Thursday, December 2.

FIRST DIVISION.

THE LAWSON SEED AND NURSERY COMPANY (LIMITED) AND LIQUIDATORS *v.* PETER LAWSON & SON (LIMITED).

Public Company—Winding-up—Voluntary Liquidation—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 129.

A limited company is absolutely entitled, after taking the procedure required by the Companies Acts, to resolve that it cannot, by reason of its liabilities, continue its business, and that it ought to go into voluntary liquidation, and thereafter to have the same put under the supervision of the Court; and it is therefore incompetent and irrelevant for a creditor, when the supervision order is craved, to oppose it, and to petition for a recal of the resolution to wind up, on the ground that under a contract with the company he has valuable rights which it is truly the object of the liquidation to defeat.

The Lawson Seed and Nursery Company (Limited) was, on 2d January 1873, incorporated under the Companies Acts 1862 to 1867 to carry on the business of nurserymen and seedsmen.

In 1884 a provisional agreement was entered into between the company, first parties, and Thomas M'Laren, S.S.C., on behalf of the firm of Peter Lawson & Son, second party, whereby certain provisions were made on the narrative that the first parties were proprietors or owners of the nursery stock situated at Bangholm and Warriston, Windlestrawlee, Golden Acre, Granton Road, and certain plants at Broomhill, near Edinburgh, and also of the general seed stocks, fixtures, fittings, implements, and office furniture in the premises occupied by them as aforesaid, and that they had entered into certain contracts to have seeds supplied to them, and that it was proposed to form a company under limited liability to be called Peter Lawson & Son (Limited) for the purpose of (1) acquiring from The Lawson Seed and Nursery Company (Limited) their right, title, and interest in the premises; (2) purchasing the general seed stock, fixtures, fittings, office furniture, books, and implements belonging to The Lawson Seed and Nursery Company (Limited), with their interests in the contracts and goodwill of the seed business; (3) the management and realisation of the nurseries at Bangholm, Warriston, Windlestrawlee, Golden Acre, and Broomhill; and (4) the collection and realisation of all debts due to The Lawson Seed and Nursery Company (Limited)." The proposed company of Peter Lawson & Son (Limited) was thereafter formed on the basis of the agreement. The agreement provided that The Lawson Seed and Nursery Company should give Peter Lawson & Son (Limited) a lease of the business premises in Edinburgh and Leith, and transfer to them the seed stock and fittings, and by the seventh article it was provided that "the said company" [Peter Lawson & Son (Limited)] "shall manage and realise, on behalf of the first parties" [The Lawson Seed and Nursery Company (Limited)], "and subject to their direction and control, the said nurseries situated at Bangholm and Warriston, and clear off the remaining stocks of plants at Windlestrawlee, Golden Acre, and Broomhill, and pay the proceeds, as these are received, to the first parties. The said first parties shall pay all nursery rents, taxes, wages, and other expenses connected with the said nurseries, including the wages of all parties employed with approval of the first parties exclusively in the nurseries, but the said company shall pay all other expenses of management. The said company shall be entitled to deduct from the proceeds realised a commission of five per cent. for their trouble, but declaring that this commission shall be payable only on trade sales by private sale or public sale, and not on a sale of the nursery stock as a whole, should that be carried out by the first parties, who reserve full power at any time to dispose of the nursery stock in bulk or as a whole. But in the event of the said company finding a purchaser for the said nurseries as a whole, other than themselves, to the satisfaction of the first parties, the said company shall be entitled to a commission of five per cent. on the purchase price." By the eighth article of the agreement it was provided—"The said company shall, subject to the direction and control of the first parties, collect the whole of the book-debts due to the said first parties (and for which they shall receive a remuneration of five per cent. on the amount collected), and shall pay the same on collection to the said first parties."

This agreement was recorded in the Books of Council and Session. The agreement was in operation from the formation of the new company of Peter Lawson & Son (Limited) till the proceedings now reported were taken in 1886.

Questions having arisen in that year about the management, and about the right of The Lawson Seed and Nursery Company (Limited) in consequence of their dissatisfaction therewith to appoint a manager at the nurseries and on other matters, the directors of The Lawson Seed and Nursery Company (Limited) resolved on 16th October to call an extraordinary general meeting with a view to a winding-up voluntarily.

This meeting was duly called and held, and the following extraordinary general resolutions were adopted:—"That the company was unable to continue its business, and that it was advisable to wind it up voluntarily; that Messrs George Todd Chiene and John Scott Tait be appointed liquidators; and that the liquidators should, if and when they found it expedient to have the voluntary liquidation of the company continued subject to the supervision of the Court, concur in applying to the Court for a supervision order."

Accordingly a petition praying for a supervision order was presented to the Court, with consent and concurrence of the liquidators.

The petitioners stated that they desired a supervision order so as to avoid difficulties which they anticipated through the separate action of creditors.

Peter Lawson & Son (Limited) lodged answers. They referred to the agreement quoted above, stated that the right it gave them to manage the business, collect the debts, and receive commission thereon was an important consideration to them in making the agreement, that they had paid considerable sums in connection

with working the agreement, that the petitioners were endeavouring to defeat it, and that this was a device to get rid of it by a liquidation and to start a new company free of it, to the great loss and damage of Peter Lawson & Son (Limited). They further alleged that the object of the present application was not only to defeat the agreement, but to deprive them of their just rights under the same; that the petitioning company was perfectly solvent, and had no creditors who were pressing for payment; that they (respondents) were satisfied that if the provisional agreement was worked out according to its true intent sufficient debts would be recovered to pay its liabilities; and that if the object of the liquidation was to realise the estate, they, the respondents, had a right to effect that realisation, and to get paid for their trouble in terms of the agreement.

The respondents also presented a counter petition craving the Court, as The Lawson Seed and Nursery Company had not agreed to wind up for any good and sufficient reason, but simply to get rid of the agreement by which they were bound, to recal and rescind the resolutions to wind up, and find and declare that it was unjust, or at least that it was inexpedient, to have passed them.

Sec. 129 of the Companies Act 1862 provides that "a company under this Act may be wound up voluntarily . . . . whenever the company has passed an extraordinary resolution to the effect that it has been proved to their satisfaction that the company cannot by reason of its liabilities continue its business, and that it is advisable to wind up the same."

Argued for the petitioners—Creditors could never intervene to stop a voluntary winding-up. The 129th section of the Companies Act 1862 left that matter entirely in the discretion of the company itself. Here the petitioners desired a supervision order because of the questions which had arisen with the respondents, who were in possession of the books, and to such an order they were absolutely entitled under the statute.

Argued for the respondents — The petitioners were barred from presenting this application by the terms of the agreement. Impliedly they had renounced the right to be wound up under the statute. They had agreed to a form of voluntary winding-up other than the statutory form, viz., that the respondents should have the duty and benefit of conducting the winding-up. The respondents had, for that right to wind up the petitioning company, paid a full price. The right of the respondents under the agreement was higher than that of a mere creditor; it was that of an administrator. This was just an attempt to destroy the respondents' administration. The respondents' petition for recal of the resolution was, no doubt, unprecedented, but it was competent in the circumstances, the whole matters in dispute being before the Court.

At advising—

Lord President—The petitioners here are The Lawson Seed and Nursery Company (Limited) and the liquidators of that company. At an extraordinary general meeting of the company held on 29th October 1886 an extraordinary resolution was adopted to the effect "that it has been proved to the satisfaction of The Lawson Seed and Nursery Company (Limited) that the company cannot by reason of its liabilities continue its business, and that it is advisable to wind up the same," and that the company should be wound up voluntarily. Liquidators were named, and they were instructed to apply to the Court, when they found it expedient, for a supervision order. This petition is simply to carry out the terms of the resolution.

In matters of this sort the jurisdiction of the Court is somewhat limited. If such a resolution as this has been come to in the regular way there is scarcely any question as to the granting of the order here craved. I can understand *shareholders* coming forward and objecting on various grounds, such as that the resolution had not been competently gone about, that there had been want of notice, or failure to proceed in proper form. They might also be heard to say that if the liquidation was to proceed it would be more expedient that it should be under the supervision of the Court than that it should be voluntary. But if a *creditor* comes forward to say that his rights are prejudiced by the company going into liquidation at all, I think that such a statement is wholly irrelevant. It is possible that creditors of a certain class may be prejudiced by a company going into liquidation. They might make more of their claims if they did not. But that is altogether irrelevant. One can easily figure the case of a continuing contract, where the continuation of the company is indispensable to the creditors making the most of the contract, but that is not a relevant consideration.

What the respondent company—Peter Lawson & Son (Limited) — state is simply this, that they are in right of a contract to manage the affairs of The Lawson Seed and Nursery Company, and to collect its debts, receiving a commission upon the proceeds realised. They also say that they have the right to wind it up. It is quite possible that the creditors may have an interest adverse to winding-up, but that is no objection to a liquidation, whether voluntary or not. That being so, I think the course adopted of presenting a petition for having the extraordinary resolution rescinded is absolutely incompetent. It is admitted to be entirely unprecedented. I can see no authority or principle for it, and it must be refused. The only question which remains is, whether the liquidation shall remain voluntary or whether it shall proceed under the supervision of the Court. As regards that question, the opposing creditors say that they have no interest, if there is to be a winding-up, at all. On these grounds I think that

---

MacCredie's Trustees v. Lamonds, *ante*, p. 114.

The Reporters are informed by the Defenders, with reference to Part II. of this report (being that part which states the decision of the Lord Ordinary on certain deductions claimed by the defenders, which did not require to be dealt with by the Inner House), that the defenders did not, as stated on p. 117 of the report, acquiesce in his Lordship's decision on these points, but that, after the interlocutor was reclaimed against, the questions between the parties as to these deductions were compromised by the pursuers agreeing to allow certain deductions.

we have a plain duty to perform, and that is to grant the supervision order.

LORD MURE—The petitioners ask for a supervision order in pursuance of an extraordinary resolution which was adopted in accordance with the provisions of the 129th section of the Companies Act of 1862. The third sub-section of that section enacts that "whenever the company has passed an extraordinary resolution to the effect that it has been proved to their satisfaction that the company cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up the same," a voluntary winding-up may proceed. The advisability of the measure is thus left to the company, and the Court has no jurisdiction to review the opinion which the company may form. It cannot judge of it apart from the rest of the proceedings. That being so, the application for a supervision order is opposed, and a counter-petition is presented calling upon the Court to rescind the extraordinary resolution. But we have no jurisdiction to do this—it is not competent—and accordingly there is no reason why the supervision order should not be granted.

LORD SHAND—If the respondents had any good grounds for challenging this resolution it appears to me that they should be presented in an action of reduction, and not in such a form as we have here. The resolution is *inter socios*—it is come to by the shareholders, in the management of the company's affairs, and the statute clearly provides that if the company is satisfied of its inability to carry on its business, and of the advisability of winding it up, it may resolve so to do. If such a resolution is passed it must be acted upon until rescinded in some competent way, and accordingly if the Court is asked in accordance with that resolution to grant a supervision order, I am of opinion that it must be granted. It certainly must be granted in a question with outsiders—such as the respondents here—unless reduced. I therefore take it that as there is no such action here, the petition for rescinding the resolution must be refused, and the answers to the petition for a supervision order cannot be entertained.

But I go further. Even if both petition and answers could be considered, I am of opinion that there is no title to present this counter petition or to put in those answers; and even if there was a title, that there were no reasonable grounds stated.

There is no title, for, looking to the agreement, this company is nothing but a creditor. It is true that an arrangement was made by which it was to manage the affairs of the old company and wind it up at the close. But the whole interest of the new company to do this is to earn commission. Is a creditor having an adverse interest to the winding-up to have a right to step in and say that the company shall not be wound up because he would be prejudiced? The Court cannot look at such a claim.

Further, we are told that the company has bound itself to be wound up by the respondents, and when we ask where is the agreement, we are told that it is not express, but that it is implied. I should be very slow to find implied an agreement so extraordinary by which a company binds itself not to avail itself of the Companies Acts under which it was constituted, but here I find nothing suggesting such an agreement.

LORD ADAM concurred.

The Court granted the supervision order.

Counsel for Petitioners—H. Johnston. Agents—Mackenzie & Kermack, W.S.

Counsel for Respondents—Balfour, Q.C.—M'Kechnie. Agents—T. & W. A. M'Laren, W.S.

Thursday, December 2.

FIRST DIVISION.

COMMERCIAL BANK OF SCOTLAND (LIMITED) *v.* LANARK OIL COMPANY (LIMITED).

Public Company—Winding-up—Companies Act 1862 (25 *and* 26 *Vict. c.* 89), *sec.* 80, *sub-sec.* 1 *—Security to "the reasonable satisfaction of the creditor."*

A creditor holding a security over the heritable property (consisting of part of its works) of a limited company, having demanded payment as provided in sec. 80 of the Companies Act 1862, and remaining unpaid, presented a petition for a winding-up order, alleging that the company was unable to pay its debts. *Held* that it was not a good answer by the company that the apparent value of the security greatly exceeded the debt, unless it could also be shown that it was truly a marketable security for the amount of the debt.

The Lanark Oil Company (Limited) was on the 3d August 1883 incorporated under the Companies Acts 1862 to 1880. The amount of the shares was by the beginning of 1886 fully called up, and there was then no uncalled capital belonging to the company.

This was a petition by the Commercial Bank for a winding-up order, on the ground that the company was unable to pay its debts. The company had borrowed money from the bank under a cash-credit bond and assignation in security over the works and property of the company, duly recorded, whereby the company was bound, conjunctly and severally with the other obligants in the bond, to pay the principal and interest to the bank at any time when the same should be demanded after three months from the last date of the bond.

At 26th August 1886 the company owed under this cash-credit a balance of £10,000, 7s. 10d., conform to certificate by the accountant of the bank as stipulated in the bond, as well as £567, 0s. 10d. of interest. On 30th September the bank served a demand on the company requiring payment. Payment was not made. It was in respect of this debt, and of an alleged debt of £1000, constituted by a promissory-note in favour of the company, of which the bank alleged that they were indorsees and onerous holders, that the petition was presented.

The 80th section of the Companies Act 1862 provides, sub-section (1)—"A company under this Act shall be deemed to be unable to pay its debts (1) whenever a creditor by assignment, or otherwise, to whom the company is