

Saturday, February 20.

SECOND DIVISION.

RADFORD & BRIGHT, LIMITED v.  
D. M. STEVENSON & COMPANY.

*Arrestment—Arrestments on Dependence—Company—Recall of Arrestments on Dependence of Action against Company in Liquidation pending Appeal to House of Lords—Expenses—Petition for Recall.*

In March 1900 an English company, incorporated under the Companies Acts, was ordered to be wound up by the English Courts. After the commencement of the winding-up an action against the company was raised in the Court of Session in January 1902 by A without having first obtained the leave of the English Courts required by the Companies Act 1862. The action was sisted for the purpose of giving A an opportunity of obtaining the requisite leave. In November 1902 leave was granted by order of the English Courts, giving A liberty to proceed with his action under sections 87 and 163 of the Companies Act 1862. The action then proceeded. In May 1903 the Lord Ordinary assoltized the company, and in November 1903 the Inner House adhered. A expressed the intention of appealing to the House of Lords.

In January 1902 A had used arrestments on the dependence of his action, and attached funds belonging to the company. In November 1903, after final judgment in the Court of Session, the liquidator of the company asked A to give him a letter withdrawing these arrestments, or alternatively an undertaking to proceed at once with his appeal to the House of Lords. A refused to do so, but offered to withdraw the arrestments on being satisfied that a judgment in his favour by the House of Lords would be duly implemented.

Thereafter in January 1904 the company and its liquidator having presented a petition for the recall of the arrestments, the Court, on the ground that, even if the arrestments were valid, the position taken up by A was unreasonable, recalled the arrestments, and found the petitioners entitled to the expenses of the application.

*Company — Winding-up — Arrestments Used after Commencement of Winding-up—Companies Act 1862 (25 and 26 Vict. cap. 89), secs. 87 and 163.*

*Opinion (per Lord Trayner), that the words of section 163 of the Companies Act 1862 were absolute, and not modified or restricted in any way by section 87, and that arrestments which had been made on the dependence of an action raised after the date of the announcement of the winding-up of a limited company must necessarily be inept and ineffectual.*

Section 87 of the Companies Act 1862 enacts:—"When an order has been made

for winding up a company under this Act, no sist, 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."

Section 163 enacts:—"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 estate or effects of the company after the commencement of the winding-up shall be void to all intents."

In January 1904 a petition was presented to the Court by Radford & Bright, Limited, incorporated under the Companies Acts, having their registered office in London, and now in liquidation, and by John Wilford Bolton, the liquidator of the company, for the recall of arrestments used in January 1902, on the dependence of an action brought against the company by D. M. Stevenson & Co., coal exporters, Glasgow.

The circumstances giving rise to the petition were as follows:—

On 28th March 1900 the petitioners' company was ordered to be wound up by an order of the High Court of Justice in England, and the petitioner Bolton was appointed liquidator.

On 4th January 1902 the respondents raised an action in the Court of Session against the petitioners for £1192, 14s. 2d., and on the dependence of this action the respondents used the arrestments in question. Before commencing the action the respondents omitted to obtain leave from the English Courts to proceed against the petitioners, as required by section 87 of the Companies Act 1862. To give them an opportunity of obtaining leave the action was sisted.

On 5th November 1902 leave to proceed was granted by the English Courts in the following terms:—"And it is ordered that the said Messrs D. M. Stevenson be at liberty to proceed under sections 87 and 163 of the Companies Act, 1862, with an action against the said Messrs Radford & Bright, Limited, and another, which action has been commenced in Scotland in the Court of Session, Second Division."

The action then proceeded, and on 20th May 1903 the Lord Ordinary (STORMONTH DARLING) assoltized the petitioners from the conclusions of the summons. On 17th November 1903 this judgment was adhered to by the Second Division of the Court.

On 28th November the petitioners wrote to the respondents asking for a letter withdrawing the arrestments, or alternatively for an undertaking to prosecute at once an appeal to the House of Lords. This the respondents declined to give, although they expressed the intention of appealing to the House of Lords. They, however, on 7th December 1903, offered to withdraw the arrestments without prejudice to their right of appeal if satisfied that a judgment in their favour if obtained would be duly implemented.

Thereafter the petitioners presented this petition for the recall of the arrestments.

Argued for the petitioners :—(1) In terms of section 163 of the Companies Act 1862, the arrestments were invalid from the start. The effect of that section was not limited by section 87. No doubt the English Judges had adopted a contrary view, but their practice was not binding in the Scottish Courts, and the Lords Justices of Appeal in England had expressed a strong opinion against the construction adopted in English practice. *In re Lancashire Cotton Spinning Co.*, 1887, 35 Ch. Div. 656. (2) Even if the arrestments were held to be valid, it was in the discretion of the Court to recall them if they thought such a course reasonable. If the arrestments were not recalled, the liquidator would be prevented for two years from ingathering the estate. Such a course was not reasonable.

Argued for the respondents :—(1) Section 163 must be construed along with section 87, and the two sections when read together left the matter to the discretion of the Court, as was the practice in the English Courts. In the present case the action was still in dependence, and the Court should exercise that discretion by refusing the prayer of the petition unless the petitioners gave the reasonable guarantee to the respondents that if a judgment was pronounced in the House of Lords in favour of the respondents it would be implemented as fully as if the arrestments although recalled were still in force. (2) This was an English winding-up, and the leave obtained from the Courts in England to proceed with the action included leave to continue the arrestments. The Court ought, therefore, not to interfere in the matter. (3) section 163 only dealt with arrestments "put in force," and an arrestment was not "put in force" within the meaning of that section until possession was actually taken—in *re London and Devon Biscuit Co.*, 1871, L.R., 12 Eq. 190.

The case of *Allan v. Cairns*, November 15, 1902, 20 R. 36, 30 S.L.R. 114, was not cited by either side.

**LORD TRAYNER**—The important question raised before us is whether the arrestments used by the respondents are valid or of any effect having regard to the provision of the 163rd section of the Companies Act of 1862. The petitioners Radford & Bright went into liquidation in March 1900, and after the winding-up order was pronounced the respondents raised an action against the petitioners, without having first obtained the leave of the Court as required by section 87 of the Companies Act. This rendered the action incompetent, and the objection to competency having been taken, the respondents applied to the English Court for leave to continue the action that they had so commenced. Leave was given them by an order pronounced in November 1902, whereby they were said to be at liberty to proceed under sections 87 and 163 of the Companies Act with the action which they had already brought. On the dependence of their action the respondents had used the arrestments which the petitioners

now seek to have loosed. The 163rd section of the Act declares all diligence of the nature of attachment (or arrestment) shall be void if used after the commencement of the winding-up, as the arrestments in question undoubtedly were. The respondents, however, maintain that the leave given to them to proceed with their action in effect preserved the validity of their arrestments, and rely on some authorities in England in support of their view. I am not prepared to adopt the views which have been expressed in England on this subject, which were followed but disapproved in the case referred to by Mr Ure. I regard the words of section 163 as absolute, and not modified or restricted in any way by section 87. It appears to me that liberty to proceed with the action meant nothing more than this, that the respondents should proceed with an action improperly brought in the first place, but now authorised to proceed in order to determine the question which was raised in that action, and had no reference whatever to the diligence which had been done on its dependence. I cannot see how leave to proceed with an action could validate an arrestment which the statute expressly declares to be void. While that is my opinion (which after the argument addressed to us I have thought it right to express) it is not necessary to proceed upon it here, for I am quite prepared to grant this petition in the exercise of the discretion which we undoubtedly have. I think the position that the respondents have taken up is unreasonable. They say it is their intention to appeal against the judgment pronounced against them in this Court, but they decline to say when; and I think it would be unreasonable to defer the winding-up of this estate in order to maintain the preference, or supposed preference, which the respondents have in the liquidation to the detriment of the other creditors and the obstruction of the liquidator in the performance of his duties. I am therefore of opinion that this petition ought to be granted.

**LORD MONCREIFF**—I do not wish to indicate any difference of opinion from what Lord Trayner has said in regard to sections 87 and 163 of the statute. My present impression is in accordance with what his Lordship has said. But I prefer to rest my decision upon this ground, that it is within our discretion to recall this arrestment, and that in exercise of that discretion the arrestment ought to be recalled. I think the respondents have had ample time to make up their minds whether or not they will proceed with the appeal.

The LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

The petitioners asked for expenses, and argued—The respondents were unreasonable in refusing in November 1903 to grant the respondents' request for a letter withdrawing the arrestments or an undertaking to proceed with the appeal. They should

therefore be found liable for the expenses of this application—*Robertson v. Park, Dobson & Company*, October 20, 1896, 24 R. 30, 34 S.L.R. 3.

Argued for the respondents—They had not acted unreasonably. They merely wished to retain their preference. They had offered to withdraw the arrestment on getting a guarantee but had been met with an obstinate refusal. In these circumstances the petitioner was not entitled to recover from the respondents the expenses of the petition—*Roy v. Turner*, March 18, 1891, 18 R. 717, 28 S.L.R. 509.

The Court pronounced this interlocutor—

“Recall the arrestments which have been used on the dependence of the summons mentioned in the petition: Prohibit and discharge any further arrestment from being used upon the dependence of the said summons: Find the petitioners entitled to the expenses incurred in the petition,” &c.

Counsel for the Petitioners—Ure, K.C.—Spens. Agents—J. & J. Ross, W.S.

Counsel for the Respondents—Salvesen, K.C.—R. Scott Brown. Agents—Kelly, Paterson, & Company, S.S.C.

Saturday, February 20.

## SECOND DIVISION.

[Lord Kincairney, Ordinary.]

### NELSON'S TRUSTEES v. TOD.

*Superior and Vassal—Feu-Duty—Sub-Vassal—Right of Recourse—Liability of Sub-Feuars for Cumulo Feu-Duty where Feu Sub-divided without Superior's Consent—Sub-Feuar's Right of Relief Prejudiced by Superior's Actings.*

The owner of a feu granted in 1827 divided it into four lots, and allocated the feu-duty among them without the consent of the superior. Thereafter the lots passed into the possession of different sub-feuars.

In 1858 the superior granted a charter of confirmation to the sub-feuar of lot 2, which bore that the subjects were to be holden of the superior as immediate lawful superior for payment of the amount formerly allocated on the lot, “being a proportional part of the *cumulo* feu-duty.” In the charter the rights of the superior and the right of all others concerned were reserved.

In 1892 the sub-feuar of lot 3 died, and his heir refused to make up a title to the feu, and the feu-duty ceased to be paid.

In 1902 the superior brought an action of poinding of the ground against the sub-feuar of lot 1 in order to recover from her the arrears of feu-duty due from lot 3.

Held that the pursuer by granting the charter of confirmation had deprived the defender of her right of

recourse against the owner of lot 2 and against that lot itself, which would otherwise have been open to her, and therefore the defender *assolizied*.

This action of poinding of the ground, brought for the purpose of poinding the effects on one of the sub-divisions of a feu for recovery of arrears of the *cumulo* feu-duty, was raised in the following circumstances:—By feu-charter dated 9th February 1827 Græme Reid Mercer of Mavisbank feued to John Hogg and Thomas Brown and their heirs and assignees whomsoever the lands known as Kevockmill Bank, Lasswade, extending to nearly six acres. Subinfeudation was expressly prohibited, and the yearly feu-duty was fixed at £69, 15s. 9d., of which the feuars obliged “themselves, their heirs, executors, and successors” to make payment.

After Mr Mercer's death his trustees became the superiors of the above feu. In 1899 the superiority was acquired by the trustees of the deceased William Nelson in virtue of a decree under the Heritable Securities (Scotland) Act 1894.

After 1831 the vassals in the said feu divided it into four lots, and apportioned the *cumulo* feu-duty in these lots as follows:—£12 on each of the lots to the east, and £22, 17s. 10½d. on each of the lots to the west. The superiors never sanctioned this sub-division or apportionment.

The first or eastmost lot after various transmissions came into the possession of the late Colonel Pullan in 1882. In 1893 Miss Jean Tod as heritable creditor obtained decree in an action of maills and duties applicable to this lot, and in virtue of that decree uplifted the rents and profits of this portion of the feu. The tenant of this lot and the buildings thereon was A. W. Gordon.

The second lot was disposed in 1858 to W. J. Hitchcock. In the same year Mr Mercer's trustees, the superiors of the lands, granted in favour of Mr Hitchcock a charter of confirmation, which bore that the subjects were to be holden under the superiors as immediate lawful superiors “for payment of the sum of £12 sterling of yearly feu-duty” payable as therein stated with the casualties specified, which feu-duty of £12 was stated to be “a proportional part of the *cumulo* feu-duty” of £69, 15s. 9d. yearly “payable from the whole of the grounds feued by the said John Hogg and Thomas Brown from the said Græme Mercer, reserving always the bygone and current feu-duties, and our own right and the right of all others concerned as accords in law.”

This lot was thereafter acquired by John Kolbe Milne.

The third lot was after various transmissions acquired by the North British Railway Company.

The fourth or westmost lot was in 1879 disposed to Dr William Jameson, who was infert in the subjects. It was bequeathed by Dr Jameson on his death in 1892 to his widow, but both she and his heir-at-law renounced the feu, and the feu-duty of £22, 17s. 10½d. thereafter ceased to be paid.