which, in view of what had happened thirteen years previously, no doubt cost him a great deal of uneasiness. At first he seems to have been able to overcome these attacks, and evidently companionship with the pursuer did more than anything else to restore him from his depressed state of mind. But on 17th September he appears to have become convinced, and as it proved with only too good reason, that he was on the verge of an attack of insanity. He accordingly thought it to be his duty to communicate with pursuer's father, and he wrote the letter of 17th September 1900, which is quoted in the record. In that letter he told Mr Liddell what his condition was and said that the marriage must be postponed. He did not propose anything else. His words were—"I do not think the marriage can take place in the meantime." It seems to me that Mr Easton was not only entitled but bound to take up that position, and the terms in which he wrote to Mr Liddell were entirely creditable to him. I do not find that Mr Easton ever changed the position which he took up in the letter, and it is plain that the pursuer continued to regard the engagement as subsisting. Further, at no period subsequent to the letter was Mr Easton ever in a condition which would have justified his marrying.

In regard to what passed at the meeting between Mr Liddell and Mr Easton on the 18th September, I think that the former was under an entire misapprehension in regard to the condition of the latter. He said that he did not see much wrong with Mr Easton, and that he thought that there was no reason why the marriage should not go on. If that was Mr Liddell's view it is not surprising that he should have regarded Mr Easton's refusal to go on with the marriage at the time as equivalent to a breaking off of the engagement.

There was one circumstance which was founded on as showing that Mr Easton must have regarded the engagement as at an end, and that is that he made a will in which he made no mention of the pursuer. I think that he might have been expected to make some provision for her, but I do not think that anything can be founded on the fact that he did not do so, because it is impossible to say what his motives were or indeed to what extent his mind had been then affected.

I therefore agree with the Lord Ordinary that no breach of the engagement is proved, and that being so it is unnecessary to express any opinion in regard to the case of *Hall*.

LORD KYLLACHY was absent.

The Court refused the reclaiming note and adhered to the interlocutor reclaimed against.

Counsel for Pursuer (Reclaimer)—Guthrie, K.C.—Gunn. Agents—Mackay & Young, W.S.

Counsel for the Defender (Respondent)—Wilson, K.C.—D. P. Fleming. Agents—Kinmont & Maxwell, W.S.

Saturday, December 1.

FIRST DIVISION.

W. & J. C. POLLOK *v.* THE GAETA PIONEER MINING COMPANY, LIMITED.

Company—Winding-up—Creditor's Petition—Disputed Debt—The Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *secs.* 79 (4) *and* 80 (4)—*Caution.*

A creditor of a company incorporated under the Companies Acts 1862 to 1900 demanded payment of his account, and the amount was disputed. Settlement being delayed the creditor presented a petition under the Companies Act 1862, secs. 79 (4) and 80 (4), for a winding-up order on the ground that the company was unable to pay its debts, averring that his own and other claims were due. The company resisted on the ground that it was willing to pay whatever of the debt in question was found due, and that the other claims had not yet been presented. It offered caution if required.

The Court *refused* the petition, being of opinion that the case for refusal, the debt being in dispute, was *a fortiori* of that of a petition being presented, under section 80 (1) of the Companies Act 1862, which applies where a company has "neglected" a demand for payment; and further, that in any event the offer of caution was conclusive. *Cuninghame and Others* v. *Walkinshaw Oil Company, Limited*, November 17, 1886, 14 R. 87, 24 S.L.R. 66, *followed.*

The Companies Act 1882 (25 and 26 Vict. cap. 89), sec. 79, enacts—"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." Sec. 80 enacts—"A company under this Act shall be deemed to be unable to pay its debts (1) whenever a creditor, by assignment or otherwise, to whom the company is indebted, at law or in equity, in a sum exceeding fifty pounds then due, has served on the company by leaving the same at their registered office, a demand under his hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand neglected to pay such sum, or to secure or compound for the same to the reasonable satisfaction of the creditor. . . . (4) Whenever it is proved to the satisfaction of the Court that the company is unable to pay its debts."

On November 9, 1906, Messrs W. & J. C. Pollok, solicitors, Hamilton, presented a petition to the Court praying that the Gaeta Pioneer Mining Company, Limited, incorporated in 1905 under the Companies Acts 1862 to 1900 with a capital of £50,000, and having its registered office at Irvine, Ayrshire, should be wound up by the Court under the said Acts.

The petition stated—". . . That by the 79th section of the Companies Act 1862 (25 and 26 Vict. c. 89) it is provided, *inter alia*, 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;' and by sec. 80 of the Companies Act 1862 it is provided, *inter alia*, 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.'

"The petitioners are creditors of the said company to the extent of £121, 6s. 9d., being the amount incurred to them for legal and professional services as *per* account rendered and herewith produced. The petitioners have demanded payment of the said sum from the said company, but they delay to make payment of the same.

"The mine is situated in Queensland, Australia. It is fully equipped, and has been crushing ore for about five months at a loss.

"The system of gaining the gold has proved too costly, with the result that the company is now in debt in Queensland to the extent of over £1000, for which a writ has been served upon the company there.

"In this country the company owe the British Linen Bank upwards of £400, and the secretary's, consulting engineer's, and directors' salaries have been for some time unpaid. There are also other claims against the company.

"In these circumstances the petitioners humbly submit that the said company should now be wound up by the Court in terms of said Act, and an official liquidator appointed for that purpose. The said company cannot pay its debts. . . ."

The respondents lodged answers, in which they stated—"Admitted that the salaries of the secretary, consulting engineer, and directors are unpaid, but explained that payment has not been demanded. *Quoad ultra* the statements in the petition are denied.

"The petitioners some time since rendered the account on which this petition is based, but which as then rendered amounted to £42, 8s. 6d. Mr James Cullen Pollok, a partner of the petitioners' firm, was a director of the respondents' company, and was then due the company arrears of calls, which he has since paid, to the amount of £40. On 16th August 1906 he offered, by letter addressed to the company's solicitor, Mr John Watt, Irvine, to discharge the account for £40, to be put to the credit of said calls. Said offer was not accepted, and by Mr Pollok's desire the account was not submitted to the board of directors until 1st October 1906. The directors being of opinion that the account was overcharged, and that it included some items for which the company was not liable, gave instructions that it should be taxed by the Sheriff Court auditor in Ayr. The said James Cullen Pollok, who was present at the meeting, stated no objection to the account being so taxed, and it was accordingly laid before said auditor, who on 13th October 1906 taxed it at £8, 13s. The account with the auditor's docquet thereon is produced herewith. Thereafter on 27th October 1906 the petitioners wrote the respondents as follows:—'As you have objected to our account as rendered, we beg herewith to withdraw it, and herewith send you amended account, and beg to intimate that unless same is now paid action will be taken. We may say we are prepared to submit this account to the taxation of the Auditor of the Court of Session.' Said amended account was simply the account formerly rendered re-charged and with one or two of the items omitted. It contains several items for which the respondents do not consider themselves liable and is much overcharged. As is well known to the petitioners, it is the practice of the respondents' board of directors to meet once monthly, on the 3rd Wednesday of each month. There had therefore been no meeting between the date when said 'amended account' was rendered and the presentation of the petition. The respondents have always been prepared to pay any sum truly due to the petitioners on the amount thereof being duly ascertained. . . ."

Argued for the respondents—The petition should be refused. The amount of the account was in dispute, and a disputed debt could not be made the ground of a petition for winding up—*Cuninghame, &c.* v. *Walkinshaw Oil Company*, November 17, 1886, 14 R. 87, 24 S.L.R. 66; *in re London and Paris Banking Corporation* (1874), L.R., 19 Eq. 444. Further, the respondents were willing to find caution for the amount of the account, and thus the creditor's interest was secured, and he was not entitled to have the company wound up—*Commercial Bank of Scotland, Limited* v. *Lanark Oil Company, Limited*, December 2, 1886, 14 R. 147, 24 S.L.R. 146. If the petitioner's debt was safe he had no title to apply for a winding-up merely because the company was unable to pay its debts. The averments were too vague and general to base a winding-up order under sec. 79. The facts necessary to prove the company's insolvency were lacking in the averments.

Argued for the petitioners—A creditor was in the same position in this matter as a contributory—Companies Act 1862, sec. 62—and averring that other debts than his own were unpaid was entitled to apply for a winding-up order. There were sufficient averments as to the inability to pay debts to entitle the creditor to apply in terms of sec. 80 (4) and sec. 79 (4) of the statute. There was no limitation of the right to petition if it was averred that the company was unable to pay its debts. Whether the debt was constituted or not was of no moment. The cases cited were not in point. They were cases under the Companies Act 1862, sec. 80 (1), which sub-section applied when the debtor company "neglected" to pay a demand, and the accounts in these cases being disputed, there was obviously no "neglect"; consequently the petitions were refused. This petition was not under

that sub-section, but under sec. 80 (4) on a general averment of insolvency. Proof should be allowed.

LORD KYLLACHY—I think it quite plainly follows from the decision in *Cuninghame* v. *Walkinshaw Oil Company* (14 R. 87) that if the petitioners here had proceeded under the 4th sub-section of section 79, and the 1st sub-section of section 80, of the Companies Act 1862, it would have been a sufficient answer to the petition that their debt was disputed on what appeared to be *bona fide* grounds. This petition, however, is presented, not as the outcome of any proceedings under section 80, sub-section 1, but is presented under sub-section 4 of section 79, and on the ground simply that the petitioners—not alleging any default by the company with respect to their own debt, which they admit is disputed—ask for a winding-up order on the ground simply that they are alleged creditors of the company, and that they allege and undertake to shew that the company "is unable to pay its debts."

The objection to this petition is therefore, as it appears to me, *a fortiori* of that in the case of *Cuninghame* (14 R. 87). It is impossible, I think, to hold that a petitioner under section 79 (4) can be in a better position than a petitioner who has served the company with a demand for payment under section 80 (1) of a disputed debt.

I should therefore be prepared, even apart from the respondents' offer of caution, to refuse the petition. But the offer of caution being made, it appears to me to conclude the matter.

LORD PEARSON and LORD MACKENZIE concurred.

The Court, on caution being found by the respondents as offered by them for the ascertained amount of the petitioners' account, dismissed the petition with expenses.

Counsel for the Petitioners — Findlay. Agents—Patrick & James, S.S.C.

Counsel for the Respondents — Chree. Agents—Mackay & Young, W.S.

Tuesday, November 27.

SECOND DIVISION.

[Lord Johnston, Ordinary.

KILMARNOCK DISTRICT COMMITTEE OF THE COUNTY COUNCIL OF AYR *v.* SOMERVELL.

Contract—Agreement—Clause—Condition-Precedent—Condition in an Agreement that All Plans of Works shall before the Works are Proceeded with be Submitted to and Approved and Signed by the Second Party to the Agreement.

The district committee of a county council having formed a certain estate into a special water supply district entered into an agreement with S., the heir of entail in possession of the estate, by which it was, *inter alia*, provided—"First, all plans of works to be executed in connection with the said water supply and rights of way-leave in so far as upon or passing through the second party's said estate, and any alterations which may be made upon said plans, shall, before the works are proceeded with, be submitted to and approved and signed by the second party . . ." The district committee submitted to S. certain plans of works.

Held that S. was not entitled *simpliciter* to reject the plans submitted, but was bound to consider them, and in the event of his disapproving thereof to state specific objections thereto and the grounds of his objections.

Contract—Arbitration—Clauses—Terms of Agreement on which Held that Differences Fell under a General Arbitration Clause, not under a Clause Referring to a Named Arbiter.

The district committee of a county council entered into an agreement with S., the heir of entail in possession of an estate, by the first article of which the plans of certain proposed works for the supply of water were before the works were begun to be approved by the second party, and it was, *inter alia*, provided, that "in the event of any engineering difficulties arising in the laying of" certain "piping on the lines delineated on" a plan annexed to the agreement, "any question of necessary deviation shall, failing agreement between the parties, be submitted to the amicable and final decision of" T. The agreement also provided for a feu-contract being entered into in the terms of a draft scheduled to it, and contained a clause referring all questions and differences which might arise between the parties under the agreement or feu-contract to two arbiters mutually chosen, &c. The draft feu-contract contained, *inter alia*, a provision that in the event of dispute as to the construction of the works when completed being in accordance with the plans "as approved by the first party or the arbiter appointed under the first head of the" agreement it should be referred to T. The district committee submitted to S. certain plans of the proposed works for his approval.

Held—reversing the Lord Ordinary (Johnston)—that if parties failed to adjust their differences after S. had lodged specific objections to the plans, the adjustment of these differences fell to be dealt with, not by T., but under the general clause of arbitration in the agreement.

The Kilmarnock District Committee of the County Council of the County of Ayr, who as such were the local authority for the execution of the Public Health (Scotland) Act 1897 within their district, raised on 14th March 1906 an action against James Somervell, heir of entail in possession of the lands