Friday, December 23.

FIRST DIVISION.

J. SPEIRS & COMPANY *v.* CENTRAL BUILDING COMPANY, LIMITED.

Company—Winding-up Order—Debt under Fifty Pounds—No Assets for Order to Operate upon other than Heritage Fully Bonded — Companies (Consolidation) Scotland Act 1908 (8 *Edw. VII, cap.* 69), *secs.* 129 (5), 130 (1) *and* (3), *and* 141.

The Companies (Consolidation) Act 1908 enacts—Section 129—"A company may be wound up by the Court . . . (5) if the company is unable to pay its debts . . ." Section 130—"A company shall be deemed to be unable to pay its debts (1) if a creditor . . . to whom the company is indebted in a sum exceeding fifty pounds then due, has served on the company . . . a demand under his hand requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum . . . ; (3) if, in Scotland, the induciæ of a charge for payment on an extract decree . . . have expired without payment being made." Section 141—"On hearing the petition the Court . . . shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets."

Creditors to the amount of £40 obtained decree for that sum against a limited company and taking extract charged thereon. The company paid £32. After some months the creditors presented a petition for the winding-up of the company. The company opposed the granting of the order on the grounds (1) that the petitioners would gain nothing as the sole assets consisted of heritage bonded to its full value, and (2) that the debt was under £50.

The Court *granted* the order, holding that the first objection was immaterial in view of section 141, and that the limitation to debts of £50 in section 130, sub-sec. 1, did not apply to sub-section 3.

J. Speirs & Company, wrights and builders, Hillhead, Glasgow, presented a petition for the winding-up of the Central Building Company, Limited, having its registered office at 157 West George Street, Glasgow.

The petitioners, *inter alia*, stated—"By the memorandum and articles of association the objects for which the company was formed were declared to be, *inter alia*—To carry on in Glasgow or elsewhere in Scotland the business of builders, feuars, property and landowners, dealers and investors in every form of security connected therewith, and any other trade or business subsidiary or auxiliary to such businesses; and also to act as agents, with or without remuneration, for other parties in all or any of the trades and businesses aforesaid. . . . The petitioners are creditors of the said company. On 6th December 1909, in an action in the Sheriff Court of the county of Lanark at Glasgow, the petitioners obtained decree against the company for the sum of £40, 9s. 6d. sterling, with interest thereon from the 12th day of November 1909. The said decree was extracted on 5th April 1910, and on 26th May 1910 the said company was charged to make payment on the said extract decree within seven free days of the date of the said charge. The said extract decree, with charge appended, is produced herewith. On 7th June 1910 £32 was paid to account, but the petitioner has been unable to obtain payment of the balance; the *induciæ* of the said charge for payment on the said extract decree have accordingly expired without payment being made. Mr William Speirs, a partner of the petitioner's firm, is also a creditor of the company in a debt of about £1500. The company do not dispute this debt, but they do not admit that it is yet payable. The company is in fact unable to pay its debts, and it is just and equitable that it should be wound up by the Court. In these circumstances the petitioners humbly submit that the said company should now be wound up by the Court in terms of the said Act, and an official liquidator or liquidators appointed for that purpose."

Answers were lodged for the Central Building Company, Limited, which, *inter alia*, stated — "No other creditors are pressing the respondents and the whole of the members of the company, other than the said William Speirs" [a partner of the petitioners], "and of the creditors, other than the said William Speirs and the petitioners, are of opinion that liquidation of the company would not be in the interests of the members or creditors of the company. The company is solvent, but it would be disastrous to all concerned for its assets to be realised by forced sale. Practically the only assets of the respondents consist of heritable properties, over which there are bonds. The petitioners could gain nothing by liquidation as the heritable creditors would control their realisation, and if sold at the present time it is not believed that there would be any reversion for unsecured creditors. In these circumstances the petitioners submit that the petition should be refused."

Argued for the petitioners—(1) It might be that in England there had at one time been a practice of not pronouncing a winding-up order where the debt did not exceed £50—Palmer's Company Precedents, 10th ed., part ii, pp. 50 and 61,—but whether that practice still subsisted or not, at any rate in Scotland there was no such practice, nor was there anything in the Companies Consolidation Act 1908 (8 Edw. VII, cap. 69), requiring as a general condition of a company being deemed insolvent that the debts it had failed to pay must amount to £50. It was true that failure to that amount was a requisite of sub-section 1 of section 130 of the Act, but it was not a requisite of sub-section 3. (2) Even assuming that

there were no assets other than heritage, which was fully bonded and would yield no reversion, that was no answer in view of the provisions of section 141 of the Act.

Argued for the respondents—(1) The practice in England was not to order a winding-up where the debt was under £50 unless there were special circumstances—*in re Industrial Insurance Association, Limited* (1910), W.N. 245; *in re Fancy Dress Balls Company* (1899), W.N. 109; Buckley on the Companies Acts, 9th ed. 309. (2) The Court would not pronounce a winding-up order where no benefit would accrue to the petitioners—*in re Krasnapolsky Restaurant and Winter Garden Company* (1892), 3 Ch. 174; *in re Crigglestone Coal Company Limited* (1906), 2 Ch. 327; *Gardner & Company* v. *Link*, July 11, 1894, 21 R. 967, 31 S.L.R. 804.

At advising—

LORD PRESIDENT—This is a petition for the winding-up of the Central Building Company Limited. The petition sets forth that the petitioners are creditors of the company, and that on 6th December 1909 they obtained decree for the sum of £40, that the decree was extracted, and that the company was charged to make payment within seven days; that £32 was paid to account, but that the petitioners have been unable to obtain payment of the balance.

The petitioners therefore aver that the company is unable to pay its debts and should now be wound up, looking to the terms of section 130 of the Companies (Consolidation) Act 1908, which enacts—"A company shall be deemed to be unable to pay its debts . . . if, in Scotland, the induciæ of a charge for payment on an extract decree . . . have expired without payment being made." They therefore maintain that they are entitled to a winding-up order.

The company have put in answers, and the argument on their behalf was rested upon what was stated to be English practice. It was said, first, that a winding-up order would confer no benefit on the petitioners because there were no assets except heritable property over which prior securities were held. I do not think that that argument can avail them.

I am content to take it that before the Companies (Consolidation) Act was passed the law was correctly laid down by Mr Justice Buckley in the case of the *Crigglestone Coal Company* (1906), 2 Ch. 327, confirmed by the Court of Appeal. What he points out there is that one whose debt is not paid is entitled to a winding-up order *ex debito justitiæ*, and that the cases to the contrary are really not exceptions to that rule, because they are cases in which there were no assets upon which a winding-up order could operate, and the Court would not pronounce a decree which would have no effect.

That being the state of the law in 1906, in 1908 the Companies (Consolidation) Act was passed, and section 141 enacts—"(1) On hearing the petition the Court may . . . make any interim order or any other order that it deems just, but the Court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets."

The Legislature is presumed to know the law as it stands, and when it says, in face of the law as laid down in *Crigglestone*, that the fact of there being no assets is not to be a reason for refusing a winding-up order, I do not think anything more can be said.

The second ground of argument for the company was that the petitioners' debt is under £50, and a case only reported in the Weekly Notes was read to us, in which Mr Justice Neville seems to have said that a winding-up order will not be granted if the debt in question is under £50. That judgment does not bind us, and I am unable to see that there is any foundation for it in the statute. Section 130 specifies circumstances in which a company shall be deemed to be unable to pay its debts, and sub-section (1) of that section deals with the limitation to debts exceeding fifty pounds, but sub-section (3) contains no such limitation, and enacts—"if, in Scotland, the induciæ of a charge for payment on an extract decree . . . have expired without payment being made," then a company shall be deemed to be unable to pay its debts. I therefore am of opinion that a winding-up order must be granted in this case.

The LORD PRESIDENT intimated that LORD KINNEAR, who was absent at the advising, concurred in this opinion.

LORD JOHNSTON—By section 129 of the Companies (Consolidation) Act 1908 it is provided that a company may be wound up if it is "unable to pay its debts," and section 130 defines the circumstances when a company is to be deemed unable to pay its debts. It defines, to use a short but appropriate expression, the "notour bankruptcy" of a company, *e.g.*, in Scotland by section 130 (3) it is to be deemed notour bankrupt if it allows a charge to expire without payment.

This company is in that position. But the balance unpaid of the sum charged for is small; it is under £10. In these circumstances it is said that in England a practice exists of refusing a winding-up order when the debt due to the petitioner is under £50. The sum of £50 may have been suggested because under section 130 (1) it is the minimum debt by which the notour bankruptcy can be produced by mere notice of demand, not complied with for three weeks.

Neville, J., is reported in *in re Industrial Insurance Association, Limited* (1910), W.N. 245, to have expressed himself to the effect that the practice is not to order a winding-up when the debt is under £50 unless there are special circumstances, and to have added that he found such special circumstances in *in re World Industrial Bank, Limited* (1909), W.N. 148, where the com-

pany was trading upon this supposed practice in refusing payment of a debt though they had assets, and in another case where it was obvious that the company would never commence business.

But I do not think that there is any foundation for the alleged rule, if it be a rule of practice. The matter is very fully dealt with in *in re Crigglestone Coal Company, Limited* [1906], 2 Ch. 327, in terms which apply irrespective of the amount of the debt of the petitioning creditor. If any general rule can be deduced, I should say it was rather the reverse of what Melville, J., says, and that any creditor, whatever the amount of his debt, is entitled to a winding-up order unless special circumstances exist for refusing it. Here I do not find any such circumstances which it is in the mouth of the company to state. It is true that the Court is not bound to pronounce a winding-up order even when the conditions of the statute exist. Nowhere the company say that the whole of the creditors other than the petitioners are averse to liquidation. As Buckley, J., in *in re Crigglestone Coal Company,* pointed out, a petitioner in a winding-up has a representative as well as a personal character, and the Court may refuse him an order if it finds that he does not represent his class. But that is not for the company but for the creditors to maintain, and here no one but the company appears.

I think therefore that the winding-up order should be granted.

LORD MACKENZIE—I agree with your Lordships. A winding-up order is, in my opinion, a perfectly proper remedy for enforcing payment of a just debt. The point urged by the respondents is I think determined against them by the section of the Companies (Consolidation) Act 1908, to which your Lordships have already referred.

The Court pronounced this interlocutor—

"... Order that the Central Building Company Limited be wound up by the Court under the provisions of the Companies (Consolidation) Act 1908 ..."

Counsel for Petitioners — Valentine. Agents—Oliphant & Murray, W.S.

Counsel for Respondents — Wilton. Agent—Alexander Bowie, S.S.C.

Friday, December 23.

SECOND DIVISION.

POLLOK (TAYLOR'S TRUSTEE) *v.* ROBINSON AND OTHERS.

Succession—Will—Codicil—Construction—Faculties and Powers—Trust—Power of Division Given to Trustee.

By her trust-disposition and settlement a testatrix left legacies to a number of beneficiaries including A. She gave her trustees power to pay the residue of her estate over in such proportions as they themselves might decide "to the beneficiaries already named, or to and amongst any relatives who may be in necessitous circumstances." By codicil she revoked the legacy to A and left legacies to B and C, who were not mentioned in the trust-disposition. No relatives in necessitous circumstances were found.

Held (1) that the trust-disposition and codicil falling to be read together as one will, A was not entitled to share in the residue, not being a beneficiary, but that B and C were so entitled, and (2) that the trustee was not bound to hold any portion of the residue for behoof of necessitous relatives of the testatrix.

Miss Williamina Taylor, who resided at 122 North Frederick Street, Glasgow, died on 7th October 1909 leaving a trust-disposition and settlement and codicil. By the trust-disposition and settlement she conveyed her whole means and estate, heritable and moveable, to James Cullen Pollok, and to any other persons whom she might thereafter appoint, in trust for the purposes therein set forth.

The *trust-disposition* and *settlement* which was dated 30th June 1909, provided, *inter alia*—"I direct my trustees to pay the following legacies, *videlicet,* to my nephew *Charles Albert Robinson* and to my niece *Helena Robinson* ... the sum of *One* hundred pounds sterling each, to *William Mackay Sutherland* ... ten pounds, and to *Mrs Agnes Cullen or Pollok* ... for many acts of kindness done by them to me, the sum of twenty pounds, to my old friends *Miss Emilia Connor* ... and *Mrs Margaret Wright* ... the sum of five pounds each, to *Charles* and *William Dorward,* sons of my cousin, the sum of *five pounds* each, and to the *minister of the Tron United Free Church, Glasgow,* the sum of *twenty-five pounds,* to be applied by him for the benefit of said church in such way as he may consider it best; and lastly, should I leave no writing under my hand disposing of the balance of my said estate, then I give to my trustees full power to pay same over in such proportions as they themselves may decide to the beneficiaries already named or to and amongst any relatives who may be in necessitous circumstances. My said trustees shall be the sole judges of the manner in which the division of said residue and payments thereof shall be made, and no one shall have any right to quarrel or impugn their decision."

The *codicil,* which was of date 4th August 1909, provided, *inter alia*—"I, Williamina Taylor, before designed, the maker of the foregoing settlement, being desirous of making certain alterations thereon and additions thereto, do hereby, in the first place, revoke the legacy of ten pounds sterling to William Mackay Sutherland; in the second place, I increase the legacy of five pounds sterling bequeathed to Miss Emilia Connor to ten pounds sterling; in the third place I leave and bequeath the following