The petitioners thereafter moved in the Single Bills for decree in terms of the prayer of the petition, and argued—The Companies (Consolidation) Act 1908 (8 Edw. VII, c. 69), section 223, did not apply, and this was a *casus improvisus*. The liquidator of a company was in an analogous position to the trustee in a sequestration—Companies Consolidation Act 1908 (*cit.*), section 151 (2) (*g*) and (6)—and in similar circumstances the Court had exercised its *nobile officium* to provide a remedy when none was to be found in the Bankruptcy Acts—*Northern Heritable Securities Investment Company, Limited* v. *Whyte*, 1888, 16 R. 100, 26 S.L.R. 91; 1891, 18 R. (H.L.) 37, 28 S.L.R. 950; *MacDuff* v. *Baird*, 1892, 20 R. 101, 30 S.L.R. 109.

The opinion of the Court was delivered by

LORD PRESIDENT—In the special circumstances of this case, and following the analogy of the decisions under the Bankruptcy Acts, we think we may, in the exercise of the *nobile officium* of the Court, approve of the report and pronounce an interlocutor in the terms suggested by the reporter.

The Court pronounced an interlocutor in the terms suggested by the reporter.

Counsel for the Petitioners—Solicitor-General (Morison, K.C.)—Maclaren. Agents—Drummond & Reid, W.S.

Friday, March 17.

SECOND DIVISION.

(SINGLE BILLS.)

DONAGHY *v.* M'GORTY.

Process—Jury Trial—Decree by Default—Failure of Pursuer to Fee Fund Precept for Citation of Jury—Expenses—C.A.S. (1913) *K, ii,* 1, *Table of Fees* 23 (5).

Where a pursuer failed to fee fund the precept for the citation of a jury the Court *assoilzied* the defender with expenses.

The Codifying Act of Sederunt (1913), K, ii, 1, enacts that the Clerks of Session shall be entitled to charge the fees specified in the table thereto annexed—

TABLE OF FEES.

"23. *Jury Causes*:—

(5) Citation of each jury, to include outlays of Sheriff-Clerk in citing and in countermanding, £2 0 0"

James Donaghy, teacher of music, Glasgow, *pursuer*, brought an action against Gerald M'Gorty, wine and spirit merchant, Glasgow, *defender*, for £200 damages in respect of personal injuries.

An issue having been approved for the trial of the cause, the Lord Ordinary (ANDERSON) on 24th February 1916, on the motion of the defender, appointed the trial to proceed at the sittings in the ensuing Spring vacation, and the case was set down for trial on 20th March 1916.

The last day for fee funding the precept for citing the jury to try the cause was 10th March 1916, but the pursuer failed to fee fund the precept, whereupon the defender lodged a note stating that the defender's agents had received on 13th March 1916 a letter from the pursuer's agents intimating that they had ceased to act for the pursuer, and moving the Court in respect of the pursuer's failure to fee fund the precept and otherwise to proceed, to assoilzie the defender with expenses.

On 17th March 1916 counsel for the defender appeared in the Single Bills, there being no appearance for the pursuer, and moved that the defender should be assoilzied with expenses. Counsel stated that the motion had been intimated to the defender, and cited *M'Millan* v. *North British Railway Company*, 1914, 2 S.L.T. 309, and *Cullen* v. *Magistrates of Edinburgh*, (1903) 10 S.L.T. 602, and referred to the Codifying Act of Sederunt, (1913) K, ii, 1, Table of Fees 23 (5).

The Court, consisting of the LORD JUSTICE-CLERK, LORDS DUNDAS, SALVESEN, and GUTHRIE, pronounced this interlocutor—

"... In respect the pursuer has failed to fee fund the precept for the citation of a jury for the trial of the cause as required by section K, ii, 1, Table of Fees 23 (5), of the Codifying Act of Sederunt 1913, discharge the order for the trial set down for 20th March curt.; assoilzie the defender from the conclusions of the action; find the pursuer liable to the defender in expenses. . . ."

Counsel for the Defender—Macdonald. Agent—David J. W. Dunn, Solicitor.

Friday, March 17.

SECOND DIVISION.

(SINGLE BILLS.)

BALMENACH-GLENLIVET DISTILLERY COMPANY, LIMITED, PETITIONERS.

Company—Preference Shares—Scheme of Arrangement—Cancellation of Arrears of Dividends on Cumulative Preference Shares—Companies (Consolidation) Act 1908 (8 *Edw. VII, cap.* 69), *sec.* 120.

On the petition of a company, whose memorandum of association and articles of association gave it no power to cancel arrears of dividends on cumulative preference shares, a scheme of arrangement whereby the arrears of dividend were cancelled was sanctioned by the Court under section 120 of the Companies (Consolidation) Act 1908.

In re Schweppes, Limited, [1914] 1 Ch. 322, *followed.*

The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69, sec. 120, enacts—"*Power to Compromise with Creditors and Members.*—(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the

company and its members or any class of them, the Court may, on the application in a summary way of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company, or class of members, as the case may be, to be summoned in such manner as the Court directs. (2) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company. . . ."

The Balmenach-Glenlivet Distillery, Limited, Balmenach, Cromdale, Strathspey, *petitioners*, presented a petition to the Court craving the Court to order meetings to be summoned (*a*) of the holders of the preference shares and (*b*) of the holders of the ordinary shares of the company for the purpose of taking into consideration, and if so resolved, of approving of a scheme of arrangement, which, *inter alia*, proposed to cancel arrears of dividends on the preference shares, and on resuming consideration of the petition with the reports of the chairmen of the said meetings to sanction the said scheme of arrangement.

On 18th February 1916 the Court remitted to W. M. Whitelaw, Esq., S.S.C., to inquire into and report upon the facts and circumstances set forth in the petition, the scheme of arrangement proposed by the petitioners, and as to the regularity of the present proceedings.

Mr Whitelaw reported, *inter alia*—". . . While it appears to the reporter that the compromise or arrangement embodied in the scheme has been duly proposed between the company and its two classes of shareholders as required by the Companies Act of 1908, and that the members present at the meetings of 2nd February 1916 have agreed to the proposed scheme, there is one point to which the reporter thinks that it is necessary that your Lordships' attention should be directed.

"The scheme of arrangement proposes the cancellation of arrears of dividend on the preference shares. The rights of preference shareholders are contained in article 5 of the memorandum, which provides that 'the capital of the company is £120,000 (reduced to £39,000) sterling, divided into 6000 preference shares of £10 (reduced to £5, 10s.) each which shall be entitled to receive out of profits a cumulative preferential dividend of five per centum per annum (in the manner after stated) and 6000 ordinary shares of £10 (reduced to £1) each, held as fully paid up, with power to increase and reduce the capital and (without prejudice to existing rights) to divide the shares for the time being into several classes, and to attach thereto respectively such preferential, deferred, or special rights, privileges, or conditions with regard to repayment of capital or payment of dividends, or both, or voting, as may be determined by or be in accordance with the regulations of the company; provided always that no shares having rights, privileges, or conditions of any kind, preferential to or *pari passu* with those of the said preference shares, shall be created or issued unless said creation and issue shall have been previously agreed to by an extraordinary resolution of the holders of said preference shares, passed in terms of the articles of association. The preference shares shall rank on the net profits of the company (including any balance at the credit of profit and loss account brought forward from previous years, and any sum at the credit of reserve applicable for equalisation of dividend) for a dividend of five per centum per annum, in preference to any dividend on the ordinary shares; and in the event of the net profits in any year not being sufficient to pay such dividend in full for that period, the shortcoming shall be made good out of the net profits of the subsequent year or years, such arrears of dividend being also paid in preference to any dividend on the ordinary shares. In the event of a winding-up of the company being followed by a distribution of its surplus assets among its members, such distribution shall be regulated as follows, viz. — *First*, in repaying to the holders of the preference shares mentioned in this memorandum *pari passu* and to the holders of any other issue of stock or shares having priority to the ordinary shares, *pari passu* according to their respective priorities and privileges, the amount paid up thereon, and any arrears of dividend thereon; thereafter in repaying to the holders of the ordinary shares *pari passu* the amount paid thereon; and the residue (if any) shall be paid to the holders of ordinary shares.'

"The only right conferred by article 5 of the memorandum whereby any of the rights of the preference shareholders to a cumulative preferential dividend of 5 per cent. can in any way be altered is (without prejudice to existing rights) the division of the shares into several classes, and the attaching to such classes of divided shares the rights, preferential, deferred, or otherwise enumerated in that article.

"There is no power in the articles of association to modify the rights of preference shareholders to the cumulative preferential dividend of 5 per cent.

"In the case of *Ashbury* v. *Watson* (1885, 30 Ch. Div. 376) it was decided that if conditions with reference to dividends are inserted in a memorandum they were, by virtue of section 12 of the Joint Stock Companies Act 1862, unalterable. Section 7 of the Companies (Consolidation) Act 1908 is in the same terms as section 12 of the 1862 Act.

"In the case of *Welsbach Incandescent Gas Light Company, Limited*, [1904] 1 Ch. Div. 87, the rights conferred by the memorandum on preference shareholders were