cannot hear it from these complainers. I am clearly of opinion that they have a good title to be heard as proprietors of the shares, although not members of the company. This is the only question we require to determine, although I agree with the Lord Ordinary that the resolution was illegal.

LORD KYLLACHY—I concur. I should have been glad to have seen my way to support the judgment of the Lord Ordinary, because I think we see sufficiently behind the scenes to realise that the complainers' interest to raise this question is not of a very substantial character; but the question having to be decided, I am unable to hold otherwise than that these persons being contributories of this company have a sufficient title to complain that the proceedings which resulted in the appointment of this liquidator were irregular and therefore illegal. That being so, the only question is whether the respondent has succeeded in showing (contrary to the Lord Ordinary's opinion) that, assuming the complainers' title, their objection to the regularity of the proceedings is well founded. As to that I am afraid that the terms of the company's articles of association are conclusive in the complainers' favour. I do not, I confess, see how, having regard to those articles, any meeting of the company capable of passing a special resolution for winding up could be legally constituted without the personal presence of at least ten members of the company.

As to the competency of trying such a question by a process of interdict, I should, if the point had been raised, have had some difficulty. But the respondent's counsel I think very properly stated that they did not take any objection and were quite willing that the question should be decided in the present process.

The LORD JUSTICE-CLERK concurred.

The Court pronounced this interlocutor—

". . . Recal the said interlocutor reclaimed against: Recal also the interlocutor of 7th June: Sustain the 1st and 2nd pleas-in-law for the complainers: Interdict, prohibit, and discharge the respondent from acting in any way as liquidator, or representing himself as liquidator, of the North British Property Investment Company, Limited, under an alleged resolution of said company dated 31st March 1904, and decern." . . .

Counsel for the Complainers and Reclaimers — Hunter — Grainger Stewart. Agent—William Green, S.S.C.

Counsel for the Respondent—Cooper, K.C. Welsh. Agents—Welsh & Forbes, W.S.

Thursday, January 19.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

EDGAR *v.* KENNEDY AND HUTTON'S TRUSTEE.

Bankruptcy — Trustee — Compromise by Trustee of Action against Bankrupt Approved by Commissoners—Dissentient Creditor Proposing to Prosecute Action —Indemnity to Trustee and Trust Estate —Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *secs.* 169 *and* 176.

A trustee on a sequestrated estate proposed to compromise an action which had been raised against the bankrupt, and the terms of compromise were approved at a meeting of the commissioners, and were subsequently embodied in a joint-minute. A creditor who was a commissioner and had dissented from the approval of the compromise, but had not appealed under section 169 of the Bankruptcy Act 1856, lodged a minute in the cause maintaining his right to take up the defence of the action for his own behoof in the name of the trustee, on the footing that he should pay the trustee the sum to be paid under the compromise, and should grant a bond of indemnity for £500, with satisfactory caution—such bond being, he contended, sufficient to secure the trustee and the trust estate against all liability. In these circumstances the creditor sought to prevent authority being interponed to the joint-minute.

The Lord Ordinary having refused the crave of this minute, and interponed authority to the joint-minute, the creditor reclaimed.

The Court *adhered*, on the grounds—(1) that, the dissentient creditor not having appealed under section 169 of the Bankruptcy Act 1856 against the resolution of the trustee and commissioners to compromise the action, the compromise was finally concluded, and (2) that in the circumstances of the action it was not certain that the bond of indemnity offered by the dissentient creditor would be adequate to secure the trustee and the trust estate against all liability.

On the 15th April 1904 Angus Kennedy, builder, Hillhead, Glasgow, raised an action against Robert Hodgson Hutton, house factor, formerly of 115 North Montrose Street, Glasgow, concluding for (1) reduction of a disposition of certain property in Paisley, upon which the Carlile Boarding House had been erected, granted by him in favour of the defender, dated 3rd and 8th March, and recorded in the Division of the Register of Sasines applicable to the county of Renfrew 9th March 1904, and (2) payment of £500 of damages with expenses.

The pursuer averred that having agreed to sell the property in Paisley to the defender and to accept the price in instalments, he had stipulated that the disposition, which

had been completed, was not to be delivered until the instalments were paid, and had left it till then in the hands of the law-agents, who were acting for both purchaser and seller, but that the defender had by misrepresentation induced the law-agents to record the disposition at once.

Hutton's estates were sequestrated upon 21st May 1904, and the trustee thereon, John Dall, accountant, Glasgow, having received intimation of the action, was sisted a party to it upon the 9th July. He arranged terms of settlement with the pursuer, and these terms were approved by the Commissioners on the bankrupt estate by minute dated 15th October 1904.

Peter Edgar, house factor, Glasgow, one of the commissioners, and the largest creditor of the bankrupt, dissented on the grounds (1) that the bankrupt's books showed Kennedy to be due to the bankrupt the sum of £47, 3s., against which only £30 had been offered in settlement, and (2) that the action relative to the Carlile Boarding House should be continued, as the settlement was in his opinion carried out with undue haste and to the prejudice of the estate. Edgar did not appeal under section 169 of the Bankruptcy Act 1856 against the resolution to compromise.

Considerable correspondence passed between the agents of the different parties as to Edgar sisting himself a party to defend the action, as to the terms upon which this could be done, and as to the competency of his still doing so after the terms of compromise had been accepted, and after a long period of time had intervened, during which he had several times been informed that an arrangement must be made by a certain date else the compromise would be carried through. Meanwhile the action was on the 22nd October put to the Adjustment Roll of the 26th October, when it was continued until the 9th November, and on that date, in respect of the settlement alleged to have taken place, and upon cause shown, it was again continued to the 16th November, when, in respect that it was stated that a principal creditor of the defender proposed to lodge a minute objecting to the settlement referred to, the adjustment of the record was again continued for a week.

The joint-minute proposed by the pursuer and the trustee, dated 9th November 1904, stated "That the action had been settled on the following terms, *videlicet*:—(First) That the pursuer shall pay to the said defender as trustee on the sequestrated estate of the said defender Robert Hodgson Hutton (1) the sum of £30 in repayment and settlement of certain sums of money advanced by the said Robert Hodgson Hutton to him, and (2) the further sum of £20, together with the sum of £59, 19s. 4d. of legal expenses incurred by the said John Dall as trustee foresaid in connection with the present action; (Second) That the pursuer departs from the conclusion in the summons for payment of £500 in name of damages; (Third) that the pursuer relieves and discharges the said defender John Dall, as trustee foresaid, and the said sequestrated estate under his charge, of all and any liability for payment of a bill of £55 discounted by the said Robert Hodgson Hutton for the pursuer on or about the 22nd March 1904; and (lastly) That the said defender John Dall, as trustee foresaid, consents to decree in terms of the reductive conclusions of the summons," &c.

Upon the 22nd November Edgar lodged a minute in the cause, in which he, *inter alia*, stated—"That the minuter is a creditor on the said sequestrated estates to the extent of £2300 or thereby. He is by far the largest creditor. That the minuter is entitled, on putting the trustee in as good a position as he would have been had the settlement been carried through, to take up the defence of said action, and prosecute the same for his own behoof in the name of the trustee, subject to his accounting to the said trust estate for any surplus of funds recovered after meeting all his own claims and expenses in full. That the minuter proposes to safeguard the trustee by (1) paying the sums of £30 and £20 and the legal expenses incurred by the trustee, all in terms of the joint-minute adjusted between the pursuer and the trustee; and (2) granting a bond of indemnity for £500, with caution to the satisfaction of the Clerk of Court failing agreement, to indemnify the trustee and the trust estate against all liability for (*a*) principal or expenses under said summons, and (*b*) the amount of a bill for £55 discounted by Hutton to accommodate the pursuer. That the minuter considers said bond of indemnity for £500 is amply sufficient to secure the trustee, as only a dividend would be due by him on the damages awarded, if any, and on said bill; but the minuter is willing that the trustee should reserve power to demand further security should there ever be any likelihood of the bond tendered being insufficient. That the minuter is entitled to an assignation by the trustee in his favour of all the rights and claims paid for by him, particularly of all claims outwith the scope of the foresaid action, but included in the terms of settlement."

Upon the 23rd November 1904 the Lord Ordinary (KYLLACHY) pronounced an interlocutor refusing the crave of Edgar's minute and interponing authority to the joint-minute for the pursuer and the trustee.

Edgar reclaimed to the First Division.

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79), enacts, section 169:—"—It shall be competent to appeal against the resolutions of the creditors at meetings either to the Lord Ordinary or the Sheriff, provided a note of appeal shall be lodged with and marked by one of the clerks of the Bill Chamber within fourteen days after the date of the meeting at which the resolution objected to has been passed, or (as the case may be) in the hands of and marked by the Sheriff-Clerk within the like period; and it shall in like manner be competent to appeal against any deliverance of the trustee or commissioners to the Lord Ordinary or the Sheriff, provided the note of appeal shall be lodged and marked as aforesaid within fourteen days from the

date of the deliverance." . . . Sec. 176—"The trustee may, with consent of the commissioners, compound or transact or refer to arbitration any questions which may arise in the course of the sequestration regarding the estate, or any demand or claim made thereon, and the compromise, transaction, or decree-arbitral shall be binding on the creditors and the bankrupt."

Argued for the minuter and reclaimer—(1) A dissentient creditor had by common law the right to take up an action to which the bankrupt estate was a party, and which it was proposed to compromise, provided he put the trustee in as good a position as he would have been in had the compromise been carried through and gave the trustee security for any liability which might be incurred—Bell's Com., 5th ed. vol. ii., p. 415; *Spence* v. *Gibson*, December 13, 1832, 11 S. 212, at p. 214; *Sprot* v. *Paul*, July 5, 1828, 6 S. 1083; *M'Kay* v. *Brownlee*, January 31, 1866, 4 Macph. 333, 1 S.L.R. 126; *Marshall & Aitken* v. *Campbell's Trustee*, July 2, 1889, 16 R. 895, 26 S.L.R. 636; Goudy on Bankruptcy, pp. 252 and 333. This right was an absolute right in equity outside of the Bankruptcy Statutes, and was therefore not dependent upon an appeal being taken to the Sheriff or any procedure therein laid down. This was necessary unless the right was to become of no avail, for a creditor might never hear of a resolution or deliverance until the period for appeal had expired. Besides, appeal here was inappropriate, for the creditor did not wish to attack the grounds upon which the resolution was based, or to prevent the abandonment of the asset, but merely to have the right to take the asset up. Bankruptcy merely deprived the individual creditor of his right to attach any part of the bankrupt's estate to the prejudice of the whole estate, but here there would be no prejudice, and every one must be held to have acted in knowledge of the creditor's common law right to intervene. (2) In the circumstances the indemnity offered to the trustee was ample.

Argued for the pursuer and respondent—(1) The Bankruptcy Act 1856, section 176, gave the trustee, with consent of the commissioners, power to compromise, and that power he had exercised. The pursuer therefore had made a valid compromise with a competent party, who was, indeed, the only party in the case prior to Edgar's minute. The compromise was complete either when the terms were agreed upon, for a compromise in litigation might be complete though it had not yet been embodied in a minute—*Dewar* v. *Ainslie*, December 14, 1892, 20 R. 203, 30 S.L.R. 212—or when the minute was adjusted or signed or lodged. Any right the creditors might have had to intervene should have been exercised by way of appeal in accordance with the procedure laid down by section 169 of the Bankruptcy Act, and all the cases referred to by the minuter had arisen in that way. It was too late to come in now.

Argued for the trustee (defender and respondent)—The trustee was entitled to insist that before the creditor was allowed to take up the action, he, the trustee, should not only be placed in as good a position as if the compromise had gone through, but that he should be given an indemnity to cover all possible expenses of litigation and all damages, including any possible decree against him personally. The case might be taken to the House of Lords, and looking to everything the indemnity offered was not nearly sufficient.

At advising—

LORD ADAM—[*After narrating the facts*]—The Lord Ordinary has refused the crave of Mr Edgar's minute and has interponed authority to the joint minute compromising the action. The question accordingly is, whether the Lord Ordinary should have allowed Edgar to intervene as defender in the action. In my opinion the interlocutor of the Lord Ordinary is right. That interlocutor has been maintained to us on two grounds—the first by the pursuer and the second by the trustee. It is said in the first place that a compromise has been effected by the trustee which is final and conclusive, and reference has been made to section 176 of the Bankruptcy (Scotland) Act 1856, which provides that the trustee may, with the consent of the commissioners, compromise any question regarding the estate, and that the compromise shall be binding on the creditors. It appears to me that there is a great deal of force in this argument. I do not know what the language of section 176 means unless it gives the power to compromise. *Prima facie* the statute has considered that the interests of the creditors are sufficiently guarded by the trustee and commissioners, and if they are satisfied as to the compromise they are entitled to carry it through. Whether a creditor who considers himself aggrieved has any recourse against the trustee I do not inquire. I can fancy that in a case where the trustee has rushed through a compromise in order to defeat the rights of creditors something might be said, but nothing of that sort occurred here. The creditor here knew that the trustee and commissioners proposed to compromise the action, and took no advantage of the provisions of the statute, and I agree with Mr Constable that so far as his client, the pursuer in the action, is concerned the compromise has been concluded.

But then it is said, in the second place, that the creditor has still a right to intervene. I have no doubt that in certain circumstances a trustee is bound to allow a creditor who thinks he has compromised for an inadequate sum to use his name provided he is willing to keep the trustee and the estate *indemnis*. But the trustee is not bound to allow the use of his name unless he is indemnified by the creditor, and the question is whether the indemnity proposed by Mr Edgar is sufficient. The action is one of damages, and no one can tell what a jury may award; then again the amount of expenses is quite unsettled, and there are various other indefinite claims. The offer made by Mr Edgar is to pay a specific sum with the legal expenses already incurred, and to grant a bond of indemnity

for £500 to the satisfaction of the Clerk of Court. Is it clear beyond doubt that this limited guarantee for £500 is perfectly certain to indemnify the trustee and the estate? I think it is not, and on both grounds I think the Lord Ordinary is right.

LORD M'LAREN—In the scheme of the Bankruptcy Act the three stages in the formation of a contract which are commented on by Lord Stair and are familiar to lawyers are kept distinct—the stages of consideration, resolution, and engagement. Full consideration is provided for by the necessity for consultation of the commissioners before the trustee resolves upon any administrative act of importance. If the trustee and commissioners are then agreed their resolution must be formulated by a deliverance, and a creditor who feels aggrieved by the resolution has the right of appealing against it to the Sheriff or the Lord Ordinary. It is only when the preliminary procedure has been carried through, and the question has passed into the stage of resolution, that the trustee is entitled to enter into a binding engagement. Now, after an engagement has been entered into under these conditions I do not think that a creditor can come forward and be heard to say—"This is an improvident arrangement and I object to it." The answer to that would be—"Your rights, along with those of the general body of creditors, are placed (subject to review) in the hands of the trustee and commissioners, and your time to object, if you desired to do so, was when the resolution to compromise was taken."

Here the disputed act of administration is a compromise, and I agree with Lord Adam that the power to compromise given to a trustee by the Bankruptcy Act is as broad and clear in its terms as such a power could well be, and the provision that a compromise shall be "binding on the creditors" is a warning to them that unless they appeal at the proper time they will be bound by the act of the trustee. Mr Edgar had his opportunity of going to the Lord Ordinary and objecting to the compromise. If he had done so his first contention would no doubt have been that the trustee ought to contest the action at the expense of the bankrupt estate for the benefit of the general body of creditors. He would probably have failed in that contention, for I do not think that any judge who had examined the subject-matter of this action would have held that the trustee could conscientiously defend it at the expense of the estate, and I think he would have held, and rightly held, that the trustee was justified in compromising rather than in running the risk of a decree of reduction going out with expenses against the estate.

It is not contended that the creditor has been prevented from using his right of appeal, but it is maintained that cases might arise where, under similar circumstances, the creditor might be put to serious prejudice if kept in ignorance of the resolution. I do not think that the Bankruptcy Act proposes to safeguard the interests of creditors in every possible contingency; it only provides for them such protection as is consistent with a speedy and effective winding-up of bankrupt estates. Further, it cannot be maintained here that Mr Edgar was prejudiced while in ignorance of the steps that the trustee proposed to take, for he was one of the commissioners himself, and was necessarily aware of what was going on, and yet he neither appealed nor entered into negotiations for carrying on the litigation himself. He is unfortunately not in a position to give the necessary guarantee himself but has had to go to an insurance company to obtain it, and that is a proceeding that takes time. The trustee gave him due warning that the time during which the guarantee must be offered was running out, and it was no doubt a misfortune for Mr Edgar that he was unable to obtain it before that period expired. But I do not think that there was any duty on the trustee to delay concluding that compromise which he considered to be beneficial to the estate merely for the purpose of enabling a creditor to contest an action which he himself thought that he could not conscientiously defend. I think he was quite right in effecting the compromise when he did, and I see no grounds on which a court of law could interfere to set it aside.

I do not know on what grounds the Lord Ordinary based his judgment, but we are told that it was on the ground that the trustee had the power to compromise and had effectually done so by the joint-minute which is in process. Both on that ground and on the ground that the trustee was not bound to lend his name to a creditor without an adequate indemnity, I concur with your Lordship in the judgment proposed.

LORD KINCAIRNEY—I concur.

The Court adhered.

Counsel for the Minuter and Reclaimer—C. K. Mackenzie, K.C.—Macmillan. Agents—Gardiner & Macfie, S.S.C.

Counsel for the Pursuer and Respondent—Constable. Agents—Macgregor & Stewart, S.S.C.

Counsel for the Trustee, Defender and Respondent—Findlay. Agents—Patrick & James, S.S.C.

Saturday, December 24.

OUTER HOUSE.

[Lord Stormonth Darling.

DUNCAN *v.* PERTHSHIRE CRICKET CLUB.

Reparation—Injuries through Collapse of Stand—Relevancy—Defective Structure—Spectator who had Paid for Admission—Contract or Delict—Process—Proof or Trial by Jury.

In an action of damages against a cricket club for injuries received through the collapse of a stand, the