sequestration, only insolvency and a claim, and therefore there could be no transference of any portion of the debt to each creditor.

At advising—

LORD PRESIDENT—This is a question which it may be right to bring under the notice of the Court as not yet decided in a case where under a voluntary liquidation creditors seek to rank upon the bankrupt estate. The question is not a difficult one. It must be decided upon the common law, without having regard to the rules of the sequestration statutes. All the creditors, secured and unsecured, are entitled to rank upon the insolvent estate for their debts as they stand at the time when the competition arises. A payment to account prior to that date will go to diminish the amount of the debt, and the creditor will only rank for the amount remaining after such deduction. Payments after that date stand in a different position. These payments may be recovered to the fullest extent which the creditor can contrive to obtain from his debtor, or payment may be made by a co-obligant of the debtor, but it will not go to diminish the amount owed to him at the time when the claim arose.

If we apply that rule to the present case, it decides the only question which arises, unless there is any force in the argument founded upon the construction of the English Judicature Act of 1875. It is unnecessary to enter into detail in regard to that argument, because nothing can be clearer than that that Act and the preceding one of 1873 are entirely confined to the administration of justice in the High Court of Justice as defined by the earlier statute, the Act of 1873.

LORD DEAS—Upon the general law I have never had any doubt since the decision in the case of *Melrose*. I have just as little doubt that the general law is applicable to the case of a liquidation under the Companies Acts.

LORD SHAND—It may be very desirable that the equalising rules of the bankruptcy law as enacted in England should apply also to cases of judicial and voluntary liquidation. But this can only be done by rules such as those which are applicable in England. The rule of the common law must obtain in Scotland, and there is no doubt as to what it is on both the points which have been argued.

LORD MURE was absent on Circuit.

The Court pronounced the following interlocutor:—

"Find (First) that the petitioner is bound to rank *pari passu* on the assets of the company the creditors secured and unsecured in respect of their debts, with interest thereon as at the commencement of the liquidation; (Second) that the creditors holding securities over the company's estate are not bound in the said ranking to deduct the value of such securities held by them respectively, and that in particular the said Henry Leck is not bound in the ranking to deduct the value of the security held by him for the sum of £17,000 contained in the bond over the subjects at Merryflats, referred to in the petition; (Third) that the said Henry Leck is entitled to be ranked for the sum of £45,750 contained in the bond referred to in the petition, with interest thereon as aforesaid, without deducting the proceeds recovered by him on the sale of the security subjects; and (Fourth) that the petitioner is bound now to proceed to divide the funds in his hands in accordance with the principles above set forth, reserving to the petitioners right to call the creditors holding securities to account if it should appear that such creditors or any of them, from the dividends in the ranking, and from the proceeds of the securities, draw more than full payment of their debt: Find the whole parties entitled to expenses out of the funds in the hands of the liquidator, and decern," &c.

Counsel for Petitioner—Lorimer. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Leck—R. V. Campbell. Agents—Murray, Beith, & Murray, W.S.

Counsel for Unsecured Creditors — Murray. Agents—Davidson & Syme, W.S.

Wednesday, January 16.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

WALKER *v.* MAGISTRATES AND COUNCIL OF THE CITY AND ROYAL BURGH OF GLASGOW.

Burgh—Police—Glasgow Police Act 1866 (29 *and* 30 *Vict. c.* 273), *sec.* 166—*Expense of Extinguishing Fire.*

The 166th section of the Glasgow Police Act provides that "the proprietor and occupier of every land or heritage within the city, in which a fire breaks out, shall be jointly and severally liable to pay to the treasurer as a contribution toward" the expenses of the fire brigade in extinguishing the fire "the sum of £15 sterling, or whatever less sum is equal to one-half of the said expenses." *Held* that on a sound construction of this section a proprietor within the city who had paid a sum of £15 for the services of the fire brigade in extinguishing a fire which broke out in his premises, was further liable to pay a sum equal to one-half of the expenses of extinguishing the fire in a neighbouring house which belonged to him, and to which it had spread.

On the 21st February 1881 a fire broke out in a biscuit factory situated in Cleveland Street and Dorset Street, Glasgow, belonging to John Walker. It extended to a neighbouring tenement which also belonged to him, and which fronted Cleveland Street, and which was separated from the biscuit factory by a court 30 feet in breadth. The Glasgow Fire Brigade was summoned, and assisted to extinguish the fire. Thereafter the Magistrates and Council of the city of Glasgow, acting under the General Police and Improvement (Scotland) Act 1862, Order Confirmation (Glasgow) Act 1877, in execution of the powers and duties of the Glasgow Police Acts 1866, 1872, 1873, 1875, and 1877, rendered Walker an account for the services of the fire brigade, and claimed from

him the sum of £15, being the maximum sum chargeable under the 166th section, quoted *infra.* A further claim was made for £2, 6s. 2d. in respect of the fire having spread to the adjoining tenement in Cleveland Street.

The Glasgow Police Act 1866 (29 and 30 Vict. c. 273), in order to provide for the prevention and suppression of fires, by the 158th section requires the Board of Police constituted by the Act to provide and maintain fire-engines "for extinguishing fire," . . . "and such fire-escapes and other implements for safety or use in case of fire as they consider necessary."

The 159th section prescribes the duties of the inspector of fires, who is made responsible to the board for the maintenance of the said establishment in a complete state of efficiency, and is required to "make provision for securing a speedy attendance of firemen with engines and their appurtenances, and with fire-escapes and other implements. on every alarm of fire within the city."

By section 163 the inspector and firemen appointed by him may take any measures which appear expedient for extinguishing or preventing the extension or diminishing the loss caused or likely to be caused by any fire, and protecting the lives and property of the inhabitants.

By section 166 of the Glasgow Police Act 1866 it is provided that "the said inspector [that is, the inspector of fires] shall make up and deliver to the Board a statement of the whole expense attending each fire, which shall include the wages payable to the firemen and other persons employed at it, the rewards or premiums which he recommends to be given to such firemen and other persons, the outlay incurred in taking them and the engines to the spot where such fire occurred, and in obtaining a supply of water, and other like expense, and such statement, in so far as approved of or as altered by the Board, shall be *prima facie* evidence of the amount of expenses attending the said fire."

By section 166 it is provided that "the proprietor and occupier of every land or heritage within the city in which a fire breaks out shall be jointly and severally liable to pay to the treasurer, as a contribution towards such expenses, the sum of £15 sterling, or whatever less sum is equal to one-half of the said expenses."

Walker paid the sum of £15, but refused to pay the further sum of £2, 6s. 2d., and brought this action against the Magistrates to have it declared that they "were only entitled to levy and recover from the pursuer the sum of £15 sterling and no more, as a contribution towards the expenses of the Glasgow Fire Brigade in connection with a fire which broke out on or about 27th February 1881 in the premises then belonging to and occupied by the pursuer, and that it is *ultra vires* of the defenders to levy or recover from the pursuer the further sum of £2, 6s. 2d. sterling demanded by them, or any other sum or sums of money, as a contribution towards the expenses of the said fire brigade in connection with the said fire, or otherwise in respect thereof." There was also a conclusion for interdict against the defenders recovering as damages, under the Glasgow Police Act, the sum of £2, 6s. 2d., or any other sum, or instituting proceedings before the Sheriff, as provided by the Act, for the recovery of the same.

The pursuer pleaded—"(1) Upon a sound construction of the 166th section of the Glasgow Police Act 1866, only the proprietor and occupier of any land or heritage within the city of Glasgow in which a fire originates are liable to contribute towards the expenses of the Magistrates and Council of the city of Glasgow attending each fire, and the proprietor and occupier of any tenement or tenements to which the same extends are not liable in any such contribution. (2) Under the Glasgow Police Act 1866 the pursuer is only liable in payment of the sum of £15 in respect of the services of the fire brigade on the occasion of the said fire, as proprietor of the premises in which the same broke out, and is not liable for any further sum as proprietor of the separate tenements to which the same extended, and the demands of the defenders being unwarranted by the said statute, illegal, and *ultra vires*, the pursuer is entitled to decree of declarator and interdict as concluded for. (4) Generally, the pursuer is entitled to decree in terms of the conclusions of the summons with expenses."

The Magistrates and Council defended the action. They admitted that pursuer was proprietor of the Cleveland Street property, but stated that their claim in respect of the Cleveland Street property had been made against a Mr Lammie, who was factor for the property, and was as such the proprietor for the purposes of the statute.

They pleaded—"(1) The averments of the pursuer are irrelevant, and insufficient to support the conclusions of the summons; and (3) On a sound construction of the Police Act of 1866, Mr Lammie, as the proprietor of the tenement in Cleveland Street, in which the fire broke out, was bound to contribute to the expense of extinguishing the fire."

The Lord Ordinary (KINNEAR) sustained the first and third pleas-in-law stated for the defenders, and assoilzied the defenders from the conclusions of the summons.

"*Note.*—[*After quoting the sections of the Act as above*].—The pursuer maintains that under the 166th section the defenders are not entitled to exact a contribution of £2, 6s., 2d. for the services of the fire brigade in extinguishing a fire which had occurred in his house in Cleveland Street, because the fire did not originate in that tenement but extended to it from another subject also belonging to the pursuer, and in respect of which he admits his liability.

"The argument is that the contribution provided by the 166th section is intended as a penalty upon the proprietors and occupiers of houses where a fire has originated, and, accordingly, that the term 'breaks out,' which is said to be synonymous with 'originates,' is used to exclude from the scope of the enactment any tenement which may have caught fire, not from any accident originating within itself, but from the sparks or flames which may have fallen upon it from another burning tenement.

"But there is nothing in the words of the section or in the context to suggest that the contribution in question is intended as a penalty. It is a clause which in terms provided for payment of the expenses of extinguishing fires. The scheme of the Act for that purpose is perfectly clear and intelligible. Where a fire occurs within the city, one half of the expense is to be borne by the owners and occupiers of the houses in which fires have broken out, and which have benefited directly by the services of the fire-brigade, and

the other half is to fall upon the rates, to which such owners and occupiers have contributed. Where it occurs without the city, the whole expense is to be borne by the owners and occupiers, who have made no contribution to the rates. There is nothing, therefore, in the expressed purpose of the enactment to suggest that the houses in which fire originates should alone be liable to contribute, and that others which may have obtained equal benefit from the services of the fire establishment should be exempt. Nor does it appear to me that there is anything in the words to support that contention.

"The term 'break out' is certainly not synonymous with 'originate,' for a fire may or may not break out at the point where it originates; nor does it appear at all consistent with the manifest purpose of the enactment to require that no contribution towards the expense attending a fire shall be recoverable unless the origin of the fire shall be traced to the tenement which may have obtained the services of the fire establishment. It may be that on a critical analysis of the words they may be found, as the pursuer says, to denote a sudden issue or escape from a state of confinement, or, as it is expressed in the definition cited from Latham, something that 'discovers itself with sudden effect.' But the purpose of the section is not to define a particular mode in which a fire may have made itself manifest. And if, without adverting to such distinctions, the framers of the Act intended merely to describe the fact of a fire having taken place so as to require the aid of the firemen and engines provided by the board for its extinction, it is quite in accordance with the ordinary use of language to speak of it as a fire that has broken out, whether the flames have, in the stricter sense of the words, broken out from within or laid hold upon the tenement from without. If there be any degree of inaccuracy in the language employed, it is not such as to create any real uncertainty as to the meaning of the Act."

The pursuer reclaimed, and argued—On a sound construction of the Act of 1866 he was not bound to contribute more than a sum of £15 for each fire or conflagration, and that sum he had paid. The further sum claimed was a sum applicable to a house to which the original fire had spread. Now (1) the word "fire" referred to that conflagration to which the fire brigade had been originally called; and (2) the expression "breaks out" meant "originates" or "begins."

Counsel for defenders were not called on.

At advising—

Lord Craighill—Though all has been urged that could have been said in support of the case of the pursuer, I am of opinion that the interlocutor of the Lord Ordinary assoilzieing the defenders ought to be affirmed. The pecuniary value of this action is inconsiderable, but the question in controversy is of considerable importance to the defenders, the Magistrates and Council of the City of Glasgow. The matter in issue is the interpretation of the 166th section of the Glasgow Municipal Act of 1866. The pursuer contends that, according to the true reading, the house in which the fire begins is the only house the proprietor and occupant of which can be called upon to contribute towards the expenses that have been incurred by the fire department in extinguishing the fire; and he endeavours to maintain this conclusion, first, upon the ground that the word "fire" as used in the clause referred to means the conflagration to which the fire brigade had been called, however many the houses may be to which the fire extended; and secondly, that the words "every land or heritage within the city in which a fire breaks out" must be held to, mean the lands or heritage in which the fire originates or begins. For the reasons explained by the Lord Ordinary I am satisfied that this contention in both its branches is erroneous. There seems to me to be no warrant whatever for holding that the expenses of the fire or conflagration as a whole are those alone of which account is to be taken, as provided by the 165th section, a portion of which is to be recovered from the proprietor and occupier as provided by sec. 166. Reference was made to the 165th section as giving countenance to this interpretation, but I am disposed to think that this clause rather aids the construction adopted by the Lord Ordinary than that upon which the pursuer insists, and I may add that the practice which has been followed since 1866, when the Glasgow Municipal Act was passed, is not immaterial in this controversy. Where a fire has extended to several houses, the account for the expenses of each has been kept separate, and the owner of each has been dealt with as a contributory. As regards the interpretation of the words "breaks out," the meaning put upon them by the pursuer appears to me to be unreasonably strained and limited. A fire may break out in a house though it be not the first which was on fire. This is according to the recognised and every-day use of the words. There seems to me to be no authority for holding that these words are only the equivalents of "originate" or "begin." From section 166, taken by itself, and much more taken in connection with the other clauses, particularly sec. 167, the soundness of the Lord Ordinary's judgment is, I think, manifest. By sec. 167 the proprietor and occupier of every land or heritage beyond the city in which a fire breaks out, and to which any engine or firemen are sent, are to be liable to the whole expense attending the fire. The words in this clause, so far as their meaning is in dispute, are the same as those which occur in the 166th clause, and of course the same interpretation must be put on the words of the one clause which is put upon those in the other. In the result the pursuer's construction in the case of fires beyond the municipal boundaries would be to throw the whole expenses of extinguishing the conflagration, to whatever number of houses the fire might extend, upon the owner and occupier of the house in which the fire had begun or originated. This is a view which I think cannot be seriously maintained. The owner of the first house is a sufferer through no fault of his own, as the owners of the other houses were, and to cast all the expenses arising from the efforts that were made to subdue the general conflagration upon him is obviously so unreasonable as of itself to be a consideration sufficient to determine what is the true interpretation of the words the meaning of which is now to be judicially determined.

For these reasons, as well as those which the Lord Ordinary has explained in his note, I concur in his judgment.

Lord Rutherfurd Clark and Lord M'Laren concurred.

The LORD JUSTICE-CLERK and LORD YOUNG were absent.

The Court adhered.

Counsel for Pursuer—J. P. B. Robertson—Graham Murray. Agents—Cowan & Dalmahoy, W.S.

Counsel for Defenders—Lord Adv. Balfour, Q.C.—Lang. Agents—Campbell & Smith, S.S.C.

Tuesday, January 22.

SECOND DIVISION.

SPECIAL CASE—TAYLOR'S TRUSTEES AND OTHERS.

Succession — Testacy — Provision to Children—Conditio si sine liberis decesserit—*Clause of Survivorship.*

A testator by the residuary clause of his settlement directed that a share of his estate should be liferented by a daughter, the fee to go to her issue equally, declaring that if she died without issue the share should belong to the surviving residuary beneficiaries equally. The residuary beneficiaries were the testator's two sons and the children of another son, H, who had predeceased the testator. The daughter died without issue, and was predeceased by one of the children of H leaving a child. *Held* that this child was a "surviving residuary beneficiary," and therefore entitled to share with the others in the share liferented by the daughter. *Rougheads* v. *Rainnee*, M. 6403, followed.

Henry Taylor died in 1873 leaving a trust-disposition and settlement whereby he conveyed his whole property to trustees for certain purposes. He was survived by five children —William, Patrick, Agnes (Mrs Miller), Joanna, and Jane (Mrs Primrose). He was predeceased by a son named Henry, who left three children, and by a daughter named Mary (Mrs Hendry), who left two children. The eighth purpose of Mr Taylor's settlement (the earlier purposes of which provided for Joanna and Jane and Mrs Hendry's children) provided—"I direct my said trustees to divide the whole residue of my estate into four equal shares, and as soon as convenient after my decease to pay one of said shares to each of William Taylor and Patrick Taylor, both grain merchants in Glasgow, my sons, and to hold, apply, and pay the remaining two shares thereof as follows, viz., to hold one share for behoof of the children of my deceased son Henry, equally among them, and to pay the same, share and share alike, when they respectively attain the age of twenty-one years or are married, whichever of these events shall first happen, the survivors succeeding and being entitled equally among them to the shares of any child or children of my said son predeceasing the foresaid terms of payment of their share, and the shares of daughters being paid to them always exclusive of the *jus mariti* and right of administration of their husbands; and the remaining share of said residue my said trustees shall hold for the liferent alimentary use of Agnes Taylor, my daughter, wife of Doctor Hugh Miller of Bombay, and for her children in fee; declaring that the interest or proceeds of said last-mentioned share shall be paid to my said daughter during all the days of her life exclusive of the *jus mariti* and right of administration of her present or any future husband, and that the principal sum thereof shall be divided at the first term of Whitsunday or Martinmas after her death, and paid to her children equally on their respectively attaining majority or being married, the lawful issue of predeceasers succeeding to their parent's share and otherwise, in the same manner as is provided with regard to the share appropriated to the children of my son Henry; declaring that on the death of either of my sons, or of the said Agnes Taylor [Mrs Miller], without issue or children thereof, or of the family of my said son Henry, before the time of payment above mentioned, the share that would have fallen to them shall be divided amongst the surviving residuary beneficiaries above named equally."

Mrs Miller died in 1882, having enjoyed the liferent of the share of residue destined to her in liferent and her children in fee. She left no children, and it was to settle the right to the fee of this share that this Case was adjusted.

The first parties were Mr Taylor's trustees. The second parties were William and Patrick Taylor, his sons. The third parties were Henry Taylor's children, who survived Mrs Miller. The fourth parties were the tutors of Jessie Amelia Thomson, a child of one of Henry's daughters who had predeceased Mrs Miller. These second, third, and fourth parties maintained that the share in dispute fell to be divided "amongst the surviving residuary beneficiaries equally," in terms of the eighth purpose of the settlement quoted above. The next-of-kin and the widow of the testator (fifth parties) maintained that the share was intestate succession. There was also a dispute between the third and fourth parties. They were agreed that one-third of the share belonged to each of the second parties William and Patrick Taylor, but the third parties maintained that the remaining third must be equally divided between them as the only children of Henry who survived Mrs Miller, while the fourth parties maintained that Jessie Amelia Thomson was entitled to one-third of this third part of the share as the only child of her mother, a child of Henry.

The questions of law were—"(1) Whether the share of the residue liferented by Mrs Miller falls to be divided into three equal parts among the said William Taylor, Patrick Thomson Taylor, and the representatives of the testator's son Henry Taylor (second), under the said eighth purpose of the said trust-disposition and settlement; or whether the said share is intestate succession of the testator? (2) In event of the first alternative of the above question being answered in the affirmative, Whether the said Miss Jessie Amelia Thomson is entitled to one-third of the portion of said share falling to the representatives of the said Henry Taylor (second), either immediately or contingently on her attaining the age of twenty-one years or being married?"

The Court having expressed the opinion that the first question must be answered in the first alternative, the discussion was confined to the second question.

Argued for the parties of the fourth part—The