Company, March 11, 1869, 7 Macph. 640, 6 S.L.R. 424; *Hay* v. *Dufourcet & Company*, June 19, 1880, 7 R. 972, 17 S.L.R. 669. (2) It described the debt as due to Archibald Gillies as partner of the firm of David Gillies & Sons, which firm in point of fact no longer existed.

The respondent (Burns) argued—The respondent's arrestment was valid. (1) The arrestment in Baird's hands as an individual was good, because he, as liquidator, having ranked Gillies on the company's estate, and having declared a certain dividend as payable to him, became liable to Gillies as an individual for the sum thus earmarked—*Ritchie* v. *M'Lachlan and Others*, May 27, 1870, 8 Macph. 815, 7 S.L.R. 500; *Hamilton* v. *Kerr*, November 23, 1830, 9 S. 40. (2) The fund was described as due to Gillies both as an individual and as a partner of the firm. Accordingly, if the first part of the designation was correct it did not matter if the second was bad. It was quite competent in one schedule to arrest in the hands of one arrestee two sums due to two separate persons.

LORD KYLLACHY—I am of opinion that this arrestment is hopelessly bad, and it is hardly necessary to go into particulars. The arrestment is, I think, bad on the ground expressed by the Sheriff-Substitute. And it is also bad on the separate ground urged by Mr Morison, viz., that it is impossible to read the schedule as applying to two separate and unconnected debts due by the company to the two individuals named. What was sought to be attached plainly was some sum supposed to be due to those two persons jointly by a private firm which the arrester supposed was still existing and was being wound up by Mr Baird.

LORD STORMONTH DARLING—I cannot doubt that the proper way to arrest the funds of a company in liquidation is to arrest the debt as due by the company itself and the liquidator as such. This arrestment fails in that essential particular, and is also open to the objection which Lord Kyllachy has indicated. But it is enough to say that it is entirely inept to constitute a preference in favour of the person who has used it, and that we must remit the case to the Sheriff accordingly.

LORD JUSTICE-CLERK and LORD LOW concurred.

The Court sustained the appeal, repelled the claim for Burns, and remitted to the Sheriff to proceed.

Counsel for the Appellants—Morison—A. Mackenzie Stuart, Agents—Macpherson & Mackay, S.S.C.

Counsel for the Respondent—Graham Stewart—Macmillan. Agents—Cowan & Stuart, W.S.

Tuesday, January 30.

SECOND DIVISION.

ELSMIE & SON *v.* TOMATIN SPEY DISTRICT DISTILLERY, LIMITED, AND ANOTHER.

Company — Winding-up — Supervision Order or Winding-up Order—Wishes of Creditors and Shareholders—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 149.

On January 4 a creditor to the extent of £152, 7s. 8d. brought a petition to have a company wound up compulsorily. On 13th January an extraordinary general meeting of the company was held, at which a resolution was passed that as the company by reason of its liabilities could not continue its business it be wound up voluntarily, and that A be appointed liquidator, with instructions to place the liquidation under the supervision of the Court.

A note was accordingly presented which set forth the resolution, and stated that a majority of the creditors approved of the voluntary winding up and of the liquidator appointed, and a mandate stating the approval of creditors to the extent of £3176, 7s. 9d., who were a majority in number and value, was lodged in process.

The petitioning creditor contended that the shareholders had no *locus standi* to oppose his petition; that no creditor opposed the petition and the mandate produced was not sufficient; that out of eight creditors for whom the mandate was lodged five were or had been directors of the company, and so had other interests than those of creditors; and that the liquidator appointed was the nominee of one of the directors.

Held that as the majority of the creditors as well as the shareholders desired the voluntary winding-up to be continued under supervision, and as there was no suggestion that the petitioners would be prejudiced by the liquidation commencing at a later date than if the petition for compulsory winding-up were granted, or in any other way, a supervision order should be made and the liquidation be continued with A as liquidator.

In *re West Hartlepool Iron Works Company*, 1875, L.R., 10 Ch. 618, *approved* and *followed*.

Expenses—Petition for Winding-up Order—Resolution of Company to Wind-up Voluntarily under Supervision—Refusal of Winding-up Order—Expenses of Petitioner.

Where the Court, giving effect to the wishes of a large majority of a company's creditors, and taking into consideration the whole circumstances of the case, refused the petition of one creditor for a winding-up order, and decided that the voluntary winding-up

under supervision resolved on by the company subsequent to the petition being presented should be continued, it *allowed* the petitioning creditor his expenses, and directed them to form part of the expenses of the liquidation.

By sec. 79 of the Companies Act 1862 (25 and 26 Vict. cap. 89) it is provided,—"A company under this Act may be wound up by the Court as hereinafter defined under the following circumstances (that is to say) . . . (4) whenever the company is unable to pay its debts; (5) whenever the Court is of opinion that it is just and equitable that the company should be wound up." By sec. 80 of said Act it is provided—"A company under this Act shall be deemed unable to pay its debts . . . (4) whenever it is proved to the satisfaction of the Court that the company is unable to pay its debts."

By sec. 91 it is provided—"The Court may, as to all matters relating to the winding-up, have regard to the wishes of the creditors or contributories, as proved to it by any sufficient evidence. . . . In the case of creditors regard is to be had to the value of the debts due to each creditor. . . ."

By sec. 147 it is provided—"When a resolution has been passed by a company to wind up voluntarily, the Court may make an order directing that the voluntary winding-up should continue, but subject to such supervision of the Court, and with such liberty for creditors, contributories, or others, to apply to the Court, and generally upon such terms, and subject to such conditions as the Court thinks just."

By sec. 149 it is provided—"The Court may, in determining whether a company is to be wound up altogether by the Court or subject to the supervision of the Court, in the appointment of liquidator or liquidators, and in all other matters relating to the winding-up subject to supervision, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence. . . . In the case of creditors regard shall be had to the value of the debt due to each creditor. . . ."

On January 4, 1906, George Elsmie & Son, coal merchants, Aberdeen, presented a petition praying the Court to order that the Tomatin Spey District Distillery, Limited, be wound up and James Alexander Robertson-Durham be appointed official liquidator. The said company was on 8th June 1897 registered and incorporated under the Companies Acts 1862 to 1890 and had its registered office in Inverness. The nominal capital of the company was £12,000, divided into 1200 shares of £10 each. Of these 600 were issued and fully paid up. The working capital of the company was thus £6000.

In the narrative of the petition the petitioners set forth that they were creditors of the said company to the amount of (1) £140, 7s. 7d., with legal interest from 13th November 1905, being the amount of the balance due to them for coal supplied to the company, and for which sum with interest as above they held a decree of the Lord Ordinary (Salvesen) dated 7th December 1905; and (2) to the amount of £12, 0s. 1d., being the total amount of expenses incurred in the action in which they obtained decree as above stated, for which sum they also held decree dated 21st December 1905. They further set forth that application had been made to the company for payment of the sums decerned for, but that they still remained unpaid; that the distillery had not been working for some time past; and that the company was and had been for some time insolvent and unable to pay its debts. The petition was served on the company, and on 9th January notice of this application was given by advertisement in the *Edinburgh Gazette*, *Scotsman*, and *Inverness Courier*.

On 13th January an extraordinary general meeting of the company duly convened was held, when the following extraordinary resolution was duly passed, viz.—"That it has been proved to the satisfaction of this meeting that the company cannot by reason of its liabilities continue its business, and that it is expedient to wind up the same; and accordingly that the company be wound up voluntarily."

At the same meeting the following additional resolutions were also duly passed, viz.—"(1) That Mr James Forsyth, solicitor, Union Street, Inverness, be and is hereby appointed liquidator for the purposes of winding up the company, with every power which by the Companies Act 1862, and Acts amending and extending the same, is conferred on liquidators. (2) That the liquidator be instructed to take the necessary steps for having the liquidation placed under the supervision of the Court of Session."

On 17th January a note was lodged on behalf of the company and Forsyth as liquidator. In this note the company admitted that the petitioners were its creditors to the extent of £152, 7s. 8d. as above set forth and that it could not by reason of its liabilities continue its business, and it set forth the resolution of January 13 above quoted. The company, however, stated that there were debenture holders to the amount of £6000 (the debenture holders did not make any appearance) and ordinary creditors besides the petitioners to the amount of about £3321. The note further stated—"The shareholders and the great majority of the creditors are opposed to a winding-up by the Court, and desire that the company should be wound up voluntarily under the supervision of the Court. They also desire that in the interest of economical and efficient management the liquidator should be a person resident in the locality. They accordingly oppose the appointment of the nominee of the petitioners, and desire that the present liquidator James Forsyth should act as liquidator in the winding-up."

Mandates were lodged in process from eight creditors of the company, whose debts together amounted to £3176, 7s. 9d., approving of the voluntary liquidation of the company under the supervision of the Court and of the appointment of Forsyth as liquidator.

Argued for the petitioners (Elsmie & Son)—(1) There was no appearance for any creditor in opposition to the petition. The shareholders of the company and the liquidator had no *locus standi* to resist the petition of a creditor asking for a compulsory winding-up. An order continuing the voluntary winding-up and approving of the liquidator, could not be pronounced without a petitioning creditor; the mere lodging of mandates of creditors was not sufficient. (Lord Stormonth Darling referred to *Drysdale & Gilmour* v. *Liquidator of International Exhibition*, Nov. 13, 1890, 18 R. 98, 28 S.L.R. 91, where an order was pronounced though there was no petitioning creditor). (2) Of the eight creditors who had lodged mandates approving of the continuation of the voluntary winding-up and of the liquidator nominated at the meeting, one was a director, one had been a director but had lately resigned, one was judicial factor for the late managing director, one was secretary of the company, and one was a nominal firm the sole partner of which was a director. These were not true creditors, in the sense that they had other interests than that of creditors. It might perhaps turn out that they had kept the business going longer than they ought, and so be personally liable. (3) In any event the liquidator appointed was the nominee of a director whose suggestion the shareholders had adopted, and the Court should appoint an independent liquidator resident in Edinburgh, because the majority of the creditors were resident in the south of Scotland. Reference was also made to Lindley on Companies, 5th ed. 874, and to sections 137, 138, and 151 of the Companies Act 1862 (in addition to the sections quoted).

Argued for the Tomatin Spey District Distillery, Limited, and Forsyth—The great bulk of the creditors had by their mandate approved of the voluntary winding-up under supervision resolved on by the shareholders, and of the liquidator appointed. The mandates were sufficient evidence of their wishes. There was a difference of opinion here between one creditor and the great majority, and the onus accordingly was on Elsmie & Son to show that they would be prejudiced by a supervision order being pronounced—in re *West Hartlepool Ironworks Company*, July 30, 1875, L.R. 10 Ch. 618; in re *New York Exchange, Limited*, July 27, 1888, 39 Ch. Div. 415; *Pattisons, Limited* v. *Kinnear*, February 4, 1899, 1 F. 551, 36 S.L.R. 402—and the choice of liquidator was equally committed to the majority of the creditors by sec. 149. It was true that the liquidator had been suggested by a director at the company's meeting, but he was suggested because he was an independent person, and after two liquidators originally proposed had been objected to as being interested in the company. The liquidator had been chosen by the shareholders and their choice had been approved of by the creditors in their mandates. No specific objection had been made against the liquidator appointed.

LORD JUSTICE-CLERK—The case stands in this position. One creditor for no very large amount on 4th January presented a petition praying the Court to order that the Tomatin Spey District Distillery, Limited, be wound up, and a liquidator be appointed. A general meeting of the shareholders of the company was held on 13th January, when it was resolved that the company be wound up voluntarily, that Mr James Forsyth be appointed liquidator, and that he be instructed to take the necessary steps to place the liquidation under the supervision of the Court of Session. The shareholders were quite within their right in so acting, and the only way this resolution can be superseded is by the creditors coming forward and showing cause why this should not be done. Here, however, the great mass of the creditors have come forward in support of what has been done by the shareholders, and by their mandates approved of the winding up under supervision, and of the liquidator nominated. No special cause has been shown why the liquidation should not stand. The only objection of the petitioner, who makes no suggestion against the probity of the gentleman nominated, is that he would prefer a liquidator appointed by the Court. Apart from authority my own view would be to let the appointment stand, but the matter has been decided in England, *in re West Hartlepool Ironworks Company*, [1875] L.R. 10 Ch. 618, and it would be very inconvenient to have a different practice here from in England.

Therefore on the whole matter I think we should refuse the prayer of the petition, and allow the liquidation to proceed under the supervision of the Court.

LORD KYLLACHY—I agree. I see no reason for interfering with a scheme of liquidation which has the approval of the shareholders and of the majority of the creditors.

LORD STORMONTH DARLING—I concur, and only wish to add that in this case there is no suggestion that anyone will be prejudiced by the liquidation commencing at a later date than if the petition for compulsory winding up were granted. That being so, we have only to consider whether the petitioner has stated any good ground—he being the only creditor in favour of compulsory winding up by the Court—why the wishes of the majority of the creditors, signified by their mandate, should be disregarded. I am of opinion that he has not.

LORD LOW was absent.

The Court pronounced this judgment—

"Refuse the petition: Direct and ordain that the voluntary winding up of the Tomatin Spey District Distillery, Limited, resolved on by the extraordinary resolution quoted in the said note, be continued, but subject to the supervision of the Court in terms of

the Companies Act 1862, and Acts amending and extending the same: Confirm the appointment of James Forsyth designed in the said note as liquidator of the said company, in terms of and with the powers conferred by the said Acts: Further order that all subsequent proceedings in the winding-up be taken before Lord Dundas, one of the permanent Lords Ordinary, and remit the winding-up to him accordingly and decern: Find the petitioners entitled to expenses, and direct that the same shall form part of the expenses in the liquidation: Also find the said liquidator entitled to expenses as between agent and client, and direct that the same shall form part of the expenses in the liquidation," &c.

Counsel for Elsmie & Son—Younger, K.C.—Kemp. Agents—Mustard & Jack, S.S.C.

Counsel for Tomatin Spey District Distillery Company and Liquidator—Constable—Macmillan. Agent—A. B. Fletcher, S.S.C.

Thursday, February 1.

SECOND DIVISION.

[Lord Ardwall, Ordinary.

BROWN *v.* NORTH BRITISH RAILWAY COMPANY.

Title to Heritage—Bounding Title—Measurement — Bounding Title where Lands Defined by Measurement and no other Description.

A disposition in 1819 conveyed to a canal company "all and whole the piece or pieces of ground consisting of four acres and thirty-seven thousandth parts of an acre or thereby Scots measurement being part of my lands . . . which are required for the purposes of the said canal and on which the company have commenced their operations." It contained no further description of the area of ground conveyed. There existed, however, extrinsic evidence by which the area conveyed could be identified. The disposition had been recorded, which under the Canal Company's Act operated to the effect of giving infeftment.

Held that to make the disposition a valid warrant for infeftment the area conveyed at the date of infeftment must have been a definite subject capable of identification; that extrinsic evidence was therefore competent to identify it at the present time; and that the area having been identified the title was a bounding title.

Prescription—Positive Prescription—Possession—Acts of Possession not Attributable to Claim of Ownership—Railway and Canal Company.

Circumstances in which *held* that certain acts of possession on the part of a railway and canal company were not attributable to a claim of ownership, and could not establish a title by prescription.

Railway—Superfluous Lands—Land Taken for a Double Line—Lands Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 19), *sec.* 120.

At the making of a railway, land for a double line of rails was taken, but only a single line was to be at first laid, the second line to be laid if and when necessary. The land which was not immediately required was not fenced off, but was allowed to be used by the farm tenants of the adjoining lands.

Held (*by* Lord Ardwall, Ordinary) (1) that the land acquired for the future doubling of the line could not become "superfluous lands" within the meaning of sec. 120 of the Lands Clauses Consolidation (Scotland) Act 1845, and (2) that if it could, then in that case it would be necessary for the claimant in order to succeed, to prove that at no future date would the railway company require to double the line of rail.

On 21st September 1904 Robert Ainslie Brown of Manuel, S.S.C., Edinburgh, brought an action against the North British Railway Company and others, *inter alia*, (first), to have it found and declared "that all and whole that area of ground extending to one acre and sixteen parts of an acre Scots or thereby . . . lying on the south-west side of the Union Canal, near the village of Causewayend, in the parish of Muiravonside and county of Stirling, is a part and portion of and comprehended within the bounds and marches of the lands and estate of Manuel, lying in the said parish and county, and belongs heritably to the pursuer as proprietor of the said lands and estate of Manuel;" and (fifth) to have it found and declared "that all and whole that piece of ground . . . lying on the north-west side of the viaduct forming part of the said defenders' railway between Manuel Station and Causewayend Station in the said parish and county, and which viaduct bounds the said piece of ground on the south-east, is part and portion of and comprehended within the bounds and marches of the pursuer's said lands and estate of Manuel, and belongs heritably to the pursuer as proprietor of the said lands and estate of Manuel, and which piece of ground is part of the lands which were compulsorily taken by the Slamannan Railway Company or by the Monkland Railways Company for the purposes of their undertaking as set forth in the Slamannan and Borrowstounness Railway Act 1846 (9 and 10 Vict. c. 107), or the Monkland Railways Act 1851 (14 and 15 Vict. c. 62), from the pursuer's . . . author, and not having been required or used by the said defenders the North British Railway Company, or their . . . authors the Slamannan Railway Company, or the Monkland Railways Company, for said purposes, has become 'superfluous lands' within the meaning of the . . . sec. 120 of the Lands Clauses Consoli-