Thursday, January 29, 1891.

OUTER HOUSE.

[Lord Stormonth Darling.

GRIEVE *v.* ROBERTSON (LIQUIDATOR OF THE INTERNATIONAL EXHIBITION ASSOCIATION, &c., 1890) AND OTHERS.

Process — Multiplepoinding — Competency when Limited Company in Liquidation Defender—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *secs.* 87 *and* 151—*Action Premature.*

By sections 87 and 151 of the Companies Act 1862 it is provided that no first action or proceeding shall be proceeded with or commenced against a company which is being wound up under the supervision of the Court, except with the leave of the Court and subject to such terms as the Court may impose.

One of a large number of subscribers to the guarantee fund of an exhibition association incorporated under the Companies Acts, and then being wound up under the supervision of the Court, having received intimation that the amount of his guarantee was claimed by the liquidator, and by a bank which alleged that the letter of guarantee had been hypothecated to the bank, raised an action of multiplepoinding without obtaining the leave of the Court, in which he called as defenders the liquidator, the bank, and an arrestor who had used arrestments in his hands of all sums due by him to the association. *Held* that the leave of the Court not having been obtained, the action was incompetent. *Opinion* that in any event the action was premature, there being no reasonable apprehension of accumulation of actions.

James Grieve, hotel-keeper, Edinburgh, was a subscriber to the guarantee fund of the International Exhibition Association of Electrical Engineering, Inventions, and Industries, 1890, incorporated under the Companies Acts 1862 to 1886, to the extent of £250. The number of subscribers to the fund was upwards of 450. The association went into voluntary liquidation on 5th November 1890, and on 13th November 1890 the liquidation was placed under the supervision of the Court. The liquidator was James Alexander Robertson, C.A., Edinburgh.

On or about the 24th day of October 1890, the British Linen Company Bank, through their agents, Messrs Mackenzie & Kermack, W.S., Edinburgh, intimated to Mr Grieve that the Executive Council of the said association had hypothecated to the bank in security of advances the letters of guarantee granted by the subscribers to the guarantee fund of the exhibition, and that his letter of guarantee was then in the hands of the bank; and that in the event of there being any call upon him under his guarantee, the amount of such call would fall to be paid to the bank. On or about the 28th day of October 1890, Drysdale & Gilmour, contractors, Edinburgh, used arrestments in the hands of the pursuer, of, *inter alia*, all sums of money in the pursuer's hands pertaining and belonging to the association. On or about the 15th day of November 1890, James Alexander Robertson, addressed a letter to Mr Grieve, intimating that he had been appointed liquidator of the association, and that in order to meet the loss or deficiency which had arisen from the exhibition he had found it necessary to call up the whole of the guarantee fund of the association, and requesting him to send him in course a remittance for the said sum of £250, being the amount of his subscription to the guarantee fund. On or about the 18th day of November 1890 Messrs Mackenzie & Kermack addressed a second letter to Mr Grieve, in which they referred to their intimation, of date 24th October 1890, and also to the letter by the liquidator of the association, of date 15th November 1890, above mentioned. They then proceeded to state that the liquidator had no authority from the bank to take payment from the guarantors, and that he was not in a position to deliver up or discharge Mr Grieve's guarantee, and that they were directed to inform him that the bank claimed the sum due by him under his letter of guarantee, and would not recognise any payment to the liquidator, and they requested him to make payment of the said sum of £250 to the bank.

In these circumstances Mr Grieve raised an action of multiplepoinding in which he called as defenders James Alexander Robertson, the liquidator of the association, the British Linen Company Bank, and Drysdale & Gilmour.

The liquidator lodged defences to the action, in which he averred, *inter alia*—"The liquidator and the said bank respectively claim right to the exclusive possession of the letters of guarantee, and to the guarantee fund of the said association, and by the letters referred to in the condescendence the liquidator and the said bank did no more than intimate their respective claims to the pursuer and the other guarantors, of whom there are upwards of 450. There was no double distress, and the question of preference between the two claimants fell naturally and properly to be decided in the course of the liquidation, and by the summary procedure prescribed by the Companies Acts, and neither of the claimants, as the pursuer well knew, intended to raise proceedings in Court against him. On 22nd November the liquidator presented a note to the Court to have the said bank ordained to deliver forthwith into his hands the letters of guarantee, and to find and declare that the said bank have no valid security or preference over the guarantee fund or the letters of guarantee. Answers to this note were on 25th November lodged by the said bank, and the question between them is now in dependence before the Court. The decision

of the question in the liquidation proceedings will supersede the necessity of proceeding with the present action, which is wholly unnecessary and uncalled for. By sections 87 and 151 of the Companies Act of 1862, it is provided that no suit, action, or other proceeding shall be proceeded with or commenced against a company in liquidation except with the leave of the Court and subject to such terms as the Court may impose. The pursuer commenced the present action without obtaining leave of the Court, and the association is not called as a defender."

The liquidator pleaded—"(1) The action is incompetent as laid. (2) the action is irrelevant. (3) The action having been commenced without the leave of the Court being first obtained, falls to be dismissed. (4) There being no double distress, the action should be dismissed. (5) The present proceedings are inconvenient and unnecessary, in respect the rights of the claimants fall to be, and are in course of being, decided by the Court in a summary proceeding in the liquidation, and the action should in consequence be dismissed, or at all events sisted until the respective rights of the claimants shall have been settled in said summary proceeding. (6) In the circumstances the action should be dismissed with expenses."

The Lord Ordinary (STORMONTH DARLING) on 29th January 1890 dismissed the action with expenses.

"*Opinion.*—It seems to me that although the pursuer may have acted under a reasonable apprehension of his being sued by more than one party, he really was in too great a hurry, and in particular, that he omitted a statutory duty—for so I regard it—of coming to this Court before he raised his action. I think sections 87 and 151 taken together made it necessary for him to obtain the leave of the Court before he raised his action of multiplepoinding, and that for want of that the action is bad. I think that even apart from that he was premature in raising the action when he did, and of course in considering whether an action of multiplepoinding is necessary at common law, what the Court has to judge of is entirely a matter of conduct—whether the real raiser of the action is acting under a reasonable apprehension of accumulation of actions, or whether he is crying out before he is hurt. Now, here I think the pursuer was in the latter category. Of course although two very definite claims had been made upon him, still neither was accompanied by any threat of immediate action, and I think any reasonable person must have known, when he was only one out of a very large number of guarantors, that it would be unlikely that either the liquidator or the bank would proceed against each one of them separately, and there was no intimation of their selecting his case as a test case. Therefore I think he ought to have held his hand, and only if it were proposed to select him out of the whole number of guarantors would he have been justified in raising this action. But, as I have said already, apart from that I think it was his statutory duty to obtain the leave of the Court although there was a third party who was a necessary defender to the action. I do not read the section as in any way excluding that case, and it would be in the highest degree inconvenient if such a rule were laid down. There are many actions where there is a necessary third or fourth party, but where it is most undesirable that the company in liquidation should be harassed with actions without the leave of the Court. I shall dismiss the action and find the pursuer liable in expenses to the liquidator."

Counsel for the Pursuer and Real Raiser—Baxter. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Counsel for the Defender—J. A. Robertson—A. S. D. Thomson. Agents—Davidson & Syme, W.S.

Saturday, March 14.

OUTER HOUSE.

[Lord Kincairney.

PORTEOUS *v.* CALEDONIAN RAILWAY COMPANY.

Process—Lis alibi pendens.

A person brought an action of damages for personal injury in the Sheriff Court, which was dismissed as irrelevant, and in which expenses were found due to the defenders. Thereafter, but before the defenders' account of expenses had been taxed, he brought an action against them in the Court of Session founding upon the same circumstances. Plea of *lis alibi pendens sustained.*

James Porteous brought an action against The Caledonian Railway Company for the sum of £1000 as damages sustained by him through his being injured in his person by his being jammed between a truck and the terminus buffers at the Terminus Quay, Glasgow, by the fault of the defenders. The defenders in their answers stated "that the pursuer on 4th August 1890 raised an action in the Sheriff Court at Glasgow against the defenders in the present action for a sum in name of damages for the accident, which is the cause of action in the present case. The defenders lodged defences to the said action of 4th August 1890, and on 22nd October 1890, Sheriff-Substitute GUTHRIE, before whom the said action depended, pronounced therein an interlocutor in the following terms—'*Glasgow, 22nd October* 1890.—Having heard parties' procurators, Finds that the pursuer has failed to set forth a revelant case inferring liability against the defenders: Therefore dismisses the petition, and decerns: Finds the defenders entitled to expenses; allows an account thereof to be given in, and remits the same, when lodged, to the Auditor to tax and