persons who reside for some temporary purpose only from that of persons who have the view or intent of establishing their residence. I think all of these three expressions, "residing in the United Kingdom," "having his residence in the United Kingdom," or being a person residing, but "not with any view or intent of establishing his residence in the United Kingdom" may be legitimately referred to, and ought to be in the view of the Court in settling the meaning of the words "residing in the United Kingdom" in the principal clause which is the subject of construction; and I am disposed to hold that a person is not liable to the assessment which has been here imposed unless it can be fairly said that he has his ordinary residence within the United Kingdom—an ordinary residence I shall rather say within the United Kingdom during the period for which the taxation is imposed.

I may say in passing, although it may not directly bear closely upon the question we have now to decide, that it occurs to me that although the provision in section 39 is in the language of exemption, yet, as I have indicated in the course of the argument, it rather appears to me to be a section of an explanatory nature which is intended to impose liability or to show that liability exists in certain circumstances upon persons who come to this country, but who are the subjects of other realms. For although no doubt the language there used is the language of exemption, it concludes with words which impose liability, viz., that "nevertheless every such person shall, after such residence in Great Britain for such space of time as aforesaid, be chargeable to the said duties for the year commencing on the sixth day of April preceding;" and the clause in itself provides that persons who have been "in Great Britain for some temporary purpose only, and not with any view or intent of establishing a residence therein, and who shall not actually have resided in Great Britain at one time or several times for a period equal in the whole to six months in any one year, shall be charged with the said duties mentioned in schedule D as a person residing in Great Britain in respect of the profits or gains received from or out of any possessions in Ireland, or any other of Her Majesty's dominions, or any foreign possessions," and so on, exempting—if you take it as an exemption—only from liability for profits from possessions as distinguished from profits or gains in respect of the carrying on of a profession or vocation or trade. If it be an exempting clause only, the result would be that a person coming for a temporary purpose only, with no view of establishing a residence, and who does not remain for six months in all, would nevertheless be liable for income tax upon profits upon any trade or vocation, which I do not think is the meaning of this section.

But that I state only in passing with reference to the proviso in the clause. The question here to be determined on—the meaning of the words "residing in the United Kingdom"—is whether Mr Lloyd, the appellant, has had an ordinary residence as distinguished from a temporary residence in Great Britain during the period in question. If he had been merely a temporary resident without any characteristic of settled residence about the occupation of his house at Minard, there would have been no liability; but I agree with your Lordship in holding that ordinary residence may be had in several countries—that a person may in the same year have an ordinary residence in several countries. It is obvious, as your Lordship has pointed out, that many persons have an ordinary residence in Scotland during one part of the year, and a residence, which might equally well be described as an ordinary residence, in London—a house, his own property, regularly resorted to for a considerable part of the year, and equally properly described as an ordinary residence. And so, as has been stated in argument, the same thing holds good in reference to different countries, that a person may have an ordinary residence in Scotland and another abroad where he has property, and a house to which he resorts many months in the year regularly. It appears to me that this case is of that class. Mr Lloyd no doubt has his ordinary residence at Leghorn. He is there the greater part of the year, carries on his business there, and has his home there undoubtedly; but I think equally he came to an ordinary residence when he came to his property at Minard in this country. He came to it as his home with his family and establishment, the only distinction being that in Scotland he was not carrying on business. I think, however, that although not carrying on business in Scotland he was residing in Scotland within the meaning of the Act, and occupying an ordinary residence for the time, and that therefore the deliverance of the Commissioners ought to be affirmed.

Lord Deas was absent.

The Court affirmed the determination of the Commissioners, and refused the appeal, with expenses.

Counsel for Appellant — Trayner— Jameson. Agents—Pearson, Robertson, & Finlay, W.S.

Counsel for Respondent — Mackintosh — Lorimer. Agent — Crole, Solicitor of Inland Revenue.

Friday, March 14.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

M'BRIDE (BOYLE'S FACTOR) *v.* STEVENSON.

Bankruptcy — Composition-Contract — Secured Creditor— Valuing and Deducting Security— Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 65.

It is an implied condition of the composition-contract that secured creditors must value and deduct their securities, and claim a composition only on the balance.

The creditors of a bankrupt having accepted a composition, he was discharged from the sequestration. Thereafter a secured creditor who had not claimed in the sequestration sued him for the amount of the composition on his debt without deducting the value of the security. *Held* that he was only

entitled to composition on the balance of his debt after deducting the value of his security.

This was an action at the instance of James M'Bride, writer in Glasgow, as factor *loco tutoris* to the children of the deceased Neil Boyle, against Samuel Stevenson, timber merchant, Polmadie Saw Mills, Glasgow, for £89, 5s. 7d., being a composition of 6d. in the pound on a total debt of £3571, 13s. 11d.

At Martinmas 1876 the defender had borrowed from the pursuer a sum of £3500, granting in security a bond and disposition in security over certain heritable subjects in Glasgow, the rate of interest to be 5 per cent. Interest was paid down to Martinmas 1878.

On 25th April 1879 the defender's estates were sequestrated under the Bankruptcy Acts, and a trustee appointed thereon. The defender was then owing the pursuer the principal sum in the bond, amounting with unpaid interest to £3571, 13s. 11d. The pursuer, believing his security to be ample, did not claim in the sequestration. The defender made an offer to his creditors of 6d. in the pound, which was accepted by them, and he was discharged and re-invested in his estates on 10th July 1879.

On 26th June 1879 the pursuer had served upon the trustee and the defender the statutory schedules of intimation with a view to the sale of the subjects, but there being no demand for such property the sale was not carried out.

This action for £89, 5s. 7d. as composition at 6d. per pound on the sum of £3571, 13s. 11d., with interest at 5 per cent. from 10th July 1879, was raised in May 1883.

The pursuer stated that he was "entitled to receive from the defender 6d. in the pound on the said sum of £3571, 13s. 11d., with interest thereon from the date of the defender's discharge. This composition, exclusive of interests, amounts to the sum sued for, and as the defender has refused payment, the present action has been rendered necessary."

The defender averred that the subjects in the security belonged to him at the date of the sequestration of his estates, and fell under the sequestration; that as the pursuer could not have claimed in the sequestration, he could not now claim as for composition payable under the sequestration, except on condition of valuing and deducting his security, in terms of section 65 of the Bankruptcy (Scotland) Act 1856. He admitted liability for composition of 6d. per pound on the balance of the debt after such valuation and deduction.

The pursuer pleaded that in respect of the defender's offer of composition, and discharge following thereupon, he was entitled to 6d. per pound on the debt, with interest.

The defender pleaded—"(2) The security subjects having formed part of the defender's estate at the date of his sequestration, the pursuer is bound to value and deduct the said security before suing for composition. (3) The pursuer having lodged no claim in the sequestration, can have no higher right against the defender, as now re-invested in his estate, than he would have had against the trustee in the sequestration."

Section 65 of the Bankruptcy (Scotland) Act 1856 enacts that "to entitle any creditor who holds a security over any part of the estate of the bankrupt to be ranked in order to draw a dividend, he shall, upon oath, put a specified value on such security, and deduct such value from his debt, and specify the balance; and the trustee, with consent of the commissioners, shall be entitled to a conveyance or assignation of such security at the expense of the estate, on payment of the value so specified, out of the first of the common fund, or to reserve to such creditor the full benefit of such security, and in either case the creditor shall be ranked for and receive a dividend on the said balance, and no more, without prejudice to the amount of his debt in other respects."

On 13th July 1883 the Lord Ordinary repelled the defences and decerned against the defender, conform to the conclusions of the libel.

"*Opinion.*—In this case the pursuer, a heritable creditor, sues the defender, who is debtor in the obligation, for payment of a composition of sixpence in the pound on the amount of the principal sum and interest due upon the bond. The defence is that the pursuer is bound to value his security as a condition of claiming a composition. I am of opinion that the defence is ill-founded. At common law a secured creditor is entitled to rank on his debtor's estate for the full amount of the unpaid debt, and to hold his security as a fund for the payment of the balance, subject to this condition, that he cannot draw from the personal and real estates of his debtor together more than the amount of his claim and interest. On this subject I refer to the opinion of the Lord President in the recent case of *University of Glasgow* v. *Yuill's Trustee*, 9 R. 643. The question is, whether the present case is governed by the common law or by the provisions of the 65th section of the Bankruptcy (Scotland) Act 1856. Now, the scope and purpose of that section are expressed in its introductory words—'To entitle any creditor who holds a security over any part of the estate of the bankrupt to be ranked in order to draw a dividend, he shall,' &c. The provisions of the section are therefore confined to the case of a creditor who desires to be ranked in order to draw a dividend. They are conditions of the right of drawing a dividend, and they suppose an estate to be divided. But in the present case the bankrupt's estate is not to be divided amongst his creditors. He has been re-invested in it, and in consideration of such re-investment he has agreed to pay, not a dividend, but a composition of sixpence in the pound to all his creditors. If it were necessary to consider the policy of the statute, I can see reasons why the 65th section should not apply to the present case. That section was passed for the purpose of establishing a more equitable system of ranking amongst creditors. But the creditors have no interest in this case. Even if the defence were successful, and the heritable estate valued, they would receive no more than the agreed-on composition. But it is not necessary to look for reasons. The 65th section is in my opinion plainly inapplicable to the case, and the pursuer is therefore entitled to be ranked in conformity with the principles of the common law for the amount of his claim without deduction. I therefore grant decree in terms of the conclusions of the action, with expenses."

The defender reclaimed, and argued—If the

pursuer had claimed in the sequestration he would have been under the provisions of section 65, and so bound to value and deduct his security. The fact that the pursuer made no claim in the sequestration did not alter the nature of his claim, which could only be for the balance after his security was deducted. There was an analogy in valuing and deducting for voting purposes in sequestrations. A composition-contract covered all debts.

Authorities—Bankruptcy Act 1814 (54 Geo. III. c. 137), secs. 50, 59; *Ferguson* v. *Smith*, November 16, 1836, 15 Sh. 25; *M'Vicar*, November 23, 1829, 9 Sh. 146; *Bell* v. *Carstairs*, December 17, 1842, 5 D. 318; Bell's Comm. (5th ed.), p. 458; Bankruptcy Act 1856, secs. 59, 65, 143, 144, 145; Alexander's Digest, p. 211.

Argued for pursuer—The defender had obtained his discharge upon the faith of his undertaking to pay 6d. per pound upon his whole debts, and the debt owing to the pursuer fell to be estimated for the purposes of the composition apart from any securities held for it. The heritable creditor might proceed upon the personal obligation, or he might realise his security. The composition in this case came in the place of the personal obligation of the bankrupt. The respondent was not at common law bound to value his security, and neither of the sections of the statute under which it was sought to make him value and deduct applied, and they had reference only to voting qualifications. The present question was a purely statutory one, and must be ruled by the terms of the statute. Section 65 was confined to cases of ranking and drawing a dividend, and there was no analogy to be drawn from the sections relating to voting. The case was exceptional, as no claim had been made in the sequestration.

Authorities—*University of Glasgow* v. *Yuill's Trustees*, February 10, 1882, 9 R. 643; *Black* v. *Melrose*, February 29, 1840, 2 D. 706; Bell's Comm. ii., p. 475; the sections of the statute cited by the reclaimer.

At advising—

Lord President—The estates of the defender here were sequestrated in April 1879, under the Bankruptcy Act of 1856, and in the sequestration the defender made an offer of a composition of 6d. in the pound, which offer was accepted, and he was discharged and reinvested in his estates.

The pursuer was a creditor for a sum of £3500, for which he held a heritable security, and thinking his security ample he made no claim in the sequestration. He now raises this action, and claims a composition upon his whole debt as at the date of the sequestration, without valuing and deducting the security which he holds. The defender says that he could not have claimed in the sequestration, and cannot now claim as for composition payable under the sequestration, except on condition of valuing and deducting his security in terms of section 65 of the Bankruptcy Act of 1859. The Lord Ordinary has decided in favour of the pursuer, and his judgment is based upon three propositions—First, at common law his Lordship says a secured creditor is entitled to rank on his debtor's estate for the full amount of the unpaid debt, and to hold his security as a fund for the payment of the balance, so long as he does not draw from the personal and real estate of his debtor together more than the amount of his claim and interest. Now, the truth of this proposition cannot be disputed.

Second, it is said by the Lord Ordinary to be a question whether the case is governed by the common law or by sec. 65 of the Bankruptcy Statute of 1856. The scope and purpose of the section are expressed in its opening words, "To entitle any creditor who holds a security over any part of the estate of the bankrupt, to be ranked in order to draw a dividend, he shall," &c. Now, that only expresses the alteration of the common law in this respect made by the 65th section of the 1856 Act.

The third proposition is that the provisions of the section are confined to the case of a creditor who desires to be ranked in order to draw a dividend.

As to the first two of these propositions, they cannot be disputed. I think that the Lord Ordinary is right with regard to the third also, with the qualification that that is not the position of the pursuer. These three propositions, then, may be considered sound, but the effect of the direction introduced by the 65th section is that no secured creditor in a sequestration can draw dividends in any event except upon the unsecured portions of his debt. This becomes by force of this enactment a universal rule of sequestration law. But the offer of a composition by the bankrupt, its acceptance by the creditors, and its judicial approval are all steps of procedure in the sequestration. They have for one of their objects to put an end to the sequestration, and to restore the estate to the bankrupt, but they are not the less on that account sequestration proceedings, and must all have a certain reference to the rules of sequestration law.

The essence of the composition-contract is, that the bankrupt buys from his creditors the estate in the hands of the trustee which would fall to be divided among all the creditors, and the consideration which he gives for the purchase is the value, on a fair estimate in the opinion of the parties to the contract, of what the creditors would draw in the form of dividends. But a composition is not merely a contract with the whole body of creditors; it is in effect a contract between a bankrupt and each creditor who would be entitled to a dividend, and therefore what each creditor is surrendering or selling is his prospect of a dividend, and the fair consideration is an equivalent in money payable either immediately or in instalments secured by caution. But if any secured creditors were entitled to demand a composition on the full amount of their debts they would receive a great deal more than an equivalent for what they had surrendered or sold, which would be quite inconsistent with the essential nature of the contract. I am therefore of opinion that it is an implied condition of the composition-contract that secured creditors must value and deduct their securities, and claim a composition only on the balance, just in the same way as they are bound to do in claiming a dividend.

Some difficulty was suggested as to the mode in which the security is to be valued for the purpose of drawing composition, as the only directions of the statute on this subject apply to claims for voting or drawing dividends; but if the principle be clear, the mode of making it out can easily be

arranged, and may safely be left to the parties themselves. If the creditor proposes to put too small a value upon his security, I think that the discharged bankrupt would be very well justified in insisting upon redeeming that portion of his estate which forms the subject of the security at the sum named by the creditors.

I therefore think that the Lord Ordinary's interlocutor must be recalled, and the logical consequence of that is that the defender must be assoilzied.

Lord Mure—I agree with what your Lordship has said as to the general rule of law relating to secured creditors, and I also think that the provisions of this 65th section of the Bankruptcy Act of 1856 are specific and clear. It must be kept in mind that the composition offer here was made in the course of the sequestration proceedings, and also that the rules laid down for ranking and drawing a dividend under this 65th section of the Act are very express, and declare that the creditor must value his security on oath, and deduct that value from his debt. It appears that no claim in the sequestration was lodged by the present pursuer, as he considered the heritable security which he held sufficient to meet his debt, but he now proposed to recover a composition upon his whole debt without valuing and deducting the heritable security which he holds. I agree with your Lordship in thinking that a secured creditor, like the present pursuer, is bound to value and deduct his security, and can only claim a composition on the balance. He must act as he would do if he were claiming a dividend.

It was argued to us in the course of the discussion that the qualification requisite for drawing a composition was analogous to that which was essential for voting; and that in the latter case under the provisions of sec. 59 the creditor was obliged to value and deduct, and I must say that that is my reading of that section also. It provides that "If a creditor hold a security for his debt over any part of the estate of the bankrupt, he shall before voting make an oath, in which he shall put a specific value on such security, and deduct such value from his debt, and specify the balance, . . . and he shall be entitled in any case to vote in respect of the balance and no more." . . .

Now, in the interpretation clause the word "vote" in addition to its ordinary meaning includes "a consent to any offer of composition," . . . and therefore in the consideration of any question of composition all creditors who hold securities are, I think, bound to value and deduct their securities, and can claim a composition only upon the balance.

Lord Shand concurred.

The Court recalled the Lord Ordinary's interlocutor, and assoilzied the defender.

Counsel for Pursuer—J. P. B. Robertson—M'Kechnie. Agents—Smith & Mason, S.S.C.

Counsel for Defender—Mackintosh—Pearson. Agents—Ronald & Ritchie, S.S.C.

Friday, March 14.

FIRST DIVISION.

[Bill Chamber.

LOCAL AUTHORITY OF DUMFRIES *v.* MURPHY.

Police—Public Health—Nuisance—Smoke—Consume "as far as Practicable"—Public Health (Scotland) Act 1867 (30 *and* 31 *Vict. cap.* 101), *sec.* 16, *sub-sec. H—Interdict.*

The Public Health (Scotland) Act 1867, sec. 16, sub-sec. H, provides, with regard to burghs, that the word "nuisance" shall be held to include any furnace "which does not as far as practicable" consume its own smoke. In a complaint brought by a local authority under this sub-section—*held* that it would be sufficient to constitute a nuisance within the meaning of the Act if a furnace, though well constructed, were systematically badly worked, but on the facts that the nuisance averred had not been proved.

This was a petition presented to the Sheriff of Dumfries and Galloway by the Local Authority of Dumfries, acting under the Public Health (Scotland) Act 1867, against Hugh Murphy, tanner, Dumfries, the prayer of which was "to decern for the removal, or remedy, or discontinuance of the nuisance hereinafter condescended on, and to grant interdict against the recurrence of it, all in terms of the Public Health (Scotland) Act 1867, and particularly sections 16, 18, 19, and 105 thereof."

By section 16, sub-section H, of the Public Health (Scotland) Act 1867, the word "nuisance" under said Act is declared to include, *inter alia*, "any fireplace or furnace which does not as far as practicable consume the smoke arising from the combustible matter used in such fireplace or furnace, and is used within any burgh for working engines by steam, or in any mill, factory, dyehouse, brewery, bakehouse, or gaswork, or in any manufactory or trade process whatsoever."

The petitioners averred that the respondent carried on a currying and tanning business in Shakespeare Street, Dumfries, and that within these premises on or about 17th, 18th, 19th, 20th, 24th, 25th, 26th and 27th July 1883 he "used, and still uses, a fireplace or furnace which did, and does not, as far as practicable, consume the smoke arising from the combustible matter used therein for working one or more engines by steam in said premises, or in the manufacture of leather or other trade process carried on by him therein, whereby a nuisance within the meaning of said section 16, sub-section H, existed, and still exists."

They further averred "that the said nuisance is caused by the burning in said fireplace or furnace of refuse bark or other similar material, instead of having the same removed to a suitable place, and to save the expense of such removal."

Section 17 of the Public Health (Scotland) Act 1867 provides that "If the local authority or sanitary inspector have reasonable grounds for believing that nuisance exists in any premises, such local authority or inspector may demand admission for themselves . . . . or any other person or persons whom the local authority may desire to inspect such premises, or for any or all