded upon sub-sections 4 and 5 of section 79 of the Act of 1862. As to sub-section 4, the company was in fact solvent, and the petitioners had pointed to no debt unpaid which was actually due and for which a creditor could claim immediate payment—*European Life Assurance Society*, 1869, 9 Equity 122; but in any case sub-section 4 afforded no ground for a petition at the instance of these shareholders, who, if the company were insolvent, could have no interest in its assets, which would be insufficient to meet the claims of creditors and debenture holders—*Rica Gold Washing Company*, 1879, 11 Ch. D. 36; *Chapel House Colliery Company*, 1883, 24 Ch. Div. 259; *ex parte Fox*, 1871, L.R., 6 Ch. 176. As to sub-section 5, the sub-section was inapplicable to the present case, as it was not *ejusdem generis* with any of the four sets of circumstances already enumerated in sub-sections 1 to 4—*Suburban Hotel Company*, 1867, L.R., 2 Ch. 737. But even if it were, liquidation at the present time would be most unjust and most inequitable, as it would depreciate the assets of the company and ruin its business to the prejudice of creditors and all concerned. If the Court were satisfied on the point they could dismiss the petition without further procedure—*Macdonell's Trustees* v. *Oregonian Railway Company*, June 12, 1884, 11 R. 912, 21 S.L.R. 625; *Wotherspoons* v. *Brescia Mining Company, Limited*, December 5, 1896, 24 R. 207, 34 S.L.R. 158. Allegations as to past mismanagement were no ground for liquidation. There was here no question of the directors having acted *ultra vires;* the shareholders had sanctioned the issue of the debentures, but even if they had not, it was settled that directors might issue debentures at a discount—*Anglo-Danubian Steam Navigation and Colliery Company*, 1875, 20 Eq. 339.

Argued for the petitioners—They had set forth a *prima facie* case for liquidation sufficient to entitle them to an order for intimation and advertisement. It was unjust and inequitable that the company should be continued on its present footing. If not actually insolvent, it was no longer capable of being carried on as a going concern and was really being bolstered up solely in the interests of the various debenture holders, chief among whom were Messrs Morgan & Company. Under the proposed scheme the holders of the new debenture bonds would have complete control of the company to the exclusion of the preference and ordinary shareholders. The position of the company and the extravagance and mismanagement of the directors combined to make it "just and equitable" that the company should be wound up. The fact that the majority of the shareholders were opposed to the petition was not conclusive—*Varieties, Limited* [1893], 2 Ch. 235; *Gutta Percha Corporation* [1900], 2 Ch. 665.

LORD TRAYNER—In this petition we are asked (1) to order intimation and advertisement of its presentation, and (2) thereafter, with or without answers on the part of those called as respondents, to order the United Collieries Company to be wound up by the Court under the provisions of the Companies Acts. Several parties representing different interests (who they are and what their interests I shall notice hereafter) have appeared and object to our making any order in this petition. We

have had a full and able debate from both sides of the bar, and we are now to determine whether any, and if so what order should now be pronounced.

The petitioners are shareholders in the Collieries Company, and the two grounds on which their petition is based are (1) that the company is unable to pay its debts, and (2) that it is just and equitable that the company should be wound up. The first of these grounds was not maintained by the petitioners, and I cannot see how they could have maintained it. If the statement that the company is unable to pay its debts—that is, that the assets of the company are insufficient to meet its liabilities—is true, then the petitioners have no interest to insist in this petition, for if the company has not assets sufficient to meet its liabilities there can obviously be no reversion for distribution among the shareholders. If, on the other hand, the statement is not true, then as a ground of petition it disappears. Conceding that this was so, the petitioners maintained that nevertheless the financial straits of the company and its want of ready money with which, if called upon, to discharge all claims that could be made against it was a circumstance and a circumstance of weight to be taken into account in dealing with the second ground, namely, that in the whole circumstances disclosed it was just and equitable that the company should now be wound up. I concur in that view, and have accordingly taken the present condition of the company into consideration in making up my mind whether it was just and equitable that the company should now be wound up. But I have also taken into consideration other circumstances which appear to me to be of at least equal weight.

There are thirteen petitioners named in the petition, but of these two disclaimed the petition by letter the day after its presentation. The eleven petitioners hold shares (all fully paid) to the extent of £136,488 out of a share capital (all paid-up) of £1,800,572—that is, the petitioners represent less than one-thirteenth of the share capital. The petition is opposed by (1) the company, which presumably represents the shareholders who are not petitioners—that is, shareholders who represent 12/13ths of the share capital; (2) the first debenture-holders, who are creditors of the company to the extent of £942,900; (3) the second debenture-holders, who are creditors to the extent of £348,241; (4) the waggon companies mentioned in the petition, who are creditors to the extent of £300,000; and (5) by all the trade creditors of the company, fifty-two in number (except three or four), whose respective claims exceed the sum of £50. From this it appears that the interests of the opposing respondents far exceed the interests of the petitioners, taking the shares of the latter as of par value, which at present they are not. It also appears, no doubt, that the company is deeply indebted, but it is not maintained (as I have already said) that the assets of the company are not sufficient to meet all claims. That, however, will depend upon whether the assets of the company are valued or realised as for a going concern. If the company was ordered to be wound up and its assets separately disposed of under a forced sale, which is what would result from a winding-up, it is pretty evident that a large loss would be incurred. Part, and no inconsiderable part, of the company's assets consists of the rights they hold under their mineral leases, some of which would or might be rendered valueless as subjects of sale by reason of the provision that they are not assignable. It is plainly therefore in the interests of the creditors, and indeed of all concerned, that nothing should be done which would impair the value of the company's assets, and a forced realisation of them would necessarily do so. I have not forgotten what was urged upon us by the petitioners' counsel as to the character of the proposal (the issuing of profit debenture stock) by which it was hoped to relieve the company from its present difficulties, nor as to the past bad management of the company, nor the control of the company in future by the debenture holders or some of them. But I more than question the relevancy of these considerations. Looking to the whole circumstances, and having regard to the wishes of the creditors, and a large majority at least of the shareholders (whose wishes we are by the Companies Acts entitled to give effect to), I have come to the conclusion that there is no case made out for winding up the company—a course which in my opinion would be seriously detrimental to the interests of all concerned. That being my opinion I am against ordering any intimation or advertisement of the application, especially as we were assured by the respondent's counsel that on his information it would among business men (and probably, I suppose, on the Stock Exchange) be injurious to the company's interests if even an order for intimation were made, such an order being regarded (however erroneously) as an indication that there was a *prima facie* case for a winding-up. In my opinion, therefore, the petition should *de plano* be refused.

The LORD JUSTICE-CLERK, LORD YOUNG, and LORD MONCREIFF concurred.

The Court refused the prayer of the petition.

Counsel for the Petitioners—Clyde, K.C. —T. B. Morison. Agents—Drummond & Reid, W.S.

Counsel for the Company—Ure, K.C.—M'Lennan. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the First Debenture-holders —Campbell K.C.—Hunter. Agents—John C. Brodie & Sons, W.S.

Counsel for the Second Debenture-holders—The Lord Advocate (Scott Dickson, K.C.)—D. P. Fleming. Agents—Dundas & Wilson, C.S.

Counsel for the Creditors and Majority of Shareholders—Salvesen, K.C.—Horne. Agents—Webster, Will, & Co., S.S.C.