SCOTT and BRAND in answer.

The Court adhered, with additional expenses.

Agent for Pursuer—John Walls, S.S.C.

Agent for Defender—W. M. Johnstone, S.S.C.

Tuesday, June 29.

FIRST DIVISION.

M'LAREN & CO. AND OTHERS *v.* PENDREIGH.

Bankrupt—Composition—Statutory Majority—Bond of Caution—Massing together of two Bankrupt Estates. Certain parties carried on a business as brewers under the firm of J. & G. P., and also a separate business as grain merchants under the same firm. The two companies, and the estates of the partners, were sequestrated. The grain creditors were offered a composition, with payment of expenses, and security, the offer further stating that the like offer of composition was made to the brewery creditors, —both offers being made on the footing that the creditors should be entitled to rank upon both estates for their full claims. *Held* that this offer was not in terms of the Bankrupt Act, and that any dissenting creditor was entitled to object to the massing of the two sequestrated estates which the offer implied.

The estates of J. & G. Pendreigh, grain merchants in Edinburgh and Leith, and mill-masters at Catcune Mills, Gorebridge, and of the individual partners, were sequestrated, Carter being appointed trustee.

At a meeting of creditors held on 27th April 1869, the following offer of composition by the bankrupts was read to the meeting:—

"*Edinburgh, 27th April* 1869.

"To the Chairman of the Meeting of our Creditors to be held to-day.

"Sir—We hereby offer to make payment of a composition of three shillings and sevenpence halfpenny per pound upon the whole debts due by us as grain merchants in Edinburgh and Leith, and mill-masters at Catcune Mills, Gorebridge, in the county of Edinburgh, said composition to be in full of all claims against us, either as a company, or against us, the individual partners thereof, as at the date of the sequestration of our estates, payable said composition by the following instalments:—One shilling and threepence at three months; one shilling at six months; ninepence at nine months; and sevenpence halfpenny at twelve months after our final discharge.

"The separate firm of J. & G. Pendreigh, brewers, Abbeyhill Brewery, Edinburgh, and the partners thereof, make offer of a like composition of three shillings and sevenpence halfpenny per pound, payable by the same instalments; and both offers are made on the footing that the creditors shall be entitled to rank upon both estates for their full claims.

"We further offer to pay and provide for the expenses attending the sequestration, and the remuneration to the trustee; and we offer Mr George Pendreigh senior, residing at Upper Dalhousie, in the county of Edinburgh, as our security for the said composition, expenses, and remuneration.—We are, Sir, your most obedient servants,

(Signed) "J. & G. PENDREIGH.
JAMES PENDREIGH.
THOMAS G. SCOTT.
GEORGE PENDREIGH.
JOHN PENDREIGH.

"I hereby offer to become security for the foregoing offer.

(Signed) "GEORGE PENDREIGH senior."

Before the foregoing offer was put to the meeting, Mr M'Laren, a creditor, intimated the following protest:—"That the offer of composition is incompetent and informal, as there are two separate sequestrated estates, and the offer proposes that creditors on one estate shall rank and receive a dividend on both estates."

To this protest Mr Paterson adhered, and thereupon these gentlemen left the meeting.

The chairman having put the offer and the security proposed to the meeting, the creditors and mandatories for creditors present unanimously resolved to entertain the offer and security for consideration; and directed the trustee to call a meeting of the creditors for the purpose of having the same finally decided on, in terms of the statute.

On 7th May the trustee issued a circular intimating this offer of composition, and calling a meeting of creditors to decide thereon. The state of affairs and valuation of the grain estates annexed to the circular gave the assets at £49,155, 7s. 1d., and the liabilities at £141,694, 17s. 6d., shewing a dividend of 6s. 9d. per pound, subject to expenses of sequestration.

At a meeting of creditors on 21st May, the creditors present unanimously agreed to and accepted of the offer of composition, approved of the security, and directed the trustee to proceed accordingly. The trustee reported in terms of the 138th section of the Bankruptcy (Scotland) Act 1856, whereupon the Sheriff-substitute (HALLARD) pronounced this deliverance:—"The Sheriff-substitute, having considered the foregoing report, with the minutes of meeting of creditors and bond caution therein referred to, and having heard Mr Trayner in support of the discharge, and Mr Murdoch on behalf of certain creditors who lodged a caveat craving to be heard, Finds that the offer of composition, with the security therein mentioned, has been duly made, and is reasonable, and has been unanimously assented to by the creditors assembled at said meeting; but before granting a discharge, appoints the bankrupts to appear and emit the statutory declaration at a diet to be afterwards fixed."

M'Laren & Co. and Cochrane, Paterson & Co. appealed to the Inner House on 4th June 1869.

Young, another creditor, presented a note of appeal to the Lord Ordinary on the Bills, which note the Lord Ordinary on 11th June, in respect of the dependence of the similar appeal in the Inner House, reported.

GORDON, Q.C., CLARK, and ASHER for M'Laren and others.

SHAND and STRACHAN for Young.

Solicitor-General, (YOUNG, Q.C.), GIFFORD and TRAYNER for respondent.

At advising—

LORD PRESIDENT—In this sequestration we have six appeals, all raising the same question. There are three creditors who insist in these appeals, and each has an appeal against the resolution of the meeting approving of the composition, and each has also an appeal against the deliverance of the Sheriff-substitute approving of the composition. The question is, whether the composition has been regularly made under the statute, and is such as can be approved of and carried into effect so as to bind the whole creditors in the sequestration. This

raises a question of some importance, and I must suppose of some importance to the parties; but I must say it is not a question which presents any difficulty to my mind. This is a purely statutory proceeding. When a merchant, or company of merchants, becomes bankrupt, they and their creditors may make any private arrangement they please for disposal of the bankrupt's estate and discharge of the bankrupt, if they are unanimous. When they are not unanimous, or when there is not that confidence between the bankrupt and his creditors which leads them to make a private arrangement, they must resort to the process of sequestration, which is a purely statutory process, one of the essential characters of which is that the general body of creditors is entrusted with very large powers in the management and distribution of the estate through the trustee; and one of these powers, and perhaps the most important one, is that either a bare majority or a certain specified majority may bind not only the absent creditors, but a dissenting minority present at the meeting. That is not a power at common law; it is conferred by statute only, and it cannot be competently exercised except under compliance with the statute.

This is a proceeding of the general body of creditors at a certain meeting on 27th April 1869, at which there was a very large attendance of creditors. An offer of composition was made, and that is an offer which falls under the 139th section of the statute. It proposed to pay to the creditors, in full of their claims, a composition of 3s. 7½d. by several instalments—(*reads from offer*). So far the offer was quite in terms of the statute, and if there were added to that merely the security which the statute requires, there could have been no objection to the regularity of the proceedings. They say that the offer—(*reads offer of security*). Now, so standing the offer, without that other paragraph to which I shall immediately advert, it would have been a good offer of 3s. 7½d., with George Pendreigh senior as cautioner; and if the creditors had been willing to accept that offer and that security there was nothing to prevent them doing so, having a majority in terms of the 139th section. But it is vain to disguise the fact that the creditors were not prepared to accept of that offer, because they had then or shortly after before them a report by the trustee which showed that the estate would yield 6s. 9d. Therefore it is vain to say that the offer, as I have described it, was either entertained or accepted, or was such that the creditors would have thought of entertaining it. But then there was added this paragraph:—"The separate firm of J. & G. Pendreigh, brewers, Abbeyhill Brewery, Edinburgh, and the partners thereof, make offer of a like composition of three shillings and sevenpence halfpenny per pound, payable by the same instalments; and both offers are made on the footing that the creditors shall be entitled to rank upon both estates for their full claims." Now, this is the element in the transaction which introduces the fatal flaw. The partners of the Brewery Company are not the same as those of the Grain Company. The business carried on by the two companies is separate. The creditors of the two companies are not the same, though it is said—but not admitted—that there are some creditors who stand in such a position as to be entitled to rank on both estates; and we are told it was for avoiding questions of difficulty in the way of double ranking that that device was adopted. But what was that device? It seems to be an arrangement between the two bodies of creditors to mass the two estates together, and so to give a dividend to each creditor, whatever his position as to double or single ranking, of twice 3s. 7½d. That may be a highly expedient arrangement, but what we have to consider is how it stands under the bankruptcy statute; and on that point I entertain no doubt. It is quite beyond the contemplation of the bankruptcy statute. A combination of parishes is allowed by statute in order to lessen the expense of providing for paupers, but I never heard of a combination of sequestrations or bankrupt estates for the more easy and expeditious administration of the estates of a bankrupt. That is quite new, and would require statutory authority. The incompetency is farther shown on following out the proceedings to a conclusion. It is obvious on the face of the offer that the only composition, in the proper sense, is a composition of 3s. 7½d., and it is for that alone that the cautioners are to give security in the form of a bond of caution; and accordingly, when the bond of caution is prepared and lodged in terms of the Act of Parliament, we find that the bankrupts, as principals, and George Pendreigh as cautioner, bind themselves—(*reads from bond*). Now this deed is very appropriately called a bond of caution and deed of agreement. I never heard of such a statutory document in a sequestration. It is a bond of caution only that is authorised, and the creditors are entitled to a bond of caution for the whole composition to be paid to them. The creditors have here been assured that their sum is double 3s. 7½d., but their bond of caution is only for 3s. 7½d.; and if it be said that there is another bond of caution in the other sequestration, all I have to say is, that it is not a bond of caution in favour of the appellants, but in favour of the creditors of the Brewery Company. Is that in terms of the statute? What is there beyond? There is an agreement by the bankrupt and cautioners that the creditors in this sequestration, who are not creditors on the brewery estate, shall rank on it. That, if it has any meaning, must mean this, that M'Laren and the other creditors are to be privileged to claim on an estate in which they are not interested, and to swear that they are creditors on it. If they do not, they can take nothing under this agreement. It is needless to go farther into the matter. It is fundamentally and radically a violation of the Act of Parliament; and the conclusion, therefore, at which I arrive is, that this is not a composition which can be sustained, and that the interlocutor of the Sheriff-substitute must be recalled, and the resolution of the creditors rescinded.

LORDS DEAS and ARDMILLAN concurred.

LORD KINLOCH—I am of opinion that the offer of composition now brought in question is such as could not be competently made under the statute.

Admittedly there were two separate companies carrying on business under the same firm of J. & G. Pendreigh, the one as dealers in grain, the other as brewers. The partners were not identical. The companies were separately sequestrated. They were as distinct companies as if the one was a company of Pendreighs, grain-dealers, the other of Smiths or Thomsons, brewers.

The composition now in question is that which was offered by the grain company. As to this, the trustee reported that the estate was likely to yield 6s. 10¾d., or at least 6s. 6d., per £; giving effect to

certain double rankings alleged to lie in the person of creditors to a considerable amount against both estates.

The composition offered is a composition of 3s. 7½d. per £, with the usual statutory security, with the addition of a like sum proposed to be paid out of the Brewery Company estate, on which all the Grain Company creditors are to be entitled to rank equally with the Brewery creditors. These latter are to have the same privilege against the Grain Company estate. In other words, the two estates are to be massed; the creditors of both are to be ranked on one common fund; and a dividend of 7s. 3d. to be drawn indiscriminately by all.

I am of opinion that, whatever recommendations there may be to this proposal in the way of expediency or equity, the proceeding is statutorily inadmissible. The question is not whether the scheme would be effectual if the whole creditors on both estates assented to it. The question is, whether it can be carried by the statutory majority in opposition to dissenting creditors. To this result, it is indispensable that the offer should be strictly within the statute.

I conceive that an insuperable objection lies in the bare fact that the scheme implies the massing of two entirely separate estates, both in their funds and liabilities. This appears to me fundamentally at variance with the first principles of the bankrupt law, which devotes each sequestrated estate to its own proper creditors. The theory of the law is that the composition is a fair equivalent for the value of that particular estate, if allowed to be wound up in ordinary course. How can this idea be practically worked out if not merely the estate under sequestration is to be taken into view, but another estate, with which many of the creditors have no concern, and whose affairs are not even so much as brought under their cognizance? The whole object of the law is set aside unless each sequestrated estate is kept entirely by itself, and the composition payable is estimated on its own assets, and payable exclusively to its own creditors.

I am clearly of opinion that a dissenting creditor is entitled to have the statute rigidly followed out in this respect. And whatever may be said on the subject of expediency, I think a ready answer is open to every such creditor. The main ground of expediency on which the present proceeding is defended is, that a great amount of double rankings will come into controversy; and the scheme proposed is a short-hand process for settling them all. But the dissenting creditor on the grain estate is entitled to say that he expects to cut down these double rankings to such an extent as to leave the grain estate in a position of great superiority over that of the brewery, and he objects on that account to the brewery creditors being put on the same level with himself. It is impossible for the Court to decide, under the present proceeding, what is the true amount of the double rankings. But this very fact is one of the strongest objections to the validity of the composition, as to which the Court have thus no means of deciding whether it is reasonable or not. It is a conclusive plea against the proposed composition that it involves a random settlement of the rankings of the creditors; and implies the sanction of the Court, without inquiry, to a universal double ranking on both estates.

I cannot see how it is possible to follow out into practical efficacy this offer of composition, without infringing at every step the principles of the bankrupt law. The creditors of the grain company, while ostensibly having a composition of 7s. 5d. tendered them, have only the statutory security for 3s. 7½d. For the other sum of 3s. 7½d. they have to go against another company, on which many of them have no right to rank as creditors. I see no absolute security that they will make good this sum from the other estate, or that their claim may not be frustrated by a recusant cautioner, or an objecting brewery creditor. Apparently, they could make good no claim, except by taking an untrue affidavit that they are creditors on the brewery estate. The statute seems to me to afford no certain means for the grain company creditors making good any sum of composition from the brewery company estate; and on this account, were there no other reason, the proposed composition is nugatory.

These illustrations might be largely multiplied. In substance they all evolve themselves from the primary objection that two separate sequestrated estates cannot be competently massed to the effect of giving all the creditors on both estates their united funds for an indiscriminate dividend. This primary objection I think it is impossible to overcome.

Agents for M'Laren & Co. and Cochrane, Paterson & Co.—Murdoch, Boyd & Co. S.S.C.

Agent for Young—S. F. Weir, S.S.C.

Agent for Respondent—P. S. Beveridge, S.S.C.

Thursday, July **1.**

FIRST DIVISION.

PEDDIE *v.* HENDERSON.

Jury Trial—Agreement—Building Contract—Sufficiency of Work—Inspector of Works. In an action of damages against a builder for bad work, the Court refused to set aside the verdict as against evidence—Lord Deas *diss.*

Observations, per Lord Deas, as to the liability of contractor for work which is bad and not according to contract, where it is passed by the inspector of works.

This was an action of damages for breach of contract, at the instance of Donald Smith Peddie, C.A., against Alexander Henderson, builder in Edinburgh. The case was tried on March 1869 on the following issues:—

"Whether the defender contracted with the pursuer to execute certain work on the pursuer's proposed buildings at Trinity in terms of offer and acceptance, plans and specification, Nos. 6, 7, 8, 10, 11, 12, 13, and 14 of process; and whether the defender failed to implement the said contract by executing the said work, as regards the drains, in a sufficient manner, to the loss, injury and damage of the pursuer. Damages £200;

OR,

"Whether the pursuer failed timeously to object to the said work, as regards the drains executed by the defender."

After counsel for the parties had addressed the jury, and Lord Ormidale had, in the course of his charge, brought under the consideration of the jury what appeared to him to be the material matters bearing on the first issue, and after having explained to the jury that it was only in the event of their coming to the conclusion that the pursuer was entitled to their verdict under that issue it would be necessary for them to deal with the second or alternative issue, in reference to which