Friday, February 3.

FIRST DIVISION.

PATTISONS LIMITED *v.* KINNEAR AND OTHERS.

Company — Winding-up — Supervision Order or Winding-up Order.

Circumstances in which the Court *ordained* the voluntary liquidation of a company to be continued under the supervision of the Court, that course having the approval of a large majority of the creditors, and only a small minority being in favour of a winding-up order.

Company — Winding-up — Supervision Order—Reconstruction.

Circumstances in which the Court, in ordaining the voluntary liquidation of a company to be continued under the supervision of the Court, *directed* that the liquidator should take no steps towards the reconstruction of the company except with the special leave of the Court.

Pattisons Limited was on 7th March 1896 incorporated under the Companies Acts for the purpose of carrying on the business of wine and whisky merchants. The nominal capital of the company was £400,000, consisting of 20,000 ordinary shares of £10 each, and 20,000 cumulative preference shares of the same amount.

On 5th December 1898 the company suspended payment. A meeting of creditors was held on 6th January 1899, at which 250 creditors or representatives of creditors were present, representing £795,061 out of a total liability of £872,030. At that meeting Messrs John Scott Tait and Robert Alexander Murray, acting on the instructions of some of the larger creditors, submitted a balance-sheet, which showed liabilities as £920,400, 9s. 11d., and assets as £837,606, 15s. 9d.—deficiency £82,793, 14s. 1d. The meeting of creditors agreed unanimously that a meeting of shareholders should be called with a view to passing an extraordinary resolution for the voluntary winding-up of the company, and for the placing of the liquidation under the supervision of the Court, and also agreed to recommend to the shareholders the appointment of Mr Tait as one of the liquidators. The committee of advice appointed at the creditors' meeting subsequently approved of the appointment of Mr Murray as an additional liquidator.

An extraordinary general meeting of the company was held on 19th January 1899, at which shareholders representing 30,187 shares were present, and at which a resolution was passed that the company be wound up voluntarily. Messrs Tait and Murray were appointed liquidators for the purposes of the winding-up, and were instructed to take the necessary steps for having the liquidation placed under the supervision of the Court.

Accordingly, on 20th January 1899 a petition was presented by Pattisons Limited and Messrs Tait and Murray, the liquidators thereof, setting forth the foregoing facts, and craving the Court to order that the voluntary winding-up of Pattisons Limited be continued, but subject to the supervision of the Court, in terms of and with the powers conferred by the Companies Acts 1862 to 1898.

Answers were lodged by James Kinnear, builder and contractor, and Messrs Redpath, Brown, & Company, Limited, who on 13th January 1899 had presented a petition to the Court for the winding-up of Pattisons Limited by the Court, and the appointment of an official liquidator. Mr Kinnear was a creditor of the company to the extent of £1852, 16s., representing work executed by him in the erection of bonded stores for the company in Leith, and Messrs Redpath, Brown, & Company were creditors for £1189, 19s. 6d. for iron and other work executed by them for the company.

In their answers the respondents made the following averments:—In the prospectus of the company the assets made over to the company were stated as of the value of £203,555. The vendors Robert and Walter Pattison continued to be managing directors of Pattisons Limited, and as shareholders had and have complete control of the company. In the first yearly report of the company a profit was shown on revenue account of £56,893, and in the second yearly report of £67,170. No balance-sheet was published or circulated among the shareholders. The sums declared and paid as dividends were not profits earned in the business of the company, but were in the knowledge of Walter and Robert Pattison paid out of the capital of the company, which was in fact and to their knowledge insolvent at the date of the second annual meeting. "Questions will arise in the liquidation regarding the liability of the said directors and other officials of the company to repay the dividends declared and paid." Prior to the creditors' meeting on 6th January Messrs Tait and Murray had drawn up another balance-sheet showing a surplus of assets over liabilities of £441,576. No explanation was given to the meeting of the discrepancy between this balance-sheet and that actually submitted. The losses of the company were chiefly caused by reckless speculations in whisky in which Walter and Robert Pattison engaged. "Questions will arise as to how far the company's assets are liable for debt so incurred." According to the balance-sheet the company owed balances to the British Linen Company and the Clydesdale Bank amounting to £194,687. That sum was exclusive of sums due by the company to those banks on accommodation bills stated in the balance-sheet at £442,649. There were grounds of serious challenge regarding the validity of certain vouchers and securities claimed to be held by these banks.

The respondents proceeded—"The respondents, who are creditors not connected with the whisky trade, believe and aver

that their interests and the interests of other independent creditors will be seriously prejudiced unless a compulsory order for winding up is made, and independent liquidators are appointed by the Court to investigate the conduct of the company's affairs, the liabilities to the company of the said Walter and Robert Pattison and the other directors and officials of the company, and the claims of creditors claiming to be secured or to hold preferences. The present petition and the whole proceedings subsequent to the 6th December 1898 have been taken at the instance and under the control of the said Walter and Robert Pattison, in conjunction with the creditors who had been engaged along with them in the speculations above mentioned, in order to avoid independent investigation into the conduct of the company's affairs or the claims of those creditors, and to carry through a scheme of reconstruction of the said company in their own interests, to the prejudice of the respondents and other unsecured creditors."

The respondents then set forth the details of a scheme of reconstruction prepared by Messrs Tait & Murray "on the instructions of Walter and Robert Pattison, and certain creditors conjunct and confident with them." This scheme, they averred "would be prejudicial to the interests of unsecured creditors, in respect, *inter alia*, that (1) it extends the preference of the secured creditors to the whole assets; (2) the interest on debentures of unsecured creditors could not be paid unless the company earned a net annual profit of £65,000; (3) the payment of their debts would be postponed till 1920; and (4) the assets and management of the company are to be entrusted to the directors of the reconstructed company, instead of the assets being realised for the benefit of the creditors. If the company is wound up by order of the Court, and by independent official liquidators, no scheme of reconstruction can be carried through without examination by the liquidators and approval by the Court."

The Companies Act 1862 (25 and 26 Vict. cap. 89), section 79, enacts—"A company under this Act may be wound up by the Court . . . under the following circumstances, that is to say—(1) Whenever the company has passed a special resolution requiring the company to be wound up by the Court. . . . (4) Whenever the company is unable to pay its debts."

Section 80—"A company under this Act shall be deemed to be unable to pay its debts . . . (4) Whenever it is proved to the satisfaction of the Court that the company is unable to pay its debts."

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."

Argued for the respondents—This was a case in which the company should be wound up by the Court. The respondents' application for a winding-up by the Court had at least the advantage of priority. In a question between a company and one of its creditors, the creditor had a right to a winding-up order *ex debito justitiæ*, unless it could be shown that such an order would do him no good—*Gardner & Company* v. *Link*, July 11, 1894, 21 R. 967. Here there were circumstances averred which would place the respondents at a disadvantage unless a winding-up order were pronounced. The respondents were in a special class of creditors; their debt was due in respect of work done at the company's buildings. The great bulk of the creditors on the other hand were "in the trade," or had discounted the company's bills. Besides, the banks had a preponderating influence among the creditors, and it might be the liquidator's duty to contest their claims to a preference. Moreover, the respondents' averments made it plain that there were many things in the company's affairs which required searching investigation. In such circumstances the Court always preferred a liquidator of its own appointment—*Barned's Banking Company*, 14 L.T. 451, *per* Romilly, M.R.; *National Debenture and Assets Corporation*, L.R. (1891), 2 Ch. 505; *The Varieties, Limited*, L.R. (1893), 2 Ch. 235; *Medical Battery Company*, L.R. (1894), 444; *Land Development Association*, L.R., February 5, 1892, W.N. 23. In *Drysdale & Gilmour* v. *Edinburgh Exhibition*, November 13, 1890, 18 R. 98, there were no averments that the affairs of the company called for special investigation. It was left to the discretion of the Court by the statute to determine whether or not the opinion of the majority of creditors should prevail; and there were the strongest reasons here for appointing as liquidator some independent person wholly unconnected with those who had brought the concern to grief. The liquidators appointed by the shareholders had been suggested by the parties concerned in the accommodation bills. The voluntary liquidator would have too free a hand. He was irremoveable except for fault, and could exercise greater

powers without going to court than an official liquidator. He would have absolute authority to sanction a reconstruction scheme like that already broached, by which cash payments to the creditors might be indefinitely postponed, and they might be compelled to accept scrip in payment of their claims. It had been decided that section 161 of the Companies Act 1862 applied to a winding-up under the supervision of the Court as well as to a purely voluntary winding-up—*Imperial Mercantile Credit Association*, L.R., 12 Eq. 504; *Anglo-Romano Water Company, Wright's Case*, L.R., 5 Ch. 437. A voluntary liquidation under the supervision of the Court might run through such a scheme of reconstruction and the only remedy open to a dissentient creditor would be an appeal under section 137 of the 1862 Act.

Argued for petitioners — The petition should be granted. No reason had been adduced why effect should not be given to the wishes of the vast majority of the creditors. The majority even of "stone and lime creditors," to which class the respondents belonged, representing £23,000, were desirous of voluntary liquidation. A strong *prima facie* case of impropriety must be made out before the Court would interfere to thwart the majority of creditors. A creditor was not entitled *ex debito justitiæ* to a winding-up order as against others creditors, though he was as against the company — *West Hartlepool Ironworks Company*, L.R., 10 Ch. 618; *Drysdale, ut sup.*; *Oriental Commercial Bank*, 14 L.T. 755; *Inns of Court Hotel Company*, 1866, L.R., W.N. 348; *California Redwood Company, Limited*, unreported. It made no difference whether the application for a winding-up order or the resolution of the creditors in favour of liquidation under supervision was prior in time—*New York Exchange, Limited*, L.R., 39 Ch. Div. 415. Precisely the same arguments as those of the respondents had been used unsuccessfully in the *City of Glasgow Bank* case, November 27, 1878, 6 R. 244, *per* L.-P. Inglis at 252. The recent English cases relied on by the respondents were decided under the Companies Winding-up Act 1890, which did not apply to Scotland. The explanation of the discrepancy between Mr Tait's two reports was that bills which, in preparing the first, he had assumed from the company's books to be assets of the company, turned out on inquiry to be accommodation bills, and therefore liabilities instead of assets. A great deal of work had already been done in the way of examining the company's books, and it would mean great waste of time and money if, owing to the appointment of an entirely new liquidator, that work had to be done over again There would be no material difference in the respondents' position whether the company was wound up by the Court or voluntarily under the supervision of the Court. Under secs. 159 and 160 of the Act of 1862 the liquidator must obtain the sanction of the Court for any scheme of compromise or reconstruction, and a compromise imposed by a majority of creditors upon a minority under the Joint Stock Companies Arrangement Act 1870, sec. 2, must also be sanctioned by the Court—Buckley on Companies, 7th ed. 364.

At advising—

Lord President — "In determining whether a company is to be wound up altogether by the Court or subject to the supervision of the Court," and "in the appointment of liquidators," we are authorised to have regard to the wishes of the creditors. In administering the Act the Court, both here and in England, have carried out the spirit of this provision by giving effect to the wishes of the creditors where those are plainly manifested and do not in some way invade or menace the rights of dissentient creditors. This is not only in accordance with the system of the Companies Act, but it is also in harmony with our own general system of bankruptcy in Scotland which has always allowed creditors full liberty to manage their own affairs even when the decision is that of a majority.

In the case before us the creditors, if taken as a whole, are by an overwhelming majority in favour of liquidation under supervision. If the banks be left out of account, there is still an overwhelming majority on the same side. Even if all others are left out and regard be had solely to creditors of the same class as the petitioners, there is still a large majority against their proposal. This being so, it seems to me that we have sufficient evidence of the wishes of the creditors, and have no occasion to resort to the other means provided for ascertaining them.

The question remains, however, whether adequate reason has been shown for our not giving effect to those wishes, for neither the statute nor the decisions require us blindly to to do so with the result of causing injustice or the risk of injustice to any person or persons, or if there are decisive reasons for an official liquidation not of a kind natural to be considered by the creditors themselves. Now, the learned counsel for the petitioners presented a very powerful argument against the expediency of accepting the present liquidation. But from beginning to end of that argument the reasons advanced were of a class and character entirely appropriate to the consideration of the creditors and entirely within their comprehension. They were largely rested on the relations of certain persons one to another, and the inferences arising as to the probable spirit and direction of the voluntary liquidation if allowed to continue. Now, these are matters upon which the creditors were sufficiently informed, for most of them do not require any minute examination, and the creditors as business men are very well qualified to conjecture how far the apprehensions sought to be excited should influence their conduct. They have decided, and the subject-matter of their decision being of the nature which I have indicated, it would be against the practice of the Court and the

spirit of the statute that we should review their decision or disregard it. The petitioners have been unable to show that they stand in any different position as regards interest or danger from the tradesmen of their class who have voted against them. As I am not a creditor, and do not sit here to criticise the action of the creditors, I have no occasion to say which side I think had the best of the argument in the question of expediency.

As the argument of the parties often touched the question of reconstructing this company, I think it right to say that if your Lordships continue the voluntary liquidation, subjecting it to supervision, that will not in the smallest degree prejudge the question of reconstruction one way or the other. Whatever their impressions may have been at an earlier stage, the liquidators will now enter on their duties with fresh responsibility and in the spirit of the Court under whose supervision they are to act. It may however reassure the petitioners against any apprehension that the Court will allow this matter, should it ever arise, to be treated as a foregone conclusion, if, following the analogy of the *City of Glasgow Bank* case, we insert in the supervision order an order that unless and until it shall be otherwise directed and ordained by the Court, the liquidators shall not take any steps towards the reconstruction of the company except with the special leave of the Court. With this proviso I think that we should pronounce the usual supervision order and send the liquidation to Lord Stormonth Darling, the petition for an official liquidation being refused.

LORD ADAM concurred.

LORD M'LAREN—I agree with your Lordship that, other things being equal, the wishes of the preponderating majority of the shareholders and creditors ought to be decisive in a question of the kind; but of course if there were any reasons for supposing that the majority of the creditors had interests adverse to the minority, and that they were likely to use those which they possessed to the detriment of the minority, then their convenience ought not to outweigh the obvious justice of the case. In the present case I have not been able to discover any tangible ground for supposing that differences of this kind would exist between different classes of creditors. It is, no doubt, true that the British Linen Company and the Clydesdale Bank are very large creditors, representing perhaps something like the interests of all the others put together; but in the absence of any specialty—and none such was brought to our notice—I must assume that the interest of those banking companies is just the same as that of all the other creditors; that is to say, that it is their interest to get as much as they can out of the estate of their insolvent debtor, and it is no disadvantage, but quite the contrary, that the two powerful commercial companies, deeply interested, should have recommended voluntary liquidation, and should be prepared to take an active interest in the affairs of this concern.

LORD KINNEAR concurred.

The Court pronounced this interlocutor:—

"Direct and ordain that the voluntary winding-up of Pattisons Limited, resolved on by the extraordinary resolutions passed at an extraordinary general meeting of the said company held on 19th January 1899, be continued, but subject to the supervision of the Court, in terms of the Companies Acts 1862 to 1898; confirm the appointment of the said John Scott Tait and Robert Alexander Murray as the liquidators of the said company, in terms and with the powers conferred by the said Companies Acts; confirm the appointment of "certain persons "as a committee to advise with the liquidators any matter arising in the liquidation, with power to communicate with the creditors and shareholders generally; and declare that any of the proceedings in the said voluntary winding-up may be adopted as the Court may think fit; declare that the creditors, contributories and liquidators of the said company are to be at liberty to apply to the Court as there may be just occasion; direct and ordain that unless and until it shall be otherwise directed and ordained by the Court, the liquidators shall not take any steps towards the reconstruction of the company except with the special leave of the Court; and further direct and ordain that all subsequent proceedings in the winding-up be taken before Lord Stormonth-Darling, Ordinary, and remit the winding-up to his Lordship accordingly in terms of the sixth section of the Companies Act 1886," &c.

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Counsel for the Respondents—D.-F. Asher, Q.C.—Kennedy. Agents—Gordon, Falconer, & Fairweather, W.S.

Friday, February 3.

FIRST DIVISION.

[Lord Pearson, Ordinary.

MACKAY *v.* PARISH COUNCIL OF RESOLIS.

Process — Suspension — Caution — Charge "Under Pain of Imprisonment."

A party against whom decree had been pronounced at the instance of a parish council for payment of advances made by them for the support of his illegitimate child, and of expenses of process, raised a suspension of a charge given upon the decree "under the pain of imprisonment," on the ground that the charge was bad, imprisonment