But, were it technically necessary to find that there was *culpa* on the defenders' part here, I think there is quite enough in the case. There was a want of due diligence in the effort to extinguish the fire. For three months no steps whatever were taken, and not until March 1873, or six months after the ignition, were any vigorous measures taken, and by that time things had gone too far. Though the defenders had the right to bring up and spread this material, it should have been placed in separate bings of smaller size and sufficiently under control—not in one bing of so great a height, and containing such an enormous quantity as 200,000 tons.

Lord Gifford—I am of the same opinion. The questions of principle here involved are delicate and difficult, but they come to be relieved of everything save the one point for inquiry, and that is whether the acts of the defenders on their own property was such as to render them liable to the pursuer for the damage which he has suffered. The defenders say it is not *culpa*, and therefore we are not liable. But the pursuer referred the Court to the cases of *Rylands* and of the *Earl of Orkney*, showing that in those cases the defender was found liable in damages even without *culpa*. We have two principles here which require to be reconciled. The first is the pursuer's right to use his own property, and the second is based on the maxim alluded to by your Lordships, "*sic utere tuo ut alienum non lodas.*"

The ordinary use of an agricultural subject is cultivation, and if in the exercise of that ordinary use accidental loss to a neighbour is caused no liability is incurred. Such a use of the subject has been termed primary, but there are other uses, termed non-primary. Thus, where water has been collected for a mill, and damage has thereby resulted, in that case a liability is created even though it may be impossible to bring home negligence to the maker of the dam. I agree with your Lordship in the chair that *culpa* is at the root of all this, but fault is a very flexible term, and a much greater duty is laid on a person who is not making a primary use. In the case of an *opus manufactum* (and here there was an *opus manufactum*), the act may be perfectly legal and still non-natural, and the highest possible precaution must be taken. This, it is certain, the defenders did not do, and in that sense there was fault. No doubt there was danger—it may have been remote—but there it was. Chemists know that such things *might* catch fire, and therefore extraordinary precautions should have been taken. Accordingly it is no use to say that the defenders did not know the inflammable nature of the substance; they should have employed men of skill who could have informed them.

In conclusion, I may say that whether I put the matters on the broad ground of non-natural use as Lord Cairns did in the case of *Rylands* or not, I can only arrive at the same conclusion, that the defenders are liable.

The Court adhered.

Counsel for Pursuer — Asher — Strachan. Agents—Morton, Neilson & Smart, W.S.

Counsel for Defenders—Trayner—Robertson. Agents—Melville & Lindesay, W.S.

Saturday, February 19.

FIRST DIVISION.

WILSON (LIQUIDATOR OF THE GLASGOW AND DISTRICT CO-OPERATIVE SOCIETY, LIMITED) — PETITIONER *v.* M'GENN & COMPANY—RESPONDENTS.

Company—Voluntary Winding-up—Extraordinary Resolution—Notices, Form of—Companies Act, 1862, *sec.* 129, *subsec.* 3.

Notice was given of an extraordinary meeting of shareholders in a company "to consider and, if approved of, to sanction the voluntary winding-up of the company. The directors enclose a balance-sheet. . . . . From the results of that balance . . . . it will be apparent that it is hopeless to carry on the company with any prospect of success," &c. At the meeting an extraordinary resolution to wind up voluntarily was passed under the 3d sub-section of the 129th section of the Companies Act, 1862, and a liquidator was appointed. — *Held* that this resolution was invalid as an extraordinary resolution under the 129th section, and that the liquidator had no title, the notice not disclosing that it was proposed to pass such a resolution for winding-up as would not require confirmation by a subsequent meeting.

The Glasgow and District Co-Operative Society, Limited, incorporated under the Companies Acts 1862 and 1867, carried on business in Glasgow in groceries and such goods during 1873 and 1874.

At a meeting of the Company on the 2d April 1875 the following resolution was carried: — "That the directors be authorised to issue bonds to an amount not exceeding £2000, in bonds of £2, 10s. each, to be redeemed in five yearly drawings, or earlier in the option of the directors, at a premium of 5s. per bond. Until each bond is drawn interest will be paid half-yearly at the offices of the Company at the rate of five per cent. per annum. No dividend to accrue on the ordinary capital until all the bonds are redeemed."

At a subsequent meeting, on the 3d May 1875, the Company passed this resolution:—"It having been proved to the satisfaction of this meeting that the Company cannot by reason of its liabilities continue its business, resolve that it is advisable that the Company be wound up, and this meeting requires the Company to be wound up voluntarily accordingly."

A liquidator, John Wilson, was at the same time appointed, who forthwith proceeded to wind up the Company's affairs.

On 17th June 1875 M'Genn & Company, creditors of the Company, raised action against them in the Sheriff Court at Glasgow for payment of a debt due them, and thereafter, on 21st June, upon the dependence of the action, arrested goods and monies belonging to the liquidated Company in the hands of different parties. They further proceeded by an action of forthcoming to obtain the goods they had arrested.

This was a petition at the liquidator's instance under the 138th and 163d sections of the Companies Act 1862, praying the Court to order

M'Genn & Company "to desist and cease from following out the said action of forthcoming, and any other diligence to the prejudice of the general body of the creditors, and to acquiesce in and accept the same dividend as the said general body of creditors."

M'Genn & Company lodged answers, in which they stated that the resolution of 3d May was invalid, and the appointment of the liquidator null, in respect that the notice calling the meeting and the resolution itself were not in accordance with the provisions of the Companies Act 1862. The notice was not that prescribed for calling a meeting to pass an extraordinary resolution. It was in these terms:—

"Notice is hereby given, that an extraordinary meeting of the shareholders in this company will be held in the Religious Institution Rooms, upon Monday, the 3d day of May 1875, at two o'clock P.M.,

"To consider and if approved of, to sanction the voluntary winding-up of the company.

"The directors enclose a balance-sheet of the company's affairs, prepared by the auditor to this date. From the results of that balance, showing a deficiency of £3898, 3s. 9½d., it will be apparent that it is hopeless to carry on the company with any prospect of success, and that the directors are not warranted in asking the shareholders to advance any further sums by subscribing to the bonds, as proposed in a previous circular.

"JOHN BAILLIE, *Secy.*

"*Glasgow, 26th April* 1875."

They further stated they were misled by the resolution passed at the meeting of 2d April, which, if passed, would have enabled the company to pay its debts, and upon the faith of that resolution being carried out, and of statements that the company was able to pay its debts, they sold the company goods to a considerable extent.

In these circumstances M'Genn & Company asked that the prayer of the petition should be refused, and pleaded, *inter alia*—

"II. The prayer of the petition ought to be refused, in respect (1) the same is unauthorised by the statute; (2) the petitioner, in consequence of the invalidity of the resolution to wind up the company and the nullity of his appointment, is not *in titulo* to insist therefor; and (3) even if *in titulo*, the petitioner's remedy is to defend any action of furthcoming that may be raised, or to bring an action of multiplepoinding.

"IV. The resolution to wind up the said company being invalid, and the petitioner's appointment as liquidator null and void, the prayer of the petition falls to be refused, with expenses."

Argued for the petitioner—The company after coming to the conclusion that business could not be conducted successfully were entitled to come to a resolution to wind up. The notice given of the extraordinary resolution was sufficient. If that were so, under sections 87 and 163, the prayer of the petition should be granted.

Argued for the respondents—This was an extraordinary resolution, and being so was incompetent unless the company was insolvent. Even if competent, due notice was not given, and the petitioner had therefore no title. But if he should be held *in titulo*, he could not succeed in this petition, because (1) section 163 of the Act did not apply to voluntary windings up; (2) the action of furthcoming was not directed against the company; and (3) in every case the Court had discretion.

Authorities—*In re London and Mediterranean Bank*, June 8, 1871, L. R., 12 Equity, 335; *Oakes* v. *Turquand and Harding*, July 1867, L. R., 2 H. of L., App. Cases, 325; *in re Bridport Old Brewery Co.*, Jan. 12 1867, L. R., 2 Ch. App. 191; Buckley's Law and Practice under the Companies Act, 103.

At advising—

LORD PRESIDENT—This is a petition at the instance of the liquidator of the Glasgow and District Co-Operative Society (Limited), to restrain the respondents, who are creditors of the Company, from following out an action of furthcoming or any other diligence to the prejudice of the general body of creditors, and there is no doubt of the competency of such an application under ordinary circumstances. The respondents meet the petition by the important and serious objection that the Company was not validly put in liquidation, and that the liquidator has no title, which is undoubtedly a good answer if well-founded.

The ground of the objection is this—The resolution of the Company to wind up is dated 3d May 1875, and is as follows—[*reads resolution*]. It is expressed in terms of the 3d sub-section of the 129th section of the Companies Act (25 and 26 Vict. c. 89). Under this section there are three cases in which a company may be wound up voluntarily.

The difference between the second and third case, as contained in the 2d and 3d sub-sections of the section, is very important. In the second, it is enough that the Company has passed a special resolution requiring the Company to be wound up voluntarily, without assigning any reason or coming to any other resolution. That special resolution must be carried by a majority of three-fourths of the members present at that meeting, and must be affirmed subsequently by a majority present at a meeting held not less than fourteen days, nor more than a month, after the first meeting. A winding-up under the second head will not be effectual unless so carried out. The third case, which is the one with which we are here concerned, enables a company to wind up voluntarily if they have passed an extraordinary resolution "to the effect that it has been proved to their satisfaction that the Company cannot by reason of its liabilities continue its business, and that it is advisable to wind up the same." An extraordinary resolution means one that may be passed at one meeting without confirmation at a subsequent one, and it must be passed in such manner as would, if it had been confirmed by a subsequent meeting, have constituted a special resolution. There is here more than the mere resolution which alone is necessary under the second head; the difference is, that under this head the resolution must affirm that it has been shown to the satisfaction of the meeting that the liabilities of the Company prevent its continuing its business. In the present instance the resolution is unobjectionable in its terms, because it sets forth this fact, not indeed in precise words, but as nearly so as it is at all necessary to make them.

But it is said that no notice was given to the shareholders of the intention to pass such a resolution. There can be no doubt that notice was required. Everything depends here upon the terms of the notice, and had it contained no further intimation than that it was to be held "to consider and, if approved of, to sanction the voluntary winding-up of the Company," it is quite plain that the resolution carried at the meeting of the 3d May would be useless unless subsequently affirmed. The further statement which follows is not notice of a resolution, nor has it anything to do with a resolution which is to be moved. It is merely information. The reference to a previous circular which proposed the subscription of additional capital, has not much to do with the present question. The shareholders are informed that the Company's affairs are in a bad state, and that there is a deficiency. No doubt the balance-sheet which was sent with the notice shows a balance on the wrong side, but that fact cannot be said to exhibit the insolvency of the Company. Its capital is to a great extent lost, but it is not insolvent. The information given is to the effect (1st) that the resolution which it is intended to propose is to wind up voluntarily; and (2d), as a reason for this, that their affairs are not in a good condition. Is that notice that a resolution in terms of the third subsection under the statute is to be brought forward? I rather think a shareholder receiving this notice would be entitled to think that the resolution to be moved was one in terms of the second sub-section, and therefore requiring confirmation.

I cannot therefore say that this was a good notice, and that it conveyed to the shareholders that it was intended to proceed in terms of the third sub-section. At this meeting a liquidator was appointed, and his appointment cannot hold any more than the resolution. The petitioner's title therefore is destroyed, and the resolution passed must be held to be invalid.

Lord Deas—There are three ways in which a company may be voluntarily wound up. The third of these under the statute is by extraordinary resolution, which requires no subsequent confirmation; but there must be notice to the shareholders that it is intended to pass an extraordinary resolution. The notice of meeting in the present case does not bear that it was intended that any such resolution should be brought forward, and if there was no notice of it it is plain that all parties interested were entitled to take it for granted that no such course would be followed.

If any authority were necessary for the decision of the case, we have it in the case which was quoted to us *in re Bridport Old Brewery Company*, and one of the grounds upon which Lord Justice Turner based his opinion was, that the notice did not state that an extraordinary resolution to wind up the company would be proposed.

Lord Ardmillan—This is a case of voluntary winding-up. A Company in such a case proceeds by resolution. A Court in a judicial winding-up proceeds by orders. A resolution which requires confirmation is to be distinguished from a resolution that requires no confirmation.

The notice of a meeting to *consider* is not effectual as notice of a meeting to *resolve*; and notice of a meeting to pass a resolution requiring confirmation, and which therefore may be reconsidered, is not applicable to a meeting to pass a resolution not requiring confirmation, and which therefore is final and cannot be reconsidered. In the first case the subject could be discussed at the second meeting when confirmation of the resolution is proposed. In the last case, the resolution being final without confirmation is at once conclusive, and accordingly notice in the first case is by no means so important or so necessary as in the last case.

The expression, "extraordinary resolution," means, not a resolution at an extraordinary meeting, but a resolution which is itself of the character known as "extraordinary," and is so dealt with in the statute, and I have no doubt that, of a meeting called to pass an extraordinary resolution special notice suited to the nature of the resolution is directed by this statute, sections 51 and 129.

Your Lordship in the chair has pointed out that the first portion of the terms of the notice is all that can be properly said to be notice; the statement which follows is a mere comment or explanation, and is not meant to be anything more. In fact it is an embarrassing, perhaps a misleading, addition to the notice, and for the purposes for which the notice is now said to have been sufficient I think it was defective, as the notice in the *Bridport* case, cited to us, was held to be.

It would be hazardous to regular procedure in these cases to come to a different conclusion.

Lord Mure — I also concur, and think that there is here no express notice of the intention to pass an extraordinary resolution. The addendum to the notice is a description which is calculated to be misleading to all the shareholders, and to make them think that nothing more was to be done than had been done at the meeting a month before.

The following interlocutor was pronounced:—

"Sustain the objection stated for the respondents to the title of the petitioner; dismiss the petition and decern; find the respondents entitled to expenses; and remit to the Auditor to tax the account thereof and report."

Counsel for the Petitioners—Guthrie Smith—Henderson. Agents—Mitchell & Baxter, W.S.

Counsel for the Respondents — M'Kechnie — Guthrie. Agent—Robert Steven, W.S.

Wednesday, February 19.

FIRST DIVISION.

THE LORD ADVOCATE *v.* THE SCHOOL BOARD OF THE PARISH OF STOW.

School—Education Act 1872 (35 & 36 *Vict. cap.* 62) *—Board of Education—School Board.*

In a petition at the instance of the Lord Advocate under the 36th section of the Education Act 1872, to have a School Board ordained to comply with a requisition made upon them by the Board of Education, that they should proceed to erect certain school buildings in terms of a resolution by the School Board, confirmed by the Board of Education—the Court are under the statute