The Court adhered.

Counsel for Respondents (Pursuers)—Trayner—Shaw. Agent—H. W. Cornillon, S.S.C.

Counsel for Reclaimers (Defenders)—Mackintosh—Dickson. Agent—J. Gillon Fergusson, W.S.

Wednesday, June 4.

FIRST DIVISION.

CITY OF GLASGOW BANK LIQUIDATION—(*TENNENT'S SECOND CASE*)—HUGH TENNENT *v.* THE LIQUIDATORS.

Public Company—Winding-up—Compromise—Jurisdiction—Companies Act 1862 (25 *and* 26 *Vict. c.* 89) *section* 160 — *Compulsion of Liquidator to Accept a Compromise.*

Held that in a winding-up by or subject to the supervision of the Court it has no power to order the liquidators to accept a compromise offered by a contributory.

This was the sequel of a case already reported in the Court of Session, Jan. 22, 1879, *ante*, p. 238; and in the House of Lords, May 20, 1879, *ante* p. 509. The petitioner was now charged at the instance of the liquidators to make payment of the sum of £15,000, which was the amount of the first instalment of a call on £6000 stock, the call being at the rate of £500 per £100. The petitioner offered to surrender his whole estate, with the exception of his claims of relief against the bank and its shareholders of all sums which he might be called on to pay as a contributory; and he prayed the Court "to restrain the said liquidators from following out the said charge to the effect of doing diligence thereon against the complainer, and to decern and ordain the said liquidators—upon the petitioner making a full surrender to them of his whole estate, means, and effects, to the satisfaction of the said liquidators, or of your Lordships—to discharge the petitioner of his liability as a contributory of the said bank, and to find that the said liquidators are not entitled, as a condition of granting such discharge, to insist on the complainer assigning to the said liquidators his claims of relief against the said bank and the shareholders thereof, mentioned in the said statement of facts; or to do further or otherwise in the premises as to your Lordships shall seem proper"

By the 160th section of the Companies Act of 1862 (25 and 26 Vict. c. 89) it was enacted as follows:—"The liquidators may with the sanction of the Court, where the company is being wound-up by the Court or subject to the supervision of the Court, and with the sanction of an extraordinary resolution of the company where the company is being wound-up altogether voluntarily, compromise all calls and liabilities to calls, debts, and liabilities capable of resulting in debts, and all claims, whether present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and any contributory or alleged contributory, or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets of the company or the winding-up of the company, upon the receipt of such sums, payable at such times, and generally upon such terms as may be agreed upon, with power for the liquidators to take any security for the discharge of such debts or liabilities, and to give complete discharges in respect of all or any such calls, debts or liabilities."

Argued for the petitioner—The Court would not interfere with the liquidators as regarded the mere details of their management, but any one interested might apply to the Court whenever he thought proper to do so, as indeed the order pronounced in this liquidation specially provided. The Court must see that the liquidators dealt fairly by all concerned. It was provided by section 109 of the Companies Act that "the Court shall adjust the rights of contributories amongst themselves, and distribute any surplus that may remain amongst the parties entitled thereto." Now, that was what the Court were asked to do here, for the claim of relief emerged only when the rights of creditors had been fully settled. It was not an asset of the petitioner as regarded creditors; and consequently he offered a surrender of his entire assets to the liquidators in so far as they represented the creditors of the company, although he refused to surrender this claim. Why then should the liquidators deal differently with him from the way in which they dealt with every other shareholder who had made a full surrender?—for it was admitted that they did not drive many contributories into sequestration. [LORD PRESIDENT—The question is, Have we jurisdiction under section 160 of the Act? Have you any answer to the case of *Pearson*, 7 Chanc. App. 309?]. Admitting the authority of that case, it applied only where the liquidators represented creditors—here their only interest was as representing fellow shareholders.

Argued for the liquidators—The Court had no jurisdiction to compel the liquidators to accept a compromise—Sect. 160 of the Act, and *Pearson's* case, *supra*. If the Court had such jurisdiction, the equity of the case was with the liquidators, who were merely asking for a full surrender of the petitioner's assets, for this claim was plainly a valuable asset for creditors, as it might be sold at once.

At advising—

LORD PRESIDENT—It appears to me that the prayer of this petition is for an order upon the liquidators that they should upon condition of the petitioner making a surrender of his estate, with the exception of a certain part, accept that offer of compromise and grant him his discharge. That is the form of the prayer with one exception, and that exception consists in the commencement, in which the petitioner makes an application for an order "to restrain the said liquidators from following out the said charge to the effect of doing diligence thereon against the complainer, and to decern and ordain the said liquidators—upon the petitioner making a full surrender to them of his whole estate, means, and effects, to the satisfaction of the said liquidators or of your Lordships—to discharge the petitioner of his liability as a contributory of the said bank." But this part cannot be disconnected from what

follows, because the prayer to restrain diligence is only for the purpose of compelling the liquidators to effect a compromise; in other words, the Court is asked to restrain diligence until a compromise is effected. Therefore this is in substance a petition for an order on the liquidators to accept the compromise offered by the petitioner, and to discharge him of his liabilities as a contributory of the bank.

Now, it appears to me that under the Act of 1862 there was no power whatever given to the liquidators to accept a compromise at all, if it were not for the 160th section of the statute; and the power and jurisdiction of the Court in this matter are also settled by the same clause. I need not read the words. The clause is a purely enabling enactment, which gives the liquidators power to accept compromises if they thought them reasonable, and it is clearly shown that the compromise is to be matter of agreement, for that is the word in the Act, between the liquidators and the contributory—such compromises to be effectual only if sanctioned by the Court. But the only interposition by the Court contemplated by the statute is either to sanction or to refuse to sanction compromises made by the liquidators. Now, that being the nature of the statutory provision upon the subject, I think that this petition is incompetent, and ought to be refused. I do not think that liquidators can be compelled by any judicial authority to accept a compromise of which they themselves disapprove.

Now that is sufficient for the disposal of this petition, but I am bound to say further, that as far as I have heard the merits of this petition discussed, even if the Court had the power to order the liquidators to accept such a compromise, this is not a case in which I should be disposed to exercise that power, because the prayer of the petition seems to me to come simply to this, that this gentleman insisted upon having a discharge upon surrendering, not the whole, but a part only of his estate; and the part which he wishes to reserve is a claim of relief against the bank and his fellow shareholders, in respect that he was induced to purchase his shares by the fraud of the bank. Now if that claim is well founded both in fact and in law, it clearly forms a valuable portion of his estate, and there cannot be the smallest doubt that in a mercantile sequestration it would vest in the trustee by force of the Bankrupt Acts. It is a claim which may be disposed of in the market for the benefit of the entire body of creditors, and chiefly, as we are told, for the benefit of the liquidators as representing the creditors of the bank. In these circumstances to compel the liquidators to give up their right to this claim would just be to deprive the creditors of part of their property.

Lord Deas—In the course of this liquidation we judicially know that the liquidators have agreed to discharge shareholders upon a surrender of their whole existing assets; and it is not disputed on the part of the petitioner that the liquidators are prepared to do the same thing so far as he is concerned—that is, if he surrenders his whole estate they will give him his discharge. But he insists for an exception in his case, that he should be discharged without making a complete surrender—that is to say without surrendering this claim against the bank. That is the compromise which he insists upon, but it is not the sort of compromise which liquidators are in the habit of giving. I agree with your Lordship that the substance of this petition is that the liquidaton should be compelled to grant a discharge upon the terms proposed by the petitioner, and not upon the terms proposed by themselves. That being so, I have, to say the least, the greatest possible doubt whether it is competent for us to compel the liquidators to accept this surrender

But I do not think that it is necessary to decide this point, because even if such a petition be abstractly competent, I am not prepared to grant the petition now before us. A good deal was said regarding the sale of this claim. I do not express any opinion upon that. I do not know whether in the course of a fair and just administration of this estate it will be necessary to sell the claim. The whole question is whether we are to compel a compromise on the footing proposed by the petitioner and not on the footing proposed by the liquidators.

Lord Mure—Although the first part of the prayer of this petition asks the Court to restrain diligence, the prayer, when read with reference to the 10th article of the statement appended to the petition, shows that the object, and apparently the sole object, which the petitioner has in view is to compel a compromise. He seeks to have diligence stayed because the liquidators will not accept the compromise offered by him, and are unreasonable in so doing. Now this application, in the view I take of it, would, if granted, be an interference with the liquidators in matters as to which, by section 160 of the Act, they are vested with authority to deal, in the first instance, in their own discretion; and it is only when they have come to the conclusion that any particular compromise is a proper one, and apply to the Court to sanction it, that the Court would be entitled to interfere. I therefore concur with your Lordship that this petition should be refused as incompetent.

Lord Shand—I am of the same opinion. It is evident that the Court is asked to restrain diligence solely for the purpose of enabling the petitioner to effect a compromise; and I am of opinion that under the Act the Court has no power to compel a compromise. But I am bound to add that I agree with your Lordship as to the merits of the application. This claim is an asset of the estate; and if the petition was granted it is not disputed that on the sale of the claim the petitioner would put the price into his pocket. But I think that the creditors are entitled to the price, and therefore that the petition must be refused.

The Court refused the petition.

Counsel for Petitioner — Scott — Mackintosh. Agents—Drummond & Reid, W.S.

Counsel for Liquidators — Kinnear — Balfour. Agents—Davidson & Syme, W.S.