to grant him a certificate of poverty in usual form, or to do otherwise as to your Lordships may seem good."

There was no opposition, and the Court, without delivering opinions, granted the prayer of the note.

Counsel for Applicant—R. C. Henderson. Agent—R. S. Carmichael, S.S.C.

Saturday, January 19.

SECOND DIVISION.

GAUNT'S EXECUTORS *v.* LIQUIDATORS OF LA MANCHA SYNDICATE, LIMITED.

Company — Voluntary Liquidation — Removal of Liquidator by Court—Due Cause, what Constitutes — The Companies Act 1862 (25 *and* 26 *Vict. c.* 89), *sec.* 141.

Section 141 of the Companies Act 1862 provides—" . . . The Court may also, on due cause shown, remove any liquidator, and appoint another liquidator to act in the matter of a voluntary winding-up."

Per the Lord Justice-Clerk—"The Court is entitled to take *any* circumstances into account in considering the question of the removal of a liquidator, and is not limited to considerations of misconduct or personal unfitness."

Per Lord Stormonth Darling—"It is an extreme measure to remove a liquidator who has been appointed by the shareholders, and it will only be done when the Court is of opinion that it would be against the interest of the liquidation to allow him to remain."

Adam Eyton, Limited, 1887, 36 Ch.D. 299; *Marseilles Extension and Land Company*, 1867, L.R., 4 Eq. 692; *British Nation Life Assurance Association*, 1872, L.R., 14 Eq. 492, *approved.*

Circumstances in which in a voluntary liquidation the Court refused to remove the liquidators appointed by the shareholders, *holding* that "due cause" for so doing had not been shown.

Charles Henry Slater and others, the executors of the deceased Edwin Gaunt, a contributory of the La Mancha Syndicate, Limited, presented a petition for (1) a supervision order in the voluntary winding-up of the La Mancha Syndicate, Limited; (2) the removal of the present liquidators William Douglas Cairney and George Andrew Robinson, and the appointment of a new liquidator.

The petition was presented under sections 141 and 147 of the Companies Act 1862.

The following statement of facts is taken from the petition—"1. The La Mancha Syndicate Limited was on 18th April 1899 incorporated under the Companies Acts 1862 to 1898, and has its registered office at 163 Hope Street, Glasgow. The nominal capital of the company was £40,000, divided into 40,000 shares of £1 each. Of these shares 35,906 have been issued and are fully paid, and the petitioners are duly registered as holders of 4500 shares.

"2. The principal object for which the company was formed was to adopt, subject to such modifications, if any, as might be agreed upon, and to carry into effect, an agreement made between James Edwards, 14 St Ann's Square, Manchester, and Ralph Robertson Stewart, 45 Renfield Street, Glasgow, as trustee for the company, dated 13th March 1899, for the acquisition of certain mining rights in Spain; and the memorandum of association contained in addition as objects of the company, *inter alia*, the purchase, leasing, developing, sale, and disposal of mines and mining rights.

"3. The company commenced to carry on business immediately after its incorporation. It acquired the business property and assets referred to in the agreement above mentioned, and thereafter carried on business as authorised by the memorandum of association until September 1904, when, in consequence of various circumstances, arrangements were made for the sale of the company's assets to a new company formed in Spain and called the Compania Minera de Villa-gutierrez. This sale was, it is believed and averred, entered into between the two companies, and ultimately carried through shortly thereafter, but the petitioners have been unable to obtain full or authentic information on the subject, or a copy of the agreement of sale.

"4. What purports to be an abstract thereof has been received by them from Mr Wm. D. Cairney, C.A., Glasgow, secretary and formerly chairman of the syndicate, and is in the following terms:—

"The new scheme founded by Mr Abram's friends is substantially the formation of a foreign company, to be under the sole management of the Panarroya Company, in which they retain a controlling interest. The La Mancha Syndicate would have one director (Mr Barris) to represent them and their interests on the board.

"The scheme provides for a capital not exceeding in English money £70,000 6 per cent. preference shares and £35,000 second class shares. The preference shares are entitled to a 6 per cent. dividend and 50 per cent. on the net profits, the remaining 50 per cent. going to the second class shares. A sinking fund would be provided for the purpose of paying off the preference shares over a term of years to be subsequently arranged, based on the possibilities of the mines, which will be at the discretion of the new board. When the preference shares are paid off new shares will be issued to the holders of the preference shares, pound for pound, and these shares will then be entitled to 50 per cent. of the net profits.

"To facilitate the carrying out of this proposition La Mancha board had better give Mr Barris the necessary powers.

"For the purchase or relinquishment of all rights now centred in La Mancha Syndicate it is proposed to give them as consideration £20,000 in preference stock, with the rights and privileges above mentioned.

"It is clearly understood that in consenting to such material alterations it is on the clear understanding that the Company Panarroya will obtain and hold 51 per cent. interest in the new company and assume entire management at the mines, retaining such of the staff as in their discretion is advisable. And further, that they will provide offices for the new company in their offices, and that the assets in the new company are to be considerably extended, namely, by the inclusion of certain mines (a list of which has already been furnished to Messrs Simpson Partners) and the rights, &c., now belonging to Mr Villanova, and of course adequate working capital to make a large output.'

"5. The new company is thus to be under the sole management of a company called The Panarroya Company, which is the chief of a group of mining companies, and is to hold 51 per cent. interest in the new company, whose capital is not to exceed £70,000 sterling in 6 per cent. preference shares and £35,000 sterling in second class shares. It is declared that the preference shares are to be entitled to a dividend at the rate of 6 per cent., and in addition 50 per cent. of the net profits, the remaining 50 per cent. profits going to the second class shares. The 'Mr Abrams' mentioned in the abstract is Edward W. Abrams, of 4 Suffolk Street, London, W., mining financier, who is largely interested in the Panarroya and other mining companies. The shareholders in La Mancha Syndicate, Limited, are to receive in respect of the transfer of that company's assets to the new company, 20,000 preference shares of the latter of the sterling equivalent of £1 each. The foregoing abstract of the agreement of sale is very vague with regard to various important matters, but the petitioners have not been able to obtain further information from the secretary of the syndicate or to verify the abstract. The secretary, and afterwards the liquidators, have been called upon by the petitioners for a full copy of the agreement, but they have failed to furnish one; and thus the petitioners are kept in ignorance or uncertainty as to their rights.

"6. In March 1905 the petitioners' solicitors put themselves in communication with the secretary of the syndicate in order to get information as to the carrying out of the sale of its assets to the new Spanish company and for delivery of certificates of the shares of the latter company corresponding to the petitioners' interests in the syndicate. The secretary, the said Mr Cairney, then acknowledged that the course to be followed was to place the syndicate in liquidation and divide the shares *pro rata*, and indicated that a general meeting of the syndicate would be held in about three weeks; but he stated that the certificates had not been received. No meeting was then convened, but in August 1905, in reply to further inquiries, the secretary stated that the certificates were ready, but disclosed that they were in the hands of the said Mr Abrams.

"7. No meeting of the syndicate having been called, the petitioners on 26th October 1905 served a requisition upon the directors calling upon them to convene a meeting. An extraordinary general meeting of the shareholders of the La Mancha Syndicate, Limited, was accordingly convened and held at Glasgow on 10th November 1905, when the following resolutions were carried by the requisite majority, and thereafter, at a meeting held on 27th November 1905, they were submitted for confirmation with a view to their becoming special resolutions and were duly confirmed:—(1) 'That the company be wound up voluntarily.' (2) 'That William Douglas Cairney, 163 Hope Street, Glasgow, and George Andrew Robinson, 10 St James Square, Manchester, accountants, be and are hereby appointed joint liquidators for the purpose of such winding up.'

"8. Since the syndicate went into liquidation the petitioners have urgently pressed the liquidators, as they did the secretary before, to proceed with the winding up and to obtain delivery of the certificates and to have them divided among the shareholders of the syndicate, but without result. The liquidators have allowed Mr Abrams to hold the certificates down to the present time, and have taken no effective means to compel delivery, although Mr Abrams at one time undertook to deliver them, and Mr Cairney, as joint liquidator, has declared that Mr Abrams has now no possible defence. The correspondence between the parties is referred to.

"9. Notwithstanding the terms of the foregoing resolution and the efforts of the petitioners as above mentioned, they and the other shareholders of the syndicate have not yet received delivery of the share certificates to which they are entitled under the agreement of sale above referred to; nor have the liquidators used the necessary means to obtain them, and they are still held by the said Mr Edward W. Abrams. This is done on the pretext that he has certain claims against a Mr S. J. Barris, who was proprietor of, and who sold the mining rights to, La Mancha Syndicate, Limited, in the first instance when that company was established. No such right or claim is mentioned in the abstract of the agreement of sale before mentioned, nor has it been disclosed to the petitioners by the syndicate or the liquidators.

"10. The petitioners, who are the holders of 4500 £1 shares in La Mancha Syndicate, Limited, submit that the pecuniary relations of Mr Abrams with third parties should in no way interfere with the winding up of the syndicate. The liquidators have grossly failed in their duty to the shareholders in not proceeding with the winding up and in allowing the certificates of the new shares to remain in the possession of anyone but themselves or the shareholders entitled thereto. The petitioners' rights are seriously prejudiced, and they are precluded from exercising the rights to which they are entitled as shareholders and from realising the estate under their charge."

The liquidators Cairney and Robinson lodged answers, in which they stated, *inter alia*—"The document quoted in article 4 of the petitioners' statement is the memorandum of a scheme proposed to the company by Mr Abrams for realising its assets. This document was submitted to an extraordinary general meeting of the shareholders, held at the registered office of the company on Thursday, 26th May 1904. The meeting by resolution approved of the sale of the assets to a new company to be formed in the manner proposed in the memorandum, the consideration being £20,000 of preference stock in the new company. The meeting further empowered Mr Barris, who was one of the directors of the company, and who held personally £14,000 of shares out of the company's total share capital of £35,906, to sign all documents and perform the acts necessary for carrying through the transaction. The resolution of the company to the foregoing effect was confirmed at a second extraordinary general meeting held on the 10th June 1904. At this time the affairs of the company were in a very critical condition. Its capital was entirely exhausted, and the existing levels of the mines having been worked out, a large capital expenditure was necessary if the undertaking was to be carried on. Further, the company was in debt for wages to the amount of £800, which had to be immediately provided in order to prevent liquidation, which, the shareholders were satisfied, would yield them nothing. The whole mining properties, which were mainly leasehold, and the other company assets in Spain, stood in the name of Mr Barris, who is a Spaniard and resides in Spain, his absolute title being only subject to a declarator of trust in favour of the company, executed in this country on 6th November 1898. The transaction was carried through in Spain by Mr Barris on behalf of the company, and Mr Abrams on behalf of the purchasers. Mr Abrams gave a written undertaking to Mr Barris to deliver to him on behalf of the company, as soon as he obtained them, £20,000 6 per cent. preference shares in the Compania Minera de Villa-gutierrez, and Mr Barris executed the necessary deeds transferring the properties to the new company. These facts have been fully disclosed to the petitioners and their agents.

"6. Admitted that the certificates had not been received in August 1905. Only a part of them have yet been received, and the balance is still under the control of Mr Abrams and Mr Barris as hereinafter explained. Until a few weeks ago Mr Abrams was not in right to deliver said shares. In arranging for the transfer of the properties to the new company the proprietor of the leasehold subjects, Senor Villanova, insisted that the £16,000 of shares in the new company, which he was offered as the purchase price, should be bought back from him at par by Mr Abrams by instalments over a period of two years. He further insisted on a guarantee that the instalments would be paid. Mr Abrams succeeded in obtaining the necessary guarantee from Messrs Rothschild of Paris, but only upon condition that he would retain the shares falling to La Mancha Syndicate until the whole of said instalments had been paid. To this condition Mr Abrams was compelled to agree, and he undertook to deliver the shares to Mr Barris only so soon as he should receive them free of this condition. The last instalment of said £16,000, amounting to £3000, was only paid a few weeks ago. Further, the liquidators have ascertained that Mr Abrams, at the request and with consent of Mr Barris, who was interested in the £20,000 preference shares to the extent of £7800, and represented that he was greatly embarrassed by the delay in delivering the shares, agreed to their being deposited in bank in Paris in security of an advance by the bank to Mr Barris of £5000, which has not yet been repaid. There has never yet been a market in Villa-gutierrez shares, and the certificates, which are bearer warrants, cannot be uplifted until said advance has been repaid.

"7. Admitted that the resolutions above mentioned were passed and confirmed as stated.

"8. Admitted that the petitioners since the syndicate went into liquidation have pressed the respondents as liquidators to obtain delivery of the certificates, and that delivery for the reasons above stated has not been made. *Quoad ultra* denied. The respondents have used every endeavour to obtain delivery of the certificates. They have had frequent meetings and correspondence with Mr Abrams, and have now obtained his undertaking that the shares, under the deductions after mentioned, will be delivered to the respondents not later than 20th March next 1907.

"The shares to be then delivered will be of the face value of . . £20,000 0 0

Less (1) £2660 of shares purchased and paid for by Mr Abrams at 15s. per £ .	£2,660 0 0	
(2) Mr Barris' proportion of the said shares	7,800 0 0	
		10,460 0 0
Leaving Villa-gutierrez shares deliverable .		£9,540 0 0

"In the meantime they have received from him, and hold in security of his implementing said undertaking, certain shares in the Villa-gutierrez and other companies which the respondents are advised might be realised at a sum of over £12,700, and Mr Abrams has also lent to the syndicate £500, making a security on the above basis of over £13,200. The respondents have very carefully considered the advisability of taking legal steps against Mr Abrams, but they are satisfied, in view of the terms of his contract and of its being a Spanish contract entered into with Mr Barris, and of the difficulties caused by the subsequent actings of these parties, as well as of the possible value of a judgment if and when obtained, that in the circumstances litigation is inadvisable in the best interests of

the shareholders. They are of opinion that it is much more to the advantage of the shareholders to accept the undertaking above mentioned with the security foresaid than to enter upon litigation.

"In these circumstances the respondents respectfully submit that they have exercised the utmost diligence in the discharge of their duties to the syndicate and the shareholders, and that the prayer of the petition for their removal from office should be refused, with expenses. They do not desire to oppose the application for a supervision order, but they respectfully submit in the circumstances of the liquidation, and in view of the expense it would entail, that such an order is at present unnecessary."

The petitioners contended that they had shown "due cause" for the removal of the liquidator within the meaning of sec. 141. They quoted the following authorities—*Marseilles Extension Railway and Land Company*, 1867, L.R., 4 Eq. 692; *British Nation Life Assurance Association*, 1872, L.R., 14 Eq. 492; *Sir John Moore Gold Mining Company*, 1879, 12 Ch. D. 325; *Adam Eyton, Limited*, 1887, 36 Ch. D. 299; *Lysons* v. *Liquidator of the Miraflores Gold Syndicate, Limited*, May 23, 1895, 22 R. 605, 32 S.L.R. 469.

The respondents contended that no sufficient reason had been shown for the removal of the liquidators. They did not at the hearing oppose the motion that the liquidation should be placed under the supervision of the Court.

LORD JUSTICE-CLERK—In this case, where the representatives of a deceased shareholder have come forward with a petition for the removal of the liquidators, we should require them to show good reason before granting their application. I do not think that good reason has been shown. The liquidators seem to have been diligent, and to have performed their duties as well as possible in the face of considerable difficulty. I quite assent to the views expressed by Cotton, L.J., in the case of *Adam Eyton, Limited*, 1887, 36 Ch. D. 299; and of Malins, V.C., in the case of the *Marseilles Extension Co.*, 1867, L.R., 4 Eq. 992; and the *British Nation Life Assurance Association*, 1872, L.R. 14 Eq. 492, because I think that the statute plainly implies that the Court is entitled to take any circumstances into account in considering the question of the removal of a liquidator, and is not limited to considerations of misconduct or personal unfitness, as suggested in the case of the *Moore Gold Mining Co.*, 1879, 12 Ch. D. 325. At the same time, I am not satisfied that any such case has been made out against the liquidators as would justify their removal. Of course while the application is refused *hoc statu*, it is open to the petitioners to renew their petition at any time should they think that circumstances require it.

On the other point I think it very desirable that the liquidation should be placed under the supervision of the Court, and that an order should be pronounced to that effect.

LORD STORMONTH DARLING—I entirely agree on both points. The company went into voluntary liquidation on 27th November 1905, and the application now made is twofold—to remove the liquidators appointed by the company, and to place the winding-up under the supervision of the Court. I think the latter motion should be granted. It is one that is almost never refused, and it is as much in the interest of the liquidators as of the company.

But I think that the motion for the removal of the liquidators should be refused. It is an extreme measure to remove a liquidator who has been appointed by the shareholders, and, as expressed in the case of *Adam Eyton, Limited*, 1887, 36 Ch. D. 299, it will only be done when the Court is of opinion that it would be against the interest of the liquidation to allow him to remain. In the present case the liquidators, who are two in number, have certainly had a difficult task to perform. The property of the company was situated in Spain; it consisted chiefly of mining rights, and we know that things move slowly in Spain. The matter was further complicated by the fact that the company had no title to the property in Spain except through a Spanish gentleman Mr Barris, whose position was fully explained to the shareholders at the outset. When it was agreed to sell the assets of the company it was arranged that Mr Barris should act as trustee for the company, and should be the person to whom the new shares, which formed the consideration-money, were to be handed over. The present petitioners, whose interests as executors of a deceased shareholder are not quite the same as those of the general body of shareholders, come forward and complain, with some show of reason, of delay on the part of the liquidators in getting possession of the new shares, which prevents them winding up the estate under their charge. I do not say that they had no legitimate interest to come forward, but when the question is whether it would be against the interests of the liquidation as a whole to allow the liquidators to remain in office, I do say that in my opinion it would be detrimental to those interests to remove them. They have visited Spain, and have full knowledge of the affairs of the liquidation. Further, standing the undertaking by Mr Abrams to make forthcoming on 20th March the shares, the failure to secure which is the chief cause of complaint against the liquidators, I think it would be a very strong step to remove them at the present stage. I also notice that the petitioners do not offer to pay the expenses of the legal proceedings which, they say, should now be taken to enforce delivery of the shares. At present we must take the case on the footing that the liquidators should have taken, or should now take, legal proceedings in Spain at their own expense, and I am not prepared to assent to an order involving such a conclusion.

LORD LOW—I am of the same opinion. The liquidators had a very complicated and difficult set of circumstances to deal

with. I have a strong impression that they could not have done more than they have done without embarking on an expensive and doubtful litigation in Spain at their own expense. I do not think they could be expected to do anything of the kind, and in my opinion no sufficient reasons have been disclosed for removing them. At the same time I think it advisable to continue the liquidation under the supervision of the Court.

The Court pronounced an interlocutor ordering the liquidation to be continued subject to the supervision of the Court, and confirming the appointment of the petitioners as joint liquidators.

Counsel for the Petitioners—Lorimer, K.C.—J. H. Millar. Agents—J. S. & J. W. Fraser Tytler, W.S.

Counsel for the Respondents—M'Lennan, K.C.—Mercer. Agent—John Baird, Solicitor.

Wednesday, January 23.

SECOND DIVISION.

[Sheriff Court of Dumfries and Galloway at Dumfries.

DUMFRIES HARBOUR COMMISSIONERS *v.* STEAMSHIP "FULWOOD," LIMITED.

Reparation — Negligence — Harbour Commissioners—Berth at Quay—Ship.

Harbour commissioners had laid the bottom of the berth at a certain quay with timber baulks or skids, but had allowed these to fall into such disrepair that several were amissing, and those remaining were not on a uniform level. An inspection would have disclosed the defects. A vessel berthing there was strained and damaged.

Held that the commissioners were liable in damages, as they had not used reasonable diligence to keep the berth safe.

This was an action by the Steamship "Fulwood," Limited, Preston, owners of the steamship "Fulwood," against the Commissioners of the Harbour of Dumfries and the Navigation of the river Nith, to recover damages from them for injuries sustained by the said ship while berthing at Glencaple Quay in the river Nith. The defenders were vested with the control and management, *inter alia*, of Glencaple Quay, and were by "An Act for Improving the Harbour of Dumfries and the Navigation of the River Nith" (51 Geo. III, c. 147), entitled to levy dues on goods imported to and exported from the river Nith, and on all vessels entering the said river. By section 11 of the said Act these dues were directed to be applied by the Commissioners "to the improvement of the navigation of the said river, . . . and for performing every other thing necessary for the safety of the shipping and goods belonging to the said port."

About 1866 the defenders, for berthing purposes, laid the bottom of the berth at Glencaple Quay with a series of skids or timber baulks. These skids were laid in the bed of the river, and ran out at right angles to the quay in the form of a "grid."

The facts in the case, as disclosed by proof, appear from the note of the Sheriff (FLEMING) and from the following findings in fact, the first seven of which were made by the Sheriff-Substitute (CAMPION), the remaining findings being added by the Sheriff (FLEMING), and the portions of 9 and 10 printed in italics being added by the Inner House:—"(1) That the pursuers are owners of the steamship 'Fulwood' of Preston, and that the defenders, as Commissioners of the Harbour of Dumfries and the navigation of the river Nith, are vested with the control and management of Glencaple Quay; (2) that on 21st March 1905 the 'Fulwood' having arrived at the river Nith was joined at Carsethorn by the pilot Robert Major, and by him taken to Kingholm Quay, where she discharged and loaded part of her cargo; (3) that on 22nd March 1905 the 'Fulwood' was taken by Major, the pilot, to load the remainder of her cargo down to Glencaple Quay, where she was moored about 1·45 p.m.; (4) that at the time the 'Fulwood' was moored at Glencaple Quay the tide was ebbing, and that about an hour afterwards the vessel took the ground; (5) That in consequence of it having been reported to him that the rigging of the foremast was becoming tight and the vessel straining, the master Joseph Quaile, between 5 and 6 o'clock after the ebb of the tide examined the berth and found that the vessel was unsupported from the foremast forward; (6) that on the turn of the tide the 'Fulwood' floated about 11·30 p.m. on the evening of 22nd March, and an hour later sailed for Liverpool with a cargo of 190 tons on board, arriving there about midday on the 23rd, when the master made a report to the managers of the 'Fulwood;' (7) that in consequence of said report the 'Fulwood' was inspected by the witness Smart, when it was discovered that the 'Fulwood' had sustained considerable damage; (8) that the said damage amounts to at least the sum sued for, and was sustained at Glencaple Quay on 22nd March 1905; (9) that said damage was caused by the skids placed at said quay by the defenders, and maintained by them for berthing purposes, having been allowed to fall out of a uniform gradient, *and by several of them where the forward part of the vessel would rest as she was berthed being wanting;* (10) that said defects could have been ascertained by the defenders by the exercise of reasonable care; (11) that the defenders by their harbourmaster were aware that the 'Fulwood' was about to take up the berth at said quay: and (12) that no warning was given to the master of the 'Fulwood,' or anyone on his behalf, that said defect existed. . . ."

The pursuers pleaded—"The pursuers having suffered loss and damage through