the years 1881 and 1886 in favour of his wife and daughter. The value of the property so alienated was about £1200, and the supposed reason of the alienation was that the bankrupt might evade payment of calls in respect of his shares in the Property Investment Company.

The trustee being unwilling to sue an action of reduction from want of funds, Mr Peter Couper, manager of the Property Investment Company, gave, with the knowledge and sanction of the directors, a letter of guarantee or indemnity to the trustee in the following terms, viz.—

"*The Property Investment Company of Scotland, Limited, 37 George Street, Edinburgh, 1st August* 1889.

"W. A. DAVIS, Esq.,

"Trustee on Mr John Richardson's Sequestrated Estate.

"*Richardson's Sequestration.*

"Dear Sir,—On behalf of this company I hereby undertake, in the event of your raising proceedings, to reduce the deeds granted by the bankrupt, and generally to ingather the sequestrated estates in terms of the creditors' instructions, to keep you skaithless of all responsibility and liability in the premises, including relief from all disbursements you may personally make in case of there being no funds in the sequestration ingathered by you from which you can obtain payment and relief. I also agree to pay you the usual fee for your trouble as the same shall be fixed by the Commissioners, should no funds be ingathered by you.—Yours truly,

"Adopted as holograph,

"PETER COUPER, *Manager*."

Having received this letter, the trustee raised actions in the Court of Session against the wife and daughter of the bankrupt, but after a proof had been led the defenders were in each case assoilzied by decrees dated 25th July 1890. These judgments were under consideration of the directors of the company upon 29th July 1890 with a view to decide whether they should be reclaimed against, but before any decision had been arrived at the present petitioner was appointed official liquidator under a petition for the winding-up of the company.

The official liquidator on entering upon his duties consulted counsel in reference to said proceedings and his duty in the circumstances, and he was advised that he might either move to be sisted as pursuer in room of the trustee in the sequestration, or might give the trustee a further indemnity for expenses, but that in the former case he must undertake to relieve the trustee of all expenses already incurred, and that in the latter the trustee was entitled to require that the official liquidator should undertake to relieve him of all expenses both incurred and to be incurred in the said actions, so that in either case the trustee might, in the event of a deficiency of funds to meet the whole claims against the company, which the official liquidator anticipated might occur to some extent, obtain a virtual preference for the expenses incurred by him prior to the date of the liquidation. At the date of the official liquidator's application to the Court the trustee had no preference over the other creditors of the company for these expenses. The expenses of both sides in said actions to the date of the liquidation were estimated to amount to £300.

The official liquidator was further advised by counsel that the judgments of the Lord Ordinary were such as ought to be brought under review of the Inner House by reclaiming-note, but that his power to guarantee the expenses of an action carried on, not in the name of the company, but in another name in its interest, with the possible consequence of incurring liability for expenses already incurred, was so doubtful as to render it proper for him to lay the circumstances before the Court and ask special direction as to the course which he should adopt. Having full regard to the pecuniary issues at stake, the official liquidator concluded that in the interests of the company and its creditors a reclaiming-note against each of the said judgments should be prosecuted, and accordingly the application was made as above for the Court's sanction in prosecuting the reclaiming-notes.

The Court took time to consider the application, and thereafter—and especially in view of the opinion of counsel—sanctioned the prosecution of the process by the official liquidator in his name.

Counsel for the Official Liquidator—H. Johnston. Agents—Morton, Smart, & Macdonald, W.S.

Saturday, November 29.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

WHYTE *v.* FORBES.

Sequestration — Petitioning Creditor's Claim — Decree for Interim Execution pending Appeal — Contingent Debt — Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 14.

The claim under an order for interim execution pending appeal is a contingent debt, and therefore, in terms of section 14 of the Bankruptcy Act 1856, it cannot be the foundation of a petition for sequestration.

In an action of reduction by George Whyte against Simon Forbes (reported *ante*, vol. xxvii., p. 731, and 17 R. 895) the Lord Ordinary on 9th July 1890 pronounced an interlocutor dismissing the action and finding the pursuer liable in expenses, and on 11th June 1890 the First Division adhered, and found the pursuer liable in additional expenses.

Whyte having appealed against these judgments to the House of Lords, Forbes

petitioned the Court for execution pending appeal, in terms of the Act 48 Geo. III., cap. 151, sec. 17, and thereafter the Court decerned, and ordained Whyte to make payment to Forbes of the taxed amount of the expenses in said action, and of the dues of extract, amounting in all to £129, 8s. 10d., and allowed the decree to be extracted and execution to proceed thereon, notwithstanding Whyte's appeal, upon Forbes finding caution in common form to repeat the same in the event of the interlocutors being reversed in the House of Lords, and granted warrant to messengers-at-arms to charge Whyte upon the said decree, and to arrest his goods in payment of the said sum, and if Whyte failed to obey the charge, to poind his effects.

By section 17 of 48 Geo. III. cap. 151, it is provided—"That when any appeal is lodged in the House of Lords, a copy of the petition of appeal shall be laid by the respondent or respondents before the Judges of the Division to which the cause belongs, and the said Division, or any four of the Judges thereof, shall have power to regulate all matters relative to interim possession or execution, and payment of costs and expenses already incurred, according to their sound discretion, having a just regard to the interests of the parties as they may be affected by the affirmance or reversal of the judgment or decree appealed from."

Forbes found caution on 1st September, and having extracted the decree, presented a petition for Whyte's sequestration on 29th September, founding on the debt due to him under said decree.

Whyte opposed the petition.

By section 14 of the Bankruptcy (Scotland) Act 1856 it is enacted—"Petitions for sequestration may be at the instance or with the concurrence of any one creditor whose debt amounts to not less than fifty pounds, or of any two creditors whose debts together amount to not less than seventy pounds, or any three or more creditors whose debts together amount to not less than one hundred pounds, whether such debts are liquid or illiquid, provided they are not contingent."

On 21st October the Lord Ordinary (KYLLACHY) refused the petition and decerned.

"*Opinion.* — The petitioning creditor's debt consists of a claim for the expenses of an action in the Court of Session, for which expenses he has obtained decree, and which decree is under appeal to the House of Lords. In such circumstances the Lord Ordinary cannot doubt that the petitioner's debt is *prima facie* contingent, and as such cannot found a petition for sequestration.

"The petitioner, however, maintains that having petitioned the Court for interim execution pending appeal, and having obtained an order for such interim execution, his debt is put in the same position as if it were absolute. In short, he states that the Court, by allowing decree to go out and to be extracted, and execution to proceed thereon, have impliedly authorised sequestration under the Bankrupt Statutes. The Lord Ordinary has given careful consideration to this argument, but he is unable to give effect to it. The process of sequestration is not, in his opinion, a process of execution within the meaning of the Court's order. Although it has in certain respects the effect of a diligence, it is primarily a process of distribution, and is not in any proper sense a process of execution employed by the petitioning creditor for the recovery of his debt.

"On the whole, the Lord Ordinary considers that he must refuse the sequestration. He may add that it was admitted at the discussion that no instance can be found of sequestration following upon an order for interim execution pending appeal."

The petitioner reclaimed, and argued—The decree which constitutes the petitioner's claim was absolute in its terms, the debt was presently payable, and the Court had allowed the execution of diligence to proceed on the decree. These facts demonstrated that the petitioner's claim was not a contingent debt, either in the general sense or in the sense of the Bankruptcy Act, because in both cases a contingent debt meant a debt not presently payable, on which the execution of diligence could not proceed—Bankruptcy Act 1856, sec. 53; Goudy on Bankruptcy, p. 185, *et seq.* In one case the Court had even allowed interim execution of a warrant of incarceration—*Norval* v. *Smith*, June 25, 1828, 6 S. 1017. In allowing execution to proceed upon the decree the Court had excepted no form of diligence, and accordingly the claim under the decree was a proper foundation for an award of sequestration, which was not only a process of distribution but also of execution—*Stuart* v. *Chalmers*, June 14, 1864, 2 Macph. 1218; *Kinnes* v. *Adam & Son*, March 8, 1882, 9 R. 698. Suppose that the House of Lords were to reverse the judgment of the Court of Session, Whyte's claim against the petitioner would be under the latter's bond of caution, a different obligation altogether from the claim on which the petitioner founded in applying for sequestration.

The respondent was not called upon.

At advising—

LORD PRESIDENT—I do not think it is necessary to call for any answer here. The question seems to me to be simply whether the debt on which the petitioner has applied for sequestration is a contingent debt or not? It is a claim arising under a deliverance of the Court pronounced under the 17th section of the Administration of Justice Act of 1808, which provides, with regard to appeals to the House of Lords, that "When any appeal is lodged in the House of Lords, a copy of the petition of appeal shall be laid by the respondent or respondents before the Judges of the Division to which the cause belongs, and the said Division, or any four of the Judges thereof, shall have power to regulate all matters relative to interim possession or execution, and payment of costs or expenses already incurred according to their

sound discretion, having a just regard to the interests of the parties as they may be affected by the affirmance or reversal of the judgment or decree appealed from." Under that section a large discretion is certainly placed in the Court. Nothing is said about requiring bonds of caution for repayment in the event of decree being allowed to go out for payment of costs. In short, it is left in the hands of the Court to decide what are to be the conditions on which any order is to be made.

It appears to me that the rational way to look at the present question is to ask whether, if an application had been made at the time when the application for interim execution was presented to allow the party to apply for sequestration, it would have been granted? That would have depended entirely on whether the debt constituted by the order for interim execution is a contingent debt or not, and the same question arises now where we are considering the effect to be given to the order there pronounced.

It seems almost beyond the possibility of a doubt that the debt is a contingent debt. Contingency may be of this nature—that the debt may never become due or payable. But surely it can be understood that debts, although not absolutely due, may be payable *ad interim*, which is the position of the present debt. It is not very easy to conceive cases arising under the ordinary operation of the law illustrating what I say, but I think an illustration may easily be obtained from cases of special agreement, such as are often before us in the transactions of companies—the purchase and sale of estates for company purposes, where the parties are taken bound to pay a sum of money, but in certain events the money will revert to them, and in certain events not one sixpence will be repaid. Is that not a contingent debt though presently payable. That is exactly the position of matters here. Present payment is necessary, but there may be repayments. Whether there will be or not depends on what may be the judgment of the House of Lords in the appeal.

I entirely agree therefore with the Lord Ordinary's judgment.

LORD ADAM—I am of the same opinion. I agree with your Lordship that the only question is, whether the debt is a contingent debt? If it is, there can be no further question, because section 14 of the Bankruptcy Act of 1856 says that sequestration cannot be awarded in respect of a contingent debt.

I think that the decree of the Court of Session ascertained the amount of the debt, and that it was due, but that decree is not final. The effect of the presentation of an appeal to the House of Lords was that it was no longer ascertained by a final judgment that the debt was due, and the matter thus remained in suspension, the question whether any debt was due at all depending on whether the judgment of the Court of Session may be affirmed or reversed. If that judgment is affirmed the debt will finally be ascertained to be due, and its amount will be fixed. If, on the other hand, the judgment of the Court of Session is reversed, it is equally clear that no debt will ever be due. That being so, it appears to me to be beyond question that the debt is a contingent debt, and it is because it is contingent, and for no other reason, that the necessity for an application to the Court of Session for interim execution arises. The Legislature thought it right that a party who has obtained a decree in his favour in the Court of Session should have the use of the money decerned for in the meantime till it was finally ascertained whether the debt was due or not. The object, therefore, of the application for interim execution does not in the least alter the nature of the debt. If in this case the judgment of this Court is reversed, the money for payment of which decree was granted will be repaid, and no debt will be due to the petitioner.

Such being the nature of the debt, I think it is a contingent debt, and I see no difficulty in the fact that the petitioner has been allowed the interim use of the money, and none the less is it a contingent debt because diligence may have been used on it. The debt having been ascertained to be a contingent debt, the Bankruptcy Act is a barrier over which the Court cannot pass to grant decree of sequestration.

LORD M'LAREN—The question here is, whether the petitioning creditor has a title to apply for sequestration, and that depends upon the 14th section of the Bankruptcy (Scotland) Act 1856, which, while specifying the amount of the debt, &c., concludes with these words, "whether such debts are liquid or illiquid, provided they are not contingent."

We are familiar with the statute under which creditors who hold contingent claims are entitled to be ranked. But while it is allowed that in an existing sequestration the trustee should take cognisance of the contingent debt, it has not been thought proper that a contingent claim should be the foundation of sequestration, and I think the reason must be that the Judge applied to generally knows nothing of any debts excepting the petitioning creditor's debt, and the non-payment of a contingent debt does not constitute *prima facie* evidence of the debtor's inability to meet his obligations. If that be the reason of the statutory rule, I must say it applies strongly to a case of this description. In a certain sense no doubt this debt is due, because under statutory authority the Court has given decree for it notwithstanding an appeal to the House of Lords. But it is only interim execution, and there may be an order for repayment. I am of opinion that the interlocutor should be affirmed.

LORD KINNEAR—I agree with your Lordship in the chair.

The Court adhered.

Counsel for the Petitioner—C. S. Dickson. Agent—Alex. Morison, S.S.C.

Counsel and Agent for the Respondent—Party.