nominal. I believe the appellant here was acting with perfect good faith, and that he did not abstain from going to the Dean of Guild for any other reason than that he believed it was a case in which there was no necessity under the statute for doing so. On the question of expenses I entirely agree with what your Lordships have said, and have nothing to add.

LORD MONCREIFF was absent.

On 4th June 1902 the Court pronounced the following interlocutor:—

"Dismiss the appeal: Find the appellant has without any warrant of the Dean of Guild Court, and in contravention of the Edinburgh Municipal and Police (Amendment) Act 1891, section 59, altered the structure of the house at 12 Gayfield Square, Edinburgh, by cutting the joists of the floor on the street floor of the said house at the point marked Q on the plan No. 60 of process —[*Then followed a finding in favour of the appellant with reference to the points which had been given up by the Procurator-Fiscal of the Dean of Guild Court*] —Modify the amount in which the appellant was fined and amerciated by the Dean of Guild, viz., £10, to the sum of one shilling, for which sum decern against the appellant for payment to the petitioner: Find the appellant entitled to expenses up to and including the 23rd January 1902, and to the subsequent expenses subject to modification: Remit to the Auditor to tax the said expenses and to report: Recal the said interlocutor of 1st May 1902 so far as it finds the respondent Adam Dick liable in expenses, and decern."

On 8th July 1902 the Court pronounced an interlocutor approving of the Auditor's report on the appellant's account of expenses, and with regard to the expenses to which the appellant had been found entitled subject to modification, fixing the modication at two-thirds of these expenses as taxed.

Counsel for the Respondent and Appellant—Clyde, K.C.—A. M. Anderson. Agent —W. R. Mackersy, W.S.

Counsel for the Petitioner and Respondent—Mackenzie, K.C.—Deas. Agents — Graham, Johnston, & Fleming, W.S.

Thursday, October 24, 1901.

OUTER HOUSE.

[Lord Kyllachy.

CRESSWELL RANCHE AND CATTLE COMPANY, LIMITED *v.* BALFOUR MELVILLE.

Bankruptcy — Discharge — Effect of Discharge—Liability of Shareholder in Company for Calls Made Subsequent to His Discharge in Bankruptcy — Deed of Arrangement — Company — Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *secs.* 35, 36, 37, 38, 52, 53, 126, 129, 137, 146, *and* 147.

The holder of four hundred £5 shares in a company was sequestrated on 14th December 1894. He was discharged and reinstated in his estate on 17th December 1895 under a deed of arrangement—the discharge being of all debts and obligations contracted by him or for which he was liable at the date of the sequestration. In the beginning of May 1894 the shares were paid up to the extent of £3 per share, there being a liability of £2 per share. Calls each of 5s. per share were made by the company on 31st May 1894 and 9th January 1895, respectively, and the company received dividends in respect of these calls from the trustee under the deed of arrangement. A call of 5s. per share was made by the company on 30th December 1895, and — the company having meantime gone into liquidation —a further call of 25s. per share was made by the liquidator of the company on 22nd May 1896. Nothing was received by the company or its liquidator in respect of the shares in question under the last-mentioned calls. In an action brought by the company—its liquidation having been stayed in February 1901—against the shareholder for payment of the two calls last mentioned, the shareholder pleaded that the claim was excluded by his discharge. *Held*, that as there was no obstacle to the company claiming and obaining a ranking on the shareholder's estate for the amount uncalled on the shares held by him at the date of the sequestration, either in the sequestration or under the deed of arrangement by which the sequestration was superseded, the company's claim was excluded by the discharge obtained by the shareholder, and the shareholder was entitled to decree of *absolvitor*.

The Cresswell Ranche and Cattle Company Limited brought an action against James Heriot Balfour Melville, Writer to the Signet, Edinburgh, concluding for payment of (first) £100 sterling, with interest at the rate of 10 per cent. on the said sum from February 28, 1896, and (second) £500 sterling, with interest at the rate of 5 per cent. on the said sum from June 15, 1896.

The Cresswell Ranche and Cattle Company Limited was incorporated under the Companies Acts on February 6, 1885, its share capital amounting to £320,000, divided into 64,000 shares of £5 each. Shortly after the incorporation of the company the defender applied for 400 shares, which were duly allotted to him, and he was duly registered in the company's books as a member, and as a holder of these 400 shares.

On April 23, 1896, the company went into voluntary liquidation, and on May 12, 1896, a supervision order was pronounced by the First Division of the Court of Session. On February 20, 1901, an order was pronounced staying the liquidation, and the directors of the company were again put in full charge of the company's affairs.

Prior to May 1894 the company made various calls on its shares, which calls were duly paid by the defender, so that at that date his shares were paid up to the extent of £3 per share, with a liability of other £2 per share.

On December 14, 1894, the defender was sequestrated, and subsequently a deed of arrangement was entered into between him and his creditors bearing various dates between and including November 14 and December 5, 1895, and approved by the Sheriff on December 17, 1895.

The remaining £2 per share was called up in four calls, as follows:—(1) 5s. per share on May 31, 1894; (2) 5s. per share on January 9, 1895; (3) 5s. per share on December 30, 1895; and (4) 25s. per share on May 22, 1896. The first three of said four calls were made by the directors of the company before it went into liquidation; the fourth call was made by the liquidator. The company and the liquidator received dividends, amounting in all to £29, 13s. 11d., in respect of the two first of the calls above specified from the defender's trustee under the deed of arrangement. The company also stated on record that it was anticipated that further payments of comparatively small amount would be received from said trustee in respect of these two calls.

The sums sued for consisted of the last two of the above-mentioned calls, in respect of which two calls nothing had been paid, with interest. In making the call No. 3, the directors, in accordance with the company's articles of association, fixed that interest at 10 per cent. should be charged on the call after February 28, 1896.

The pursuers, with regard to the deed of arrangement entered into between the defender and his creditors, averred as follows:—"It was part of the arrangement set out in the said deed that the defender should be reinvested in the whole unrealised portions of his estates, and he was reinvested accordingly. His estates embraced the said 400 shares, and these were never intromitted with or realised by the trustee in the sequestration. They continue to be the property of the defender, and he is registered as holder thereof in the register of the members of the company, and has been so throughout. The two calls sued for were both made after the sequestration of the defender's estates had been terminated, and after he had been reinvested in his estates, including the said shares, in accordance with the said deed of arrangement."

The defender averred, *inter alia*, as follows:—"At the date of the sequestration [of the defender] the said shares formed part of the defender's estate. They passed to the trustee in the sequestration under his act and warrant. The defender does not know whether or not they were intromitted with or realised by the trustee in the sequestration. Denied that the said shares are the property of the defender. . . . By the said deed of arrangement it was agreed that the proceeds of the sequestrated estates, so far as realised by the trustee in the sequestration, should, under deduction of certain expenses, be handed over by the trustee in the sequestration to the trustee under the said deed of arrangement, who should divide the same among the creditors of the defender according to their respective rights and preferences to be fixed and ascertained in terms of the Bankruptcy (Scotland) Acts." [*Here followed a statement of the provisions in the deed as to the sum to be provided for division among the defender's creditors, and as to a bond for* £4000 *to be granted by his friends as a collateral obligation.*] "The fifth article of the said deed of arrangement then provided that upon delivery of such collateral obligation the creditors should produce the said deed of arrangement to the Sheriff of the Lothians and Peebles for his approval, and to have the sequestration declared at an end, and the bankrupt should be entitled to have himself exonered and discharged, and he was thereby, upon such delivery, absolutely and for ever exonered and discharged, of and from the whole debts and obligations contracted by him or for which he was liable at the date of said sequestration, reserving always the claims of the creditors for the obligations undertaken in the said deed of arrangement, and also reserving to such of the creditors as held securities, diligences, or preferences or obligations for their foresaid debts, their claims full and entire against such securities, diligences, preferences, or obligants, and also reserving their debts, but only to the extent of supporting their securities, diligences, and preferences, and to no other or further extent or effect whatever. Further, by said deed of arrangement the creditors consented and agreed both with the defender and *inter se* not to require or accept payment from the defender or on his behalf except only in terms of said deed. The said deed of arrangement was duly signed on behalf of the pursuers, who are parties thereto and bound thereby. The said collateral obligation was duly delivered to the trustee under the said deed of arrangement, conform to certificate by said trustee endorsed thereon. The defender was on 17th December 1895 discharged by the said Sheriff. At the dates when the calls sued for were respectively made, the trustee was in course of distributing the said bankrupt estate under

the said deed of arrangement. It is believed that the distribution of the said estate is not yet complete, and that the said trustee still has funds belonging thereto in his hands."

The defender denied that he was reinvested in the said shares or intromitted with them in any way, or treated them as his property.

The pursuers pleaded, as follows:—"The defender being justly due and indebted to the pursuers in the sums sued for, which he refuses or at least delays to pay, decree therefor ought to be pronounced against him, with expenses."

The defender pleaded, *inter alia*, as follows:—"(1) The pursuers are barred by the terms of the deed of arrangement founded on from insisting in the present action. (3) The defender's liability on the shares mentioned in the condescendence being a debt due by him prior to the date of his discharge, the same has been extinguished by his discharge, and he should be assoilzied, with expenses. (4) The defender's liability on the shares mentioned in the condescendence being a debt due by him prior to the date of his sequestration, and payable pending the distribution of his estate under the said deed of arrangement, the said liability has been extinguished, and he should be assoilzied, with expenses."

The arguments of the parties sufficiently appear from the opinion of the Lord Ordinary. The following authorities were cited—Goudy on Bankruptcy, 2nd ed., p. 436; *Garden* v. *M'Iver*, June 15, 1860, 22 D. 1190; Lindley on Partnership, 5th ed., p. 556; *M'Mahon* [1900], 1 Ch., p. 173; *Hardy* v. *Fothergill*, 1888, 13 App. Cas. 351, at 360; *Fraser* v. *Robertson*, January 7, 1881, 8 R. 347, 18 S.L.R. 224; *Whyte* v. *Northern Heritable Securities Investment Company*, June 16, 1891, 18 R. (H.L.) 37, 28 S.L.R. 950.

On 24th October 1901 the Lord Ordinary (KYLLACHY) delivered the following opinion:—"The pursuers here are the Cresswell Ranche Company, which was incorporated in 1885, and which carried on business until 1896. In that year it went into liquidation, but in February of the present year it had its liquidation stayed and resumed its business.

"The defender is Mr J. H. Balfour Melville, who held, and it is said still holds, 400 shares of £5 each in the company, and who is in this position, that having been sequestrated on 14th December 1894 he was on 17th December 1895 discharged and reinvested in his estates under a deed of arrangement made in pursuance of section 35 and following sections of the Bankruptcy Act of 1856. Under this deed of arrangement he provided a sum of £8000 to be paid by instalments, and to be distributed among his creditors in the same manner as under the sequestration, and it may be pointed out that the pursuers do not aver that the distribution and winding-up under the deed of arrangement have yet been completed.

"The pursuers it appears made calls upon their shareholders at various dates prior to May 1894, which calls were duly paid by the defender, and by these his shares became paid up to the extent of £3 per share. On 31st May 1894 the company made a further call of 5s. per share, and on 9th January 1895 they again made a further call, also of 5s. per share. These calls were not paid by the defender, but they were both made, the first before and the second during his sequestration, and for them the company ranked and obtained, or are in the course of obtaining, a dividend. This left 30s. per share still to be called up, and of this sum 5s. per share was called up on 30th December 1895, just a fortnight after the defender's discharge. The remaining 25s. was called up a few months later, viz., on 22nd May 1896, this call being made by the liquidator shortly after the company went into liquidation.

"The present action is brought by the company to enforce as against the defender his personal obligation to make payment of these last two calls. The defence is that the claim is excluded by the defender's discharge, by which in terms of the statute and of the deed of arrangement he is discharged of 'all debts or obligations contracted by him, or for which he was liable at the date of the sequestration.'

"The question is, whether on the just construction of this discharge the pursuers' claim is excluded.

"Now, *prima facie*, the words of the discharge are very general. They make no distinction between debts due and debts to become due, or between debts certain and debts contingent; and in order to obviate any ambiguity in the word 'debts' they expressly include all 'obligations' contracted by the bankrupt, or for which he was 'liable.' *Prima facie*, therefore, they indicate that their object, and the object of the statute, was to discharge the bankrupt of every possible liability existing at the date of his sequestration.

"It is, however—although not expressed in the Scotch statute—a general principle of bankruptcy law, going back to an early period, and expressed in the discharge clauses of all the English bankruptcy statutes, that the extent of the bankrupt's discharge is always commensurate with the creditors' right to come in and rank. It was accordingly assumed at the discussion, and I see no reason to doubt properly, that notwithstanding the general terms of the Scotch clause it is impliedly subject to this limitation.

"The question therefore comes really to be, (1) whether there was any obstacle to the pursuers claiming and obtaining a ranking in the sequestration in respect of the defender's liability to pay up the amount uncalled on his shares at the date of the sequestration, and (2) whether in any view there was any obstacle to their obtaining a ranking under the deed of arrangement by which the sequestration was superseded and under which the assets of the estate were or are in course of being distributed.

"As to the first and more general point one thing at least seems certain, viz., that

if the present had been an English bankruptcy either under the Act of 1869 or under the present Act of 1883, the claim of the pursuers to come in and prove would have been quite clear, and by consequence the defender's discharge would have been conclusive. In Lindley on Partnership, 5th ed., p. 556, it is said—'Under this Act' (Act of 1883) 'when a shareholder becomes bankrupt all calls in arrear are provable as debts, and his liability for future calls may be estimated and proved as well when the company is being wound up as when it is not.' And there have been various cases in which, as regards similar claims, the right of the creditor to come in and prove has been recognised. The latest is the case of *M'Mahon* (1900), 1 Ch. Div. 173, where it was held by Mr Justice Stirling that a company was entitled to prove in the bankruptcy of a deceased shareholder for the estimated value of his liability to future calls in respect of shares standing in his name. The general point is perhaps, however, best illustrated by the case of *Hardy* v. *Fothergill* (1888), 13 App. Cases 351, and the other cases there referred to.

The pursuers, however, suggest that the terms of the Scotch Bankruptcy Statute, viz., the Act of 1856, are, with respect to the ranking of future or contingent claims, more restricted than those of the present English Bankruptcy Act, or of the (on this point) practically identical Act of 1869. It was mentioned that they more closely resemble the terms of the previous English Act of 1861, under which there is no doubt that there were various decisions negativing the right of a going company to prove in the bankruptcy of a shareholder for future calls.

"Both parties also referred to the case of *Garden or Fraser* v. *M'Iver*, 22 D. 1190, which it appears is the only Scotch authority on the subject, and which, according to the pursuers, places some qualification on the generality of the claiming and discharging clauses of the Scotch statutes.

"It accordingly becomes necessary to examine the various statutes referred to. These are—(1) Bankruptcy (Scotland) Act 1856, secs. 52, 53, 126, 129, 137, and 146; (2) Bankruptcy (England) Act 1861, secs. 153, 154, and 161; Bankruptcy (England) Act 1869, secs. 31, and 49; (4) Bankruptcy (England) Act 1883, secs. 37, 30, and 32.

"Upon such examination one point at least seems clear, viz., that there is no ground for assimilating the provisions of the Scotch Act with respect to the ranking of future and contingent claims to those of the English Act of 1861. The Scotch Act proceeds on the principle of assuming and recognising the right of all creditors, without respect to the futurity or contingency of their claims, to rank and draw a dividend either at once or ultimately. As already said, the discharging clause (in connection with which the voting and ranking clauses must of course be read) applies to 'all debts and obligations contracted by the bankrupt or for which he is liable at the date of his sequestration.' And apart from that clause all that the Act provides is that a creditor, if he desires to vote and draw a dividend in respect of a contingent claim, must have his claim valued in a certain manner, failing which the dividend effeiring to his claim shall not be drawn but set aside until the contingency is purified. So far therefore as words are concerned the Scotch statute could hardly in this matter be more general or comprehensive.

"On the other hand, the proof clauses of the English Act of 1861 (on the decisions under which, as I have said, the pursuers found) were as Lord Selborne pointed out in *Hardy* v. *Fothergill*, L.R., 13 App. Cas. 360, confined like the clauses of the former English Acts 'to certain specified kinds of contingent debts and liabilities,' and although the provisions of sections 177 and 178 of the earlier Act of 1849 were unrepealed and left in force, that Act obviously used the word "debts" in a limited and technical sense, distinguishing 'debts' from 'liabilities,' and confining the right to prove for contingent 'liabilities' to the case of traders.

"It is also, I think, the fair result of a comparison between the Scotch Act and the present English Act (1883) that, with respect to the matter in question, there is no substantial difference between the two. The English Act is, it is true, more fully and anxiously expressed so as to place beyond doubt that, as Lord Fitzgerald said in *Hardy* v. *Fothergill*, 'all creditors should be entitled to come in and prove, and the bankrupt should emerge from the bankruptcy freed from all his liabilities.' Its important words are, 'Save as aforesaid, all debts and liabilities present and future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy.' There is also an anxious enumeration of what shall fall under the term 'liabilities.' But in my opinion the general words in the Scotch statute are quite sufficient to express and operate the same result. If it were otherwise one can hardly doubt that an amending statute would ere now have been passed so as to remove in a matter of this kind an undesirable difference between the bankrupt laws of the two countries.

"I am therefore of opinion that while the English decisions, proceeding as they do on interpretations of different enactments, may not be binding, the later decisions, that is to say, those since 1869, afford at least important analogies, and are so far important authorities in the defender's favour.

"It remains, however, to consider the one Scotch authority, the case of *Garden* v. *M'Iver*. That was a case of a claim made in a sequestration under a clause of warrandice contained in a disposition granted by the bankrupt some years before his bankruptcy. At the date of the sequestration there was no prospect of eviction or attempted eviction. But pending the sequestration eviction was threatened and

an action brought. In these circumstances the disponee, whose title was challenged, made a claim in the sequestration as for a contingent debt, and he pressed that claim, even after he had been assoilzied in the Court of Session from the action of eviction, doing so on the ground that an appeal had been intimated to the House of Lords. The trustee rejected the claim and the claimant appealed, and the whole subject of contingent claims was very fully considered. In the end the Court (the Lord Justice-Clerk Inglis, Lord Wood, Lord Cowan, and Lord Benholme) came unanimously to the conclusion that there was no sufficient reason for refusing the ranking sought.

"In result therefore the case in question seems entirely in favour of the defender; but the pursuers found upon certain doubts or reservations expressed by the Judges with respect to the position of claims upon warrandice where the warrandice does not emerge before or during the sequestration, and with respect generally to the position of claims depending upon contingencies so remote and improbable that, as Lord Wood puts it, 'a claim for dividend cannot be listened to.'

"Now it does not appear to me that the defender here has any occasion to quarrel with any of the doubts and reservations which were thus expressed. The facts of the present case make it, I think, impossible to suggest that the liability here was remote or improbable, so remote and improbable that the claim for dividend could not be listened to. We do not know much of the history of this company, nor do we know the sequence of the earlier calls (those prior to May 1894), which were, as I have said, paid by the defender before his sequestration. But it is at all events clear that at the date of the sequestration, in December 1894, the company was in course of calling up its unpaid capital. A call had been made in May 1894, and another was just about to be made, and was in fact made, a few days after the sequestration. It may also, I think, be taken that the company was in such a position that further calls in the near future were by no means unlikely, and that if a claim had been made there would have been little difficulty in satisfying the trustee or the Court that such was the case. It is a significant fact that the company went into liquidation in April 1896. I may observe, however, in passing, that this is the only connection in which the fact of liquidation is of consequence in this case. The defender did not appeal to the 75th section of the Companies Act of 1862. He has, as it happens, no interest to do so.

"Even therefore if it was necessary for the defender to show that the pursuers' claim could have been ranked in—what I may call—the sequestration proper, I am of opinion that that condition is satisfied, and that therefore the defender must be assoilzied.

"But there is another, and perhaps shorter view of the case, on which, as it seems to me, the result is the same—I mean the view that the winding-up under the deed of arrangement was for the present purpose just a continuance of the sequestration, and that the calls in question could beyond doubt have been ranked for in that winding-up.

"It must, I think, be assumed that the winding-up arrangement was in progress at the date of each of the two calls. The defender says that it is still in progress, and the pursuers seem to imply the same thing, for they speak incondescendence 7 of having the prospect of receiving from the trustee under the deed of arrangement some additional dividends on the earlier calls, but at all events there is nothing to suggest that the winding-up was concluded five months after its commencement—that is to say, before 22nd May 1896, when the second of the calls in question was made. The instalments specified in the deed itself make that almost impossible. The position, I take it, really was that although under the sequestration there was a partial realisation of assets, the ranking of the creditors and the payment of dividends took place mainly, if not entirely, under the deed of arrangement. That according to their statement was certainly the case as regards the pursuers themselves.

"Now, this being so, what distinction can for the present purpose be taken between sequestration as a process of ranking and distribution and winding-up by arrangement as a similar process? They are both processes of distribution in bankruptcy. They are both also statutory—the deed of arrangement and the procedure under it being, as I have said, regulated by section 35 and the following sections of the Act of 1856. Altogether I have not, I confess, been able to see that the case is at all different from what it would have been if the sequestration proper had continued until June 1896 instead of December 1895, and in that case the decision in the case of *Garden* v. *M'Iver* would have been expressly in point, as would also indeed have been some of the earlier English cases quoted at the discussion—cases which involved the element of the claiming company going into liquidation during the dependence of the proceedings in the shareholder's bankruptcy.

"On the whole matter I am of opinion that the defender is entitled to absolvitor."

The Lord Ordinary assoilzied the defender from the conclusions of the action.

Counsel for the Pursuers — Solicitor-General (Dickson, K.C.)—Fleming. Agents —Morton, Smart, & Macdonald, W.S.

Counsel for the Defenders—Guy—Hamilton. Agents—Clark & Macdonald, S.S.C.