Wednesday, March 8.

SECOND DIVISION.

WILSON *v.* MANN.

Process—Attendance of Counsel.

When a reclaiming note in the Short Roll was called the junior counsel for the reclaimer asked that the hearing might be postponed as he was alone in a proof in the Outer House and his senior was engaged in the other Division. The Lord Justice-Clerk, while postponing the hearing, intimated that he wished it to be distinctly understood that the excuse was not a sufficient one, and in future would not be received.

Counsel for Pursuer—Dean of Faculty (Watson)—Mair. Agent—William Officer, S.S.C.

Counsel for Defender—R. V. Campbell. Agent—A. Kirk Mackie, W.S.

Friday, March 10.

FIRST DIVISION.

SDEUARD *v.* GARDNER & SON.

Company—Companies Act 1862—*Voluntary Winding-Up—Notice.*

Held that a notice of an extraordinary general meeting "to consider and resolve whether under existing circumstances the company should be wound-up, and if so resolved upon to decide in what manner this should be done," was a good notice in terms of section 129, sub-section 2, and section 51.

Company — Arrestments — Jurisdiction — Voluntary Winding-up.

Held that the Court had no power to stay the proceedings of a creditor against a company in voluntary liquidation, but that to give the Court such power the company must be wound-up by the Court or under the supervision of the Court.

Sdeuard was liquidator of the Western Isles Steam Packet Company, which had gone into voluntary liquidation, in terms of section 129, sub-section 2 of the Companies Act 1862. Gardner & Son obtained a decree against the company in the Glasgow Sheriff Court for a sum of money due to them by the company, and thereupon arrested monies of the company in the hands of various parties. Sdeuard thereon presented this petition, praying the Court to order Gardner & Son to withdraw the arrestments, laying his petition on sections 138 and 163 of the Companies Act, which sections are quoted in the opinion of the Lord President.

The respondents put in answers, *inter alia*, to the following effect:—"The respondents, looking to the defective terms of the minutes produced, do not admit that the company has validly gone into voluntary liquidation, nor that the petitioner is validly appointed. But, apart from this objection, the respondents submit that the Companies Acts afford no authority for interfering with the ordinary diligence of creditors in deference merely to a voluntary liquidation of the company. They contend that interference with actions is only possible when the rights of creditors are protected by a winding-up ordered by the Court, or subject to the supervision of the Court.

The terms of the notice were as follows:—

"133 *West George Street,*
Glasgow, 25*th January* 1875.

"Sir,—An extraordinary general meeting of the shareholders of this company will be held within the company's offices here on Thursday, the 4th day of February proximo, at twelve o'clock noon, for the purpose of considering the present position of the company, and to consider and resolve whether under existing circumstances the company should be wound up, and if so resolved upon to decide in what manner this should be done.—Your obedient servant,

"James Sdeuard, *Secretary.*"

Argued for petitioner—Substantially, this notice only presented an alternative course, and was therefore good. No special form was given, and all that was wanted was to prevent surprise. *Bridport Brewery*, 2 L. R. Ch. App. 191.

As to the competency of stopping arrestments in voluntary windings-up—The power was conferred by section 138. Without this power no one would make use of a voluntary winding-up. It was specially provided that the liquidator should pay all equally, which would be impossible if the respondents established a preference. The point had been repeatedly decided in England in favour of the competency.

Authorities—*Sablonière Foreign Hotel Co.*, 3 L. R. Eq. 74; *Keyusham Co.*, 33 Beavan 123; *Peninsular Banking Co.*, 35 Beavan 280; *East Kent Shipbuilding Co.*, 18 Law Times, n.e. 748; *ex parte Levett*, 5 L. R. Eq. 69; *Poole Co.*, 17 L. R. Eq. 268.

Argued for Respondents—The notice was bad, because it was not sufficiently specific—*Silkstone Colliery Co.*, 1 Ch. D. 38. By section 163, judicial windings up, arrestments, &c., were void by the statute. It was therefore not a "power" of the Court to stay proceedings. The creditor was completely tied up if this were so. There was no process to move in. The English authorities nearly all rested on Sir S. Romilly's authority alone. The Common Law Courts seemed to have taken a different view, and such questions might now be brought before a common law division. The liquidator was merely a trustee.

Authorities—*Brighton Arcade Co.*, 3 L. R. C. Pl. 175, and comments thereon in *Black*, 8 L. R. Ch. 254; *Great Ship Co.*, 10 Jurist N. S. 3; *London Cotton Co.*, 10 Jurist N. S. 313; *Hull Forge Co.*, 36 Law Journ. Chanc. 337; *Gibbs*, 10 L. R. Eq. 330; *People's Garden*, 1 Ch. D. 44; *Jamieson*, 6 M. 91 and 8 M. (H. L.) 88.

At advising—

Lord President—In this case we have a question of considerable general importance, but I cannot say I think it attended with much difficulty.

This voluntary winding-up professes to be made under sub-section 2 of section 129 of the Companies Act. The provision there is that a company may be wound up voluntarily whenever the company has passed a special resolution re-

quiring the company to be wound up voluntarily. It is objected by the respondents that the resolution here is not a special resolution, as defined by section 51, and it is contended that on that account the company is not validly in liquidation at all, and consequently the respondents are entitled to object to the title of the liquidator.

The 51st section provides—"a resolution passed by a company under this Act shall be deemed to be special whenever a resolution has been passed by a majority of not less than three-fourths of such members of the company for the time being entitled according to the regulations of the company to vote, as may be present in person or by proxy (in cases where by the regulations of the company proxies are allowed) at any general meeting of which notice specifying the intention to propose such resolution has been duly given, and such resolution has been confirmed by a majority of such members for the time being entitled according to the regulations of the company to vote as may be present in person or by proxy at a subsequent general meeting of which notice has been duly given, and held at an interval of not less than fourteen days nor more than one month from the date of the meeting at which such resolution was first passed." There are several requisites here to the constitution of a special resolution. There must be two meetings, and the notice calling the first must specify the intention to propose a resolution for a voluntary winding-up. At the first meeting there must be a majority of three-fourths; then an interval must elapse of not less than fourteen days or more than a month, and due notice must be given of the second meeting, and at that meeting the resolution must be confirmed by a majority. I think it is conceded that in the present case all these requisites were complied with except one; but the respondents contend that the notice calling the first meeting was not in proper terms. The rest of the proceedings are unchallenged.

Now, the terms of the notice were as follows:—[*His Lordship read the notice*].

No doubt this is not a literal compliance with section 51, because it does not say specially that it is the intention of a person, named or not as the case may be, to propose a resolution; but the real question is if this is not a substantial compliance with the section, and whether any one getting this notice would not know what was going to be done. I do not think it would detract from the statutory validity of the notice if it contained intimation of some other resolution which was to be proposed as well. Suppose it had borne that while one person would propose a resolution to wind up voluntarily, another would propose a winding-up under the Court, I think the notice would still have been good, and that the existence of the second alternative would not detract from the effect of the notice. Now, does not this notice state in different words the same substance as that. The first question is, is the company to be wound up? the second, in what manner ought it to be done? Now, properly under the statute there are only two ways of winding up a company, the one under the Court, and the other voluntarily. No doubt there may be superinduced a third way, under the supervision of the Court, but that cannot be without the company first being wound up voluntarily; and accordingly here there is really only one alternative course presented. I think this is a good notice. I do not think any shareholder could doubt for a moment what was going to be discussed. It was not intended that notices of this kind should be so strictly construed as that any verbal departure from the rules should sanction a nullity. If sufficient intimation is given as to what is going to be done that is enough. I am of opinion, therefore, that the objection is ill-founded, and that the company here is in valid liquidation, and that the liquidator has a good title; but whether he is entitled to prevail in his petition is another matter.

The petition prays us "to declare the arrestments used by the respondents to be void to all intents, or to order the said respondents to withdraw the said arrestments, and to desist and cease from using arrestments or any other diligence to the prejudice of the general body of creditors of the company, and to acquiesce in and accept the same dividends as the said general body of creditors."

This petition is laid on section 138, taken with section 163. Section 138 provides—"Where a company is being wound up voluntarily, the liquidators or any contributory of the company may apply to the Court in England, Ireland, or Scotland, or to the Lord Ordinary on the Bills in Scotland in time of vacation, to determine any question arising in the matter of such winding-up, or to exercise, as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court; and the Court, or the Lord Ordinary in the case aforesaid, if satisfied that the determination of such question, or the refused exercise of power, will be just and beneficial, may accede wholly or partially to such application, on such terms and subject to such conditions as the Court think fit, or it may make such other order, interlocutor, or decree on such application as the Court thinks just." And the 163d section provides—"Where any company is being wound up by the Court, or subject to the supervision of the Court, any attachment, sequestration, distress, or execution, put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents."

Power is here first given "to determine any question arising in the matter of such winding-up." I do not think these words cover the case before us, because no question has arisen in the winding-up for determination. What has happened is that a creditor of the company has used arrestments, but that is a matter outside the winding-up, and proceeding as if the winding-up did not exist. But we are asked to interfere in virtue of these words, "to exercise as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court." This raises the very important question as to what is the class of powers contemplated by this section. Section 163 has no application. It enacts with reference to windings-up by the Court, or under the supervision of the Court, that "any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after

the commencement of the winding up shall be void to all intents."

There is no power here conferred, and section 138 only confers the same powers as possessed by the Court in judicial windings-up.

In argument, however, reference has been made to other sections, of which one is section 85. But section 85 refers only to that period which intervenes between the presenting of a petition to the Court under this Act and the making of an order for winding up the company, and it seems quite impossible that it should have application where there is no corresponding period, no petition, and no order. Further, section 87 has been quoted, which provides that "when an order has been made for winding up a company under this Act, no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court, and subject to such terms as the Court may impose." Here again there is no power conferred on the Court, but a mere provision that where an order has been made, *i.e.*, where the company is in liquidation by the Court no creditor shall be allowed to raise an action without leave of the Court. There may be in such cases good reason for restraining a creditor, and I do not say that we have not the power to prevent a creditor doing that without leave which he may do with leave. Such a power is implied in the section; but the important question is, Whether that power is contemplated in section 138? To revert to the words of that section, we are empowered "to exercise as respects the enforcing of calls, or in respect of any other matter, the powers," &c. Here there is a specification of one matter, viz., enforcement of calls. Now, enforcement of calls occurs in another part of the Act, viz., sec. 121, where other powers are mentioned, and in secs. 115, 117, and 118. Section 115 enables the Court to summon before it persons suspected of having property of the company. Section 117 gives a power of examination of parties, and by sec. 118 the Court is empowered to arrest any contributory about to abscond or remove his property. Now, all these powers are just as useful to a voluntary winding-up as they are to a winding-up by the Court, and therefore when sec. 138 says—"as respects the enforcing of calls, or in respect of any other matter," I think the clause must be reasonably construed as referring to that class of powers which I have specified. If you were to extend sec. 138 so as to embrace the power of the Court to restrain actions and diligence, the consequences would be serious, and it is necessary to look ahead and see these. Section 133 defines the consequences following on a voluntary winding-up, and sub-section 7 provides that "the liquidators may, without the sanction of the Court, exercise all powers of this Act given to the official liquidator." The liquidators are placed in this position in voluntary windings-up, and in them alone; for by sec. 95 the official liquidator's powers are all "with the sanction of the Court." Accordingly, this liquidator may, without sanction of the Court, take measures against this creditor; but if he gets the order here asked for the creditor is not to be allowed to apply to the Court. I do not see how a creditor in a voluntary winding-up can come here of his own accord, though he may come if he is brought here by the liquidator. If this petition be granted, the position of the liquidator is this, that the liquidator might do anything, but the creditor could do nothing against the liquidator or the company. That is anomalous, for questions of importance might arise between these which would require the consideration of the Court. This appears to be one of those anomalous results arising which create a presumption against the interpretation of the statute contended for by the petitioner.

In judicial windings-up the creditors are restrained, but so is the liquidator; neither can stir a step without leave. But that is to be reversed if we grant the prayer of this petition.

I must say that these considerations would lead me to entertain the greatest doubt whether it was the intention of the Legislature that the creditor's hands should be tied up; but any doubt is removed entirely by reference to sections 148 and 151, which, in a matter of construction, afford as strong an argument as could be found. They occur in the part of the statute devoted to windings-up under the supervision of the Court.

The 148th section provides—"A petition praying . . . that a voluntary winding-up should continue, but subject to the supervision of the Court . . . shall, for the purpose of giving jurisdiction to the Court over suits and actions, be deemed to be a petition for winding-up the company by the Court." But for this clause I must assume that in a winding-up subject to the supervision of the Court, the Court would not have had jurisdiction over suits and actions, and if so, *multo magis*, not in a voluntary winding-up. Then comes section 151—"Where an order is made for a winding-up subject to the supervision of the Court, the liquidators appointed to conduct such-winding-up may, subject to any restrictions imposed by the Court, exercise all their powers without the sanction or intervention of the Court, in the same manner as if the company were being wound up altogether voluntarily; but save, as aforesaid, any order made by the Court for a winding-up subject to the supervision of the Court, shall for all purposes, including the staying of actions, suits, and other proceedings, be deemed to be an order of the Court for winding up the company, and shall confer full authority on the Court to make calls, . . . and to exercise all other powers which it might have exercised if an order had been made for winding up the company altogether by the Court."

This not only repeats 148 in different words and application, viz., that in winding-up under supervision the Court shall have power of staying actions, but there are other words of importance. The Court is to "exercise other powers which it might have exercised" if the winding-up had been by the Court. This shows that there are powers which the Court may exercise when the winding-up is by the Court, which it has not when the winding-up is voluntary.

Clearly the result is—(1) There are powers which the Court may exercise in a winding-up by the Court which it may not exercise in a voluntary winding-up; (2) One of these, in particular, is the power to stay actions, and that is confined to winding-up by the Court, and cannot be exercised in a voluntary winding-up.

I am the more anxious to explain the ground on

which our decision should proceed, because I am anxious to avoid the decision of the question —Whether creditors have anything to do with a voluntary winding-up, and can be affected by proceedings therein? That is not determined here. Though raised in argument, it is not necessary for the decision of the case. I am therefore of opinion that the Court has no jurisdiction under sec. 138 to stay actions, &c., and that therefore the prayer of the petition should be refused.

Lord Ardmillan—This is an application by the liquidator in a voluntary winding-up to stay the proceeding of a creditor. I think the notice of the meeting to be held on 4th February 1875 is sufficient. No particular terms of notice are directed by the statute, and all the intimation required is given. I have nothing to add to what your Lordship has stated on this point.

The second question, viz., the interposition of this Court to stay the diligence of creditors in a voluntary liquidation, is important. I am of opinion that when a company is wound up judicially, or where a winding-up, voluntary at its commencement, is placed under judicial supervision, the rights and interests of creditors may be brought within the jurisdiction of the Court.

But a voluntary winding-up is just an arrangement by contributories—that is, by the debtors. The creditors are not parties; they cannot apply to the Court for interposition in their favour; nor can the company or the contributories or the liquidator obtain the interposition of the Court against them.

The case of a contributory required to pay calls, and meeting a demand for calls by setting against that demand a claim as a creditor, has occurred in England. I do not think that case is in point, because, as a contributory, he is within the scope of the voluntary liquidation.

But a creditor of the company is outside of the procedure for voluntary liquidation, and the provisions of the 138th section are, I think, limited to "the matter of the winding-up," or the exercise of powers in the enforcement of calls, or in the winding-up, and within the scope of it. The creditor not being a contributory, not being liable to a demand for calls, not requiring leave to proceed, and not liable to be restrained from proceeding without leave, is, in my view, beyond the scope of the voluntary winding-up. In order to obtain the authority of the Court to control his proceeding the winding-up must be judicial, or brought under judicial supervision.

Several decisions in England have been urged on us as authorities.

I agree with your Lordship in your view of the 147th, 148th, and 151st sections, and I agree also that in declining to interfere with this creditor, who is not a shareholder under this voluntary winding-up, we are acting on a sound principle, and not running counter to these English decisions.

Lord Deas—By the second sub-section of section 129 of the statute it is provided that notice must be given that a meeting is to be held, and it is to the terms of that notice that objections have here been taken. I am clearly of opinion that it is not necessary that the notice should bear that the meeting is to be held for the purpose of passing a special resolution. When we look at the definition of a special resolution I do not see how it could be required that it should so bear. Section 51 defines what a special resolution is. The resolution must be first carried by three-fourths, at a meeting of which notice is given, and then confirmed by a majority at a subsequent meeting within a certain time. The first meeting could not therefore pass a special resolution according to the definition, for whatever resolution it passed could not become special till it was subsequently confirmed. The next objection is that the notice here was not sufficiently specific. I am of opinion that this is not well founded. It would come to this—that no notice could be good unless the thing proposed to be done were one only. At that rate there would be three meetings at least, and in one view another one still. That could scarcely be the meaning of the statute. Where, as here, there is presented a distinct alternative, I think that is quite enough.

The next question is, whether we can be called on to stop the proceedings of this creditor. The question is not whether we can do other things, but whether we can stop these proceedings. The result at which I arrive on consideration of sections 85 and 148, taken with section 151, is that power is given to the Court to stay proceedings in winding-up by the Court, or under the supervision of the Court—and the whole question here is, whether section 138 gives that power in voluntary windings-up. I am of opinion, for the same reasons as stated by your Lordship, that it does not. Taking the actual words, the power is not conferred. It is very improbable it could have been intended to be conferred, and it is very improbable, *prima facie*, in a voluntary winding to which creditors are no party. The remedy is plain and easy—to apply to the Court for a judicial winding-up or for supervision, and the moment that is done proceedings can be stayed. I go entirely on the words of the statute.

Lord Mure—I have little to add. On the first point, I quite concur in thinking that we must not deal too critically, more especially where the original notice is not for a final resolution, but only for one which requires subsequent confirmation. Upon the second point, I had at first some difficulty, looking to the broad terms of section 138. Section 163, I think, has no application.

But looking to the part of the statute where we find section 138, and looking at sections 148 and 151, where special powers are given to the Court, I think it cannot be held that section 138 was intended to confer this power of staying actions, because sections 148 and 151 would then be unnecessary.

The Court pronounced this interlocutor:—

"Refuse the petition, and decern: Find the petitioner liable in expenses, and remit to the Auditor to tax the account of said expenses, and report."

Counsel for Petitioner—Mackintosh—Lang. Agents—W. & J. Burness, W.S.

Counsel for Respondents—R. V. Campbell. Agent—P. H. Cameron, S.S.C.