the claim, I think the judgment of the Lord Ordinary is right. I think that doctrine is applicable to the case of constructive total loss, as well as to an actual loss in such circumstances as we have here, and with such weather and such damage caused by that weather as we have here. In short, it is all one to the shipowner whether there is an actual total loss or a constructive total loss—I mean the damage to him is the same, except only the case of the price which may be got for the wreck, which, of course, is deducted from the claim against the underwriters.

With that exception the owners are in the same position with respect to this insured vessel as if she had gone down. They get the value and give the underwriters credit for the value of the materials, which in this case are not worth repairing. If she had gone down, it might have been said that in all human probability, and with something approaching to certainty, she would not have gone down if she had not been unseaworthy, the weather, although bad, being such as would not in all likelihood have wrecked a sound ship.

Therefore, upon the whole matter, my opinion coincides with that of the Lord Ordinary, that a case for liability as for constructive total loss is here established.

Lord Craighill—The ship "City of Manchester" was insured by a time policy to endure from December 1880 to December 1881, by the defenders. She left Glasgow soon after the policy was effected, on a voyage to Rio Janeiro with a cargo of coals. The voyage was successfully made, the coals were delivered, and thereupon the vessel left that port in ballast for Astoria, in Oregon, for a grain cargo to be shipped for Great Britain. The voyage from Rio was successful until the Falkland Islands were reached, but there, as the pursuers allege, storms were encountered by which the ship was so seriously injured as to render it necessary that in place of prosecuting her voyage she should return to a port where her injuries might be repaired. Accordingly she was taken back to Barbadoes, and it was discovered upon a survey that the repair of the ship would cost more than the ship would be worth after she was repaired. This was the report of surveyors made before it had been discovered that the beams of the ship were rotten, and that money expended upon her would be money thrown away. All parties are now agreed that when the ship reached Barbadoes she was constructively a total loss. This action has been raised for £4500, the sum insured under the policy, and what is to be determined is whether the pursuers are entitled to recover that sum. The Lord Ordinary, for the reasons explained in his note, answers affirmatively, and I concur in his judgment. The thing insured against was a peril of the sea, and I am of opinion that the proof shows that the ship was reduced to the condition in which she reached Barbadoes through stress of weather, or, in other words, through a peril of the sea. No doubt, had she been a stronger ship she might have survived the injury, but seaworthiness is not warranted in a time policy, and the pursuers being entitled to recover for a constructive total loss as they would be entitled to recover for an actual loss, they must here prevail, because the thing which led to the loss has been shown to be a peril of the sea, against which the pursuers were insured.

Lord Rutherfurd Clark concurred.

Lord Justice-Clerk—I also concur in the result, and much on the grounds explained by the Lord Ordinary in his note. There are some somewhat subtle questions that might arise under the category to which this case belongs, but I do not think this is a case of any difficulty at all. It is quite plain that this vessel was probably, when she started from Glasgow—perhaps not certainly—in a condition that was not seaworthy; but it has been decided—and it is too late to go back on the principle—that unseaworthiness is no defence against an action on a time policy. Consequently the question is, How did it happen? In the first place, this vessel instead of proceeding on her voyage was obliged to put back to Barbadoes, and I have no doubt whatever that that was occasioned by the perils of the sea which she encountered on her way from Rio to the Cape. In the second place, it is clear that repairs were rendered necessary by these very perils of the sea. That she was driven out of her course by those perils of the sea, and that the necessity for those repairs arose from the perils of the sea, cannot be doubted. And then when the repairs came to be considered, it was found that from the condition of the vessel she could not be repaired except at a cost greater than her value would be—that she was, in short, a constructive total loss. As that was caused entirely by the perils of the sea, I think her loss is embraced by this policy.

The Court adhered.

Counsel for Reclaimers—Mackintosh—Jameson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Respondents—Trayner—Guthrie. Agents—J. & J. Ross, W.S.

Wednesday, February 7.

FIRST DIVISION

TURNBULL *v.* LIQUIDATORS OF BENHAR COAL COMPANY (LIMITED).

Public Company—Winding-up—Arrestments on Dependence, Withdrawal of—Preference—Bankruptcy Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 108—*Companies Act* 1862 (25 *and* 26 *Vict. cap.* 89), *secs.* 133, 163.

A creditor used arrestments on the dependence of an action against a public company. Ten days thereafter the company went into voluntary liquidation, which was subsequently placed under supervision of the Court. The liquidators admitted that the debt sued for was due. In a question as to the value of the arresting creditor's diligence, *held* that he was entitled to be ranked preferably on the assets of the company in respect of his arrestments.

George Vair Turnbull, shipbroker and merchant in Leith, was sole surviving trustee under (1) the settlement of the late Robert Park, merchant, Leith, dated 21st April 1860; (2) the trust-dis-

position and settlement of the late Andrew Park, wood merchant, Edinburgh, dated 6th December 1854; (3) trustee under the contract of marriage of John Park, merchant, Leith, and Mrs Anne Park, his spouse, dated 15th September 1855. On the 20th December 1880 there were served upon the Benhar Coal Company (Limited) summonses in three actions at his instance as trustee under these trusts. In each summons there was a warrant to inhibit and to arrest on the dependence, and on the same day on which they were served arrestments were used in the hands of the Edinburgh and Leith Gas-Light Company to the extent of £1500 in all. At an extraordinary meeting held upon the 30th December 1880 it was resolved to wind up the Benhar Coal Company voluntarily, and John Turnbull Smith, chartered accountant, Edinburgh, and Andrew Watson Turnbull, Portobello, were appointed liquidators. The summonses were called in Court on 8th January 1881. On January 18, 1881, an order was pronounced directing that the liquidation should continue under the supervision of the Court. On 25th January 1881, no defences having been lodged, the three actions were in the undefended roll of the Lord Ordinary before whom they depended, when the Lord Ordinary, in respect that the company was in liquidation under the supervision of the Court, declined to grant decree in absence until the leave of the Court should be obtained under sec. 87 of the Companies Act 1862, which provides that "When an order has been made for winding-up a company under this Act, no suit, action, or proceeding shall be proceeded with against the company except with leave of the Court, and subject to such terms as the Court may impose."

On 4th February 1881, the liquidators, Mr Turnbull having declined to withdraw the arrestments, presented a note in the liquidation to have them recalled. By minute of 16th February 1881, referring to this note, Mr Turnbull consented to the recal of the arrestments "under reservation of and without prejudice to any right of preference which by the use of the said diligence he may have established; and further, on the condition that in the event of the arrestment being recalled leave should be given to the respondent (Turnbull) to proceed with and prosecute the actions raised by him against the said company on the dependence of which the inhibitions and arrestments were used." On 17th February 1881 the First Division, after hearing counsel on the note and minute just narrated, pronounced this interlocutor—"Recal the inhibitions and arrestments mentioned in the said note, under the conditions, however, expressed in the said minute, viz., that any right of preference which the said G. V. Turnbull may have established by the use of the said diligence shall not be prejudiced; and further, that notwithstanding the said recal the respondent shall have power to proceed with and prosecute the actions raised by him against the Benhar Coal Company (Limited) on the dependence of which said inhibitions and arrestments were used, and grant warrant for marking the said inhibitions as discharged in the register of inhibitions, and decern." Turnbull then on 22d February obtained decree in the three actions.

On 13th January 1883 a joint note was presented to the Court on behalf of the liquidators of the company and Mr Vair Turnbull, which, after narrating Turnbull's minute of 16th February 1881, proceeded to admit that the Benhar Coal Company was indebted to the trusts represented by Mr Vair Turnbull to the amount claimed in the three actions, and that under the actions inhibition and arrestment had been used, and set forth that the assets of the company were not sufficient to pay all its creditors in full, but that at the date of the arrestments and inhibitions used by Turnbull funds and estate were attached to an extent which with the dividend to be received from the company's estate would be more than sufficient to meet payment of the debts for which they were used. The parties in these circumstances concurred in asking the Court to determine "whether the arrestments and inhibitions above referred to were effectual to entitle the said trustee (Turnbull) to be ranked and preferred preferably and *primo loco* for the amount of the several sums due to him with interest and expenses."

Section 163 of the Companies Act 1862 provides that "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 estates or effects of the company after the commencement of the winding-up shall be void to all intents."

Section 164 provides—"Any such conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property as would, if made or done by or against any individual trader, be deemed, in the event of his bankruptcy, to have been made or done by way of undue or fraudulent preference of the creditors of such trader, shall, if made or done by or against any company, be deemed, in the event of such company being wound up under this Act, to have been made or done by way of undue or fraudulent preference of the creditors of such company, and shall be invalid accordingly; and for the purposes of this section the presentation of a petition for winding-up a company shall, in the case of a company being wound up by the Court, or subject to the supervision of the Court, and a resolution for winding-up the company shall in the case of a voluntary winding-up, be deemed to correspond with the act of bankruptcy in the case of an individual trader, and any conveyance or assignment made by any company formed under this Act of all its estates and effects to trustees for the benefit of all its creditors shall be void to all intents."

Section 108 of the Bankruptcy (Scotland) Act 1856 is in these terms—"The sequestration shall, as at the date thereof, be equivalent to an arrestment in execution and decree of forthcoming, and to an executed or completed poinding, and no arrestment or poinding executed of the funds or effects of the bankrupt on or after the sixtieth day prior to the sequestration shall be effectual."

Argued for the liquidators—No preference was created by the arrestments used by Park's trustees, for all such preferences are cut down by section 163 of the Companies Act of 1862. An arrestment is of no use without a forthcoming—it does not create a real right, and can give the creditor no active title.—*Clark* v. *West Calder Oil Co.*, 30th June 1882, 19 Scot. Law Rep. 757; sections 12 and 108 of Bankruptcy Act 1856. Stair, iii. 1, 39, and 42. The company cannot be

made bankrupt after a winding-up order has been pronounced, and all diligences must be under the control of the Court, although in certain instances diligence has even been allowed against the liquidators of a company, as where the liquidators have continued to occupy the company's premises an action for rent has been sustained—*In re Great Ship Co.*, 33 L.J., Ch. 245; *Smith, Fleming, & Co.*, L.J., 1 Ch. App. 538, 545; *North Stafford Carrying Co.*, L.R., 19 Eq. 60; *Disinfector Company*, L.R., 20 Eq. 162; *Stanhope Silkston Coal Co.*, L.R., 11 Ch. Div. 160; *United English and Scottish Life Insurance Co.*, L.R., 5 Eq. 300; Buckley on Companies Acts, 4th ed., p. 210. The duty of the Court is to distribute the assets of the company *pari passu*, except in the case of secured creditors.

Argued for the claimants—The arrestments used entitled the claimants to be ranked preferably on the assets of the company. No furthcoming was necessary to create a preference, for a furthcoming was merely a judicial order upon the arrestee to pay, and such an order to be operative must draw back to the date of the arrestment. There was no competition of diligence here, merely a liquidation prior to which arrestments on the dependence had been used. Section 163 of the Companies Act of 1862 could apply in the present case, for it dealt with diligence commenced subsequent to the winding-up, but these arrestments were used prior to the resolution of company to wind up, at which time the claimant was a secured creditor—*Mitchell* v. *Scott*, 29th June 1881, 8 R. 875.

At advising—

Lord President—Mr Vair Turnbull, the arresting creditor who claims a preference in this liquidation in respect of the diligence which he has used, is trustee upon three estates to which this company was indebted, and on 20th December 1880 he raised three actions against the Benhar Coal Company for the purpose of recovering the sums of money which it was then alleged were due. These summonses seem all to have contained warrants to arrest and inhibit. On the same day arrestments were used in the hands of the Edinburgh & Leith Gas Light Co. to the extent of £1500, and on the 22d of December inhibition was used against the company — a circumstance which turns out not to be of importance in the present question, as there appear to be sufficient funds in the hands of the liquidators to meet Mr Vair Turnbull's claim. The company appears to have agreed upon a voluntary winding-up, and the extraordinary resolution to that effect was passed upon the 30th December, or just ten days after the diligence already referred to was used, and Mr Vair Turnbull now claims a preference over the funds in the hands of the liquidators in respect of the arrestments then used. It was arranged between the parties by minute that these arrestments should be recalled, on condition however "that any right of preference which the said George V. Turnbull may have established by the use of said diligence shall not be prejudiced, and further, that notwithstanding the said recal the respondent shall have leave to proceed with and prosecute the actions raised by him against the Benhar Coal Company (Limited) on the dependence of which the said inhibitions and arrestments were used." The consequence of this was that we pronounced an interlocutor upon the 17th February 1881, in which we recalled the diligence, but on the conditions contained in the minute which I have just referred to. Decrees are said to have been subsequently obtained by Mr Turnbull, and the date at which this was done, although not mentioned in the printed papers, is said to have been the 22d February 1882. It does not appear to me, however, to be of much consequence when these decrees were obtained, or even if they were obtained at all, for their only use was to establish Mr Turnbull's claim against the company—a claim which I hold to have been fully admitted, and the question accordingly which we have now to determine comes to be, whether for these admittedly good debts any preference has been secured by the arrestments on the dependence? If the question here raised had occurred in a process of sequestration, and arrestment had been used prior to anything amounting to constructive bankruptcy, I should have held it good, on the authority of the case of *Mitchell* v. *Scott* (June 29, 1881, 8 R. 875). Nor do I think that the Act of 1696 would have applied. It applies to competition of diligence, but neither in the case of *Mitchell* nor here is there any competition of diligences. This is an ordinary liquidation, prior to the commencement of which diligence on the dependence has been used. If, then, there is nothing in the Bankruptcy Statutes preventing the creating of a preference in such circumstances, is there anything to be found in the Companies Acts making a new rule in a liquidation from what would have prevailed in a sequestration? It is said by the liquidators that the Act of 1862 excludes any such preference, and they rest their contention on several sections of that Act. Now, the 133d section which we were referred to makes provision for *pari passu* ranking in a distribution of the assets of the company, but I fail to see how the liquidators can derive any benefit from that section, for though the statute here provides for *pari passu* ranking, its provisions can clearly be applicable only to unsecured creditors. Reliance is also placed upon secs. 85 and 87. Now, no doubt these sections are of great value in guiding the Court in matters connected with the winding-up of companies, but I cannot see how they can be of the slightest importance in meeting a claim like that now before us. Mr Turnbull's preference in the present case was secured by the diligence which he used, and the debt upon which that diligence was used is admitted by the liquidators to be resting-owing. He has an arrestment on the dependence, followed by what is equivalent to a decree, and he is therefore in the same position as if he had arrested in execution. That being the state of matters, I am clearly of opinion that the funds in the hands of the liquidators must, in the first place, be devoted to the payment of the arresting creditor's debt. As to secs. 163 and 164, the first of which has reference to diligence used after the commencement of the winding-up, and the other to fraudulent preferences, both of which sections are said to apply to the present case, the simple answer is that nothing of the kind has occurred here; there has been no distress of any kind after the winding-up had commenced, for the execution was completed prior to the date of the meeting at which the

company agreed voluntarily to wind up, and that appears to me to be all that the arresting creditor required. The 164th section, again, merely cuts down preferences which if made in the case of an individual trader would in the event of his bankruptcy be deemed to be of a fraudulent character. I am therefore of opinion that there is nothing in the Act of 1862 or in any of the other Companies Acts which can operate in the way of excluding Mr Turnbull from the benefits which he has secured by the use of these arrestments, and that the parties here are in the same position in which they would have been in an ordinary sequestration where diligence had been done more than sixty days before its commencement. But it has been urged further that a diligence of this kind must be timeously followed up. It appears to me that it was so in this case. If the creditor had been compelled to proceed with his action in order to obtain a decree, the Court in the exercise of its discretion would have authorised him so to do, for this is a matter clearly within the discretion of the Court, and one which in the circumstances the interests of justice between the parties would have demanded. On the whole matter, then, I have come to the conclusion that this diligence has given Mr Turnbull a good preference.

Lords Deas and Mure concurred.

Lord Shand—The question here is, whether Mr Turnbull is in the position of a secured creditor by the arrestments which he has used? for although the statute declares that in the distribution of the assets of the company the creditors must rank *pari passu*, that must necessarily relate to unsecured creditors only, for there can be no doubt that a creditor secured by a bond and disposition in security is entitled to its benefits, while the general body of creditors can be provided for only from what may remain after the secured creditors are paid in full. Mr Turnbull has used an arrestment, and he has followed up that arrestment and obtained a decree in his favour—all this is admitted. Now, it is clear, I think, that if what has taken place here had occurred in a sequestration in which a trustee had been appointed, Mr Turnbull would have been entitled to get the benefit of the diligence he had used. If, then, his position would have been favourable in a question with a trustee in bankruptcy in whom all the property of the bankrupt vests, much more must it be so in the case of a liquidation where the company retains all its assets, and where the liquidator's position is that merely of an administrator. The parties came before this Court on the 17th February 1881 in a question as to whether the arrestments which had been used should or should not be recalled. It might well have been a matter of dispute then whether Mr Turnbull was not entitled to go on with his actions and obtain a decree; such a decree would draw back to the date of the arrestments, and the creditor would have a direct right to found upon his arrestment in any subsequent proceedings. Had the parties not arranged matters by the minute to which your Lordship has referred, then I think that the creditor would clearly have been entitled to have proceeded with his action. Reference was made to the 87th section of the Act of 1862, which is in these terms:—

"When an order has been made for winding-up a company under this Act, no suit, action, or other proceedings shall be proceeded with or commenced against the company except with the leave of the Court, and subject to such terms as the Court may impose;" and section 151 provides that "When an order is made for a winding-up subject to the supervision of the Court, the liquidators appointed to conduct such winding-up may, subject to any restrictions imposed by the Court, exercise all their powers without the sanction or intervention of the Court, in the same manner as if the company was being wound up altogether voluntarily." . . . . Now, this last section extends the operation of the Act to the case of a company which is being wound up voluntarily but subject to the supervision of the Court. In this case the creditor has laid a *nexus* on the funds of the company, and to determine the validity of that *nexus* I think that he would have been entitled to have proceeded with his action and to have obtained a decree in order to make available any preference which the use of his diligence might have secured to him. It seems to me that the parties here are in the same position as the parties were in the case of *Mitchell* v. *Scott* already referred to, which I think must be held to rule the present case. I therefore agree with your Lordship in thinking that Mr Vair Turnbull is entitled to be ranked preferably on the assets of this company.

This interlocutor was pronounced:—

"The Lords . . . find and declare that the said George Vair Turnbull is entitled to be ranked for his admitted debt preferably and *primo loco* on the funds in the hands of the Edinburgh and Leith Gas Company belonging to the Benhar Coal Company, and covered by the arrestments used by the said creditor; find the said George Vair Turnbull entitled to expenses, and remit," &c.

Counsel for Liquidators—J. P. B. Robertson—Murray. Agents—J. & F. Anderson, W.S.

Counsel for Claimants — Trayner — Armour. Agents—Beveridge, Sutherland, & Smith, S.S.C.

HIGH COURT OF JUSTICIARY.

Wednesday, February 7.

(Before the Lord Justice-Clerk, Lords Young and Craighill.)

MURRAY *v.* M'DOUGALL (P.-F. OF J.P. COURTS OF ROXBURGHSHIRE.)

Justiciary Cases—Public-House—Contravention of Hotel Certificate—"Keeping Open House"—"Permitting or Suffering Drinking" on the Premises at Unlicensed Hours—Public-Houses Acts Amendment (Scotland) Act 1862 (25 and 26 Vict. c. 35).

An hotel-keeper allowed a guest of two lodgers in his hotel to come into the hotel along with them after 11 p.m., to remain till 1 a.m. next morning, and between these hours to be supplied with liquor on the order