That result was not provided for by any regulations in the lease, but was left to be attained by the operation of the ordinary motives which guide a man in carrying on his business. If, however, the tenant changes the system of management and adopts a new one, which disturbs the ordinary recurrence of the terms convenient for making manure, the motives which were previously supposed to operate so as to lead the tenant to apply the manure to his land in June cease to operate, and the question arises whether there is in the lease anything to prevent the tenant making such a change and applying the manure to the land at a different time. If during the course of the lease he had changed his system of management, and begun feeding cattle in stalls in summer to a great extent, and if, as some of the witnesses say, the only useful time for manuring the land were in June, the practical question would then have arisen, whether the disadvantage of making a great quantity of manure after the 15th of June was a sufficient reason for abiding by the old system. The question would have been one of the balance of advantage. It seems to me that if such a question had occurred during the course of the lease it would have been quite out of the power of the landlord to interfere and say that the tenant was not to apply the manure except as was contemplated when the lease was entered into. If the tenant had a great quantity of manure in hand after the middle of June, the landlord might prohibit him from selling it, and it would be a question for the tenant whether he would make manure which he could not sell, nor with any advantage put into the ground in winter.

In the case which has happened the tenant made a great quantity of manure after the month of June in the last year of his lease, and so threw on his landlord the result of his change of system. The question is, whether there is anything in the contract to prevent him doing so? and I think there is nothing. We are all agreed that there is nothing in the lease to prevent the tenant changing his system of management; is there anything to enable the landlord to deal with the manure which the tenant has in hand in consequence of his change of system without paying for it? I think there is not, because the clause in the lease treats of manure made after June in the last year of the tenant's occupancy, and provides that the tenant shall leave it on the farm, and that he shall be entitled to payment for it from the proprietor or incoming tenant. There is nothing to limit the proportion of manure to be left in this position. It is said that the lease contemplates that only a small proportion of the straw crop should be left over after the land has been manured, and it is accordingly suggested that the tenant's possession of such straw is really accounted for by a relaxation of the conditions of the lease which it was understood between the parties would be made. I can find no ground for such a conclusion, but the tenant is—it seems to me in accordance with his contract—in possession of manure at the end of his occupancy, and is entitled to payment for it. No doubt the extent of his claim presses somewhat hardly upon the landlord, because undoubtedly the operation of the clauses of the lease is to throw on the landlord a burden which neither party contemplated at the time when the contract was entered into, and to confer on the tenant a corresponding advantage—a result not altogether equitable,—but when people make a contract of this kind, containing very specific and stringent stipulations for the regulation of their future rights and interests in circumstances which they do not very clearly foresee, the consequences are very apt to be prejudicial to one or other of the parties. Where this happens, as it frequently does, it is impossible for the Court to make a new contract for them different to that which they have made for themselves, or to readjust their interests as they might have done if they had not been already bound. We must construe the contract they have made according to its terms.

The Court varied the interlocutor of the Lord Ordinary by omitting the words "unfair or" and "or of the rules of good husbandry" from the fourth finding: *Quoad ultra* adhered to said interlocutor and decerned, &c.

Counsel for Pursuer—Shaw — A. S. D. Thomson. Agent—T. T. Muir, S.S.C.

Counsel for Defender—Comrie Thomson —C. N. Johnston. Agents—Strathern & Blair, W.S.

Wednesday, February 3.

FIRST DIVISION.

COWAN AND OTHERS, PETITIONERS.

Company—Winding-up — Creditor's Petition—Disputed Debt—Voluntary Liquidation — Majority Requisite for Special Resolution—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89)*—Expenses.*

Creditors of a public company holding an extract decree-arbitral for £58, 12s. 2d., presented a petition for the winding-up of the company. The company in their answers alleged that a process of voluntary liquidation was going on, and produced a minute of an extraordinary general meeting containing a declaration by the chairman to the effect that a resolution to wind-up the company voluntarily was carried. The minute further contained the statement that there voted for the resolution eight, and for an amendment four. The company admitted their liability for the debt to the amount of £43, but disputed it to the extent of £15, 12s. 2d., and stated that they wished to test the regularity of the arbiter's decree.

Held (1) that there was no voluntary

liquidation as the minute bore upon its face that the requisite majority of three-fourths, required by section 51 of the Companies Act 1862, had not existed; (2) that the disputed debt was of too shadowy and unsubstantial a nature to justify the refusal of the petition.

Expenses.

A shareholder of the company was allowed at the first hearing of the petition to lodge answers. They contributed nothing material to the arguments for or against the petition. *Held* he was not entitled to expenses.

The Scottish Publishing Company, Limited, was on April 22nd 1885 registered and incorporated under the Companies Acts 1862 to 1886 with its registered offices in Edinburgh. It objects were, *inter alia*, to publish magazines and papers and purchase copyrights.

Samuel Cowan & Company, printers and publishers, Perth, were employed by the company from 1886 to 1888 to print and publish for them a monthly magazine called "The Scottish Church." A dispute arose as to the payments due to Cowan & Company, and the question was submitted to arbitration. The arbiter, Mr W. J. Menzies, W.S., on the 10th of December 1891 issued his final decree-arbitral, by which he found Cowan & Company entitled to a sum of £58, 12s. 2d.

The company were on 10th December 1891 charged to make payment of this sum, and on their failing to do so, Cowan & Company on 23rd December presented a petition under the Companies Acts 1862 to 1886 for the purpose of having the company wound up by the Court.

They averred that they were creditors of the company to the extent of £58, 12s. 2d., for which they had an extract decree-arbitral; that they had charged the respondents to make payment; and that the *inducice* of the charge had expired without their having done so. The company therefore was liable to be wound up under the 79th and 80th sections of the Companies Act of 1862, and the present application should be granted. A letter dated 18th December 1891 was produced, in which the respondents did not dispute the debt.

On the 2nd of January 1892 answers were lodged for the company. The respondents denied liability for the debt, on the ground that the decree-arbitral was illegal, null, and void, and stated that they would have challenged the proceedings had they not taken steps for the voluntary liquidation of the company. They further stated that an extraordinary general meeting of the company had been held on 29th December 1891 to consider a resolution "that the company be wound up voluntarily under the provisions of the Companies Acts 1862 to 1890," and that the above resolution had been passed. They produced a minute of the meeting signed by the chairman, which contained, *inter alia*, the words—"Mr Forbes' amendment being then put against the proposed resolution, and a show of hands being taken, there voted for the former four, and for the latter eight. The resolution therefore became the decision of the meeting, and the chairman declared it carried. No poll was demanded." They further produced minutes of a meeting held on 13th January 1892, at which the above resolution was confirmed. They averred further that the affairs of the company were perfectly solvent, and that under the circumstances they should be allowed to go on with the voluntary liquidation as being a cheaper process than a judicial winding-up.

At the first hearing of the petition the liquidator appointed by the company was sisted and allowed to adopt the answers lodged by the company.

Mr Denham, a shareholder of the company, was allowed to lodge answers in support of the petition. The answers were lodged on 20th January 1892, and adopted the statements of the petitioners, and contained certain statements with regard to the affairs of the company, which were, however, not pressed at the bar.

Argued for the petitioners—(1) The company was unable to pay its debts in the sense of the statute, the *inducice* of a charge having expired without their making payment—Companies Act 1862, sec. 80, sub-sec. 3. The interest of the petitioners was merely to get payment of their debt, and on receiving it they would withdraw the petition. The respondents had not disputed the debt till they came into Court, and even now only disputed it to the extent of £15. It was not therefore a case for any indulgence to be shown to the company by the Court. The case of *Bowes* v. *Hope Life Insurance Company*, March 28, 1865, 11 H. of L. Cases, 389, showed that where a creditor appeared with a judgment debt he was entitled to get his winding-up order. There the order to wind up was merely suspended for a time, because it was alleged that there had been a collusive arrangement to get the decree upon which the debt was founded. Here no such collusion was alleged, and the circumstances were therefore not special enough to justify the Court in refusing judicial winding-up. In the case of *Cunningham* v. *The Walkinshaw Oil Company*, November 17, 1886, 14 R. 87, there were no other debts, large assets, and the company wished to carry on business; it could therefore be differentiated from the present one. (2) The resolution to wind up voluntarily had not been carried in accordance with the provisions of the Companies Act 1862, sec. 51. A majority of three-fourths was requisite for a special resolution, and the minutes showed there had not been such a majority at this meeting. The chairman should have demanded a poll to see which way the proxies voted, and should not have been contented with the bare majority in a show of hands. It would be wrong to go against the chairman's own statement as recorded in the minutes—*Horbury Bridge Company*, 1879, L.R., 11 Ch. Div. 109; *Caloric Engine Company*, April 18, 1885, Law Times, lii., 846; Lindley on Companies, 5th ed. 308.

Argued for respondents—(1) Where a debt was disputed, or special circumstances made it expedient to do so, the Court might throw out a petition to wind up a company. Under sec. 86 of the Companies Act of 1862 the Court might dismiss the petition. Further, the words of sec. 79 were words of permission, not of direction—Buckley, Notes to sec. 79 of 1862 Act. The special circumstances in this case were that the respondents had not raised a suspension of the decree-arbitral because they believed they were undergoing a process of voluntary winding-up. They wished the same thing as had been done in *Bowes* v. *Hope Life Company, supra*, viz., to have the chance of suspending the judgment. They were prepared to consign the money in dispute till the question was settled. Their winding-up did not imply insolvency, but merely that they did not wish to continue carrying on business—*Cunningham supra.* (2) There was a voluntary winding-up going on. Section 51 of the 1862 Act enacted, *inter alia*, in defining a special resolution, that "a declaration of the chairman that the resolution has been carried shall, unless a poll has been demanded by at least five members, be conclusive evidence of the fact without proof of the number or proportion of the votes." . . . The mere fact of the majority should therefore be considered, and not the figures given, since the minority acquiesced without demanding a poll, it being evident to them how the proxies would vote. If the writer of the minutes had not inserted the figures there would have been no dispute as to the validity of the resolution. The minute should therefore be treated as containing simply a statement by the chairman to the effect that the resolution had been carried. Under the circumstances there was a good voluntary liquidation going on, and the Court should not interfere by ordering a judicial winding-up—*New York Exchange*, 1888, L.R. 39 Chan. Div. 415, 423.

At advising—

LORD PRESIDENT—Upon the first question in this case, viz., whether there is here a voluntary liquidation or not, I cannot say that I have any doubt. We have to judge of it upon the minute of meeting of 29th December last, and having regard to the fact that by the 51st section of the Companies Act of 1862 a majority of three-fourths is necessary to carry a special resolution, the question is whether there is such a majority here. I think the contrary is shown, because the minute bears that the figures for the resolution and amendment are eight and four respectively. These figures do not show a majority of three-fourths, but on the footing that these are the *media*, as I think they purport to be, by which the conclusion is reached, the minute goes on to state—"The resolution therefore became the decision of the meeting, and the chairman declared it carried." It is true that the section I have referred to bears that "a declaration of the chairman that the resolution has been carried shall be deemed conclusive evidence of the fact without proof of the number or proportion of the votes recorded for or against the same." But in the present case we find a minute under the hand of the chairman which is evidence not corroborative but contradictory of the validity of the resolution. Now, the section merely dispenses with the need of proving the numbers, but it does not suggest that when they are proved under the hand of the chairman and in the very minute founded on, the chairman's declaration is to overrule and nullify them. Accordingly, without entering upon a consideration of the questions which have been argued in regard to the manner of voting, or the construction of the provisions relating to voting by proxy, I think the case must be treated as one where there is no voluntary liquidation.

The other question which follows is, whether the Court is to grant or refuse a compulsory winding-up? The petitioners hold a decree for £58, 12s. 2d., and the respondents' case was opened upon the footing that that entire sum was still in dispute. But it now appears that the question, as we have to decide it, relates only to a balance of that sum amounting to £15. Further, when the nature of the debt and of the objections to it are examined, it appears that there is a decree-arbitral, under which the petitioners were awarded the sum of £58, 12s. 2d., and that the objections are of a somewhat shadowy character. Applying the kind of consideration which the Court is in the habit of giving—where they are scrutinising the answers to a judgment debt—I cannot say that the objections pleaded are either very sharply stated or such as are instantly verifiable. They were not stated at the outset, because the correspondence shows that the £58 was for some time treated as an extant debt of the company. It now appears that the debt is not admitted, but that the position is, that if anything is to be made of the objection there must be a suspension of the decree and then a reduction of the decree-arbitral. I cannot see that it is at all demonstrated that decree of reduction would be matter of high or immediate probability.

Accordingly, we have now to decide whether we are to refuse liquidation upon the footing that the objections stated to the debt in question involve a suspension and a reduction of a decree-arbitral, the sum in dispute being now only £15 of the original £58. If we were to give effect to these objections I think we should create a very dangerous precedent, for we should encourage all sorts of cavils against judgment debts every time an order for liquidation is sought. I am not prepared to accept that responsibility, and accordingly I am for granting the prayer of the petition.

LORD ADAM—The first question for consideration is, whether there is a good voluntary liquidation or not? By the 51st section of the Companies Act of 1862 a majority of not less than three-fourths of the members of the company, voting either

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