the defenders from the conclusions of the action, and decerns," &c.

The pursuer reclaimed—At the hearing the following cases were referred to—*Rodgers' Trustees* v. *Rodger*, January 9, 1875, 2 R. 294, 12 S.L.R. 204; *Bayne's Trustees* v. *Bayne*, November 3, 1894, 22 R. 26, 32 S.L.R. 31; *Cathcart's Trustees* v. *Allardice*, December 21, 1899, 2 F. 326, 37 S.L.R. 252.

LORD JUSTICE-CLERK—The Lord Ordinary has decided that the pursuer has no right to deal with the subjects in question as his own. In my opinion that judgment should be affirmed. It seems to me to be clear that what is granted in the letter relied on is the use of a particular house, and that implies nothing more than this, that the grantee is to have the use of the house for himself in respect of his infirmity.

LORD YOUNG, LORD TRAYNER, and LORD MONCREIFF concurred.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Munro—W. T. Watson. Agents—Macdonald & Stewart, S.S.C.

Counsel for the Defenders and Respondents—Wilson, K.C.—W. Thomson. Agents—Hamilton, Kinnear, & Beatson, W.S.

Saturday, May 28.

FIRST DIVISION.

[Lord Pearson, Ordinary.

ECUADORIAN ASSOCIATION, LIMITED (IN LIQUIDATION) *v.* LORD STANMORE AND OTHERS.

Company — Winding-up — Voluntary Liquidation subject to Supervision of Court—Appointment of Liquidators.

A petition having been brought by creditors for the winding-up of a company by the Court on the allegation that the company was unable to pay its debts, the company subsequently, at an extraordinary general meeting, resolved by a majority (1) that the company should be wound up voluntarily under the supervision of the Court; and (2) that two persons, A and B, who were partners, should be appointed liquidators. The minority of the company, while not disputing the ability and fitness of A and B, moved the Court to appoint an independent liquidator to act along with A and B, averring (1) a number of circumstances in the history of the company which, they alleged, were suspicious and needed thorough and impartial investigation; and (2) that there was a conflict of interest between them and the majority of the shareholders.

The Court *refused* the motion.

The Guayaquil and Quito Railway Company, a corporation organised under the laws of the State of New Jersey, United States of America, on 7th March 1904, presented a petition for the winding-up by the Court of the Ecuadorian Association, Limited, incorporated under the Companies Acts 1862 and 1898, and having its registered office situated at 15 Hill Street, Edinburgh.

The petitioners suggested Francis More, C.A., Edinburgh, and Herbert William Haldane, C.A., Edinburgh, both partners in the firm of Lindsay, Jamieson, & Haldale, as fit persons to be appointed official liquidators of the association. In ordering intimation of the petition, the Court, in respect that the petitioners stated that they were apprehensive that in the meantime preferences might be obtained over the assets of the association, appointed Mr More and Mr Haldane to be provisional liquidators.

The petitioners averred, *inter alia*, as follows:—The Ecuadorian Association, Limited, was incorporated on 4th April 1899. The primary purpose for which the association was incorporated was the acquisition of certain shares in the Ecuador Development Company, a company incorporated under the laws of the State of New Jersey, United States of America, and certain first mortgage gold bonds of the petitioner's company. At the date of the incorporation of the Association the Ecuador Development Company was engaged in the construction and equipment of a railway from Duran to Quito, in the Republic of Ecuador, under a contract from the petitioners. In 1900 it was arranged that the association should acquire all the rights and interests of the Ecuador Development Company in the railway construction contract, and should itself construct the railway from Duran to Quito so far as this had not been done at the date of the transfer. After April 1900 the said Association was engaged in the construction of the said railway from Duran to Quito, but owing to difficulties encountered by it, the cost of construction was found greatly to exceed the estimate upon which the contract had been entered into, and in January 1903 the railway remained still incompleted, while the funds at the disposal of the said association had become exhausted. The association had meantime obtained from the petitioners advances in bonds to the amount of $1,606,000, which are still resting-owing, and besides incurring other indebtednesses it had borrowed in London and New York, sums understood to exceed £150,000, to secure which it had pledged practically all its assets available at the time. In order that the railway should be completed, the association entered into negotiations with the Ecuador Company of New Jersey—a company incorporated for the purpose of carrying on the enterprise. The Association assigned to the Ecuador Company all its rights and interests in, *inter alia*, the railway construction contract, on condition that the Ecuador Company should imple-

ment all the obligations of the said association under said contract, and pay or discharge the Association's debts and liabilities. The Ecuador Company of New Jersey entirely failed to carry out the obligations undertaken by it, and although action had been taken in New York to enforce fulfilment of these or payment of damages, the said Association had meantime been compelled to default in performing its obligations under the railway construction contract. Various suits were pending in the Courts of the State of New York against the said association, and in some of these judgment had been obtained against it.

The petitioners further averred that a notice had been issued of an extraordinary general meeting of the association for the purpose of considering and, if thought fit, passing a resolution for the voluntary winding up of the company; that the association was unable to pay its debts; that besides the above-mentioned decrees against it in the American Courts, there were various claims against it in this country which it had failed to discharge; and that in respect of their advances before referred to (of which they had been unable to obtain repayment), the petitioners were the largest creditors of the Association.

Answers were lodged by the Ecuadorian Association, submitting that the petition should be sisted until the meeting of shareholders, and if the company resolved on a voluntary winding-up, that the winding-up should be continued under the supervision of the Court, and that the prayer of the petition for a compulsory winding-up should be refused.

The Association averred, *inter alia*, that its assets chiefly consisted of (1) certain bonds and securities pledged in London and New York; (2) certain plant and material in Ecuador; and (3) certain claims for damages and for breach of contract, which were the subject of lawsuits pending before the Law Courts of the State of New York.

A note was subsequently lodged by the Association stating that at an extraordinary meeting held at Edinburgh on March 31, it was resolved by a majority that the company should be wound up voluntarily; that Francis More and Herbert William Haldane be appointed joint-liquidators; and praying the Court that the voluntary winding-up of the Association be continued, subject to the supervision of the Court.

Answers were also lodged by the Right Honourable Lord Stanmore and others, shareholders and debenture holders of the Association.

These respondents, while concurring in the prayer of the petition, in so far as it craved for a winding-up order, submitted that the Court should nominate an independent liquidator, to act alone or along with the said Francis More, in respect that there were matters in the history and management of the Association which called for a full and searching investigation in the interests of the shareholders as apart from the interests controlled by the Board.

These respondents in their answers made the following averments, *inter alia*, with respect to the history and management of the association:—In June 1897 Archer Harman, Louisville, Kentucky, U.S.A., and others, obtained from the Republic of Ecuador a concession to construct a railway between the cities of Guayaquil and Quito in said Republic. In September 1897 the petitioning company was constituted and organised by the said Archer Harman and others with a capital of $12,282,000, divided into preferred and common stock, each share being of the par value of $100, and with a right to issue $12,282,000 of 6 per cent. gold bonds of the par value of $1000 each as the work of construction advanced. Archer Harman and his associates were to receive the whole of the preferred stock and 51 per cent. of the common stock, the Government of Ecuador reserving to itself 49 per cent. of the latter stock. The said Archer Harman is president of the petitioning company. In January 1898 the American Construction Company was organised by the said Archer Harman and others for the purpose of constructing the railway, but this company became insolvent in September 1898. In September 1898 Archer Harman and others formed a second company, called the Ecuador Development Company, to which were transferred the rights of the American Construction Company. The Development Company was floated with a capital of $200,000, and as remuneration for the construction of the railway was to receive from the petitioning company $4,050,000 in cash, $4,100,000 6 per cent. gold bonds, all of its preferred stock, and 51 per cent. of its common stock. In April 1898 the said Archer Harman and others, for the primary purpose of acquiring one-fourth of the share capital of the said Ecuador Development Company (of which he was manager), floated the said Ecuadorian Association with a capital of £70,000. The said Archer Harman assumed the position of managing director of said association, which position he still occupied. Said one-fourth—500 shares—was the property of the said Archer Harman and E. H. Norton. The association at various dates subsequently continued to purchase more shares in the Development Company from Archer Harman and E. H. Norton, and finally, by the agreement of September 1900, acquired "all the rights and interests of the Development Company in the railway construction contract." Another agreement was made in September 1900 between the association and the petitioning company, whereby the agreement between the latter company and the Development Company, to which the association had acquired right, was modified. The association agreed to abandon its right to payment of $4,050,000 in cash and to take in exchange therefor $8,182,000 gold bonds of the petitioning company. This agreement was carried through without the knowledge or consent of the shareholders, and the association was thereby deprived of its right to demand cash due to it under the original contract. Said Archer Harman was at this time the

president of the Railway Company and the managing director of the said association, and had a controlling interest in both.

The capital of the association had been raised from £70,000 at its formation in April 1899 to £500,000 in February 1901, and in April 1901 the only public issue of shares was made when 50,000 £1 shares were issued. In June 1901 the association raised £850,000 by issuing £934,000 debentures, secured as a first charge on $10,000,000 6 per cent. gold bonds and the preference and common stock of the petitioners' company. The trustees for the debenture holders did not obtain delivery of the full security. In January 1902 an arrangement was made by which the debenture-holders of the association exchanged their debentures for gold bonds of the petitioning company in certain proportions, and along with the bonds each debenture-holder received a "contingent right certificate" for the nominal amount of the debenture held by him.

These respondents further averred that at the extraordinary general meeting on March 31, 1904, no proof of the insolvency of the association was afforded, and that the majority at said meeting consisted of shareholders who had a larger interest in the petitioning company than in the association, and whose interests were identical with the interests of the petitioning company; that the interests of the association and the petitioning company were naturally antagonistic; and that on a proper accounting the alleged claim of the petitioning company would be shown to be of no force or effect. They also stated as follows:—"Throughout the association's existence the shareholders have not been consulted with reference to matters affecting their interests by the board, who have left the management in the hands of the said Archer Harman. Since 1899 the said Archer Harman has controlled both the petitioning company and the said association, being president of the former and managing director of the latter. Although the registered office of the association is in Edinburgh, the board of directors have on occasions permitted, without the sanction of the shareholders, the head office to be alternately at London and New York. Further, the last general meeting was held in New York on 30th December 1902, at which accounts for the year to 31st December were submitted. No accounts have since been issued or submitted. Even at the meeting of shareholders on 31st March 1904 no balance-sheet or financial statement was submitted, and no explanation of any kind was furnished by the directors. An accurate statement of accounts would have disclosed gross mismanagement by the directors. On their own showing over one and a quarter millions in cash fall to be accounted for."

On April 16, 1904, the Lord Ordinary (PEARSON) officiating on the Bills pronounced an interlocutor, *inter alia*, in the following terms:—"In respect parties are agreed that the voluntary winding-up of the company, the said Ecuadorian Association, Limited, should be continued under supervision; Refuses the prayer of the petition that the said company be wound up by the Court: Further refuses the motion of the respondents the Right Honourable Lord Stanmore and others for the removal of both or either of the liquidators appointed at the extraordinary general meeting of the company held on 31st March 1904, and for the appointment of another or additional liquidator: Directs and ordains the voluntary winding-up of the said company resolved on by the members thereof on 31st March 1904 to be continued, but subject to the supervision of the Court, in terms of the Companies Acts 1862 to 1900, and declares that the creditors, contributories, and liquidators of the said company, and all other persons interested, are to be at liberty to apply to the Court as there may be just occasion: Finds the petitioners, respondents, and compearers entitled to expenses as the same may be taxed, and appoints them to be expenses in the liquidation, and decerns: Grants leave to reclaim."

Opinion.—"The Ecuadorian Association, Limited, has its registered office in Edinburgh.

"In the beginning of March 1904 a notice was issued for an extraordinary general meeting of the association to be held on 31st March to consider and, if thought fit, to pass a resolution that the company be wound up voluntarily, and that Mr Francis More, C.A., be appointed liquidator, with authority to apply to the Court to have the voluntary winding-up continued under supervision.

"During the currency of this notice the Guayaquil and Quito Railway Company, alleging themselves to be large creditors of the company, presented this petition to have the company wound up by the Court. They suggested Mr More and his partner Mr H. W. Haldane, C.A., as official liquidators. In ordering intimation of the petition the Court appointed Mr More and Mr Haldane to be provisional liquidators, as the petitioners stated that they were apprehensive that in the meantime preferences might be obtained over the assets of the association.

"Answers have been lodged by the association itself, and also by certain shareholders and debenture-holders of the company who represent shares to the value of over £14,000, and debentures and 'contingent right certificates' to the value of £3950, and who claim that they are supported by other shareholders, making a total representation of £50,000.

"The extraordinary general meeting of the company was held on 31st March, when it was resolved that the association should be wound up voluntarily; and Mr More and Mr Haldane were appointed liquidators. The last-mentioned respondents dissented from this resolution, and moved that 'an independent liquidator be appointed to act along with Mr More as representing the shareholders,' but this motion was lost.

"All parties are now agreed that the voluntary liquidation should be continued

subject to supervision, and no question was raised before me as to whether such an order could be pronounced in a petition which prays for a compulsory winding-up. It appears to be in accordance with practice that this course may be taken without even amending the petition where parties are agreed upon it.

"The argument before me has been confined to the question who should be the liquidators? The respondents (by which I mean the individual respondents) maintain first, that the two liquidators nominated should be removed (under the powers conferred by section 141 of the statute), and that one 'independent liquidator' should be appointed by the Court; and alternatively, that Mr Haldane should be removed, and replaced by an 'independent liquidator' to act in conjunction with Mr More.

"The only guide furnished by the statute in the consideration of such a question is contained in section 149, which enacts that the Court may have regard to the wishes of the creditors or contributors in, *inter alia*, the appointment of liquidator or liquidators. Here, so far as appears, the creditors are all at one, and their proposal is concurred in by a large majority of the shareholders. The share capital is £500,000. Of this about one-half was subscribed in cash, and the remainder represents services and other considerations set forth in a contract duly filed. But taking it in the most favourable view for these respondents, namely, that only the cash shares are to be taken into account and that they themselves represent £50,000 of share capital, they represent only one-fifth as against four-fifths.

"But the respondents say (1) that in the circumstances set forth at large in their answers there is urgent need of thorough and impartial investigation into the history of this company; and (2) that there is a sharp conflict of interests between themselves and those holding the majority of shares, owing to the latter being largely interested in other concerns which would benefit by the ruin of this company. These extraneous interests they say predominated at the meeting which appointed the two liquidators, and these gentlemen (as being the nominees of that party) ought to be removed and replaced by an independent man chosen by the Court, or at least one of them ought to be so replaced.

"I am not surprised that these respondents should make a strenuous effort to have their motion granted. Both from the pleadings and from the discussion before me I gather that many things connected with the history of this association demand a thorough inquiry in order to find out to what extent the suspicions entertained by the respondents are well founded. But it does not at all follow that I should give effect to the respondents' objections by removing both or either of the two gentlemen who were nominated at the meeting, and whom the Court have already appointed to be provisional liquidators upon a compulsory winding up, or even by adding a third liquidator.

"I think the terms in which the respondents' motion is stated themselves suggest the answer. Their demand is for an independent liquidator. Is there any reason to believe that the two liquidators named are not and will not continue to be independent? I have heard none whatever, except that they are the nominees of those alleged to have the opposing interest. It seems to be thought that this fact in some way implies a position of dependence or subservience towards their nominators. This surely cannot be presumed from the mere fact that they have paid these two gentleman the compliment of selecting them out of the whole profession of accountants, nor is it because of any previous connection on the part of either of them with the company, or with those who are said to have the adverse interest. So far as I have heard, there is no allegation of the kind. It is true that the word *nominee* in mere language, and specially in company language, often connotes a position of dependence, or even of identity of interest, as in the case of an nominee of shares. But that the naming of a person as liquidator should *per se* carry any such imputation with it is out of the question. If it did, to name a person would be to disqualify him. In fact if there were anything in this objection it would exclude one of the respondents' alternative motions, and would lead to the removal of both the 'nominees,' as not being in a position to do their duty impartially. The only other course open would be to recognise frankly the conflict of interests, and to select liquidators accordingly so that each conflicting interest might be represented, a course which would not tend to a satisfactory liquidation. I think the opposite view is the sound one. The liquidators, by whomsoever named, are bound to act independently and to hold the balance even, with a view to the most favourable realisation of the assets for behoof of all who have an interest in them. I see no reason whatever to doubt that they will perform their duty in this respect.

"I therefore refuse these respondents' motion for another liquidator, and continue the existing liquidation, but subject to the supervision to the Court.

"The individual respondents appear to think that leave to reclaim is necessary. I should not myself have thought so; but in case it should be regarded as doubtful, I grant leave."

The respondents Lord Stanmore and others reclaimed, and argued—There were many circumstances in the history of the association which demanded a searching inquiry and independent investigation. Further, the majority of the shareholders of the association had interests conflicting with the interests of the minority (the respondents) in respect of the majority being more largely interested in the petitioning company, whose interest lay in the association being put out of the way. Under the interlocutor of the Lord Ordinary the minority would be unrepresented

in the liquidation, and in the whole circumstances an independent liquidator should be appointed by the Court to act along with the liquidators appointed at the meeting of shareholders.

Argued for the petitioners—There were no circumstances here of any special difficulty or needing particular investigation. All the information was to be found in written documents, and the ability and fitness of the two liquidators appointed by the company was not in question. It was not enough for the respondents to say that there were conflicting interests; they must show that the liquidators were in some way partial or biassed, and that the interests of the minority were likely to be prejudiced. If the liquidators failed in their duty the respondents had their remedy by applying to the Court under section 115 of the Companies Act 1862.

LORD PRESIDENT—I do not see any reason for interfering with the discretion which the Lord Ordinary has exercised. He has refused to remove the liquidators appointed by the company or to appoint an additional liquidator. The liquidators are two gentlemen of undoubted ability and fitness for the duties with which they are charged, and after giving all attention to the argument which has been submitted to us we do not see any reason for disturbing the Lord Ordinary's interlocutor.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Reclaimers and Respondents—The Lord Advocate (Dickson, K.C.)—Laing. Agents—Laing & Harley, W.S.

Counsel for the Petitioners—Constable. Agents—W. & F. Haldane, W.S.

Counsel for the Ecuadorian Association Limited—Ure, K.C.—Lyon Mackenzie. Agents—Bonar, Hunter, & Johnstone, W.S.

Counsel for Glyn, Mills, Currie, & Company, Compearing Creditors—Macphail. Agents—Tods Murray, & Jamieson, W.S.

Saturday, June 4.

FIRST DIVISION.

THE KIRKCALDY STEAM LAUNDRY COMPANY, LIMITED, PETITIONERS.

Company—Resolution to Alter Memorandum of Association—Confirmation by Court—Companies (Memorandum of Association) Act 1890 (53 *and* 54 *Vict. cap.* 62), *sec.* 1—*Change of Name.*

A petition presented by a laundry company for confirmation of a resolution to alter its memorandum of association to the effect of enabling it to carry on its business in a largely extended district *granted* without any condition as to the name of the company being altered so as to indicate the alteration in the area of its operations.

The Kirkcaldy Steam Laundry Company, Limited, incorporated under the Companies Act 1862 to 1890, presented a petition for confirmation of an alteration of its memorandum of association under the Companies (Memorandum of Association) Act 1890, sec. 1.

The company was established under its memorandum of association for the purpose of carrying on a laundry in "Kirkcaldy and its neighbourhood." The alterations proposed to be made in the memorandum of association were designed to enable the company to extend its operations into a larger district by allowing it to carry on a laundry or laundries in "Kirkcaldy and Leven, and elsewhere in the county of Fife." No change of name was proposed.

The Companies (Memorandum of Association) Act 1890, sec. 1, empowers companies to alter the provisions of their memorandum of association subject to the confirmation of the Court. Sub-section (3) enacts—"An order confirming any such alteration may be made on such terms and subject to such conditions as to the Court seems fit." . . .

Sir Charles B. Logan, W.S., to whom the Court had remitted the petition for inquiry, drew attention in the following paragraph of his report to the question whether a change in the name of the company should not be made so as to indicate the extended area of the company's operations:—"It has been the practice of your Lordships to grant an extension of objects to a company only upon the name of the company being changed, so as to indicate the addition of new business or the extended area of its operations, and there are decisions in the English Courts shewing that the same practice obtains there. I brought this matter under the notice of the petitioners, but they have submitted that as the object of the alterations on the memorandum of association is not to enable the company to take up a new class of business, but only to carry on business in other towns in the county of Fife besides Kirkcaldy, an alteration of the name is not required. In the circumstances, and as it does not appear to me that anyone dealing with the company would be misled by the present name, your Lordships may perhaps take the view that no change is necessary."

He reported that the proceedings had been regular, and that the reasons for the proposed alterations on the company's memorandum being sufficient their Lordships might (subject to the disposal of the question as to the name of the company) be pleased to confirm the alterations of the provisions of the memorandum of association.

The petitioners expressed at the bar their desire not to change the name of