

Counsel for the Reclaimers—The Solicitor-General (Ure, K.C.)—Horne. Agents—Beveridge, Sutherland & Smith, S.S.C.

Counsel for the Respondents—Scott-Dickson, K.C.—Spens. Agents—Boyd, Jameson, & Young, W.S.

Saturday, July 7.

SECOND DIVISION.

SCOBIE AND OTHERS v. ATLAS
STEEL WORKS, LIMITED.

Company—Winding-up—Petition for Winding-up Order—“Just and Equitable”—Petition by Individual Shareholders within Six Months from Incorporation and before any Shareholders’ Meeting—Companies Act 1862 (25 and 26 Vict. cap. 89), sec. 79 (1), (2), (5).

Section 79 of the Companies Act 1862 provides that a company may be wound up by the Court “(1) whenever the company has passed a special resolution requiring the company to be wound up by the Court; (2) whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year; . . . (5) whenever the Court is of opinion that it is just and equitable that the company should be wound up.”

Less than six months after the incorporation of a limited company formed for the purpose, *inter alia*, of working a patent for horse-shoes, three preference shareholders presented a petition under section 79 (5) for winding-up by the Court, averring that the patent was worthless, that no shoes had been manufactured, that the actual cost of making the shoes largely exceeded that estimated in the prospectus, that the capital had all been spent, that the plant was insufficient, that business could only be carried on at a loss, and that there had been mismanagement by the directors. Answers were lodged by the company explaining the delay in commencing business and generally denying the averments of the petitioners. No meeting of shareholders had ever been summoned to consider the question of winding-up.

The Court *dismissed* the petition.

Per the Lord Justice-Clerk—“I can conceive of a case of such a petition as this being granted although a majority of the members were in favour of the company going on, because there might be circumstances in which we should hold that it was just and equitable that the company should be wound up, but that could only be after the domestic tribunal of the company has exercised its function, which here it has not yet done.”

Per Lord Stormonth Darling—“Where a petition is presented under

sub-section 5 of section 79—that is, the ‘just and equitable’ head—it will require a very strong case on the part of the petitioner to induce this Court to interfere when the case contemplated in sub-section 2 of section 79 has not arisen.”

The Atlas Steel Works, Limited, was on the 15th December 1905 registered and incorporated under the Companies Acts 1862 to 1900, with its registered office at Moorepark, Renfrew. The capital of the company was fixed at £10,000 divided into 5000 preference shares of £1 issued to the public and 5000 ordinary shares of £1 each taken by the vendors. The objects for which the company was formed were to acquire the Atlas Steel Foundry, Renfrew, and to carry on general foundry work, also, *inter alia*, to acquire British Patent No. 9404 of 1904 for an improved method of making horse-shoes. The consideration payable to the vendors was £1500 cash, being the price of the foundry and plant, and all the ordinary shares in the company, being the price of the patent. The minimum subscription on which the directors were entitled to proceed to allotment was £2000, and they in fact proceeded to allotment on a subscription of £2007.

On 9th June 1906 Alexander Scobie, the late works manager of the company, 58 West Regent Street, Glasgow, and two others, all being preference shareholders, presented a petition to the Court under the Companies Acts 1862 to 1900, and specially under the Companies Act 1862, secs. 79, 82, 92, for an order for the winding-up of the company by the Court. They stated—“A prospectus dated 15th December 1905 was issued inviting the public to subscribe for the preference shares. . . . In said prospectus the following statement and certificate appeared:—‘The Atlas Foundry was acquired in the winter of 1904, and since then has been put into thorough repair and the furnace into complete working order at considerable expenditure, after which experimental work was carried on making horse-shoes. The work was in charge of Mr Duncan M’Neill, steel works manager, who has for many years held a responsible position in the Mossend Steel Company. Mr M’Neill has granted the following certificate:—“The experimental work in connection with the casting of steel horse-shoes at the Atlas Foundry, Renfrew, a few months ago, was carried out under my personal supervision and instructions. . . . By systematically arranging the moulding, the cost of making steel horse-shoes complete, ready for nailing on, should be less than £8 per ton, melting five tons per day, and if the moulders can deal with ten tons per day (which can be produced from the same furnace), the cost should be under £7, 10s. per ton. From my knowledge of the wearing capacity of steel and wrought iron, I am satisfied that shoes cast in steel of the quality produced at the experimental tests, will wear longer than similar hand-made shoes of wrought iron.” . . . After sundry testimonials to the quality of horse-shoes made in the said

experiments, the said prospectus proceeded to state—"The present market price of horse-shoes runs from £15 to £20 per ton according to size. It will be noted that the difference between the price of making the patent shoes as certified by Mr M'Neill and the selling prices is considerable and leaves a very large margin for profit in working the undertaking. . . . The said estimate of profits is based on totally erroneous and misleading statements. No complete experiments for determining the cost of manufacturing horse-shoes were made by the said Duncan M'Neill. The said experiments by him were in smelting only, and no experiments were made by him to discover the cost of moulding, dressing, and finishing, which constitute a very large item in ascertaining the cost of turning out the finished article. So far, however, as the said experiments show the cost of manufacturing horse-shoes, they indicate that the said estimate falls far below the actual cost. The five cwt. of finished shoes manufactured in the said Duncan M'Neill's experiments cost about £40. The said Duncan M'Neill was not qualified to conduct said experiments. He was incorrectly described in said prospectus as a steel works manager, being a foreman smelter in the employment of the Mossend Steel Company. His only experience was in smelting. Further, the said Atlas Foundry is incapable of finishing more than one ton of shoes per day, as not more than this quantity of steel can be dried in the stoves. The small quantity of horse-shoes manufactured in said foundry since the company acquired it cost at the rate of about £88 per ton. The company therefore cannot carry on business as manufacturers of horse-shoes except at a heavy loss. The patent acquired by the company is believed to be worthless. No advantage is to be derived from manufacturing horse-shoes under it, and since the company was formed no attempt has been made to use it. The principal object of the said company, which was to manufacture horse-shoes under said patent, has therefore failed. The petitioners believe that the promoters of the company never had any expectation that the work proposed would be carried on. The plant is quite inadequate for dealing with a sufficient quantity of steel to make work in the foundry profitable. To supply sufficient plant to enable the company to deal with the weight of shoes referred to in the certificate granted by the said Duncan M'Neill, and quoted in the prospectus, would involve an outlay of at least £2000. Further, the office in the foundry is supplied with neither furniture nor books. Since work was begun at the foundry all that has been done has been the casting of six steel ingots of about 22 cwts. each, and the making of 1 cwt. of horse-shoes. The company has now ceased to do business, and the directors, to whose number the vendors have now been added, have closed the foundry and dismissed all the employees at it except the petitioner Alexander Scobie, who is the works manager, and

two watchmen. The sum subscribed for the preference shares was £2007. Of this there is a sum of £174, 5s. outstanding for unpaid calls, which are believed to be irrecoverable. £1500 was to be paid to the vendors. The sum left is inadequate to pay expenses of flotation, which have been estimated at £150, material and plant purchased by the company at the price of about £400, which is mostly unpaid, and the wages bill paid and incurred to the company's employees of over £300. No return has yet been obtained for the work done in the foundry, and should such return be received it could only amount to about £40. The company has therefore insufficient funds to discharge its liabilities. If, however, all the assets of the company, including the foundry itself, were forthwith realised there would still be an available balance for the shareholders. The petitioners believe that in their negotiations with the said company the said vendors used such misrepresentations as to the equipment and value of said foundry that repetition of the price paid therefor may be claimed from them, and in particular that the vendors represented that they had expended £1500 in acquiring and providing plant and furnishings for said foundry, the fact being that the sum so expended did not by much exceed half of said sum. It is therefore desirable that an official liquidator should be appointed. The directors are not carrying on the management of the company in compliance with the provisions of the Companies Acts, and in particular no register of members is kept at the registered office. No books are kept at the registered office, and all letters addressed to the company are re-addressed by the post-office to the office of the vendor . . . at 45 Renfield Street, Glasgow. The present secretary, Colin Wilson, is a clerk in the office of Messrs Lindsay, Meldrum, & Oatts, the company's solicitors, who are also the vendors' solicitors. Mr George Adamson, chemist, Govan, was originally appointed by the vendors secretary of the company at a salary of £2, 10s. per week, but was never allowed to take up the duties of secretary. He drew said salary until the beginning of May 1906, when he resigned. He frequently applied for the company's books, but though they were promised to him he did not receive them. Meantime the said Colin Wilson acted as secretary. In these circumstances the petitioners are dissatisfied with the management of the company. The petitioners are all preference shareholders in the company and subscribed for shares on the faith of the said erroneous statement in the prospectus. . . ."

Answers were lodged by the Atlas Steel Works (Limited), who denied the petitioners' averments and averred that the capital was not exhausted; that the purpose had not failed, it having been understood that the company was not to begin manufacturing horse-shoes on a large scale until a favourable opportunity offered; that the patent was a valuable one; that the cost of the experimental work was no

criterion of what the running cost would be in normal conditions; and that there was no cause to complain of the origin and management of the company.

Argued for the petitioners—This was a case where it was “just and equitable” that a winding-up order should be pronounced. The company being commercially insolvent, there yet remained sufficient assets to return something to the shareholders—in *re European Life Assurance Society*, L.R. (1869), 9 Eq. 122; the objects of the company had failed—in *re Amalgamated Syndicate*, [1897] 2 Ch. 600; the patent could not be worked to advantage—in *re Coolgardie Consolidated Gold Mines (Limited)*, 1897, 76 L.T. 269. The vendors here controlled the company, making it useless to refer the matter to a meeting of shareholders and rendering this petition necessary—in *re The Varieties (Limited)*, [1893] 2 Ch. 235; compare also *Pirie v. Stewart*, June 28, 1904, 6 F. 847, 41 S.L.R. 685. At anyrate the petition should be continued and an inquiry ordered into the financial position of the company and the value of the patent.

Argued for the respondents—Inquiry would be as harmful as winding up, and winding up by the Court was out of the question, until at any rate the matter had been brought up at a meeting of shareholders, the proper forum for the settlement of the domestic differences of a company—in *re Langham Skating Rink Company*, 5 Ch.D. 669; *Symington v. Symington's Quarries (Limited)*, November 21, 1905, 8 F. 121 (*per* Lord President), p. 129, 43 S.L.R. 157.

LORD JUSTICE-CLERK—It seems to me quite out of the question to grant this petition as it stands. Mr Bartholomew asked us as an alternative to order an inquiry into the statements made in the petition. But it is for the company to take the first step and to ascertain the wishes of the members in the usual way. I can conceive of a case of such a petition as this being granted although a majority of the members were in favour of the company going on, because there might be circumstances in which we should hold that it was just and equitable that the company should be wound up, but that could only be after the domestic tribunal of the company has exercised its function, which here it has not yet done. It is not suggested that the company has taken any steps in the matter, and until it has we cannot think of interfering. Then it is suggested that this petition ought to be hung up pending the ascertainment of the wishes of the members. I must say that I sympathise with what Mr Lippe said as to the disastrous effect which that course would probably have on the prospects of the company. A new petition can be brought at any time. On the whole matter I think that this petition should be dismissed, and I move your Lordships accordingly.

LORD KYLLACHY—I am of the same same opinion. I make no attempt to lay down any general rule. I think it enough

to say that, having regard to the whole circumstances, we ought not, in my opinion, to entertain this petition.

LORD STORMONTH DARLING—I also concur, and would also refrain from laying down any general rule on the construction of clause 79 of the statute. I confine myself to saying that where a petition is presented under sub-section 5 of section 79—that is, the “just and equitable” head—it will require a very strong case on the part of the petitioner to induce this Court to interfere when the case contemplated in sub-section 2 of section 79 has not arisen.

That being the case here, Mr Bartholomew has, I think, failed to show that we would be justified in taking the case out of the jurisdiction of the “domestic tribunal” (as it has been called) which the statute contemplates.

LORD LOW—I am of the same opinion. It seems to me that in the circumstances it would not be just and equitable to order the winding up of the company.

The Court refused the prayer of the petition.

Counsel for the Petitioners—Bartholomew. Agent—Henry Robertson, S.S.C.

Counsel for the Respondents—Lippe. Agents—Erskine Dods & Rhind, S.S.C.

Wednesday, June 27.

SECOND DIVISION.

[Lord Salvesen, Ordinary.

BROWN v. FRASER.

Reparation — Wrongous Information — Privilege — Malice — Probable Cause — Facts and Circumstances Inferring Malice — Whether Malice Necessarily Antecedent—Relevancy.

A, a plasterer, brought an action against B, a builder, for damages for false information having been given to the police leading to his arrest and trial for theft in the following circumstances:—B, in order that A might do certain plaster work for him, employed him to make according to a plan belonging to B five cornice moulds. These A made with his own zinc, but with B's wood as a backing. He did not, however, he averred, follow the plan, as it had been departed from and was worthless. B paid for making the moulds, but, as A averred, not for the zinc, of which B was aware. Having been dismissed by B, A, admittedly to cause inconvenience, removed the moulds and plan, and wrote falsely stating that he had burnt them, adding, “You are at liberty to give me in charge for theft if you fancy you have a case.”

B informed the police, but, as A averred, maliciously withheld the fact that the zinc was his. A was arrested