space to the south remained enclosed. I think that the privilege in favour of Mr Baxter extends to the southmost point, that the two properties are alongside of each other, and that it is only to the north that there is any limitation. . . . It was maintained, however, by the complainers that the right conferred by the bond of servitude was one which might be lost by the negative prescription, and that it had been so lost, since the constitution of the servitude was in 1825, and the right conferred was only exercised the other day. Now, if under the bond of servitude the right conferred on Mr Stewart had been a right of access by an existing road or street, and if that right was not exercised for forty years, then this plea would probably have been well founded, and the negative prescription would apply. But that is not the nature of the right; it is one of a different description. No doubt a right of access is given, but it is plainly in contemplation that it is a right which is not to be immediately exercised. Then other things have to be done, and when the necessity arises for an access from the east to the west side, then the privilege is to be exercised. The first thing the respondent required to do was to demolish the dyke over which the Joint-Stock Company had their servitude right of rearing fruit-trees. Therefore, if it was by the act of demolishing the wall that access was to be obtained, then until Mr Baxter or his successors should find occasion for access from that side it was not to be expected that the privilege would be used. If they had done anything mischievously or maliciously under their right of servitude, when no advantage was to be gained, and when there might have been mischief, then probably an application for interdict might have been made in more promising circumstances. I fail to see how it can be said that such a privilege as this may be lost by the negative description. It falls clearly under the description of a *res meræ facultatis*—a right which is to be used hereafter when occasion arises—which has never been held to fall under the negative prescription.

I am therefore for repelling the reasons of suspension and refusing the interdict.

Lord Mure and Lord Adam concurred.

Lord Deas and Lord Shand were absent.

The Court recalled the interlocutor of the Lord Ordinary and refused the interdict.

Counsel for Complainers—Scott—W. Campbell. Agents—J. & J. Galletly, S.S.C.

Counsel for Respondent—Sol.-Gen. Asher, Q.C.—J. A. Reid. Agent—J. Smith Clark, S.S.C.

Thursday, June 12.

SECOND DIVISION.

BURNETT AND OTHERS, PETITIONERS (WINDING-UP OF OREGONIAN RAILWAY COMPANY, LIMITED).

Public Company—Winding-up—Inability to Pay Debts—Title of Creditor to Petition—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *secs.* 79 *and* 80.

The Companies Act 1862 provides, by sec. 79, that a company may be wound up by the Court . . . "whenever the company is unable to pay its debts." The 80th section provides "that a company shall be deemed to be unable to pay its debts when it has neglected for the space of three weeks, after demand by a creditor, in a sum exceeding £50 then due, to make payment thereof, or secure or compound the same, or . . . (4) whenever it is proved to the satisfaction of the Court that the company is unable to pay its debts."

Certain holders of bonds of a public company presented, as creditors, a petition for the winding-up of the company on the ground that the interest on their bonds was unpaid, and that they believed and averred that the company was unable to pay its debts. The capital of their bonds was not due. When an order for intimation was moved for in the Single Bills the company objected to the order on the ground that the petitioners' interest had been paid within twenty-one days from the date of their demand. It appeared from the admissions of parties that the cause of the company's difficulties had been the refusal of a debtor to pay them a large sum of which they were proceeding to enforce payment; that the company were raising money to meet the interest to other bondholders; and that the object of the petition was, in the event of a liquidation being found necessary, to give the petitioners an influence therein and to fix the date of its commencement. The petitioners maintained that though their own interest had now been paid they were creditors of the company in respect of the capital of their bonds, and were entitled to the order craved, because they averred that the company was unable to pay its debts, and because the interest of other bondholders had admittedly not been paid. The Court *refused* to order intimation, and *dismissed* the petition on the ground that (1) the petitioners' own interest being admittedly paid, and the other bondholders not themselves taking action, there was nothing to show that any existing debt was due and unpaid; and (2) that there remained only the statement that the company was unable to pay its debts, which was not sufficiently specific.

Question, Whether the petitioners were "creditors" in the sense of the Companies Act 1862?

By the 79th section of the Companies Act 1862 (25 and 26 Vict. cap. 89), it is, *inter alia*, enacted—"A company under this Act may be wound up by the Court . . . . under the

following circumstances (that is to say) . . . . (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."

By the 80th section of the Act it is enacted—"A company under this Act shall be deemed to be unable to pay its debts (1) Whenever a creditor, by assignment or otherwise, to whom the company is indebted at law or in equity, in a sum exceeding fifty pounds then due, has served on the company, by leaving the same at their registered office, a demand under his hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand neglected to pay such sum or to secure or compound for the same to the reasonable satisfaction of the creditor . . . (3) Whenever in Scotland the *induciæ* of a charge for payment on an extract decree, or an extract registered bond, or an extract registered protest, have expired without payment being made. (4) Whenever it is proved to the satisfaction of the Court that the company is unable to pay its debts."

This petition was presented by certain bondholders, to the amount of £7480, creditors of the Oregonian Railway Company, Limited, who stated that they "believe and aver that the company is unable to pay its debts," and that they were desirous, for the protection of their rights as bondholders, to have the company wound up by the Court, and Mr James Alexander Robertson, chartered accountant, Edinburgh, appointed as liquidator. The petition set forth:—The objects of the company were stated by the memorandum of association, dated 30th April 1880, to be the constructing, owning, leasing, selling, &c., of railways in the State of Oregon or elsewhere in North America, and in particular of certain lines there. By the articles of association of the company, dated 30th April 1880, it was provided (sec. 2) that the original capital of the company should be £160,000, divided into 16,000 shares of £10 each, and it was further provided (sec. 3) that the company might increase its capital. The company was by the articles to have power to borrow to a certain amount per mile of railway. The whole of the original capital of the company was applied for and allocated, and £6 on each share of £10 was called up. The first object of the company was to acquire and extend what was known as the Dayton, Sheridan, and Grand Ronde Railway in the Willamette Valley, Oregon, and for that purpose the company in 1880 borrowed £95,000, for which they issued first mortgage coupon bonds having fifteen years to run from 15th May 1880, and bearing interest at six per cent.

"The security for the said bonds," the petition further stated, "was—(1) A mortgage or deed of trust, dated 11th and 14th February 1881, whereby the said railway was conveyed to certain persons as trustees for the said bondholders; (2) the uncalled capital; and (3) the property and assets of the company as then existing. It was, *inter alia*, provided in the said mortgage or deed of trust that the company might lease the said line, with the consent of the trustees under the said mortgage first had and obtained, and upon such terms and conditions as might be agreed upon and be expressed and set out in said written consent.

"In the year 1881 the company resolved to unite two sections of their line by erecting a bridge over the Willamette River, and to extend the line to the city of Portland, and for this purpose the company, by special resolution of date 22d December 1880, agreed to increase their capital from 16,000 shares of £10 each to 40,000 shares of £10 each. 16,000 only of the new shares were taken up, and upon these £6 per share has been called. The company also borrowed a further sum of £119,700, for which they issued bonds or deeds of security at a premium of four per cent., having twenty years to run from 15th May 1881, and bearing interest at the rate of six per cent. The security for the said bonds was—(1) A mortgage or deed of trust, dated 2d and 4th February 1882, whereby the company's railways (other than that already mentioned, and specially mortgaged in security of the 1880 bonds) were conveyed to certain persons as trustees for the said bondholders; (2) the uncalled amount of the capital for the time other than the original capital of £160,000 held in security for the 1880 bonds; and (3) the property and assets of the said company other than those conveyed to the holders of the 1880 bonds.

"The extension of the railway to Portland, which was the principal object for which the said sum of £119,700 was borrowed in 1881 as aforesaid, was never carried out, and the security of the bondholders was thereby greatly lessened, as the said extension would have given the bondholders the security of twenty-six additional miles of railway, besides increasing the value of the whole line by connecting it with a city of importance. Further, the said sum of £119,700 exceeded by at least £15,000 the amount of £1500 per mile which the company was entitled to borrow in terms of the said articles of association.

"By indenture dated the 1st day of August 1881, the company let the whole railways possessed by them to the Oregon Railway and Navigation Company of Portland in Oregon, in the United States, for a period of 96 years from the said 1st of August 1881, at a rent of £28,000 per annum, under certain deductions, until the proposed extensions of the railway were completed. The consent of the trustees under the mortgage or deed of trust in security of the 1880 bonds was not obtained to the said indenture, as required by the said mortgage or deed of trust first mentioned. The said lessee company entered into possession of and carried on the said railways under the said lease, but it is believed that they have found the said railways much less remunerative than they expected, and have allowed the line to fall into a state of disrepair. They have accordingly expressed their dissatisfaction with the terms of the said lease, and have intimated their intention to repudiate it on the ground of invalidity. It is believed that the said lessee company have failed to pay the half-year's rent due at Whitsunday last.

"The interest upon the said bonds was regularly paid half-yearly when the same became due until the term of Whitsunday last, when no interest was paid. In a circular dated 13th May 1884, which was sent by the secretary of the said company to the bondholders, it was stated that 'in the present state of uncertainty as to payment by the lessee company of the Whitsunday rent, the

directors, considering the amount of their advances on behalf of the company, deeply regret they do not feel at liberty to authorise the bank to pay the Whitsunday coupons.'"

The petitioners then set forth the amount of their bonds, and stated that interest due at Whitsunday 1884, to the amount of £60, was due and unpaid, and that payment had been demanded from the company on 17th May 1884. "The amount of the uncalled capital of the company," the petitioners further stated, "is £64,000 on the original capital, and a like sum upon the increased capital, and if the said uncalled capital were called up and applied in extinction of the said bonds a sum of £31,000 would still remain unpaid on the 1880 bonds, and a sum of £55,700 on the 1881 bonds. The petitioners have been unable to obtain accurate information as to the value of the assets of the company. There are no books of the company at the head office at Dundee showing the expenditure of the company. Only one balance-sheet of the company has been issued, viz. in July 1882, and no statement has ever been published, or it is believed even made up, showing the details of the capital expenditure, which appears to have amounted in 1882 to £417,833 or thereby. An extraordinary general meeting of the said company has been called for the 7th of June 1884, to consider a resolution to wind up the company voluntarily, but in the circumstances the petitioners believe that it is advisable, in the interests of the bondholders, that the company should be wound up by the Court."

The petition, though prepared, and a copy of it sent to the secretary on 6th June, did not appear in the Single Bills till 10th June.

With regard to the statement that a meeting of the company to consider a resolution to wind it up voluntarily had been called for the 7th June, it appeared from documents produced that an extraordinary general meeting had been called for that day to consider extraordinary resolutions, (1) that it had been proved to the satisfaction of the company that it could not by reason of its liabilities continue its business, and that it was advisable to wind it up, and (2) that it be wound up voluntarily. It also appeared that notice had also been given for the same meeting of a resolution to increase the capital of the company to the amount of £20,000 by the creation of 20,000 new preference shares of £1 each, to carry a preferential dividend of 10 per cent., and have priority over all other capital of the company in the distribution of the assets. With regard to these resolutions, the petitioners' agents on 6th June sent this letter to the secretary of the company:—"Dear Sir,—The course followed by your directors has placed our clients in a position of considerable difficulty. Looking to the effort made to raise £20,000 of preferred capital, and to the offer of Messrs Cox and Leng to contribute £5000 towards the legal expenses of enforcing the lease [that to the company who had taken a lease of the line, as stated in the petition], we were unwilling to apply for a winding-up if such arrangements could be carried through satisfactorily. But we have only heard of them from the newspapers, and anything we have learned otherwise led us to doubt if this object would be attained. We presume from your silence on the subject that you will not know yourself if the preferred shares are to be taken up until the first meeting of shareholders to be held to-morrow. If the capital be not then subscribed, another meeting will be held immediately afterwards for the purpose of resolving on a voluntary liquidation and of appointing a liquidator. In the interest of our clients, which, as they are advised, can only be efficiently protected by a liquidator entirely independent of and unconnected with either the directors or the shareholders of the company, we wish the winding-up to be conducted by an Edinburgh accountant, and at the first meeting of the bondholders Mr Mitchell suggested Mr J. A. Robertson, to whom no objection could be taken, and whose experience, as well as his ideas regarding his own remuneration, satisfy us that the interests of all concerned will be safe in his hands. In order to secure to our clients a voice in the appointment of the liquidator, we have therefore been advised to present to-day the enclosed petition for the winding-up of the company. In the event of the preferred capital being subscribed to-morrow, and of satisfactory guarantees being given for its application in the interest of the bondholders, it will be open to our clients to withdraw the petition. If, however, the additional capital is not subscribed, and the shareholders appoint a liquidator who may appear to us not to be suitable in the circumstances, the petition will be proceeded with, unless other arrangement shall be made to our satisfaction. In order not to prejudice any chance there may be of your raising the preferred capital, we have delayed presenting the petition, so that it will not appear in the Single Bills till Tuesday" [10th June].

At the meeting on 7th June the company passed a resolution "That the Oregonian Railway Company is quite capable of conducting its business, and therefore that it is not desirable to wind up the same."

On 9th June the interest due to the petitioners was paid by the company.

On 10th June counsel for petitioners moved in the Single Bills for an order for intimation of the petition. This motion was opposed by counsel for the company, who contended, *inter alia*, that in respect the debt averred in the petition to be due had been paid on the previous day (9th June), conform to a receipt for the amount produced, the petition should be *de plano* dismissed as incompetent. The Court, in order that an opportunity might be given that the statements made on behalf of the company might be embodied in a written form, continued the motion, and on 11th June the following minute was boxed to the Court:—"Murray, for the company, stated that on 9th June current, being within twenty-one full days of the date of any demand for payment being made therefor, the whole past-due interest, including additional interest up to 9th June on the bonds, was paid to the agents making said demands, conform to receipt herewith produced.

"The interest was not demanded in terms of the Companies Act 1862, sec. 80, sub-sec. 1, in respect that the demand was not made under the hand of the creditors, and was not left at the registered office of the company. The demand, made as it was by the present agents for the petitioners, was delivered in Dundee through the post-office on the 19th of May. It is produced herewith and referred to.

"The principal sums in said bonds are not re-

payable till the years 1895 and 1901, as set out in the petition.

"The company now has at its disposal a sum sufficient to pay the whole interests which became due to the bondholders at Whitsunday last, and also those to become due at Martinmas next."

The minute then set forth the resolution of 7th June (above narrated), that the company was capable of conducting its business, and that a winding-up was not desirable.

On 12th June the Court heard argument on the petitioners' motion for intimation.

Argued for the company—The petition fell to be dismissed. (1) The minute contained statements of fact which showed that the petitioners were not in a position to demand liquidation. The true condition of the company was as follows:—The revenue of the company consisted of the rent payable by the Oregon Railway and Navigation Company of Portland under the lease of 1st August 1881 mentioned in the petition. As long as this was paid, the company regularly paid the interest on the debenture bonds. The lessee company had, however, repudiated the lease, averring that they were advised that it was against public policy, and they ceased to pay the rent as formerly. In consequence of this the company were unable to pay the half-year's rent due at Whitsunday last. They were advised to take proceedings in order to compel payment, and these would probably have issue in a few months, two of the directors having subscribed a sum of £5000 to try the question. In these circumstances the meeting of 7th June had been held, and it had been resolved not to wind up but to continue the business by means of the issue of preference stock. This to the amount of £16,000—a sum sufficient to pay the interest for some time to come—had been taken up. The letter of the petitioners' agent showed their true object, and what the petitioners proposed to do, in keeping a liquidation hanging over the head of the company, would only hamper it and destroy the chance of raising funds. This was a state of matters which did not justify liquidation. Intimation of the petition would infallibly destroy the credit of the company in the market. In fact the presentation of the petition had already stopped the taking up of the preferential stock. But (2) the company was not "unable to pay its debts" in the statutory sense. The only debt due to the petitioners, viz., the interest on their bonds up to 9th June had been paid before the petition was lodged, and their title to insist in the petition had been taken away. The only possible debts due at present were the principal sums in the bonds, and these were not repayable till 1895 and 1901. In the case of *The European Life Assurance Society*, Oct. 1869, 9 Equity 122 and 128 (judgment of Sir W. James), it was laid down that the "inability" of a company to pay its debts under section 80 of the Act was an inability to pay debts actually due, for which a creditor could demand immediate payment, and the Court would not order a company to be wound-up by reason of any liability not immediately payable, unless it was reasonably certain that the existing and probable assets would be insufficient to meet existing liabilities. The statute required something more than was averred in the petition—some of the common law *indicia* of insolvency which warrant sequestration. (3) The petition was incompetent, inasmuch as the Act provided that 21 days must elapse after demand for payment of the sum due before a liquidation can be demanded (*vide* sub-sec. 1 of 80th sec. of Act)—*Catholic Publishing Co.*, 33 L.J. Ch. 825; Buckley, 3d ed. 380.

The petitioners replied—The petition contained perfectly distinct averments that the company was unable to pay its debts, and the petitioners offered to prove this. Two notices had been given to the shareholders for the 7th June—one for the purpose of resolving that it was desirable to wind-up, and the other for the purpose of resolving that the capital should be increased to £20,000. The second resolution no doubt was carried, but the only way the company could pay the interest on their bonds was to raise £20,000 of preference shares bearing 10 per cent. interest. They were in fact going to borrow money at 10 per cent. to pay interest on money previously borrowed at 6 per cent. The floating debt amounted to some £57,000 unsecured, and there were only some £7000 total free assets to meet it. This debt was proposed to be paid out of the preference shares. The company was in fact eating up its capital. This state of facts, then, disclosed an undoubted *prima facie* case for intimation. The petitioners were, however, quite willing that the petition should, after intimation, be sisted so as to fix the list of contributories in the event of a future winding-up being necessitated by the lease being held to be bad.

At advising—

LORD JUSTICE-CLERK — In the first place, in regard to our power to make any order which we think most for the interest of all parties, there is no doubt that it is within our discretion to refuse to pronounce an order for intimation. If intimation be requisite or desirable we may order it, but if we see no necessity or propriety in such an order, it is not an essential part of our duty to pronounce it, and one can easily see that such an intimation may prove in the highest degree injurious to the credit of such a company.

It is vain in the face of the proceedings and admissions to try to disguise the fact that this company has financial difficulties to overcome, but that is not what the winding-up clauses of the statute are intended to meet. They are designed to meet cases where there are tangible reasons for saying that the company is unable to pay its debts. The first question therefore comes to be, whether the petitioner has set out with sufficient specification that the company is unable to pay its debts? Now, the petitioner came into Court alleging that the company was unable to pay its debts because it had not paid him the interest on the debentures held by him, which was due at last Whitsunday, but under the clause of the statute the company has twenty-one days to pay the debt after the demand is made, and it turned out that before the twenty-one days expired the debt was paid, and therefore as far as the petition proceeds on the allegation that the debt of the petitioner is not paid, the event has proved that statement to be inaccurate.

The next question is more difficult. It is whether a person who was and is a bondholder or creditor of the company, but not in any debt which is actually due, and which the company are

unable to liquidate, who therefore is fully paid as far as he has the right to be paid, is entitled to present such a petition in the name and for the interest of the other creditors, who are not said to have made any demand on the company, and who seem to be in no mood to take such proceedings? That is a very doubtful matter. The question can hardly be said to arise here however, for I do not think that there is sufficient allegation in the petition of inability on the part of the company to pay its debts. All the bondholders except those whose names are on this petition are content with the present state of matters; nobody has made any demand which has not been met, and nobody except the petitioner has presented such a petition as this. I have a very strong feeling that this is not a case falling within the contemplation of the Act. But independently of that I do not think that the petition sets out inability on the part of the company to pay its debts in the sense of the statute. It is true that there is a statement that the interest due to the other bondholders last Whitsunday is yet unpaid, but the payment of their interest may be postponed with the consent of the creditors. It is not sufficient to say that a company has not paid its debts when it has so far arranged a financial transaction with consent of the creditors by which its debts will ultimately be paid. In order to warrant the prayer of this petition being granted it must be shown that there is interest due to other creditors, and that it cannot be paid. I do not think that it would be a proper application of the power given to us by the statute to grant this petition. If the other creditors are dissatisfied they can make a demand, and if after the lapse of twenty-one days they are unpaid they have their statutory remedy. If they do not choose to do this I do not think it is the duty of the Court to grant this petition because a few creditors are of a different opinion. On these grounds, which are, I think, entirely consistent with the English authorities, I am of opinion that we should not only decline to make any order for intimation, but should dismiss the petition.

Lord Young—This case is not unattended with difficulty, and admits of and requires the exercise of discretion by the Court. The petition is *ex facie* quite regular, and is at the instance of a party having a title to present it, and the presentation of it was, I understand, quite regular also, so that if it had been our duty to order intimation of every *ex facie* regular petition, we should of course have ordered intimation of this one, for it would have been within the right of the petitioners to have that order; but I think that at the earliest possible stage, and as soon as the petition is before it, the Court is entitled to exercise its discretion and judgment in what it believes to be the legitimate interests of all parties concerned, upon information laid before the Court in so satisfactory a manner that the Court may safely act upon it. Accordingly at the earliest possible stage, when the petition was moved before the Court, counsel for the company appeared and stated reasons why in its interests, and in the interests of others than the petitioners, no order should be pronounced upon the petition. We in consequence directed the company to put in a minute embodying what their counsel had stated at the bar, and we have heard further statements to-day on both sides, and on the facts so stated, which are either not disputed, or which in the exercise of our judgment we are, I think, at liberty to receive as facts, we have to exercise our judgment as to what is best to be done in the interests of all concerned, and on that matter I concur in the conclusion at which your Lordship has arrived.

The origin of the petition is before us, beyond the possibility of a doubt, for we have it in a letter from the agents for the petitioner, which is altogether candid and creditable, and becoming in every way. The company is rather a peculiar company, as it is the proprietor of a railway in Oregon—that is, the company have made and stocked a railway there, which has been let to another company in America on a lease for ninety years, and at a certain rent. That rent constitutes the revenue of the company, and so long as it was paid the company paid its debts, which, generally speaking, are simply debenture bonds—it paid the interest on these so long as the rent was paid. But the rent has now been withheld upon some ground which we can hardly enter upon without a fuller explanation than we have got—that it is against public policy to lease the railway—and in these circumstances the company is not in a position to pay the interest on the debenture bonds. It has been explained to us that the company is advised to take, and is in the course of taking, proceedings against the tenant company to compel payment of the rent, and that these proceedings will probably have issue in the course of a few months. Now, I am the furthest in the world from holding that a company like this, about to pursue its tenant for rent withheld on such grounds, and so unable in the meanwhile to pay the interest on its bonds, is an insolvent company and unable to pay its debts. It may be unable to pay its debts until the issue of the lawsuit, but I will not countenance for a moment the thought that this means that the company is unable to pay its debts in the statutory sense. However, it was an emergency, and on the stoppage of its revenue the company advertised a meeting of the shareholders to consider whether it should be wound up, and the railway that was leading to so much trouble realised, or whether it should issue preference stock to the extent of £20,000 to enable it to pay the debenture bond interest at Whitsunday and Martinmas. It was thereupon that the present petitioners, who are bondholders to the extent of £7000 out of a total of over £200,000, addressed a letter to the company saying that if there was to be liquidation they should like to have a liquidator appointed in Edinburgh; and to secure a voice in the election of the liquidator—for which office they thought Mr Robertson a most excellent man with most moderate charges—they presented this petition, not by any means with a view to winding-up if the alternative of issuing preference stock was adopted by the shareholders, but simply to secure to the petitioners a voice in the appointment of the liquidator, it being always in their power to withdraw the petition if the alternative motion was adopted. That alternative was adopted, and we are told some £16,000 of the £20,000 of preference stock has been taken up—quite sufficient to pay the interest at Whitsunday and Martinmas, and indeed for some time to come—but the pre-

sentation of this petition to wind up, although meant merely to secure a better chance for Mr Robertson if liquidation was resolved upon, has stopped the taking up of this preference stock, and that is just a practical illustration of the effect upon so sensitive a thing as the subscription of money which the presentation of a petition of this kind may have. Now why is this to go on? The shareholders and the other bondholders are really all agreed that it is most expedient for all concerned that they should proceed against the American Company, and compel them to pay the rent, and to apply the produce of this issue of preference stock, which now amounted to £16,000, towards paying the interest on the bonds while the litigation is being prosecuted. Now, how is it according to the reasonable interest of any one to keep this petition in Court and to order a more formal publication of what has had rather an injurious effect already, when it is not proposed that the company should in the meanwhile be wound up. It was not possible seriously to suggest that a company is in the position of being unable to pay its debts—its existing debts—if not a single creditor can be found to say a debt was due which the company did not pay on demand. The petitioners said there was a debt due to them which they did not get on demand, but they got it as soon as this petition was presented, and there is no contradiction of the statement in the minute that the company has at its disposal a sum sufficient to pay the whole interest which became due at Whitsunday last, and also that to become due at Martinmas next. To be sure, the petitioners are creditors for capital, but in respect of their capital there was nothing due to them, and the statement that the company was unable to pay the capital of its bonds would involve the question of the worth of the stock of which the capital of the company consists —namely, the railway in Oregon which they had constructed. In the present case it is enough to say the capital is not due, for when the statute says that a company is unable to pay its debts, it means that the creditors are not satisfied that they can get their own which is at present due to them. Now, not a creature can be got to say that about this railway company, and we see that everyone but the petitioners is satisfied that the proper course is to apply the money in the company's hands to pay the Whitsunday interest and the coming interest at Martinmas, and so on as long as this litigation lasts, and that it would be mischievous in the interests of all concerned to order intimation of this petition. I therefore concur in the view that upon the whole history of this case we ought not only to refuse to order intimation, but also to dismiss the petition.

LORD CRAIGHILL—This, I think, is a case of difficulty, and the decision has been to me the cause of some anxiety. But in the end, and without much hesitation, I have come to be of opinion that the judgment which your Lordship has suggested is the true conclusion. I have little to add, for the grounds of judgment have, according to my views of the matter, been fully and satisfactorily presented, especially in the opinion of Lord Young. One or two words of explanation, however, I think it right to offer. In the first place, the question as to the petitioners' title I desire to leave, so far as I am concerned, an open question. That they had a title when the petition was presented is certain; but the interest then due, which was the only debt due to them which was then exigible, has since been paid. The capital of the debt no doubt remains unpaid, and for that, in a sense, they are of course creditors; but these bonds have a long time to run before payment can be demanded. The first half is payable only in 1895, and the second not till 1901. Are they in these circumstances creditors within the meaning of that word as used in the Act of 1862. This is an important question; and upon it there has not been cited to us, and I have not found, any authority in any decided case, or any indication of opinion in the work of any author on the subject. My own inclination would be to come to an opposite conclusion, because, as presumably every creditor who asks for an order for liquidation is lying out of money which cannot be recovered without resort to this application, it is only reasonable to hold that one who has no debt unpaid of which payment can be demanded is not in the situation which must be occupied by one asking for liquidation. I do not, however, mean to commit myself to an opinion. My desire simply is, that this, so far as I am concerned, shall be left an open question.

In the second place, since provision has now admittedly been made for payment of the interest on the debenture bonds held by others than the petitioners, the petition must be read, and the state of the company's affairs judged of, in the light of that consideration. The consequence is that we find no statement of debt now due remaining unpaid, and the only thing left as a basis for the application is the allegation which the petitioners have made in the words of the statute (sec. 80), that the company is unable to pay its debts. But this, I think, is *per se* not enough. Specification of something calculated to satisfy the Court that this is more than a random statement is necessary. But there is here nothing of the sort. On the contrary, the petitioners confess their inability not merely to give particulars but to say more than what they have alleged they believe to be true. This will not do; and upon this ground the petition must be dismissed.

But, in the third place, that on which I mainly proceed is the persuasion that this is not an application for liquidation honestly made in the interest of all concerned, but a proceeding adopted to further an ulterior purpose which the petitioners desire to accomplish. As their counsel explained, and as appears from the correspondence, they do not really desire a winding-up to be begun and carried forward; they are content, once the Court have done something which shall fix the date at which the liquidation, if ever it shall be entered on, is to draw back, and to have the company to continue, as far as that may be possible, in the administration of their own affairs. The end in view is a *nexus* on the transfer of shares. In other words, their aim is to fix the present shareholders, and those who have parted with shares within the last year, to remain liable for the petitioners' bonds. To lend our aid to such a purpose would, I think, be to the company a ruinous, and as I think, an unfair proceeding, and also one outside the purpose for which liquidation may be

granted. The petition ought therefore to be refused.

LORD RUTHERFURD CLARK—I have had very considerable difficulty, but after such consideration as I have been able to give, I am disposed to concur in the opinion of Lord Young.

The Court dismissed the petition with expenses.

Counsel for Petitioners — Pearson — Low. Agent—Mitchell & Baxter, W.S.

Counsel for Respondents—Mackintosh—J. P. B. Robertson — Graham Murray. Agent — J. Smith Clark, S.S.C.

Friday, June 13.*

FIRST DIVISION.

[Lord Kinnear, Ordinary.

HOZIER *v.* HAWTHORNE AND OTHERS.

Road—Public Right-of-Way along River Bank—Substitution and Deviation during Period of Prescription—Prescription.

A public right-of-way along the bank of a navigable river *held* to have been established by evidence of use by the public for 40 years, although during that time there had been operations on the bank throwing back the line thereof, and though the line of road had also been otherwise deviated and another substituted for a portion of it while the period of prescription was running.

Road—Substituted Road—Acquiescence—Prescription.

Where the public acquiesce in a substituted road, and use it in place of one over which there is a public right-of-way, possession for the full prescriptive period, such as would be required to found a new right, is not necessary in order to found a right to the substituted road.

This was an action at the instance of Colonel Hozier, proprietor of the lands of Partick, near Glasgow, in which he sought to have it found and declared that he had the sole and exclusive right of property in that portion of the lands of Partick which extended about 1000 yards along the bank of the river Clyde from the mouth of the Kelvin and Meadowside Ferry to the Ree or Saw Mill Road on the west, and that free of any servitude of passage or right-of-way through the same and any part thereof. The action was brought against Thomas Hawthorne and George Fulton, as representing the public, and the summons also concluded that the defenders should be interdicted from trespassing upon any part of the lands referred to above (and of which a plan was lodged in process), and from pulling down any fences erected thereupon. The Commissioners of Police of the burgh of Partick were also called as defenders. The object of the action was to try the question whether there existed a public right-of-way along the Clyde bank through the lands of the pursuer.

In December 1880 the pursuer feued a portion of the lands through which the right was claimed, to Messrs D. & W. Henderson, shipbuilders, and formed a footpath through his lands along the boundary of this feu to Meadowside Ferry, fencing off this ground and footpath. The fences crossed the line of the public right-of-way claimed along the bank, and were broken down by members of the public, and hence the present action. The pursuer also made another path running westward through his lands. He undertook, if decree were pronounced in his favour, not to shut up the paths he so made.

The defenders Hawthorne and Fulton averred that for more than forty years there had existed a public road or right of public way as a footpath through the lands in which the pursuer claimed an exclusive right of property.—"(Stat. 1) For a period of more than forty years there has existed a public road or right of public way as a footpath from the ferry at the junction of the rivers Kelvin and Clyde, called the Meadowside Ferry, westward along the north bank of the Clyde to the road formerly known as the Ree Road, now as the Sawmill Road, and thence westwards to Whiteinch and Scotstoun. The said public road or right of public way has been for more than forty years, and is largely used by the inhabitants of Partick, Whiteinch, and Govan, and by others, both for purposes of recreation and of business. The said road is a public road, and being on the bank of the Clyde, which for a length of time has been the principal river highway in Scotland, the said footpath formed a much-prized walk for recreation and exercise. It was a favourite resort for the public, who have used and enjoyed the said right of public way from time immemorial without molestation or interruption. Further, for forty years and upwards, or for time immemorial, the said public road, along which the said right of public way exists, has been used by the public as a means of passing between its two termini as above described. This right of public way is of peculiar value to the inhabitants of Partick, Whiteinch, and Govan, as affording a convenient and desirable access between the shipbuilding yards and other public works on both banks of the Clyde and their dwelling-houses, and other places of resort. The said public way was also used as a road to the church. It formed a convenient and desirable access to the inhabitants of Whiteinch and Scotstoun, and others living on the north side of the Clyde, to the Govan parish church. The Meadowside Ferry connects Partick and Whiteinch with the populous town of Govan on the south side of the Clyde, and with the city of Glasgow on the east side of the Kelvin. (Stat. 2) Between Meadowside Ferry and Meadowside Ferry west, the foresaid public right-of-way has always been recognised and left uninterrupted, notwithstanding that a very large shipbuilding yard, owned at one time by Messrs Tod & M'Gregor, and now by Messrs D. & W. Henderson, has been erected close to the ferry, and at different times extended westwards, and also notwithstanding the great practical importance of an immediate water frontage to a shipbuilding yard, subject to the control of the owner or occupant of the yard. The only other buildings on the north bank of the Clyde between Meadowside Ferry and the Ree Road or Sawmill

* Decided March 19.