the particular circumstances of this case I think it should be granted. I have come to be of this opinion, because I am satisfied from the pleadings that the parties had not their ideas focussed upon the point on which this new evidence is desired, and in particular that the position taken up by the pursuer in his pleadings was not such as to put the defenders in negligence in not having made such inquiries as should have brought to light the book in question. The action is one of interdict directed against road trustees, and founded on an alleged interference with the lands occupied by the pursuer by discharging on to them the surface water from a public road. It is answered that the trustees have a statutory right to do so, and that they have always done so. Mr Christie has argued that inasmuch as when you look at the statute tabled in answer you there find an exception to the right in favour of lands being the site of a house or garden, it is necessary for the party pleading the statute to exclude the exception. I do not think that is so. Where a party tables a right under a statute, and the provision in that statute is qualified by an exception, it is for the other party to show that he comes within the exception. I am dealing here only in popular language with the effect of these pleadings. The parties here went to proof, the proof was concluded, but was not technically closed, because a commission was granted to examine two aged witnesses. It was at this commission that for the first time questions were asked which raised this point as to the land in question having been the site of a house or garden, and upon the answers given by these witnesses the Sheriff has practically decided the case. It was at this point that the new document was discovered. I think that in the circumstances a fair case has been made out for allowing the document to be put in. Upon what terms this is to be allowed is another matter; I think that should be left over until we hear the case. I am therefore for allowing the admission of the document in question along with the necessary evidence as to its authenticity and reliability, reserving the question of the expenses of this note.

LORD M'LAREN—When this application was made, I suggested that it came within the scope of the principle of *res noviter*, and though my suggestion was not accepted by counsel, I think the principle is wide enough to apply not only to the admission of new facts, but to the admission of evidence to meet a new point of contention not previously raised in the case. Be that as it may, this is a matter for the discretion of the Court, and must be decided upon the principles which are applicable to *res noviter*. No doubt it would be easier to admit new evidence after proof was closed but before argument. Here not only has the proof been closed but debate and judgment have followed, and it is a difficult case for the exercise of that discretion, and one which I should not like to be looked upon as a precedent. But still all that is asked is that a document very pertinent to the case should be admitted, and I think the document should be admitted with of course that amount of evidence which is necessary to prove the document.

LORD KINNEAR—I agree with your Lordship in the chair. I think the reasons which your Lordship has given are sufficient for the decision of this case. I therefore think that we may admit this document, but I wish to reserve my opinion as to any other question which has been raised.

LORD PEARSON concurred.

The Court pronounced this interlocutor—

"The Lords having considered the note for the appellants and heard counsel for the parties, open up the proof: Allow the defenders and appellants to put in evidence the bound volume of estate plans mentioned in the note, and allow the defenders and appellants a proof as to the authenticity and reliability thereof, and to the pursuer a conjunct probation: Grant diligence at the instance of both parties for citing witnesses and havers: Appoint the proof to proceed before Lord Pearson at such time and place as his Lordship shall fix, reserving the question of expenses."

Counsel for the Pursuer (Respondent)—J. R. Christie. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for the Defenders (Appellants)—Macmillan. Agents—Bryson & Smart, S.S.C.

Tuesday, February 2.

SECOND DIVISION.

THE EDINBURGH AMERICAN LAND MORTGAGE COMPANY, LIMITED *v.* CLELAND AND OTHERS.

Company — Scheme of Arrangement — Debenture Holders — Company not in Liquidation, and Able to Pay Creditors—Alteration of Security for Debentures—Opposition by a Minority—Joint Stock Companies Arrangement Act 1870 (33 *and* 34 *Vict. cap.* 104), *sec.* 2—*Companies Act* 1900 (63 *and* 64 *Vict. cap.* 48), *sec.* 24—*Companies Act* 1907 (7 *Edw. VII, cap.* 50), *sec.* 38.

The Companies Act 1907, sec. 38, makes applicable to companies not in course of being wound up the Joint Stock Companies Arrangement Act 1870, which, by sec. 2, provides that where any compromise or arrangement is proposed between a company in course of being wound up and its creditors (or, under the Companies Act 1900, sec. 24, its members), the Court may order a meeting of such creditors or class of

creditors, and if a scheme of arrangement is approved by a majority in number representing three-fourths in value of those present in person or by proxy at such meeting, and if such scheme be sanctioned by the Court, it shall be binding.

An investment company which under its memorandum of association had power to borrow to the extent of its subscribed but uncalled and unpaid capital, and had issued debenture stock under an agreement with trustees, terminable debentures, and deposit receipts to that amount, proposed, with the object of getting rid of the liability on the company's shares, to alter its borrowing power. It presented a petition setting forth a proposed scheme of arrangement whereby the borrowing power of the company was to be eighty per cent. of its issued capital plus the amount of its reserve funds, and craving the Court to order meetings of the different classes of holders of debentures and shares, and to sanction the scheme if approved by the necessary majorities at such meetings. The scheme also contained extensive alterations on the company's powers of investment. The meetings having been held and the scheme approved thereat, a small minority of the holders of debenture stock, and also a small minority of the holders of terminable debentures lodged answers opposing it. They objected to the alteration of their security, and maintained that there was no precedent for forcing a minority to accept a scheme which they considered to their detriment, in the case, as here, of a very successful company having, moreover, power to pay off if it chose the objecting minority upon terms specified in the deed of trust, that the reasons which would induce the Court to sanction a scheme of arrangement in the case of a company being wound up although it might be opposed by a minority were inapplicable where the company was successful and not being wound up, and the scheme must therefore be judged upon other grounds, and should in this case not be sanctioned. The company having dropped the proposal as to the alteration of its power of investment, maintained that the question of solvency or insolvency of the company was irrelevant, the Companies Act 1907 having extended the powers under the Joint Stock Companies Arrangement Act 1870, sec. 2, to all companies.

The Court *sanctioned* the scheme as amended.

Per Lord Low — "Notwithstanding, however, the very large support that was given to the scheme as originally proposed, if it had not been for the modifications which have been made, I should have thought the objections stated here for the respondents very formidable."

The Joint-Stock Companies Arrangement Act 1870 (33 and 34 Vict. cap. 104) enacts—Section 2—"Where any compromise or arrangement shall be proposed between a company which is in the course of being wound up, either voluntarily or by or under the supervision of the Court under the Companies Acts 1862 and 1867, or either of them, and the creditors of such company or any class of such creditors, it shall be lawful for the Court, in addition to any other of its powers, on the application in a summary way of any creditor or the liquidator, to order that a meeting of such creditors or class of creditors shall be summoned in such manner as the Court shall direct, and if a majority in number representing three-fourths in value of such creditors or class of creditors present either in person or by proxy at such meeting shall agree to any arrangement or compromise, such arrangement or compromise shall, if sanctioned by an order of the Court, be binding on all such creditors or class of creditors, as the case may be, and also on the liquidator and contributories of the said company."

The Companies Act 1900 (63 and 64 Vict. cap. 48) enacts—Section 24—"The provisions of section 2 of the Joint-Stock Companies Arrangement Act 1870 shall apply not only as between the company and the creditors or any class thereof, but as between the company and the members or any class thereof."

The Companies Act 1907 (7 Edw. VII, cap. 50) enacts—Section 38—"The Joint-Stock Companies Arrangement Act 1870 shall apply to a company which is not in the course of being wound up, in like manner as it applies to a company which is in the course of being wound up, as if in that Act references to the Court having jurisdiction to wind up the company were substituted for references to the Court, and references to the liquidator were omitted therefrom, and references to the company were substituted for references to contributories of the company."

On 18th December 1908 the Edinburgh American Land Mortgage Company, Limited, presented a petition craving the Court to order that separate meetings of (1) holders of terminable debentures and deposit-receipts of the company, (2) holders of debenture stock, (3) holders of preference stock, (4) holders of ordinary shares, £1 fully paid, and (5) holders of ordinary shares of £5 each, £1 paid, be summoned to consider, and if so advised, to agree to a scheme of arrangement therein set forth; and if approved at such meetings by majorities, of three-fourths in value, of the persons present either in person or by proxy, to pronounce an order sanctioning such scheme of arrangement.

The company had been registered under the Companies Acts 1862 and 1867 on 11th September 1878, and the capital was £500,000 divided into 100,000 shares of £5 each.

The memorandum of association set forth the objects of the company, *inter alia*—"III (1) The receiving of money by way of loan not exceeding in amount such part of the sub-

scribed capital as should at any time remain uncalled and unpaid, including the creation and issue of debenture stock and the granting of deposit-receipts, bonds, debentures, debenture stock certificates, or other documents therefor to the lenders. . . . (2) The lending of money and making advances of money repayable with interest at fixed times, or by instalments, or by way of terminable annuity or otherwise, upon the security of heritable real estate situated in the United States of America or in the Dominion of Canada, and also the investing to the extent of one-half of the subscribed paid-up capital, and according to the discretion of the directors, any reserved fund in and upon public funds, stocks, or first-class convertible securities in Great Britain, United States, or in the Dominion of Canada. (3) The purchasing, acquiring, holding, transferring, selling, disposing of, and dealing in all or any of the mortgages and securities on which the loans and advances by or on behalf of the company are made, and all or any of the lands and properties taken in security of such loans and advances, and the performing of all operations in connection therewith."

Debenture stock to the amount of £144,770 was issued in terms of an agreement dated 15th October 1895 between the company and Sir James Alexander Russell, Woodville, Edinburgh, and another, as trustees for the debenture stockholders. The agreement provided, *inter alia*—"*Second*, The gross amount of debenture stock, and of terminable debentures and deposit-receipts, issued or to be issued by the company, shall at no time exceed the amount which the company may borrow under and in virtue of its memorandum and articles of association: Declaring always that the borrowing power of the company shall not be extended or widened unless by agreement with the trustees duly authorised as provided in article 30th hereof. . . . *Fifth*, At Martinmas 1905, or at any time thereafter, the company shall have right to redeem the debenture stock of the first issue, or any part thereof, on giving not less than six calendar months' notice to the holders thereof, at the price of £105 for every £100 of stock. In the event of the company exercising the option to redeem part only of an issue of debenture stock, it shall do so by determining the stock to be redeemed by drawings to be made to the satisfaction of the trustees. . . . *Sixth*, That in any of the following events, viz.: (1) If an order shall be made by a court of competent jurisdiction for winding-up the company; or (2) if an effective resolution be passed by the shareholders for winding-up the company; or (3) if default be made for one calendar month in payment of the interest on the debenture stock, or any part thereof, and if the debenture stockholders in meeting assembled, as hereinafter provided, shall, after the expiry of said period, and while such default continues, resolve to call up such debenture stock, then, and in any of these events, the nominal amount of the debenture stock registered in the name of each debenture stockholder will forthwith become payable, with the interest thereof until paid, but save as aforesaid the principal sum of such debenture stock shall not be repayable by the company, nor shall it be called up or be demandable by the holders thereof. . . . *Twenty-first*, These presents are entered into by the trustees as representing the debenture stockholders, and the obligations undertaken by the company under these presents shall accordingly be enforceable, not only in name of and at the instance of the trustees, but unless otherwise provided at the instance of each individual debenture stockholder so far as regards his own individual interest, and in particular and without prejudice to the said generality each and every debenture-stockholder shall be entitled to enforce periodical payment of the interest due to him, and also of the principal amount of the stock held by him in all or any of the events mentioned in article sixth. . . . *Thirtieth*, These presents may at any time be added to, cancelled, or modified by a supplementary agreement or agreements to be executed by the company and the trustees, the latter being first authorised to execute the same by a resolution of the stockholders passed by a majority of not less than three-fourths of the debenture stockholders present in person or by proxy at a meeting specially convened to consider such resolution. . . ."

The petition set forth—"By the Edinburgh American Land Mortgage Company, Limited Act 1897, the directors were authorised, *inter alia*, from time to time, by resolution, to offer to the holders of the ordinary shares or their nominees the option of paying up an aggregate specified amount in advance of calls on such shares, and to accept the amount so paid in pursuance of such option, and to convert same into preference stock to be issued rateably to the said holders or their nominees, paying up such amounts according to the amounts paid by them respectively, and carrying a cumulative preferential dividend at the rate and from the date specified in such resolution, and to be held subject to such conditions, if any, as should be specified in the said resolution, and the nominal amount of each such ordinary share should be reduced by a sum equal to the amount so paid thereon.

"The directors, in exercise of such power, have, from time to time, given the shareholders the opportunity of paying up the £4 per share uncalled capital upon their shares, such amount, when paid, being converted into cumulative preference stock carrying dividend at the rate of 4¼ per cent. The holders of 7450 shares have availed themselves of such offers, and in terms of said Act the shares when so paid up have been divided into 7450 shares of £1 fully paid, and the £4 per share has been converted into £29,800 4¼ per cent. cumulative preference stock.

"The issued capital of the company now amounts to 67,550 shares of £5 each, £1 paid, 7450 shares of £1 each, fully paid, and £29,800 4¼ cumulative preference

stock, amounting in all to £375,000, of which £270,200 is still uncalled. . . .

"The memorandum of association limits the borrowing power to such part of the subscribed capital as shall at any time remain unpaid and uncalled, and consequently at the present moment the borrowing power amounts to the sum of £270,200. The directors have availed themselves of this power to the extent of £270,200, the sum of £125,430 being borrowed upon terminal debentures and deposit-receipts, and the sum of £144,770 by the issue of debenture stock.

"The company has proved very successful, and dividends varying from 5 per cent. to 7½ per cent. have been paid regularly.

"The company has accumulated a reserve fund, which now amounts to the sum of £37,000, and various sums have also from time to time been set aside as a special reserve fund for the purpose of meeting the expenses of the rearrangement of the capital as after proposed. This special reserve fund now amounts to £10,500.

"For some time past there has been a strong feeling on the part of many shareholders of the company that the existence of the liability upon the shares was detrimental to their interests, and also that if the uncalled capital were to be paid up the borrowing power of the company should be altered and the company's powers of investment extended. . . ."

The scheme of arrangement set forth, with certain alterations (printed in italics) subsequently suggested, was: — "1. That the borrowing power of the company be increased to *eighty per cent. of* the amount of the issued capital of the company for the time being, *plus the amount of the Reserve Funds at the time of borrowing*, and that for this purpose the objects of the company be altered by deleting from sub-section (1) of section III of the memorandum of association of the company the words 'not exceeding in amount such part of the subscribed capital as shall at any time remain uncalled and unpaid,' and substituting therefor the words 'not exceeding *eighty per cent. of* the nominal amount of the issued capital for the time being, *plus the amount of the Reserve Funds at the time of borrowing*."

"2. That the objects of the company also be altered to the following effect:—(1) By deleting the following words in sub-section (2) of section III of the memorandum of association, viz.—'And also the investing to the extent of one-half of the subscribed paid-up capital, and according to the discretion of the directors, any reserved fund in and upon public funds, stocks, or first-class convertible securities in Great Britain, the United States of America, or in the Dominion of Canada,' and substituting therefor the following words—'And the purchasing, investing in or upon, or otherwise acquiring, holding, selling, pledging, charging, disposing of, and dealing in all or any of the securities or investments following, *videlicet*—bonds, mortgages, debentures, debenture stock, scrip, assets, obligations or securities, and the shares or stocks, preference, ordinary or deferred, and whether fully paid-up or not, of any company, person, firm, corporation or trust carrying on, or formed to carry on, business in the United Kingdom of Great Britain and Ireland, or India, or any British colony or dependency, or in the United States of America, or any foreign country or state, or in the shares, stocks, bonds, debentures, obligations, scrip, or securities of any British, colonial, or foreign Government or authority, supreme, municipal, local or otherwise.' (2) By inserting after sub-section (2) of section III of the memorandum of association the following section to be numbered sub-section 2*a*—'The purchasing or otherwise acquiring the whole or any part of the goodwill, business, property, and assets, and undertaking the liabilities of any person or company carrying on any business which this company may legally carry on, or possessed of property suitable for the purpose of this company, and the paying for same in cash or in bonds, debentures, debenture stock, or other acknowledgments of debt or stock or shares of the company, or partly in each of such modes.'

"3. That in respect of the increase of the borrowing power the holders of debenture stock should be paid a bonus in cash out of the special reserve fund at the rate of £2, 10s. for every £100 of stock held by them.

"4. That in respect of said increase of the borrowing power the interest presently payable on the outstanding terminable debentures and deposits of the company be increased by one-quarter of 1 per cent. per annum, from 11th November 1908 till the respective dates of maturity of such debentures and deposits. . . . . .

"7. That the directors be authorised to assent to any modification or alteration of this scheme, or to any conditions which the Court may think fit to approve or impose, and on the scheme being approved, with or without modification, to enter into all such deeds, and to take all steps requisite with the view of having same carried fully into effect.

"8. That the sanction of the Court to this scheme shall be sufficient authority to the company, and the trustees, under an agreement, dated 15th October 1895, between the company *of the first part*, and Sir James Alexander Russell of Woodville, Edinburgh, and Graham Gilbert Watson, Writer to the Signet, Edinburgh, as trustees therein mentioned, *of the second part*, to enter into a supplementary agreement, modifying the said agreement to the effect of extending or widening the borrowing power of the company as provided in this scheme."

On 18th December 1908 the Court pronounced an interlocutor ordering meetings of the various classes of share, stock, and debenture holders, as specified in the petition, to be held on 8th January 1909, and appointing Gilbert Graham Watson, the chairman of the company, to preside at the meetings and to report the result to the Court.

On January 9th 1909 Mr Watson reported, *inter alia*, that at each of the said meetings the scheme of arrangement was submitted, and at each of the said meetings the following resolution was submitted:—"That the scheme of arrangement dated 17th December 1908 submitted to this meeting with the following modifications [*v. portions in italics, supra*], viz.—By inserting after the word 'to' occurring on the first line of clause I of the scheme the words 'eighty per cent. of'; by inserting after the word 'being' occurring on the second line of said clause the words 'plus the amount of the reserve funds at the time of borrowing'; by inserting after the word 'exceeding' occurring on the second last line of said clause the words 'eighty per cent. of'; and by adding at the end of said clause the words 'plus the amount of the reserve funds at the time of borrowing,' . . . be and the same is hereby approved and agreed to, and the board of directors be and is hereby requested to take all necessary steps to obtain the sanction of the Court of Session to the scheme with the said modifications, and any further modification, alteration, or addition which the Court may think fit to approve or impose, and afterwards to carry out and give effect to the said scheme as sanctioned:" that at the meeting of holders of debentures and deposit-receipts, the voters in favour of the scheme present in person or by proxy numbered 108, representing £60,474, 7s. 9d. in value, and those against numbered eleven, representing £5144, 17s. 4d. in value; that at the meeting of holders of debenture stock the voters in favour of the scheme present in person or by proxy numbered eighty-eight, representing £68,174, 14s. 10d. in value, and those against numbered thirty-two, representing £15,985 in value; that at the meeting of holders of preference stock forty were present in person or by proxy representing £17,660 in value, and were all in favour; that at the meeting of holders of ordinary shares of £1 fully paid, thirty-eight were present in person or by proxy representing 5743 shares, and were all in favour; and that at the meeting of holders of ordinary shares of £5 each, £1 paid, 101 were present in person or by proxy representing 47446 shares, and were all in favour.

On January 21st 1909 answers to the petition were lodged by (1) Mrs Sophia Lang Cleland and others, holders of debenture stock to the amount of £10,574, 4s. 3d.; and (2) Patrick Edward Campbell and others, holders of terminable debentures amounting to £7894, 17s. 4d., and maturing at various dates between 15th May 1909 and 15th May 1913.

The respondents averred — "(Ans. 3) Under the company's memorandum and its Act of 1897, its power of borrowing was limited to the amount of its subscribed capital so far as uncalled and unpaid. On the other hand, its power of investment was confined to lending money on the security of heritable real estate situated in the United States of America or in the Dominion of Canada—the only exception being that to the extent of one-half of the subscribed paid-up capital and of its reserved fund it might invest 'in and upon public funds, stocks, or first-class convertible securities in Great Britain, the United States of America, or in the Dominion of Canada.' The other and minor objects of the company were not of such a nature that they could result to any material extent in increasing the company's indebtedness. (Ans. 4) The position thus substantially was that the company could have no creditors except the persons lending money to it, and that as against their claims the company held either loans secured over heritable estate in the United States of America or Dominion of Canada, or cash to at least the full amount of these creditors' claims; while the creditors had as additional security—(1) the uncalled capital of the company to an amount at least equal to the full amount of their claims; and (2) such investments of a high class as the company might select for one-half of its paid-up capital and for its reserved fund. The respondents, therefore, were satisfied that the security for their loans to the company was of the most solid and undoubted character, and they made their loans to the company in the full and justifiable expectation that said security for their loans would not be impaired. . . . (Ans. 6) Under the scheme now proposed the security of the respondents for their loans to the company would be materially altered in character, and in the opinion of the respondents most seriously impaired. The alteration consists not only in increasing the company's borrowing powers, and thus of necessity diminishing the respondents' security, but in entirely changing the nature of the company's investments and business. Under the proposed scheme the company, instead of being limited to lending on heritable security in the United States or Canada, and investing a small part of its assets in the high class of securities already described, would be entitled to lend its whole assets without any security whatever to any company, person, firm, corporation or trust resident or carrying on business of any description in any part of the world. It would further be entitled to invest its whole assets in the ordinary or even deferred shares, 'whether fully paid-up or not,' of any such company, firm, corporation, or trust. The value of the company's assets might thus be enormously diminished, and the extent of its obligations indefinitely increased. (Ans. 7) The result of such alterations would be all the more serious to the respondents, as they hold no special security from the company, but are simply unsecured creditors. The respondents would never have taken the debenture stock or debentures of a company with such objects as the petitioners now propose to have. In these circumstances it would be inequitable that the respondents should be compelled to continue creditors of the company if its conditions were so materially altered as it would be by the proposed scheme. . . . (Ans. 9) The

respondents further maintain that the petition is incompetent, and ought to be dismissed for the following among other reasons:— . . . (*c*) because the amended scheme now proposed is materially different from that which the meetings were called to consider, and may in certain events affect the debenture holders more injuriously; (*d*) because no meeting of the holders of debenture stock has been specially convened to consider a resolution to authorise the trustees to modify in the manner now proposed said agreement under which said stock was issued, and the proposed alteration of the company's borrowing powers would therefore be in direct breach of said agreement. . . . ."

The petitioners lodged replies to the answers, in which they expressed their willingness that the powers of investment should remain unaltered, and that the scheme be modified by deleting clause 2, and craved the sanction of the Court to this modification.

The replies further stated—"6 and 7 . . . (2) The main purpose of the scheme is to get rid of the liability presently attaching to the ordinary shares. Incidentally to this end it is necessary to alter the borrowing powers of the company, at present limited to the amount of the uncalled capital; and the scheme as passed provides that said borrowing powers should be limited to 80 per cent. of the amount of the issued capital of the company for the time being, plus the amount of the reserve funds at the time of borrowing. When the debenture stock was issued the capital of the company was £361,925, and the borrowing power of the company was £288,000, equal to 80 per cent. of the issued capital. Under the scheme it will be £300,000, and £47,500 of reserve, equal to 80 per cent. of the issued capital, plus the amount of the reserve funds, at present amounting to £47,500. The petitioners submit that capital paid up and invested as assets of the company is, as a security, more reliable than capital still remaining uncalled in the hands of the shareholders, and for the slight increase in the amount of the borrowing powers, the sum to be paid to the stockholders and the additional interest to be given to the holders of debentures is a full and sufficient consideration for any alteration in the security. 9. . . . (*c*) The petitioners refer to the terms of the notice calling the statutory meetings, and also to the forms of proxy as approved by the Clerk of Court, from which it is plain that modification of the scheme was contemplated and authorised. The said modifications in place of being prejudicial are in fact in the interests of the holders of debentures and debenture stock. (*d*) The petitioners refer to the said agreement, which is produced herewith."

Argued for the respondents—(1) The scheme proposed involved the acceptance by the respondents of a security different from that which they contracted for. There was no authority for forcing a minority of creditors to accept a security different from that which they had contracted for if the company was able to pay all its creditors in full. Where a company was in liquidation the position was entirely different, and the reasons which would influence the Court to sanction the scheme were different. The chief reason, of course, then was that the minority of creditors must agree to a sacrifice in order to save something from the wreck. That reason did not exist here. The Companies Act 1907 (7 Edw. VII, c. 50) sec. 38, might have made arrangements possible where a company was not in liquidation, but it did not follow that such arrangements should be approved wherever they would have been approved in the case of a company in liquidation. It did not matter whether the alteration in the security prejudiced the creditors or not, but the respondents would in fact be prejudiced by the scheme. The security which they contracted for consisted of the investments of the company in a limited class of security, the reserve fund and the uncalled capital, while under the scheme their security might be entirely investments in American land. The case of *Gillies* v. *Dawson*, February 4, 1893, 20 R. 1119, relied on by the petitioners, had no application to the case of a company which was able to pay all its creditors in full. (2) Further the scheme could not be sanctioned without violating the agreement with the trustees for the debenture stock holders. That agreement contemplated only alteration in the borrowing power within the memorandum of association and not alteration of the memorandum. Besides the terms of section 30 of the agreement had not been complied with, because the meeting was not summoned to consider a resolution authorising the trustees to alter the agreement. The agreement could not be affected by supervenient legislation, and the Companies Act 1907, therefore, did not apply. There was no good reason why the scheme should be sanctioned, because the alteration might be effected by paying out those creditors who did not agree to the alteration of their security. In any event, this scheme being different from the scheme the meetings were called to consider, should not be sanctioned.

Argued for the petitioners—(1) The purpose of the Companies Act 1907 was to extend to all companies the benefit of provisions formerly available only to companies in liquidation. The question of solvency or insolvency was irrelevant, for the Act of 1907 merely removed the necessity for going into liquidation in order to carry out a scheme of arrangement. Prior to the Act any company could effect that by going into liquidation. In considering whether a scheme ought to be sanctioned the Court would keep in view (*a*) whether the statutory requirements had been complied with; (*b*) whether the class of creditors summoned to the meeting were fairly represented by those who attended, and whether the majority were acting *bona fide* in the interests of the class whom they represented; and (*c*) whether the proposed

scheme was such as a man of business would reasonably approve—in *re Alabama, New Orleans, &c., Railway Company*, [1891] 1 Ch. 213; *Gillies* v. *Dawson, cit.* The only question here could be whether the scheme were such as a business man would reasonably approve, and it was submitted that it was. It had been approved by a large majority of all the parties interested in the success of the company. It was no answer that a minority of creditors would thus be forced to accept a security of which they did not approve—in *re Alabama, New Orleans, &c., Railway Company, cit.; Liquidator of the Melville Coal Company* v. *Clark*, July 2, 1904, 6 F. 913, 41 S.L.R. 715. (2) The meeting of debenture stockholders had been called for the purpose of considering the scheme, and that involved the authorisation of the trustees to amend the agreement so as to give effect to the scheme. The agreement had therefore been complied with, assuming that it was necessary for the petitioners to do so. The possibility of modification of the scheme was referred to in the scheme itself and in the notices and proxies, and was therefore brought to the notice of the parties interested.

LORD LOW—In this case I think all the statutory requirements have been fully complied with, so we have no difficulty upon that ground. In the next place, it is important to notice that the scheme which the Court is asked to sanction, even as originally proposed, received the approval of all classes interested in the affairs of the company. These classes were the holders of terminable debentures and deposit-receipts, the holders of debenture stock, the holders of preference stock, and the holders of two classes of ordinary shares. There was no objection to the scheme at all except upon the part of the holders of terminable debentures and debenture stock, and the number of objectors, and the amount of stock held by them was comparatively small. I observe from the report of the meeting that the holders of terminable debentures and deposit-receipts who voted in favour of the scheme were 108 in number, whereas there were only eleven who voted against the scheme, and these represented only a little over £5000, while those voting in favour of it represented over £60,000. In like manner the holders of debenture stock who voted in favour of the scheme numbered 88 and represented £68,174, and those who voted against were 32 in number and represented £15,985, so that the majority in favour of the scheme was much larger than that required by the statute. Further, I see no reason to doubt that the interests of the debenture-holders were properly and fairly represented.

Notwithstanding, however, the very large support that was given to the scheme as originally proposed, if it had not been for the modifications which have been made I should have thought the objections stated for the respondents here very formidable, but I think the modifications which the company have now made have removed all the serious objections to the scheme. Its true object was to get rid of the large uncalled liability attaching to the shares, and by the modifications which the company have made upon the original scheme there is just as little alteration made upon the position of the debenture-holders as is consistent with having the capital called up instead of four-fifths of it being uncalled. I am satisfied that the security for the debentures will not be prejudiced, while as the proposal is one which is likely to be for the benefit of the company, it is incidentally in favour of the debenture-holders. I have no doubt that it is a proposal which (to take the test which was laid down in the *Alabama* case, [1891] 1 Ch. 213) a reasonable business man might be expected to approve of.

Accordingly I think that your Lordships ought to sanction the scheme as amended.

LORD ARDWALL—I am of the same opinion. Sufficient majorities have been secured in terms of the Acts, and I am not much impressed with the difficulty said to arise upon the trust deed, because there a three-fourths majority in value is all that is required, while with regard to the provision that a meeting is to be called expressly for the purpose when alterations are to be made in the relations of holders of debenture stock to the company, I think that has been sufficiently complied with. It seems to me that that is really a frivolous objection—to say that a separate meeting should be called for considering each separate resolution of a proposed reconstruction scheme seems absurd.

Coming to the real question here, there is no doubt that it is, as Mr Stewart said, very much matter of opinion whether the debenture holders have better security with the uncalled capital for which shareholders of unknown solvency are liable, or with the same amount actually invested in mortgages or other similar securities. I do not think the one being substituted for the other can be viewed as a change really detrimental to the interests of the debenture holders. Then again, there is undoubtedly an increase in the borrowing powers of the company, but I think that is fairly met by the proposal to give the debenture holders the proposed bonus of fifty shillings per cent. and the holders of terminable debentures a quarter per cent. more interest. Then we have the increased powers of investment, which I do not think can injure the debenture holders to any extent. A few of the debenture holders compearing in this process seem to think that they are in an adverse position to the shareholders of the company. Now of course it is the shareholders—the ordinary and preference shareholders—of the company on whom any detriment will first fall in case of misfortune happening to this company, and to suggest that this is a scheme propounded by the shareholders which will injure or may injure or is intended to injure the company, and through it the holders of debentures and debenture stock, is to talk

something very like nonsense, because the shareholders are the very persons who will first suffer if the company is injured in any way. I suppose the real origin of the respondents' position is, as Mr Hunter seemed to indicate in his closing remarks, that these debenture holders wished to be paid out at 105 per cent. Now I do not think that is a very legitimate object. It is in the option of the company to pay off these debentures at that figure, but I do not see why the Court should impose on the company as a whole an obligation to do so as a condition of sanctioning this scheme. As amended, it is, I think, a scheme that ought to be approved of.

LORD DUNDAS—I also think that the scheme as now amended is one that we ought to sanction, and I do not desire to say anything more.

The LORD JUSTICE-CLERK was absent.

The Court sanctioned the scheme as amended at the bar by the deletion of clause 2 thereof.

Counsel for the Petitioners — Graham Stewart, K.C. — Lord Kinross. Agents — Guild & Shepherd, W.S.

Counsel for the Respondents—Hunter, K.C.—Chree. Agents—Gordon, Falconer, & Fairweather, W.S.—Cadell, Wilson, & Morton, W.S.—Graham, Johnston, & Fleming, W.S.—Robert Lawson, W.S.

Thursday, February 4.

SECOND DIVISION.

(SINGLE BILLS.)

NORTH BRITISH RAILWAY COMPANY *v.* BUDHILL COAL AND SANDSTONE COMPANY.

(Reported *ante* November 24, 1908, 46 S.L.R. 178.)

Expenses — Appeal to House of Lords — Appeal Lodged but Petition not Presented or Order for Service Made — Decree Granted under Caution for Repetition.

Defenders who had been successful both in the Outer and in the Inner Houses, and found entitled to expenses, moved for approval of the Auditor's report and for decree in name of the agents disbursers. Prior to the motion the pursuers had appealed to the House of Lords, but owing to the House being in vacation their petition of appeal had not been presented, nor had an order for service been pronounced.

The Court *granted* the decree craved subject to caution being found for repetition in the event of the appellants succeeding, or the House pronouncing any order disentitling them to the expenses in question.

The case is reported *ante ut supra.*

On 14th December 1906 the North British Railway Company brought an action against the Budhill Coal and Sandstone Company concluding, *inter alia*, for declarator that the defenders had no right to remove the sandstone from certain lands belonging to the pursuers. On 22nd June 1907 the Lord Ordinary (DUNDAS) dismissed the action and found the defenders entitled to expenses. The pursuers reclaimed to the Second Division, who on 24th November 1908 adhered and found the defenders entitled to additional expenses.

After the defenders' account of expenses had been remitted to the Auditor, but prior to approval of his report, the pursuers lodged a petition of appeal to the House of Lords. On 4th February 1909 the defenders moved for approval of the Auditor's report and for decree for the taxed amount of expenses in name of the agents disbursers. At that date, owing to the House of Lords being in vacation, the petition of appeal had not been presented, nor had any order for service been pronounced. The pursuers opposed the motion.

Argued for pursuers—As the case was under appeal to the House of Lords, decree for expenses should not be granted at present. In any event such decree should only be granted on caution being found for repetition in the event of the appeal being successful.

Argued for defenders—As the case was not removed from the Court of Session, until the petition of appeal was presented and an order for service pronounced in the House of Lords, execution could not be stayed, and the defenders were entitled to the decree craved. The mere lodging of the petition did not remove the case from the Court of Session — *Edinburgh Northern Tramways Company* v. *Mann*, October 16, 1891, 19 R. 24, 29 S.L.R. 51.

LORD JUSTICE-CLERK—A matter of this kind is of course entirely in the discretion of the Court. The difficulty in this case arises from the fact that the petition of appeal has been lodged but has not been presented, and no order for service has been pronounced owing to the House of Lords being in vacation. Exercising our discretion, I think the right course is to give the decree asked for by the defenders, subject to caution being found for repetition in the event of the judgment being reversed, or any other order being pronounced by the House of Lords which would have the effect of disentitling the defenders to these expenses.

LORD LOW, LORD ARDWALL, and LORD DUNDAS concurred.

The Court pronounced this interlocutor—

"The Lords approve of the Auditor's report on the defenders' account of expenses: Ordain the pursuers to make payment to the defenders of the sum of nine hundred and ninety-five pounds four shillings and sixpence (£995, 4s. 6d.) sterling, the taxed amount thereof, but that only on caution being found to the