LORD ASHBOURNE — "Or when sitting under the presidency of the Lord High Steward on a criminal case?"

VISCOUNT CROSS—I agree, subject to the remarks made by Lord Spencer, and now that that point has been met I entirely agree with the motion.

Report from the Committee for Privileges:—"That according to the present practice of the House of Lords there is no reason why a Peer should not be heard as counsel on an appeal at the Bar of this House; but that this resolution is not intended to apply to the appearing of barristers who are Peers before committees of this House, or before this House when sitting under the presidency of the Lord High Steward on a criminal case." Made and agreed to, and resolved accordingly.

Tuesday, November 21.

FIRST DIVISION.

SYMINGTONS, PETITIONERS.

Company — Statute — Winding-up — Grounds for — Construction of General Words in Separate Sub-section of Act— Ejusdem Generis—"Just and Equitable" Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 79, *sub-sec.* 5.

Section 79 of the Companies Act 1862 enacts—"A company under this Act may be wound up by the Court as hereinafter defined under the following circumstances, that is to say, (1) whenever the company has passed a special resolution requiring the company to be wound up by the Court; (2) whenever the company does not commence its business within a year of its incorporation or suspends its business for the space of a whole year; (3) whenever the members are reduced in number to less than seven; (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."

Held that sub-sec. (5) was a substantive enactment to which effect would be given although the conditions present might not be *ejusdem generis* with those enumerated in sub-secs. (1), (2), (3), and (4) of that section.

Observations (*per* Lord M'Laren) as to when in the construction of a statute general words are to be confined to things *ejusdem generis* with those enumerated.

Company — Winding-up — Grounds for— "Just and Equitable"—Deadlock—"Substratum" Gone—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 79 (5).

A limited company was formed to take over a business formerly carried on by two brothers A & B as partners. A, B, and C (another brother) were appointed directors. B was appointed managing director. No shares, however, were issued, and the assets of the firm were never formally transferred to the company. Owing to continuous quarrelling on the part of A and B, who between them had the whole substantial interest in the company, no business was done. Finally, with the support of four members of the company, who, however, had merely a nominal interest in it, B was made sole director. A and C having petitioned the Court to wind up the company, *held* that it was just and equitable that a winding-up order should be pronounced, and petition *granted.*

This was a petition at the instance of David Kennedy Symington, Belmont, Dunbeth Avenue, Coatbridge, and John Symington, tube manufacturer, Airdrie, contributories of Symingtons' Quarries, Limited, incorporated under the Companies Acts 1862 to 1900, and having its registered office in Bank Street, Coatbridge, for winding up of the company.

The company was formed in September 1899 to take over from the firm of D. K. & H. Symington the working of two quarries, Kipps and Annanlea, then held on lease by that firm. No formal agreement to do so was ever entered into between the firm and the company. The members of the firm, however (who were two brothers, Hugh Symington and the petitioner D. K. Symington), signed a memorandum dated 15th August 1899 by which they agreed to transfer the quarries to a limited company to be registered under the name of Symingtons' Quarries, Limited. No formal transfer of the quarries ever took place, no assignation of the leases was ever granted, and neither leases nor plant were ever vested in the company.

By the said memorandum it was also agreed that the nominal capital of the company should be £20,000 in ordinary shares of £1 each, of which £15,000 were to be issued, one-half to D. K. Symington and the other half to Hugh Symington. By the articles of association it was provided that Hugh, John (another brother), and D. K. Symington should be the directors of the company, and that Hugh Symington should be appointed managing director for the first three years. It was further provided that the business of the company should be conducted by the directors, and that managing directors should be bound to observe the orders of the directors. At the first meeting of the directors, held on 24th January 1900, it was agreed to allot one share to each of the subscribers as well as to the petitioner D. K. Symington. No share certificates were, however, issued to them, and no payment was ever made to the company for shares. No other shares were ever allotted.

The petition further stated that the said Hugh Symington, as managing director of the company, from the first appropriated to himself the management and control of the company, and failed to obey the instructions of the directors. In particular, he sent away materials from the quarries to

contracts which he himself was executing without pricing them at the time, and used the company's plant and horses on his own account. He also failed to submit to the directors for sanction numerous accounts incurred by him in name of the company, and contracted an overdraft debt with the company's bankers without the instructions or approval of the board of directors. At the meeting, on 24th January 1900, above referred to, it was agreed that meetings of the directors should be held monthly, for the purpose of submitting accounts, &c., but since 11th March 1901 no meeting of the directors had been held owing to Hugh Symington's refusal to take part therein. Moreover, on or about that date, he changed the company's bank account from the name of the company into his own name, and since then he had operated with the monies of the company solely through that account. The petitioners had repeatedly objected to his so dealing with the affairs of the company, and their protests were duly set forth in the minutes. The balance-sheet of the company as at 31st December 1904 showed a loss for the year of £3954, 2s. 10d. No dividend had been paid by the company, but Hugh Symington as managing director had regularly drawn from the company a yearly salary of £500. At a meeting on 12th April 1905 Hugh Symington moved that the number of the directors should be reduced to one. The motion was carried against the petitioners, and thereafter it was in the same manner determined—in spite of the petitioners' protests—that he should be the sole director. The said resolutions were carried in order to enable Hugh Symington to oust the petitioners from all control over the company's assets and affairs, and to place him in a position of unrestricted authority. Matters had now come to a complete deadlock, and the carrying on of the business in its present condition must inevitably end in the loss of the company's assets, one-half of which belonged to the petitioner D. K. Symington. In these circumstances it was "just and equitable" that the company should be wound up, in terms of section 79, sub-section (5), of the Companies Act 1862.

The company lodged answers, in which they admitted that the capital of the company and the subscribers to the memorandum of association were correctly stated; that no formal transfer of the quarries had been made to the company; that no share certificates had been issued to the subscribers; that no payments had been made to the company for these shares; that no other shares had been allotted; that no dividends had been paid by the company; that Hugh Symington had drawn a salary of £500 annually; and that on 12th April 1905 he had become sole director. *Quoad ultra* the averments of the petitioners were denied. Explained that the company had carried on business at the quarries as provided for by the agreement. The assignations or other deeds necessary to vest the company in the quarries would have been granted but for the action of the petitioners, who declined to sanction them, The fact that the share certificates had not been issued was also due to the conduct of the petitioners, who had declined as directors to sign them. Hugh Symington was entitled to manage the affairs of the company, as he was the managing director. At a meeting of the directors, held on or about 1901, the petitioner (D. K. Symington) refused to sign cheques as a director in order to meet trade accounts and wages, and intimated that he would sign none in future. The business of the company was thus brought to a standstill, and it was in order to save its position that Hugh Symington had opened the bank account referred to, and had since conducted the banking business of the company through that account. Since the meeting on 1901 the petitioners D. K. and John Symington had declined to take any part in the business of the company. The debit balance carried forward in 1904 was not a trading loss for that year, but the accumulated loss carried forward from year to year since the formation of the company, and consisted chiefly of depreciation and interest on capital. Apart from the obstruction caused by the petitioners, the business of the company had been satisfactory. Its affairs were now being managed in an efficient manner, and there was no reason why it should not in future be worked at a profit. The petition ought therefore to be refused.

In addition to the facts admitted by the respondents, it appeared from the minutes that owing to continuous quarrelling on the part of D. K. and H. Symington little or no business was done; that Hugh Symington had from the first appropriated to himself the management of the company; that matters had gone from bad to worse; that, finally, with the support of four nominal members of the company—viz., the members of the legal firm who floated the company—Hugh got himself made sole director; that John and D. K. Symington had no longer any share in the management of the company; and that matters had therefore come to an absolute deadlock.

Argued for petitioners—There was no assignation in favour of the company, and therefore the company had no title to the business. No balance-sheet was ever prepared, nor had any statement been produced to show that any assets had been transferred to the company. The minutes showed that the company was unable to carry on business owing to disputes between the directors. The managing director had got himself made sole director. In these circumstances it was "just and equitable" that the company should be wound up. It was not necessary that the circumstances founded on should be *ejusdem generis* with those specified in subsections (1), (2), (3), and (4) of section 79 of the Companies Act 1862. The former rule to that effect had been relaxed by more recent decisions—*In re Amalgamated Syndicate*, [1897] 2 Ch. 600. [LORD PRESI-

DENT—Are you not under sub-section (4) as well? How can this company pay its debts?] *In re Suburban Hotel Company*, 1867, L.R. 2 Ch. App. 737; *in re Sailing Ship Kentmere Company*, W.N., 1897, p. 58. Sub-sections (1) and (2) were also applicable—viz., ceasing to do business and being insolvent. Both these conditions were present here. Moreover, the company had no directors, no bank account, no assets. The whole substratum of the company was gone. Winding up was competent. Where the effect of a successful action against the company would result in its being brought to an end, then a winding up was competent.

Argued for respondents—The petitioners' averments were irrelevant. In any event, there would have to be inquiry, for the petitioners' averments were denied. The company had assets, viz., the beneficial interest in the leases and the stock-in-trade. It was not necessary to have a legal title, seeing that the company was in possession with the consent of the previous owner. The company had also possession of the machinery and plant in virtue of agreement. The company was able and willing to carry on business. It was also ready to issue the shares referred to in article 8 of the petition. The case of the *Amalgamated Syndicate* cited by the petitioners was not in point, for the ratio of that decision was that the company had really come to an end. The earlier decisions as to the necessity for the circumstances being *ejusdem generis* with those mentioned in the preceding sub-sections had not been modified and were still binding — Buckley on Companies, 257; *in re Anglo-Greek Steam Company*, (1866) L.R., 2 Eq. 1. [The LORD PRESIDENT referred to Lindley on Companies, pp. 862, 863.] In the case of the *Suburban Hotel Company* (*cit. supra*) the section was very narrowly construed. The recent cases relied on by the petitioner were based on specialties. [The LORD PRESIDENT referred to the case of *in re Brinsmead*, [1897] 1 Ch. 45, 406.] The winding-up of the company might entail an action of damages against the company at the instance of the landlord of the quarries in the event of the company giving them up. The other reasons now alleged for winding-up the company were not set forth in the petition. The averments that the company had no business and no assets were denied, so that in any event there would have to be inquiry.

At advising—

LORD PRESIDENT—This is a petition for the winding up of a company called Symingtons' Quarries, Limited, and the circumstances under which the proceedings arose are these:—The two brothers Symington carried on a partnership of D. K. & H. Symington for the working of two quarries. Some time ago the brothers seem to have had certain difficulties, and after an attempt to arrange for a dissolution by means of buying one or the other out by sealed tenders they ultimately brought matters to a conclusion by entering into an agreement on 15th August 1899. One of the articles of that agreement is in these terms—"The parties agree to make over lots 2 (Kipps), 3 (Annanlea), and 6 (furniture) to a private limited company, to be registered under the name of Symingtons' Quarries, Limited. The nominal capital of the company to be £20,000 in ordinary shares of £1 each, and £15,000 to be issued, one half to David and the other half to Hugh or their respective nominees. Hugh to be managing director for three years at an annual salary of £500, and David and John to be ordinary directors. John Symington to take £100 in shares to enable him to hold balance for voting." Following upon that the company was created and registered and the subscribers to the memorandum of association consisted of just the number that are necessary by law, viz., seven, who were Hugh Symington and John Symington, mentioned in this memorandum, a Chartered Accountant, who by a further term of the agreement was proposed as the auditor of the company, and four legal gentlemen who were members of the firm who managed the floating of the company. All these seven subscribers were put down in the memorandum for one share each. The memorandum of association is in perfectly general terms, that is to say, it puts as the object of the company that it is to work quarries with a great many other allied particulars, but the peculiarity of it is that it has no reference *in gremio* to the taking over of the particular business of D. K. & H. Symington, and in particular there is no reference to any document which could be held as an assignation of the rights of either of the contracting parties in the memorandum which I have quoted.

The company held its first meeting on 24th January 1900. There were present only the three Symingtons, John, David, and Hugh. It was agreed to appoint John Symington the chairman of the company, and then the minute of meeting goes on thus:—"In the meantime it was arranged to allot one share to each of the subscribers to the memorandum of association, and to Mr David K. Symington, Belmont, Dunbeth Avenue, Coatbridge. After the balance-sheet of the late company is prepared and the various assets transferred, it was agreed to allot the balance of the shares." That meeting is followed by a set of other meetings of which we have the minutes, but with which I do not propose to trouble your Lordships. It is perfectly clear that these two brothers, David and Hugh, began to quarrel from the very outset. David at first seems to have taken exception to what he considered the improper use of the company's plant and material by Hugh for other purposes. Hugh was engaged in other business, and David seems to have conceived that Hugh was using this business to help his own. It is evident that the quarrel began at once, and that this quarrelling was directed, as quarrelling often is between members of a family, to points not only of substance but to points of an absolutely trivial description. The

only fact which I think your Lordships need to notice is that nothing more was ever done as to really constituting the company. The shares were never allotted and the assets of the old partnership were never as a matter of fact transferred to the company. The company as such simply entered into possession of the quarries and worked them, and indeed the gravamen of one of the charges of Mr David Symington was that the old name of D. K. & H. Symington continued to be used to the outside public instead of the name of the company. The quarrel went on from bad to worse until at last in 1905 Mr Hugh Symington executed what I really cannot call anything less than a *coup d'etat.* The four members of the firm of law-agents seem to have been on the one side, and accordingly, reinforced by his four friends, Hugh had a meeting of the company after proper notice. Notice was given of a motion that the number of directors should be reduced to one, and that that one should be Hugh. They carried that motion, and David was turned out, and John was turned out, and Hugh became the imperator of the company, and that is the present condition of affairs.

This petition is accordingly brought by David Symington and John Symington to have the company wound up under the 79th section of the Companies Act 1862, which provides that a company may be wound up by the Court "(5) Whenever the Court is of opinion that it is just and equitable that the company should be wound up." We were quoted at the bar a considerable amount of decision and dicta upon this section. I do not think it necessary to go minutely into the cases further than to say this, that everybody concedes, and it is stated by a very high authority on this branch of the law, viz., Mr Justice Buckley in his book on the Companies Act, that a rather wider construction had been given by the courts to this section than was given in the earlier decisions. At first it was held that it was to be construed somewhat strictly in reference to matters *ejusdem generis* as those in the previous clauses of the section, but later decisions have rather enlarged that view. I think I am not wrong in saying that what the decisions have come to is this; that if the Court finds that the real substratum of the company has gone, or if the company has come to a deadlock, they will consider themselves justified in acting under that sub-section. On the other hand they certainly will not allow the aid of that section where all that has happened is merely what you may call a domestic quarrel between two sets of shareholders. The company itself is the proper forum for the settlement of domestic differences according to the powers of the majority under the constitution of the company.

Taking that view of the general powers of the Court, I confess I have come clearly to be of opinion that this is a case where your Lordships ought to exercise jurisdiction and ought to wind up this company. The present position is really quite an impossible position. In the first place, it is not truly a controversy among various sets of shareholders, because it is impossible to say that this company has in any, except a technical sense, at the present moment any shareholders at all. There are these three brothers, and there are these legal gentleman and the auditor, who of course were merely brought in for the purpose of forming the company, and doubtless are liable to pay £1 for their shares—whether they *de facto* have ever paid that sum, I am more than doubtful. They were never meant to hold any real stake in the company at all. The true scope of the company was what is contained in the articles of association by which these two brothers were to have 7500 shares each, both brothers being directors, the third brother being there to see fair play between the other two. That is the only company to which under the agreement the private partnership was bound to make over the assets, and that company has been put out of possible existence by the *coup d'etat.* I think, accordingly, that the case comes strictly within the set of cases in which the substratum of the company is gone. For this reason I am of opinion we should grant the petition.

LORD ADAM—I am of the same opinion.

LORD M'LAREN—If I were forming an opinion for myself upon the true meaning of the clause in the Companies Act which defines the conditions under which the company is to be wound up, I should not have come to the conclusion that the general reference to the discretion of the Court was to be confined to things *ejusdem generis* with those conditions which precede it. I apprehend that the true rule for determining whether general words are to be confined to things *ejusdem generis* is this, that if the general words are bound up with the enumeration by proper words of relation then their meaning is confined to the subject-matter indicated in the enumeration, but if the general words are severed from the enumeration of particulars there is no logical reason for interpreting the one by the other. One familiar instance is the case where the general words precede the enumeration, in which case it was pointed out by Lord Westbury in one of the entail cases that the *ejusdem generis* rule of construction does not apply, and on the contrary the general words may be taken in the wider sense, the enumeration being regarded as illustrative. But of course the inversion of the order of arrangement is not the only way in which it is possible for the writer to show that he means the general words to be taken in their comprehensive sense. In this Act of Parliament the general words have reference to the discretion and judgment of the Court. The case put is "whenever the Court shall be of opinion that it is just and equitable that the company should be wound up." That introduces a different order of ideas altogether from the conditions which precede, because these are not conditions referred to the judgment of the Court, but are defined

in the Act itself, and the function of the Court is only to say whether the facts of the case come within one or the other category. I have made these observations, because, while I find in the English decisions that not much weight is now attached to the *ejusdem generis* rule of construction of this clause, yet I think it desirable, at least for my own satisfaction, to see upon what grounds the true construction can be maintained and defended. Coming to the application to the facts of this case, one of the grounds on which it has been the practice of the Court to decree a dissolution is where there is a small number of partners equally or nearly equally divided so that it is impossible that the business of the company can be carried on. That is a rule that would very seldom be applicable to a company under the Companies Act—never certainly where the company appeals to the public for subscriptions to its shares—because if the directors are equally divided, or if there is such a division as makes it difficult to carry on the company's affairs, the remedy of the shareholders is to turn them out and to elect a harmonious board of directors. But then this is not a company that is formed by appeal to the public. It is what, for want of a better name, I may call a domestic company, the only real partners being the three brothers of a family, the other shareholders having only a nominal interest for the purpose of complying with the provisions of the Act. In such a case it is quite obvious that all the reasons that apply to the dissolution of private companies on the grounds of incompatibility between the views or methods of the partners would be applicable in terms to the division of the shareholders of this company, and I agree with your Lordship that this is a case in which it would be just and equitable that this company should be wound up and the partners allowed to take out their money and trade separately.

LORD KINNEAR—I agree with your Lordship that the judgment proposed is in accordance with the views taken in the Court in England to the authority of which we must always attach the greatest possible weight since their experience of the operations of the statute is so much larger than ours. I think it is just and equitable that this company should be wound up on two grounds which have separately been considered sufficient in former cases, and which in the present case occur in combination. The first is that the affairs of the company have been brought to an absolute deadlock, which can only be relieved, so far as we can see, by winding up; and the second is that the entire administration of its affairs is now concentrated in one director, who is enabled by the assistance of subscribers to the memorandum, who have only a nominal interest in the company, to overrule at his pleasure the judgment and opinion of his co-directors, the other members who have a real interest in the concern. I do not think that it is just or equitable that this state of things should be allowed to continue, and I therefore agree with your Lordships.

The Court pronounced this interlocutor—

"Order that Symingtons Quarries, Limited, be wound up by the Court under the provisions of the Companies Acts 1862 to 1900, and appoint John M. Macleod, Esq., C.A., Glasgow, to be official liquidator of the said company, he always finding caution for his intromissions and management before extract, and decern," &c.

Counsel for Petitioners—Ure, K.C.—R. S. Horne. Agents—Webster, Will, & Company, S.S.C.

Counsel for the Respondents—Younger, K.C.—Hunter. Agents—Dove, Lockhart, & Smart, S.S.C.

Tuesday, November 21.

FIRST DIVISION.

[Sheriff Court at Aberdeen.

WESTERMAN (WESTERMAN'S EXECUTOR) *v.* SCHWAB AND OTHERS.

International Law—Succession — Will — Revocation by Marriage—Will of Englishwoman subsequently Marrying Domiciled Scotsman—Wills Act 1837 (1 *Vict. c.* 26), *secs.* 18 *and* 35.

Held that a will dealing with moveable estate, which was duly executed by a lady domiciled in England, was not revoked by her subsequent marriage in England to a domiciled Scotsman.

The Wills Act 1837, section 18, provides —"And be it further enacted that every will made by a man or woman shall be revoked by his or her marriage. . . ." Section 35 provides—"And be it further enacted that this Act shall not extend to Scotland."

This was an action of multiplepoinding, raised in the Sheriff Court at Aberdeen, at the instance of Thomas Collette Westerman, executor-dative of the late Mrs Sarah Ann Scott or Westerman, wife of the deceased Edward Westerman, soap manufacturer, 104 Leslie Terrace, Aberdeen.

Mrs Westerman died at Aberdeen on 25th March 1904. Her husband, who had survived her, died on 27th April 1904 without having expede confirmation of her estate. The pursuer, who was a son of the late Mr Westerman by a prior marriage, thereafter gave up an inventory of her estate, and was duly confirmed executor-dative. After paying preferable claims the free residue of her estate amounted to £272, 2s.—one-half of which was paid to the husband's representatives as *jus relicti*, and the remaining half (£138, 11s.) formed the fund *in medio* in this action. To this fund claim was made (1) by Frederick Schwab and others, the executor and legatees under a will dated 4th June 1897, made by Mrs Westerman prior to her marriage to Westerman, and while she was a spinster and