

At advising—

LORD PRESIDENT—The objection here is that this reclaiming-note should have been presented within ten days of the date of the interlocutor reclaimed against. The objection is founded on the 11th section of the Act of 1850, which provides—“That it shall not be competent to reclaim against any interlocutor of the Lord Ordinary at any time after the expiration of ten days from the date of signing such interlocutor, with the exception only of reclaiming-notes against interlocutors disposing in whole or in part of the merits of the cause, and against decrees in absence, which reclaiming-notes shall continue to be competent in like manner as at the passing of this Act.” Now, the question is whether the interlocutor before us disposes in whole or in part of the merits of the cause? As matters stood under the Act of 1850 it might have been difficult to say that a decision upon a mere question of expenses could in any sense be called “disposing in whole” of the merits of the cause. But in the Act of 1868 a material alteration has been made upon the phraseology. In the first place, the 52d section, in explaining the effect of a reclaiming-note against a final judgment, provides that “Every reclaiming-note, whether presented before or after the whole cause has been decided in the Outer House, shall have the effect of submitting to the review of the Inner House the whole of the prior interlocutors of the Lord Ordinary of whatever date, not only at the instance of the party reclaiming, but also at the instance of all or any of the other parties who have appeared in the cause, to the effect of enabling the Court to do complete justice without hindrance from the terms of any interlocutor which may have been pronounced by the Lord Ordinary, and without the necessity of any counter reclaiming-note; and after a reclaiming-note has been presented, the reclaimer shall not be at liberty to withdraw it without the consent of the other parties as aforesaid, and if he shall not insist therein, any other party in the cause may do so, in the same way as if it had been presented at his own instance.” Then in the following section, the 53d, we have a definition of what is to be deemed a final judgment in the Outer House—the only judgment which can be brought under review without the leave of the Lord Ordinary, except in a few specified cases, such as interlocutors allowing proof. The section provides—“It shall be held that the whole cause has been decided in the Outer House when an interlocutor has been pronounced by the Lord Ordinary which either by itself or taken along with a previous interlocutor or interlocutors disposes of the whole subject-matter of the cause, or of the competition between the parties in a process of competition, although judgment shall not have been pronounced upon all the questions of law or fact raised in the cause; but it shall not prevent a cause from being held as so decided that expenses, if found due, have not been taxed, modified, or decreed for.” Now, it is to be observed that the words used in the 1868 Act are the “whole subject-matter of the cause,” whereas the words made use of in the Act of 1850 are “whole merits” of the cause. And although it may be a question whether expenses can be said to form part of the merits of the cause, it may very well be held that they are a part, and often

a very important part, of the “subject-matter” of the cause. This change of language, therefore, seems to me on that account of great importance, and when we go on the matter is made very clear, for the statute in the 54th section provides by the clearest implication, until the question of expenses is determined no final judgment can be pronounced, and if so, then the “whole subject-matter” of the cause, in the language of the statute, has not been disposed of. In short, until the question of expenses has been determined, the “whole subject-matter” has not been finally disposed of, and until such final disposal there can be no review. It appears to me accordingly that the subject-matter of the case was not finally disposed of till the interlocutor of the 2d June, and consequently that the appellant is within the time allowed by the statute.

LORDS DEAS and SHAND concurred.

LORD MURE was absent.

Counsel for Pursuer and Reclaimer—**J. A. Reid.** Agent—**A. Rodan Hogg, Solicitor.**

Counsel for Defender and Respondent—**Strachan.** Agent—**Party.**

Thursday, June 22.

FIRST DIVISION.

(Before Lord President Inglis, Lords Deas and Shand.)

THE ANGLO-AMERICAN BRUSH ELECTRIC LIGHT CORPORATION (LIMITED), PETITIONERS.

Public Company—Companies Act 1862, sec. 79—Winding-up—Allotment of Shares subsequent to Presenting of Petition.

By section 79 of the Companies Act 1862 (25 and 26 Vict. cap. 89) it is enacted, *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— . . . 5. Whenever the Court is of opinion that it is just and equitable that the company should be wound up.”

Circumstances in which a petition for the judicial winding-up of a company was *refused*, on the grounds (1st) that if granted some advantage might be conferred on the petitioners over the other shareholders; and (2d) that as the company was in the immediate prospect of being wound up voluntarily, this application was premature.

The Anglo-American Brush Electric Light Corporation (Limited) on the 17th May 1882 presented a petition asking that the Scottish Brush Electric Light and Power Company (Limited) should be wound up by the Court under the provisions of section 79 of the Companies Act of 1862.

It appeared from the terms of various agreements referred to in the course of the discussion, the more important passages of which are quoted in the opinion of the Lord President, that the Anglo-American Company were proprietors of a valuable patent which they

were anxious to introduce into Scotland. This they succeeded in doing, through the medium of Mr William Hope, of Leith, who undertook the formation of a small company to introduce the use of dynamo-electric machines and electric lamps made in accordance with the said patent.

It was part of the arrangement between the Anglo-American Company and Mr Hope that if the small company to be started by him should turn out to be a success, it was to give place to a new company which was to be established on a much more extensive scale.

The small company, as started by Mr Hope, turned out to be a great success, and accordingly, carrying out the terms of the first agreement, arrangements were made, and on 25th April 1882 a memorandum of agreement was drawn up, between the Anglo-American Company, the Scottish Company (*i.e.*, the small company started by Mr Hope), and the Brush Electric Light and Power Company of Scotland, under which name the new and more extended company was incorporated.

Owing to an error in the framing of the articles of association of the "Scottish" or intermediate Company, no sale could take place by them to the new company except through the machinery of a liquidation, and it became a question whether that liquidation should be judicial as prayed for by the petitioners, or voluntary as claimed by the Scottish Company.

The petition for the judicial winding-up of the Scottish Company was presented on the 17th of May 1882, on which day an allotment of about 1250 of the unallotted shares of the company had been made by the directors.

The Anglo-American Company (the petitioners) were holders of 1900 shares in the Scottish Company, and at the date of the present discussion there still remained about ninety shares unallotted. The success of the intermediate company had been so marked, and the assets were so substantial, that there arose a competition between the directors of the Scottish Company on the one hand, who desired to increase the number of participants in the assets, and the Anglo-American Company on the other, who desired to reduce the number as much as possible. By the terms of the first agreement the whole of the shares in the Scottish Company were to have been allocated by the 30th of December 1881; this period, however, had been extended by consent to 30th June 1882.

It was argued for the petitioners—That it was *ultra vires* of the directors to allocate any shares subsequent to 1st May 1882. The concern should be judicially wound-up, and an order pronounced to that effect would carry back to the date of presenting the petition. Though the petitioners were large shareholders, yet under the 51st section of the Act of 1862 they had for the purpose of voting at a special meeting very small powers.

Argued for respondent—This petition is premature; the company still exists to pay debts and to receive money due; there is no object to be gained by hurrying on its liquidation, while by so doing an undue preference may be given to the petitioners over the rest of the shareholders. The directors are quite within their powers in allotting the remainder of the shares. A judicial winding-up is objected to on account of the expense.

Authorities—The Companies Act 1862 (25 and

26 Vict. c. 89), sec. 79; 11 and 12 Vict. c. 45, sec. 12; Lindley on Partnership, 1240; *Surburban Hotel Co.*, L.R., 2 Ch. App. 737; *Langham Skating Rink*, L.R., 5 Ch. Div. 669; *Wheal Lowell Mining Co.*, 1849, 1 M'N. & G. 1; *Professional Benefit Society*, Aug. 1, 1871, 6 Ch. 356; *National Savings Bank Association*, 1866, L.R., 1 Ch. App. 547; *London and County Coal Co.*, 1866, 3 Eq. 355.

At advising—

LOLD PRESIDENT—The Scottish Brush Electric Light and Power Company (Limited), which is sought to be put under liquidation by this petition, seems to have been brought into existence, not so much with a view to doing business in the matter of electric lighting and power, as to be the precursor and parent of another company to be established upon more extensive lines for the same purposes; and it is necessary, in order to dispose of the matter now before us, to see exactly what were the circumstances in which this company was formed, and how long it was intended it should remain in existence.

The first agreement is one between the petitioners, the Anglo-American Brush Electric Light Corporation (Limited) and Mr William Hope, of Leith, in which Mr Hope undertakes that he shall form a company with the object of introducing the knowledge and use of dynamo-electric machines and electric lamps, made in accordance with the invention belonging to the Anglo-American Brush Company, into Scotland, as preliminary to the establishment of a company on a wider and more extensive basis for the purpose of using and dealing in such machines and lamps in Scotland in the event of its being ascertained through the medium of the said company first thereafter mentioned that the establishment of such wider and more extensive company would be expedient or advantageous. The special stipulations in this agreement are, in the first place, that Mr Hope "shall, on or before 30th day of November 1881, procure the incorporation of a company under the Companies Acts of 1862 and 1880, with a nominal share capital of £50,000, divided into 5000 shares of £10 each, and with such memorandum and articles of association as shall contain nothing at variance with these presents. And the said William Plenderleith Hope hereby undertakes that the whole of the shares of such company, other than those to be issued to the vendors hereunder, shall be *bona fide* subscribed for and allotted on or before the 30th day of December 1881." Mr Hope also undertakes that he and such company "shall, within seven days after the incorporation of such company respectively, agree to sell and purchase the premises herein agreed to be sold to him;" and it appears that the time within which the shares should be allotted was extended subsequently by agreement to the 30th of June of the present year. Then, as regards the consideration to be paid to the Anglo-American Company, the third article provides that "besides the consideration referred to in the seventh clause hereof, the consideration for the licence aforesaid shall be the sum of £10,000 payable to the vendors, as to £2500 in cash, and £7500 by three bills of equal amount, payable respectively at three, six, and nine months, and by way of further consideration the issue of fully paid-up shares in the pro-

jected company of the nominal value of £20,000, which fully paid-up shares shall be issued to the vendors, or as they shall direct, at the same time as the allotment and issue of the remainder of the said projected company's shares shall take place." Then in the seventh article the further consideration is that Mr Hope "shall, before the 1st day of January 1883, procure the incorporation of a company under the Companies Acts 1862 to 1880, with liability limited by shares, and with a nominal capital of at least £500,000, divided into shares of £10 each. The objects of such new company shall be to acquire and work under the said licence, and the projected company hereinbefore mentioned shall concur in executing and doing all acts and things necessary for enabling such new company to purchase and acquire the said licence, and the goodwill, plant, and trade effects of the projected company first hereinbefore mentioned, at such price as may be agreed upon." Now, that is the first agreement between Mr Hope and the petitioners. But then there comes another agreement between Mr Hope and certain individuals on behalf of the Scottish Brush Electric Light and Power Company, which is just carrying out so far the consideration of the first agreement, and then we come to the memorandum of agreement, dated 25th April 1882, the parties to which are the preliminary company, as it may be called, which is now sought to be put into liquidation, the petitioners the Anglo-American Brush Company on the second part, and the Brush Electric Light and Power Company of Scotland on the third part, subsequently called the New Company, being the company projected in the previous agreement, which is permanently to carry on the business, and which Mr Hope had undertaken to get incorporated. Now, that agreement provides for the creation of stock and division into shares, and a number of other things, and among others, this Scottish Company, being the preliminary company, as I have called it, agree to sell, and the New Company agree to purchase, all that had been transferred under the previous arrangement from the Anglo-American Company to the Scottish or preliminary company. The second head of the agreement is this—"As a part of the consideration of the said sale the New Company shall adopt, perform, and fulfil all contracts and engagements undertaken in the ordinary course of business of the Scottish Company, and now binding on it, and shall at all times keep the Scottish Company indemnified against all liability in respect of such contracts and engagements, and against all actions, proceedings, costs, damages, claims, and demands in relation thereto, but nothing in this agreement contained shall be deemed to bind the New Company to pay or discharge any debts, liabilities, or obligations of the Scottish Company other than such as may attach to the future carrying out of pending contracts, of which the benefit shall be taken over by the New Company." Then thirdly—"As further part of the consideration for the said sale, the New Company shall, at the request of the Scottish Company, issue to the Scottish Company, or to such person or persons as it shall direct, 8000 shares in the New Company, with a sum of £5 credited as having been paid-up thereon." And then, as the residue of the consideration for the sale, the New Company is to pay to the Scottish Company the

sum of £15,000, which is to be paid in manner following, viz., £7500 is to be paid to the Anglo-American Company to retire the bills of the Scottish Company for that amount, and the balance is to be paid to the Scottish Company itself. The Scottish Company—what I have called the preliminary company—obtain shares in the New Company of the value of £40,000 and £15,000, which is to be paid in the manner I have just described. Then it is provided that the sale and purchase shall take effect as from the 1st of May 1882, "and as from that date the Scottish Company shall be deemed to carry on business as agent for, and for the benefit of, the New Company, and all necessary apportionments (if any) of current outgoings shall be made for the purpose of giving effect to this provision—Save as aforesaid the Scottish Company shall not as from the 1st day of May 1882 carry on any business." Now, the result of all this is so far plain enough. The object of the Anglo-American Company was to introduce the working of the patents belonging to them into Scotland, and the mode in which they proceeded to accomplish this object was, in the first place, by agreement with Mr Hope to secure the promotion of this preliminary company which we are now dealing with, in order to ascertain whether the business would work well in Scotland, and finding that it did so they then proceeded to urge Mr Hope and his friends to go on with the formation of the New Company, which is to be upon a wider and more extensive basis, to have a larger capital, and to carry on business on a much larger scale. That company has now been formed, and the Scottish Company—that is, the preliminary company—has now been dissolved, and the purpose and objects of its existence having pretty well come to an end, there is no reason in the world why there should not be an end of that company. But it so happens that that company which it is now sought to be put into liquidation has no power to sell its stock to the New Company, and that can only be done therefore by putting the Scottish Company into liquidation, so that liquidators appointed either voluntarily or by the Court may carry out the sale which was the ultimate object contemplated by this agreement, and the Anglo-American Company, who are deeply interested in the working of the New Company, present this petition for the purpose of having the old or preliminary company wound up.

Now, if the matter had stopped there one would say that it cannot be of very much consequence whether this company is wound up voluntarily or by the Court. The company which is resisting this petition say that they are going to be wound up voluntarily, but that the proposal to wind up under this petition is premature, and that until the 30th of June they shall discharge the duties imposed upon them by the first of these agreements, under which this company was brought into existence. They have still got a quantity of shares not allocated, and they say they came under an obligation to have all these shares allocated before the 30th of June. But from these shares there springs an interest in the Anglo-American Company, which it is quite obvious affords the sole motive for the presentation of this petition. The Anglo-American Company hold £20,000 in round numbers of the shares in the preliminary company. There was

only a certain amount of stock actually allocated beyond the amount which is held by the Anglo-American Company when this petition was presented, and they say that every additional allocation of stock only diminishes the value of their interest in this company. The company as far as one can see has no liabilities of any consequence, but there is a considerable amount of assets, and instead of not becoming contributors in the liquidation, the great object and obvious interest of the Anglo-American Company is in the first place to become contributories themselves, and then to diminish the number of contributories, because a contributory will have to contribute nothing, but on the contrary will be contributed to. In these circumstances they have presented this petition.

Now, there is no hurry about putting this company into liquidation as far as the mere management of the company is concerned, and the winding up of the company and sale of the stock, plant, and general effects. But if this petition were granted and a winding-up order were pronounced, it is said that the petitioners might obtain a very considerable advantage. Now, the question which remains to be determined between them and the other shareholders or directors of the company is, whether it is in the power of the Scottish Company to allot the unallotted stock so as to diminish the value of the interest of the Anglo-American Company in the preliminary company, and I think there is not much doubt that if we did pronounce this winding-up order there would be an advantage gained by the petitioners, the Anglo-American Company, because there can be no alteration in the status of any shareholder after the winding-up order, and it may be doubtful how far after the day of presenting this petition, under one of the clauses of the Companies Acts, it may be unlawful to do anything so as to create any difference of that kind. On the other hand, the directors of the company which it is proposed to put into liquidation, say they are doing what they conceive they have a right to do. They do not want any advantage to themselves in disposing of this stock. The question is, whether they have right to do this thing? They want everything to be kept open. They have already on the 17th of May taken a step which has the effect of allotting a very large portion of the remainder of the unallotted stock. They have allotted the stock to a large number of individuals, some of them being directors of the company and others being shareholders, the amount allotted on that day being 1255 shares. It was alleged that this petition was presented on the very same day on which that allotment was made, and there might be a question, if the liquidation proceeded upon this petition, whether the presentation of the petition had or had not the effect of preventing such an allotment from being made, and at all events there would arise this question, whether after the presentation of the petition, and if a winding-up order is pronounced, anything more could possibly be done in the way of allotting a portion of the shares, some portion of which I understand are still unallotted? Now, I confess I am not prepared to pronounce a winding-up order which shall really have any practical effect except to give the petitioners an advantage in the trial of the question which is to be tried between them and the directors of the preliminary company, and I do not see any other object

that can be served by pronouncing this winding-up order. The preliminary company are only entitled to carry on their business as agents of the company, but if the directors are to have an opportunity of trying the question whether they are entitled, or bound as well as entitled, to allocate the remainder of the stock, and so to enlarge the number of partners and contributories in any future liquidation, I am not prejudicing their right to do so by any indirect advantage to be secured by the petitioners by the pronouncing of a winding-up order at this time. I am disposed to think that we will do justice to all parties if we refuse this petition and allow the parties to go on till the 30th of June, which is now very near at hand, in the way of allocating this stock, leaving the question, however, entirely open, whether after the 1st of May, at all events, or whether after any particular date that may be selected by the petitioners, the directors were entitled by the allocation of this stock to increase the number of shareholders of the company?

LORD DEAS—The petition before us is a petition for the winding-up of the Scottish Brush Electric Lighting and Power Company, and it appeared in the course of the discussion that no objection is made by that company to liquidation; on the contrary, they were themselves contemplating voluntary liquidation. It appeared also in the course of the discussion that the whole question between the parties was whether that liquidation should take place upon one date or another, and in particular whether it should take place on the 17th of May or at the 30th of June. It was said that the reason of that dispute about the date arose out of the way in which the date might affect the allotment of shares. There appeared to be two questions thus raised—in the first place, whether the avoiding the allotment of the shares was a reason for directing a winding-up order at all, and, in the next place, if it was, whether if it should be directed to take place, any disadvantages would arise if it took place on the day which was suggested. Therefore the whole question is, Is there any necessity for the liquidation proceeding at all as from that day? I think the way in which your Lordship proposes to meet the case is the right and proper way, and I entirely acquiesce in it, and therefore I have nothing more to add in addition to what has been stated by your Lordship.

LORD SHAND—I agree with your Lordships in thinking that this application for a judicial winding-up order of this company ought to be refused.

There is admittedly no question here as to the interests of creditors, which will be fully provided for, because the company is in circumstances of prosperity, and there will be a large surplus of assets after meeting all the claims of creditors. The petitioners are shareholders of the company, and when we come to examine into their position we find it to be, not merely or even mainly that they desire that the company shall be wound up, but that they seek to have the commencement of the liquidation as at the 17th of May, in order to secure advantages to themselves as in a question with the other partners of the company. If this order were pronounced, there can be no doubt that they would secure one advantage, viz., that it would no longer be in the power of the direc-

tors to allocate certain stock of the company which is still unallocated and yet in their hands. After the winding-up order had been pronounced I do not see that it would be possible for the directors by allocating the unallocated stock in their hands to affect the status of the partners, but it may be they might secure another very important advantage, because if the liquidation were to take place as at the date of this petition, on the 17th of May, it might be very questionable whether the directors would be able to found upon any allocation letters issued after that day, as giving effect to the allocations which took place on the 17th of May. The question that arises is, whether the petitioners have shown that it would be just and beneficial that this winding-up order should date back to the 17th of May, and if they, the petitioners, had therefore presented a case which came within the clauses of the Companies Acts, which provides that the Court may order a winding-up where they think it just and beneficial, their position might have been better. But I am of opinion, that seeing that the whole purpose which is to be served by making the order as of that date is to give one set of shareholders of this company a substantial advantage over the others, it is not just and beneficial that that order should be pronounced. It appears as matter of fact that this company is still carrying on business. There are a number of contracts which it is in the course of fulfilling. No doubt these contracts are being fulfilled now, under the arrangement with the New Company that the profit or loss in connection with these shall ultimately be the concern of the New Company. Notwithstanding, I think the company is still carrying on business, although it may be a limited business in that respect, but still it is the business they were entitled to carry on until the day fixed by their agreements, viz., the 30th of June. And that being so, it seems to me to be premature to give a winding-up order as at the 17th of May.

I am further of opinion with your Lordship, that seeing that the object of this petition is really to give one set of shareholders an advantage over the others in the question whether there is or is not a power to allocate these unallocated shares—and that is the sole purpose of the petition—the petitioners have failed to show any ground for granting the winding-up order asked. And I also agree with what your Lordship has said as to whether the allocation of shares can be proceeded with effectually, or whether the Anglo-American Company have a good right to object to that allocation? All that, I think, is open and unaffected by anything that has taken place, and the directors are to be left free to proceed in that matter, leaving to the Court to say how far their proceedings are valid and effectual.

The Lords refused the petition with expenses.

Counsel for Petitioner—Robertson—Pearson.
Agents—Bruce & Kerr, W.S.

Counsel for Respondents—Mackintosh—
Lorimer—Dickson. Agent—Thomas Dowie,
S.S.C.

Friday, June 23.

SECOND DIVISION.

(Before Lord Justice-Clerk Moncreiff, Lords
Craighill and Rutherford Clark.)

[Sheriff of Lanarkshire.

GRIEVE v. LYNN.

*Bill of Exchange—Payment for Honour—Proof
prouit de jure.*

A third party paid the sum contained in a bill to an endorsee after it was due, the bill being endorsed to him for value, but without recourse against the endorser. He did no diligence on the bill for a year, in the course of which the acceptor became bankrupt. In an action at the holder's instance against the drawer for payment of the sum contained in the bill, the Court *allowed* the latter a proof *prouit de jure* of an averment as to the footing on which the holder had acquired the bill, and particularly that he had paid it for the honour of the acceptor, and not, as the pursuer averred, for the honour of both the drawer and acceptor.

Henry Grieve, clothier, Glasgow, presented a petition in the Sheriff Court of Lanarkshire at Glasgow, in which he prayed the Court to ordain James Lynn, coal merchant there, to pay him the sum of £50 sterling, with interest thereon, as the amount of a bill payable a month from its date, viz., 5th October 1880. The pursuer averred that the defender had drawn the bill upon Alexander Lynn, residing at Pollockshields, and the said bill was duly accepted by Alexander Lynn. The defender had endorsed the bill for value to the Commercial Bank of Scotland, who in turn had endorsed it also for value to the pursuer, but without recourse against the said bank. The acceptor of the bill failed to pay it at maturity on the 8th November 1880, and the defender was bound to have retired it at that time. He further averred that he was still the endorsee and holder for value of the bill, and although he had called upon the defender to retire it the latter had refused.

In reply the defender made the following averments—He was anxious to assist his brother Alexander Lynn, who had begun business in Glasgow under the firm or company name of the Clyde Paper Stock Company, and accordingly he arranged with his brother that the sum of £50 should be raised for his use by means of an accommodation bill to be discounted with the Commercial Bank of Scotland, Rutherglen. The bill founded on by the pursuer was accordingly granted, and discounted with the said bank, and the proceeds handed to Alexander Lynn for his use in this business. About the beginning of November 1880 Alexander Lynn assumed John Wilson, accountant, Glasgow, as a partner in his business, and immediately thereafter, in connection with the business, he went to America, leaving instructions with his partner to pay the bill on his behalf when it fell due. Shortly after the bill fell due, the pursuer, who was either a partner with John Wilson, or had money transactions with him, and also with Alexander Lynn, on account of which he desired to support the credit