thereto: Finds the pursuers entitled to expenses from the date of the Sheriff-Substitute's interlocutor," &c.

Counsel for the Appellants—Guthrie, K.C.—Orr. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents—Hunter—R. S. Horne. Agents—Webster, Will, & Co., S.S.C.

Tuesday, June 28.

FIRST DIVISION.

PIRIE AND OTHERS *v.* STEWART

Company — Winding-up — Petition for Winding-up Order—Just and Equitable —Companies Act 1862 (25 *and* 26 *Vict. c.* 89), *sec.* 79.

A company was formed to "purchase, charter, hire, or otherwise acquire" steam or other vessels, having a capital of £10,000 in £1 shares, of which, however, only 2825 shares were subscribed. At the end of its first year's trading, during which the only business carried on was the ownership and management of one vessel, that vessel was lost, and the only remaining asset of the company was a balance of £363 in bank. A majority in number and value of its shareholders proposed to have the company wound up, but failed to obtain the three-fourths majority necessary to carry a resolution for winding-up voluntarily. A minority of the shareholders were anxious to continue business by chartering vessels, and had made an offer to the majority of a price per share for their holding more than would apparently be obtained in a winding-up.

In a petition under the 79th section of the Companies Act 1862 the Court *granted* a winding-up order.

The Stewart Steamship Company, Limited, was on 25th March 1902 registered and incorporated under the Companies Acts 1862 to 1900, with its registered office at Strath Buildings, 208 South Market Street, Aberdeen. By its memorandum and articles of association power was taken to purchase, charter, hire, or otherwise acquire, build, equip, and maintain steam or other ships, and to carry on the business of shipowners; and the prospectus explained that the intended sphere of the company's business was the East and West Coast Baltic herring trade and the general coasting trade. The capital of the company was £10,000 divided into £1 shares, but of this amount only 2825 shares were subscribed among twenty-three members. These were fully paid-up. James R. Stewart, the principal promoter of the company, was by the articles of association appointed manager with sole power to regulate the ship or ships which might belong to the company.

On 17th May 1904 John Pirie, master-mariner, 40 East Church Street, Buckie, and three others, being four of the five directors of the company, with the consent and concurrence of nine shareholders, representing in all 1435 shares, presented a petition to the Court for an order for the winding up of the company. They stated —"In or about the month of July 1902 the company acquired by purchase the s.s. 'City of Verviers,' a trading vessel of 290 tons or thereby. The purchase was negotiated and effected by the said manager of the company without consulting the directors, and solely on his own responsibility as to the vessel's suitability and adequacy for the purposes in view and her value. The purchase price of said vessel was £2000, but she was in such condition and so unsuited to the trade in view that she required an outlay of about £1100 on alterations and repairs, and this expenditure was incurred by the manager without authority of the directors and without consulting the directors. This whole expenditure was met partly out of subscribed capital and partly by means of an overdraft from the bank. After the purchase of the 'City of Verviers,' she was employed in the Baltic herring trade for a short period, then in the general coasting trade for a short time, in both of which trades money was lost, and latterly in the general coasting trade on time charter. This is the only business the company has ever done, and instead of making a profit the said business was carried on at a loss of £757, 4s. 7½d., as appears from the first balance-sheet as at 30th September 1903. On or about 6th July 1903 the said vessel stranded at Llandulas in North Wales, and became a total wreck. Previous to foundering she had done considerable injury to the pier at Llandulas, which gave rise to a claim of damages, for which the company was ultimately, after a litigation, found liable. The said manager had neglected to make provision by insurance against such damages, and the said claim consequently was one against which the company had no relief. The principal sum of damages and expenses of the litigation amounted in all to £1344, 14s. Since the loss of said vessel the company has not transacted any business, nor has it been in a position financially to do so. From a special balance-sheet prepared on 14th April 1904 by the auditors of the company, the total capital loss sustained by the company is shown to amount to £2415, 13s. 1d., including the loss in connection with said claim of damages. The only asset now remaining, so far as shown in said balanee-sheet, is a sum of £363, 8s. 10d. in bank. . . . In view of the heavy losses which the company has sustained, and its present obligations, the directors, and, so far as is known, the whole of the shareholders (with the exception of the said James R. Stewart and his nominee after mentioned), are agreed that it is impossible for the company to continue its business, and that, in order to save what is left of the assets it should be immediately wound up. The company really existed for the purpose of working the s.s. 'City of Verviers.' Consequent upon the loss of

that vessel, and upon the loss of capital to replace it, the objects of the company have become impossible of fulfilment. The said James R. Stewart has made a suggestion that the remaining assets of the company might be employed in working a boat on time charter. This suggestion has not received support from any of the other shareholders, and the petitioners, who are nearly all practically acquainted with the trade, are strongly of opinion that the idea is impracticable with the small capital at their disposal, and that it would only result in further loss. Moreover, the petitioners have, in consequence of his past management of the company's business, ceased to have confidence in the said James R. Stewart as a manager, or in his ability to profitably work the business of the company. Of the subscribed capital of £2825, the said James R. Stewart in his own name and in that of a nominee, Mr Alexander Edwards, British Linen Company Bank, Market Street, Aberdeen, holds £755, being slightly more than one-fourth of the total. It is, accordingly, impossible for the company to carry an extraordinary or a special resolution for a voluntary winding up, as both of these resolutions require a majority of three-fourths in value. In order to ascertain the feeling of the shareholders, however, the petitioners, who, along with the said James R. Stewart are the directors of the company, convened an extraordinary general meeting of the members at Buckie on Tuesday, 19th April 1904, notice of which was sent to each of the shareholders ten days previously. In said notice intimation was made to the shareholders that an extraordinary resolution would be submitted to the meeting in the following terms—"That it has been proved to the satisfaction of the company that the company cannot by reason of its liabilities continue its business, and that it is advisable to wind up the same." Said meeting was attended by the said James R. Stewart for himself and as proxy for his said nominee, representing in all 755 shares, and by other thirteen shareholders either personally or by proxy, representing in all 1435 shares. There was thus an aggregate share capital represented at said meeting of £2190, out of a total subscribed capital of £2825. After receiving a protest by the said James R. Stewart against the validity of the meeting and the proposed motion, it was moved and seconded in terms of the above-quoted resolution. On a poll being demanded, the thirteen shareholders (representing 1435 shares) voted for the resolution, and the said James R. Stewart, for himself and as proxy for his nominee (representing 755 shares), voted against it. In terms of the articles each member has one vote for each share, and the voting accordingly was 1435 for and 755 against the resolution. With the exception of Mr Stewart's and his nominee's no vote was recorded against the resolution, but in consequence of the requisite three-fourths majority not being obtainable, the motion was not carried as an extraordinary resolution. The shareholders are consequently obliged to apply to the Court for a compulsory winding-up."

Answers were lodged by James R. Stewart, who denied that the misfortunes of the company were due to him, and attributed them to Pirie; averred that at the last properly constituted meeting the voting had been 1380 votes for continuing and 1365 for winding up, and maintained that the company was in a favourable position to carry on its business of chartering and hiring. He further stated—"If the prayer of this petition were granted and the company wound up the free assets of the company would not be sufficient to pay the shareholders a dividend of 2s. per share. To show his confidence in the future prospects of the company, and to remove any ground for attempting to wind up the company, Captain Stewart, through his agents, addressed a letter on 25th April 1904 to each of the petitioners and consenters, offering to buy their shares for 2s. per share. The petitioners and their consenters, however, in the full knowledge that by accepting Captain Stewart's offer they would receive more than they could by a winding up of the company, declined the offer made to them."

The Companies Act 1862 (sec. 79) enacts—"A company under this Act may be wound up by the Court . . . under the following circumstances (that is to say)—. . . (5) Whenever the Court is of opinion that it is just and equitable that the company should be wound up."

Argued for the petitioners—This was a case where a winding-up order should be pronounced. The company had been formed for the owning of ships, and that was no longer possible. Where the substratum, the main business, of a company was in this way lost, the Court would not allow it to be carried on upon some subsidiary branch of business—Lindley on Companies (6th ed.), vol. ii. p. 851, and in the whole circumstances it would be inequitable to force a majority of the shareholders to continue business while a new experiment was being tried.

Argued for the respondents—The rule was that the Court would not interfere where the substratum, the main business for which the company had been formed, could still be carried on—*in re Haven Gold Mining Co.*, 1881, 20 Ch. Div. 151; *in re Langham Skating Rink Co.*, 1877, 5 Ch. Div. 669; *in re Suburban Hotel Co.*, 1867, L.R., 2 Ch. Ap. 737. The purpose of this company was to have vessels at its disposal, and chartering was as much the main business as owning. For chartering suitable vessels for the trades contemplated there remained sufficient capital, and that being so it would be inequitable to force a winding-up of the company, especially where the shareholders in favour of that course could if they chose sell their shares for more than they could get by winding-up.

LORD PRESIDENT—This is a petition at the instance of a number of shareholders of the Stewart Steamship Company, Lim-

ited, for an order for the winding up of that company. The conditions under which such an order may be given are defined in the 79th section of the Companies Act 1862—[*His Lordship quoted the section*]. That seems to me to include every consideration which is fair and reasonable for all the interests concerned.

In considering such a question it is natural to turn first to the history of the company, and we seldom find a more unfortunate or disastrous record. The company was incorporated with a share capital of £10,000 divided into 10,000 shares of £1 each, but of these shares only 2825 were taken up by twenty-three members. The company therefore does not appear to have gained the confidence of the commercial community. One member, Mr James R. Stewart, who had been from the first the leading promoter of the company, was by the articles of association appointed general manager with sole power to regulate the working of the ship or ships which might belong to the company. Business was begun by the purchase at the price of £2000 of the s.s. "City of Verviers," a purchase which was effected by Mr Stewart without consulting the directors. His judgment appears to have been such that this vessel was unsuitable for the intended trade, with the result that £1100 had to be spent on her in alterations and repairs, an expenditure which was incurred by Mr Stewart without consulting the directors and without their authority. These two sums amount to over £3000, which is in excess of the whole subscribed capital of the company, which was £2825. The whole subscribed capital was thus already gone. That is how matters stand now, for no other business appears to have been done. The vessel ended by foundering at the pier at Llandulas, and not only did she founder, but she caused considerable damage to the pier, for which the company was held liable. The principal sum of damages which the company has had to pay, together with the expenses of the litigation, amounted to £1344, and the total capital loss sustained up to the present time is stated at £2415, 13s. 1d., being little short of the whole subscribed capital of the company. Indeed, the only asset of the company appears to be £363 in bank. This at once suggests the question—If the company is to recommence business where is it to get capital? There does not seem to be any demand or even any market for its shares. I have seldom seen a more unfortunate history.

It is not surprising that under the circumstances now stated it is not desired by a number of the shareholders that the trading of the company should not be longer continued, but Captain Stewart says that there are still sufficient assets to enable the company to work on time-charters. Captain Stewart and his nominees have a large stake in the company, but other shareholders representing 1435 shares are against this course, and this is not surprising. The voting at the meeting at which this question was discussed appears to have been holders of 755 shares for continuing, and the holders of 1435 shares for winding up the company. We have now to decide whether with this uniformly disastrous career, and with the holders of nearly two-thirds of the subscribed capital desiring that the company should be wound up, it is just and equitable that the company should be continued or whether it should be wound up. I think it would not be reasonable to make this large majority of the shareholders go on until a new experiment has been made, and not improbably the remaining assets of the company dissipated. That would be very hard, and in my view unjust. I therefore come to the conclusion that the case of the petitioners has been made out, and that it is just and equitable that the company should be wound up.

LORD ADAM—This company has had rather an unfortunate career. It started with 10,000 shares, of which only 2825 were paid up by 23 members. It began business as lately as 1902 by the purchase of a ship for £2000 and spending £1100 on her alteration, so that the total capital and more was engrossed in the fitting out of this vessel. That was the beginning of the business, and it ended so far as the ship was concerned by her foundering and damaging a pier, so that the company had to pay £1344 in damages and the expenses of litigation. That was an unfortunate occurrence in one sense, but not in another, for they had already made a trading loss of £700. The result is that there remains a balance in bank of £363. It is stated that they intend to carry on business by chartering vessels. I do not think that it would be just and equitable that they should be allowed to do so, and therefore think a winding-up order should be pronounced.

LORD M'LAREN—The question in this case is whether a majority of the shareholders of the company should be compelled to carry on the business against their will. Their operations in the past year have been disastrous, but a sanguine minority are anxious to continue, and it is suggested that without a ship, without capital, without business, or even a united proprietary, success may be retrieved. I think the mere statement of the facts a sufficient answer to this suggestion, and as the only alternative is the winding up of the company, I consider that it is just and equitable that the company should be wound up.

LORD KINNEAR concurred.

The Court granted an order for the winding up of the company.

Counsel for the Petitioners—C. N. Johnston, K.C.—J. Duncan Miller. Agents—Inglis, Orr, & Bruce, W.S.

Counsel for the Respondent—Aitken, K.C.—Lippe. Agents—Erskine, Dods, & Rhind, S.S.C.