Thursday, March 5.

FIRST DIVISION.

BRUCE PEEBLES & COMPANY, LIMITED *v.* SHIELLS AND OTHERS.

Company — Liquidation — Liquidator — Official of Company—Director—Foreign. Circumstances in which the Court, in granting, at the prayer of a company, an order placing its voluntary liquidation under supervision, confirmed the appointment as joint liquidator of a director of the company resident outwith the jurisdiction, there being associated with him another liquidator unconnected with the company resident within the jurisdiction.

On 14th February 1908 Bruce Peebles & Company, Limited, a company with an issued capital of £291,905, carrying on business of electricians, mechanical engineers, suppliers of electricity, engineers, brass-founders, gas-meter manufacturers, and manufacturers and dealers in apparatus for the employment of electricity or gas, presented a petition for winding-up in which they, *inter alia*, sought the provisional appointment as liquidator of Andrew Wilson Tait, C.A., Moorgate Street, London E.C., "a director of the company acquainted with all its affairs and the present position and requirements," and stated that an extraordinary meeting had been called for the 24th February to resolve on the voluntary liquidation of the company. The provisional appointment was made. The extraordinary meeting was held. At it the voluntary liquidation was resolved on, Tait and James Alexander Robertson Durham C.A., Edinburgh, were appointed joint liquidators, and they were instructed to have the liquidation placed under the supervision of the Court. A note in the petition to that effect and seeking confirmation of their appointment, was accordingly presented by Tait and Robertson Durham.

Answers were lodged, *inter alios*, (1) by Krauss & Sons, Bristol, creditors to the extent of £4666, who desired a compulsory winding-up with a neutral person as liquidator, and (2) by Courtenay John Shiells, C.A., Edinburgh, a preference shareholder to the value of £400, who objected to the appointment of Tait on the grounds "(1) that he is not subject to the jurisdiction of the Court; (2) that inasmuch as one of the first and most important duties of the liquidator to be appointed will be carefully to investigate the conduct of the directors in connection with their administration of the company's affairs—the said administration being open to grave suspicion and comment in various particulars—*e.g.*, payment of dividends on ordinary shares—it is highly inexpedient that a director of the company, as Mr Tait is, should be appointed to the said office; and (3) that the expense attendant on the appointment of a London accountant, who would constantly have to come to Edinburgh, probably accompanied on many occasions by his staff, in order efficiently to perform his duties, is entirely unnecessary, and is undesirable in the interests of economy," and sought the appointment of a neutral liquidator or liquidators resident in Scotland.

The *facts* and *arguments* of parties are given in the *opinion* of the Lord President.

The following authorities were referred to —By the petitioners, on the point that an official of a company might be appointed liquidator—*Sanderson* v. *Muirhead*, July 18, 1884, 21 S.L.R. 766; *M'Knight & Company, Limited* v. *Montgomerie*, February 27, 1892, 19 R. 501, 29 S.L.R. 433. By the respondents, on the point that the person appointed liquidator must be within the jurisdiction—*Brightwen & Company* v. *City of Glasgow Bank*, November 27, 1878, 6 R. 244, 16 S.L.R. 131; *Barberton Development Syndicate, Limited*, February 23, 1898, 25 R. 654, 35 S.L.R. 499: and on the point that an official of the company was ineligible—*in re Gold Company*, (1878) L.R., 11 C.D. 701, *per* Malins, V.C., at 706.

LORD PRESIDENT — In the application that is before us we have first of all to decide whether this should be a compulsory winding-up or whether the voluntary winding-up which has already been started by the company should be continued under the supervision of the Court. There has been scarcely any argument upon that point, and at any rate it is sufficient to say that there is no reason why we should disturb the liquidation at present going on. The Court will accordingly pronounce the ordinary form continuing the winding-up under the supervision of the Court.

The real question, however, which has been argued before your Lordships is the question who the liquidators are to be. The provisional liquidator, who was appointed only the other day, is Mr Tait, who is a chartered accountant resident in London, and also was a director of the company. The application of the company, who are the presentors of the petition, was originally intended to be an application to get the order which has just been made by the Court, and to confirm the appointment of Mr Tait as liquidator; but after the prayer had actually been framed they were approached by several of the creditors who said that they objected to having a director of the company appointed as sole liquidator, but indicated that they would be perfectly contented if an independent liquidator was appointed in conjunction with Mr Tait, and the name suggested was that of Mr Robertson-Durham. Accordingly, before your Lordships to-day the position taken up by the company has been that the liquidators ought to be Mr Tait and associated with him Mr Robertson-Durham. The application is opposed by certain parties who, through the counsel who appeared, represent in all £7000 worth of creditors, 1600 shares, and £1000 worth of debenture debt. The total figures which might be represented under these three heads are, for creditors,—I give the figures

of course roughly,—£200,000; for debentures, £75,000; and for shareholders £290,000 —58,000 odd shares. Now the objections that have been made by the compearing parties are really reduced to two heads alone. They objected to Mr Tait, first, in respect that he is domiciled in England, and not subject to the jurisdiction of the Court; and secondly, that he has been, and was at the moment of the liquidation, a director of the company. On the other hand, the company have given special reasons, as they say, why Mr Tait's appointment should be confirmed. These special reasons are as follows—they explain that the company has been brought into the difficulties which necessitate its liquidation because of the tightness of money in the money market, and that, assuming its business may go on, it is not certain that it will eventually prove insolvent. Whether that is the case or not it is true that the company at this moment, in the course of its business, is engaged in carrying out a great many important and lucrative contracts. Therefore it is in the interests of all concerned that the benefit of these contracts should not be lost, because, even apart from the question of the relinquishment of profit from these contracts, there would be a very severe loss to the company in respect that under the forfeiture clauses, which are common enough in such contracts, they would lose a great deal of their plant in various parts of the world by that plant being seized by the persons with whom they had contracted. They further explained that there are in several of these contracts clauses of what we call in Scots law irritancy, by which the contracts may be brought to an end by the liquidation of the company, and they go on to say that the continued presence of Mr Tait in the active management of the business as a going concern is really a *sine qua non* in the negotiations which must necessarily ensue with the various parties with whom they have these contracts. That is a story which upon the face of it appears to have quite the impress of truth and probability. It is not admitted to the full by all the parties who are here compearing, and of course it is impossible for your Lordships sitting here to have an inquiry in order to get at the absolute truth of the state of facts. In regard to these matters your Lordships are bound to deal in a case of this sort with the *prima facie* view, and all I say is that the story as told seems to me to bear the impress of truth. But your Lordships, I think, in such a case, where it is found that averments made on one side are not admitted on the other, have pointed out to you by the terms of the statute what is the proper method of solution. You are in all these matters, the statute says, to have regard to the wishes of the creditors and of the contributors. I have already given the figures of the compearing and objecting persons, and I have given the figures of the total compearers. In every such case of course it is not to be expected that we should have everybody here; but for the petitioners we have here, so far as the creditors are concerned, about £124,000 out of £200,000, and we have to notice that one very large creditor, the Royal Bank, who has over £43,000, is neutral, but neutral in such a way as practically to belong to the petitioners, because the Royal Bank, following its usual practice, did not take any part in determining the course to be taken by the creditors, but intimated that it would leave the decision to the trade creditors, which is tantamount to voting with the majority. Accordingly you have here a sum of something like 160 odd thousand pounds, and you have on the other side practically about £40,000 worth out of the whole shareholding, and the petitioners have through a separate appearance practically the whole of the debenture holders. I need scarcely say, when these figures are compared with the figures of the compearing objectors, that there is absolutely an overwhelming majority in favour of the demand by the petitioners. Therefore I think your Lordships should have little hesitation in supposing that the particular reasons which have been given for appointing this gentleman are true, seeing that the belief that these reasons are true is a belief that commends itself to the enormous majority of the shareholders, and still more of the creditors, who are of course the persons most to be thought of. Accordingly it seems to me that everything points to granting the prayer of the petition in this matter unless there is some real objection in law. Now it is no objection in law to the appointment of the gentleman that he is not at this moment subject to the jurisdiction of the Court. It seems to me that he subjects himself most clearly by consenting to become an officer of this Court; and, subject to the difficulty of arresting him in England, I cannot help thinking we should have every power against him, if such a thing were necessary —a contingency which is, I am glad to think, most improbable—that we would have against a Scotch liquidator. Nor do I find it has been ever laid down that it is impossible for the Court to appoint liquidators not subject to its jurisdiction. On the contrary, Lord President Robertson in the case of *The Barberton Development Syndicate, Limited*, 1898, 25 R. 654, seems to me to have been particularly careful to bar the idea that such a course was incompetent, although it goes without saying that in ninety-nine cases out of a hundred it is much more convenient in practice for the Court to appoint a gentleman in their own jurisdiction, for this reason, that it is better to have the man who conducts it there also. And the considerations which guided the Court in the well-known case of the *City of Glasgow Bank—Brightwen and Others* v. *City of Glasgow Bank*, 1878, 6 R. 244—are really too obvious to require stating. In that case there was nothing to be done but to distribute the assets of the City of Glasgow Bank. There were four men, capable gentlemen, in Scotland who had been appointed, and the man proposed to be added

to these four was a gentleman who was in England—really, if I may use the expression, clearly a case of a fifth wheel to the coach. Here the reason for asking that Mr Tait should be a liquidator is not really connected with the distribution of the assets of the company, but is connected with the weighty consideration of being able to continue this business as a going business at present, and consequently making the most money out of it for both creditors and shareholders. Well then, possibly the only other matter is that it is said Mr Tait was a director, and it is hinted or said that questions may arise as to the conduct of the directors in the past. That may be so, and I think it would be a very weighty consideration against the appointment of Mr Tait as the sole liquidator. But it is not now proposed that Mr Tait should be sole liquidator. I do not wish to say anything peculiarly personal in the matter, but it is only fair to Mr Robertson Durham to say that he, the gentleman selected and put before us, is a gentleman well known to this Court, and one at the head of his profession, and one in whom the Court has every confidence. It is perfectly absurd to think that Mr Robertson Durham, knowing his duties as an officer of this Court, would ever allow to remain uninvestigated any transaction in the past because he thought it might eventually go against the interests of Mr Tait. If such things are unfortunately discovered I conceive it would be a duty which he would perform, to call attention to the matter, to say to Mr Tait that the time had now come in which his interests became conflicting, and to call upon him to resign; and if he did not do so it would be Mr Robertson Durham's duty to bring the matter before the Court, and in such circumstances as I have put I do not think it is doubtful what the Court would do. All that is speculation as to the future, and all that does not touch the real crucial point of the matter, viz., the extreme desirability of keeping these contracts running. Accordingly I am of opinion here—it is a peculiar and in many respects a unique case—that the petitioners have really made out the position they have put before us. Upon this matter of conflicting interests, there again it seems to me your Lordships' action is really backed up by the action of the persons to be considered, the creditors. As soon as it was known that Mr Tait was to lodge a petition to appoint him liquidator the creditors said "No," and the moment it was proposed to have Mr Robertson Durham along with him the creditors said "Yes," and they are saying "Yes" before your Lordships to-day. I am therefore of opinion that the prayer of the note should be granted.

LORD M'LAREN—I concur.

LORD KINNEAR—I also concur.

LORD PEARSON was absent.

The Court pronounced this interlocutor—

"Order that the voluntary winding-up of Bruce Peebles & Company, Limited, resolved on by the extraordinary resolution quoted in the note, be continued, but subject to the supervision of the Court: Confirm the appointment of the said A. W. Tait and J. A. Robertson Durham as joint-liquidators of the said company in terms of and with the powers conferred by the Companies Acts 1862-1900: Appoint the said A. W. Tait to find caution for his own actings and intromissions as joint-liquidator by a bond containing a clause consenting to the jurisdiction of the Court of Session being prorogated: Limit such caution to the sum of £500, and allow a bond for that amount by the Ocean Accident and Guarantee Corporation, Limited, to be approved by the Clerk: Find the petitioners and the said liquidators entitled to the expenses of the petition and note," &c.

Counsel for Petitioners and Liquidators—Dean of Faculty (Campbell, K.C.)—Clyde, K.C.—Sandeman. Agents—Davidson & Syme, W.S.

Counsel for English Debenture Holders (*concurring*)—Maitland. Agents—Macandrew, Wright, & Murray, W.S.

Counsel for Krauss & Sons (Respondents)—Macmillan. Agents—Gardner & Macfie, S.S.C.

Counsel for Shiells (Respondent)—Munro. Agents—W. & F. Haldane, W.S.

Counsel for other Respondents—Lyon Mackenzie & F. C. Thomson. Agents—Norman M. Macpherson, S.S.C.—Wood & Robertson, W.S.

Thursday, March 5.

FIRST DIVISION.

[Sheriff of Perth.

RAMSAY *v.* HOWISON, *et e contra.*

Landlord and Tenant—Lease—Damages—Bar—Mora—Muirburn—Claim of Damages by Tenant for Breach of Obligation in Lease—Payment of Rent without Deduction or Reservation.

In an action raised by a tenant, in the tenth year of his lease, against his landlord, to recover damages alleged to have been suffered in that and the preceding year through the latter's failure to fulfil the obligation undertaken by him in the lease to burn yearly, one year with another, a certain proportion of the moorland—*held* that the pursuer was not barred by delay, or by having paid rent and only complaining without making a specific claim, inasmuch as the damage caused by the failure to burn was cumulative, and he was entitled to wait till it declared itself and could be estimated

Broadwood v. *Hunter*, February 2, 1855, 17 D. 340, *distinguished.*