LORD MONCREIFF—I think we are bound to follow the case of *Miller's Trustees*. This is a simple example of the kind of case which is ruled by that decision. There is no doubt that the residue has vested in the second parties, and the only question is whether a restriction of this kind on a vested right of fee, where there are no ulterior interests to be protected, can receive effect. Without expressing any opinion on the case of *Miller's Trustees*, I think we are bound to follow it. It was a decision of a Court of Seven Judges which has been followed in many cases, and if it is to be reconsidered it must be by the Whole Court.

The Court answered the first question in the affirmative, and the second question in the negative.

Counsel for the First Parties—D. Anderson. Agents—Skene, Edwards, & Garson, W.S.

Counsel for the Second Parties—Chree. Agent—W. K. Aikman, W.S.

Saturday, October 27.

SECOND DIVISION.

BELL'S TRUSTEES *v.* THE HOLMES OIL COMPANY, LIMITED.

Company—Winding-Up—Voluntary under Supervision or by the Court — Creditor's Petition—Company Unable to Pay Debts — Wishes of Creditors — Cutting down of Preference—Preference to Creditors — Companies Act 1862 (25 *and* 26 *Vict. c.* 89), *secs.* 79, 84, 91, 130, *and* 164.

On 3rd October 1900 a creditor of a company, which it was admitted could not pay its debts, presented an application to the Court for the compulsory winding up of the company. They produced a disposition dated 15th August 1900, by which the company had disponed to a bank certain heritable property belonging to it.

On 22nd October certain other creditors lodged answers opposing the application on the ground (1) that the great body of the creditors desired to wind up voluntarily under supervision of the Court, and (2) that they hoped to carry out a plan of reconstruction which (if effected) would be beneficial to all concerned.

The petitioning creditors contended that even if the company resolved to wind up voluntarily under supervision of the Court, the date of bankruptcy would be not the time of the presentation of the present petition, but the time of passing the resolution, and that therefore the disposition of 15th August would not be invalidated.

The Court being of opinion that it was at least questionable whether the right to challenge the conveyance to the bank would be preserved if the company were wound up voluntarily under supervision in conformity with a resolution to that effect to be passed by the company, *granted* the application for compulsory winding up.

The 79th section of the Companies Act 1862 (25 and 26 Vict. cap. 89) provides, *inter alia*, that "a company under this Act may be wound up by the Court as hereinafter defined, under the following cirumstances (that is to say) . . . (4) whenever the company is unable to pay its debts; and (5) whenever the Court is of opinion that it is just and equitable that the company should be wound up."

Section 91 of the Act provides, *inter alia*, that "the Court may as to all matters relating to the winding up have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence."

The Holmes Oil Company, Limited, was incorporated on 4th April 1884 under the Companies Acts 1862 to 1883, its registered office being at Holmes, Uphall, Linlithgowshire. Its nominal capital was £100,000, divided into 10,000 shares of £10 each, and the objects for which it was incorporated were to purchase or lease seams of shale and other minerals; to manufacture mineral products; to manufacture oil and all products of oil, shale, and petroleum; and kindred purposes.

On 3rd October 1900 the trustees of the late Robert Bell, who were the lessors of a shale field leased by the company, presented a petition to the Court, in which they craved an order for the winding up of the company by the Court.

The petitioners averred that they were unpaid creditors of the company to the amount of £4628, of which sum £1268 was overdue lordships, rent, &c., and the remaining £3000 was a claim of damages against the company in respect of its having allowed the mines leased to become flooded. They also averred that the company was unable to pay its debts or to implement its obligation to keep the workings in a good workable state.

The petitioners also produced a disposition dated 15th and recorded 17th August 1900, by which the company disponed to the Royal Bank of Scotland two pieces of ground extending to 5 roods 20 poles or thereby.

Answers were lodged on 16th October for the company. The respondents did not dispute that it was necesary that the company should be wound up, but averred that they had taken measures with the object of winding up the company with a view to reconstruction; that they had called a meeting of shareholders for 31st October, to which a complete statement of affairs would be submitted, and at which, if it was thought advisable, a special resolution for the winding up of the company would be passed; and that a meeting of creditors had been called for 16th October. They further averred that in the meantime it was believed that the interests of the company and its creditors would be seriously prejudiced if the company was forced into a judicial liquidation, as the prospects of

reconstruction would be much diminished thereby. They therefore craved that proceedings should be sisted till after the meetings above mentioned.

On 22nd October answers were also lodged for John Wood, Limited, J. & J. Cunningham, Limited, Love & Stewart, Limited, and the Armadale Colliery Company, Limited. They averred as follows—"The respondents are creditors of the Holmes Oil Company, Limited. They represent claims in the shape of ordinary trade debts amounting to £3103, 19s. 8d. or thereby, or 75 per cent. in value of the whole creditors of the company other than the petitioners and secured creditors. Owing to the short time which has elapsed since the respondents became aware of the petition, it has not been possible to communicate with all the creditors. The respondents believe that by the time the petition is heard all or nearly all the ordinary creditors will have signified their concurrence with them. The company called a meeting of its creditors for Tuesday the 16th October 1900, the petition having been gazetted on the 9th. At the said meeting a committee of creditors was appointed, including representatives of each of the petitioners, and this committee inspected the works on 18th October. The committee has not had time to complete its inquiries into the position of the company and into the prospect of a successful reconstruction, but they will be in a position to report to the creditors on these matters shortly. At this meeting and at the shareholders' meeting, which has been convened for the 31st inst., the question of voluntary liquidation will also be determined."

Argued for the petitioners—Where a joint stock company was unable to pay its debts, a creditor of the company was entitled to—and the Court had no discretion to deny — a winding-up order, unless (1) no advantage could be obtained by the creditor from such an order being pronounced, or (2) unless it clearly appeared that the company was in a position to retrieve itself and that its circumstances were improving, so that it was for the advantage of the creditors that the business should be carried on—*In re Chapel House Colliery Company* 1883, L.R., 24 Ch.D. 259, opinion of Bowen, L.J., 269, approved in *Gardner & Co.* v. *Link*, July 11, 1894, 21 R. 189; *in re Krasnaspolsky Restaurant, &c. Co.* [1892], 3 Ch. 174; *in re The General Rolling Stock Co., Limited*, 1865, 13 W.R. 423. In the present case it was admitted that the company could not pay its debts, and it was for the petitioners' advantage that further loss should not be occasioned. Besides, the disposition produced by them clearly showed that if any further delay were granted a preference would be created in favour of the bank to the prejudice of the petitioners. A voluntary winding-up commenced at the date of the resolution to wind-up—section 130 of Act of 1862—and that date would necessarily be more than sixty days after the date of the deed. Section 3 of the Companies Act 1886 did not strike at a disposition of the nature of the one in question. In all the cases quoted on the other side there were three concurring circumstances—(1) A large majority of the creditors opposed to the winding up; (2) a probability that the company would retrieve itself; (3) the fact that the petitioning creditor would suffer no prejudice from delay. None of these circumstances were present in this case.

Argued for respondents—The Court had complete discretion to refuse the petition or direct the matter to stand over for a period. It was not bound *ex debito justitiæ* to make an immediate order on the petition of a creditor, whose debt was admitted and not paid, especially when other creditors opposed the granting of an immediate order—Buckley on the Companies Acts (7th ed.) 288; *in re Brighton Hotel Co.*, 1868, L.R., 6 Eq. 339; *in re Western of Canada Oil Lands and Works Co.* (1873), L.R., 17 Eq. 1. It would not prejudice anyone and would facilitate a re-construction if delay were granted, so that the shareholders could resolve on a winding up under supervision. The same course would thus be followed as in *Drysdale & Gilmour* v. *Liquidators of International Exhibition of Electrical Engineering and Inventions*, November 13, 1880, 18 R. 98. [Lord Moncreiff—I am not sure that that case can be given much weight to. It was decided by a Court collected together at a moment's notice, and as far as I remember there was not much discussion]. *Pattisons Limited* v. *Kinnear*, February 4, 1899, 1 F. 551. No advantage would be obtained by compulsory winding up which would not be obtained by a voluntary winding up under supervision. The alleged preference would be nullified under section 3 of the Companies Act 1886. The respondents included the great majority of the creditors and the Court should give effect to their wishes. The sum of £3000 claimed for damage to the mines was absurd; all the cost of pumping the mine free of water would be £150. A delay of a fortnight was all that was desired.

At advising—

Lord Trayner—This is an application for an order for the compulsory winding up of the respondent company. The application is made by a creditor, and it is admitted that the company cannot pay its debts. In these circumstances the Companies Acts entitle the petitioning creditor to the order now asked unless there be grounds which would induce the Court to refuse or postpone granting it. I am of opinion that the order prayed for should be granted. The only grounds on which we were asked by the respondents (creditors) to refuse the order for compulsory winding up were these—(1) that the great body of the creditors desired to wind up voluntarily and under supervision of the Court, and (2) that they hoped to carry out a plan of reconstruction which would be beneficial (if effected) to all concerned. From the facts before us it is open to reasonable doubt whether a plan of reconstruction is at all

feasible, but if it is, it will not be hindered by the order for compulsory winding up. The first ground I have referred to is one to which the Court will always attach considerable weight. But it appears to me that the interest of the creditors is more likely to be preserved than injured by the granting of the compulsory order. In saying this I allude principally to the fact that the company have executed a conveyance in favour of one of their creditors affecting materially the value of the assets available for the general body of creditors. Now, the right to challenge that conveyance (having regard to the date on which this petition was presented) will be preserved if the order now asked is granted, whereas it is at least questionable whether that right of challenge would be preserved if the company was wound-up voluntarily under resolution to that effect now or hereafter passed by the company.

LORD MONCREIFF and the LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

The Court granted the prayer of the petition.

Counsel for Petitioners—Jameson, Q.C.—Horne. Agents—Drummond & Reid, S.S.C.

Counsel for Respondents, The Holmes Oil Company, Limited—Younger.

Counsel for Respondents, John Wood, Limited, and Others—Salvesen, Q.C.—Clyde.

Saturday, October 20.

FIRST DIVISION.

[Lord Pearson, Ordinary.

HENDERSON'S TRUSTEES *v.* HENDERSON.

Trust—Administration—Recovery of Estate—Antenuptial Marriage-Contract—Security for Provisions—Assignation of Share in Testamentary Estate—Substituted Assignation of Policies—Sum Equal to Amount of Provision Paid over to Trustees.

By antenuptial contract a husband bound himself to pay an annuity of £250 to his wife if she survived him, and after his death to pay the sum of £3000 to the children of the marriage. In security of these provisions he assigned to the marriage-contract trustees the balance of his share in the succession of his father, so far as then unpaid, directing them to pay to him the life interest thereof, and also to return to him any residue of the principal which should remain over after "these purposes are provided for." In 1862 a sum of £961 fell to be paid to account of this share, which was by inadvertence paid to the truster instead of to the trustees, and was invested by him in his business. In an action brought by the marriage-contract trustees against the husband in 1897 after the death of the wife for payment of this sum of £961, the defender averred that the trustees had received an assignation in security of two paid-up policies of assurance on his life amounting together to £515, and also a policy for 2000 dollars, that in security of payment of the premiums on this last policy they had the interest of over £5500 of funds belonging to the defender's late wife and liferented by him, and of £2850 paid to the trustees in cash out of the testamentary estate of his father in terms of the assignation in the marriage-contract; and that in consequence of this the trustees had agreed not to insist on payment of the sum now sued for. He further maintained that the pursuers had now no interest to have the fund contributed by him in security of the marriage-contract provision kept up beyond the sum of £3000, and that they held funds and securities provided by him to a greater amount.

Held that the defence was irrelevant, on the ground (1) that the obligation to assign contained in the marriage-contract had not been validly discharged and could not be satisfied by the assignation of the policies, and (2) that as the husband's obligation in the marriage-contract was to assign the share of the testamentary estate in security of payment of the sum of £3000 after his death, he and his representatives being only entitled to repayment of the residue remaining after the purposes of the trust had been fulfilled, and further as it did not follow that by retaining investments of the present value of £3000 the trustees would have £3000 available when the provisions came to be payable, the husband's obligation would not be sufficiently implemented by payment to the trustees of the sum of £3000 and no more.

By antenuptial contract of marriage entered into between Mr Alexander Henderson and Mrs Agnes Elder Robertson or Henderson, Mr Henderson made certain provisions for his wife and children, in terms of which he bound himself and his successors to make payment to his wife, if she survived him, of £250 per annum, and to make payment to the child or children of the marriage who should be alive at his death, if there should be two or more children, of the sum of £3000, payable at the term of 15th May or 11th November which should first happen after his death in the case of children then major or married and to others at the first term after their respective majorities or marriages.

In security of these provisions Mr Alexander Henderson assigned, disponed, and conveyed to the trustees under the marriage-contract, "and to the acceptors or acceptor, survivors or survivor of them, and to such persons as they shall afterwards assume into the trust in virtue of the powers hereinafter conferred on them, the majority alive and accepting being a quorum, All