Wednesday, July 13.

FIRST DIVISION.

[Lord Lee, Ordinary.

THE NATIONAL BANK *v.* MACQUEEN AND OTHERS.

Bankruptcy — Preference — Arrestment—Appropriation of Funds Arrested to a Specific Purpose.

On the 8th August 1879 the directors of a heritable security company resolved to make a call payable at a bank on the 1st of December following. The minute of the directors bore, that after payment of debts due to the bank, the proceeds of the call were "to be placed on deposit, and there to remain to meet payments of principal which may be required by the debenture-holders of the company." On 20th April 1880 one of the debenture-holders, whose debenture was then past due, raised an action for payment, and used arrestments on the dependence in the hands of the bank. At that date the entire proceeds of the call stood in a separate account in the books of the bank, but on 26th April the bank applied part of the proceeds in paying their own debt, and the remainder they placed in a deposit-receipt, which bore that the sum had been "placed in deposit-receipt for debenture-holders, as per memorandum of the directors of the company of 8th August 1879." The company went into voluntary liquidation. In a competition between the debenture-holder who had used arrestments and the other debenture-holders —*held* that the former was entitled to be ranked preferably on the sum in the deposit-receipt.

Bankruptcy—Preference—Notour Bankruptcy—Act of Bankruptcy—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 164—*Bankruptcy (Scotland) Act* 1856 (19 *and* 20 *Vict. cap.* 79), *secs.* 7, 8, *and* 12.

Where a single creditor arrested on the dependence of an action against a company within sixty days of a resolution to wind the company up voluntarily, and was the only creditor who had done diligence against the company—*held*, assuming that the resolution to wind-up voluntarily was equivalent to notour bankruptcy, that, as the object of the 16th section of the Bankruptcy Act was to equalise, but not to cut down diligence, the arresting creditor was entitled to be ranked preferably for the full amount of her debt.

Miss Mary M. C. M'Queen, as acting for her brother Dr D. M'Queen, was the holder of two debentures for £1500 and £200 respectively, granted by the Edinburgh and Glasgow Heritable Company, Limited, and payable at Martinmas 1879. They were not then paid, and on 18th May 1880 Miss M'Queen obtained decree for the principal sums, together with the interest due and expenses. On the dependence of this action she used arrestments in the hands of the National Bank to the extent of £2000.

The Heritable Company had obtained advances to a considerable amount from the National Bank, for repayment of which the Bank were pressing. At a meeting of the directors of the Heritable Company held in Edinburgh on 8th August 1879, the minute bore—"The directors having taken into consideration the expediency of making another call, hereby resolve to make a call of £1 per share, payable at the National Bank of Scotland on the 1st December next, and they instruct Messrs Mackenzie & Black, W.S., to write to Mr Dove, the law agent of the National Bank, that it is the intention of the directors to devote the proceeds of the call, which it is expected will realise about £5000, towards payment of the sum of £3000 in liquidation of the debt due to the National Bank by the company, and £2000 to be placed on deposit, and there to remain to meet payments of principal which may be required by the debenture-holders of the company." The minute further bore that in the event of the call not realising the full sum of £5000, or being in excess thereof, then the payment to the bank and the sum to be placed on deposit should be correspondingly diminished or increased. Intimation of the directors' resolution in regard to the call was duly made to the National Bank, and the bank acquiesced therein. At a meeting of directors held on 22d October 1879, the minute bore — "With reference to the debentures falling due, the manager was instructed to inform the parties (Dr Daniel M'Queen and Miss Mary M. C. M'Queen) that these would be met from the proceeds of the call upon the shareholders, which falls due upon 1st December next.' Intimation of the resolution of the directors in the above minute was made to Miss Macqueen for herself and her brother Dr Macqueen.

In virtue of the call upon the shareholders payable 1st December 1879, the said bank betwixt that date and 16th April 1880 received the sum of £4839, 2s. 6d. At 20th April 1880, the date of the above mentioned arrestment at Miss Macqueen's instance, that sum stood in a separate account in the books of the bank. On 26th April 1880 the bank applied £2903, 9s. 6d., being part of the sum, in reducing the company's debt to it, and placed £1935, 13s., being the balance, in a deposit-receipt, in the following terms:—"Received from the company after named for the debenture-holders of the Edinburgh and Glasgow Heritable Company, Limited, being proportion of call received, placed in deposit-receipt for debenture-holders, as per memorandum of the directors of the company of 8th August 1879, Nineteen hundred and thirty-five pounds 13/ sterling, to credit in deposit-receipt with the National Bank of Scotland.

"*By order of the Board of Directors.*

"(Signed) JAMES K. CHALMERS, *p. Manager.*

"(Entd.) Geo. Todd, *p. Acct.*"

On 3d May 1880 the heritable company at an extraordinary general meeting passed a resolution that it should be wound up voluntarily, and J. A. Molleson, C.A., Edinburgh, was appointed liquidator. When the company went into liquidation there was owing to parties who had lent on debentures in all the sum of £11,700 0 0

Of this there was due to Miss Macqueen . . . 1,700 0 0

Leaving, £10,000 0 0

Of that sum, however, the only debentures which fell due in November 1879 were Miss Macqueen's, none of the remainder falling due till Whitsunday 1880.

In these circumstances the bank raised this action of multiplepoinding, calling as defenders Miss Macqueen and the other debenture-holders.

Miss Macqueen claimed to be ranked preferably on the fund *in medio*, and pleaded—"The claimant is entitled to be ranked and preferred on the fund *in medio* in terms of her claim—(1) In virtue of the directors' minutes and intimations thereof, and of the deposit-receipt condescended on, whereby the fund *in medio* was specifically appropriated to payment of the claimant's debt. (2) In virtue of the arrestments used by her on 20th April 1880, and of the decree in her favour, dated 18th May following."

The other debenture-holders claimed to be ranked rateably, and pleaded—"(1) The real raiser, Miss Macqueen, has no right of preference over the other debenture-holders by virtue of the arrestment condescended on, or otherwise. (2) The arrestment used by the real raiser was cut down by the resolution to voluntarily wind up the company, and all the debenture-holders are entitled to be ranked *pari passu* with the real raiser according to the amount in the respective debentures held by them."

The Lord Ordinary (LEE) ranked and preferred Miss Macqueen in terms of her claim.

His Lordship added the following note:—"It is instructed by the execution of arrestment that on 20th April 1880 arrestments were used at the instance of the real raiser in the hands of the National Bank to the extent of £2000 due and addebted by the said bank to the Edinburgh and Glasgow Heritable Company (Limited). The arrestment was upon the dependence of an action at the instance of Miss Macqueen against the limited company, and it appears from the extract decree that decree for payment was pronounced in that action on 18th May 1880. The sums contained in that decree are those specified under heads 1 and 2 of Miss Macqueen's claim, and are just the sums payable under the debentures, with interest from 11th November 1879, when said sums became exigible.

"It appears from the statements on record that at the date of the arrestment there was in the hands of the National Bank a sum of £4839, 2s. 6d. belonging to the Edinburgh and Glasgow Heritable Company, being the proceeds of call of £1 per share payable at the said bank on 1st December 1879. It also appears that on 26th April 1880 the bank, in terms of authority received by them from the company, applied £2903, 9s. 6d. of said sum in reducing a debt due by the company to them, and on the same day placed the balance of £1935, 13s. on a deposit-receipt in name of the company 'for debenture-holders, as per memorandum of the directors of the company of 8th August 1879.'

"The terms of the minute of 8th August 1879 bear that a proportion of the proceeds of the call then resolved upon was to be placed on deposit with the National Bank, 'there to remain to meet payments of principal which may be required by the debenture-holders of the company.' But it appears from the statements on record that the only debenture-holder who was in a position to demand payment at the time when the call became payable, and when the sum of £1935, 13s. was set apart as aforesaid, was Miss Macqueen. None of the competing claimants could demand payment of their debentures before Whitsunday 1880.

"In these circumstances Miss Macqueen raised the present action of multiplepoinding in name of the National Bank, concluding in the usual form that the bank should be found liable only in once and single payment of the sum of £1935, 13s. set apart in the deposit-receipt above mentioned, and founding upon the arrestment and decree as her title to raise the action.

"No objection to the action has been stated by the National Bank. The usual interlocutor was pronounced finding the pursuers liable in only once and single payment, holding the condescendence annexed to the summons as a condescendence of the fund *in medio*, and appointing claims. The questions raised by the pleas of the competing claimants, Gow and others, were—(1) Whether the arrestment was effectual to attach the sum contained in the deposit-receipt? and (2) Whether the arrestment was not cut down by the resolution of the company on 3d May 1880 to wind up voluntarily under the Companies Act 1862?

"After some discussion it was conceded by the counsel for the claimants Gow and others that their second plea-in-law could not be maintained; and the Lord Ordinary is of opinion that, consistently with the principles applied in the cases of *Sdeuard* v. *Gardner*, 3 Rettie 577, and *Clark* v. *Wilson*, 5 R. 867, this concession was necessary and proper,

"With regard to the first point, it was contended that the effect of setting apart the sum of £1935, 13s. on a deposit-receipt in the terms mentioned in the condescendence was to appropriate that sum to the benefit of the debenture-holders generally, and thus to vest in them as a class a *jus quæsitum* in that particular fund, in like manner as if it had been paid away by the bank to a trustee for their behoof. It was argued that the claimant Miss Macqueen was not entitled by virtue of her arrestment to follow the sum out of the general account, in which the proceeds of the call stood at 20th April, into the special deposit account, to which it was transferred on 26th April, and that even if she could follow it, no preference could be claimed as against the other debenture-holders.

"The Lord Ordinary is of opinion that this contention is ill-founded. In the first place, he finds no sufficient ground, in point of fact, for holding that the setting apart of the sum in a deposit-receipt was equivalent to a payment of the money by the bank, or was intended by any of the parties to the deposit-receipt to affect the rights of an individual debenture-holder who was at that time in a position to demand immediate payment. Nothing in the documents referred to appears to bear such a construction. But, in the second place, it appears to the Lord Ordinary to have been beyond the power of the bank and of the company at that time to relieve the fund of the *nexus* imposed upon it by the real raiser's arrestment by any such form of proceeding. The rule that arrestments are ineffectual to attach funds or goods appropriated to a specific purpose, or consigned to an agent for the benefit of certain persons to whom notice is given, so as

to complete the right and vest the *jus quæsitum*, is inapplicable to the case of money simply transferred to an account for debenture-holders unnamed and undefined. Even if the deposit-receipt had borne to be for the whole debenture-holders, that could not have prevented any one of them whose debt was due at the time using the diligence of the law to obtain a preference, or following out such diligence already commenced.

"It was suggested that the National Bank might have applied the whole proceeds to their own debt but for the arrangement made by the company. That does not appear to the Lord Ordinary to be strictly correct. The company were free to resolve or not resolve to make a call, and in making a call payable at the National Bank they were free to attach conditions. But however this may be, the Lord Ordinary is of opinion that the company could not, and that the bank did not, by the procedure which was adopted, exclude the diligence of the real raiser from operating effectually upon the sum set apart for debenture-holders."

The other claimants reclaimed.

At advising—

Lord President—I do not suppose your Lordships entertain any doubt about this case. Miss Macqueen raised an action against the Edinburgh and Glasgow Heritable Investment Company, and obtained decree dated 18th May 1880. On the dependence of that action she used arrestments in the hands of the National Bank on the 20th April 1880, and there is no doubt that there were funds of the common debtor in the hands of the arrestee at that date. The *nexus* was therefore complete. But afterwards an arrangement was made between the bank and the common debtor, to the effect that the funds in the hands of the bank should be employed in a different manner; but it is quite plain that no arrangement of that kind can affect the arresting creditor. The arrestment remained unloosed down to the date of the present action, which is equivalent to a furthcoming. No doubt the bank paid themselves out of the funds, and the remainder of the sums arrested they placed on deposit-receipt in the terms mentioned on record; but that makes it all the more clear that the sum placed on deposit was part of the sum arrested. The Lord Ordinary has held that the arrestment is effectual, and I have no doubt that his judgment should be affirmed.

The other point relates to the effect of the 164th section of the Companies Act, but that section seems to me to have no application to the present question at all. It is said that a voluntary winding-up is equivalent to an act of bankruptcy, and that the arrestment here was used within sixty days of bankruptcy; but the relevancy of that argument I must confess I do not understand. If it had been proposed to equalise all diligences within the sixty days, I could then understand what was intended. But there is no such proposal, because there is only one diligence which creates a preference. Notour bankruptcy following on diligence at any time within sixty days has the effect of equalising that diligence with all others within that period, but it does not cut down diligence. The whole fallacy proceeds on the assumption that an act of bankruptcy cuts down diligence.

Lord Deas, Lord Mure, and Lord Shand concurred.

The Court adhered.

Counsel for Miss Macqueen—Darling. Agents—Waddel & M'Intosh, W.S.

Counsel for Reclaimers—Trayner—R. Johnstone. Agents—J. & J. Galletly, S.S.C.

Wednesday, July 13.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

DUNDEE AND NEWCASTLE STEAM SHIPPING COMPANY (LIMITED) *v.* THE NATIONAL GUARANTEE AND SURETYSHIP ASSOCIATION (LIMITED).

Caution—Where Failure to Check Accounts.

Guarantee association *assoilzied* from a claim made against them by employers for losses sustained by default of an agent, on the ground that no proper system of checking the agent's accounts such as the defenders were entitled to expect, had ever been carried out by his employers.

This was an action by the Dundee and Newcastle Steam Shipping Company (Limited) against the National Guarantee and Suretyship Association (Limited) to enforce their guarantee of £500 for the fidelity of W. D. Doeg, the pursuer's agent. The pursuers had vessels trading between Dundee, Newcastle, and Middlesborough, and from about the year 1861 till the 23d December 1879 Doeg acted as their agent in the two last-mentioned towns, his principal duty being to collect the freights payable to the pursuers by their customers in and around those places. Monthly statements of the freights to be collected were sent by the pursuers to Doeg as they became due. Whenever these were forwarded to him, the amount of them was entered in the pursuers' books in Dundee to his debit. After deducting his disbursements he remitted to the pursuers the balance of the sum at his debit so far as collected by him. He was not bound to make good any portion of the debit which he failed to recover, unless the failure was owing to his own default, nor was he bound to remit the amount of freights collected until the end of the second month after the month to which they were applicable. For example, the freights for January, so far as collected by him, were payable to the pursuers in the end of March, and those for February in the end of April. Any part which he was unable to recover within the period stated he was in use to remit as soon as received. It was thus usual for him to have in hand sums of money of varying amount belonging to the pursuers between the dates when the freights collected by him were paid by the parties and the time agreed upon for his remitting the same to the pursuers. Towards the end of 1878 the pursuers resolved to require Doeg to furnish them with caution for his intromissions on their account. Doeg offered the pursuers the cautionary obligation or guarantee of the defen-