from the views expressed in *The Caledonian Railway Company* v. *Special Commissioners of Income-Tax*, November 18, 1880, 8 R. 89.

Argued for the Surveyor of Taxes—The words "wear and tear" could not be contended to include depreciation caused by plant becoming obsolete and out of date.

At advising—

LORD PRESIDENT — Mr Dickson has very properly admitted that if the question were to be determined on the Act of 1842 he has no case. The Act of 1878 was passed because the Act of 1842 did not allow for anything but a certain amount of repair, and accordingly it is really on the Act of 1878 that this question turns. Now, I can quite follow the argument by which it is maintained for the shipowners that a logical carrying out of the policy of the Act of 1878 might lead to some further extension of the deductions. I am not saying that that is a necessary result or that the argument is sound, but it is at all events plausible. But what we have to do is to consider whether the Act of 1878 gives the relief now claimed, and I think quite clearly it does not. Taking the terse statement of the contention of the appellants in the note to the case, what they ask is that they shall have an allowance for loss of earning power owing to the plant being rendered more or less obsolete through the introduction of improved or other plant. Now, the introduction of improved or other plant means its introduction in the ships of other people; and, accordingly, the state of the argument is this, can we say that Mr Dickson's ship has suffered wear and tear because other shipowners have built better ships? It seems to me that that is a fair statement of the contention, and I think that it answers itself. The words "diminution of value through wear and tear in a year" plainly point to the physical deterioration going on in the subject which is being considered, and to bring in under these words the fact that relatively the ship is now of less value because during the year other people have built better ships seems to me to strain the language in a way which is entirely unwarranted. I am therefore for refusing the appeal.

LORD M'LAREN—I agree with your Lordship, and on the same grounds. It seems to me that the depreciation which is claimed under the head (*a*) in the note appended to the Commissioners' opinion, if it refers to depreciation such as will affect the earning capacity of the ship during the actual year, then that is already allowed for, because on the income side of the account the amount of freight or income earned is less, and therefore less tax is paid. But if it means, as I understand the argument, that the vessel through competition with other vessels is less able to earn freight during the remainder of its existence, then I think, on the principle of the case of the *Coltness Iron Company* and other cases of that class, no deduction can be made upon that head, because the assessment is not made upon capital but upon income, and the principle of the Act is that you pay income-tax upon a subject which may be continually diminishing in value, and when it is exhausted you have no longer any tax to pay because the income ceases. An exception, and only one, has been admitted to that somewhat hard principle of taxation, and that is the allowance to be made for wear and tear, but on a fair construction I think wear and tear means nothing more than the physical depreciation of the subject apart from its being rendered less useful by the discovery of better machinery or better modes of doing the same thing. I am therefore of opinion that the Commissioners have rightly rejected the claims made under the two heads (*a*) and (*b*).

LORD KINNEAR concurred.

LORD ADAM was absent.

The Court affirmed the determination of the Commissioners.

Counsel for the Steamship Company—C. S. Dickson—Wilson. Agents—J. & J. Ross, W.S.

Counsel for the Surveyor of Taxes—Comrie Thomson—A. J. Young. Agent—P. J. Hamilton Grierson, Solicitor of Inland Revenue.

Wednesday, July 11.

FIRST DIVISION.

GARDNER & COMPANY *v.* LINK AND OTHERS.

Company — Winding-up — Petition by Creditor — Opposition of Majority of Creditors—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *secs.* 79 *and* 80.

The creditor of a company having charged for payment of his debt, and the *induciæ* having expired without payment being made, he presented a petition for a winding-up order. The application was opposed by creditors who held much the greater part of the debt due by the company, on the grounds that a liquidation would be injurious to the just interests of the creditors, and that the petitioner would get nothing by it.

The Court *held* that the petitioner was entitled to the order craved, the respondents having failed to show that there were no assets which could be made available in the liquidation for payment of his debt.

Observations on *The Chapelhouse Colliery Company's case*, L.R., 24 Ch. Div. 259.

On 18th June 1894 G. P. Gardner and Company presented a petition for the purpose of having the Columba Steamship Company wound up by the Court.

The petitioners were creditors of the Columba Steamship Company for two sums of about £100 each constituted by separate decrees. The company had been duly charged to make payment of the sum contained in one of said decrees, but the days of charge had expired without payment being made.

Answers were lodged for John Waldo Link, and four other creditors of the company, who craved the Court to refuse the petition, or to direct that it should stand over for such time as the Court might think fit, and at all events until a meeting could be held for the purpose of ascertaining the wishes of the creditors.

The respondents stated—"The respondents are creditors to the amount of £27,400 or thereby. . . . The other debts of the company, excluding the petitioners' debt, do not much, if at all, exceed £1000. The respondents as creditors are opposed to the company being put into liquidation by the Court, and submit, in the circumstances after stated, that that course would be very injurious to the just interests of the creditors of the company, and would defeat their prospect of being paid their claims; further, that the petitioners could not gain anything by a winding-up order.

The company was formed for the purpose of acquiring steamships, and founding a line of steamers. The company acquired four steamers known as the 'Pelican,' 'Kent,' 'Louisiana,' and 'Alabama' for its purposes, and the price was to be paid partly by cash raised on mortgages of the vessels, partly by bills, as well as from other sources. Money was raised on mortgage of certain of the vessels.

Some time after the formation of the company, the company, without having themselves worked the vessels, arranged for the sale of their property, or a great part thereof, including said four vessels, to a society or company formed and registered in Belgium, which company was to pay a lump price of £89,000, being £40,000 in cash and £49,000 in its own shares. The 'Kent' and the 'Pelican' have been delivered to the said Belgian Company, and the said Belgian Company have made payment of about £16,000 in cash, and have undertaken to transfer £24,000 of their shares to the Columba Company; but the 'Louisiana' and 'Alabama,' which also form part of the property sold for said lump price, are at present in the possession of a mortgagee, a Mr Stewart, engineer, Glasgow.

In order to the Columba Company receiving the balance of the said lump price of £89,000, it will be necessary for the Columba Company to transfer the remainder of the property agreed to be transferred, including the 'Louisiana' and the 'Alabama,' to the Belgian Company, and, on making such transference, they will be in a position, as the respondents believe and aver, to make payment of the debts due to all the creditors, and will have a valuable property in said Belgian Company.

If, however, a winding-up order were pronounced as craved by the petitioners, the said 'Louisiana' and 'Alabama' would not pass into the possession of the liquidator, but would be realised by said mortgagee, and the value would be entirely lost to the Columba Company, and further, there would arise to the said Belgian Company against the Columba Company a large claim of damages for the non-fulfilment of the contract to transfer the property at the said lump price, as well as for repayment of what has been already paid. A liquidator would further be without funds to incur the responsibility of questions arising between the Columba Company and the said Belgian Company.

If the Columba Company be not forced into liquidation, the mortgagee has expressed his intention not to proceed to realise his security.

The respondents further have ascertained and aver that under the memorandum and articles of association, the directors of the Columba Company have, in order to secure premiums of insurance, hypothecated to underwriters at Lloyds the calls which might otherwise have been made by a liquidator upon the shares so far as not fully paid up (or issued as fully paid up), and that in the event of a liquidation a liquidator would only have the claim upon the said Belgian Company, which he would not be able to enforce if unable to perform the Columba Company's part of said contract."

The majority of the respondents were also shareholders of the company.

The Court had also before it another petition for the winding-up of the company presented by another creditor in January 1894, but this petition need not be further referred to, as the petitioner was willing that some delay should be granted in accordance with the respondents' request.

Section 79 of the Companies Act of 1862 provides that a company under said Act "may be wound-up by the Court under the following circumstances. . . . (4) Whenever the company is unable to pay its debts." Section 80 provides that a company "shall be deemed to be unable to pay its debts (3) Whenever, in Scotland, the *induciæ* of a charge for payment on an extract decree . . . have expired without payment being made."

Argued for the petitioners—The company could not pay its debts, and the Court was bound *ex debito justitiæ* to grant the winding-up order craved—Companies Act 1862, sections 79 and 80; Buckley on the Companies Acts, section 79 of the Act of 1862. No ground had been stated by the respondents for taking the case out of the ordinary rule. The wishes of the respondents were not a ground for refusing the petitioner the right which the statute gave him, especially as the majority of the respondents were shareholders as well as creditors. The cases quoted did not support the respondents' contention. In these cases the company had earned profit, and had every prospect of earning more. Here the company had never earned any, and all that remained to be done could be carried through by a liquidator quite as well as by the directors. Further, in the

Uruguay Railway Company's case the petitioner was a debenture-holder, and a debenture-holder was not to be put in the same position as an outside creditor. The Court was also satisfied in that case that the petitioner could gain nothing by a liquidation. The *Chapelhouse Colliery Company's* case, where the application of an outside creditor had been refused, was treated by the Court as very exceptional, and the ground on which the Court proceeded was, that the petitioning creditor could take no benefit by the liquidation as there were no assets available for satisfaction of his debt. That was not shown to be the case here. Nor would the Court delay granting the petition unless a good reason was adduced to justify delay, such as had been given in the case of the *St Thomas Dock Company*, where the object of the delay was to get information as to the earnings of the dock, which was in the West Indies. In the present case no good reason for delay existed, and six months had elapsed since the date at which the first petition for a winding-up order had been presented without anything being done. If, however, the Court were of opinion that delay was advisable, the petitioner would suggest that a provisional liquidation should be appointed as had been done in certain cases—*in re Olathe Silver Mining Company*, 1884, L.R., 27 Ch. Div. 278; *Benhar Coal Company*, February 25, 1879, 6 R. 706.

Argued for the respondents—The question whether the company should or should not be wound up was for the creditors to decide. The Court was only bound to grant a winding-up order *ex debito justitiæ* where the question was between a petitioning creditor and the company. The Court would not order a winding-up where a large majority of the creditors were opposed to that course being taken, or where the petitioning creditor would get nothing by the liquidation of the company, and both these conditions existed here—*Uruguay Central Railway Company*, 1879, L.R., 11 Ch. Div. 372; *in re Chapelhouse Colliery Company*, 1883, L.R., 24 Ch. Div. 259; Buckley on the Companies Acts, section 91 of the Act of 1862. At any rate, a petitioning creditor was not entitled to an immediate order, and this was a case in which delay should be granted, at all events until a meeting of the creditors could be held—Companies Act 1862, sec. 91; *St Thomas Dock Company*, 1876, L.R., 2 Ch. Div. 116; *Brighton Hotel Company*, 1868, L.R., 6 Eq. 339; *in re Western Canada Oil Company*, 1873, L.R., 17 Eq. 1.

At advising—

LORD PRESIDENT—The petitioners G. P. Gardner & Company are creditors of the company whose winding-up they seek, and that company is in the position defined by the 80th section of the Companies Act 1882, because it is a debtor who must be deemed to be unable to pay his debts. The petitioners are therefore *prima facie* entitled to have a winding-up order pronounced.

But Mr Sym as representing creditors, who are at the same time, be it observed, in the main shareholders, maintains that the circumstances of the case are such that the ordinary course should not be followed, and in support of his argument he referred particularly to the case of *In re Chapelhouse Colliery Company*, 1883, L.R., 24 Chan. Div. 259.

Now, in that case the judgment of Lord Justice Bowen states the question raised. His Lordship says (p. 269)—"The case may be decided on the simple principle that no one can be entitled to ask for a winding-up order when it is impossible that he should obtain anything by it. Here if a winding-up order were made there are no assets on which it could take effect."

Now, any person objecting to the winding-up of a company on this ground is bound to satisfy the Court that the company stands in the predicament he asserts it to occupy. Here, *prima facie*, there are assets, because there is, among other things, a certain amount of uncalled capital. It is said that this is hypothecated, but that statement is left in such a state of vagueness that we are neither told the amount of the debt for which it is hypothecated nor the amount of stock which is thus hypothecated.

Therefore, it having fallen upon the objectors to make out this point, I think they have completely failed to do so. There is nothing therefore against the petitioning creditor being granted a winding-up.

It is true that certain dilatory pleas have been stated to the effect that it is desirable that there should be a meeting of the creditors of the company, but unfortunately although liquidation was threatened six months ago apparently no practical step was taken, and no definite practical step has been contemplated. Therefore, unless we are to encourage the idea that every time a company cannot pay an individual creditor, it may have the crisis tided over in order to have time to consider whether it should have the uncalled capital called up, which should in this case have been considered six months ago. I think we cannot give effect to Mr Sym's contention.

LORD M'LAREN concurred.

LORD KINNEAR—I am also of the same opinion. I take the general rule to be that laid down by Lord Justice Bowen in the case of the *Chapelhouse Colliery Company*, where he says that it is is not a matter of discretion whether the Court will comply with the application of a creditor whose debt is unpaid for a winding-up, but that it is the duty of the Court to give the creditor that relief which the Legislature intended to give him. His Lordship goes on to say, what is obviously quite consistent with the words I have quoted, that nevertheless the Court will not grant the winding-up order if it is obvious that the machinery of the Act for securing the payment of debts due to company creditors cannot avail for that purpose, and that it would be an abuse of that machinery to put it in motion when it cannot avail for the purpose for which it is intended. But in that

case it was clear that the petitioner could take no advantage from the winding-up. It was an application by a debenture-holder for a winding-up order in respect of interest due on his debentures. All the other debenture-holders opposed the application. It appeared that the company was still carrying on business; its property consisted of a colliery held under a lease which would have been forfeited if the winding-up order had been granted; and all the other assets were so tied up that it would have been impossible for the liquidator or the creditors through him to touch them. The ground therefore on which the Court held that no benefit could result to the applicant from a winding-up was simply that there were no assets to be affected by the order or to come into the hands of the liquidator. For the reasons stated by your Lordship, it is impossible to suggest that the company with which we are now concerned is in that position. They obtained £16,000 on a sale of ships, and it is not shown that the money is beyond the reach of creditors; they have other property subject to a mortgage, the amount of which is not stated; and further, some of the capital is uncalled. It is therefore not made clear that there are no assets existing for payment of the company debts. That being so, the case of the *Chapelhouse Colliery Company* is not an authority for the present case, except in so far as it lays down the general principle that creditors have a legal right which is not subject to the discretion of the Court.

Lord Adam was absent.

The Court granted the prayer of the petition.

Counsel for the Petitioners—N. J. D. Kennedy. Agents—Martin & M'Glashan, S.S.C.

Counsel for the Respondents — Sym. Agents—Richardson & Johnston, W.S,

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Thursday, July 12.

FIRST DIVISION.

FORRESTER'S TRUSTEES *v.* FORRESTER AND OTHERS.

Succession — Settlement — Conditio si institutus sine liberis decesserit.

By trust-disposition and settlement dated in 1888, a testatrix, after providing for certain specific bequests to each of her children *nominatim*, and to certain of her grandchildren, including the daughters of her child Margaret, directed her trustees to divide the residue of her estate among her said children. The deed made no provision for the destination of the residue in the event of the testatrix being predeceased by any of her children. The daughter of the testatrix, Margaret, died in 1889 leaving issue. In 1890 the testatrix executed a codicil wherein she referred to the death of this daughter, and disposed of certain specific bequests made to her in the settlement. In 1893 the testatrix died without having made any provision for the disposal of the share of residue appointed by the settlement to be paid to Margaret.

Held that the *conditio si sine liberis* applied, and that Margaret's children were entitled to the share of residue appointed to be paid to their mother.

By trust-disposition and settlement dated in 1888 Mrs Forrester conveyed her whole means and estate to trustees. In the second place, she directed them to deliver a number of specific bequests, consisting mainly of articles of plate, furniture, and jewellery, to each of her seven children by name, and to certain of her grandchildren, and *inter alia* to deliver to her daughter, Mrs Margaret Robson "one-third of my silver and plated articles, so far as not specially bequeathed, . . . one of my bracelets for her daughter Margaret Merry, and another for her daughter Agnes as keepsakes." Lastly, the testatrix directed her trustees "to divide the residue of my estate into seven equal shares, and to pay over one share to each of my said children, excepting my son Robert Forrester, whose share I direct and appoint my said trustees to hold in trust for behoof of his wife in liferent for her liferent alimentary use allenarly, and for her children in fee, payable the said fee to the said children on their respectively obtaining majority, or to the survivors or survivor of them (their mother's liferent having always first lapsed)." The settlement contained no provision with regard to the destination of the shares of residue in the event of any of the children of the testatrix predeceasing her.

One of the daughters of the testatrix, Mrs Margaret Robson, died in 1889, leaving issue.

In 1890 the testatrix executed a codicil wherein she referred to the death of her daughter Margaret, and disposed of some of the articles of plate bequeathed to her by the trust-disposition and settlement. In 1893 the testatrix died without having made any reference to the share of residue appointed by the trust-disposition and settlement to be paid to her deceased daughter.

After the death of the testatrix questions were raised as to the disposal of this share of the residue of her estate, and a special case was presented to the Court by (1) the trustees of the testatrix, (2) her surviving children, and (3) the children of her deceased daughter Mrs Margaret Robson, in order to obtain the opinion of the Court upon the following questions:—"(1) Has the said share of residue in question, destined to the said Mrs Margaret Elizabeth Forrester or Robson, fallen into intestacy, and ought the same to be divided by the first parties as trustees and executors foresaid according to the laws of intestate succession? or (2) ought the said