G. A. FALLIS AND D. M. DEACON .....APPELLANTS; 1962 *Dec. 6, 7, 11

AND

UNITED FUEL INVESTMENTS, LIMITED ..... RESPONDENT. 1963 **June 24

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Companies—Petition for winding-up order—Resolution of common shareholders—Whether preference shareholders entitled to notice of meeting and a vote—Whether a discretion in the Court to refuse order—Winding-up Act, R.S.C. 1952, c. 296, s. 10(b)—Companies Act, R.S.C. 1952, c. 53, s. 101.

Pursuant to a resolution of the common shareholders of the respondent company that the company be wound up under the provisions of the *Winding-up Act*, R.S.C. 1952, c. 296, a petition was made for a winding-up order. A notice of the meeting at which the resolution was passed had been sent to the common shareholders but not to the holders of class "A" and class "B" preference shares. The petition was rejected by the trial judge solely on the ground that although only the common shareholders were given voting rights by the letters patent, this did not govern a special meeting of shareholders under s. 10(*b*) of the *Winding-up Act* and that all shareholders, preferred as well as common, were entitled to notice and to vote at the meeting.

The Court of Appeal allowed an appeal from this decision and in an unanimous judgment held that the preference shareholders were not entitled to a notice of the meeting and a vote, that the special meeting of shareholders referred to in s. 10(*b*) was simply a special general meeting of the shareholders within the meaning of s. 101 of the *Companies Act*, R.S.C. 1952, c. 53, and, hence, the holders of non-voting preference shares were not entitled to notice or to vote. It was also held that where a majority of the common shareholders have passed a resolution under s. 10(*b*), any discretion the Court may have to refuse a winding-up order should not be exercised unless it can be shown that the action of the majority shareholders was fraudulent or equivalent to bad faith. Subject to this, the right to decide that a company should be wound up rests with the majority shareholders. By leave of this Court, an appeal was brought from the winding-up order made by the Court of Appeal.

Held: The appeal should be dismissed.

The Court agreed with the judgment of the Court of Appeal that the preference shareholders were not entitled to notice of the meeting and a vote. The submission that there exists in the Court an equitable jurisdiction which in the circumstances of this case should be exercised against the winding-up order failed. The Court has some discretionary power to refuse an order under all subsections of s. 10 with the exception of subs. (*a*), but where was such a discretion to be found on the application of a preferred shareholder who did not want to be redeemed? Redemption is a normal incident of preference shares. It

*PRESENT: Kerwin C.J. and Taschereau, Martland, Judson and Ritchie JJ.

**Kerwin C.J. died before delivery of judgment.

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was true that the "B" shares in contrast to the "A" shares were not redeemable in the ordinary sense. It was also true that they resulted from a reorganization. But the "B" shareholders were really trying to tell the company that in its prosperity it must carry on indefinitely because of their right to participate in the common dividends. A dismissal of the petition would inevitably be an affirmation of this position and would put upon the letters patent a construction that they could not bear, namely, that there could be no winding-up without the consent of the "B" shares.

Symington v. Symington (1905), 13 Sc.L.T. 509; *Loch v. John Blackwood Ltd.*, [1924] A.C. 783, distinguished; *Castello v. London General Omnibus Co.* (1912), 107 L.T. 575, distinguished and disapproved.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of McLennan J. dismissing a petition for a winding-up order. Appeal dismissed.

B. J. MacKinnon, Q.C., and *B. A. Kelsey*, for the appellants.

A. S. Pattillo, Q.C., and *D. J. Wright*, for the respondent.

The judgment of the Court was delivered by

JUDSON J.:—This is an appeal by two shareholders of the respondent company from a winding-up order made by the Court of Appeal[1] under s. 10(*b*) of the *Winding-up Act*, R.S.C. 1952, c. 296, pursuant to a resolution of the common shareholders of the company requiring the company to be wound up. The appellants are the holders of class "B" preference shares of the company. They were granted leave to appeal by this Court on March 16, 1962.

United Fuel Investments Limited was incorporated in 1928 under the provisions of the *Companies Act*, R.S.C. 1927, c. 27, for the purpose of acquiring and operating natural and other gas systems and participating in the management and operation of companies with similar undertakings. Immediately after its incorporation it acquired two subsidiaries by the purchase of all the issued shares of these companies. These companies were United Gas Limited and Hamilton By-Product Coke Ovens Limited. The first was a distributing company and the second was a company producing manufactured gas which it sold to the distributing company. I will refer to these three companies

[1] [1962] O.R. 162, 31 D.L.R. (2d) 331.

from now on as the holding company, the distributing company and the manufacturing company.

At incorporation the capital structure of the holding company was as follows:

	Authorized	*Issued*
Preferred shares, 6 per cent cumulative redeemable $100 par value	250,000	90,000
Common shares no par value	250,000	100,000

All the issued shares, 90,000 preferred and 100,000 common, were issued to a firm of investment dealers for a price of $8,250,000. The preferred shares were sold to the public and the investment dealer retained the 100,000 common shares. These shares, in 1930, it sold to Union Gas of Canada, hereinafter referred to as "Union Gas". This was a large company engaged in Western Ontario in the distribution and production of natural gas.

As there were 100,000 common shares and only 90,000 preference shares, which only had a vote after four quarterly dividends were in arrear, the control of the holding company was always vested in the holders of the common shares. Because of competitive conditions in the Hamilton area from another company, Dominion Natural Gas Company Limited, neither the distributing company nor the producing company prospered as they might otherwise have done. The result was that Union Gas, as controlling company, the distributing company and Dominion Natural Gas made an agreement to provide for the reorganization of the business, capital and affairs of the holding company. It is unnecessary to go into more detail about this inter-company agreement but in these reasons the reorganization of the capital structure of the holding company is important and it is necessary to deal with it in some detail.

The reorganization was approved by order of the Court on January 17, 1939, and embodied in supplementary letters patent dated February 7, 1939. Before its approval, the arrears of dividends on the preference shares amounted to $37. The holder of each 6 per cent preference share of the par value of $100 received as a result of the reorganization:

(i) 1 6 per cent cumulative redeemable class "A" preference share, par value $50;

(ii) 1 non-cumulative class "B" preference share, par value $25;

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(iii) a dividend of $2 cash per share, in full payment of $37 in accrued and unpaid dividends.

The preference shareholders gave up as a result of this reorganization:

(a) a capital amount of $25 per share, a total of $2,250,000;

(b) arrears of dividends of $35 per share, a total of $3,150,000, or a total of $5,400,000.

The following table shows the capital of the holding company before and after reorganization:

Before reorganization		*After reorganization*	
100,000 common shares no par value	$ 100,000	90,000 common shares, without nominal or par value	$ 50,000
90,000 preference shares, $100 par value	$ 9,000,000	90,000, 6 per cent cumulative redeemable class "A" preference shares of the par value of $50 each	$ 4,500,000
		90,000 non-cumulative class "B" preference shares of the par value of $25 each	$ 2,250,000
	$ 9,100,000		$ 6,800,000

I have set out these figures in detail because the obvious disparity between the concessions made by the preference shareholders and the common shareholders is urged by counsel for the appellants as a ground for the refusal of the winding-up order. But this reorganization was worked out in 1937 and 1938 and approved by the Court after full consideration in 1939, (*Re United Fuels Investments Limited*[1]). The dissenting vote was only about one-fortieth of the issued preference shares and the opposition on the motion for approval came from one individual, who did point out that the common shareholders were giving up very little.

I am concerned here with the rights of the holders of the class "B" preference shares on this reorganization. These rights and their inter-relation with the rights of the class

[1] [1939] O.W.N. 52, 1 D.L.R. 779.

"A" preference shares are set out in the supplementary letters patent as follows:

Clause (*a*) provides for a 6 per cent cumulative preferential dividend on the class "A" shares and for the non-payment of any dividends on the class "B" and common shares until all arrears of the class "A" shares have been paid.

Clause (*b*) provides for dividends on the class "B" and common shares in these terms:

(*b*) Subject to the rights of the holders of the Class "A" Preference Shares, the moneys of the Company properly applicable to the payment of dividends which the Directors may determine to distribute in any fiscal year of the Company by way of dividends shall be distributed among the holders of the Class "B" Preference Shares and the Common Shares pro rata according to the number of Shares held.

Clause (*c*) provides for the priorities of the class "A" shares on a liquidation, dissolution or winding-up, gives them an additional $10 per share if the winding-up is voluntary, and denies further participation in the assets.

Clause (*d*) then deals with the rights of the class "B" shares in the same events in these terms:

(*d*) Subject to the rights of the holders of Class "A" Preference Shares the holders of Class "B" Preference Shares shall have the right on the liquidation, dissolution or winding-up of the Company or other distribution of assets of the Company among Shareholders (other than by way of dividends out of moneys of the Company properly applicable to the payment of dividends) to repayment of the amount paid up on such Shares, and if such liquidation, dissolution, winding-up or distribution be voluntary, to an additional amount equal to $5 per Share before the holders of any of the Common Shares or any other Shares of the Company junior to the Class "B" Preference Shares shall be entitled to repayment of the amounts or any part thereof paid up on such Common Shares or other junior Shares or to participate in the assets of the Company, but the holders of the said Class "B" Preference Shares shall not have the right to any further participation in the assets of the Company.

Clause (*e*) provides for purchase in the market of both the class "A" and class "B" shares at certain prices in these terms:

(*e*) The Company, pursuant to Resolution of the Board of Directors, may at any time purchase in the market the whole or from time to time any part of the Class "A" Preference Shares outstanding at a price not exceeding $60 per Shares and unpaid cumulative dividends and costs of purchase, or of the Class "B" Preference Shares outstanding at a price not exceeding $30 per Share and Costs of purchase. From and after the date of purchase of any Class "A" Preference Shares or Class "B" Preference Shares under the authority in this paragraph contained, the Class "A"

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Preference Shares or Class "B" Preference Shares so purchased shall be deemed to be redeemed and shall be cancelled.

Clauses (*f*), (*g*) and (*h*) provide for the redemption of the class "A" shares at $60 per share on notice.

Clause (*i*) gives the class "A" shares a right to elect 2 directors if 8 quarterly dividends are in arrears and then deals with the voting rights of both class "A" and class "B" shares in these terms:

> Save as aforesaid, no holder of Class "A" Preference Shares shall have any right to vote at or receive notice of any Annual or Special General Meetings of the Company. No holder of Class "B" Preference Shares shall have any right to vote at or receive notice of any such meetings.

It will be seen that the class "A" shares are redeemable both by purchase and on notice. The class "B" shares are only redeemable by purchase. The only other way of paying them off is on a winding-up. The class "A" shares have but limited voting rights and the class "B" shares have none at all unless, as McLennan J. held, they have a right to vote on a winding-up.

When the arrangement was submitted to the shareholders a letter was sent by the President of Union Gas (the controlling company) which held the 100,000 common shares (he was also the President of United Fuels, the holding company) with the following explanation:

> From the foregoing and from the enclosed memorandum it will be seen that the proposed arrangement is not primarily a re-organization of capital as between the preferred and common shareholders but is a joint agreement by both classes of shareholders to give up certain rights in order to terminate a disastrous competitive situation with Dominion in the City of Hamilton.
>
> The carrying out of the agreement will enable United Gas to control and extend the sale and distribution of all gas now served in the Hamilton area . . .
>
> Under the proposed arrangement, the preferred shareholders will have a preference on dividends to the approximate amount earned on the average during the past ten years. However, their participation in earnings will not be limited as at present because, through the medium of the new Class "B" shares, the preferred shareholders are also enabled to participate equally share per share with the common shareholders in any further distribution made possible by increased earnings.

I will not concern myself any further with the history of the class "A" shares but between 1942 and 1945, United Fuels (the holding company) purchased for cancellation

20,311 class "B" shares, leaving outstanding 69,689 of these shares.

In July 1960, Union Gas, the controlling company, made an offer both to the class "A" and class "B" shareholders. I am not interested in the terms of the offer to the class "A" shareholders. They were redeemable on notice. The offer to the class "B" shareholders was two and a half common shares of Union Gas plus $2.50 for one United Fuel class "B". Ninety-eight per cent of the class "A" shareholders accepted but only 68 per cent of the class "B" shareholders accepted. The following table shows the particulars of the acceptances, the offer having remained open according to its terms until September 30, 1960:

	Shares Outstanding	*Shares Exchanged*	*Shares not Exchanged*
Class "A"	90,000	86,814	3,186
Class "B"	69,689	47,222	22,467

Then followed the winding-up proceedings. Union Gas requisitioned the summoning of a meeting for November 8, 1960, to pass a resolution to wind up the company. The company then sent out a notice to the common shareholders but not to the remaining class "A" or class "B" shareholders. Only the common shareholders attended and voted. The vote of the common shareholders was as follows: 89,920 votes for to 8 votes against, with 8 shares not voting. Of the "yes" votes, 89,906 were cast by Union Gas or its nominees. United Fuel then petitioned the Court under s. 10(*b*) of the *Winding-up Act* for a winding-up order. McLennan J. rejected the petition solely on the ground that although only the common shareholders are given voting rights by the letters patent, this does not govern a special meeting of shareholders under s. 10(*b*) of the *Winding-up Act* and that all shareholders, preferred as well as common, were entitled to notice and to vote at the meeting. The Court of Appeal took a different view. It was a unanimous judgment delivered by Schroeder J.A. They held that the preference shareholders were not entitled to a notice of the meeting and a vote, that the special meeting of shareholders referred to in s. 10(*b*) is simply a special general meeting of the shareholders within the meaning of s. 101 of the *Companies Act* and, hence, the holders of non-voting preference shares were not entitled to notice or to vote.

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They also held that where a majority of the common shareholders have passed a resolution under s. 10(*b*), any discretion the Court may have to refuse a winding-up order should not be exercised unless it can be shown that the action of the majority shareholders was fraudulent or equivalent to bad faith. Subject to this, the right to decide that a company should be wound up rests with the majority shareholders.

I agree with the judgment of the Court of Appeal that the preference shareholders were not entitled to notice of the meeting and a vote, and I have nothing to add to the reasons of Schroeder J.A. The main ground of appeal was that there exists in the Court an equitable jurisdiction, which in the circumstances of this case should be exercised against the winding-up order. The common shareholders submit that once they show a resolution of shareholders passed at a meeting properly called and conducted, they are entitled to a winding-up order or, in the alternative, if there is a discretion in the Court to refuse the order, it is exercisable only on very narrow grounds, which do not exist here.

Sections 10 and 13 of the *Winding-up Act* read:

10. The court may make a winding-up order,

(*a*) where the period, if any, fixed for the duration of the company by the Act, charter or instrument of incorporation has expired; or where the event, if any, has occurred, upon the occurrence of which it is provided by the Act or charter or instrument of incorporation that the company is to be dissolved;

(*b*) where the company at a special meeting of shareholders called for the purpose has passed a resolution requiring the company to be wound up;

(*c*) when the company is insolvent;

(*d*) when the capital stock of the company is impaired to the extent of twenty-five per cent thereof, and when it is shown to the satisfaction of the court that the lost capital will not likely be restored within one year; or

(*e*) when the court is of opinion that for any other reason it is just and equitable that the company should be wound up.

13. The court may, on application for a winding-up order, make the order applied for, dismiss the petition with or without costs, adjourn the hearing conditionally or unconditionally, or make any interim or other order that it deems just.

I am satisfied that there is some discretionary power under all the subsections with the exception of subs. (*a*).

If the charter has expired or the specified event has occurred a winding-up order must follow the application. There are, however, minor examples of the exercise of discretion under subss. (*b*), (*c*) and (*d*). There is a line of cases, beginning in 1894 and ending in 1918, set out in the footnote*, where the assets of an insolvent company were being administered under the *Assignments and Preferences Act*. The Courts asserted a jurisdiction to reject a creditor's petition for a winding-up order, even where the insolvency was clear, because the application was contrary to the wishes of the majority of the creditors and against convenience and economy in the administration of the assets.

Shareholders' petitions have been dismissed in cases apparently within the purview of the Act on the ground of triviality of interest and regard for the wishes of the majority.‡ I merely mention these cases in order to put them on one side, for they afford no help in this problem.

Nor do I think that *Symington v. Symington*[1] and *Loch v. John Blackwood Ltd.*[2], strongly relied upon in the respondent's submission, deal with this particular problem. These were concerned with the "just and equitable" subsection. Before they were decided it had been held in England that the "just and equitable" item was merely intended to include cases of the same kind as those covered in previous items of the section, (*In re Suburban Hotel Company*[3]). *Symington v. Symington* and *Loch v. John Blackwood Ltd.* deny this rule of construction and give subs. 10(*e*) an independent operation which has been widely recognized in a variety of situations. But this independent recognition of the scope of subs. 10(*e*) does not involve, as counsel for the respondent submitted, the denial of a "just and equitable jurisdiction" under subss. (*b*), (*c*) and (*d*).

The oddity of this case is that a winding-up order is

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* *Wakefield Rattan Co. v. Hamilton Whip Co.* (1894), 24 O.R. 107; *Re Maple Leaf Dairy Co.* (1901), 2 O.L.R. 590; *In re Strathy Wire Fence Co.* (1904), 8 O.L.R. 186; *Re Charles H. Davis Co. Limited* (1907), 9 O.W.R. 993; *Re Olympia Co.* (1915), 25 D.L.R. 620 (Man.); *Marsden v. Minnekahda Land Co.* (1918), 40 D.L.R. 76 (B.C.).

‡ *In re London Suburban Bank* (1871), L.R. 6 Ch. App. 641; *In re Middlesborough Assembly Rooms Co.* (1880), 14 Ch. D. 104; *Re The Tomlin Patent Horse Shoe Co. Ltd.* (1886), 55 L.T. 314.

[1] (1905), 13 Sc. L.T. 509. [2] [1924] A.C. 783.

[3] (1867), L.R. 2 Ch. App. 737.

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sought for a very prosperous company. It was doing well until 1957 but with the bringing of natural gas into the area served by the company, a period of increasing prosperity and expansion began. The future looks very bright. The class "B" shareholders wish to retain their position and share in this prosperity with the common shareholders. The common shareholders wish to wind up the company and pay the class "B" shareholders off in accordance with the terms of the supplementary letters patent. The class "B" shares, with their right to participate in dividends, have some of the attributes of common shares but they are undoubtedly preference shares with defined rights on a winding-up.

The claims of the class "B" shareholders may be summarized as follows:

(*a*) That to the extent of their right to participate in dividends, they are in the same position as the common shareholders and should not be eliminated from the company. They assert a right to the continued existence of this company.

(*b*) That their sacrifices on the reorganization assured the continued existence of the company.

(*c*) That during the period 1947 to 1957, the company retained in the business for the purpose of expansion out of earnings the sum of $3,800,308. These earnings, if the company had not chosen to retain them, would have been available for the declaration of dividends to the "B" and common shareholders. A winding-up will deprive them of any participation in this accumulation.

The "B" shareholders also question the reason given by the common shareholders for the winding-up. Union Gas, the common shareholder, says that there is now no reason to continue United Fuel as a holding company with only one subsidiary. In 1959, because of the available supply of natural gas, the Coke company was sold. The result of a winding-up order will be to put all the assets of the holding company and its subsidiary distributing company into Union Gas after payment of all claims. There will undoubtedly be some saving and convenience of administration if this is done.

The "B" shareholders answer that this is not the true reason. United Fuel, the holding company, began as a company distributing gas as a result of the operations of two subsidiaries. It is still in the business of distributing gas through the operation of one subsidiary. This one subsidiary, instead of buying manufactured gas from another subsidiary, is buying it from an independent source, Ontario Natural Gas Storage, which happens to be a wholly owned subsidiary of Union Gas.

We have, therefore, on one hand an allegation of a "freeze-out"; on the other, a submission that convenience of administration justifies the winding-up, and that in any event, the common shareholders are entitled to wind it up. I think the material discloses a good deal of substance in the allegations of the class "B" shareholders concerning the reasons for winding up this company but does this make any difference? They are holders of preference shares. It is true that they are not redeemable by notice but there has always been the right to buy the shares for cancellation and there has always been what, to me, is a clear provision in the constitution of the company for their prior payment on a winding-up and a premium if the winding-up is voluntary.

What does voluntary winding-up mean in these supplementary letters patent? It appears in the conditions relating to the preference shares and the common shares. In a Canadian context it must include a petition based on a shareholders' resolution under s. 10(*b*), for the Canadian Act, in contrast to the English Act, does not recognize any winding-up outside the Act.

Therefore, when the reorganization was put through in 1939, the rights of the "B" shareholders were clearly ascertained. They were subject to redemption on a voluntary winding-up. The supplementary letters patent contemplated the possibility of a voluntary winding-up. It appears very doubtful whether in 1939 anyone thought of a voluntary winding-up because of prosperity but that cannot alter the meaning of the charter of the company.

I assume that Union Gas is exercising its right, as the common shareholder of this company, to wind up the company in its own self-interest and for convenience and economy of administration. Can a preference shareholder

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who wants the company to continue prevent this being done?

Where can one find a discretion to refuse a winding-up order on the application of a preference shareholder who does not want to be redeemed? It is a normal incident of preference shares that they are subject to redemption. It is true that the "B" shares in contrast to the "A" shares are not redeemable in the ordinary sense. It is also true that they resulted from a reorganization. But the "B" shareholders are really trying to tell the company that in its prosperity it must carry on indefinitely because of their right to participate in the common dividends. A dismissal of the petition would inevitably be an affirmation of this position and would put upon the supplementary letters patent a construction that they cannot bear, namely, that there can be no winding-up without the consent of the "B" shares. This is asking the Court to do what a shareholders' committee might well have tried to do at the time of the reorganization, if it had been able in 1938 to foresee conditions in 1958. If the company has the right to wind up now, as I think it has, the motives which were so strongly emphasized by counsel for the "B" shareholders have no relevance. Whenever a company chooses to redeem preference shares according to their terms, it is wasting time and effort unless the motive is self-interest.

Counsel for the class "B" shareholders relied on certain authorities in the United States relating to the dissolution of solvent, prosperous corporations. These cases are: *Theis v. Spokane Falls Gaslight Co.*[1]; *William B. Riker & Son Co. v. United Drug Co.*[2]; *In re Paine*[3]; *In re Doe Run Lead Co.*[4]; *In re Security Finance Co., Rouda v. Crocker*[5]. Without going into details, these cases are all concerned with a common problem, an attempt of a majority of common shareholders to get the assets of the corporation into

[1] (1904), 74 Pac. 1004; 34 Wash. 23 (Wash. C.A.).

[2] (1912), 82 A. 930 (N.J.C.A.).

[3] (1918), 166 N.W. 1036 (Mich. C.A.).

[4] (1920), 223 S.W. 600 (Mo. C.A.).

[5] (1957), 317 P. 2d 1 (Calif. C.A.) at p. 5.

another corporation in which they alone are interested and the minority is not, and to pay off the minority common shareholders in cash. This is an entirely different problem from the right to wind up for the purpose of redeeming preference shares.

The dangers inherent in the use of dissolution procedure in such a case are obvious. The first is that the assets may be sold by the majority to themselves under the cloak of a new corporation at an unfair price and the second is the denial to the minority of the opportunity to participate.

I am not overlooking the case of *Castello v. London General Omnibus Co. Ltd.*[1], referred to in the reasons for judgment of the Court of Appeal. In that case the Court of Appeal in England refused to restrain a sale of assets to another company exclusively owned by the majority in the old company and compelled the minority in the old company to take a cash payment. It is true that the cash payment was, on its face, a very generous one but the shareholders did not want cash. They wanted to stay with the company instead of being paid off. The case is referred to with approval in the judgment of the Court of Appeal but it is not the present case and I do not think it should receive approval in this Court. As far as I can see, it has never been referred to in any English or Canadian text and has never been judicially noticed either in England or in Canada.

I would dismiss the appeal with costs, including the costs of the application for leave to appeal.

Appeal dismissed with costs, including the costs of the application for leave to appeal.

Solicitors for the appellants: Wright & McTaggart, Toronto.

Solicitors for the respondent: Blake, Cassells & Graydon, Toronto.

[1] (1912), 107 L.T. 575.