Saturday, June 27.

SECOND DIVISION.

MACQUISTEN, PETITIONER.

Company—Voluntary Winding-Up—Supervision Order—Additional Liquidator—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *secs.* 138, 147, 149, *and* 150.

The shareholders of a company, which had a considerable amount of uncalled capital, and in addition heritable property, valued at a sum which showed a surplus over the total claims, resolved that the company should be wound up voluntarily. Thereafter a creditor, whose debt, which constituted the greater part of the claims upon the company, had been repudiated by the directors previous to the resolution to wind up the company, presented a petition for a supervision order and for the appointment of an additional liquidator. The petitioner averred that his interest was adverse to that of the shareholders, and that the validity of his claim would be most conveniently tried under a supervision order.

The Court *granted* a supervision order, but *refused* to appoint an additional liquidator.

Arthur Penrhyn Stanley Macquisten, chartered accountant, Glasgow presented a petition under the Companies Acts 1862 to 1886, in which he prayed the Court to order the winding up of Adam, Sons, & Company, Limited, resolved on by the shareholders, to be continued, but subject to the supervision of the Court, and further to appoint an additional liquidator.

The petitioner stated that on 23rd May 1896, at an extraordinary general meeting of the shareholders of the company, it was resolved that the company should be wound up voluntarily, and that Thomas Watson Sime, chartered accountant, Edinburgh, should be appointed liquidator; that the company carried on business as wool-brokers, warehouse-keepers, bill-brokers, and financial agents and general merchants in Leith, having a nominal capital of £25,000 and an issued capital of £17,600, of which £4320 was paid up; and that he was a creditor of the company to the extent of £4500 as holder for value of two promissory-notes for £2000 and £2500 respectively, both dated 3rd April 1896, and endorsed to him, which became due on 6th June, and had been duly presented for payment but had not been paid.

He further stated—"It is believed that the petitioner is the largest ordinary trade creditor of the said company, and that several questions may arise in the said liquidation which made it expedient that the liquidation should proceed under the supervision of the Court. The company acquired its business from Mr Alexander Adam, its present managing director, who is the largest contributory of the company. There are only seven shareholders of said company, and it is believed that there will be sufficient surplus assets to meet the debts of all the creditors except the petitioner. These shareholders intend, it is believed, to dispute the petitioner's claim, and the liquidator who has been appointed is a nominee of said shareholders. The heritable property of the company has been heavily mortgaged, its entire capital having been used for the purpose of providing the margin between the mortgages and cost price. The stores are too lightly built for any other trade than the wool trade, and if the mortgagees are allowed to realise for their own interests alone, very serious loss will ensue to the petitioner. It is therefore expedient that an additional liquidator should be appointed."

Answers were lodged for the company and the liquidator Mr Sime, in which the respondents stated—"The liquidator has not had an opportunity of dealing with any claim of the petitioner's upon the said promissory-notes, and has formed no opinion in regard thereto. In the meantime he is informed that the directors of the company do not admit that the petitioner is a creditor of the respondent company, or that the promissory-notes in question are ordinary trade bills."

They further stated that the company debts were few, that the liquidator, having only entered upon his duties subsequent to 23rd May 1896, was not yet in a position to state fully how the company stood, but that the warehouses, which were the principal asset, had been valued at £12,200 which, deducting the amount for which they were mortgaged, namely £7000, left a surplus from this item alone of £5200, and that the other assets amounted to about £1800, and the debts other than the petitioner's to about £1100, and that consequently the shareholders had the real interest in the liquidation.

The Companies Act 1862 (25 and 26 Vict. cap. 89), section 138, enacts—"Where a company is being wound up voluntarily, the liquidators or any contributory of the company may apply to the Court in England, Ireland, or Scotland, or to the Lord Ordinary on the Bills in Scotland in time of vacation, to determine any question arising in the matter of such winding-up, or to exercise, as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court; and the Court or Lord Ordinary in the case aforesaid, if satisfied that the determination of such question, or the required exercise of power, will be just and beneficial, may accede, wholly or partially, to such application, on such terms and subject to such conditions as the Court thinks fit, or it may make such other order, interlocutor, or decree, on such application as the Court thinks just." Section 147—"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 with such liberty for creditors, contributories, or others to apply to the Court, and generally upon such terms and subject to such conditions as the Court thinks just." Section 149—"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 any sufficient evidence, and may direct meetings of the creditors or contributories to be summoned, held, and regulated in such manner as the Court directs, for the purpose of ascertaining their wishes, and may appoint a person to act as chairman of any such meeting, and to report the result of such meeting to the Court. 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." Section 150—"Where any order is made by the Court for a winding up subject to the supervision of the Court, the Court may, in such order or in any subsequent order, appoint any additional liquidator or liquidators; and any liquidators so appointed by the Court shall have the same powers, be subject to the same obligations, and in all respects stand in the same position, as if they had been appointed by the company: The Court may from time to time remove any liquidators so appointed by the Court, and fill up any vacancy occasioned by such removal, or by death or resignation."

Argued for the petitioner—(1) The petitioner was entitled to a supervision order. The Companies Act 1862, sec. 149, directed that in determining whether a supervision order should be granted, the Court may have regard to the wishes of creditors. In no case had a creditor's petition for a supervision order been refused. Much less should it be refused here when the petitioning creditor's debt constituted the greater part of the company's liabilities, where the shareholders had an adverse interest, and where questions as to the validity of the debt were certain to arise, which could more readily be settled by the Court under a supervision order. (2) An additional liquidator should be appointed. The present liquidator was the nominee appointed in the interest of the shareholders, and their interests were hostile to the petitioner's. It was not necessary to allege anything against the conduct or qualifications of the liquidator even in a petition for the removal of a liquidator—*in re Marseilles Extension Railway and Land Company*, Aug. 5, 1867, L.R., 4 Eq. 692, much less in a petition for an additional liquidator. All that was necessary to show was that there were circumstances which made it desirable to have an additional liquidator. That was the case here.

Argued for the respondents—(1) There was no necessity for a supervision order here. The valuations showed a large margin, and this was really a shareholders' liquidation. In a voluntary winding-up the liquidator could apply to the Court just as readily as under a supervision order—Companies Act 1862, sec. 138. As regards the wishes of persons interested, the whole of the shareholders and all the creditors, with the exception of the petitioner, were in favour of a voluntary winding-up. (2) There was no necessity for an additional liquidator, and it would be unjust to impose such an expense upon the company. The liquidator had formed no opinion hostile to the petitioner. He had not yet had time to examine into the validity of his claim. Nothing had been stated against this gentleman to justify the appointment of an additional liquidator.

LORD JUSTICE-CLERK—I am quite unable to see what possible injury can happen to anyone from the liquidation being placed under the supervision of the Court. If all goes well in the liquidation, there will be no additional expense. If anything occurs requiring the Court to intervene, the expense will be less under a supervision order than otherwise. Certainly it will not be more. Looking to the fact that a very large proportion of the claims against this company are at the instance of a creditor who desires such an order, I do not think we can refuse to grant the motion.

On the other hand, the appointment of an additional liquidator is a procedure which ought not to be taken except upon some special ground. Here there is a liquidator to whom no objection is stated, either personally or to his qualifications, and as regards any supposed possible bias on his part, the petitioner will be protected by the liquidation being put under the supervision of the Court. I am therefore of opinion that there are no grounds here for imposing upon this company the additional expense involved in the appointment of an additional liquidator.

We shall grant the supervision order, but refuse the motion for an additional liquidator.

LORD TRAYNER—I am of the same opinion. This can scarcely be called a shareholders' liquidation. Taking a reasonable view of the position of this company as represented by the respondents, there is at least room to doubt whether there will be more than sufficient to meet debts, assuming as we must assume at this stage that the petitioner's claim is valid. Seeing that four-fifths of the debts of the company are said to be due to this petitioner, I think that he is entitled to have effect given to his views. There will be this advantage in having this liquidation continued under the supervision of the Court, that any disputes which may arise as to the petitioner's claim will be settled in a speedy and inexpensive manner, which would not be available if the liquidation were voluntary.

I think there is no cause for interfering with the liquidator who has been appointed, at all events in the meantime. If such cause arises—I do not suppose it will—the

petitioner under the supervision order will have the means of readily bringing it before the Court.

It appears to me therefore that we should grant the supervision order craved, and remit to a Lord Ordinary that, we should refuse the application for an additional liquidator, and direct the expenses of this petition to be expenses in the liquidation.

LORD MONCREIFF concurred.

LORD YOUNG was absent.

The Court pronounced the following interlocutor:—

"Order the voluntary winding-up of Adam, Sons, & Company (Limited), resolved on by the extraordinary resolution of 23rd May 1896, to be continued, but subject to the supervision of the Court in terms of the Companies Acts 1862 to 1890; further, direct all subsequent proceedings in the winding-up to be taken before Lord Stormonth Darling; remit to him accordingly: Find both parties entitled to expenses, and direct the same to be expenses in the liquidation; remit to the Auditor to tax the same, and to report to the said Lord Ordinary; *quoad ultra*, refuse the petition, and decern."

Counsel for the Petitioner—Salvesen—Horne. Agents—Wallace & Pennell, W.S.

Counsel for the Respondents—Lorimer. Agent—W. J. Haig Scott, S.S.C.

Thursday, July 2.

FIRST DIVISION.

[Sheriff of Aberdeen.

COOK *v.* SINCLAIR AND COMPANY.

Bankruptcy—Process—Voluntary Trustee—Action for Delivery of Bill of Exchange Assigned by Bankrupt within Sixty Days of Bankruptcy—Act 1696, *c.* 5—*Bankruptcy Act* 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 10.

A debtor within sixty days of bankruptcy indorsed to one of his creditors a bill of exchange in payment of a prior debt. The bill was subsequently indorsed for value to a third party. Thereafter another creditor, who had been appointed trustee for creditors under a voluntary trust-deed, which gave him no power to reduce illegal preferences, raised an action in the Sheriff Court against the assignee of the bill for delivery, and failing delivery for payment of the contents of the bill.

Held that the action was incompetent, the pursuer having no title *qua* trustee, and not being entitled *qua* creditor to demand delivery or payment to himself.

Observations (*per* Lord M'Laren) on procedure under the Act 1696, cap. 5, as controlled by sec. 10 of the Bankruptcy Act 1856.

This was an action raised in the Sheriff Court by Alexander Skene Cook as trustee acting for behoof of the creditors of Marshall Thomson, chemist, Ballater, and as an individual creditor, against William Sinclair & Company, druggists, Aberdeen. No power to reduce illegal preferences had been given to the pursuer by the trust-deed appointing him trustee. The pursuer craved the Court to ordain the defenders "first, to deliver to the pursuer two bills for £100 each dated 16th October 1894, at twelve months' date, granted by Alexander Hadden to Marshall Thomson . . . and endorsed and delivered by the said Marshall Thomson to the said defenders on or about 17th October 1894; and failing their doing so within such period as the Court shall appoint, to ordain the defenders to pay to the pursuers the sum of £200 sterling with the legal interest thereof from the date of citation hereon till payment;" and secondly, to pay to him the sum of £8, 1s. 6d. as interest upon the two bills.

The pursuer averred that he was a creditor of Marshall Thomson to the extent of £12, and represented creditors to the extent of £600, and that Marshall Thomson became notour bankrupt on 24th November 1894; and pleaded that the endorsation and delivery of the two bills in question having been done by the debtor voluntarily within sixty days of notour bankruptcy in satisfaction or further security of a debt due to the defenders, was voidable at the pursuer's instance so far as it was to his prejudice as trustee for behoof of creditors and as an individual.

The defenders averred that the bills had been endorsed to them for value, and had been in turn endorsed by them to a third party for value received. They pleaded—"(1) No title to sue; (2) The action is incompetent."

The Sheriff-Substitute (DUNCAN ROBERTSON) on 11th July 1895 sustained the plea of incompetency.

Note.—"The pursuer in this case is trustee for behoof of the creditors of Marshall Thomson, chemist, Ballater, in virtue of a trust-deed granted in his favour on 9th November 1894. That trust-deed does not give the trustee any power to reduce illegal preferences. Pursuer also avers that he is a personal creditor of Marshall Thomson to the extent of £11, 4s. In this action he asks that the defender should be ordained to deliver to him two bills for £100 each dated 16th October 1894, at twelve months' date, granted by Alexander Hadden, chemist, Ballater, to Marshall Thomson, and alleged to be delivered by Marshall Thomson to the defenders Sinclair & Company, wholesale druggists, Aberdeen, and failing defenders doing so, to pay the contents of said bills, and also to repay the sum of £8, 1s. 6d. paid by Marshall Thomson to defenders on 23rd October 1894, being interest or discount on said bills. Marshall Thomson became notour bankrupt on 24th November 1894, and pursuer here says the bills were so endorsed to defenders in satisfaction or further security to them of a draft due by Marshall Thomson within