what exceeding £700, which when this action was raised was still due by the managing director. He also avers that there was advanced in like manner to Deans, the secretary of the company, a sum, the balance unpaid of which somewhat exceeds £2000. He brings the action in 1889, four years after the purchase of the shares, against Mr Crawford one of the directors, and he concludes that the defender shall repay to the company those two balances due by the managing director and the secretary. The Lord Ordinary dismissed the conclusion to that effect as not well founded. Now, I am not disposed to decide any more than is required for the circumstances of the particular case. I have regard, first, to the character of the company; secondly, to the fact that the pursuer is the only shareholder who complains; and thirdly, to the fact that Crawford is the only director called. Having regard to these facts I have to consider this action in which the pursuer alone seeks as against Crawford alone to have an inquiry into the propriety of the advances to the managing director and the secretary. I do not mean to decide any question as to whether the directors of such a company may permit advances to be made with or without heritable security to the managing director. The action is not well suited for determining that. I am far from indicating any opinion that they cannot do so.

As to whether such a question can be tried in an action by one shareholder against one of the directors alone, the general rule is that stated by Sir G. Jessel in the case of *Russell*, that an action to have money replaced in the company's coffers must as a general rule be at the instance of the company itself, and be laid against the directors as a body. The Master of the Rolls says, "The rule is a general one, but it does not apply to a case where the interests of justice require the rule to be dispensed with." I cannot find in the circumstances of this case any case of necessity in the "interests of justice" which ought to introduce an exception to the rule, and allow this pursuer to sue Mr Crawford (or indeed all the directors) to restore this alleged balance due by the managing director. I can understand a case in which the circumstances are such that the Court will not refuse to an individual shareholder the remedy of suing alone such an action. But they do not exist here.

As to the advance of £2000 to the secretary, I think that in such a case there might be special circumstances which would induce the Court, in order to do justice, to allow an individual shareholder to sue alone. But, again, there are none here, and I cannot countenance the statement of a general rule of law that a company for lending money can in no case advance money to its law agent. Therefore as to the first question of the action I am of opinion that the Lord Ordinary's judgment should be adhered to.

As to the other part of the case, the Lord Ordinary seems to think that it does not look a hopeful one, and I share that opinion, but he has allowed a proof holding that the statements are irrelevant, and I agree in that judgment also.

LORD RUTHERFURD CLARK concurred.

LORD LEE—I am of the same opinion. As to the demand for repayment by the defender to the company I think there is a clear distinction between this case and that of *Leslie* v. *Lumsden*. There the pursuer asked that money which he paid for his shares should be restored. Such an action could only be raised by an individual shareholder. Here the pursuer demands that the defender shall pay money into the coffers of the company. Now, the pursuer did not attend the meeting of the company, and object to what was done. He is not in the position of a protesting minority. Nor is he a beneficiary under a trust like the pursuer in *Perston* v. *Perston's Trustees*, 1 Macph. 245.

LORD JUSTICE-CLERK—I am of the same opinion.

The Court refused the reclaiming note.

Counsel for the Pursuer and Reclaimer—Lorimer. Agent—J. B. W. Lee, S.S.C.

Counsel for the Defender and Respondent—H. Johnston—Guthrie. Agents—Morton, Stuart, & Macdonald, W.S.

Wednesday, July 9.

FIRST DIVISION.

AVERY & COMPANY, PETITIONERS.

Company — Regulations — Reduction of Capital—Companies Act 1867 (30 *and* 31 *Vict. c.* 631), *sec.* 9.

Section 9 of the Companies Act 1867 provided that "any company limited by shares may by special resolution so far modify the conditions contained in its memorandum of association, if authorised so to do by its regulations as originally framed or as allowed by special resolution, as to reduce its capital."

By the 5th article of a company's memorandum of association the capital of the company was fixed at £15,000, "with power to the company to increase or reduce the capital as provided by the articles of association."

By section 110 of the articles of association it was provided that "the company might by special resolution modify the conditions contained in the memorandum of association to the extent authorised by the Companies Acts 1862 to 1883." The company having passed a special resolution reducing the amount of its capital, petitioned the Court under section 11 of the Companies Act 1867 for a confirmation order. The reporter to whom the case was remitted was of opinion that

the company had no power under its original regulations to reduce the capital, and that in such a case it was required by section 9 of the Companies Act 1867 that the regulations should in the first place be altered by special resolution so as to give the company this power, and that thereafter the special resolution for reduction of capital should be passed. No order was pronounced, but the Court intimated that as matters stood they were not prepared to grant the petition.

The company of John Avery & Company, Limited, was formed in the year 1884, and duly registered. The object of the company was to acquire the whole effects of the firm of John Avery & Company, wholesale stationers, &c., Aberdeen, and the goodwill of their whole business, and to carry on the various branches of the said business.

By the 5th article of the memorandum of association the capital of the company was fixed at £15,000, divided into shares of £1 each, with power to the company to increase or reduce the capital as provided by the articles of association.

By section 110 of said articles of association it was provided—"The company may from time to time, by special resolution passed by a majority of not less than three-fourths of the votes of the members entitled to vote, modify the conditions contained in the memorandum of association to the extent authorised by the Companies Acts 1862 to 1883, or alter or amend any of the provisions contained in these presents, or make new provisions in lieu thereof or in addition thereto."

At an extraordinary general meeting of the shareholders held at Aberdeen on Friday 29th November 1889 the following special resolution was duly passed—"(1) That the existing capital of the company be reduced from £15,000, divided into 15,000 shares of £1 each, to £7500, divided into 15,000 shares of 10s. each, and that such reduction be effected by cancelling capital now unrepresented by available assets to the extent of 10s. per share on each of the 8347 shares of the capital which have been issued, and which have been fully called up, and by making the nominal amount of all the existing shares of the capital, whether issued or unissued, 10s. per share, each of the 8347 shares issued being held as fully paid up. (2) That thereafter the capital of the company be increased by the creation of 7000 new shares of £1 each, which new shares shall be issued subject to the following stipulations and conditions:—1st, That said new shares shall bear interest at the rate of five per cent. per annum, and shall, as regards both capital and interest to the extent aforesaid, rank preferably to the existing shares of the company; 2nd, that said preferable interest shall be paid half-yearly; 3rd, that if in any year the existing reduced capital of the company shall receive a ten per cent. dividend, and any further sum shall, for that year, be applied by the directors to dividend purposes, said further sum shall be divided equally between the existing and the new shares."

The resolution was duly confirmed at a subsequent meeting of shareholders held on 18th December and was registered on 20th January 1890.

The present petition was presented by John Avery & Company, Limited, craving the Court to make an order confirming the reduction of the ordinary share capital of the company in terms of the special resolution above mentioned.

On 14th May an order was made for intimation on the walls and in the minute-book and for advertisement in certain newspapers, and on 28th May 1890 the Lords remitted to Mr C. B Logan, W.S., to inquire and report as to the regularity of the proceedings and the reasons for the proposed reductions of capital.

Mr Logan reported, *inter alia*, as follows—"It appears to me that the company has no power under its original regulations to reduce the capital. In that case it is required by the 9th section of the Companies Act 1867 that the regulations should in the first place be altered by special resolution so as to authorise the company to modify the conditions contained in the memorandum of association to the effect of giving them power to reduce capital, and thereafter that a special resolution so reducing the capital should be passed. The petitioners have not in the present case passed a resolution authorising the modification of the conditions, but have without any such preliminary resolution passed a resolution reducing the capital. It appears to me that this is not a sufficient compliance with the provisions of the statute, and that there ought to have been two separate special resolutions. I have therefore to bring under your Lordships' notice the question above referred to, as to whether it was necessary in the present case that there should be two special resolutions in order to carry out the proposed reduction of capital. If your Lordships should be of opinion that such resolutions were necessary, it appears to me that the proceedings which have been taken are of no avail, and that it will be necessary for the petitioners to commence the proceedings *de novo*."

By section 9 of the Companies Act 1867 it is provided—"Any company limited by shares may by special resolution so far modify the conditions contained in its memorandum of association, if authorised so to do by its regulations as originally framed or as altered by special resolution, as to reduce its capital, but no such resolution for reducing the capital of any company shall come into operation until an order of the Court is registered by the Registrar of Joint-Stock Companies, as is hereinafter mentioned."

The petitioners argued that the company was authorised by article 110 of its regulations to reduce its capital, as the reduction of capital was one of the things authorised by the Companies Act 1867.

No party appeared to oppose the application.

No order was pronounced, but the Court

intimated that they were not prepared as matters stood to grant the order craved.

Counsel for the Petitioner—H. Johnston. Agents—Crombie, Bell, & Bannerman, W.S.

Wednesday, July 9.

FIRST DIVISION.

[Sheriff of the Lothians and Peebles.

CALDERHEAD *v.* FREER AND DOBBIE.

Cessio—Earnings—Assignation to Creditors.

An agent of a building firm applied for *cessio*, his debts being £276, 10s. 6d. and his free assets £3, 10s. From his deposition it appeared that he was in receipt of a salary of £3, 15s. per week, out of which he had to pay his travelling and personal expenses, and that he also received a small addition to his income by payments on commission.

Held that he was entitled to the benefit of *cessio* on assigning £20 a-year to his creditors.

This was a petition for *cessio*, presented in the Sheriff Court at Edinburgh by Robert Calderhead against John Dobbie, Janet Freer, and others, his creditors. He averred that he was notour bankrupt in the sense of the Debtors (Scotland) Act 1880, sec. 6.

From the state of affairs lodged by the pursuer it appeared that his liabilities were £267, 10s. 6d., and that his assets consisted of his house furniture, valued at £12, 10s., and subject to a preferable claim for rent amounting to £9.

The pursuer deponed as follows—He was agent for a building firm, Benson & Company, quarrymasters, Corncockle, Dumfriesshire, from whom he received £3, 15s. per week. Up to the previous February his salary had been £3, 10s. per week. He also made a little money on commission. The salary given him was to cover his travelling and personal expenses. These had amounted to £110 the previous year, leaving him a net income of £89. He had a wife and six children.

On 12th May the Sheriff-Substitute (HAMILTON) pronounced this interlocutor;—"Having considered the oath and deposition of the pursuer and having heard party's procurators, Finds the pursuer entitled to the benefit of *cessio*, but only on condition that he assigns to his creditors out of his earnings the sum of £20 a-year: Decerns and ordains the pursuer to execute a disposition *omnium bonorum*, and also an assignation in the above terms, to and in favour of Mr James Craig, C.A., Edinburgh, who is thereby appointed trustee for behoof of the creditors of the said pursuer, in terms of the statutes and Acts of Sederunt.

The pursuer appealed, and argued—The Sheriff had no power under the Debtors (Scotland) Act 1880 (43 and 44 Vict. cap. 34) to make it a condition of granting *cessio* that the debtor should assign a portion of his income to his creditors. That Act did not contemplate that any condition should be adjected to the granting of *cessio*. Under the former law fees earned by personal labour could not be attached for debt—*Barron* v. *Mitchell*, July 8, 1881, 8 R. 933, opinion of Lord Fraser 934, and cases there cited. The pursuer's earnings were precarious and did not stand in the same position at all as the permanent incomes of officers or schoolmasters and the like.

Argued for the defenders—Before 1880 a debtor could be compelled to assign a portion of his earnings to his creditors as a condition of having *cessio* granted—*Brechin* v. *Taylor*, March 9, 1842, 4 D. 909; *Mitchell* v. *Macfarlane*, July 13, 1875, 2 R. 930; *Robertson* v. *Wright, &c.* November 29, 1873, 1 R. 237. The recent Acts had made no change in the law—*Simpson* v. *Jack*, November 23, 1888, 16 R. 131.

At advising—

LORD PRESIDENT—The question in this case is whether, in the first place, it was competent for the Sheriff-Substitute to annex to the granting of decree of *cessio* any condition, or at least such a condition as we have here, and in the second place, whether the amount of income which he has required the debtor to assign is reasonable in the circumstances.

Now, I do not think the question of the competency of annexing such a condition has been at all affected by the change of law operated by the recent statutes of 1880 and 1881. The process of *cessio* remains as it was before these Acts, a benefit to the bankrupt. The bankrupt in his petition craves the benefit of cessio, and the Sheriff finds him entitled to the benefit of the process. No doubt the benefit is not now so great as it was because of the abolition of imprisonment for debt, but the exemption from imprisonment was only one of the benefits afforded to the debtor by the granting of *cessio*. It also protected his estate against being affected by other diligence. The debtor conveys to the trustee his whole existing estate, and is protected against any part of that estate being made the subject of diligence. He is also, I take it, protected against diligence directed against his earnings, and therefore it is quite necessary that the Sheriff should have the power to make the condition that part of these earnings should be assigned for the benefit of the creditors, if they exceed what is necessary for the debtor's subsistence. The present is, I think, an ordinary case, and there is nothing, as I have said, in the recent statutes to alter the former rule.

The question how long such a condition will remain in operation, is, I think, easily solved. As soon as the petitioner for cessio comes to ask his discharge, which he can do in six months, he will find himself met with the condition that if he cannot pay 5s. in the £ he will not receive it unless he can show that his failure arises from circumstances which make it in the eye of the law