

The
Scottish Law Reporter.

WINTER SESSION, 1886-87.

In order to secure regularity of publication, it is occasionally necessary to insert the Reports of Cases slightly out of the order of dates on which they have been decided.

COURT OF SESSION.

Friday, August 13.

BILL CHAMBER.

[Lord Shand, Lord Ordinary
on the Bills.]

MACFIE v. PORTOBELLO PIER COMPANY.

*Public Company—Winding-up—49 Vict. cap. 23,
sec. 5—Jurisdiction of the Lord Ordinary on
the Bills in Vacation.*

By section 5 of the Companies Act 1886 it is enacted that "wherever the expression 'the Court of Session' occurs in" the Companies Acts 1862-1883, "or the expression 'the Court' occurring therein or in this Act refers to the Court of Session in Scotland, it shall mean and include either Division thereof, or in the event of a remit to a permanent Lord Ordinary, as hereinafter provided, such Lord Ordinary during session, and in time of vacation the Lord Ordinary on the Bills. "A creditor's petition for a winding-up had been presented to the First Division during session, and an order for intimation obtained. *Held* that the Lord Ordinary on the Bills in vacation had the powers exercised by the Division during session, and therefore had jurisdiction to grant a winding-up order.

On 17th July 1886 R. A. Macfie, a shareholder and creditor of the Portobello Pier Company (Limited), presented a petition for winding up of the Portobello Pier Company under the Companies Acts 1862 to 1886, and for appointment of a liquidator.

An order for service and advertisement was pronounced by the First Division. After the ser-

vice the petitioner applied to the Lord Ordinary on the Bills in vacation (Lord Shand) for a winding-up order and the appointment of a liquidator, founding on the Companies Act 1886.

On the 13th August 1886 the Lord Ordinary on the Bills (LORD SHAND) granted the petition and appointed a liquidator.

"*Note.*—This application has been presented to the Lord Ordinary on the Bills after the intimation and service ordered by the First Division of the Court has been made, that an order for judicial winding-up of the Portobello Pier Company should be pronounced. The petitioner submits that under the recent statute 49 Vict. c. 23 (The Companies Act 1886) the Lord Ordinary on the Bills has during vacation all the powers competent to either Division of the Court in time of session in reference to the liquidation of joint-stock companies under the Companies Acts 1862 to 1886, including the power to pronounce a winding-up order, or a supervision order in the case of a company which has passed a resolution to wind-up voluntarily.

"The competency of the application to the Lord Ordinary on the Bills depends on the construction of section 5th of the recent Act, which provides that 'wherever the expression "the Court of Session" occurs in the said recited Acts' (*i.e.*, in the Companies Act of 1862 and subsequent Acts), 'or the expression "the Court" occurring therein or in this Act refers to the Court of Session in Scotland, it shall mean and include either Division thereof, or in the event of a remit to a permanent Lord Ordinary, as hereinafter provided, such Lord Ordinary during session, and in time of vacation the Lord Ordinary on the Bills.'

"The words of this enactment admit of two different interpretations. They may either mean

(1) that the expressions 'the Court of Session' or 'the Court' occurring in the Companies Acts shall mean and include in time of vacation the Lord Ordinary on the Bills, in which case all the powers which either Division of the Court may exercise during session may competently be exercised by the Lord Ordinary on the Bills during vacation; or (2) that these expressions shall mean and include the Lord Ordinary on the Bills in time of vacation only in the case of a liquidation which has been remitted by one of the Divisions of the Court to a permanent Lord Ordinary, or in other words, that the Lord Ordinary on the Bills shall in vacation represent the permanent Lord Ordinary before whom the liquidation depends in the case only in which a liquidation has been remitted to the Outer House.

"By section 6 of the Act it is provided that 'when the Court makes a winding-up or a supervision order, or at any time thereafter, it shall be lawful for the Court, in either Division thereof, to remit the winding-up to one of the permanent Lords Ordinary,' before whom the subsequent proceedings shall go on. Until such a remit be made, a Lord Ordinary has no jurisdiction in the process of winding-up, and under the statute a remit of the liquidation process cannot be made until a winding-up order or a supervision order has been pronounced. It follows that a Lord Ordinary in the Outer House cannot competently grant such orders. He can only, after the liquidation has been remitted to him, carry out the winding-up process which has originated in a Division of the Court, and in which a winding-up or supervision order has been pronounced by the Court.

"If, then, the true meaning of section 5 of the recent Act be that the Lord Ordinary on the Bills shall only in vacation follow up the liquidation proceedings in cases where the liquidation has been remitted to one of the permanent Lords Ordinary, it would be incompetent in the Bill Chamber to entertain the present application, for this liquidation had not been remitted to a Lord Ordinary, as indeed it could not be, till after a winding-up or supervision order has been pronounced by one of the Divisions of the Court.

"It is notorious that it was the intention of the framers of the Act to give the Lord Ordinary on the Bills in vacation power to grant winding-up orders, and to carry on the proceedings in existing liquidations, and it is clearly desirable that, in order to prevent preferences being acquired and for other objects, it should be competent to obtain winding-up orders in vacation in the same way as warrants sequestrating the estates of bankrupt traders and firms may be obtained when the Courts are not sitting. Moreover, in England the Judges sitting in vacation exercise this jurisdiction to the public advantage.

"Nevertheless, if the question of competency had turned entirely on the leading words of enactment contained in the 5th clause of the statute above quoted, I should have felt the utmost difficulty in entertaining the application. The statute contains no preamble expressive of any purpose to give to the Lord Ordinary on the Bills the extensive powers contended for—powers in themselves greater than are given to any permanent Lord Ordinary—and the language used, though admitting of either of two interpretations, seems to me to read rather more naturally as

meaning that the Lord Ordinary on the Bills in vacation may in liquidations take the place of the Lord Ordinary to whom the liquidation has been remitted than as meaning that he may competently exercise all the powers of either Division of the Court, even to the extent of granting a winding-up order or an order for a winding-up under supervision.

"In the subsequent part of section 5 of the statute, however, it is I think made clear—not by words of direct enactment it is true, but by very clear implication—that of the two meanings of which the clause above quoted admits, that which gives the full powers of the Court to the Lord Ordinary on the Bills is the sound one. Section 5 in two sub-sections (1 and 2) goes on to enumerate, first, the different orders or judgments pronounced by the Lord Ordinary in vacation which shall not be subject to review, and second, the orders or judgments which, notwithstanding a reclaiming-note, are to be carried out and receive effect until the reclaiming-note be disposed of by the Court. A perusal of the different clauses of the Act of 1862 so enumerated, with reference to which the statute assumes that the Lord Ordinary on the Bills may grant orders or judgments, shows that such orders or judgments may relate to steps in a liquidation which must precede any possible remit by the Court to a permanent Lord Ordinary, and indeed may include orders for a judicial winding-up or for continuing a winding-up under supervision. Thus, under sub-section (1) it is provided that no order or judgment pronounced in vacation under section 149 of the Act of 1862 shall be subject to review 'so far as it authorises the Court to direct meetings of creditors or contributories to be held,' leaving it as matter of plain implication that to all other effects orders under section 149 may be the subject of a reclaiming-note. Now, that section enacts that '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;' after which the section goes on to provide for meetings of creditors or contributories being summoned, and to give rules for voting at such meetings. As regards these latter provisions the order of the Lord Ordinary is declared to be final. But a judgment determining whether a company is to be wound up altogether by the Court or subject to the supervision of the Court is left subject to review. This clause appears to me to recognise the power of the Lord Ordinary on the Bills to grant a winding-up order or an order to continue a voluntary winding-up under the supervision of the Court.

"Again, the same inference must, I think, be drawn from certain clauses of the Act of 1862 which, under sub-section (2) of section 5 of the Act of 1866, are declared to be subject to review under the limitations therein provided. It is there enacted as follows—'Provided always, that such orders or judgments pronounced by the said Lord Ordinary in vacation, under or by virtue, in whole or in part, of the following sections of the Companies Act of 1862, shall, from the dates of such orders and judgments, and notwithstanding any reclaiming-note against the same, be carried out

and receive effect till such reclaiming-note be disposed of by the Court, viz., sections 85, 147, 150, &c.

"Now, section 85 provides for the restraint of proceedings against a company at any time after the presentation of a petition for winding-up, and before an order for winding-up has been given.

"Section 147 is the clause in the statute which authorises the Court to make an order directing that the voluntary winding-up shall continue subject to the supervision of the Court; and section 150 provides for the appointment of an additional liquidator or liquidators when an order for winding-up subject to the supervision of the Court is made.

"These several sub-sections deal with liquidation proceedings at their outset, and before any remit can be made by a Division of the Court to a Lord Ordinary in the Outer House, and the statute plainly recognises that the Lord Ordinary on the Bills may deal with the matters therein enumerated, including an order for the voluntary winding-up of the company under supervision.

"Having regard to the circumstance that in the sub-sections of section 5 there is a clear recognition of the power of the Lord Ordinary on the Bills to make initial or first orders in liquidation proceedings, I have come to be clearly of opinion that the enacting words of section 5 must be read as amounting to a declaration that when the expression 'the Court of Session' or 'the Court' occurs in the Joint-Stock Companies Acts referring to the Courts in Scotland it means and includes in time of vacation the Lord Ordinary on the Bills, and I therefore sustain the competency of this application, and on the merits I have no doubt the prayer of the petition ought to be granted."

Thereafter the Lord Ordinary on the Bills (LORD SHAND), on a note craving, *inter alia*, power to sell being presented by the liquidator, granted power as craved.

Counsel for Petitioner—Thorburn. Agents—Macandrew, Wright, Ellis, & Blyth, W.S.

NOTE.—The same jurisdiction was subsequently exercised by Lord Fraser, Ordinary on the Bills, in a petition for winding-up of the Edinburgh and Provincial Plate Glass Insurance Co., and by Lord Trayner, Ordinary on the Bills, in a similar petition.

Tuesday, September 29, 1885.

OUTER HOUSE.

[Lord Trayner, Lord Ordinary
on the Bills.

CITY PARISH OF GLASGOW v. ASSESSOR OF RAILWAYS AND CANALS.

Valuation Cases—Valuation of Waterworks yielding no Profit—Deductions.

Held that in valuing waterworks which belonged to a corporation who were by their statutes debarred from making a profit out of the undertaking, deduction ought to be allowed of a proportion of the rates and taxes paid in respect of the subjects, such proportion being that which would be payable by a tenant; and (2) that deduction of working charges, such as salaries of officials, &c., and expenses of maintenance ought to be allowed; and (3) that deduction of law and

parliamentary charges ought not to be allowed, these being *prima facie* landlord's and not tenant's charges.

In making up the valuation roll for the year ending at Whitsunday 1886, the assessor of railways and canals under the Valuation Act 1854 (17 and 18 Vict. cap. 91) assessed the sum of £113,188, 2s. 5d. as the yearly rent or value of the undertaking of the Corporation Gasworks, a portion of which is situated within the City Parish of Glasgow. In doing so he allowed deduction (1) of the whole of the salaries paid in the treasurer's, engineer's, and clerk's departments, amounting to £8402, 17s.; and (2) deduction of the wages paid to inspectors, clerks, and other servants, and amount spent on causewaying, amounting to £13,187, 8s. 7d. He further allowed (3) the whole of the rates and taxes, amounting to £9225, 2s. 8d., and (4) structural alterations, maintenance, and repairs, being £5692, 11s. In thus stating the valuation the assessor was guided, as regarded the 1st, 2d, and 4th of these items, by the opinion of Lord Kinneir in the case between the assessor and the *Corporation of Glasgow and Others*, Oct. 1, 1884, 22 S.L.R. 10, where his Lordship held the claim for deduction of working charges and expenses for maintenance to be well founded, and "that a deduction should be allowed from the gross revenue of all necessary outlays for management, maintenance, and repairs which are not properly chargeable against revenue, and not merely a proportion of such charges."

The Inspector of Poor of the City Parish appealed to the Lord Ordinary on the Bills (TRAYNER) against this valuation, contending (1), with regard to the salaries of treasurer's office, etc., that the deduction should only be £6202, 17s. as the just proportion falling on the Corporation as tenants or occupiers, while the other £2000 was truly applicable to the duties of the officials in the interest of the Corporation as proprietors; (2), with regard to the deduction of wages, that only the half (£6693, 14s. 3d.) should be allowed, the remainder of the wages being for work done in the interest of the Corporation as proprietors; (3) that only half the rates and taxes should be allowed, and not the whole; (4) that the cost of the repairs and alterations were payable by the Corporation as proprietors. He submitted that giving effect to these contentions (and certain contentions on minor points) the true valuation should be, not £113,188, 12s. 5d., but £132,275, 6s. 1d.

He further appealed against the allocation by the assessor of the *cumulo* valuation among the parishes in which the lands and heritages were situated, in respect that the principle the assessor had adopted of making it in proportion to the structural cost in each parish was erroneous, and that the true principle was to apportion the *cumulo* valuation among the parishes in which the area of distribution was situated, that area being the only profit-distributing part of the undertaking, "or otherwise to hold the value of the portions of the undertaking outwith the area of distribution to be the value of the land occupied, as compared with the same extent of land in the immediate neighbourhood, together with four per centum on the cost of the structural works erected thereon, and to apportion the remainder of the *cumulo* valuation among the parishes in which the area of distribution, being the profit-producing part of the undertaking, is situated." The result,