we have a plain duty to perform, and that is to grant the supervision order.

LORD MURE—The petitioners ask for a supervision order in pursuance of an extraordinary resolution which was adopted in accordance with the provisions of the 129th section of the Companies Act of 1862. The third sub-section of that section enacts that "whenever the company has passed an extraordinary resolution to the effect that it has been proved to their satisfaction that the company cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up the same," a voluntary winding-up may proceed. The advisability of the measure is thus left to the company, and the Court has no jurisdiction to review the opinion which the company may form. It cannot judge of it apart from the rest of the proceedings. That being so, the application for a supervision order is opposed, and a counter-petition is presented calling upon the Court to rescind the extraordinary resolution. But we have no jurisdiction to do this—it is not competent—and accordingly there is no reason why the supervision order should not be granted.

LORD SHAND—If the respondents had any good grounds for challenging this resolution it appears to me that they should be presented in an action of reduction, and not in such a form as we have here. The resolution is *inter socios*—it is come to by the shareholders, in the management of the company's affairs, and the statute clearly provides that if the company is satisfied of its inability to carry on its business, and of the advisability of winding it up, it may resolve so to do. If such a resolution is passed it must be acted upon until rescinded in some competent way, and accordingly if the Court is asked in accordance with that resolution to grant a supervision order, I am of opinion that it must be granted. It certainly must be granted in a question with outsiders—such as the respondents here—unless reduced. I therefore take it that as there is no such action here, the petition for rescinding the resolution must be refused, and the answers to the petition for a supervision order cannot be entertained.

But I go further. Even if both petition and answers could be considered, I am of opinion that there is no title to present this counter petition or to put in those answers; and even if there was a title, that there were no reasonable grounds stated.

There is no title, for, looking to the agreement, this company is nothing but a creditor. It is true that an arrangement was made by which it was to manage the affairs of the old company and wind it up at the close. But the whole interest of the new company to do this is to earn commission. Is a creditor having an adverse interest to the winding-up to have a right to step in and say that the company shall not be wound up because he would be prejudiced? The Court cannot look at such a claim.

Further, we are told that the company has bound itself to be wound up by the respondents, and when we ask where is the agreement, we are told that it is not express, but that it is implied. I should be very slow to find implied an agreement so extraordinary by which a company binds itself not to avail itself of the Companies Acts under which it was constituted, but here I find nothing suggesting such an agreement.

LORD ADAM concurred.

The Court granted the supervision order.

Counsel for Petitioners—H. Johnston. Agents—Mackenzie & Kermack, W.S.

Counsel for Respondents—Balfour, Q.C.—M'Kechnie. Agents—T. & W. A. M'Laren, W.S.

Thursday, December 2.

FIRST DIVISION.

COMMERCIAL BANK OF SCOTLAND (LIMITED) *v.* LANARK OIL COMPANY (LIMITED).

Public Company—Winding-up—Companies Act 1862 (25 *and* 26 *Vict. c.* 89), *sec.* 80, *sub-sec.* 1 *—Security to "the reasonable satisfaction of the creditor."*

A creditor holding a security over the heritable property (consisting of part of its works) of a limited company, having demanded payment as provided in sec. 80 of the Companies Act 1862, and remaining unpaid, presented a petition for a winding-up order, alleging that the company was unable to pay its debts. *Held* that it was not a good answer by the company that the apparent value of the security greatly exceeded the debt, unless it could also be shown that it was truly a marketable security for the amount of the debt.

The Lanark Oil Company (Limited) was on the 3d August 1883 incorporated under the Companies Acts 1862 to 1880. The amount of the shares was by the beginning of 1886 fully called up, and there was then no uncalled capital belonging to the company.

This was a petition by the Commercial Bank for a winding-up order, on the ground that the company was unable to pay its debts. The company had borrowed money from the bank under a cash-credit bond and assignation in security over the works and property of the company, duly recorded, whereby the company was bound, conjunctly and severally with the other obligants in the bond, to pay the principal and interest to the bank at any time when the same should be demanded after three months from the last date of the bond.

At 26th August 1886 the company owed under this cash-credit a balance of £10,000, 7s. 10d., conform to certificate by the accountant of the bank as stipulated in the bond, as well as £567, 0s. 10d. of interest. On 30th September the bank served a demand on the company requiring payment. Payment was not made. It was in respect of this debt, and of an alleged debt of £1000, constituted by a promissory-note in favour of the company, of which the bank alleged that they were indorsees and onerous holders, that the petition was presented.

The 80th section of the Companies Act 1862 provides, sub-section (1)—"A company under this Act shall be deemed to be unable to pay its debts (1) whenever a creditor by assignment, or otherwise, to whom the company is

indebted at law or in equity in a sum exceeding £50 then due, has served on the company, by leaving the same at their registered office, a demand under his hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand neglected to pay such sum, or to secure or compound for the same to the reasonable satisfaction of the creditor."

The company lodged answers, in which they stated that the sum originally borrowed by the company from the petitioners was £20,000, of which £14,250 was upon the said cash-credit, and £5750 upon a temporary overdraft, but that the said loan of £20,000 was in April 1886 reduced by a payment to account thereof to the said balance of £10,000, 7s. 10d.; that in security of the said balance and interest now remaining due the petitioners held as a first charge the company's works and property at Lanark, which cost £80,000, and after writing off a sum of £30,000 for depreciation, stood in the company's books at the value of £50,000, and that in addition to the heritable estate and plant thus held by the petitioners in security for the balance of the said cash-credit, they held the personal obligation of three of the late directors of the company, viz., Mr William Potts, Mr Mungo Lauder, and the now deceased James Thornton, who were bound, jointly and severally, as co-obligants along with the company for the said balance and interest. They alleged further, that the whole unsecured debts owing by the company amounted to a sum not exceeding £5515 or thereby, of which £2000 was due to the present directors for advances, but for which they held no security, and that the whole debts of the company, both secured and unsecured, did not exceed £32,000, while the assets of the company exceeded £85,000. They denied the alleged debt of £1000, and stated that an action in regard to the note was still *sub judice*.

Argued for the petitioners—The demand made by them could not be met. The entries in the company's books were no evidence of the value of the property. It was not enough to say that the security of the creditor was ample; it must be marketable.

Argued for the respondents—The security was ample. It consisted not only of the works, &c., of a value far exceeding the debt, but of the personal security of the guarantors. The bank was the only creditor pressing for payment, and it was secured. The value of the security was to be estimated at the time when it was taken. Besides, such an application under section 80 was not competent to a secured creditor. He could not get this order until he had tried the market with his security.

Petitioners' authority—*In re European Life Assurance Society*, October 15, 1869, L.R., 9 Eq. 122.

Respondents' authority—*In re London and Paris Banking Corporation*, November 21, 1874, L.R., 19 Eq. 444.

At advising—

Lord President—The remedy given to the creditor of a limited company under the Act of 1862 of applying to the Court for a winding-up order is no doubt stringent, but I agree very much with what was said by the Solicitor-General that this remedy comes in the place of all the remedies open to the creditors of an ordinary trading company. In the case of an ordinary trading company, the creditor in an undisputed debt could apply for its sequestration, and he would be entitled to proceed, not only against the company, but also against the partners. This winding-up under the Companies Act of 1862 comes in the place of all these remedies. A creditor's application for an order of this sort is not to be lightly refused, for if he is creditor in an undisputed debt it is his right under the statute. Here the debt is a debt under a bond by which the company is bound to make payment of the amount outstanding at any time after three months from the date of the bond on demand, principal and interest. Now, that period has long since expired, and there can be no doubt of the right of the Commercial Bank to make this demand. The fact that the debt is long since due will not of itself justify the creditor in presenting a petition. He must first make out to the satisfaction of the Court that the company is unable to pay its debts; and the 80th section of the Act provides what shall be sufficient to infer that it is in that position. The first sub-section of that section enacts that a company shall be deemed to be unable to pay its debts, "whenever a creditor, by assignment or otherwise, to whom the company is indebted at law or in equity, in a sum exceeding £50 then due, has served on the company, by leaving the same at their registered office, a demand under his hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand neglected to pay such sum, or to secure or compound for the same to the reasonable satisfaction of the creditor." That is the evidence of inability to pay which satisfies the statute, and what the statute prescribes was done here. A notice was served on the company on September 30th 1886. The term has expired, and the debt has not been paid, and the only answer made to the demand of the petitioners by the company is that they have sufficient security for their debt—the word used is "ample"—and that being so, that the case is taken out of the operation of sub-section 1 of section 80. Now, I am willing to concede for the construction of this subsection that a company debtor "has not neglected" to pay or secure the debt if it can show that there is in existence an ample security for its debt. If the creditor had a bond over a landed estate, and the rental showed a large margin, it would be impossible to say that the creditor was not amply secured. But where the circumstances are of that character a case is not very likely to arise, for such a debtor would not resist payment. He could raise the money on the estate and pay off the debt. But such a case will never be tried, for a petition such as this will never be presented where the security is ample. I rather think that it is only where the security either is or is suspected to be insufficient that a question such as this can arise. And I think that the true test of the sufficiency of a security is whether it could command that amount of money when put into the market. In short, it must be a marketable security, or else it is not a security "to the reasonable satisfaction of the creditor." That being so, I do not think that the company have made any answer to the demand of the petitioners. And when they suggest to the creditor to exhaust

the security by selling the works and applying the price to the liquidation of their claim, I must say that they are suggesting a course which would be as destructive to their existence as a company and to their business and credit as the course proposed by the petitioners. I am therefore of opinion that the petitioners are entitled to have a winding-up order.

LORDS MURE, SHAND, and ADAM concurred.

The Court granted the prayer of the petitioner.

Counsel for Petitioners — Sol.-Gen. Robertson, Q.C.—Lorimer. Agents—Melville & Lindesay, W.S.

Counsel for Respondents—Balfour, Q.C.—M'Kechnie. Agent—George M. Wood, S.S.C.

Thursday, December 2.

SECOND DIVISION.

SMILLIE *v.* BOYD.

[Sheriff of Lanarkshire.

Reparation — Dangerous Animal — Dog — Contributory Negligence.

The pursuer, a pig-keeper, who was in the habit of calling at houses and collecting refuse for pigs, was severely bitten while collecting refuse at the defender's house, by his dog, which was known to both parties to have bitten several persons before. On the occasion in question the pursuer had been admitted to the premises by the defender's wife, who, believing her to have left, had let the dog out into the garden where she was. The defence was that the pursuer knew of the dog's nature, and had been told that if she persisted in coming to the house she did so at her own risk. *Held* that contributory negligence was not in the circumstances established, and that the defender was liable in damages.

This was an action of damages against Thomas Boyd, residing in Braeside Avenue, Rutherglen, for damages for the bite of a dog. The pursuer, Catherine Goldsmith or Smillie, a pig-keeper, who was in the habit of calling at houses in the district to collect refuse, which she obtained gratuitously for her pigs, was severely bitten while in the defender's garden on 7th October 1885 by a valuable collie dog belonging to him. It was not disputed that the dog had previously bitten other persons, and that the defender knew that. The defence was that the pursuer had by her own negligence brought the injury on herself. It was proved that the pursuer's father, who was in use to accompany her on her rounds, had previously been bitten by the dog, and the defender led evidence to show that he and she had both been warned against coming to the house because the dog had an antipathy to them, and that he had taken precautions, by putting a lock on a gate at the side of the house and within the garden, to prevent them going round to the back-door without being seen. It appeared, however, that they had not ceased to come, and that on the day in question the pursuer went to the door and rang the bell and was admitted at the front gate by the defender's wife, who then unlocked the side gate and took her round to the back-door, when it was found that there was nothing for her. The pursuer deponed that the defender's wife then told her she might pick some cabbage-blades in the garden and remove them. The defender's wife deponed that she could not swear she had not allowed her to stay in the garden for this purpose, and she might have told her she might go into the garden for cabbage-blades. About twenty minutes afterwards the defender's wife, being entirely ignorant that the pursuer was in the garden, went out with the dog into the garden. The pursuer was still there, engaged in pulling the blades, and the dog bit her. This action was brought in consequence. The pursuer concluded for £50 damages.

The Sheriff-Substitute (GUTHRIE) found that the dog was vicious, and was known to the pursuer to be so; that pursuer and her father had been often warned not to come on the premises lest the dog should attack them, and that the defender's wife had, on finding there was nothing for pursuer on the occasion in question, dismissed her; that she was in fault for being in the garden after being repeatedly warned of the danger. He therefore assoilzied the defender.

On appeal the Sheriff (CLARK) adhered, founding his judgment on the pursuer's fault as repeatedly admitted by herself at the time of the injury.

The pursuer appealed.

Argued for her—The pursuer was in the garden on the occasion in question on the invitation of the defender's wife, and was not a trespasser, and indeed there was no contradiction of her story that she was actually told to stay in the garden. The dog having been known to defender to be vicious, he was bound to use not reasonable only but absolute precautions to restrain it—*Burton* v. *Moorhead*, July 1, 1881, 8 R. 892.

The defender argued—It was unnecessary for him to say anything against the decision in *Burton's* case, but that decision did not involve that the pursuer could recover even if bitten by a dog which defender was bound to restrain, if she had herself been careless of her safety. It was proved that the pursuer was in fault, and at all events was in the garden to serve herself only, taking the risk of a danger she knew perfectly well; and further, that she had at the time attributed her injury to herself, and that was material evidence in the defender's favour—*Wilson*, June 21, 1883, 10 R. 1021. The question was, whether she was negligent, the very question put to the jury in *Sarch* v. *Blackburn*, 4 C. & P. 197, and on that question the Sheriffs were with defender. In *Daly* v. *Arrol*, reported *infra*, the Court had assoilzied the owner of a dog he knew to be fierce, and which had bitten, not a stranger, but one of his own workmen, the ground of judgment being that the pursuer was guilty of contributory negligence in unnecessarily approaching the dog.

At advising—

LORD YOUNG—In this case—knowing that an application by the pursuer to dispense with printing was to be made—I thought that I might usefully read through the evidence and the Sheriff's judgment. When I had done so my impression was that in this case the indulgence of dispensing with printing the record should be granted,