child nevertheless taking the share or shares which would have belonged or accrued to his, her, or their parent if such parent had been alive, whom failing for behoof of the said Georgina Mollison Allardice's nearest heirs and assignees in fee."

During the subsistence of the marriage the trustees had paid the annual income of Mrs M'Lean's estate to the spouses in terms of the contract of marriage. After Mr M'Lean's death the parties of the first part received payment of the principal sum in life policy on his life, with bonus additions thereto, amounting to £603, 15s. This, with £1022, 3s. 9d., conveyed by Mrs M'Lean to the trustees, formed the whole estate —in all, £1625, 18s. 9d.

At her husband's death Mrs M'Lean claimed (1) the one-half of the estate which had been conveyed by her; (2) the other half of the estate conveyed by her, together with the proceeds of the policy.

The latter claim the trustees resisted.

The questions of law submitted to the Court were as follows:—"(1) Are the parties hereto of the first part entitled in a due administration of their trust to pay to Mrs Georgina Mollison Allardice or M'Lean, a party hereto of the second part, the one-half of the means and estate conveyed by her by the said contract of marriage, which they are thereby directed in the events which have happened to hold and apply for behoof of the said Georgina Mollison Allardice or M'Lean's nearest heirs and assignees in fee? (2) Are the parties hereto of the first part entitled in a due administration of their trust to pay to the said Mrs Georgina Mollison Allardice or M'Lean, one of the parties hereto of the second part, the proceeds of the said policy of assurance on the life of the said Reverend Daniel M'Lean?"

Authorities quoted for the first parties—*Pursell* v. *Elder*, June 13, 1865, 3 Macph. (H. of L.) 59; *Cumstie* v. *Cumstie's Trustees*, June 30, 1876, 3 R. 921; *Martin* v. *Bannatyne*, March 8, 1861, 23 D. 705.

At advising—

Lord Ormidale—The authorities which have been quoted to the Court differ from the present case in this very important particular—that here there were no children born of the marriage, and that the liferent was not declared to be alimentary. Accordingly, the question of a protection to be extended over the capital sum entirely falls through, there being no interests to protect. That being so, it really comes to this—that the widow Mrs M'Lean is the only person who has an interest in this portion of the fund claimed by her, and accordingly it is hers, and she is entitled to have it conveyed to her absolutely.

Lord Gifford—The only object of this clause in the marriage-contract is to protect children. Now, here the marriage has been dissolved by Mr M'Lean's death, and there are no children, accordingly the widow has come to be the only interested person as regards the fund claimed. Mrs M'Lean could sell or assign her interest in this money, and there is no reason why it should not absolutely be paid to her.

Lord Young—(who had been called into this Division in the absence of the Lord Justice-Clerk)—I concur. It seems to me perfectly clear that the purpose of restricting Mrs M'Lean's interest to a liferent as regards half of the fund was to protect the interests of children. This may be readily seen by reading the clause without that part of it which refers to children. Now, no one would think of giving a fund to a lady in liferent and her heirs and assignees in fee, and it is manifest Mrs M'Lean has the fee.

The Court answered both questions in the affirmative.

Counsel for First Parties—M'Laren—Jameson. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for Second Party—M'Lean—Mitchell. Agent—J. M. Bell. W.S.

Tuesday, February 26.

FIRST DIVISION.

COWAN, OFFICIAL LIQUIDATOR OF THE EDINBURGH THEATRE COMPANY, PETITIONER (SHAW'S CASE).

Public Company — Liquidation — Compensation by Account Due, where Calls on Shares sued for.

Terms of a verbal agreement between the chairman of a limited company and a creditor, who was also a shareholder of the company, and in arrear of calls on his shares, *held* irrelevant to infer a crossing of the claim for arrears of calls by the debt due to the shareholder, so as to entitle him to set the one against the other when the company came into liquidation.

Proof—Discharge—Verbal or Written.

Question whether compensation whereby two debts are discharged can be proved verbally, the mutual obligations having been constituted in writing.

This was another case (*vide* Gowans' case, *ante*, p. 315), arising in the petition by the official liquidator of the Edinburgh Theatre Company to settle a list of contributories. The official liquidator proposed to put Mr Shaw on the list for thirty shares, and stated the amount due by him for arrears of calls on these shares at £255. Mr Shaw objected to the amount set down as due by him, and claimed to be entitled to set against this demand a sum of £215, 15s. 6d. due to him by the company. The balance of £39, 4s. 6d. he was willing to pay. The cross claim arose in this way—Mr Shaw was, like Mr Gowans, one of the contractors for the building of the theatre, and averred that he had subscribed for thirty-one shares on the understanding that his claims for work done were to be set against the company's claims for calls.

Mr Shaw, in his answers to the liquidator's petition, averred further, that his "work was executed in the months of December 1875 and January 1876, and an account therefor, amounting to £215, 15s. 6d., was shortly thereafter rendered to the company, and was not disputed. It was subsequently, on 7th December 1876, certified by the company's architect that the respondent was entitled to re-

ceive under his contract the said sum of £215, 15s. 6d., and this sum accordingly became at that date a liquid debt due by the company to the respondent. At the second statutory meeting of the company, held on 14th October 1876 (the respondent being at that time in arrear of calls to the extent of £210), the matter of the accounts due by the company to the respondent and certain other contractors who held shares was brought before the meeting, and the respondent put publicly to the chairman of the directors the question in what position the respondent and the other contractors were to be placed as regarded their arrears of calls. The answer made by the chairman, with the authority of the directors and with the approval of the meeting, was that the two amounts would be set off the one against the other, and with this the respondent expressed himself satisfied. There had been shortly before a meeting of certain of the contractors with Mr Mitchell, the law agent and a director of the company, at the latter's office, and at this meeting a similar question was put to Mr Mitchell, and the same answer was given."

This transaction, the respondent maintained, amounted to a crossing of the claims due to the company and to him as a contractor, and extinguished both. He asked for a proof of his averments as to what passed at this meeting. If receipts had been exchanged or a document written out at that meeting (February 8, 1868), this would have been *Habershon's* case over again—L.R. 5 Eq. 286; Lindley on Partnership, 1358. Now, here the respondent could prove an agreement which was equivalent.

It was answered for the petitioner—All that the averment amounted to was, that an agreement was made to set the accounts against one another at some future date. Besides, if it were relevant, it was not competent to prove it verbally.

At advising—

Lord President—The only point of distinction between this case and *Gowans'* case, which we disposed of lately, consists of an averment of something that passed at a statutory meeting of the company on 14th October 1876. At this time the company was owing accounts to a number of tradesmen, and among the others to the respondent. The amount of his account, as ultimately ascertained, was £215, 15s. 6d.; but it seems to have been necessary, or at all events it was contemplated, that that sum should be certified as due by the architect; it was not so certified till two months after this meeting had been held. It was in that state of matters, the company being in a state of considerable embarrassment, for they had failed, as we know, in the previous spring to obtain a subscription of new capital, that the respondent put a question to the chairman, which is thus expressed in the respondent's answers:—"The respondent put publicly to the chairman of the directors the question, in what position the respondent and the other contractors were to be placed as regarded their arrears of calls. The answer made by the chairman, with the authority of the directors and with the approval of the meeting, was that the two amounts would be set off the one against the other, and with this the respondent expressed himself satisfied." It was conceded in argument, and as there is no averment on the subject we must take it for granted, that nothing followed this. There is no mention to be found in the minute-book of what is said to have passed at this meeting, and there is no entry in the books of any set-off. The register of the company bears that the respondent was in arrear of calls upon his shares. The ledger and the subsidiary books of the company represent him, on the other hand, as a creditor of the company for work done to the amount of £215, 15s. 6d., but these liabilities are nowhere set off against one another. It is said that what passed at this meeting of the company operated compensation.

Now, in the first place, I am of opinion that there is no allegation of any verbal agreement. There is a question put as to what will happen to the debts due to the various contractors. "Oh," says the chairman, "they will be set against the calls." Does that extinguish the debts? To operate compensation both debts must be extinguished when an agreement is made between parties to set off one debt against another, and that is final; there is of necessity a mutual discharge of the debts. Unless the debt of the respondent is extinguished, the liquidator cannot strike him off the list of contributories. Now, while I am of opinion that the allegation here is so vague as to be irrelevant to infer any such agreement, I entertain the greatest doubt as to whether one debt or two debts can be discharged verbally. One debt cannot be so discharged; there must be a discharge in writing; and how two debts can be discharged by a verbal agreement to set the one against the other I do not understand. It is not necessary to decide that however, for there is not here any competent allegation of an agreement to set one debt against another.

Lord Deas and Lord Mure concurred in thinking there was no relevant averment of any agreement.

Lord Shand—The entry in the books of the company founded on by Mr Shaw was made in January 1877, several months after this meeting. If it had been of the nature of a crossing of the claims, that would have been sufficient to entitle him to succeed, but the sum in question enters the books in no other way than as a recognition by the company of their indebtedness, in the same way as the debts of all the other creditors do. As the books do not afford any ground for the averment of the entries having been crossed, what else have we. There must be a transaction by which the debt due on calls is set against the debt due for work done. But there is nothing of that kind here; all that the chairman's answer amounts to is, that it is the intention of the directors to transact with their creditors on the footing that their claims are to be set against what is due on calls. That becomes all the more apparent when I find that about this date there were a number of persons—nine, I think, in all—who were creditors to an amount of £11,000, in the same position as Mr Shaw. I am clearly of opinion then that there is no averment of such a transaction as will effect a crossing of the liabilities.

I agree with your Lordships that it is not necessary to decide whether the extinction of one debt

by a counter-claim in this way can or cannot be proved by parole. My impression—but it is only an impression—is, that as that would amount to a discharge of the debts on both sides, it is only competent to be proved *scripto*.

This case differs from *Habershon's* case in this respect, that there there was a meeting of directors at which the matter of the counter-claims that existed was taken up, and it was agreed to discharge the claim for calls by the claim due to Mr Habershon for fees as architect of the company, and that transaction was followed by an exchange of receipts, by which one debt was set against the other and both extinguished.

The Court pronounced an interlocutor repelling Mr Shaw's objections, and decerning against him to make payment of the sum certified to be due by him, with interest at ten per cent. till payment, 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—Cowan & Dalmahoy, W.S.

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

HOUSE OF LORDS.

Monday, February 18.

THE SCOTTISH EQUITABLE LIFE ASSURANCE SOCIETY *v.* BUIST.

(Before Lord Hatherley, Lord Blackburn, and Lord Gordon.)

(*Ante*, July 14, 1876, vol. xiii. p. 659, 3 Rettie 1078; and July 13, 1877, vol. xiv. p. 635, 4 Rettie 1076.)

Insurance—Acquiescence—Mora—*Bar—Fraud.*

Held (*aff.* judgment of the Court of Session, and referring as a precedent to *Anderson* v. *Fitzgerald*, 4 Clark and Finnelly's House of Lords Cases, 484) that it was no bar to an insurance company pursuing assignees of a policy of insurance for reduction thereof on the ground of wilful fraud and misrepresentation by the insured as to his habits and state of health, that certain of the officers of the company, after acceptance of the proposal and before the death of the insured, had suspicion as to his habits, but made no inquiry and gave no intimation to the assignees till after his death.

George Moir effected an insurance on his life with the Scottish Equitable Life Assurance Society for £2000, and in the succeeding month he assigned the policy to Mr Buist, who assigned it to others, retaining part of the interest to himself. Moir died in 1875, and an action was thereafter raised by the Society to have the policy reduced on the ground of fraud and breach of warranty and false statements.

The Scottish Widow's Fund and the General Life and Fire Assurance Company also brought reductions of policies granted by them to Moir upon similar grounds. Their policies had also been assigned.

The policies were eventually reduced, it being, *inter alia*, found to be no defence that the policies had fallen into the hands of onerous endorsees, as reported *ante*, July 14, 1876, vol. xiii. p. 659, 3 Rettie 1078; and July 13, 1877, vol. xiv. p. 635, 4 Rettie 1076.

Buist, the defender in the action at the instance of the Scottish Equitable Society, appealed to the House of Lords.

In opening the case the counsel for the appellant stated that it was only fair to their Lordships to mention that in a previous case decided by the House on appeal from Ireland—*Anderson* v. *Fitzgerald*, 1853, 4 Clark and Finnelly's House of Lords Cases, 484—it had been held that misstatements and concealments such as had been made in this case were fatal to the policy. Counsel admitted that the present case could not be distinguished from that, and that it would only be wasting their Lordships' time to contend further against the judgment. *

Lord Hatherley said that the learned counsel for the appellant had exercised a wise discretion in not protracting the arguments in a case which they considered hopeless. He, for his own part, could not see any mode of getting over the previous decision, and as the learned counsel for the appellant were also unable to suggest any such mode, the result must be that the appeal be dismissed, with costs.

Lord Blackburn and Lord Gordon concurred.

Interlocutor appealed from affirmed, and appeal dismissed, with costs.

Counsel for Appellant—Southgate, Q.C.—Scott.

Counsel for Respondents—Herschell, Q.C.—Balfour.

Tuesday, February 26.

KERR, ANDERSON, & COMPANY *v.* LANG.

(Before Lord Chancellor, Lord Hatherley, Lord Selborne, Lord Blackburn, and Lord Gordon.)

(*Ante*, June 1, 1877, vol. xiv. p. 494, 4 Rettie 779.)

Public Burdens—Glasgow Police Act 1866 (29 *and* 30 *Vict. cap.* 273), *sec.* 384—*Obligation to Fence River.*

The 384th section of the Glasgow Police Act 1866 empowers the Master of Works to call upon "any proprietor or occupier of a land or heritage to fence the same, or repair any chimney-stalk, . . . or any rhone, sign-board, or other thing connected with or appertaining to any building thereon, which appears to be dangerous."

Held (affirming judgment of Court of Session that a proprietor of lands which were bounded by the Clyde, a public navigable river, and through which there ran parallel to the river a public right-of-way, which was

* The argument submitted in the Court below on the point that the policy was in the hands of an onerous assignee, was not referred to by the appellant.