

Saturday, October 24.

SECOND DIVISION.

[Lord Stormonth Darling,
Ordinary.]

STOCKER v. MURRAY & HENDERSON
(OFFICIAL LIQUIDATORS OF
COUSTONHOLM PAPER MILLS
COMPANY, LIMITED).

Company—Winding-Up—Register—Process—Petition for Rectification of Register—Competency—Companies Act 1862 (25 and 26 Vict. cap. 89)—Companies Act 1886 (49 Vict. cap. 23).

Section 6 of the Companies Act of 1886 made it lawful for the Court which had made a winding-up or supervision order to remit to a Lord Ordinary to take the proceedings previously open to the Court under the Companies Act of 1862, and provided that any judgment of the Lord Ordinary should be subject to review by a reclaiming-note within fourteen days.

In winding-up proceedings which had been remitted to a Lord Ordinary, the liquidators in May 1890, and again in March 1891, presented a note to the Court for settlement of a list of contributories, and on 3rd March 1891 the Lord Ordinary granted the prayer of the note. A person whose name had hitherto without objection appeared in the list of contributories, presented a petition under section 35 of the Act of 1862, to have the register of the company and the list of contributories rectified by the removal of his name. The liquidators objected that the petition was too late and ought to be dismissed in respect that the various orders of Court had become final, particularly in view of section 6 of the Act of 1886.

Held that this section, which transferred the conduct of the liquidation and gave a power of review, did not exclude a party from the benefit of the provisions of the Act of 1862, and as the petition would have been competent under that Act, the petitioner was not now barred from thereby denying that he was a shareholder in the company.

The Companies Act 1862 (25 and 26 Vict. cap. 89), sec. 12, provides—“Where an order, interlocutor, or decree has been made in Scotland for winding up a company by the Court, it shall be competent to the Court in Scotland during session, and to the Lord Ordinary on the Bills during vacation, on production by the liquidators of a list certified by them of the names of the contributories liable in payment of any calls which they may wish to enforce, and of the amount due by each contributory respectively and of the date the same became due, to pronounce forthwith a decree against such contributories for payment of the sums so certified to be due by each of them respectively, with interest from the said date till

payment at the rate of £5 per centum per annum in the same way and to the same effect as if they had severally consented to registration for execution on a charge of six days of a legal obligation to pay such calls and interest, and such decree may be extracted immediately, and no suspension thereof shall be competent except on caution or consignment unless with special leave of the Court or Lord Ordinary.” “124. Re-hearings of and appeals from any order or decision made or given in the matter of the winding-up of a company by any Court having jurisdiction under this Act, may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same Court in cases within its ordinary jurisdiction, subject to this restriction, that no such re-hearing or appeal shall be heard unless notice of the same is given within three weeks after any order complained of has been made in manner in which notices of appeal are ordinarily given according to the practice of the Court appealed from.”

The Companies Act 1886 (49 Vict. cap. 23), sec. 6, provides—“Where the Court makes a winding-up or a supervision order, or at any time thereafter, it shall be lawful for the Court in either Division thereof, if it thinks fit, to direct all subsequent proceedings in the winding-up to be taken before one of the permanent Lords Ordinary and to remit the winding-up to him accordingly, and thereupon such Lord Ordinary shall, for the purposes of winding-up, be deemed to be ‘the Court’ within the meaning of the recited Act and this Act, and shall have for the purposes of such winding-up all the jurisdiction and powers of the Court of Session, provided always that all orders or judgments pronounced by such Lord Ordinary shall be subject to review only by reclaiming-note in common form, presented (notwithstanding the terms of section 124 of the Companies Act 1862) within fourteen days from the date of such order or judgment.”

By interlocutor dated 11th June 1889 the Second Division of the Court of Session ordered the Coustonholm Paper Mills Company to be wound up by the Court under the provisions of the Companies Acts 1862-1886. They appointed John Maclay Murray and Frank Young Henderson to be official liquidators of the company, and appointed all subsequent proceedings in the winding-up to be taken before Lord Kinnear, Ordinary. The liquidators entered upon the duties of their office on 3rd July 1889.

Upon 14th May 1890 the liquidators presented a note to Lord Kinnear for settlement of a list of contributories, and upon 2nd March 1891 the liquidators presented a similar note to Lord Stormonth Darling (who succeeded Lord Kinnear). On 3rd March 1891 his Lordship pronounced an interlocutor granting the prayer of the note.

Alexander D. Stocker, May Place, Wolstanton, Stoke-on-Trent, was entered on these lists as the holder of eight shares with an amount unpaid on them of £80, being

the whole value of the shares. Although aware of this he made no objection. Upon 1st April 1891 Lord Wellwood, as Lord Ordinary officiating on the Bills, pronounced an interlocutor making a call upon each of the contributories mentioned in the list, and ordered payment of the call to the official liquidators.

Upon 11th May 1891 Stocker presented a petition to the Lord Ordinary. He denied that he ever was a shareholder in the company or that he ever applied for shares or agreed to become a shareholder therein, and he prayed the Court to ordain the liquidators to rectify the register of the members and list of contributories of the company by removing therefrom his name as holder of the said shares.

The liquidators lodged answers, in which they averred that Stocker was a creditor of Law, the original proprietor of the paper mills, and the vendor to the company; that he had agreed to take payment of Law's debt to him in shares of the company, for which he gave no consideration; that the ten shares of which he stood as owner in the list of contributories were allotted to him; and that after that he was treated as a member of the company. Intimation of the call was sent to him but he took no notice of it.

Upon 17th July 1891 the Lord Ordinary pronounced this interlocutor:—"The Lord Ordinary having heard counsel and considered the petition for Alexander D. Stocker, No. 499 of process, and answers for the liquidators, No. 503 of process, Repels the defence of the liquidators that the petitioner is too late; allows the parties a proof of their averments," &c.

The liquidators reclaimed, and argued—This petition to the Lord Ordinary was presented too late. The list of contributories had been settled and an order to pay the calls made upon the shareholders. It was admitted that settling aright the list of contributories did not also settle the register of members, but the petitioner ought to have brought a suspension of the charge for payment of the call when it was made. It was admitted that diligence had not yet been done upon the decree ordering payment. The petitioner stood upon the provisions of the Companies Act 1862, but these provisions had been altered by the Act of 1886, and Stocker could not now proceed by petition to have the register rectified. He ought to have appeared at the time the list of contributories was to be settled—and proper intimation of that time was made to him—and objected to his name being put upon the list, but he had not adopted that course.

The respondent argued—The petitioner had taken the only course that was open to him. Suspension of the decree for payment of the call could not act as rectification of the register, and he would still be a partner in the company. The Act of 1862 provided a means of getting the register altered, and the Act of 1886 had not altered that mode of procedure, it merely made the Lord Ordinary the

Court to which the petition was to be presented instead of the Division. Mere delay in bringing his petition could not prejudice the case—*In re Alexandra Park Company* (Hart's case), July 16, 1868, L.R., 6 Eq. 512.

At advising—

LORD JUSTICE-CLERK—By the Act 1886 it became lawful for the Court when it had made a winding-up or a supervision order to remit to a Lord Ordinary to take the same proceedings in the liquidation as had previously been taken by the Court itself under the provisions of the Act of 1862. The section also provided that any judgment of the Lord Ordinary should be subject to review by a reclaiming-note presented within fourteen days. The 6th section of the 1886 Act did that, but I think it did nothing else. It transferred the contract of the liquidation, and it gave a power of review, but in my opinion it did not deprive any party of his right if he desired to take the benefit of the provisions of the Act of 1862. If this petition would not have been barred under the old mode of procedure by anything which had taken place in the Inner House up to that point in the proceedings, I do not think the fact that the proceedings have taken place in the Outer House can bar it. In my opinion the petition would have been competent under the former method of procedure, and therefore I think it is competent now.

LORD YOUNG, LORD RUTHERFURD CLARK, and LORD TRAYNER concurred.

The Court refused the reclaiming-note and remitted the case to the Lord Ordinary.

Counsel for Appellants — D.-F. Balfour, Q.C. — Burnet. Agents — Carmichael & Millar, W.S.

Counsel for Respondent — Asher, Q.C. — Salvesen. Agents — Alexander Morison, S.S.C.

Tuesday, October 27.

SECOND DIVISION.

[Sheriff of Lanarkshire.

STEPHENS, MAWSON, & GOSS v.
MACLEOD & COMPANY.

Ship — Charter-Party — Construction — Demurrage — Custom of the Port.

A charter-party stipulated that a vessel should proceed to "Portugalete, or any other usual ore loading-place in the river Nervion, not above Luchana, as ordered by merchant's agents on arrival, or so near thereunto as she may safely get, and there load in the customary manner from the factor of the said merchant a full and complete cargo of iron ore. . . . Steamer to be loaded at the rate of not less than