

Friday, February 9.

FIRST DIVISION.

[Sheriff Court at Kilmarnock.]

GRIEVE v. KILMARNOCK MOTOR
COMPANY, LIMITED.

Company—Sheriff—Jurisdiction—Voluntary Winding-up—Resolution to Wind up—Proposal to Rescind Resolution and Delete Minute from Minute Book—Action of Declarator that Resolution Duly Passed and for Interdict against Deletion—Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), secs. 135 and 285.

A limited company formally passed a resolution to wind up its affairs voluntarily, and the resolution was entered in the company's minute book. Certain members of the company subsequently gave notice of a meeting to have that minute rescinded and deleted from the minute book. A shareholder and creditor of the company thereupon brought an action of declarator that the company had passed the resolution in question, and for interdict against the rescission, and in particular the deletion from the minute book of the signed minute containing that resolution. The Sheriff-Substitute having allowed a proof the company appealed. *Held* that the Sheriff Court had jurisdiction to entertain the action, and appeal dismissed.

The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69) enacts—Section 135—“The court having jurisdiction to wind up companies registered in Scotland shall be the Court of Session in either Division thereof, or in the event of a remit to a permanent Lord Ordinary, that Lord Ordinary during session, and in time of vacation the Lord Ordinary on the Bills.” Section 285—“... ‘The court’ used in relation to a company means the court having jurisdiction to wind up the company.”

John Grieve, 116 Vulcan Street, Port Dundas, Glasgow, *pursuer*, raised an action in the Sheriff Court at Kilmarnock against the Kilmarnock Motor Company, Limited, 91 Portland Street, Kilmarnock, *defenders*, wherein he craved the Court—“(1) To find and declare that the following resolutions were passed by the defenders on 25th August 1922 as extraordinary resolutions, viz.—‘That the company cannot by reason of its liabilities continue in business and that it is desirable to wind up,’ and ‘that Henry Smith, C.A., Bank Street, Kilmarnock, be and hereby is appointed liquidator of the company,’ and (2) To interdict the defenders from rescinding or deleting from their minute book the foregoing resolutions: And to grant interim interdict. . . .”

The pursuer, who was the holder of 574 ordinary shares in the company and was its chairman, averred, *inter alia*—“(Cond. 2) For a considerable time the company's affairs have been embarrassed, and on 25th August 1922 at a meeting of the company

duly convened the following resolutions were unanimously passed as extraordinary resolutions, the statutory notice that they were to be moved as such having been given, viz.—‘That the company cannot by reason of its liabilities continue in business and that it is desirable to wind up,’ and ‘that Henry Smith, C.A., Bank Street, Kilmarnock, be and hereby is appointed liquidator of the company. . . . (Cond. 3) The defenders have delayed to act upon the resolutions passed by them, and on 9th September 1922 notice was given by Mr A. C. Baird, solicitor, 102 Bath Street, Glasgow, secretary of the company, to all the members of the company that at a meeting of the company to be held on 21st September 1922 one of the items of business to be transacted would be a motion to rescind or delete from the minute book of the company the said resolutions. . . . (Cond. 4) The pursuer is interested in seeing that the resolution to wind up is proceeded with not only as a shareholder of the company but as a creditor of the company to the extent of £287, 10s. and as a party to an agreement between him and the company dated 20th June 1919, whereby the pursuer agreed to the defenders being sub-tenants of premises in Portland Street, Kilmarnock, of which the pursuer is principal tenant under a lease still current. The pursuer is the person liable to the landlord for payment of the rent due under the lease.”

The defenders averred, *inter alia*—“(Ans. 2) Admitted that the company's affairs were temporarily embarrassed. *Quoad ultra* denied. Averred that the said meeting of the company was not duly convened in terms of law; that the resolutions were not carried by a majority of the shareholders; and that the said resolutions were not confirmed by the shareholders. . . .”

The pursuer pleaded—“1. The defenders having passed valid resolutions to wind up and for the appointment of a liquidator, the pursuer is entitled to have it declared that such resolutions were passed by defenders. 2. The winding-up of the defenders having commenced at the date when the resolutions referred to were passed, the defenders cannot competently rescind these resolutions, and the pursuer is entitled to interdict as craved. 3. The defenders having notified their intention to consider motions to rescind or alter the resolutions referred to, the pursuer is entitled to interdict and to interim interdict as craved.”

The defenders pleaded, *inter alia*—“1. The action is irrelevant. 2. The action is incompetent. 3. No jurisdiction.”

On 13th December 1922 the Sheriff-Substitute (W. J. ROBERTSON) repelled the first, second, and third pleas-in-law for the defenders and allowed a proof.

Note—“The pursuer avers that on 25th August 1922, two extraordinary resolutions were passed by the company, in which he is a shareholder and of which he is a creditor. These were (a) ‘That the company cannot by reason of its liabilities continue in business, and that it is desirable to wind up,’ and (b) ‘That Henry Smith, C.A., Bank Street, Kilmarnock, be, and hereby

is appointed liquidator of the company.' He further avers that the defenders have not acted upon these resolutions, and that on 9th September notice was given the shareholders that at a meeting on 21st September one of the items on the agenda would be a motion to rescind or delete from the minute book of the company the aforesaid resolutions. He has thereon brought the present action for declarator that these resolutions were validly passed and for interdict of the proposed proceedings. The defenders set forth three preliminary pleas. Of these the plea to the relevancy was abandoned, and I repel it *pro forma*. The plea to the competency was argued to the effect that I could only pronounce a negative decree which would have no result as it would not force the defenders to do anything. This argument I unhesitatingly reject and repel the plea. The defenders' agent rested chiefly on his plea to the jurisdiction. He maintained that in terms of sections 135 and 285 of the Companies (Consolidation) Act 1908 such an action was only competent in the Court of Session; that the internal affairs of a company are statutory, and can only be dealt with under the statute; and that thus the jurisdiction of the Sheriff Court is excluded. He referred to sections 144, 164, and 193 as illustrating his contention. But I have come to the conclusion that this is not sound. The proceeding which the pursuer is seeking to stay is not part of the winding-up process. It is outwith it, and hostile to it, and does not appear to be contemplated under any section of the Act, nor can I find any section of the Act which provides the pursuer with a statutory remedy. The pursuer seeks interdict of a threatened wrong which he says is *ultra vires* of the company; he says the threatened resolution is not a step in the winding-up. I think his view is sound as regards jurisdiction. It appears justified by the case of *Lamberton v. The Kelvindale Chemical Company, Limited, and Another*, 1910, 26 S.C.R. 123. The present case appears to me *a fortiori* of that cited. The defenders' agent conceded that if the threatened resolution is not a step in the winding-up, this Court has jurisdiction to try the question, and as I have above expressed my view that it is not so, I therefore repel this plea and allow a proof."

The defenders appealed, and argued—The Sheriff Court having no jurisdiction to entertain it, the action was incompetent. The minute in question was not challenged and it was common ground that the resolutions complained of were passed at a meeting of the company. The company being thus, technically at any rate, in liquidation, the only court which had jurisdiction in the matter was the court of the liquidation *viz.*, the Court of Session—Companies (Consolidation) Act 1908. Any remedy that there might be for the present difficulty was to be found under the Act and not at common law. Counsel referred to the Companies (Consolidation) Act 1908 (8 Edw VII, cap. 69), secs. 71, 122 (2), 135, 144, 193, and 285, *s.v.* "The court."

Argued for the pursuer—The pursuer was

entitled to prevent any tampering with the company's minute book by coming to the Court and asking for declarator and interdict. As the Act did not furnish the pursuers with a remedy he was entitled in the circumstances to proceed at common law and to secure the reduction of the resolutions complained of. The following cases were referred to:—*Crawford v. M'Culloch*, 1909 S.C. 1063, 46 S.L.R. 749; *Lawson Seed and Nursery Company, Limited v. Lawson & Son, Limited*, 1886, 14 R. 154, *per* Lord Shand at p. 158, 24 S.L.R. 144.

LORD PRESIDENT—This action is one of a very unusual character and is raised under very unusual circumstances. There appears to be little doubt that the limited company formally passed a resolution to wind up its affairs voluntarily and appointing a liquidator. The minute book of the company shows that at one time a signed minute setting forth that resolution was contained in it. But the signature to the minute has been deleted and the minute itself scored across. That minute would but for this defacement have been the proper evidence of the passage of the resolution in terms of section 71 of the Companies Act 1908, and would have vouched the commencement of the liquidation proceedings (the Companies Act 1908, section 183). Unfortunately the affairs of the company have not been harmoniously conducted. No steps were taken to get the liquidation set agoing, but there followed upon the meeting at which the liquidation resolution appears to have been passed a proposal by certain members of the company to have the minute rescinded and deleted from the minute book. If all that had been in question was a proposal to pass a rescinding resolution, perhaps little or no harm would have been done, because any such resolution would have been a mere *brutum fulmen*, and would have left the company where the first resolution placed it, namely, in liquidation. But a proposal to delete the minute containing the resolution to wind up was a much more serious matter, inasmuch as such deletion implied the destruction of the proper evidence of the passing of the liquidation resolution, and consequently of the commencement of the liquidation itself.

The present action was brought by a shareholder and creditor of the company for declarator that the company had passed the resolution in question, and for interdict against the rescission, and in particular the deletion from the minute book of the signed minute containing that resolution. As appears from the minute book itself, the action has not been effectual to prevent the *de facto* deletion of the minute from the book. It was not disputed by counsel for the company that a resolution in the terms of the defaced minute was formally passed, but it is objected that the resolution was invalid because it was not preceded by the requisite notice, and was not passed by the requisite majority. The proof allowed by the Sheriff-Substitute will cover the facts on which this objection depends. A

question of some difficulty was raised at the debate as to the determination of the validity of the resolution by means of an ordinary action in the Sheriff Court, instead of by application to this Court under section 193 of the Companies Act 1908 (see *Sdeuard v. Gardner*, 1876, 3 R. 577), or an application to this Court by the creditor for a compulsory or supervision order (see *Silkstone Fall Colliery Company*, (1875) 1 Ch. D. 38). But the very unusual circumstances in which the action is brought make it, I think, unnecessary to decide this question in the present case. For it seems clear that an action brought to prevent the anticipated attempt to delete the minute, and so to destroy the proper evidence of the commencement of the liquidation, is a competent proceeding at common law; and although it has not been effectual to prevent the defacement of the minute I think it may in the circumstances be allowed to proceed with a view to establishing by declarator the regular passing of a valid resolution. If the minute had not been defaced, it would have been good evidence of this until the contrary was proved (the Companies Act 1908, section 71 (3)). Further, if the objections to the validity of the resolution stated on behalf of the company are well founded, there is no liquidation and no liquidation proceedings. Accordingly in the peculiar circumstances of this case I think there is no sufficient ground for interfering with the Sheriff-Substitute's order allowing a general proof.

LORD SKERRINGTON—The case is wholly exceptional, and I agree with the course which your Lordship suggests.

LORD CULLEN—I also concur.

LORD SANDS was not present.

The Court dismissed the appeal.

Counsel for the Pursuer—Gentles, K.C.
—Cooper. Agent—Thomas J. Addley,
Solicitor.

Counsel for the Defenders—MacRobert,
K.C.—Crawford. Agent—W. & W. Finlay,
W.S.

Friday, February 9.

SECOND DIVISION.

[Lord Sands, Ordinary.]

A. F. CRAIG & COMPANY, LIMITED v.
A. F. & J. C. BLACKATER, *et e contra*.

Agent and Principal—Agent's Rights—Title to Sue—Sale to Agent for Undisclosed Principal—Subsequent Disclosure of Principal—Action against Agent for Contract Price Sued to Judgment—Right of Agent thereafter to Sue Seller for Damages for Breach of Contract—Election.

A & Company sold to a firm certain marine boilers and on the firm's failure to pay the balance of the price brought an action against them for the amount. The firm brought a separate action

against A & Company in which they counter claimed for damages on the ground that the boilers were disconform to contract, and the two actions were conjoined. In the course of the proceedings it appeared that the firm were really acting as agents for principals whose name was then disclosed. A & Company thereupon amended their pleadings and maintained successfully that as the firm had not suffered any damage they (the firm) had no title to sue A & Company in respect of the latter's breach of contract, and in their own action obtained decree for the price. *Held* (rev. judgment of Lord Sands, Ordinary) that as A & Company had insisted in their action against the firm and obtained decree against them after disclosure of the latter's character as agents, they had elected to treat the firm as the party liable under the contract, and that therefore the firm had a good title to sue them (A & Company) for the damages sustained by their disclosed principals.

Authorities examined.

A. F. Craig & Company, Limited, engineers and boiler-makers, Paisley, *pursuers*, brought an action against A. F. & J. C. Blackater, shipowners, Glasgow, *defenders*, for payment of £2412, 0s. 5d., being the balance of the price of certain boilers ordered by the defenders from them. Thereafter the defenders A. F. & J. C. Blackater brought a counter action against A. F. Craig & Company, Limited, in which they claimed payment of £9897, 11s. 5d. in respect of damages through defects in the boilers. The two actions were conjoined.

The following narrative of the *facts* of the case is taken from the opinion of the Lord Justice-Clerk:—"By letter dated 7th September 1917 A. F. Craig & Company, engineers and boiler-makers in Paisley (hereinafter called Craigs), offered to supply to Messrs A. F. & J. C. Blackater, shipowners in Glasgow (hereinafter called Blackaters), two marine boilers for the sum of £5900. By letter dated 8th September the offer was accepted. The boilers were duly supplied and they were fitted in a vessel named the 'Ashton.' The full price not having been paid, Craigs on 11th March 1921 signeted a summons against Blackaters in which they sued for £2412, 0s. 5d., being the unpaid balance of the contract price. In condensation 3 of that action Craigs refer to the s.s. 'Ashton' as 'belonging to the defenders,' *i.e.*, Blackaters. The defence to the action is that the boilers were disconform to contract, and that Blackaters suffered loss and damage thereby exceeding in amount the sum sued for. Blackaters responded with an action against Craigs, the summons in which was signeted on 8th June 1921, and in which they sued for £9897, 11s. 5d. in name of damages sustained by reason of Craigs' breach of contract. In condensation 1 of that action Blackaters aver 'The pursuers are the registered owners of the s.s. "Ashton," and in answer the averment is admitted. The actions were conjoined on 24th February 1922, and a