Tuesday, November 20.

SECOND DIVISION.

MITCHELL AND OTHERS *v.* RAWYARDS COAL COMPANY (LIMITED).

Public Company—Voluntary Winding-up—Petition for Supervision Order and for Appointment of Additional Liquidator—Companies Act 1862 (25 *and* 26 *Vict. c.* 89), *secs.* 147, 149, *and* 150.

Upon 1st November a public company went into voluntary liquidation after a resolution passed by a large majority, both in number and value, of the shareholders, and a liquidator was appointed. Of the same date the liquidator issued a circular to the shareholders intimating a proposal to sell a colliery belonging to the company at an upset price, and requesting answers, if any, before 12th November. No answers were received, and upon 12th November the colliery was advertised for sale upon 22nd November at the upset price. It had been offered for sale on several recent occasions. Upon 3rd November a petition for a supervision order and for the appointment of an additional liquidator was presented by one of the shareholders of the company, and afterwards concurred in by thirteen others. In said petition objection was taken to the proposal to sell the colliery at present, but no allegations were made against the liquidator already appointed, nor any objection taken to the proposed upset price. The case was put out for hearing upon 21st November, and upon the evening of 20th November a minute was lodged by the petitioners making certain accusations against the *bona fides* of the liquidator, and objecting to the lowness of the upset price and to the shortness of the notice of sale. The Court *refused* the prayer of the petition, *holding* that the statements in the minute came too late.

The Rawyards Coal Company (Limited) was incorporated under the Companies Acts 1862 to 1880, on or about the 19th day of August 1872, and had its registered office at 8 High Street, Airdrie. The capital of the company was by the memorandum of association declared to be £30,000, divided into 3000 shares of £10 each. Of these only 2644 were alloted and fully paid up.

At an extraordinary general meeting of the company, held within the registered office on 1st November 1888, the following extraordinary resolutions were adopted, viz.—That it had been proved to the satisfaction of the company that the company could not, by reason of its liabilities, continue its business, and that it was advisable to wind up the same; and that accordingly the company should be wound up voluntarily under the provisions in that behalf of the Companies Acts 1862 and 1867, and that Gavin Black Motherwell, solicitor, Airdrie, should be and was appointed liquidator for the purpose of winding-up the affairs of the company. At the said meeting of 1st November the only two shareholders actually present who opposed the resolution to wind-up were William Mitchell, Airdrie, holding 90 shares, and John Laurie, Airdrie, both directors of the company, who held certain proxies, and the total vote was 573 in favour of the resolution and 53 against it. Upon the same date the said liquidator issued a circular to the shareholders, stating that it was proposed to form a new company, and to advertise, *inter alia*, the colliery for sale at the upset price of £3000, and requesting answers on or before 12th November.

Upon 3rd November the said William Mitchell presented a petition to have the liquidation put under the supervision of the Court, and to have an additional liquidator appointed. The petition proceeded upon the facts that the indebtedness of the company was greater eight years ago than it was then; that coal had lately risen, and was still rising in price; that the present was therefore not a time to sell the works; and that as various complicated questions as to the management might be expected to arise it was desirable to have the liquidation carried on under the supervision of the Court and a second liquidator appointed.

Answers were lodged for the company and for the liquidator thereof, in which it was stated that "from the date of the incorporation of the company in 1872 until 1875 the company was entirely occupied in sinking pits and opening up the collieries which had been acquired on lease. In 1875 the company began to put out coal for the market, and according to the balance-sheet issued as at 31st May 1876 the expenditure of the company upon pit-sinking, buildings, machinery, railways, &c., amounted to £40,513, 4s., which had been met by the paid-up

capital	£22,494 0 0
And money borrowed chiefly from the Royal Bank . . .	18,028 1 6
	£40,522 1 6

For the years 1877 and 1878 a dividend at the rate of 5 per cent. was declared. No dividend had been paid since 1878. At the present time the whole assets of the company could not be valued at more than from £10,000 to £12,000, while the indebtedness of the company amounted to £21,693, 9s. 9d., of which sum £10,643, 9s. 9d. was due to the British Linen Bank. In the spring and summer of 1888 repeated attempts were made to sell the colliery plant, &c., but without success. The same were exposed for sale by public roup at upset prices, which if obtained would not nearly pay the debts of the company."

Upon 12th November no answers had been received to the liquidator's circular, and upon that day the colliery was advertised in the *Glasgow Herald* at the proposed upset price of £3000, the sale to take place upon 22nd November.

Upon 16th November a minute was lodged by John Laurie, and other twelve shareholders of the company, concurring in William Mitchell's petition, and at the urgent request of the petitioners' the case was put out for hearing in the Summar Roll of 21st November.

Upon the evening of 20th November another minute was lodged by William Mitchell and John Laurie, which was only brought to the knowledge of the company immediately before the hearing on 21st November. In the minute it was stated that the minuters were liable *singuli in solidum* along with the other directors for the sum of £10,463, 6s. 9d. due to the British Linen Bank, and were alleged to be

also liable *singuli in solidum* along with said other directors for the payment of the sum of £4300 contained in a bond granted by the said company in favour of William Motherwell, chairman of the company, and father of the said liquidator. It was further stated that the minuters had been charged upon said bond, and had been sequestrated, but that said sequestration had been recalled by the Lord Ordinary and the case reclaimed to the First Division; also that the said John Laurie was creditor of the company for a further sum of £150. It was alleged that the upset price was too low, the notice of sale too short, and that the liquidator was a tool in the hands of his relations and friends, who were shareholders of the company, and desirous of acquiring the colliery at a low figure with the view of starting another company.

The Companies Act 1862 (25 and 26 Vict. cap. 89) provides, by sec. 147, that "when a resolution has been passed by a company to wind up voluntarily, the Court may make an order directing that the voluntary winding-up should continue, but subject to such supervision of the Court . . . and equally upon such terms and subject to such conditions as the Court thinks just;" and by sec. 149, that "the Court may, in determining whether a company is to be wound up altogether by the Court, or subject to the supervision of the Court, in the appointment of liquidator or liquidators, and in all other matters relating to the winding-up subject to supervision, have regard to the wishes of the creditors or contributories as proved to it by sufficient evidence . . . In the case of creditors regard shall be had to the value of the debts due to each creditor, and in the case of contributories to the number of votes conferred on each contributory by the regulations of the company;" and by sec. 150, that "where any order is made by the Court for winding-up, subject to the supervision of the Court, the Court may in such order, or any subsequent order, appoint any additional liquidator or liquidators." . . .

Argued for petitioners—The petitioners here were both shareholders and creditors. They were largely interested in this colliery realising a good price. They could not claim to have the prayer of the petition granted as a matter of right, but where reasonable evidence was put forward in support of the allegation of prejudice, the Court regarded such applications for a supervision order with favour. The statements made in their minute showed good grounds for distrusting the management of the present liquidator if uncontrolled—*Brightwen & Company, &c.* v. *City of Glasgow Bank*, November 27, 1878, 6 R. 244.

Argued for respondents—No ground had been stated for interfering with the conduct of this liquidation and proposed sale, which was approved of by the vast majority of the shareholders. It was only last night that the suggestion of conspiracy was made, and it was without foundation. The colliery had been in the market before, and therefore a long notice was unnecessary and undesirable, as it was being worked at a loss of £400 a-month. The upset price was the largest possible in the circumstances. No bid had been made when it was £5000, and the highest private tenders had been £3600 and £2700; both were withdrawn. It was conceded that even a creditor had no right to demand that such a petition should be granted, and here no relevant allegations had been made. The statements now offered were delayed without excuse till the last moment, and were not therefore to be regarded with favour. The matter was in the discretion of the Court, but by the terms of the Act regard must be had to the wishes of the majority.

At advising—

Lord Justice-Clerk—This history of this coal mining company is unfortunately like that of very many other similar undertakings during the last twenty years. It began with a capital of £22,494, and borrowed from the Royal Bank £18,028, making a total sum of £40,500. It paid a dividend for two years of 5 per cent., but no dividend whatever has been paid since 1878, and there is no doubt that this company has been in a lamentable condition for a long time, and is now being worked at a loss of something like £400 per month. A considerable sum has been borrowed from the British Linen Company's Bank, and the directors, including the petitioners Mitchell and Laurie, granted a bond for £4300 by the said company and themselves, for which they all became, jointly and severally, liable. Some of them seem able to pay the amount of this bond, but others do not, for having been charged upon the bond they have failed to pay, have thus been rendered notour bankrupt, and may therefore be presumed to be insolvent. The shareholders of the company were informed that the directors thought there should be a liquidation, and an extraordinary meeting of the company was accordingly held upon 1st November, at which it was resolved that the company should be wound up voluntarily, and that Mr Gavin Black Motherwell, solicitor, Airdrie, should be appointed liquidator. This resolution was carried by a majority of 573 to 53. There was thus a great preponderance in number of votes in favour of the resolution, and in value the majority seems to have been about six to one.

But the question here has arisen in consequence of a notice sent by the liquidator to the shareholders, also upon 1st November, stating that it was proposed to form a new company, and to advertise the colliery for sale at the upset price of £3000, and requesting them to communicate their views to him before 12th November. Now, following upon that intimation, the petitioner Mitchell on 3rd November presented this petition, and on 12th November, no reply having been received to the circular, an advertisement appeared in the *Glasgow Herald* of the sale of the colliery at the upset price of £3000, the sale to take place on the 21st inst.

The petitioners ask for a supervision order and the appointment of an additional liquidator, on the ground that this notice of sale is too short, and that the property is virtually being thrown away, because there has recently been a rise in the price of coal, and there are better prospects for the future. The liquidator, and a large body of the shareholders who agree with him, say that this was not really the first notice of sale, because this colliery was well known in the market. It had been put up on several occasions at prices varying from £5000 to the pre-

sent proposal of £3000, and when it was attempted to dispose of it privately there had been two offers, one of £3600 and the other of £2700, both of which had since been withdrawn. We are to consider whether we are to pronounce an immediate order, which will have the effect of putting a stop to the sale to-morrow. If the question had come up before us purely, I should have held that the notice was too short for the sale of such a concern as this, but we are asked to decide this matter the day before the proposed sale, and this position in which we are placed is aggravated by the fact that up to last night the petitioners had put forward no real statement of their case at all. The suggestion now made is that the liquidator and his friends have formed a plot to get possession of the colliery at a low figure in their own interest, and it was argued that it could not have been earlier stated. If the statements in the minute of last night are true they might have been made long ago. The petitioners therefore come here in a most unfavourable position to ask the Court to stop the proceedings of the liquidator and of the great majority of the shareholders. No doubt the petitioners have a large interest, because the amount of their liability will be increased or decreased according to the result of the sale, but their case is not to be favourably considered if they only come forward now with statements which could have been fully made at a much earlier stage, and this is what I think they have done. I am therefore of opinion that we should not grant the prayer of this petition, and I base my opinion upon these two grounds, viz., first, that the opposition to the proceedings of the liquidator is trivial; and second, that it is not the case to say that the colliery is not now offered for sale for the first time. The time is short, but not in the circumstances sufficient to warrant us granting the prayer of this petition.

Lord Rutherfurd Clark—The petitioners apply for a supervision order and the appointment of an additional liquidator, and, as I understood counsel, when the case was mentioned the other day, it is necessary for their purpose that we should to-day make the order they require, because if the order is not made to-day the evil they complain of will be caused. Therefore the only matter before us is, whether we should immediately make the supervision order which the petitioners ask. I do not doubt the great interest the petitioners have in this matter, because the amount realised by the assets will determine the amount of their liabilities. So far I consider their case very favourable. But we cannot lose sight of the fact that the proceedings of the liquidator have been approved of by the great body of the shareholders and by the other guarantors.

The first consideration is this, whether this sale, if it goes on, will take place upon insufficient notice. So far there is something in the objection, for at first sight it seems unwise to sell a colliery after only ten days' advertisement. But while that is so, we cannot hold that the mere shortness of the notice is by itself enough to justify us in pronouncing this order at once. We must take into account that this colliery has really been long in the market, and that those most interested in the matter ask the Court not to pronounce this order, because they say if the sale is stopped they will incur heavy expenditure in keeping up this colliery in the condition in which alone it is saleable.

But we cannot proceed apart from the following grounds—The petitioners make a charge against the liquidator of being a tool in the hands of his relations and friends, and of acting in the interest of these relations and friends with the view of their acquiring this colliery at a very small expense. I cannot look upon that allegation as warranting us in pronouncing this immediate order when I find that they only made the charge last night, and that the other side only knew of it this morning. I think the petitioners have themselves much to blame for bringing that matter before the Court only the day before the proposed sale.

I am therefore of opinion that we should refuse to pronounce any immediate order—that is, any order to-day for the supervision of the liquidator of this company. If the parties wish the matter left over for further consideration we may keep up the petition, otherwise we may dismiss it as of no further necessity.

Lord Lee—I am also for refusing the prayer of this petition. The question before us is, whether cause has been shown for the interposition of the Court under the sections of the Act which regulate this matter. The burden of showing cause is on the petitioners, and I am clear that in the petition as originally brought no sufficient cause was shown. I agree with your Lordships in thinking that the allegation there made is not so stated as to be relevant for inquiry. The allegation made last night, which is not very clearly stated, is that the Messrs Motherwell wish to get this colliery at an absurdly low price, and that the sale is not *bona fide*. We only hear that last night for the first time, although it is admitted that the resolution of 1st November was carried almost unanimously, and that the liquidation has been carried on ever since to the satisfaction of the great body of the shareholders, and without any personal allegation against the liquidator. If the proposed upset price is ridiculously low, one does not see why that was not thought of sooner, especially as it was admitted that the suggestion that the upset price should be £3000 was made in the circular sent out on 1st November, and that no answer was received objecting to that proposal. There are clearly more of the shareholders interested in getting a good price for the colliery than the two petitioners. I am therefore not prepared to take this order off the petitioners' hands, considering that the property has previously been frequently exposed, and I think no sufficient suggestion of unfair dealing has been made to give a ground for taking the matter out of the liquidator's hands. Further, I think this petition should not be allowed to stand over, which would not be fair to the liquidator, but should be dismissed at once.

The petition was accordingly dismissed.

Counsel for the Petitioners—Graham Murray—Shaw. Agent—Thomas Carmichael, S.S.C.

Counsel for the Respondents—D.-F. Mackintosh—Dickson. Agents—Drummond & Reid, W.S.