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, 25th 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