

be shown that this statute was intended to allow proof by the parties of the facts that a grantor had signed a deed. That was not what was intended. It merely offers facilities for overcoming difficulties arising in the case of deeds which profess to be, and which actually are, probative. It provides that no deed subscribed by the grantor, and bearing to be attested by two witnesses subscribing, shall be deemed invalid because of any informality of execution. In that case it throws the burden of proving the validity of the deed upon the party seeking to make use of it. It implies that what has to be proved is this, that the persons who are set forth as having signed as witnesses did actually do so.

LORD ORMDALE—I concur entirely with what your Lordship has said. It has been proved in this case that the deed was executed by the grantor after the witnesses had signed. It is clear that they did not see him sign, nor did he see them. The question is, did the statute intend to overcome such a defect as that? It is clear that it did not. We can imagine cases in which the statute could be brought in to supply defects, as when the witnesses' names had not been mentioned in the testing clause, or they had omitted the word "witness" after their names. The 39th section of the statute implies that there are two witnesses. Here, in the circumstances proved, there were really no witnesses at all.

LORD GIFFORD—I am of the same opinion. If Mr Lang's argument was well founded it would come to this, that the recent statute had abolished witnesses altogether. It has certainly not done that.

LORD NEAVES was absent.

The Court adhered.

Counsel for Pursuer—Darling. Agents—M'Caul & Armstrong, S.S.C.

Counsel for Defender—Lang. Agent—George Begg, S.S.C.

Wednesday, March 8.

SECOND DIVISION.

[Lord Curriehill.]

DOUGLAS v. M'WILLIAM & M'UTCHEON.

Bond and Disposition in Security—Assignment.

A, the holder of a bond and disposition in security, assigned to B for an onerous cause the heritable subjects held by him under his bond. There was no direct conveyance of the bond itself, or of the sum due, but the assignment was declared to be in real security of that sum. The deed contained an assignment of all right, title, and interest which A had to the subjects, and among the writs delivered to B, "according to inventory," was a copy of the bond and disposition in security.—*Held* (reversing the judgment of the Lord Ordinary, in a competition between B and the trustee upon A's sequestrated estate) that although not in the statutory form,

there was a valid assignment to B both of the debt and of the security.

Conveyancing (Scotland) Act 1874, sec. 25—Infeftment—Register of Sasines.

The 25th section of the Conveyancing Act (1874) abolishes the distinction between feu and burgage tenures, and enables proprietors of estates held burgage to grant feus of their lands, providing that "the titles of all such feus granted before the commencing of this Act shall be unchallengeable, on the grounds that such feus were of lands held by burgage tenure, or that such titles have been recorded in the Burgh Register of Sasines.—*Held* by the Lord Ordinary, and acquiesced in, that this section obviated an objection which had been taken to a title, recorded in the Burgh Register of Sasines, to a feu granted before 1st October 1874 of land originally held burgage, but which had been feued out.

This was an action of multiplepoinding brought by John Douglas, farmer in Falhar, in the county of Wigtown, and proprietor of certain heritable subjects in the burgh of Wigtown. The object of the action was to settle a question which had arisen regarding a certain debt secured over his property. This question arose under the following circumstances:—

In 1853, the deceased James Brown, mason in Wigtown, then proprietor of these subjects, granted a bond and disposition in security for £100 over them in favour of the late William Carson, writer in Wigtown. In 1866 the subjects were acquired by John Douglas, the present nominal raiser, but under burden of this heritable security. By disposition and assignment, dated 22d June 1870, Mr Carson, in consideration of the sum of £700 paid and advanced for him by Robert M'William, S.S.C., one of the claimants in this action, residing in Edinburgh, "sold, alienated, assigned, disposed, conveyed, and made over" to the said Robert M'William, and his heirs and assignees whomsoever, heritably and irredeemably, various subjects, heritable and moveable, and, *inter alia*, the subjects contained in the said bond and disposition in security by Brown in his (Carson's) favour, "and that in real security to the said Robert M'William of the sum of £100 sterling, interest and penalty, borrowed by James Brown, mason and housebuilder in Wigtown, proprietor of said subjects, from me, the said William Carson, conform to bond and disposition in security, dated 11th July 1853, and recorded in the Register of Sasines for the burgh of Wigtown 19th November 1855." The subjects so disposed in security were held feu. This disposition and assignment contained an assignment of all right, title, and interest which the said William Carson had to the whole subjects "severally above described and hereby disposed,"—a clause of warrandice and an assignment of writs which, as the deed bore, were delivered "according to inventory, so far as in my possession." The inventory was signed of even date with the said disposition and assignment, and relative thereto. No. 10 of that inventory was "copy bond and disposition in security by James Brown to William Carson, dated 11th July 1853, recorded in Register of Sasines for burgh of Wigtown 19th November 1855." M'William expedes an instrument of sasine on this conveyance in his favour,

in which he included, *inter alia*, the subjects contained in the bond and disposition in security by Brown to Carson, and recorded it in the Register of Sasines for the burgh of Wigtown on 11th March 1872. In March 1873 the estates of Mr Carson (who had died on 23d November 1871) were sequestrated, and Alexander M'Cutcheon, banker in Newton-Stewart, the real raiser and only other claimant, was appointed trustee. On the assumption that M'William had not a valid assignment to the bond by Brown to Carson, he completed a title to it in his own favour as trustee, and now claimed to be vested in the security. The principal objection taken by him to the title of M'William was that the disposition and assignment by Carson had not conveyed to him the debt, and was disconform to the statutory enactments respecting the transmission of heritable securities. But he also maintained that M'William's infettment was null, in respect that while the subjects disposed in security were held feu, the instrument of sasine in his favour had been recorded in the Burgh Register of Sasines.

It would appear that at the time when the assignment was granted in favour of M'William Carson had been unable to find the original bond assigned. It was found after his death by M'Cutcheon, who proceeded to make up a title to it.

The claimant M'William pleaded that as Carson had assigned to him his whole right, title, and interest in the subjects, while the trustee was only vested in the bankrupt estate *tantum et tale* as it existed in the person of the bankrupt, M'Cutcheon had no good claim to the fund *in medio*. He also maintained that M'Cutcheon's actings upon Brown's bond, when found by him, were not *bona fide*.

The Lord Ordinary pronounced the following interlocutor:—

“*Edinburgh, 3d November 1875.*—The Lord Ordinary having heard the counsel for the parties, and considered the closed record and whole process, Finds that the sum of £100, and interest thereon, contained in the bond and disposition in security mentioned in the summons, and the lands thereby conveyed in security thereof by James Brown, the granter of said bond, to the late William Carson, also mentioned in the summons, and forming the fund *in medio* in this action, were not effectually transferred to or vested in the claimant Robert M'William by the bond and assignment, of which No. 8 of process is an extract, granted by the said William Carson to the claimant Robert M'William, dated 22d June 1870, or by the instrument of sasine thereon, No. 11 of process, expedite by the said Robert M'William, and recorded in the Register of Sasines: Finds that the said debt and security are now vested in and belong to the claimant Alexander M'Cutcheon, as trustee on the sequestrated estate of the said William Carson, in virtue of the act and warrant of confirmation, and of the notarial instrument expedite by him, No. 33 of process: Therefore, repels the claim of the said Robert M'William: Sustains the claim of the said Alexander M'Cutcheon, and ranks and prefers him upon the fund *in medio* in terms of said claim, and decerns: Finds the said Robert M'William liable in expenses to the said Alexander M'Cutcheon: Appoints an account thereof to be lodged, and when lodged remits the same to the Auditor of Court to tax, and to report.

“*Note.*—[*After narrating the facts of the case.*]—The sole grounds on which the trustee in the sequestration objects to the claim of Mr M'William, and himself claims the debt and security in question as part of the bankrupt estates, are—(1) That the disposition and assignment is, in consequence of defects in form, not a valid and effectual transference of the debt and security from Carson to M'William; (2) That even assuming the disposition and assignment to have been in proper form, M'William has never been validly infett in the security, and is now excluded from claiming the debt in consequence of the trustee having completed a feudal title thereto in his own person.

“1. The first question is the most important. It is, Whether Brown's security was validly transferred by Carson to M'William by the disposition and assignment already mentioned? That deed includes, as has been mentioned, several heritable subjects and other securities. It proceeds thus—‘I, William Carson, &c., in consideration of the sum of £700 sterling, paid and advanced for me by Robert M'William, S.S.C., &c., ‘have sold and disposed, and hereby sell, alienate, dispone, assign, convey, and make over to the said Robert M'William, his heirs and assignees whomsoever, heritably and irredeemably.’

“‘Sixth, All and whole that piece of ground consisting of four lots, with dwelling-houses built thereon, being part of the lands of Outer Acre’—[*Here follows description.*]—‘all lying in the burgh and parish of Wigtown and sheriffdom thereof, but always with and under the conditions, provisions, and stipulations mentioned in a contract of feu, dated the 21st day of March 1853, entered into between the Magistrates and Council of the burgh of Wigtown, on the one part, and the said John Adamson, on the other part, and that in real security to the said Robert M'William, of the sum of £100 sterling, interest and penalty, borrowed by James Brown, mason and house builder in Wigtown, proprietor of said subjects, from me, the said William Carson, conform to bond and disposition in security, dated 11th July 1853, and recorded in the Register of Sasines for the burgh of Wigtown, 19th November 1855.’ These words, it is maintained on the part of Carson's trustee, do not in form or in substance constitute a valid or effectual assignment to Mr M'William of the security in question. I think the trustee's contention is sound. The debt is not assigned,—the bond itself is not assigned,—and nothing in short purports to be conveyed but the subjects over which the debt is secured. There can be no doubt that the debt as well as the security was intended to be assigned; and as in a question with Carson himself or his representatives (in the absence of insolvency) M'William could have insisted upon Carson granting a valid and formal assignment of the debt, and failing that he could have adjudged the same in implement. But I do not think that the debt itself, which is not *in terminis* assigned, and to which the subjects are merely accessory as security, can be held to have been by implication assigned to Mr M'William in such a manner as to enable him to complete a title thereto by simply recording the disposition and assignment, or even by expediting and recording an instrument of sasine or other notarial instrument thereon.

“*In the first place, the assignment, neither in*

form nor in substance, follows the schedule (G G) in the 'Titles to Land Consolidation Act 1868,' which, substantially re-enacting the corresponding provision of the Heritable Securities Act of 1845, allowed securities which had once been constituted by infeftment to be transferred in the short form set forth in the schedule; it being declared that on such assignation being recorded in the appropriate Register of Sasines the security 'shall be transferred to the assignee as effectually as if such security had been disposed and assigned, and the disposition and assignation or conveyance had been followed by sasine duly recorded according to the law and practice prior to the 1st day of October 1845, at the date of recording such assignation or conveyance.' But it will be seen at a glance that the disposition and assignation in question does not conform to the schedule, in respect—(1) that it does not assign or bear to assign the bond and disposition in security itself; and (2) that even when the bond is referred to, it does not specify the names of either the grantor or the grantee, all of which are particulars required by the schedule, and the failure to insert which, is, in my opinion, a fatal omission. It is only on condition of following the new statutory forms that parties are allowed to dispense with the forms in use under the older law and practice.

"On the other hand, it is impossible to maintain that the security has been validly assigned in the form required by the law and practice prior to 1845. That practice required a disposition and assignation expressly assigning (1) The sum due and interest; (2) The bond and disposition in security itself; and (3) The lands in real security to the assignee of the sums, principal, and interest, &c., and containing an obligation to infeft, a procuratory of resignation, and a precept of sasine; and to complete the transference an instrument of sasine had to be expedite and recorded in favour of the assignee. But there is not in the present deed any substantial adherence to the old form; and I am therefore of opinion that the security in question was not assigned by Carson to M'William in such a manner as to enable the latter to complete a feudal title thereto as assignee under any of the forms known to or recognised by the law and practice prior to 1845, or sanctioned by the statute of that year and by subsequent legislation.

"But apart from these considerations, I think that Mr M'William's case must fail on more general grounds. The debt must be regarded as the principal, and the lands as merely accessory as security. It is indeed true that where a debt has been rendered heritable by being secured over land it cannot be effectually transferred so as to entitle the assignee to prevail in a competition with a subsequent adjudication or assignation completed by sasine, unless the heritable subjects, as well as the debt, are conveyed to the first assignee with a proper warrant for sasine followed timeously by infeftment—*Anstruther v. Black*, Morison 829. But this case gives no support to the view that the conveyance of the lands held by the cedent in security of a debt due to him by the owner of the lands will transfer the debt. On the contrary, the import of the decisions appears to me to be, that where a debt is heritably secured, and the creditor is duly infeft, the debt itself, and the subjects over which it is

secured, are held to be so inseparably connected that in order effectually to assign the debt both it and the lands must be expressly conveyed by a deed adapted to convey heritable property.

"It is said, however, by Mr M'William, that in virtue of the clause of 'assignation of writs' contained in the disposition and assignation, the debt itself, and the bond and disposition constituting it, have, as well as the lands, been validly assigned to him. The clause is in the following terms:—And I assign the writs, and have delivered the 'same according to inventory, so far as in my possession;' and in the inventory, which is a separate document, the bond and disposition in security in question is set forth as being article 10 thereof. But it is also a fact in the case that the bond was not delivered to Mr M'William, but remained in Mr Carson's possession until his death; that it has never been in the possession of Mr M'William; and that it is now in the possession of the trustee. Besides all this, it cannot be said that the insertion of a writ in an inventory, which is a separate document from the disposition and assignation, is equivalent to a specification and assignation of the debt and grounds of debt, either according to the old established form of conveyancing, or the short form introduced and sanctioned by the recent statutes. It appears to me, therefore, that the original defect in the dispositive clause of the deed is not remedied by the clause assigning the writs.

"But it is further maintained by Mr M'William that *esto* there has been a failure here to comply with the rules of conveyancing, and that he was not in a position, without farther procedure, to make up a valid feudal title in his own person to the debt and security; still, as the security only vests in the trustee in the sequestration *tantum et tale*, as it stood in the person of the bankrupt, and as the bankrupt was bound to give a good title to M'William, therefore the trustee can take the subject only under the like obligation. I am of opinion that this contention of the claimant cannot be sustained. It is true that in some cases where the bankrupt's right to an heritable subject, or an interest in heritable property, was at the date of the sequestration a mere personal right, a security granted prior to the sequestration over that right, in the belief that the bankrupt's feudal title was complete, will not necessarily be defeated merely because the grantor's own right is afterwards found to have been a personal right. The security will be sustained provided actual or constructive intimation of the assignation has been made; and in such cases registration of the deed or of sasine thereon in the Register of Sasines, though unavailing as the completion of a feudal title, has been held equivalent to intimation.—See the cases of *Paul v. Turnbull*, 13 Sh.; *Edmond v. The Magistrates of Aberdeen*, 18 D. But the present case is in no way analogous to either of those referred to, for here Carson, the cedent, was himself feudally infeft in the heritable security; the only proper and competent mode of divesting himself thereof was by a formal assignation in one or other of the well-known forms, and completed by infeftment; and if he failed so to transfer, the assignee, who is himself a law-agent, and who seems to have himself prepared the deed, must bear the con-

sequences of taking a defective assignation. This is just the ordinary case of a security being blundered by careless conveyancing, and thereby losing in a sequestration the preference to which its priority in date might otherwise have entitled it. In short, the question simply is, was Brown's security, or was it not, a part of the estate of Carson at the date of the sequestration? In my opinion it remained so, because the disposition and assignation in favour of M'William was *inhabile* to denude Carson. This being the case, the trustee, who has expedite a feudal title to the security by notarial instrument following on his act and warrant of confirmation, has now fully vested himself with the debt for behoof of the general creditors, and the claimant M'William cannot successfully compete with him for the amount.

"2. If I am right in the view now indicated, it is unnecessary to dispose of the other question raised in the record, which is, whether, assuming the assignation of the security not to be inept from defect of form, the infetment which Mr M'William expedite is inept in consequence of being recorded in the Burgh Register of Sasines, instead of in the General County Register of Sasines, being the appropriate register for writs affecting subjects which, like those in question, are held in feu? If this objection be well founded, Mr M'William cannot now, by any new procedure, make his right preferable to the real right completed by the trustee. Prior to the passing of the Conveyancing Act of 1874 this objection would have been formidable. But I think it is obviated by the 25th section of that statute, which abolishes the distinction between the tenures of feu and burgage, and provides, *inter alia*, that the proprietors of estates in land which were held burgage shall be entitled to grant feus of the same, in the same manner and to the like effect as if such estates in land had been held by feudal tenure; and the titles of all such feus granted before the commencement of this Act shall be unchallengeable, on the grounds that such feus were of land held by burgage tenure, or that such titles have been recorded in the Burgh Register of Sasines."

"The facts upon which the present question depends are as follows:—(1) The parties agreed in stating at the bar that the subjects, which are situated within the burgh of Wigtown, are part of the burghal territory granted to the burgh by the royal charter in their favour; (2) That these subjects, though properly burgage subjects, were granted in feu by the magistrates to Brown or his predecessor, and that the infetment in favour of Brown was recorded in the Particular Register of Sasines for the shire of Wigtown; (3) That the bond and disposition in security granted by Brown to Carson was recorded by Carson, both in the Burgh Register and the County Register of Sasines; and (4) That the claimant Mr M'William did not record his disposition and assignation in any Register of Sasines, but expedite an instrument of sasine *more burgi* in the whole subjects conveyed to him by that deed, including the subjects in Brown's security, and recorded that instrument in the Burgh Register of Sasines. It appears to me that such a case is one of those provided for by the recent statute. The assignation is a title,—no doubt a security title, but still a title to a feu granted before 1st October 1874 of

land which was originally held burgage, but which has been feued out. Such a title is by the Act declared to be unchallengeable, although recorded in the Burgh Register of Sasines.

"As my opinion, however, is adverse to Mr M'William on the main branch of the case, it follows that his claim must be repelled, and the claim for Mr M'Cutcheon, the trustee in the sequestration, sustained, with expenses."

M'William reclaimed.

Argued for him—The assignation, although not in the form prescribed by statute, was a valid conveyance of the debt and security. The statutory form may be dispensed with. The bond itself was assigned to M'William. There could be no doubt that in a question with Carson M'William would have succeeded, and the trustee is not in a better position than Carson, but has taken the estate *tantum et tale* as it stood in the person of the bankrupt.

Argued for M'Cutcheon—The assignation was invalid, neither the new nor the old form having been observed. The debt was not assigned. The *jus crediti* remaining in the person of Carson became vested in the trustee by the act of sequestration. The assignation of a security, which was all that was done in this case, can have no effect if the debt be not assigned along with it. What right would the assignee, under this deed, have had to discharge the debt? Carson might have been obliged to implement his imperfect assignation had this question arisen between him and M'William, but the doctrine of *tantum et tale* cannot be extended so far as to lay this obligation to implement upon the trustee.

At advising—

LORD JUSTICE-CLERK—The Lord Ordinary has paid a great deal of attention to this case, but I must confess that I am unable to follow his reasoning to the conclusion to which it brings him. There is no doubt that this deed is informal,—there is no question about that, neither the old nor the new form of the assignation has been followed. But it is quite another question whether there is not here a clear transference to the disponee of both debt and security. I do not think it necessary to inquire here how far a debt is identified with the security held for it, or to what effect the one can avail if the other is not assigned. Nor, in the view which I take of this case, are we called upon to discuss how far a trustee in bankruptcy takes the estate *tantum et tale* as it stood in the debtor. There might be a good deal to say for the view that the trustee could not withhold a document which the bankrupt would have been bound to have given up. But, putting that aside, I judge upon the facts disclosed in this case. It would appear that Brown borrowed from Carson in 1853 the sum of £100, granting a bond, and disposing certain subjects in security for the sum. Carson completed his title by recording his bond first in 1855 in the Burgh Register of Sasines for Wigtown, and afterwards in 1862 in that kept for the county. Brown afterwards became bankrupt, and his estate was purchased by the nominal raiser Douglas in 1866. But, before that, M'William having advanced £700 to Carson, the latter granted to him the document now in question, and M'William completed his title by recording an instrument of sasine in the Register of Sasines for the burgh of

Wigtown in 1872. This was done before the sequestration of Carson. The trustee, who has obtained possession of Brown's bond now lays claim to this security on the ground that the debt has never been validly conveyed to M'William. The Lord Ordinary says quite truly that the new forms of assignation provided by the Acts of 1843 and 1868 have not been followed. They were intended to have the effect of assigning as effectually a security "as if such security had been disposed and assigned, and the disposition and assignation or conveyance had been followed by a sasine duly recorded according to the law and practice prior to the 1st day of October 1845, at the date of recording such assignation or conveyance." It must be conceded that M'William did not follow the forms set forth in these statutes, but he followed the form in use prior to the passing of the Acts, to the effect that he obtained a direct conveyance of these subjects, and that he afterwards completed his title to them. The real objection stated to this deed is, that it contains no proper assignation to the debt, and this raises the question—Is that objection a good one? This assignation forms part of a disposition to a great variety of subjects. The assignation is "in real security to the said Robert M'William of the sum of £100 sterling, interest and penalty, borrowed by James Brown, mason and house builder in Wigtown, proprietor of said subjects, from me, the said William Carson." And yet it is said, notwithstanding this conveyance, that the right to the debt remained with Carson, and was not conveyed nor meant to be conveyed to their donee. This is an entire perversion of the meaning of these words. The subjects were given to M'William in real security of the sum of £100 borrowed from Carson by Brown, the proprietor. The meaning is that M'William is to be creditor in place of Carson. This may not be a very artistic way of expressing it, but as to the intention I can have no doubt. I am merely construing the words—what do they mean? The feudal right is quite sufficiently conveyed, and the whole question is, how is that right qualified. It is qualified in security for a specific debt. Carson assigned all the right, title, and interest which he had to the subjects. Surely he had the right of enforcing his debt, and if that be given over to M'William, how can it be doubted that the debt goes with it? Then the bond by Brown to Carson is itself made over to M'William as one of the writs assigned in the disposition. I go no further. On the whole matter I entertain no doubt. I can only give one effect to the meaning of these words, and that is to hold that the security and the debt were both conveyed. The assignation was good and the assignee must prevail.

LORD ORMDALE—I have come to the same opinion and upon the same grounds. I have had no difficulty with this case. It cannot be doubted that there was here a conveyance of the disposition of the subjects themselves, but it is said that there was no transference of the debt. If so—if there be a conveyance of the subjects without the debt—there arises a somewhat strange state of matters. I suppose a bond and disposition in security could hardly be separated from the debt. I think they form one right. But it may be maintained that this deed is a

nullity, altogether so unintelligible as to be worthless. I am not prepared to come to that conclusion. The conveyance of the subjects is clear and distinct, and the only question is, whether the debt has been effectually conveyed. I think the language shows that it was. It was admitted that it might be conveyed by implication. Here the implication is as strong as I ever saw.

LORD GIFFORD—I am entirely of the same opinion. I see no difficulty in the case at all. It is quite true that the deed is ill expressed. But the question is, what is its legal effect as it stands? Does it or does it not convey to Mr M'William the debt vested in Carson?

Now, in reference to the transmission of heritable subjects, there were until recently *testa solemnia*, and there might have arisen a question in point of form had this been a case in which they had been omitted. But the peculiarity of this case is, that so far as the security is concerned we have all that is necessary for its valid conveyance.

But it is said, nevertheless, that the deed is abortive and invalid as a conveyance of anything, because there is no assignation of the debt for which the security was pledged. Now, observe the deed conveys certain subjects. What right had Carson, the grantor in these subjects, to convey? Merely a right in security. There they are conveyed in "security to the said Robert M'William." Had there been nothing further I think we should have had what was sufficient, but the deed goes on to describe the debt for which they are held in security,—the sum of £100 borrowed by Brown from Carson, conform to bond, showing that Carson was merely conveying a security title. It is said that this is not a conveyance of a debt. I think it is. We are entitled to read into it the words "in my place." M'William is to take the place of Carson as creditor of Brown. There are no *testa solemnia* requisite here—any words will do, provided that they sufficiently indicate the meaning intended. The real question is, how to get at the intention of the grantor? and if his meaning be plain, any kind of expression will do. Now, the meaning is quite clear and distinct here.

In addition to this, we have an assignation to the writs, including the bond by Brown in favour of Carson. If that bond had been found in Carson's lifetime, could he have retained it for an hour if it had been demanded from him by M'William? The trustee has found it as a writ belonging to M'William, and he was bound to hand it over to him.

I think, therefore, that we should reverse the interlocutor of the Lord Ordinary, and rank and prefer M'William.

LORD NEAVES was absent.

The Court reversed the interlocutor of the Lord Ordinary, and found the reclaimer entitled to expenses.

Counsel for M'William—Burnet—Low. Agent—Party.

Counsel for M'Cutcheon—Dean of Faculty—(Watson)—M'Laren. Agents—Ronald, Ritchie, & Ellis, W.S.

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 claimer 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

reference 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—*Sablondère 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-