with and under this express provision and declaration, as it is hereby expressly provided and declared, that in case the succession to the lordship of Arbuthnott shall devolve upon the said Hugh Arbuthnott, or in case he or any of the other heirs and substitutes beforenamed and appointed shall come to stand next in succession to the said lordship of Arbuthnott, then, if either of these events shall happen before the succession to the lands and others after disponed by virtue of these presents shall have opened to him or any of the other heirs of tailzie before specified in their order, the succession shall devolve," and so forth. Now, one is quite entitled to say that this is one of these conveyancing clauses—whether taken from a style-book or not I do not stop to inquire—which is quite useless for any practical purpose; which has no effect in strengthening any purpose previously expressed. I quite assent to the statement made at the bar, that no such clause has ever been found to be of any practical value. No doubt when the event happens that the person previously entitled to succeed to Hatton forfeits his right to do so he must do what is here specified. But the law will provide that. It needs no such clause as this to direct what course is to be pursued. But the uselessness of this clause tells on both sides. The appellant says—"If it is useless for that purpose, the only object in inserting it must be to include the heirs to whom these restrictions were not previously applied." This is a curious argument. It amounts to this, that this clause, having been found useless in all deeds we have ever seen, is to receive a most important meaning here. The respondent maintains that it is to receive no more meaning than it has hitherto received. These words, it seems to me, are mere words of style, and this is the first time a proposal has been made that they should receive such a meaning as this. There was a much simpler mode of providing that the nearest heirs-male whomsoever should not hold both estates. It could have been done in one-twentieth of the space occupied by this clause, by appending to the branch of the destination containing them a prohibition just as in the previous branches of the destination. To say that this is the object of this last clause is to attribute an irrational purpose to the entailer and to the maker of the deed.

The words used are, it may be observed, rather peculiar; they are, "any of the other heirs and substitutes before named and appointed." That is hardly a phrase applicable to "heirs-male whomsoever." Such persons can hardly be said to be "named and appointed." In the previous instances, where the younger sons are taken in order, the head of the *stirps* is named, and his heirs-male appointed. The phrase is much more appropriate to their case. It is quite true that in other parts of the deed we have the words "heirs specified in their order;" but I think that the true view of these clauses is that they were only intended to apply to the class of heirs regarding whom it has already been provided that they are to forfeit their right to the estate of Hatton if they shall succeed or stand next in succession to the lordship of Arbuthnott.

It is only necessary to observe further the clause as to provisions to wives and children by the heirs of entail. The entailer provides that any provision of the kind made to affect the lands of Hatton shall, "if the granter thereof shall succeed to the lordship of Arbuthnott, in that event be absolutely null and void." And in imposing these conditions he certainly expresses himself in terms sufficient to include all heirs of entail who are called, including the "heirs-male whomsoever" of the entailer. That cannot be disputed, but I think there are two answers to it. First—It is not taking any great liberty with this clause to hold that its words are made as comprehensive as they are by mere oversight. The maker of the deed is no longer dealing with the destination, and accordingly expresses himself with greater looseness. But in the second place, even if he did intend to express himself to the effect that his heirs-male whomsoever succeeding to Arbuthnott should no longer have power to grant provisions of this kind over Hatton, that is a perfectly rational purpose. He may quite well intend that such provisions are to be laid exclusively upon Arbuthnott if anyone should be in the happy position of holding both estates.

On the whole matter, I think that the heirs-male whomsoever of the entailer are not made subject to this condition, and the consequence of that is that Lord Arbuthnott, being the next heir-male of the entailer, is entitled to be preferred to his second son.

LORDS DEAS, MURE, and SHAND concurred.

The Court adhered.

Counsel for Nicolson (Arbuthnott's *curator bonis*) (Appellant)—Asher—Pearson. Agent—John Walker, W.S.

Counsel for Lord Arbuthnott (Respondent)—Dean of Faculty (Fraser)—Paul. Agents—J. J. & A. Forman, W.S.

Friday, June 7.

FIRST DIVISION.

CLARK AND OTHERS (LIQUIDATORS OF WEST CALDER OIL COMPANY) *v.* WILSON AND OTHERS.

Public Company—Statute 25 *and* 26 *Vict. cap.* 89 (*Companies Act* 1862), *secs.* 136, 137, 87, 163, 138—*Powers of the Court to Restrain Diligence in a Voluntary Winding-up.*

A company was being voluntarily wound up when one of their creditors poinded the company's goods for a debt due for expenses in an action of interdict. The liquidators and a majority of three-fourths of the company's creditors then entered into an arrangement under the above-mentioned sections of the statute, with a view to restraining diligence. The third heading of the arrangement was as follows:—"The rights of all parties under the voluntary liquidation shall be settled on the same footing as if there had been a winding-up by or subject to the supervision of the Court under and in terms of the Companies Act 1862."

A petition at the instance of the liquidators, under the 138th section of the Companies Act 1862, praying the Court to restrain the diligence which had been used as above, *refused* on the ground that the heading of the arrange-

ment quoted above aimed at introducing a new method of winding-up, viz., a voluntary winding-up proceeding on the same footing as a winding-up under the supervision of the Court, and was beyond the powers conferred by the 135th and 136th sections of the Act.

Process—Lord Ordinary on the Bills in Vacation—Companies Act 1862, *sec.* 138.

Opinion (*per* Lord Shand) that as the petition raised a question directly "in the matter of the winding-up," it could competently under the 138th section of the Companies Act 1862, be brought before the Lord Ordinary on the Bills in vacation.

This was a petition presented by Mr George Wilson Clark and others, the directors, liquidators, and creditors of the West Calder Oil Company (Limited), against Mr John Wilson and others, for an order to restrain diligence. In May 1874 the respondents raised an action of declarator and interdict against the petitioners' company to have them interdicted from polluting the river Almond. The company admitted the pollution, and the respondents obtained decree of declarator with expenses up to 4th May 1874. From that time forward the company was allowed by the Court repeated opportunities of preventing pollution by reconstruction of their works. But as they failed to do so, the respondents at length obtained decree of interdict against the company on 3d November 1877, and on 1st March 1878 decree for expenses from 4th May 1874, amounting to £418, 9s. 1d., with 19s. 8d. of extract dues." A charge for these expenses was executed on the company on 3d April 1878, and on the 19th, on the expiry of the charge, a poinding of goods belonging to the company was carried into execution.

On 5th March 1878 it was resolved that the company should be wound up voluntarily, and on 22d March this resolution was confirmed and passed. The company then presented a petition in vacation to the Lord Ordinary on the Bills, praying the Court to restrain the diligence, on the ground that the respondents were endeavouring to obtain a preference over the other creditors of the company. An arrangement come to by the company and its liquidators on one part, and the creditors of the company on the other, was founded on, the heads of which arrangement were as follows:—"1st, That the voluntary winding-up of the company shall be proceeded with. 2d, That the liquidators shall, within ten days from the last date hereof, convene a meeting of the creditors of the company for the purpose of appointing a committee of their number to advise with the liquidators in regard to the said winding-up of the company. 3d, The rights of all parties under the voluntary liquidation shall be settled on the same footing as if there had been a winding-up by or subject to the supervision of the Court under and in terms of the Companies Act 1862. 4th, That a meeting of the Company shall also be held for the purpose of sanctioning the arrangement, in terms of section 136 of the said Companies Act." This arrangement was stated to have been agreed to by a majority of more than three-fourths in number and value of the creditors of the company.

The petitioners founded upon the following sections in the Companies Act 1862 as authorising the application:—Section 136 — "Any arrangement entered into between a company about be to wound up voluntarily, or in the course of being wound up voluntarily, and its creditors, shall be binding on the company if sanctioned by an extraordinary resolution, and on the creditors if acceded to by three-fourths in number and value of the creditors, subject to such right of appeal as is hereinafter mentioned." Section 137—"Any creditor or contributory of a company that has in manner aforesaid entered into any arrangement with its creditors may, within three weeks from the date of the completion of such arrangement, appeal to the Court against such arrangement, and the Court may thereupon, as it thinks just, amend, vary, or confirm the same." Section 87—"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." Section 163—"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." Section 138—"Where a company is being wound up voluntarily, the liquidators or any contributory of the company may apply to the Court in England, Ireland, or Scotland, or to the Lord Ordinary on the Bills in Scotland in time of vacation, to determine any question arising in the matter of such winding-up, or to exercise as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court; and the Court or Lord Ordinary, in the case aforesaid, if satisfied that the determination of such question, or the required exercise of power, will be just and beneficial, may accede wholly or partially to such application, on such terms and subject to such conditions as the Court thinks fit, or it may make such other order, interlocutor, or decree, on such application as the Court thinks just."

The Lord Ordinary on the Bills (Shand) allowed the respondents to lodge answers, and granted interim interdict against a sale of the company's property.

The respondents stated in answer, *inter alia*, that the petition was incompetent. In so far as it was founded on section 138 of the Companies Act 1862, the Court, or the Lord Ordinary on the Bills in vacation, had no power to stay proceedings by creditors against a company which was being wound up voluntarily; the powers conferred upon the Court and the Lord Ordinary by that section, it was said, were confined to matters properly falling under a voluntary winding-up. The only competent way of obtaining the benefit of a winding-up subject to the supervision of the Court was by applying to the Court under the 147th and following sections of the Companies Act 1862; and no extrajudicial arrangement between a company and some of its creditors could bind non-acceding creditors to the effect of staying proceedings at their instance against the company. The arrangement set forth in the third head above quoted was not an arrangement in the sense of the 136th section of the statute, but simply an attempt to obtain the

benefit of a winding-up under the supervision of the Court at the expense of the respondents, who under the said arrangement could not come to the Court for protection.

The case was then argued before the First Division.

Authorities—*Barston & Co.*, 1867, 4 Law Rep. (Eq.) 681; *Imperial Steamship Co.*, 37 L.J. (Ch.) 517; *Sdeuard* v. *Gardner*, March 10, 1876, 3 R. 577; *Albert Assurance Co.*, 6 Law Rep. (Ch.) 381.

At advising—

LORD PRESIDENT—This is a petition presented under the Companies Act of 1862. The respondents are creditors of the West Calder Oil Company for a debt of £418, 9s. 1d., being expenses awarded to them in an action of declarator raised by them against the company. Decree for expenses was pronounced in their favour on 1st March 1878. On the 19th April the respondents poinded certain property belonging to the company, and the poinding was carried out. A petition was thereafter presented to the Lord Ordinary on the Bills on 24th April, praying the Court to restrain the respondents from proceeding with the poinding. The matter was an important one, and the Lord Ordinary allowed answers to be lodged, and meantime granted interim interdict against the sale. The question now is, Whether this diligence shall be permanently restrained? When the diligence was executed the company was in process of voluntary liquidation, in terms of a resolution of 5th March 1878, and if the voluntary liquidation had subsisted, and nothing further had taken place, the case would have been ruled by that of *Sdeuard* v. *Gardner*, in which it was held that liquidators in a voluntary liquidation are not entitled to ask the Court to restrain diligence.

But there is a peculiarity in this case which is said to take it out of the authority of *Sdeuard*. The company drew up an arrangement with its creditors under section 136 of the Act. That section provides—"Any arrangement entered into between a company about to be wound up voluntarily, or in the course of being wound up voluntarily, and its creditors, shall be binding on the company if sanctioned by an extraordinary resolution and on the creditors if acceded to by three-fourths in number and value of the creditors, subject to such right of appeal as is hereinafter mentioned." It is said the arrangement is such as is sanctioned by that section, and that if that arrangement is binding all the creditors are restrained from diligence.

The heads of this arrangement are as follows —[*his Lordship here quoted the heads as above*].

Now, it is said that a meeting in terms of section 136 was held, and that this arrangement was sanctioned by a majority of three-fourths in number and value of the whole creditors. This is denied by the respondents. But that such was the case must be assumed for the present. Now, if this arrangement is binding on all the creditors as well as on the company, and if the third head of the arrangement is a competent provision to make under the section of the statute, then all the creditors must submit to the provisions of that section. But the question is, whether it is competent under the section for a company and three-fourths of its creditors to make a provision that a voluntary winding-up shall go on as if it were a winding-up by the Court or under supervision of the Court—in short, that this winding-up shall have all the consequences of a winding-up under either of those methods. This certainly seems very startling. The difference between a winding-up by the Court and one under the supervision of the Court was much canvassed in *Sdeuard's* case, and we held, *inter alia*, that in a voluntary winding-up it is not competent to come to the Court to restrain diligence.

Now, the question is, Whether a majority in number and value of the creditors not only can secure this privilege under a voluntary winding-up, but can confer on the Court a jurisdiction which the statute has not conferred? This arrangement cannot be sustained as competent under this section. No doubt a provision might be made securing *pari passu* ranking among the creditors, and if that were competently done it is very good that it should be. But there are competent ways and incompetent ways of doing things. It may be competent, though I give no opinion, for three-fourths of the creditors to agree to adhere to certain rules, but it is quite a different thing for them to say "under our arrangement we will change the whole machinery of the statute." That is quite incompetent, and all that is necessary for us to do is to find that this petition is incompetent, and that the present petitioners have no more right to the granting of the present petition than the petitioner in *Sdeuard's* case, and therefore I am of opinion that the third head of the arrangement can have no effect.

LORD DEAS and LORD MURE concurred.

LORD SHAND—I am of the same opinion as that expressed by your Lordship. It is, I think, unfortunate that in the statutes with which we are dealing power has not been given here as in England to a single Judge to grant the necessary order for a winding-up by the Court or subject to the supervision of the Court, with all the beneficial consequences which thereby follow. The aid of this Court in the winding-up of joint-stock companies and restraining the diligence of creditors cannot be obtained during vacation, and the result in the present case is that one creditor has, I think unfortunately, secured a preference by the use of diligence, although apparently the Company and its other creditors were unanimous in desiring to have a winding-up which would make the most of the estate for all concerned and give a *pari passu* ranking to the unsecured creditors.

It was maintained by the respondents that the arrangements provided for by section 136 of the statute are of a very limited character, being such arrangements only as are mentioned, viz., such as have in section 135 reference only to "the powers to be exercised by the liquidators, and the manner in which they are to be exercised." I am of opinion that this view is unsound, and that the provision of section 136 is of a much wider character than the argument of the respondents would admit. The terms used in section 136 are very general in their nature, and the same observation may be made as to the provision by the Act of 1870. I think, with your Lordship, that three fourths of the creditors may by arrangement with the Company regulate

a great many matters for the general behoof so as to promote the principal object of liquidation, viz., a realisation of the estate without delay and a *pari passu* ranking of the unsecured creditors. It was a legitimate course with this view that in the present instance the creditors by three-fourths of their number should agree that all should abstain from doing diligence, and if the arrangement founded on had been to that limited effect, and distinctly expressed, I see no reason to doubt it would have been effectual, although subject to appeal under section 137 of the statute. But unfortunately the parties attempted to do much more than this, for, as your Lordship has observed, the arrangement was that the rights of parties should be settled on the same footing as if there had been a winding-up by or subject to the supervision of the Court under and in terms of the Companies Act 1862, which was really a resolution to have a winding-up by or under the supervision of the Court in circumstances in which that could not be obtained under the statute. Supposing the agreement were effectual, the result of it as regards creditors doing or seeking to do diligence would be that by the agreement section 87 of the statute would be brought into operation. Now, observe what that section 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 effect of the agreement was not that all the creditors should be bound to refrain from doing diligence, but that creditors could not go on with action or diligence except with the leave of the Court and subject to such conditions as the Court might impose. But where is the jurisdiction of the Court to entertain any application on this subject? The parties cannot by arrangement create such jurisdiction or invoke the aid of the Court except by complying with those provisions of the statute which prescribe the circumstances and the manner in which the Court may interfere. The parties might, I think, have attained their object by an arrangement to the effect simply that the creditors should all refrain from diligence, although that might have been varied on cause shown on appeal, but the arrangement in the terms attempted fails because it aimed at too much.

I think the objection of the respondents to the competency of the application is not well founded. The distinction between this case and *Sdeuard* is, that this application is presented under a separate and distinct branch of the 138th section, by which the Lord Ordinary on the Bills in vacation of the Court of Session is enabled "to determine any question arising in the matter of a winding-up." This application raises a question directly in the matter of a winding-up, the question, namely, whether the whole creditors were or were not bound by the arrangement founded on accordingly. I hold that the application is competent, but for the reasons which have been explained I think it must be refused.

The Court therefore *refused* the prayer of the petition.

Counsel for Petitioners—Balfour—Rankine. Agents—Maclachlan & Rodger, W.S.

Counsel for Respondents — Moncrieff — Macintosh. Agents—Waddell & M'Intosh, W.S.

Saturday, June 8.

SECOND DIVISION.

[Lord Adam, Ordinary.

BARR *v.* COCHRANE.

Lease—Seller and Purchaser of Agricultural Subjects Let on Lease—Liability of Former when called upon by Latter to make Repairs stipulated in Lease, where Money Payment made by him to Tenants in lieu thereof.

The purchaser of an estate has no title to insist on the seller fulfilling specific obligations to make repairs which he was bound to execute by his lease to the tenant, the seller having come to an agreement with the tenant by which he was relieved from all such claims in consideration of a sum of money.

The proprietor of an estate bound himself to the tenant in the lease of a farm to put the buildings, &c., on the farm into good condition, the tenants binding themselves to leave them so at the end of the lease. Before doing this, but after the tenants had taken possession, he sold the estate. A claim having been intimated to the purchaser by the tenants, the seller bound himself to the purchaser "to execute all repairs, &c., which he was bound to execute by his lease, . . . and to relieve you as purchaser of all claims at the instance of the tenants." The seller thereupon entered into an agreement with the tenants that they should relieve him from all claims competent to them in consideration of a sum of money. *Held* (*aff.* Lord Adam, Ordinary—*diss.* Lord Ormidale) that the tenants being the only creditors in the obligation, the purchaser could not insist on the seller doing the work stipulated for.

By lease, dated 20th May and 23d June 1874, the defender in this action, Mr Cochrane, let to Messrs Inch & Mark the farms of Camilty and Crosswoodburn, with entry at the term of Whitsunday 1874. These farms were part of the estate of Harburn, of which Mr Cochrane was then the proprietor. The lease contained the following clause—"And further, as the said James Cochrane has agreed to put, as at the said term of Whitsunday 1874, the said dwelling-houses and offices on the said farms, as well as the bridges and the private roads therein and the fences on the same, including the march wall at Middle Crosswood, into good and sufficient tenantable condition, the said John Inch and Robert Mark bind and oblige themselves and their foresaids to keep and maintain the same, with the exception of the black ditch fence aftermentioned, in the like good and sufficient tenantable condition at their removal from the premises." Mr Cochrane sold the estate, including these farms, to the pursuer in this case, Mr Barr, at Whitsunday 1875.

The obligations undertaken by Mr Cochrane to the tenants Messrs Inch & Mark, viz., to put the houses and fences into good and tenantable condition, had not been implemented by him at the time of the sale of the estate to Mr Barr. Messrs Inch & Mark intimated to Mr Barr's agent, by letter dated 15th May 1875, their intention to retain the rents till the necessary