making his statement, but he is subject to any consequences that may result from his having made that statement, if in addition to having given utterance to the calumny he is proved to have made it maliciously.

LORD YOUNG was absent.

The Court allowed the issues, which were amended at the bar so as to read, "Issues in which John Gordon is pursuer and the British and Foreign Metaline Company are defenders," with the exception of striking out the words "or one or more of them" in the first two issues, and remitted the case to the Lord Ordinary for trial.

Counsel for Pursuer—Pearson—Shaw. Agents—Rhind, Lindsay, & Wallace, W.S.

Counsel for Defenders The British and Foreign Metaline Company, William Stiven, and David Stewart—D.-F. Mackintosh, Q.C.—Macfarlane. Agent—J. Smith Clark, S.S.C.

Counsel for Defender William Thompson—Dickson. Agents—Boyd, Jameson, & Kelly, W.S.

Tuesday, November 16.

FIRST DIVISION.

CUNINGHAME AND OTHERS (GLENGARNOCK IRON COMPANY) *v.* WALKINSHAW OIL COMPANY (LIMITED).

Company — Winding-up — Creditor's Petition — Disputed Debt — Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), 1867 (30 *and* 31 *Vict. c.* 131), *and* 1886 (49 *and* 50 *Vict. c.* 23).

A creditor of a limited company on certain bills which were overdue, but on which he had done no diligence, served on it a notice under the Companies Act 1862, requiring payment of the debt, and on its non-compliance with the notice presented a petition for a winding-up order. It appeared that there was a *bona fide* dispute as to a contra-account which the creditor owed the company, and the balance on which the company alleged to exceed the amount of the bills, and there was no evidence of insolvency other than the non-compliance with the notice. The Court, in view of the whole circumstances, *dismissed* the petition.

The Glengarnock Iron Company were, and for many years prior to 1886 had been, the tenants of two adjoining mineral fields in the county of Renfrew, known as the "Douglas Field" and the "Abercorn Field" respectively, which had always been wrought together as one mineral field. The Walkinshaw Oil Company (Limited) was sub-tenant under the Glengarnock Iron Company of the fields, the latest sub-lease being dated July 1883.

During the currency of a previous sub-lease the Walkinshaw Oil Company, sub-lessees, had purchased from the Glengarnock Iron Company part of the plant, &c., upon the subjects, at the price of £7000. Afterwards they purchased the remainder of the plant, &c., at the price of £15,250, and in part payment thereof granted two bills for £5250 and £5500 respectively, of which the former fell due on 17th July 1886, and the latter on 21st July 1886. On 14th August 1885 the sub-lessees had given notice of their intention to exercise their option to terminate their sub-leases. By minute of agreement between the Glengarnock Iron Company and the Walkinshaw Oil Company Limited, dated 14th May 1886, the Glengarnock Company agreed to purchase from the Walkinshaw Company, as at 26th May 1886, "all the plant of every description upon and connected with the sub-lease of the subjects embraced in the Douglas lease, and that at the valuation to be placed thereon" by the valuators thereinafter appointed. It was further agreed that the price of the said plant should be applied *pro tanto* in payment of the sums due by the Walkinshaw Oil Company, Limited, under current acceptances. In the course of the valuation, however, the parties differed as to the extent of the plant described by the words "upon and connected with the subjects in the Douglas lease." They agreed in holding as falling within this description plant valued at £8913, 3s. 10d. The items which according to the contention of the Walkinshaw Oil Company did, and according to the contention of the Glengarnock Iron Company did not, fall within this description were valued at £9443, 6s. 1d.

On 9th October 1886, while negotiations were pending for the adjustment of these differences, John Charles Cuninghame and others, the partners who were carrying on business under the name of the Glengarnock Iron Company, presented a petition under the Companies Acts 1862, 1867, and 1886, for the purpose of having the Walkinshaw Oil Company, Limited, wound-up under those statutes. They averred that they were creditors of the latter company to the extent of £1836, 16s. 2d., *i.e.*, the difference between £10,750, the amount of the two bills above mentioned, which had not been paid, and £8953, 3s. 10d., the value of the plant which they admitted to fall within the terms of the agreement of 14th May 1886, and for which they were ready to give credit; that they had served a notice on the company on 3d September 1886, and that as three weeks had elapsed since the service of the notice without payment having been made, the company was unable to pay its debts, and the present application should therefore be granted.

On the 18th October 1886 answers were lodged for the Walkinshaw Oil Company, Limited. In these answers liability upon the two bills was admitted, but they maintained that the plant, about which the parties were not agreed whether it fell within the description, did really fall within the description, and had been purchased by the petitioners. As it was worth £9443 as valued, they claimed that the balance was truly in their favour. Alternatively, they maintained that as the petitioners had entered on possession of the whole plant they were, in any view, bound to pay its fair value, which even at break-up prices would exceed the £1836 in respect of which the petition was brought. They stated that the petition was really brought to concuss them, under threat of a liquidation, to give up their contention as to what fell within the description of plant sold.

Argued for the petitioners—The company was unable to pay its debts in the sense of the statute, and therefore a winding-up order should be pronounced—25 and 26 Vict. c. 89, sec. 80;

in re Globe New Patent Iron and Steel Company, June 26, 1875, L.R., 20 Eq. 337.

Argued for the respondents—The creditor was not entitled to a winding-up order, for the debtor *bona fide* disputed the debt, and there was no evidence of insolvency other than non-compliance with the notice served under the Companies Act. Not only was the debtor not insolvent, but he was possessed of property far in excess of the debt, and there was no averment of the existence of any other creditors—*In re London and Paris Banking Corporation*, Nov. 21, 1874, L.R., 19 Eq. 444; *in re The Catholic Publishing Company, Limited*, March 7, 1864, 33 L.J. Ch. 325.

It appeared from admissions at the bar that on other transactions altogether, as to which there was a current-account between the petitioners and respondents, the petitioners owed the respondents a sum which at the date of the discussion amounted to £1200. The respondents, on the suggestion of the Court, offered to consign the £600, which was the difference between this sum and the £1800 in respect of which the petition was brought, the Court intimating that such consignation would receive consideration on the question of expenses.

At advising—

Lord President—There was no doubt a disputed debt owed by the respondents to the petitioners. The petitioners were in possession of two past-due bills which had been granted by the respondents, and they had it in their power to raise the questions by doing diligence on these bills in the ordinary way. If they had done so the respondents might have given security in the ordinary way in the Bill Chamber, and the issue between the parties might then have been tried; but instead of taking that course they have come here with a petition stating that the respondents are insolvent, and that they have neglected for three weeks to pay the debt due by them, and accordingly praying for a liquidation order under the Companies Acts. The petition was preceded by a correspondence, of the terms of which I cannot approve—letters containing threats in order to get payment of money which is said not to be due. The application is for the amount of a disputed debt, and not only is no insolvency proved, but it is plain that the respondents are possessed of a large and valuable property. This petition ought never to have been presented. A charge was the proper mode of getting payment. In the whole circumstances, I am of opinion that the petitioners should be found liable in the expenses of this application.

Lords Mure, Shand, and Adam concurred.

The Court pronounced this interlocutor:—

"The Lords . . . in respect of the consignation of £600 now made by the respondents the Walkinshaw Oil Company, conform to deposit-receipt therefor, . . . dismiss the petition, and decern: Find the petitioners liable to the respondents in expenses."

Counsel for the Petitioners — Pearson — M'Kechnie. Agents—J. & F. Anderson, W.S.

Counsel for the Respondents—Balfour, Q.C. —W. Campbell. Agents—J. & J. Gellatly, S.S.C.

Wednesday, November 17.

SECOND DIVISION.

[Sheriff of Lanarkshire.

WEBSTER *v.* TAIT (WEBSTER'S TRUSTEE).

Bankruptcy — Sequestration — Bankrupt's Obligation for Annuity to Woman who had been Living with Him — Deceased Wife's Sister — Turpis causa.

A man lived with his deceased wife's sister for some years, having first gone through a form of marriage with her in a country where such marriages are legal. After a time he left her, but agreed by a minute of agreement to pay her a certain aliment while they should survive and live apart. His estates were thereafter sequestrated. *Held* that as the aliment was not to be paid *ob turpem causam*, but as a reparation to the woman on the cessation of their illicit relation, she was entitled to claim as a creditor on his estate.

In February 1868 the wife of John Webster, a commission agent in Glasgow, died, and her sister, the claimant in this case, came to live in his house and take care of the child of the marriage. She became attached to him, and in consequence of his requests she consented after a time to go to Norway (where marriage between such relations is not forbidden by law) with him, and they went through a form of marriage at Christiana, in the British Consul's office there, on the 21st May 1869. He represented to her, as she stated in this action, that the marriage being then valid by the law of Norway, would be valid in Scotland. Thereafter they returned to Scotland and lived together for thirteen years as man and wife at a villa at Helensburgh which belonged to her. She borrowed various sums of money on the security of the villa, which money was applied in the housekeeping. They lived together till 1882, when they agreed to separate, and they entered into a minute of agreement of separation, executed on the 14th of August 1882. By this agreement John Webster agreed to pay the claimant, who was designed in the agreement as "Mrs Isabella M'Diarmid or Webster, the wife of the said John Webster," the sum of £1 sterling per week regularly "during the joint lives of the parties, and so long as they continue to live separate." On her part Mrs Webster agreed that she would not molest or disturb him, or "endeavour to compel him to live with her, or to compel restitution of conjugal rights, or compel him to allow her more or greater aliment than is hereinbefore provided." She also agreed not to contract debt in his name. The claimant then lived separate from him, letting her house. Shortly afterwards Webster married another woman. On the 24th March 1886 his estates were sequestrated by the Sheriff of Lanarkshire, and William Couper Tait, C.A., was appointed trustee in the sequestration. Before his sequestration the bankrupt had failed to make the promised payment of £1 weekly with punctuality, and a considerable sum of aliment was due.

On 22d July 1886 the claimant made a claim upon John Webster's sequestrated estate for £500 as the capitalised sum of an annuity of £52 sterling per annum during the life of the claimant, who