

Friday, March 19.

FIRST DIVISION.

JAMIESON AND ANOTHER (LIQUIDATORS OF
THE CALIFORNIA REDWOOD COMPANY,
LIMITED) v. WALKER AND ANOTHER.

*Public Company—Winding-up—Order to Stay
Proceedings—Foreign—Jurisdiction—Recon-
vention—Companies Act 1862, secs. 87 and 122.*

The liquidators of a Scottish company presented a note to the Court of Session for an order to stay proceedings which had been taken against the company in the Superior Court of San Francisco. The proceedings were at the instance of a firm in California for the purpose of enforcing a claim for commission alleged to be due in respect of services rendered to the company by the firm, and following on the action the firm had attached certain shares belonging to the company. The company in liquidation was admittedly subject to the jurisdiction of the Court in California, and had entered appearance as defenders in the action there. The liquidators stated that they had a counter-claim against the firm for promotion-money or illegal commission which they alleged the firm had received, and maintained that the rights of parties should be determined in the liquidation. Neither of the partners of the firm were domiciled Scotchmen. One of the partners was resident in London, and had brought in the Court of Session a suspension of a charge to pay calls said to be due by him in respect of shares which he held in the company. The other partner was resident and domiciled in California. He was one of two marriage-contract trustees under an English trust who had lodged a claim in the liquidation in respect of debentures of the company belonging to the trust, but in which he had no beneficial interest. This claim was lodged without his knowledge when he was in California. The claim was satisfied before judgment was given in the note to stay proceedings. Note refused on the ground that the Court had no jurisdiction *ex reconvention* or otherwise over the partner of the firm who was domiciled in California.

*Observations on the effect of section 122
of the Companies Act 1862.*

This note was presented in January 1886 by George Auldjo Jamieson and Francis More, liquidators of the California Redwood Company, for an order to stay proceedings. The date of the resolution to wind up the company was 28th April 1885, and a supervision order had been pronounced by the Court on 22d May 1885.

The respondents in the application were James Davidson Walker and Henry Dalbiac Harrison, copartners under the name and style of Falkner, Bell, & Company, trading as merchants in San Francisco, California, and also trading in London under the firm of Bell, Harrison, & Company, who had raised in the Superior Court of San Francisco in California an action against the company for two sums as commission for the

services of the firm in connection with the business of the company, the amount of which was alleged to be upwards of £5000. Following upon this action they had levied attachments of the shares of the California Redwood Company of California, the whole of the shares of which were stated to belong to the company in liquidation.

The prayer of the note was that the Court should "pronounce an order restraining the said James Davidson Walker and Henry Dalbiac Harrison, copartners as aforesaid, from taking any further proceedings in the foresaid action raised in the Superior Court of San Francisco aforesaid in or about the month of November 1885 by them against the said California Redwood Company (Limited); and also to restrain them from taking or continuing any further proceedings in or connected with the foresaid attachment of the shares held by the said company in the California Redwood Company (of California), or any other proceedings for attaching or affecting the property, heritable or moveable, real or personal, of the company, whether in security or in satisfaction or execution of any judgment or decree in the said action, as also to ordain the said James Davidson Walker and Henry Dalbiac Harrison, copartners aforesaid, to abandon and withdraw the foresaid action and the said attachment of the said shares."

It was stated in the note that the company and the liquidators had good defences to the action, and that the company was not due to the plaintiffs the sum claimed; and further, that the company had a claim against them for about £20,000 as promotion-money or illegal commission which they alleged had been obtained from the vendors by the firm.

It was further stated—"The said James Davidson Walker is resident in London. The said Henry Dalbiac Harrison was resident in London, but is now in San Francisco. They are the only partners of the said concern, which trades in London in the name of Bell, Harrison, & Company, and in San Francisco under the name of Falkner, Bell, & Company. They are possessed of assets and property in London and elsewhere in the United Kingdom which are liable for the obligations of both firms. The said James Davidson Walker is a shareholder of the company, being a holder of (1) 120 shares in his own name; (2) 690 shares in the joint name of himself and William John Menzies, W.S., Edinburgh, besides certain other shares in his wife's name." Mr Walker was charged to make payment of the calls due on these shares, and on January 1, 1886, raised a suspension of the charge, to which the liquidators lodged answers. This action was in dependence at the date of the application.

Henry Dalbiac Harrison and George Clarke Bellairs of 11 Clements Lane, Lombard Street, London, trustees under the marriage-contract of Mr and Mrs Carr Young, had lodged, as creditors, a claim in the liquidation in respect of debentures of the company. Under an agreement concluded in the course of the liquidation, dated 24th November 1885, and sanctioned by the Court, they were entitled to (1) the sum of 12s. per £ payable in cash; and (2) debentures of a new company to be formed for the balance of 8s. per £.

On 29th December 1885 Mr Harrison and Mr Bellairs received payment of the arrears of in-

terest due on the debentures. On 19th February 1886 the liquidators paid 12s. per £ by cheque in favour of "Wm. Carr Young, Esq., for H. D. Harrison and Mr Bellairs, or order," transmitted to Mr Carr Young, and delivered the debentures of the new company to and in favour of "George Clarke Bellairs, Lieutenant-Colonel, the Newark, Leicester, and Henry Dalbiac Harrison, merchant, 11 Clements Lane, London, E.C." in exchange for the old debentures, and a receipt and discharge signed by Mr Bellairs, and by Mr Carr Young acting for Mr Harrison under general power of attorney, accompanied with a guarantee by Mr Bellairs and Mr Young guaranteeing the company and liquidators against all loss, damage, and expense in consequence of their accepting the said receipt and discharge.

Under the above-mentioned agreement, according to the statement of the liquidators, Falkner, Bell, & Company were entitled to full payment of any debt they might establish against the company in respect of the claims sued for in the action in California.

The liquidators founded upon section 87 of the Companies Act 1862, 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." They also founded upon section 122 of the same Act, which provides—"Any order made by the Court in England for or in the course of the winding-up of a company under this Act, shall be enforced in Scotland and Ireland in the Courts that would respectively have had jurisdiction in respect of such company if the registered office of the company had been situate in Scotland or Ireland, and in the same manner in all respects as if such order had been made by the Courts that are hereby required to enforce the same; and in like manner orders, interlocutors, and decrees made by the Court in Scotland for or in the course of the winding-up of a company shall be enforced in England and Ireland, and orders made by the Court in Ireland for or in course of winding-up a company shall be enforced in England and Scotland by the Courts which would respectively have had jurisdiction in the matter of such company if the registered office of the company were situate in the division of the United Kingdom where the order is required to be enforced, and in the same manner in all respects as if such order had been made by the Court required to enforce the same in the case of a company within its own jurisdiction." They stated that on obtaining the order prayed for they would be able to get it enforced by the Chancery Division of the High Court of Justice in England, which had jurisdiction over Walker & Harrison.

The respondents lodged answers, which contained the following statements:—"The company is subject to the jurisdiction of said Court in San Francisco, and has entered appearance there, and lodged a defence to said action. Explained that the matters and facts to be inquired into in said actions took place in or near San Francisco, and almost all the witnesses who can speak thereto are resident there. It would cause great additional expense to have any inquiry in this country. The questions of law at issue in said ac-

tions, moreover, fall to be determined by the law of San Francisco, which is in several important respects different from the law of Scotland . . . Falkner, Bell, & Company's only place of business is in San Francisco. The firm is established under the special provisions of the law of California, and by the said law is a separate *persona*, distinct from that of the individual partners thereof, and neither the firm nor any of the partners thereof is subject to the jurisdiction of any of the Courts of this country or of England.

It was admitted that Mr Walker was holder of 120 shares of the company. With reference to the claim made by Harrison and Bellairs, it was stated that this claim was made on behalf of the marriage-contract trustee of Mr and Mr Carr Young, and that Harrison had no personal or beneficial interest in the debentures. It was explained that Harrison was in San Francisco when the claim was made, and that he knew nothing about it, and that his name was used by Mr Carr Young acting under a power of attorney without communicating with him.

It was further stated—The Court of Session has no power or authority over the pursuers or plaintiffs in said action in San Francisco, and the Court in San Francisco would not recognise or give effect to any order or warrant by the Courts in this country ordering the proceedings in San Francisco to be stayed. The prayer of the note should be refused, in respect, *inter alia*, (1) It is incompetent; (2) The Court of Session has no jurisdiction over the plaintiffs in said proceedings in San Francisco, and said plaintiffs are not subject to the jurisdiction of any of the Courts of England; (3) The Court of Session is not a *forum conveniens* in regard to the questions at issue in the actions pending in San Francisco.

Argued for the liquidators—The Court should restrain proceedings taken outside the liquidation—*Carron Company*, 5 Clark (H.L.) 416, *per* Lord Cranworth; *Oriental Inland Steam Co., ex parte Scinde Railway Co.*, L.R., 9 Ch. Ap. 557. Section 87 applied to diligence as well as to actions—*New Glenduffhill Coal Company v. Muir & Co.*, Dec. 16, 1882, 10 R. 372. The Court had the same power to restrain an individual over whom they had jurisdiction from taking proceedings in a foreign Court as from taking proceedings in a Court in the United Kingdom—*Lindsay v. Pater-son*, July 10, 1840, 2 D. 1373; *Young v. Barclay*, May 27, 1846, 8 D. 774—approved by Lord Selborne in *Orr Ewing's Trustees*, 13 R. (H.L.) 1; *Burge's Com.* iii. 1075; *Maclachlan v. Meiklam*, July 9, 1857, 19 D. 960. The probability was that the Court in California would respect an order of the Court of Session—*Busby*, 5 Maddox 297; *Carron Company, supra cit.*, p. 440. The Court could proceed by way of interdict and penalty for breach of interdict—*International Pulp Co.*, 3 Ch. D. 594; *Hamilton v. Caledonian Railway Company*, Nov. 12, 1847, 10 D. 41, altered 7 Bell's App. 272. The Court had jurisdiction over Walker in virtue of section 122, and also because he was before the Court in other proceedings, and therefore liable *ex reconventiono*.—*Ord v. Barton*, Jan. 22, 1847, 9 D. 541; *Thompson v. Whitehead*, Jan. 25, 1862, 24 D. 331, at p. 340; *Barr v. Smith and Chamberlain*, Nov. 18, 1879, 7 R. 247. This latter ground of jurisdiction applied also to Harrison, who had made a claim in the liquidation in regard to debentures.

But even if Walker alone was interdicted the firm could not proceed with the action. The order was not intended to operate on the foreign Court, but against the person to be interdicted. The power to pronounce such an interdict was not merely statutory, but inherent in the Court. The question with regard to their promotion money should be tried in the Scottish Court—*Huntingdon Copper Co. v. Henderson*, Jan. 12, 1877, 4 R. 294, *aff.* 5 R. (H.L.) 1; *Hay, in re Canadian Oil-Works Corporation*, July 20, 1875, L.R., 10 Ch. Ap. 593.

Argued for the respondents—The only source of jurisdiction pleaded by the liquidators was re-convention, and the facts were not sufficient to support it—*Thompson v. Whitehead*, Jan. 25, 1862, 24 D. 331; *Bell v. Stewart*, June 4, 1852, 14 D. 337. They could not put their case higher than that; if the Court pronounced an order the Californian Court would probably give effect to it *ex comitate*. Section 122 of the statute did not give the Court jurisdiction over persons resident in other countries—Buckley on the Companies Acts, secs. 87 and 122.

At advising—

LORD PRESIDENT—In the liquidation of the California Redwood Company, Limited, the liquidators have moved for an order to stay certain proceedings adopted by the respondents Messrs James Davidson Walker and Henry Dalbiac Harrison. These gentlemen, it appears, carry on business in California under the firm of Falkner, Bell, & Company, and they have raised an action in the Supreme Court of that country against the company in liquidation for the purpose of recovering from them the sum of £5000 alleged to be due to the pursuers of the action as commission upon certain transactions conducted for the company in liquidation; and it also appears that upon that action the plaintiffs have used some kind of diligence in California which has the effect of attaching certain property belonging to the company in that country. The effect of course of these proceedings will be, if the respondents are successful, to secure them preferences under the diligence which they have done; at least, I apprehend that must be taken for granted in the meantime.

Now, the respondents explain that the company in liquidation is subject to the jurisdiction of the Court in San Francisco—that appears not to be disputed—and has entered appearance there as defenders in the action raised by the respondents. They also state that the matters and facts to be inquired into in said actions took place in or near San Francisco, and almost all the witnesses who can speak thereto are resident there; that it would cause great additional expense to have any inquiry in this country, and that the questions of law at issue in said actions moreover fall to be determined by the law of San Francisco. They therefore maintain that it is very inexpedient in the first place that the question raised in that action should be tried in this country and not in the Court of San Francisco; and they object further that neither of the respondents is subject to the jurisdiction of this Court, and therefore that it is not competent for this Court to grant an order restraining proceedings in California. This last objection, passing over the consideration of the inexpedi-

ency or inconvenience of trying the question in this Court, seems to me to be a very formidable one.

As regards Mr Walker, he is no doubt a shareholder of this company to the extent of 120 shares I think, and although he is resisting by means of suspension in this Court payment of certain calls made upon him, it cannot be on the ground that he is not owner of these shares, and that he is not a partner of the company in respect of them, because he admits in his answers to this application that he is a shareholder to that extent. But his sole ground of defence to the present application, so far as I can see, is that he is not within the liquidation, that he is not resident within our jurisdiction, and is not likely to be, that he is not a domiciled Scotsman, and indeed appears to have no connection with Scotland of any material kind.

As to Mr Harrison, he is a partner in the firm of Falkner, Bell, & Co., and he stands still more free of any connection with this liquidation, because he is a person domiciled in California, while Mr Walker is resident at present in London, and appears to have a commercial connection with the city of London. But Mr Harrison has no residence in any part of the United Kingdom, but is resident and domiciled in California. It is said that he was a creditor in this liquidation, and that as such he obtained payment of a considerable sum of money from the liquidators. But that requires to be considered with reference to the explanation given by Mr Harrison himself upon this matter in the answers. He was one of two trustees under the marriage-contract of Mr and Mrs William Carr Young, who appear to be English people. He had himself no beneficial interest whatever in the funds which were recovered for these marriage-contract trustees, and it would rather appear from what he here alleges, which I fancy we must take for granted as true, that he really had no knowledge of the proceedings in this liquidation at all for the recovery of the money due to the marriage-contract trustees. The claim was made by the other trustee, Mr Bellairs, and by Mr William Carr Young as attorney for Mr Harrison. Mr Harrison says that this was done under the general power of attorney to act for him as one of the marriage-contract trustees along with his co-trustee, but as regards the particular matter in which Mr Carr Young acted for him in concurring with the other trustee in obtaining this money he had no knowledge whatever. It is plain, therefore, that Mr Harrison's connection with this liquidation is of the very slightest character possible, if indeed it can be said to exist at all.

Now, in these circumstances the question is, whether we should grant the prayer of the liquidator's note, and order these parties, the respondents, to stay proceedings in the actions in the Courts of California? It is not desirable that this Court should pronounce orders which it cannot enforce, and still less if there be any doubt of the jurisdiction against the parties to whom these orders are directed.

Now, it appears to me that we have no jurisdiction against Mr Harrison. He has not subjected himself to the jurisdiction of this Court in any way. He has no *persona* in connection with this Court. He is not claiming in this liquidation, because even if he can be said to have

claimed at one time the claim has been satisfied. The debt has been discharged, and all connection that he ever had with this liquidation is gone; it has come to an end. I therefore cannot say that I can see any ground for holding that there is jurisdiction against Mr Harrison, and if there be any against Mr Walker it can arise only from the circumstance of his being a shareholder of the company in liquidation.

Now, whether that would be sufficient in itself I do not stop to inquire, because I think that if we have no jurisdiction against Mr Harrison nothing can be more inexpedient or improper than to grant an order interdicting Mr Walker from proceeding with that company suit of Falkner, Bell, & Company in liquidation in California. I think the suggestion is altogether anomalous. These parties are pursuing a suit for partnership purposes to recover money due to the partnership of which they are partners, and to restrain one of these partners from going on with such a suit while the other remains free to carry it on is a sort of proceeding which I do not think could have been contemplated by the 87th section of the Companies Act of 1862. Therefore I am for refusing this application.

A great deal of the argument was founded upon the 122d section of the Act of 1862, but I do not think that as regards even Mr Walker any order that we might make for the purpose of enforcing our interdict restraining him from pursuing the action in California would be given effect to in an English Court under that section of the statute. It appears to me that what that section contemplates is that all orders pronounced by this Court in the course of a liquidation, whether it be an order for winding-up a company, or an order for continuing a liquidation under supervision, or any order made for enforcing payment of calls, or for payment of money otherwise in the liquidation, will receive effect in England by the intervention of the courts of law there just in the same way as if that order had been made by itself.

But suppose that we were to issue an order against Mr Walker as resident in London for the purpose of apprehending him, and bringing him before this Court as in contempt of Court, a question for consideration would remain, whether that would be an order within the meaning of the 122d section of the statute, and therefore as regards Mr Walker there may be very great difficulty indeed in seeing a way to enforce against him the order which we are now asked to pronounce, and therefore upon the whole of these grounds I think this application must be refused.

LORD SHAND—If the action in which it was desired to stay proceedings had been one at the instance of Mr Walker as an individual, I confess I should have felt very great difficulty in coming to the conclusion that the Court should refuse the order now asked, because in the first place Mr Walker is undoubtedly a shareholder in this company which is now in liquidation, and in the next place he is resident in England, and it rather appears to me that the 122d section of this statute is intended to give this Court the power to deal with a person resident in England just in the same way as if he were resident in Scotland. We are daily in use to grant decrees for calls against persons who are not resident in

Scotland, the jurisdiction of the Court being derived entirely from section 122 of this statute, and if the Court were in the present case under section 122 of the statute to grant decree for the payment of calls, I am not prepared to say that if a shareholder resident in England insists in carrying on legal proceedings there in his own name against a company in liquidation this Court is not to have power to stop these proceedings, and that it would not take every means in its power, by interdict or otherwise, to compel the person who so sues to refrain from doing so, and to sue and rank in this Court.

But this case is a very different one from that I have pointed at. The proposal here is that the Court should restrain Mr Walker and his partner Mr Harrison from proceeding with the action which they are carrying on for the benefit of the copartnership of which they are members in America. That action is not an action by Mr Walker as an individual. We have no reason to know that an interdict against Mr Walker as an individual would restrain that action. It might only be getting the parties into confusion in the next stage of these proceedings, and that I think we ought to avoid.

Mr Harrison confessedly does not reside in Scotland, and the Court has no jurisdiction whatever over him, and the mere circumstance that he has made a claim for payment of a debenture, which claim has received effect by payment in the liquidation, cannot be held to give jurisdiction against him, for I observe it is stated in the answers in regard to Mr Harrison that all claims under the debenture have been paid and discharged. And so there is plainly no jurisdiction against Mr Harrison.

I am of opinion that we should not as in a question with Falkner, Bell, & Company grant any decree restraining them from carrying on the proceedings complained of.

LORD ADAM—I agree with your Lordship, and have only to add that it does not appear to me that section 122 gives the Court jurisdiction. It only enables the Court to enforce an order which it has jurisdiction to make.

LORD MURE was absent.

The Court refused the note.

Counsel for Liquidators—Gloag—Lorimer.
Agents—Davidson & Syme, W.S.

Counsel for Respondents—Comrie Thomson—
Dickson. Agents—Henry & Scott, S.S.C.

Friday, March 19.

FIRST DIVISION.

MORE (LIQUIDATOR OF THE SCOTTISH
PACIFIC COAST MINING COMPANY) v.
WALKER AND ANOTHER.

*Public Company—Winding-up—Order to Stay
Proceedings—Foreign—Jurisdiction—Recon-
vention—Companies Act 1862, secs. 87 and 122.*

The liquidator of a Scottish company presented a note to the Court of Session to restrain a Californian firm from proceeding