

the Society which falls to be decided by the Society.

LORD KINNEAR—I have come to the same conclusion. The executor of a deceased member of this Society claims from the Society the money due to the deceased. The only answer made by the Society is, that the money has already been paid to some-one else; that the provisions of the Act of Parliament entitled the Society to make the payment; and that according to their own rules passed according to the provisions of the Act, they are the final judges whether they were right or wrong in so doing. Now, before we give effect to that argument, we must be satisfied that the Legislature intended to give the defenders this arbitrary power of judging in their own cause, and determining the extent of their own liabilities. I think with your Lordship that the clause on which they found has no application to a controversy of this kind, but that it is intended to provide a method for the regulation of internal disputes between members of this Society as such and the Society or the governing body of the Society. But before that clause can be brought into operation it must first be shown that the controversy to which it is proposed to apply it is really a dispute between a member of the Society as such and the Society.

Now, I agree with your Lordship in the chair that the first question in controversy here is, whether the pursuer has or has not the rights of a member of the Society—whether he is entitled to claim in the right of the deceased member or not? That is not a dispute between a member and the Society, but a question whether the person claiming is or is not entitled to the rights of a member. I think the case of *Prentice* is directly in point, and concurring entirely with the reasoning of the learned Judges in that case, and with the observations of your Lordship in the chair, I have no difficulty in reaching the same conclusion.

Upon the merits of the question—the construction of the 11th section of the Act of 1876—I also concur. I do not think that that Act was intended to give to this Society a power to select among the representatives of the deceased person, and to pay to one of them to the exclusion of another. That is exactly what they say they have done, because they set out quite clearly that they knew that the deceased had died leaving various children, but that they, in consideration of the statement of certain members of the family that one of them had a better claim than the others to the money left by his mother, gave effect to that consideration, and conferred a benefit upon this favoured brother without the consent or knowledge of the pursuer. I think in doing so they were going entirely beyond their powers. They were bound to pay to persons having a legal right as representatives of the deceased member. They may in certain circumstances be protected against defects in title in the persons to whom they have paid in that character, but that

does not entitle them to pay to one money which they know belongs to another.

LORD M'LAREN was absent.

The Court recalled the interlocutor of the Lord Ordinary, and decerned against the defenders for £50, 3s.

Counsel for the Pursuer—A. S. D. Thomson—M'Lennan. Agent—Richard Lees, Solicitor.

Counsel for the Defenders—Guthrie—Cook. Agents—Kinmont & Maxwell, W.S.

Wednesday, January 10.

FIRST DIVISION.

COX v. "GOSFORD" SHIP COMPANY, LIMITED.

Company—Winding-up—Petition by Shareholder for Winding-up Order—Companies Act 1862 (25 and 26 Vict. c. 89), sec. 7, sub-sec. 9.

A shareholder of a company, incorporated to purchase and work a particular ship and no other, applied to the Court for a winding-up order on the ground that the ship had been abandoned as a total loss. The petition was opposed by the company. It appeared that notice of abandonment had been given to the underwriters, but that the negotiations for payment of the insurance money had not been completed. No meeting of shareholders had been held to consider the question of a voluntary winding-up. The Court refused the petition on the grounds (1) that it was not definitely ascertained that the ship was a total loss, and (2) that if and when that was established, it would be for the shareholders to decide whether the company should be wound-up voluntarily.

The "Gosford" Ship Company was incorporated and registered under the Companies Acts on December 18, 1891. By article 3 of the memorandum of association the objects for which the company was established were defined as follows:—"The purchase, owning, and working of a steel sailing ship, intended to be called the 'Gosford,' built by Messrs Scott & Company, shipbuilders, Greenock, . . . and of no other ship." By sub-section D of the same article the company were empowered "to carry on the business of a shipowner in all its branches with respect to the said ship only."

On 13th December 1893 Robert Cox, who held 10 shares in the company, presented a petition stating that the "Gosford" had been totally destroyed by fire in November 1893 off the Pacific coast of North America, and craving the Court to order the company to be wound-up by the Court.

Answers were lodged for the company by Briggs, Harvie, & Company, the mana-

gers, in which the following statements were made:—"On 25th November 1893, while the ship 'Gosford' was on a voyage from Birkenhead to San Francisco with a cargo of coal, the managers received a cable from the captain from Santa Barbara, California, intimating that the ship had been destroyed by fire, and had been scuttled, and lay in 5½ fathoms of water, and that notice of abandonment should be given. Insurances had been effected by the managers for £21,500 on the hull of the said ship, for £3000 on disbursements, and the balance of freight was also insured. The managers accordingly gave notice of abandonment to the underwriters, but the underwriters have refused to accept notice of abandonment, and efforts are being made on their behalf to raise the said ship with the view of repairing her and restoring her to the company. In these circumstances the company is not in a position to be wound up. The petitioner is a holder of 10 shares of the company, and there are other 38 shareholders who hold among them 205 shares. There has not since the disaster to the ship been any meeting of the shareholders to consider what may have to be done, and it is premature to consider any proposition for winding-up the company unless and until the underwriters accept an abandonment of the said ship; but in any event the managers have ample powers to attend to the interests of the company, and to receive and discharge all sums due to the company, including the amounts insured, if they should become payable. The managers are the proprietors of 95 shares of the company."

At the hearing, counsel for the petitioner referred to various telegrams and letters to show that the ship had been abandoned as a total loss.

Argued for the petitioner—The telegrams and letters about the ship were to the effect that it was a total loss. The captain's protest had been applied for by the petitioner, but he had been informed that it was in the hands of the company's London bankers, who were in negotiation with the underwriters for recovery of the insurance money. It stated that the ship was a total loss, and advised abandonment. The petitioner had received information from the underwriters that salvage operations started by them had been abandoned. There was thus ample evidence that the ship was a total loss, and as the company had by their memorandum of association no power to work any other ship than the "Gosford" the only question was between a compulsory winding-up and a possible voluntary winding-up, towards which no step had been taken. Now, applications by shareholders for winding-up orders had been refused where steps had already been taken to have companies wound up voluntarily, but there was no case in which, liquidation being unavoidable, such an application had been refused where the shareholder came forward prior to any resolution in favour of a voluntary winding-up. Such indications of judicial opinion as these

rather showed that in these circumstances the application would be granted—*In re Gold Company*, L.R., 11 Ch. Div. 701, per L. J. Baggallay, 717; *Lindley on Companies* (5th ed.) 640. In the present case also the company was excluded from adopting a scheme of reconstruction—in *re Gold Company supra*—and there was no reason in equity why the petition should not be granted. Refusal would involve delay. The petitioner was therefore entitled to the order craved—*Companies Act 1882*, section 79, sub-section 5.

Argued for the respondents—The respondents did not dispute that the company must be wound up, but submitted that the shareholders should be allowed to decide on the mode of winding-up. The petitioner held only 10 out of 205 shares, while the respondents, the managers of the company, held 95; and if the matter depended on equitable considerations their wishes were entitled to more respect than his. The application of a shareholder stood on quite a different footing from that of a creditor, and there was no averment here that the debts of the company were unpaid. As between shareholders, the companies Act created a domestic tribunal, and it would take strong reasons to convince the Court that it was "just and equitable" to interfere with the decision of a general meeting of shareholders as to the mode of winding-up—*Buckley on the Companies Acts* (6th ed.) 208; *in re Professional, &c., Building Society*, L.R., 6 Ch. Div. 856, esp. per L. J. Mellish, 863; *in re Langham Skating Rink Company*, 669, per M. R. Jessel, 683; *in re Middlesborough Assembly Rooms Company*, L.R., 14 Ch. Div. 104. [The Lord President referred to section 129 (1) of the Companies Act as contemplating a voluntary winding-up in a case of this kind]. The petitioner would have his rights in a voluntary as in a compulsory liquidation. If anything illegal were being done he would apply to the Court to stop it. He could not be forced to go into a new venture against his will.

At advising—

LORD PRESIDENT—It appears that the ship "Gosford" was the subject of a casualty of fire off the Pacific coast of North America as lately as November 1893. There seems *prima facie* strong reason to think that the vessel is a total loss, but I am not surprised, considering the recent date of the occurrence, that the matter has not been brought to a final and admitted conclusion, as between the owners of the ship and the underwriters. From the terms of the memorandum and articles of association it is clear that if the ship is a total loss, and cannot be made the subject of further trading, then the work of the company has come to an end, and it must be wound up. But in the meantime we are not in a position to affirm positively and definitely that the rights of the shareholders have been resolved into claims for their shares of the money payable by the underwriters. It seems to me the petitioner has been quite premature, if not

precipitate, in his action. The negotiations between the executive of the company and the underwriters are not yet completed; but assuming that they were completed, it will be for the shareholders to consider whether they should proceed to a voluntary winding-up of the company. The question arising on section 129, sub-section (1), will naturally come on as soon as the chapter of winding-up is opened, and the shareholders will say whether or not the natural course, viz., for the company to be wound up by voluntary liquidation, shall not be followed. This petitioner, however, asks us to affirm that it is just and equitable now for the Court to pronounce a winding-up order, but we have no information whatever as to the wishes of the shareholders, and the time has scarcely come for their being convened and asked to come to a conclusion on the point. Accordingly I think that the grounds of the petition are entirely insufficient, and that the prayer should be refused.

LORDS ADAM, M'LAREN, and KINNEAR concurred.

The Court refused the petition.

Counsel for the Petitioner—Jameson—W. C. Smith—Macaulay Smith. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for the Respondents—Graham Murray, Q.C.—C. S. Dickson. Agents—Gill & Pringle, W.S.

Thursday, January 11.

SECOND DIVISION.

[Sheriff of Aberdeen.]

COOKE'S CIRCUS BUILDINGS COMPANY, LIMITED *v.* WELDING.

Landlord and Tenant—Lease—Occupation—Partnership—Joint-Adventure—Liability of Joint-Adventurer for Rent.

Z. & W. agreed to carry on a music-hall business in the towns of A. and B. At A. they, along with G., their law agent, visited premises, to the proprietor of which they represented themselves as partners. Some days later Z. returned to A. accompanied by G., and negotiated a lease of the premises, G giving a written assurance that Z. had power to bind the firm. Z. signed with his own name and the name of the company. W. knew the lease had been taken. The lease was for three terms, from November 1891 to May 1892, from September 1892 to May 1893, and from September 1893 to May 1894. The advertisements contained the names of Z. & W., and W. made some payments in respect of the premises. The premises were occupied by the firm for their business for three months, when they were closed. The partnership was dissolved by mutual consent a short time before that event, and Z. disappeared.

In an action by the proprietor against W. it was proved that such premises are usually let for such terms as the lease specified. *Held* that the defender was liable for the rent for the first term, beyond the time during which the occupation actually existed.

Upon 12th September 1891 an agreement of copartnership was entered into between Burlington Brumell, professionally known as Baron Zeigler, theatrical, concert-hall, and general manager, and Edward Welding, Chester Lodge, 55 Haverstock Hill, London, in these terms—"First, That said parties in consideration of the second party (Welding) paying to the first party (Zeigler) the sum of five hundred pounds sterling on the signing of this agreement do hereby contract to be copartners in carrying on a business or joint-adventure as concert hall and circus proprietors and managers under the firm or style of Baron Zeigler & Welding, the business at present to include the Royal Circus in Canal Street, Bradford, and the Royal Circus in Aberdeen, and afterwards such other place or places as may hereafter be acquired and mutually agreed upon by both parties. Second, the partnership shall be held to have commenced at this date, and shall subsist till mutually dissolved, declaring that said partnership may be dissolved by either party giving to his copartner three months' notice in writing of his intention to terminate same. Third, The first party shall act as the managing partner of the firm, and their respective duties consistently therewith shall be mutually arranged as the requirements of the business may necessitate. . . . Fourth, Each partner shall draw ten pounds sterling weekly as salary, and the nett profits remaining shall be equally divided after the working expenses shall have been provided for, it being understood that each partner shall contribute equally towards these expenses, and that the first party shall relieve the second party of all loss and responsibility that may result from the management of the Royal Circus, Aberdeen."

The contract was drawn by Alex. W. Grant, a solicitor in Glasgow, who was employed by both parties to do so.

On the previous day Zeigler & Welding had gone to Aberdeen accompanied by the solicitor, Grant, and examined Cooke's Circus Buildings along with William Sellar, the secretary of the Circus Company. Zeigler took the initiative in this proceeding, but Welding allowed himself to be introduced by Zeigler to Sellar as his partner, and told Sellar that he was the sleeping partner, and that Zeigler managed the business. Zeigler returned with Grant to Aberdeen on 21st September and adjusted the terms of an offer with Sellar, and a lease was subsequently effected between the Circus Company and Baron Zeigler & Company of the Circus premises, from the morning of the 23rd day of November 1891 to the second Saturday in May 1892; from the first Monday in September 1892 to the first Saturday of May 1893, and from the first Monday of September 1893 to the first Saturday of May 1894, declaring