

their attending the school selected for them, I do not think that any relevant ground has been stated why the petitioner should not have the custody of his children.

LORD SHAND—It is a matter of importance to keep in mind who the parties to this application are. It is the paternal grandfather who desires to retain the custody of these children, while it is the father who is making the application to have them delivered up to him. It is thus not like competition between a father and a mother for their custody. The paternal grandfather derives any rights which he may have from their father and cannot well enter into competition with him.

The arrangement under which the children went to live with their grandfather was merely temporary, and might at any time have been broken by the petitioner at pleasure. He now desires the children to attend a school which he has selected, and to spend their holidays with him, and no suggestion has been made that the moral or physical welfare of the children would in any way suffer by this arrangement. The mere fact that the father is living in lodgings can be no ground for depriving him of his lawful rights, while what was said about his being in pecuniary difficulties is met by the circumstance that it is not alleged that his creditors are in any way desirous to press their claims against him. I think in that state of matters the father's right is clear, and should be given effect to.

LORD ADAM—I entirely concur.

The Court found the petitioner entitled to the custody of the children, and continued the case until Tuesday the 13th July, to allow of some arrangement being come to as to the delivering up of them to the petitioner.

On Tuesday the 13th July counsel for the respondent stated that it had come to his knowledge since the judgment of the Court on Thursday the 8th July that the children were not within the jurisdiction of the Court, and that according to his information the children had been removed on the 27th May, and that he was unaware of where they were at the present time.

LORD PRESIDENT—The respondent has had for some time the custody of these children, and when the father applied to us to recover their custody the respondent defended, and upon various grounds refused to give up the children to their father. After the case had been decided we were informed that these children were no longer in the respondent's custody.

I go no further at present in referring to the statement which was made to us. I only say that the respondent has failed egregiously in his duty to these children in permitting them to be taken from his custody.

We can listen to no excuse, but we pronounce a peremptory order upon the respondent to cause the children to be delivered up to the petitioner within a time to be fixed by us, and to appear himself personally at the bar this day week and state what has been done.

The Court fixed Monday 19th July at 10 o'clock as the time at which the children were to be given up within the office of the petitioner's agent in Glasgow.

On Tuesday the 20th July the respondent appeared personally at the bar and respectfully stated that he declined to give up the children or to give any information as to their whereabouts.

The Court pronounced the following warrant:—

“The Lords having resumed consideration of the petition and answers, and the respondent the Reverend Peter Leys appearing personally at the bar in pursuance of the order pronounced on the 13th current, and reporting that he had done nothing to obtemper the said order, that he declined to surrender the custody of the petitioner's children, and that he declined to inform the Court where the children now are, Grant warrant to messengers-at-arms and other officers of the law to take into their custody the persons of the two pupil children, Norman Leys and Kenneth Leys, in the petition mentioned, wherever they may be found, and deliver them into the custody of the petitioner, and authorise and require all judges ordinary in Scotland and their procurators-fiscal to grant their aid in the execution of this warrant, and recommend to all magistrates elsewhere to give their aid and concurrence in carrying this warrant into effect: Further, in respect of what is above stated concerning the said Reverend Peter Leys, Find him guilty of contempt of Court, grant warrant to officers of Court and other officers of the law to apprehend the person of the said Peter Leys and incarcerate him in the prison of Edinburgh, therein to remain in custody till liberated by order of the Court or of the Lord Ordinary on the Bills, as after mentioned: Remit the petition and proceedings to the Lord Ordinary on the Bills in vacation, with power to him to pronounce such orders as shall be proper and necessary, and specially to order the liberation of the said Peter Leys, respondent, if and when his Lordship in his discretion shall think fit, and authorise execution to pass on a copy of this deliverance and warrants herein contained, certified by the Clerk of Court; and decern *ad interim*.”

Counsel for Petitioner—W. Campbell. Agent—W. Considine, S.S.C.

Counsel for Respondent—Comrie Thomson—Shaw. Agents—Millar, Robson, & Innes, S.S.C.

Tuesday, July 20.

FIRST DIVISION.

JAMIESON AND ANOTHER (LIQUIDATORS OF THE CALIFORNIA REDWOOD COMPANY, LIMITED) *v.* THE MERCHANT BANKING COMPANY OF LONDON (LIMITED).

Company—Foreign—Liquidation—Stay of Proceedings—25 and 26 Vict. cap. 89 (Companies Act 1862), sec. 87.

In a liquidation under supervision of the Court the liquidators applied to the Court for an order to restrain an English bank which

held debentures of the company in liquidation from proceeding with a suit raised by them in New York. This suit was directed against a company in New York who held certain real property in California belonging to the company in liquidation, in trust for the holders of the debentures. The debentures were payable upon presentation either in London or San Francisco. The bank pleaded that they were not subject to the jurisdiction of the Scottish Court. They had lodged a claim with the liquidator for the amount of the debentures they held. *Held* that in respect of the claim lodged the Court had jurisdiction to restrain the respondents from proceeding with the suit in New York, and order granted accordingly.

This was a note presented by George Auldjo Jamieson and Francis More, chartered accountants, Edinburgh, the liquidators of the California Redwood Company (Limited), for the determination of certain questions in the liquidation, and to have the Merchant Banking Company of London (Limited), debenture-holders, prohibited from proceeding with a suit raised by them in the Courts of New York. The liquidation was a voluntary winding-up which had been placed under supervision of the Court.

The questions for determination had regard to the validity of the debentures in the hands of the Merchant Banking Company, and also those in the hands of the trustees of Mrs Sarah Wedder- spoon, and the rights and liabilities attaching to these debentures. The Court after hearing argument upon these questions ordered a proof as stated in the opinion of the Lord President *infra*. In regard to the application by the liquidators to have the proceedings in New York restrained, the facts were these:—The Merchant Banking Company had become the holders of seventy-three debentures of the company for the amount of £14,600. These debentures were to be payable to the Scottish American Investment Company (Limited), or the bearer, upon presentation either at the office of the Bank of Scotland in London, or at the office of Falkner, Bell, & Co. in San Francisco. Upon 22d July 1885 their manager had addressed the following note to the liquidators:—“To the California Redwood Company (Limited), and Messrs Jamieson and More, the Liquidators of the said Company. Take Notice, that the Merchant Banking Company of London (Limited) claim to be creditors of the said California Redwood Company (Limited) for the sum of £14,600 principal money, and for interest on the said principal money from the date of the last payment of the same; and that they so claim in respect of 73 bonds, mortgage bonds or debentures of the said company, each for the sum of £200, and numbered respectively 28 to 99, both inclusive, and 601: And further Take Notice, that these presents are without prejudice to the rights of the said Merchant Banking Company of London (Limited), as owners of the said bonds, and their recourse in respect of the same in the United States of America or elsewhere. Dated the 22d day of July 1885.”

The liquidators had previously published in the *Edinburgh Gazette*, and in Scottish and English newspapers, a notice dated 23d June 1885, in these terms:—“The creditors of the above-named company are requested to lodge their

claims, together with the vouchers thereof, with the undersigned within one month from this date, with a view to the claims being adjudicated upon.” They also published in Scottish and English newspapers the following notice dated 15th July 1885:—“The debenture-holders and other creditors of the above-named company are reminded that their claims should be lodged with the liquidators on or before the 23d inst.” Correspondence passed between the manager of the bank and Mr Jamieson, one of the liquidators, in regard to the bank's claim, which is referred to in the opinion of the Lord President.

On 1st May 1886 the Merchant Banking Company raised an action in the Supreme Court of New York for payment of \$77,000, being the amount of the debentures they held, with interest, against the Central Trust Company of New York. Upon the back of each of the debentures there was a certificate to this effect:—“It is hereby certified that this debenture is one of a series numbered from 1 to 2500 entitled to the benefit of the indenture, assignation, declaration of trust, and agreement referred to in the foregoing debenture, dated 1st November 1883,” the certificate being signed by one of the trustees under the deed.

This indenture, assignation, declaration of trust and agreement referred to in the certificate and in the body of the deed as a security for the sum was, as stated in the respondents' answers, a deed by which, *inter alia*, upon the recital that the California Redwood Company, Limited, had resolved to issue debentures, and that it was expedient to provide security for the repayment thereof, and upon the further recital that the California Redwood Company (a company organised under the laws of the State of California) had conveyed to the Central Trust Company of New York (a company formed according to the laws of New York State, United States of America) certain real property in the State of California, by deed *ex facie* absolute, but truly in trust, for the purposes thereafter declared, the said Central Trust Company of New York declared that they held the said real property in trust for the holders of the said debentures, and for payment of the principal sums and interest therein stipulated.”

The liquidators stated—“The cause of action in the said suit is the same as that already raised by the said Merchant Banking Company in the liquidation,” and that the Court of Session, as being the Court of Liquidation, was the appropriate one for disposing of the questions between the parties. They founded on section 87 of the Companies Act 1862, made applicable by section 151 to liquidations under supervision, which provides—“When an order has been made for winding-up a company under this Act, no suit, action, or other proceeding 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.”

The respondents stated that they were a company incorporated under the Companies Act 1862, having their registered office in London. They submitted “that the respondents are not subject to the jurisdiction of the Court; that there are no grounds for restraining the respondents from prosecuting an action against a foreign company holding real estate in a foreign

country, the grounds of which action could not be entertained or disposed of by the Court of Session."

Argued for the liquidators—The Court had power either under the Companies Acts or at common law to restrain the proceedings in New York, provided they had jurisdiction over the Merchant Banking Company. They had jurisdiction because of the claim lodged by the bank in the liquidation. If it had been a claim in a sequestration there could have been no doubt about the matter—*Lindsay v. Paterson*, July 10, 1840, 2 D. 1373; *Young v. Barclay*, May 27, 1846, 8 D. 774; *Standard Property Investment Co.*, Dec. 12, 1884, 12 R. 328. But a claim in a liquidation under supervision was just in the same position. The Central Trust Company was so identified with the company in liquidation as to make the Companies Act applicable. At common law the proceedings should be restrained; everything should be disposed of in the liquidation, and the Scottish company was the proper contradictor of the Merchant Banking Company—*Liquidators of the California Redwood Co. v. Walker*, March 19, 1886, 13 R. 810; *Liquidators of the Pacific Coast Mining Co. v. Walker*, March 19, 1886, 13 R. 816.

Argued for the Merchant Banking Company—There was no jurisdiction. There had been no voluntary submission on the part of the bank to the Scottish Courts. The claim was not properly speaking a claim in the liquidation, but merely a certification to the liquidators of the existence of the debt. The bank did not know that the liquidation was not a voluntary one. The Companies Act did not apply to restraining proceedings such as these—*Oriental Inland Steam Co. ex parte Scinde Railway Co.*, L.R., 9 Chan. App. 557. There had always been a recognised distinction between proceedings in which a creditor was trying to secure a preference, and those in which he was only trying to make good his security. The Court would exercise their power in the one case but not in the other—*Athole Hydropathic Co.*, March 19, 1886, 13 R. 818. There were no grounds for restraining the proceedings. The action was not truly one against the company in liquidation, but against a third party, and the question was whether the property held by that third party belonged to the company in liquidation or to the bank. If the question were to be tried in Scotland the bank would be deprived of the benefit of certain considerations of which they could only take advantage in America. Scotland was not the convenient *forum*. The debentures were issued in California, and referred to real property there, and they were payable in England and California—*Guthrie's Savigny*, 227; *Jones v. Geddes*, 1 Phillip's Chanc. Ca. 724; *Canon Co. v. Maclaren*, 5 Clark (H. of L.) 416. Even if the Scottish Court were to hold that the bonds were valid, that would not be *res judicata* in New York.

At advising—

LORD PRESIDENT—In this liquidation the liquidators desire to have certain questions determined which have arisen between them and the two sets of respondents—the one being the trustees of Mrs Sarah Wedderspoon, and the other being the Merchant Banking Company of London, Limited.

The questions which the liquidators have propounded are—“(1) Whether the said debentures are valid documents of debt? (2) Whether the holders of the said debentures have a right of action under the same? (3) Whether the liquidators have a right to plead in answer to the claims of the holders the defences competent to them against the former holders, Falkner, Bell, & Company, or James Davidson Walker, and to set off their claim for repayment of the promotion money or commission against the amount of the said debentures? And (4) Whether the liquidators are bound to pay the amount in the said debentures to the holders thereof?” Now, the answers to these questions have involved the discussion of many important matters, and at present the Court is not in a position to give judgment upon any of them. Questions of fact have been raised upon the one side and upon the other by the liquidators as well as by the Merchant Banking Company and Mrs Wedderspoon's trustees. Till these questions are cleared up I think it would be unsafe to pronounce any judgment.

But while I am for taking the course of sending the case to proof on all these questions, there is a preliminary matter that requires to be disposed of, and that is, whether the action raised by the Merchant Banking Company in the state of New York should be allowed to proceed, or whether the respondents should not be prohibited from going on with these proceedings?

The application to stay these proceedings was rested partly on the sections of the Companies Act of 1862 and partly on the common law right of the Court to prohibit parties from proceeding with actions in regard to matters that are *sub judice* here if the Court has jurisdiction. In that case I think the prohibition should take the form of an interdict founded on the common law right inherent in the Court, but everything depends upon the question of jurisdiction. This question is one with which Mrs Wedderspoon's trustees are not concerned; they offer no objections, and have taken no proceedings. As regards the Merchant Banking Company it is said that they are claimants in the liquidation, and though that has been made matter of dispute, I do not think the matter is open to argument. I think they plainly are claimants. They have lodged a claim which is in these terms:—“Take Notice, that the Merchant Banking Company of London, Limited, claim to be creditors of the said California Redwood Company, Limited, for the sum of £14,600 principal money, and for interest on the said principal money from the date of the last payment of the same; and that they so claim in respect of 78 bonds, mortgage bonds, or debentures of the said company, each for the sum of £200, and numbered respectively 28 to 99, both inclusive, and 601: And further, Take Notice, that these presents are without prejudice to the rights of the said Merchant Banking Company of London, Limited, as owners of the said bonds, and their recourse in respect of the same in the United States of America or elsewhere. Dated the 22d day of July 1885.” This document is addressed “To the California Redwood Company, Limited, and Messrs Jamieson and More, the Liquidators of the said Company.”

Now, *ex facie* of this document there cannot be any question as to its being a claim by creditors

of the company to receive the sum of £14,600 in the liquidation of the company. With regard to the reservation at the conclusion, I think that instead of detracting from the character of the document as a claim it only makes it the more clear; for a reservation of their right to take proceedings elsewhere could have no meaning unless the banking company were claiming in the liquidation. But further, this claim was lodged in pursuance of a notice published in the *Edinburgh Gazette* calling on all creditors to lodge their claims with a view to their being adjudicated upon by the liquidators. Then, further, the debenture holders and other creditors were reminded by a notice published, not in the *Gazette*, but in various newspapers here and in London, that their claims should be lodged with the liquidators on or before the 23d July 1885. And it is in answer to these notices that this claim was lodged. It was received by the liquidators just as any other claim, for on 23d July 1885 Mr Jamieson, one of the liquidators, wrote to the manager of the Merchant Banking Company—"Your claim has been received, and you will next week receive our deliverance upon it." Now, if the bank did not intend that it should be treated as a claim, they should have written on receipt of that letter to say that it was not a claim; but instead of that on 7th August 1885 they write and say—"With reference to our own claim we gather that we shall shortly receive from you some formal 'deliverance' upon the same." Then on 18th August they again write—"We shall feel greatly obliged if you can kindly favour us with your promised 'deliverance.'"

After all that, I think it is vain for the Banking Company to attempt to say that they have not lodged a formal claim in the liquidation, and therefore I am of opinion that the Court have jurisdiction over the respondents, the Merchant Banking Company, and that their plea to the contrary effect should be repelled.

I am further of opinion that the respondents should be interdicted and prohibited from proceeding further in the suit at their instance in New York until the questions raised here have been disposed of.

LORD MURE concurred.

LORD SHAND—I am of the same opinion.

The argument maintained for the debenture holders was that the mere giving in of this claim was of no more weight than the rendering of a claim by a trader to his debtor, and was not in any way analogous to lodging a claim in a sequestration. I do not think that argument sound.

When under supervision of the Court a company is being wound-up, and an order has been pronounced that the funds recovered are to be held for the purpose of meeting the claims of creditors, I think a claim made in these circumstances is the same as a claim lodged in a sequestration. This is a liquidation under supervision, and I think that creditors who make claims in such a liquidation are in the same position as creditors who lodge claims in a sequestration, with regard to the jurisdiction of this Court.

I therefor concur that the Merchant Banking Company should be interdicted from taking further proceedings in New York.

LORD ADAM concurred.

The Court pronounced this interlocutor:—

"Allow the amended note and answers to be received and to form part of the proceedings; and having heard counsel on the amended note for the liquidators, and amended answers for the Merchant Banking Company, and for Wedderspoon's executors, Repel the objections to the jurisdiction of this Court stated by the Merchant Banking Company: Interdict and prohibit the said Merchant Banking Company from further proceeding with a suit or action instituted by them against the Central Trust Company of New York, in the Courts of that State, until the questions raised under the present proceedings shall be terminated, or until the Court shall otherwise order: Allow the parties a proof of their averments, the proof to proceed before one of the Judges of this Court on a day to be afterwards fixed: Grant authority to the Lord Ordinary on the Bills in vacation, on the application of any of the parties, if he shall see cause, to grant diligence and commission for recovery of documents, and for examination of witnesses in America or elsewhere: Reserving all questions of expenses."

Counsel for Liquidators—Sol.-Gen. Asher, Q.C. —Gloag—H. Johnston—Lorimer. Agents—Davidson & Syme, W.S.

Counsel for Merchant Banking Company—Graham Murray—Salvesen. Agents—Gill & Pringle, W.S.

Counsel for Mrs Wedderspoon's Trustees—Graham Murray—W. Campbell. Agents—J. & J. Galletly, S.S.C.

HIGH COURT OF JUSTICIARY.

Tuesday, July 20.

BARTLEMORE v. M'ALLISTER.

Justiciary Cases—School—Education (Scotland) Act 1883 (46 and 47 Vict. cap. 56), sec. 10.

Section 10 of the Education (Scotland) Act 1883 enacts that "where an attendance order is not complied with without reasonable excuse, a court of summary jurisdiction, on complaint made by the school board, may, if it think fit, impose a penalty," &c. *Held* that it is not necessary that the Court of summary jurisdiction which is called on to enforce an attendance order should be the Court which pronounced such order.

On 10th August 1885 the J.P. Court for Renfrewshire convicted James M'Allister, on his own confession, of contravening the Education Acts 1872 to 1883 by failing after due warning to secure the regular attendance of his children at a public or inspected school, and granted an order in terms of sec. 9 of the Act of 1883 ordering the children to attend Lochwinnoch Public School.

On 29th October he was prosecuted before the same Court for failing to comply with the attendance order, and on his own confession convicted and fined under sec. 10 of the Act of 1883.