"Part of the money so provided consisted of the three years' rents of the estate of Shieldhill, with which Mr Chancellor had, as heir of entail, right to deal under the entail, and also under the Aberdeen Act. But I have to observe in the outset that we have in this case nothing to do with the question whether or not he had power as heir of entail to settle these children's provisions in the way he did. The marriage-contract trustees have got payment of the money from the entailed estate, and their duty is to divide it according to the trusts of the marriage-contract. Whether those trusts were within or beyond Mr Chancellor's powers as heir of entail—I mean his powers in a question with succeeding heirs—is a matter not *hujus loci*. It must be assumed for present purposes that the trusts of the marriage-contract were all of them within the truster's powers.

"I must also observe that, with respect to the present claim, there is no question of vesting. If vesting had taken place in the late Alexander Chancellor, his executors, and not his child in her own right, would have been the proper claimants; but as I read the recent judgment of the Inner House, the only children of the original marriage in whom vesting took place before the truster's death were the children to whom during their lives shares were appointed; and it is not suggested that Alexander Chancellor was one of those children. If, therefore, the present claimant has a claim at all, it is, I think, clear enough that she correctly claims in her own right—that is to say, as being the issue and representative of a person who was a predeceasing younger child in the sense of the contract.

"The sole question accordingly is, whether Alexander Chancellor (the claimant's father) was a younger child in the sense of the contract, in respect that, although the eldest born son, and so during his life heir-apparent, he yet died before his father, and so did not succeed to the entailed estate. Now, on this question I think there is authority for holding that in construing the entail provisions the expression 'younger children' is not to be taken literally, but—unless the contrary appears—may be read as equivalent to 'children not succeeding to the entailed estate.'—See cases cited in M'Laren on Wills, ii. 1072-1074; Jarman on Wills, 5th ed. 1058.

"I think also that in the present case the argument for this construction is especially strong, because in the clauses of this marriage-contract which have to be construed, the two expressions 'younger children' and 'children not succeeding to the entailed estate' are both of them used, and used convertibly. It is of course true that Alexander Chancellor never was a younger child, being in fact the eldest born son; and that the case therefore is different from that figured in argument, viz., that of a younger son, or a succession of younger sons, becoming successively eldest sons and heirs-apparent, and yet dying one after the other before succession. But if it be once conceded that the expression 'younger children' admits of construction, it does not seem to me to be substantially more difficult to include in the class of younger children an eldest born son who does not succeed, than to include, *e.g.*, a younger born son who becomes an eldest son but does not succeed.

"It is also said that, taking the words of the destination-over to issue, on which destination the claimant founds, such issue can only take the share which would have fallen to their parent if he had survived, and that if Alexander Chancellor — the parent here—had survived he would have taken nothing. But this argument would apply equally to the issue of younger born sons becoming eldest sons and then predeceasing. And that this sufficiently bars the literal construction appears to have been the opinion expressed by at least one judge, and not dissented from by the others, in the recent judgment of the Inner House.

"On the whole, therefore, I consider that I am justified in sustaining the claim of Alexander Chancellor's daughter to participate in this marriage-contract provision."

Counsel for the Claimant Mrs Fitzgerald —William Campbell — Wilton. Agent—Robt. H. Wood, S.S.C.

Counsel for the Claimants Miss Chancellor and Others — Dundas — Pitman Agents—J. & J. Anderson, W.S.

Saturday, December 5.

FIRST DIVISION.

WOTHERSPOONS, PETITIONERS.

Company — Judicial Winding-up — Company in Process of Voluntary Liquidation—Companies Act 1862 (25 *and* 26 *Vict. c.* 89), *secs.* 79 *and* 80.

A petition was presented by debenture holders in a company, as creditors, for the winding-up of the company, on the ground that interest due on their debentures, amounting to £32, was unpaid, and that, as they believed and averred, the company was unable to pay its debts. The capital of their bonds was not due. It appeared that a special resolution had been passed to wind-up the company voluntarily with a view to reconstruction, and after the date of the present petition the liquidator presented a petition for authority to summon a meeting of debenture-holders for the purpose of considering the scheme. A motion for intimation and service in the winding-up petition was opposed by the company and liquidator.

The Court *ordered* intimation, on the ground that a debt due by the company had not been paid, and that the respondents had failed to show that it would be detrimental to the interests of the company to allow public intimation.

Macdonell's Trustees v. *Oregonian Railway Company*, June 12, 1884, 11 R. 912, *distinguished.*

Company—Scheme of Reconstruction.

Circumstances in which scheme of reconstruction sanctioned by the Court.

The Brescia Mining and Metallurgical Company, Limited, was registered in June 1892, the objects being to acquire and work certain mines in Italy. By special resolutions passed on 2nd and confirmed on 17th November 1896 it was resolved "(1) That it is desirable to reconstruct the company, and that with a view thereto the company be wound up voluntarily, and that Thomas Watson Duncan be and is hereby appointed liquidator for the purpose of such winding-up." It was also resolved that a draft agreement to be entered into between the old company and a new company, to which its assets were to be transferred, should be approved. It was provided by the fourth article of the draft agreement that the new company was to undertake the whole obligations of the old company with regard to certain mortgage debentures which had been issued by the company for £12,000. By the sixth article it was provided that the holders of all preference shares, and of all ordinary shares in the old company, should be entitled to receive an allotment of one share in the new company for each held by them in the old, the shares to be of £10 each, and issued as paid-up to the extent of £8, 15s. The balance of £1, 5s. per share was to be payable, 10s. on allotment, 5s. at an interval of not less than four months, 5s. after not less interval, and the remaining 5s. only with the concurrence of a majority of a general meeting of shareholders. It was further provided that in the event of the debenture-holders failing to assent by a sufficient majority to the terms contained in article 4, before or within seven days from the date of the agreement, or of the Court setting aside the assent, or of an order being made for the winding-up of the company under the supervision of or by the Court, the new company might rescind the agreement.

On November 20th 1896 a petition was presented by John Wotherspoon, holder of 100 £10 ordinary shares fully paid, and of 20 £50 debentures, and his wife, who held 10 £50 debentures, craving for an order for the judicial winding-up of the company.

The petitioners averred that the half-year's interest on his debentures, amounting to £32, 10s., due to Mr Wotherspoon on 1st July 1896, had not been paid, and that though he had "consented to payment being delayed for a short time, he is now anxious to get payment, and is unable to obtain it."

They averred further that the original capital of the company in June 1892 was £21,000 divided into 550 preference shares of £10 each, and £1550 ordinary shares of £10 each; that as the result of various resolutions it consisted now of 585 preference shares of £10 each, all fully paid, and 4041 ordinary shares £10 each, all issued as fully paid, whereof, however, 528 were "bonus" shares, which had been issued without payment to certain of the original preference shareholders, and that there were 1374 shares unissued.

They submitted—"The petitioners believe and aver that the holders of the said 528 bonus shares in the old company which were allotted to them without any payment being made therefor are liable to make full payment of the nominal value thereof to the company. This asset, however, which is one of the main assets of the company, will be lost if the agreement with the new company is allowed to be carried out. Further, Mr T. Watson Duncan, the liquidator named in the foresaid special resolutions, is a holder of a number of these bonus shares."

By the 79th section of the Companies Act 1862 (25 and 26 Vict. c. 89) it is, *inter alia*, provided that "a company under this Act may be wound up by the Court, as hereinafter defined, 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 said Act it is enacted that "a company under this Act shall be deemed to be unable to pay its debts." . . . . (4) Whenever it is proved to the satisfaction of the Court that the company is unable to pay its debts."

On a motion being made for intimation, service, and advertisement of the petition, the company and the liquidator appeared and objected to the motion, and were allowed to lodge answers. These were lodged on the 27th November.

The respondents averred that the petitioner John Wotherspoon had been a director of the company till November 2nd 1896, and had agreed as such not to present his coupon for payment of debenture interest, but that they were ready and hereby offered to pay it; that none of the debentures fell due till July 1905; that the question as to the "bonus" shares had been fully considered at the meetings where the special resolutions to wind up voluntarily were passed and confirmed, and at which the petitioner John Wotherspoon was present, and had concurred in the scheme, and that the effect of the scheme would be to provide more capital than could possibly be recovered from the holders of the bonus shares.

They averred—"The liquidator of the company has presented an application to the Court on 24th November 1896 for the purpose of having a meeting of the debenture holders summoned, to whom the scheme of reconstruction will be submitted and their opinion taken. The petitioners will have an opportunity at the said meeting of expressing their opinions and influencing the action of the debenture holders. The company is at present working under two mining rights in Italy. One is the Royal Concession, known as Costa Rica and Costa Bella, near Bovegno, province of Brescia, dated in 1894, referred to in the petition. This property is mortgaged to the debenture-holders, and upon it much work has been done by way of develop-

ment, and a considerable quantity of zinc and lead ore taken from it. A further deposit of these ores has lately been tapped, and another, and it is believed a more extensive deposit, is being driven for, but it cannot be reached for four or five months. A stoppage just now would seriously depreciate the debenture-holders' security, while on the other hand the discovery of an additional body of ore would greatly enhance it. The other mining right is what is termed a 'right of research' in the Torgola Valley, in the same province. As such it is not capable of being mortgaged. So long as this right is worked it is unchallengeable, but if operations are stopped the right lapses to the Government. It is desirable to preserve this right with a view to obtain a royal concession if the mine proves valuable. If a winding-up order were pronounced, and a stoppage took place, this right would be lost to the company."

On the petitioners' motion for intimation the respondents opposed.

Argued for petitioners—There was a debt presently due by the company, and accordingly they fell under the terms of the statute. As a matter of fact they could not pay their debts, though not technically insolvent, and they did not really deny this. The petitioners had therefore a clear *prima facie* title for presenting the petition, and were entitled in the first place to an order for intimation. The only case where such an order had been refused was where public intimation would be clearly injurious to the interests of the company—*Macdonell's Trustees* v. *Oregonian Railway Company* (*infra*)—but that could not be said here, since the respondents admitted that there had been a resolution to wind up voluntarily, so no harm could be done by granting this order.

Argued for the respondents—1. The petitioners had no title. They did not set up any existing debt, for the directors were willing and offered to pay the interest due, and the Court would not consider the liability for the capital of the debentures not yet payable, there being no certainty that the existing and probable assets would be insufficient to meet it—*In re European Life Assurance Society*, 1869, L.R., 9 Eq. 122. 2. Nor could the Court order public intimation in circumstances like these, where it would be injurious to the interest of the company—*Macdonell's Trustees* v. *Oregonian Railway Company*, June 12, 1884, 11 R. 912. 3. Moreover, the petitioner John Wotherspoon had assented to the reconstruction scheme, and was accordingly barred from presenting this petition.

LORD PRESIDENT — The motion by the petitioners is for an order for intimation and service. Now, I think the Court would not be entitled to refuse that order, unless someone compearing to oppose the petition could instantly verify an objection to the title of the petitioner, or could show some very special reason of danger to the common interests which would arise from the order being granted. Now, the *Oregonian* case was one of the latter description, because there the company was carrying on, and proposed continuing to carry on, such business as it had, and happened to be in a very crucial relation to its tenants the railway company in America; and the Court felt that, as the Company would go on but for the intervention of the petitioner, they were entitled, in the interests of all concerned, to withhold an order which might have, in those special circumstances, an immediate and detrimental effect upon all concerned. Now, in this case, by way of contrast, the company themselves avow that they must be wound up. They propose that the winding-up should be voluntary, and with a view to reconstruction. The petitioner, taking a different view of the general interests, says he agrees that the company should be wound up, but asks that it should be wound up judicially. That is a totally different *species facti* from that which the Court had to consider in the *Oregonian* case. The question, therefore, which we have now to consider is, whether any special reason has been shown why the proposal of the petitioner should not be considered, and in the first place publicly intimated. I think the case is one in which the petitioner is entitled to have his proposal proceeded with, at all events to its initial stage, and I am therefore in favour of granting his motion for intimation and service.

LORD M'LAREN — I am of the same opinion. The petitioners, or at least one of them, have a title capable of instant verification, because the interest due upon a debt has not been paid, and though it is some days since this petition was presented, no steps have been taken for payment of the petitioning creditor's debt. This might not be conclusive, as the amount of the debt is not large, if it could be shown that the interests of the company would be injuriously affected by an order for advertisement and service. It is, however, idle to maintain that the credit of the company is at stake because there is standing a resolution to wind up the company voluntarily. Whether that will result in a reconstruction is a question with which we are not at present concerned, the question before us being between voluntary and judicial winding-up, and I do not see why the case should not follow the ordinary course.

LORD ADAM and LORD KINNEAR concurred.

The Court ordered intimation.

Counsel for the Petitioners — Aitken. Agents—Smith & Watt, W.S.

Counsel for the Respondent — Lorimer. Agent—John Rhind, S.S.C.

NOTE.—On 9th January 1896 the petitioners put in a minute by which they consented to the petition being dismissed. They further withdrew their compearance in the petition for authority to hold a meet-

ing of debenture-holders. Counsel for the petitioners, in the latter petition, stated that the meeting had been held on 23rd December 1895, and produced a report of the meeting showing that it had been attended by debenture-holders, present personally or by proxy, representing £9930 out of £12,000 debenture debt, and that the meeting had unanimously approved of the reconstruction scheme. He moved for the Court's sanction of the scheme. The Court having at the previous hearing had the scheme fully laid before them, and there being no opposition, *sanctioned* the scheme.

HIGH COURT OF JUSTICIARY.

Tuesday, November 3.

(Before the Lord Justice-Clerk, Lord Moncreiff, and Lord Kincairney.)

FOWLER *v.* HODGE.

Justiciary Cases—Police Constable—Regulation of Traffic—Assault.

A police constable, acting under orders from his superiors, but not under any special authority from the magistrates of the burgh, ordered the carriages approaching a hall where an entertainment was being held to be drawn up in line. The driver of a hackney carriage broke the line, drove rapidly towards the hall, and, on the constable interfering, assaulted him with his whip. The driver was convicted of assaulting a police constable in the discharge of his duty. In a case stated for appeal, *held* that the constable was acting in discharge of his duty in regulating the traffic, and conviction therefore sustained.

George Fowler junior, cab proprietor, North Berwick, was convicted in the Police Court of North Berwick of assaulting John M'Petrie, police constable, North Berwick, while in the execution of his duty, under the following circumstances, as they appeared in a case stated for appeal by the Magistrate:—"(1) That on the evening of 24th September 1896, when the assault took place, an entertainment was being held in the Foresters' Hall in the High Street; that the police having reason to apprehend that there might be danger to the public from the carriage traffic at the close of the entertainment unless it were regulated, called on all the coachhirers in the town, including the appellant, late on the afternoon of the said 24th day of September, and informed them that in order to prevent obstruction and danger the carriages would require to be kept in line, facing westward, one behind the other, and that the police would call the particular cab wanted when the party seeking it required it. (2) That the police in directing the various cabs to stand in line as they did adopted the best course in a narrow street for the safe conduct of the traffic, and that this course commended itself to two of the principal cab proprietors in North Berwick adduced as witnesses by the burgh prosecutor. (3) That soon after 10 p.m. on the evening of the 24th September the appellant drove his cab up to Market Place, about 100 yards east from the Foresters' Hall, and began to drive westward towards the hall. He was asked by a policeman where he was going, and he stated that he was going to the Foresters' Hall to lift a party attending the entertainment. The policeman informed him that he must take his place in rear of the cabs then waiting, and after some objection on the appellant's part he ultimately drove his cab into the position in rear of the last carriage then in line. (4) John M'Petrie, the police constable assaulted, was on duty in the High Street in the immediate vicinity of where the appellant's cab was in line, having instructions from his superior officer not to allow two lines of carriages to be drawn up on the High Street between that position and the Foresters' Hall; that near where the appellant's cab stood in the line there was a builder's enclosure which somewhat contracted the street. (5) Soon after the appellant had taken his position in the line he drove out thereof and commenced to drive rapidly westwards towards the Foresters' Hall, whipping his horse and urging it on; Police Constable M'Petrie thereupon called on him to stop, and asked him where he was going, but the appellant paid no attention to him and continued to drive rapidly. The constable thereupon caught hold of the appellant's horse by the head, when the appellant continued to whip his horse and to urge it on, cursing and swearing at the constable, and with his whip repeatedly struck M'Petrie over the face, hands, and body, the horse going rapidly westward all the while. M'Petrie summoned assistance, and thereupon another police constable arrived, after which the appellant was asked to leave his cab that he might be taken into custody. This he refused to do, and was thereupon removed by the police, and charged with assaulting Police Constable M'Petrie while in the discharge of his duty. It was admitted by the prosecutor that the police, in regulating the traffic upon the occasion in question, were not acting under any special written authority of the magistrates of the burgh granted for the occasion in question but only in discharge of what they considered to be their ordinary duty, and further, that the magistrates had not made bye-laws or issued any notices in terms of section 385 of the Burgh Police Act of 1892. It was further conceded by the prosecutor that the appellant was not transgressing the rule of the road in driving westwards as before stated, and that the said Police Constable M'Petrie was assaulted when enforcing compliance with the said requisition of the police."

The question of law was—"Whether or not, in the absence of any magisterial order for the regulation of traffic upon the occasion libelled, Police Constable M'Petrie was