those in force here. Now, as to whether the English system is preferable to the Scotch system I will not say a word; but I think the Scotch Courts would play a very strange part if they assisted the bankrupt to evade the English law. But it was further said that an undertaking would be entered into before the Court here that 3s. 6d. in the pound would be paid as composition if the sequestration remained here. That, in consequence of some observations which fell from the Court, was departed from, and I think wisely, because it was not for the bankrupt to transact with the Court on such a subject as that; it would be unbecoming on the part of the Court to attach any weight to such an offer. But then it has been said—and that had some influence with me at the time—that this proposal would be made by the bankrupt at a meeting of creditors. But the conclusion I have come to is, that this is in the future, and it is impossible for us to proceed upon a prospective contingency which may or may not occur. Therefore I disregard this altogether, and I may say that I do not like the complexion of this proposed transaction at all. I do not like the idea of the Court not sending the proceedings to England in order to entertain such a proposal from the bankrupt. I have therefore no hesitation in saying that the sequestration should be recalled.

Lord Gifford—I am of the same opinion as your Lordships, but not without hesitation.

I have arrived at this decision with regret, for it is against the wishes of the great majority of creditors. Still, I must go upon principle, and this case raises a very important one. It is different from all the cases quoted, for it cannot be said that the bankrupt came to Scotland for the express purpose of obtaining sequestration.

The first requisite under the statute is present here undoubtedly, as there is a majority of creditors resident in England; and not only is that the case, judging from their residence, but if we look deeper we find that all the debts, except Cumstie's, are English debts. In short, it is an English bankruptcy, and all the obligations of the debtor have been contracted in England. Next, as to the situation of the property of the bankrupt. It is said that the only asset is situated in Scotland, viz., the claim against Mr Baillie of Dochfour. But this, even supposing it to be the case, is not of much importance when we find that all the bankrupt's assets as a trader (and I do not think these assets ceased to be his property although they were impledged) are in England.

The statute, besides specifying these two requisites to which I have alluded, goes on to say "or other causes," and this allows a wide latitude to the Court. What are the "other causes?" I rather think this case comes under that category of sequestrations the leading purpose of which is not to distribute the bankrupt's funds, but to obtain his discharge, and in regard to this I think we are entitled to look at the provisions of the law of England, and we find that it is different from that of Scotland, as has already been explained by your Lordships. Now, we must hold that the provisions of the law of England in this matter are wise, and we cannot encourage people to come to Scotland to get rid of them. We further find, from a consideration of the law of England, that if a man has incurred debt by means of any fraud or breach of trust, he cannot obtain his discharge by paying the 10s. in the pound, without which composition he cannot in any case get his discharge. I do not say this applies to the present case, but we are bound to take such circumstances into consideration. I think they fairly fall under the "other causes" referred to. Especially are we bound to consider such circumstances when we find that the only reason why the sequestration should go on here is that a composition of 3s. 6d. in the pound has been offered by the bankrupt's father on condition of his getting his discharge. It seems to me that an English sequestration should go on in England and a Scotch in Scotland. It would never do for the Courts of this country or of England to hold out inducements to debtors of the other country to come and get sequestration. I think this is an English bankruptcy, and should be carried out in England, and though we are going a little further than any of the other cases, I think we are only carrying out the principle of the statute.

The Court accordingly recalled Lord Adam's interlocutor, granted the prayer of the petition, recalled the sequestration, and prohibited any further procedure therein and appointed the judgment of recal to be entered in the Register of Sequestrations and marked upon the margin of the Record of Inhibitions, &c.

Counsel for Petitioner (Appellant)—Dean of Faculty (Fraser)—Rhind. Agent—William Officer, S.S.C.

Counsel for majority of creditors—Asher. Agents—Lindsay, Paterson & Co., W.S.

Counsel for W. M. Baillie—Mackintosh. Agents—J. & A. Peddie & Ivory, W.S.

Counsel for Credit Company—Maclean. Agents—W. & J. Burness, W.S.

Friday, January 25.

FIRST DIVISION.

COWAN, OFFICIAL LIQUIDATOR OF THE EDINBURGH THEATRE COMPANY, PETITIONER (GOWANS' COMPENSATION CASE).

(*Vide ante*, December 13, 1877, p. 195.)

Public Company—Liquidation—Compensation where Calls on Shares sued for.

A creditor who is also a shareholder of a company that is in liquidation cannot set off the debt due to him as a creditor against the debt due by him as a shareholder.

In a petition by the official liquidator of a limited company to settle a list of contributories, *held* that a shareholder who was also a creditor of the company for work done was not entitled to plead the debt due to him in compensation of the calls on shares due by him, even where these calls had all been made previously to the winding-up, and the plea of compensation had been stated, though

no decision had been pronounced upon it, in defence to an action raised by the company for payment of them.

Statutes 25 *and* 26 *Vict. c.* 89, *and* 30 *and* 31 *Vict. c.* 131 (*Companies Acts* 1862 *and* 1867)—*Construction of.*

It is a principle of the Companies Acts of 1862 and 1867, operated by sections 7th, 8th, 23d, 38th, 98th, 101st, and 133d, and 102d section of the Act of 1862, to secure to the creditors of limited companies a *pari passu* preference over the shareholders, and the official liquidator is astatutory trustee for that purpose.

This was a sequel to the case reported of date December 13, 1877, *ante* p. 195, in a petition presented by the official liquidator of the Edinburgh Theatre Company (Limited) to settle a list of contributories. The question to be determined in this case arose with Mr Gowans, who had a claim of £13,653 against the company for work done by him under a contract for the company, and who, it was maintained by the official liquidator, ought to stand on the list of contributories for 720 shares, and ought to be found liable for the amount of unpaid calls on that number of shares, viz., £3842, 10s. Mr Gowans had previously pleaded that the directors had failed to implement certain undertakings, and that the list should be corrected so as to give effect to certain liabilities and obligations that had fallen upon them. That contention had been decided adversely to Mr Gowans, *ante*, p. 195.

Mr Gowans now sought to be entitled to set off against the claim made upon him by the liquidator the sum due to him under his contract. On November 30th 1876 the Theatre Company had raised an action against Mr Gowans concluding for "payment to the Bank of Scotland on account of the pursuers" of the sum then due by him in respect of the amount of calls on shares standing in his name. The pursuers stated that the calls sued for had been impledged by them to the Bank of Scotland in liquidation *pro tanto* of certain advances made by the bank. In defence Mr Gowans had pleaded compensation, in respect of the sum due to him under his contract for work. His claim was constituted by a decree-arbitral dated January 26, 1877, and was therein ascertained to amount to £13,653. The decree was produced in process. The order for winding-up the Company was not pronounced till 14th June 1877, by which time all the calls had been made. On 1st November 1877 the official liquidator was sisted as a party to the above-mentioned action, and the Lord Ordinary (CRAIGHILL), before whom it depended, reported it to the First Division with reference to the present petition, which had been presented to that Division of the Court on 16th October 1877.

In his answers to the petition Mr Gowans submitted that he was not liable as a contributory, because prior to the winding-up he was a creditor of the company in a liquid debt to an amount exceeding that said to be due by him. (2) Because it was the directors' duty to have put the amount of said debt to the respondent's credit in account for calls, and the respondent ought not to be prejudiced by their failure to do so. (3) Because, in any view, it being a condition of the respondent's subscription for 300 of the shares held by him that the calls thereon should be payable out of the instalments under his contract, the respondent is not liable to pay calls on said shares otherwise than by setting off against the same the sums due to him under his contract. (4) Because the respondent's claim against the company was not only liquid, but was judicially pleaded against their claims for calls prior to the commencement of the winding-up.

The argument for the petitioner will be found summarised in Buckley on Law and Practice under the Companies Acts, 2d ed., 237, and the authorities that are there quoted were relied on by the petitioner's counsel.

Mr Gowans argued—Calls that were extinguished prior to the commencement of the liquidation could not be revived—Lindley on Partnership, 1359, and following pages. Compensation when pleaded operated as from the date when the *concursus* took place, and what followed was just equivalent to writing off debts by cross entries in books. As to the operation of compensation—cf. 1 Bankton, 492; Stair, i. 18, 6; Erskine, iii. 4, 11; 2 Bell's Comm. (5th ed.), 124; Bell's Prin. sec. 572. He had pleaded compensation in the action at the instance of the company. That operated back to the date of the *concursus*, and the result was that at the date of this order for winding-up Mr Gowans' liabilities were gone, having been extinguished by the counter claim. By pleading compensation he did not defraud anyone, for practically he paid cash. The object of the statute was to reduce the liability of shareholders to a pecuniary obligation, and to prevent parties taking promotion money in the form of shares.

At advising—

LORD PRESIDENT—The name of Mr Gowans appears in the list of contributories made up by the liquidator as the owner of 720 shares, the total amount of calls payable on these shares being £7200. Of that it appears that £3357, 10s. has been paid up, and there therefore remains in arrear a sum of £3842, 10s. The purpose of entering Mr Gowans as a contributor is of course to make him liable for that balance. The calls were all made before the order for winding-up was pronounced.

That being the state of the facts, Mr Gowans objects to being placed upon the list of contributories, because he says he is a creditor of the company for work done under his contract to a much larger amount than is due by him under these calls. In short, he pleads compensation to the effect that the debt he owes as a shareholder is extinguished by the debt due to him. If this contention is sustained, the result will be that Mr Gowans will receive in full payment of as much of his debt as can be covered by the amount of his unpaid calls, and he will therefore to that extent receive a preference over the other creditors of the company. That would be the obvious result of sustaining this plea of compensation. But I think it would be a very strange thing if, in a proceeding which has for its object the *pari passu* ranking of creditors, it is possible for any creditor to secure a preference for himself because he is also a shareholder of the company whose affairs are in liquidation.

The question of course depends on the Com

panies Acts of 1862 and 1867, but I am spared the necessity of examining the various clauses of those statutes, for I am glad to find that this point has been made the subject of decision in two cases in the Court of Chancery in the most authoritative manner. The first case was that of *Grissell*, decided by Lord Chelmsford, with the assistance of the Lords Justices of Appeal, L.R., 1 Ch. 528, and the second was that of *Black & Company*, decided by Lord Selborne with the same assistance, L.R., 8 Ch. 254. I shall read a single passage from the judgment of Lord Selborne in the latter case, which is directly applicable here, and expresses exactly the view I take of the circumstances that have arisen. He says—"The different sections of the Act," *i.e.*, the Act of 1862—"those which define the liability of limited companies, the 7th, 8th, 23d, and 38th—those which deal with the administration of assets, the 98th, 101st, and 133d—those which give the power to make calls, not in the ordinary way, but specially for the purposes of this Act, the 102d and 133d—all have in view the payment *pari passu* and equally of the debts due to the creditors, and the bank which receives the calls necessarily receives them as a statutory trustee for the equal and rateable payment of all the creditors. The result of this contention, that one particular creditor may pay himself in full by retaining his own calls and not paying them, would in effect be to give him a preference, and to exonerate him from his obligation as a shareholder to contribute towards the payment of the debts of the other creditors. That appears to me to be utterly opposed to the whole principle of the law of set-off, and to all the provisions of the Act which bear on this subject." Now, I think we find laid down there, not merely a rule resulting from a consideration of the clauses of the statute, but also a statement of the principle or reason on which they are founded, which is to my mind perfectly satisfactory. When in the course of a liquidation a creditor, who is also a shareholder of the company, proposes to set the one debt against the other, the objection which at once arises is that he is due his calls to a different person, or at least to a person acting in a different capacity from the person who is his debtor. No doubt the liquidator acts and sues in the name of the company, but, as Lord Selborne says, he is "a statutory trustee for the equal and rateable payment of all the creditors." He is ingathering the assets of the company, not for the contributories or shareholders of the company, but for the creditors in the first instance. The creditors are to have a preference over the shareholders, and it is to secure a *pari passu* preference among them that the liquidator is appointed. It is plain therefore that to plead compensation in such a case is inadmissible.

But it is said that in both of those cases to which I have referred the calls were made during liquidation, while here the calls were made before the winding-up, and therefore that as the two debts both existed and were both due before the order for winding-up was pronounced there is room for compensation. Now, that would be a very strong argument if compensation operated *ipso jure*. But it does not. The plea requires to be stated, and to have effect given to it. The circumstance that the two debts existed before liquidation will not avail, because compensation could not then take effect, and the call debt could not therefore be extinguished before liquidation had begun.

The case has a further specialty in this respect, that before liquidation began the Company had raised an action against Mr Gowans for payment of the amount due under the calls, and that in that action Mr Gowans had pleaded compensation. That action was raised in November 1876. The record was closed in January 1877, and on the 30th of that month Mr Gowans produced a decree-arbitral which made the debt due to him liquid. All that took place before the winding-up had begun, but nothing further. The action was raised, compensation was pleaded, the claim was liquid; but the action was not decided, the plea of compensation was not sustained, the one claim had not extinguished the other when the liquidator was appointed. On 1st November 1877 the liquidator was sisted as pursuer in this action without any objection on Mr Gowans' part. I do not say that that was due to any neglect on Mr Gowans' part. The liquidator was bound to take up the action, and I do not say that anything could have prevented his being sisted as pursuer. But this plea of compensation had not been sustained or given effect to by any judgment, and in these circumstances it appears to me that the debt is not extinguished, and if it exists, the right to it is in the person of the liquidator for the benefit of the creditors preferentially to the shareholders. The whole assets—and this is simply one of them—are transferred to the liquidator for that purpose. Therefore I do not think that by this specialty there is any difference constituted between this case and those which I have quoted. And even if we had not these decisions before us, I may say I should come to the same conclusion.

I desire further to say, that the decision we are to pronounce is not inconsistent with the rules regarding the balancing of accounts on which we decide preferences in bankruptcy. The application of that rule is excluded by the combination of characters that exist in Mr Gowans; he is part of the bankrupt Company as well as its creditor, and it is that that prevents the application of the ordinary equity by which we balance the mutual claims of debit and credit in bankruptcy.

Lord Deas—In the course of the Lord Chancellor (Chelmsford's) opinion in *Grissell's* case he stated that it was quite clear that the amount of a call not paid could not be set off against a debt due to the contributors. His words were—"To allow a set-off against the call would be contrary to the whole scope of the Act. In support of this view it will be sufficient to refer again to the 133d section as to the satisfaction of the liabilities of the Company *pari passu*." Then he gives as an illustration what is a fact in this case, that if the amount of the debt due by the Company was equal to the amount due under the calls, this creditor, if he could set off his claim against the calls, would be getting 20s. in the pound, while other creditors would get nothing at all perhaps. The very case put there as an illustration is a fact here. Lord Selborne, in the subsequent case of *Black*, refers to that opinion of Lord Chelmsford as a sound opinion.

As to the other points of the case, I concur

with your Lordship. I think this is a hard case for Mr Gowans, and I should gladly have come to a contrary decision, but the Act of Parliament and the course of decisions will not allow it.

Lord Mure—I see that in the cases referred to, and in the subsequent case of *Calisher*, L.R. 5 Eq. 214, where Lord Romilly delivered a judgment, reference is made to the provisions of the 101st section of the Act where it is contemplated that in a case of a company with unlimited liability there should be a set-off allowed, and the inference is drawn that in a company with limited liability there can be no such set-off, for if it were otherwise, in the case where the debt was equal to the call, the creditor who was also a shareholder would get his debt in full, while an outside creditor might get nothing. That is clear when we refer to the 25th section of the Act of 1867, which deals with the question of agreements between the company and one of its members to the effect of giving him any such right as is claimed here. On the whole question, I concur with your Lordship in thinking that no such privilege is competent to Mr Gowans.

Lord Shand—I think it is clear, on the principle stated by the Lord Chancellor in the case of *Black & Company*, that unless a shareholder in Mr Gowans' position can show that some specialty has occurred to take his case out of the general rule, he must, like the other shareholders, pay all that he is in arrear in respect of calls. The reason is that in ordinary circumstances a creditor shareholder ought not to obtain a preference over the ordinary creditors of the company. He must contribute like the other shareholders to the fund for payment of creditors, and then rank like the other creditors on the fund for the debt due to him. Your Lordship has noticed that in two cases—viz., those of *Grissell* and of *Black & Company*—that principle has been applied where the calls due by the contributory had been made after liquidation had commenced. The case of *Calisher* was precisely the same as that of Mr Gowans in this respect, that the calls had all been made before the winding-up began, so that it is a direct authority here.

But Mr Gowans has maintained that there are specialties which take his case out of the general rule of law. These are correctly enough summarised in his answers. Substantially they are three in number. The first in natural order is that which comes third—[*reads ut supra*]. It was explained to us that this defence was founded on the terms of Mr Gowans' application for shares, which contained this passage:—"I also agree to take stock in the New Theatre Company to the extent of seven and a-half per cent. on the amount of my estimate, the calls thereon to be deducted *pro rata* from the instalments as they are paid." In the case of an ordinary unlimited company such a stipulation or agreement would be no doubt a good ground of defence, but in the case of a limited company the answer is to be found in the 25th section of the Companies Act of 1867, which provides that—"Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint-Stock Companies at or before the issue of such shares." The object of filing such contracts is, that parties dealing with the Company may have notice of the power that has been given to certain shareholders of retaining the sums falling due by them as calls. An agreement that has not been so filed can receive no effect.

The other grounds of defence, the first and second alleged, which may be taken together, are conclusively disposed of by the authorities to which your Lordship has referred. The mere fact that Mr Gowans has a claim as a creditor of the Company is no good reason for a refusal to pay calls as a shareholder.

The next and most serious contention pressed was under the 4th article, where Mr Gowans maintains that his claim against the Company was not only liquid, but was judicially pleaded against their claims for calls prior to the commencement of the winding-up. There is no doubt that the fact is so, and that in an action for payment of calls that plea was maintained as stated. But it is equally clear that that action had not reached the stage at which the plea could be entertained or disposed of by the Judge. It is settled by the case of *Habershon* (L.R. 5 Eq. 286), and clear on general principle, that where there is a liability for calls, and the person liable is also a creditor of the Company, there may be a transaction between the directors of the Company and the creditor-shareholder whereby the liability for calls may, by arrangement, be set off against the debt due by the Company, and the liability for calls thereby extinguished. But that can only occur where there has been a transaction to that effect; the liability for calls must be extinguished before the liquidation begins. It is pretty clear, I think, that if this plea of compensation had been taken up and sustained by the Court before the liquidation commenced, there would then have been such a transaction as is required to extinguish the claim; but until the plea has been not merely proponed but sustained, it is ineffectual against a claim for calls.

I may observe, however, that it is by no means clear that the plea of compensation would have been sustained. I am not at all satisfied that it would, or that Mr Gowans has suffered any prejudice by the delay that has occurred. For I observe that the action for calls at the instance of the Theatre Company asks for decree, not that the money should be paid to the pursuers, but to the Bank of Scotland on account of the pursuers, on the statement that "the calls now sued for have been impledged to the Bank of Scotland in liquidation *pro tanto* of advances made by the said bank for behoof of the pursuers." If that statement was correct, an objection immediately arose to compensation. If the pursuers could show that the right to these calls was in the Bank of Scotland (and I see no reason to doubt it was so), there would no longer be that *concursus debiti et crediti* which is at the root of compensation. That illustrates in a forcible way the proposition that the plea of compensation must be sustained, and that nothing short of that can have the effect of extinguishing the liability of a shareholder for calls in respect of a debt due to him by the Company.

The Court pronounced an interlocutor repelling Mr Gowan's objections, and decerning against him to make payment of the sum certified to be due to him, with interest at 10 per cent., in terms of the 121st section of the Companies Act 1862, and of article 16th of the articles of association of the company, and finding him liable in expenses.

Counsel for Liquidator — Balfour — Pearson. Agents—Dalmahoy & Cowan, W.S.

Counsel for Gowans — Trayner — Mackintosh. Agents—Lindsay, Paterson, & Co., W.S.

Saturday, February 2.

FIRST DIVISION.

[Exchequer Cause.

UNION BANK OF SCOTLAND *v.* INLAND REVENUE.

Revenue—Inhabited House-Duty—Business Premises.

Schedule B appended to the Statute 48 Geo. III. cap. 55, enacts that "all shops and warehouses which are attached to the dwelling-house, or have any communication therewith, shall . . . be valued together with the dwelling-house" for the purposes of assessment.—*Held* that this rule is to be interpreted disjunctively, and therefore that business premises belonging to a bank which were attached to a dwelling-house occupied by the bank's accountant, but which had no communication therewith, were liable in inhabited house-duty along with the dwelling-house as one building.

The Union Bank of Scotland appealed to the Commissioners for the West District of Dumbartonshire against an assessment of inhabited house-duty, at 9d. per pound on £80, being the annual value of new premises in Dumbarton belonging to them. The premises consisted of two storeys and attics under one roof. The ground floor was used chiefly as a branch office of the bank, which was accessible only by a door opening to the public street. A small portion of the ground floor situated behind the office (but without any internal communication therewith) and the upper floor and attics formed a dwelling-house, occupied by the branch accountant of the bank as the residence of himself and family, the furniture in the house belonging to him. Access to the dwelling-house was obtained by a door opening into a passage or close leading from the street, and by a back-door opening into a court behind, which passage or close and court formed parts of the premises attached to the dwelling-house, and were used solely by the occupiers thereof. The court was enclosed by walls, excepting at the end of the passage, and there was a door on the passage at the street entrance. There was no internal communication between the bank office and the dwelling-house, or between the bank office and the court behind or the passage. To go from the one to the other it was necessary to pass along the public street. There was a bolt leading from the bank safe to and controlled from a room in the dwelling-house above.

The appellants contended (1) that as the occupation of the dwelling-house formed the basis of an assessment for inhabited house-duty, the appellants could not be liable in duty either on house or office, unless the bank corporation occupied the dwelling-house, which was not the case. The accountant occupied the house as his private residence. (2) Even assuming the corporation to be occupants of the house, the office was not liable to the duty, as it was used solely as a place of business, and had no communication with the house either internally within the fabric of the building or externally over ground forming part of the same premises. The circumstance that the office was under the same roof with the house did not of itself infer liability; if it did, every tenement consisting of separate flats in different occupation would be chargeable to duty as one house.

The surveyor contended that the bank were the occupiers of the whole premises, the accountant being in possession of the house merely as their servant, and removable at their pleasure.

The Commissioners were of opinion that the accountant's occupancy was the bank's occupancy, and confirmed the charge.

The appellants craved a Case for the opinion of the Court of Exchequer, which was accordingly stated and appointed to be heard before the First Division.

Argued for the appellants—(1) There was no "communication" in the sense of the Act between the bank and the dwelling-house, either internally within the building itself or externally over ground forming part of the same premises. Nor could the bank be held to be "attached" to the dwelling-house. Mere corporeal attachment was plainly not enough, for in this sense every house in a street was attached to it neighbour, and would be liable. There could be attachment only where there was communication, *i.e.*, the statute was not to be interpreted disjunctively. (2) To construe the rule as the Commissioners had done would inflict a hardship on small traders whose house was under £20 value, but whose shop would bring it over that amount. (3) The present case fell under the exemption granted by the Act 5 Geo. IV. cap. 44, sec. 4.

The Court intimated that the Case must be amended in order to raise the third point.

The appellant stated that he did not propose to amend.

Authorities—*Edinburgh Life Assurance Company* and *Scottish Widows Fund* v. *The Solicitor of Inland Revenue*, Feb. 2, 1875, 2 Rettie 394; *Russell* and *Salmond* v. *The Inland Revenue*, Jan. 18, 1878, *ante*, 270.

The respondents were not called upon.

At advising—

Lord President—The enactment on which the surveyor founds here is the third rule of Schedule B, appended to the Statute 48 Geo. III. chap. 55, which enacts that "all shops and warehouses which are attached to the dwelling-house, or have any communication therewith, shall, in charging the said duties, be valued together with the dwelling-house."

Now, if it had been intended by the appellant here to maintain that the business premises which