£500 of debentures voted against, and one person representing £1000 of debentures declined to vote; and when one looks at the list of those who were present at the meeting and took part in the division, one sees that they were persons who were very well qualified to judge of the matter that was put before them. If there had been any suggestion that the persons so voting had interests in different capacities from that of debenture-holders which might lead them to sacrifice to a certain extent their interests as holders of the debentures in order that they might preserve their interests as shareholders, then it would have been necessary to look very closely into what is proposed to be done. But there is no suggestion of any interest of that kind. There is no suggestion that the vote was not given *bona fide* in the interests of the debenture-holders. The only point made by the single dissentient is that what is proposed is *ultra vires*. One quite appreciates the difficulty that the dissentient may find himself placed in. One of a body of trustees finds that instead of having a debenture payable at a fixed term he is now to be placed in the position of a holder of debenture stock which he can only realise by placing it on the market, with the possibility of his not getting its full face value. But the ground of his objection is that the proposal is *ultra vires*, and a reference to the cases decided on this matter show that that ground of objection is untenable. I should point out that the present position is that at Whitsunday, 1911, £2740 of debentures or debenture bonds had fallen due and were still unpaid. That shows the wisdom of endeavouring to re-arrange the debenture debt. I keep in view that the Court has to be satisfied that the re-arrangement proposed is a reasonable one. After considering the terms of the agreement, the proposal for conversion, and the proposal that a certain amount should be set apart out of income in order to reduce the preferable burden, I am of opinion that the proposed arrangement is reasonable, and that the prayer of the petition should be granted.

LORD KINNEAR was absent.

The Court pronounced this interlocutor—

"The Lords having considered the petition (no answers having been lodged) along with the report by Mr Frederick L. Morrison, and heard counsel for the petitioners, in respect that the proposed arrangement contained in the agreement referred to in the petition has been agreed to by a majority in number representing three-fourths in value of the debenture holders present in person or by proxy at the meeting mentioned in said report, Sanction the said arrangement, and decern," &c.

Counsel for the Petitioners—Macmillan. Agents—J. & J. Ross, W.S.

Saturday, July 14.

SECOND DIVISION.

[Lord Guthrie, Ordinary.

PHILIP *v.* WILLSON (LIQUIDATOR OF BAY OF ISLANDS SLATE SYNDICATE, LIMITED) AND ANOTHER.

Expenses — Agent and Client — Charging Order—Petition Presented after Decree Extracted when Client, a Company now in Voluntary Liquidation, not subject to Jurisdiction and Fund Recovered not within Control of Court—Jurisdiction—Competency — Law Agents and Notaries Public (Scotland) Act 1891 (54 *and* 55 *Vict. cap.* 30), *sec.* 6.

A law agent who had conducted an action in Scotland on behalf of a company registered in England, presented, after decree had been extracted, and after the company had gone into liquidation, a petition for a charging order, under the Law Agents and Notaries Public (Scotland) Act 1891, section 6, on the fund which has been recovered by the action, and which had been paid over to the liquidator in England. *Held* (1) that the Court had power to grant the order, though neither the company nor the liquidator were subject to the jurisdiction, and (2) that the voluntary liquidation was no bar to the granting of the order.

The Law Agents and Notaries Public (Scotland) Act 1891 (54 and 55 Vict. cap. 30) enacts—Section 6—"In every case in which a law agent shall be employed to pursue or defend any action or proceeding in any court, it shall be lawful for the court or judge before whom any such action has been heard or shall be depending to declare such law agent entitled to a charge upon and against, and a right to payment out of, the property of whatever nature, tenure, or kind the same may be, which shall have been recovered or preserved on behalf of his client by such law agent in such action or proceeding, for the taxed expenses of or in reference to such action or proceeding, and it shall be lawful for such court or judge to make such order or orders for taxation of, and for raising and payment of, such expenses out of the said property as to such court and judge shall appear just and proper; and all acts done or deeds granted by the client after the date of declaration, except acts or deeds in favour of a *bona fide* purchaser, shall be absolutely void and of no effect as against such charge or right."

David Philip, S.S.C., presented a petition for a charging order in terms of the foregoing section on the sums recovered and remaining due under decrees in actions conducted by him in the Court of Session on behalf of the Bay of Islands Slate Syndicate, Limited, against the Reid Newfoundland Company.

Answers were lodged for Christopher Charles Willson, accountant, London,

Liquidator of the Syndicate, and Ernest William Hart, accountant, London, receiver on behalf of the debenture holders of the Syndicate, who pleaded (1) that as the Syndicate was registered in London, and had no assets in Scotland, and as the sums on which the charge was sought so far as recovered had been paid over to the liquidation assets, and as far as outstanding represented by bills which along with the extract decrees had been lodged in bank in Montreal, the Court had no jurisdiction to grant the order craved, and (2) that as the Syndicate had gone into liquidation in England, the petition was incompetent.

The following *narrative* is taken from the opinion of Lord Salvesen — "The material facts, which are not in dispute, are that the petitioner conducted a number of litigations on behalf of the Bay of Islands Slate Syndicate, in which his clients were successful in obtaining a decree for £3000 and interest. The sum of £3000 has been paid, and there is no reason to doubt that the bills which have been granted for the balance, consisting of interest and other debts constituted by separate decrees, will be met at maturity. The petitioner's accounts, so far as passed by the Auditor as good charges against the unsuccessful litigants, have also been paid, but there remains a balance of £568, 3s. 1d. due by his clients to him in terms of the taxed accounts. In consequence of an agreement entered into before the litigations were commenced these accounts have been taxed by the Auditor, not as between agent and client, but as between party and party."

On 16th June 1911 the Lord Ordinary (GUTHRIE) pronounced the following interlocutor—"Finds that the amount due by the respondents the Bay of Islands Slate Syndicate, Limited, to the petitioner is £568, 3s. 1d., and decerns against the said Bay of Islands Slate Syndicate, Limited, and against Ernest William Hart, accountant, Finsbury Pavement House, London, E.C., as receiver appointed by the debenture-holders of said Syndicate, as such receiver, and against Christopher Charles Wilson, incorporated accountant, London, as liquidator of said Bay of Islands Slate Syndicate, Limited, for payment to the petitioner of said sum of £568, 3s. 1d., with interest thereon at 5 per cent. per annum from 31st May 1911 till payment: Further, finds and declares, in terms of the Statute 54 and 55 Vict., cap. 30, sec. 6, the petitioner entitled to a charge upon and against, and a right to payment out of, the sum of £3000 recovered by the said liquidator from the Reid Newfoundland Company mentioned in the petition, and all other sums due by the Reid Newfoundland Company to the said Syndicate as and when further sums have been paid to the said liquidator or to said receiver; the said charge forming the first claim on said sums, and being always preferable to the claims of the said debenture-holders or other creditors of said Syndicate; and decerns."

Opinion—"I think this charging order must be granted. The objections which have been raised seem to come under three heads. The petitioner founds on the Statute of 1891 (54 and 55 Vict. cap. 30, sec. 6), under which it is competent to the tribunal before whom an action has been brought, in which a sum of money has been recovered for a client by a law agent, to grant a charging order which will operate on the funds so recovered. It is alleged by the respondent, and not denied, that in this case there is no money so recovered which is at present within the jurisdiction, or indeed ever was within the jurisdiction.

"The first question is whether the statute operates in these circumstances. Mr Ingram has founded on the origin of the statute, but I think I must confine my attention to the words of the statute, and I find no such limitation as Mr Robertson has maintained should be read into the statute. I am not able, apart from the words of the statute, to see any reason in principle why such a limitation should be read in. It appears to me I have nothing to do with where the money recovered is. If there was an averment that it had been all *bona fide* spent before this charging order was asked for, that might raise a different question. But with an averment as I have stated, my duty is to hold that the statute applies to the present circumstances, leaving the petitioner to work out the charging order, subject to any special rules, if there be any, in the liquidation of the company in England.

"Next, it is said that at all events where a company has either been sequestrated or where a liquidator has been appointed in the case of a limited company, a charging order cannot be granted at all. Next, it is said further in the answers for the liquidator that in the case of debenture holders 'the liquidator is vested with the duty of distributing the funds of the liquidation according to priority of ranking among the creditors in terms of the Companies Consolidation Act 1908. The charge craved is an effort to obtain an absolute preference over funds in England, belonging to an English company in liquidation where there exist, among other creditors, debenture holders holding a floating charge over the assets.' Again, I see no warrant for that in the statute, nor in principle either. I say that apart from the fact that in this particular case we have no averment that the company is, in point of fact, insolvent. I do not think that the cases quoted to me apply." [*His Lordship dealt with a defence on the merits which was abandoned in the Inner House.*]

The respondents reclaimed, and argued—(1) The Court had no jurisdiction to grant the order craved. An agent's right to a charging order on a fund which was not in his hands depended in Scotland as in England entirely on statute—Law Agents and Notaries Public (Scotland) Act 1891 (54 and 55 Vict. cap. 30), sec. 6; Solicitors Act 1860 (23 and 24 Vict. cap. 127), sec. 28. Prior to 1891 the law in Scotland was the same as that in England till 1860, and the agent's rights in regard to his account

depended on lien—*Shaw* v. *Neale*, 1858, 6 Cl. H.L.C. 581. The Act of 1891 was not intended to extend the jurisdiction of the Court in dealing with expenses beyond that exercised under the Act of Sederunt of 6th February 1806, and did not confer jurisdiction in a case like the present, where the client was a company registered in England and now in liquidation. The liquidator was not subject to the jurisdiction of the Scots Courts, the fund recovered was not under the control of the Scots Courts, and the balance was due by a foreign creditor. Further, the order if granted would avail the petitioner nothing, for it could not be enforced except in England, and the Judgments Extension Act 1868 (31 and 32 Vict. cap. 54) would not apply to such a case, while a decree conform could not be obtained, as the English and the Scottish Acts were different—*per* Lord Justice-Clerk in *Carruthers' Trustee* v. *Finlay & Wilson*, January 7, 1897, 24 R. 363, 34 S.L.R. 254. If, therefore, the petitioner could not enforce his decree, the Courts would not grant it. There was no case in which a charging order had been granted in circumstances similar to the present. In *Bannatyne, Kirkwood, France, & Company*, 1907 S.C. 705, 44 S.L.R. 553, the application was made by minute in a depending cause. The petitioner might have so proceeded here, instead of allowing the decrees to be extracted before making his application. In *Tait & Company* v. *Wallace*, October 27, 1894, 2 S.L.T. 261; *Paton* v. *Paton's Trustees*, June 1, 1905, 13 S.L.T. 96; and the *Automobile Gas Producer Syndicate, Limited* v. *Caledonian Railway Company*, 1909, 1 S.L.T. 499, the fund was in Scotland and the client subject to the jurisdiction. (2) The petition was incompetent. It involved a preference in an English liquidation, and that the English Courts alone could deal with—*Phosphate Sewage Company* v. *Lawson & Sons' Trustee*, July 5, 1878, 5 R. 1125, 15 S.L.R. 666. Further, the order craved in the petition was of the nature of diligence or execution in the meaning of sections 211 and 213 of the Companies (Consolidation) Act 1908 (7 Edw. VII, cap. 69), and was therefore incompetent—*Allan* v. *Cowan*, November 15, 1892, 20 R. 36, 30 S.L.R. 114. In any event, the petition could not be granted to the effect of creating a preference over the receiver for the debenture holders. The case of *Brunton* v. *Electrical Engineering Corporation*, [1892] 1 Ch. 434, founded on by the petitioner, turned on the terms of the particular deed creating the debentures. Even if the petitioner were entitled to a charging order, the Lord Ordinary's interlocutor was wrong in so far as it gave decree against the reclaimers.

Argued for the petitioner (respondent)—(1) The Court which tried the cause was the Court empowered to grant the order—Law Agents and Notaries Public (Scotland) Act 1891, sec. 6; Poley, Law Affecting Solicitors, p. 365. (2) The question of preference did not prejudice an agent's right to a charging order under the Act—*Automobile Gas Producer Syndicate, Limited* v. *Caledonian Railway Company* (*cit.*), *Brunton* v. *Electrical Engineering Corporation* (*cit.*). Further, the liquidation was a voluntary one, and it was not averred that the Syndicate was insolvent. That did not stop diligence, even assuming the proceedings here were of the nature of diligence.

At advising—

LORD SALVESEN—[*After the narrative above quoted*]—In the Outer House a defence was maintained on the merits, but this was expressly abandoned before us; and the only points which we are to consider are (1) whether the Court has jurisdiction to grant the order asked, and (2) whether in view of the fact that the Syndicate has now gone into liquidation, it is competent in this way to give what amounts to a preference in the liquidation to the petitioner.

The grounds upon which the jurisdiction of the Court was challenged were that the respondents have their registered office in England, and that the fund which is sought to be charged is not under the control of the Scottish Courts, having, so far as recovered, been paid to the liquidator of the Syndicate, and so far as outstanding being due by a company carrying on business in Newfoundland. On the other hand, the petitioner's accounts were incurred in Scotland in the course of a litigation which was conducted there, and which resulted in a large sum of money being recovered by the successful litigants.

In my opinion, the plea of no jurisdiction falls to be repelled. By the express terms of section 6 it is only the court or judge before whom an action has been heard or is depending who can declare the law agent entitled to a charge upon the property recovered. If, therefore, the petitioner cannot obtain his charging order here, he would be entirely deprived of the privilege which the Act confers. I see no ground for implying, as the respondents desire us to do, that a person resident abroad who litigates in Scotland is in a better position, in this matter than a Scottish litigant would be, or that the validity of the charging order depends upon whether the fund is within the control of the Court or is due by a Scottish debtor. It is an almost necessary assumption of the right to obtain a charging order that the fund has already been paid to the successful litigant for whom the law agent has acted, or at least that a decree has been granted in his favour, and in either event it is not under the control of the Court. There may be difficulties in enforcing the charging order where the client against whose funds it is made happens to be resident abroad; but that is no reason why, if the agent is otherwise entitled to it, it should not be granted.

The other ground upon which the application is resisted is that the Syndicate has now gone into liquidation, and accordingly it was maintained that the petitioner's only remedy was by claiming in the liquidation; and reference was made to certain cases in which the Court has held that execution

cannot pass against a limited company in liquidation which has its registered office outside of Scotland. The cases referred to, however, were cases of companies which had been compulsorily wound up, or in which the liquidation had been placed under the supervision of the Court. Here the liquidation is a voluntary one, and as the Lord Ordinary points out, it is not even said that the company is insolvent. In any case I apprehend that a voluntary liquidation is no bar to enforcing payment of a debt in the ordinary courts of the country. If it were so, an English limited company which litigated in Scotland could always defeat its agent's claim for a charging order by simply going into voluntary liquidation, and this of itself is sufficient to show the fallacy underlying the respondent's argument. Apart altogether from this, although a charging order may enable the creditor who obtains it to obtain a preference over other creditors, that is exactly what the statute has authorised, the presumption being that without the petitioner's work the fund recovered in the litigation, so far as not necessary to meet the agent's accounts, would not have been available for payment of other debts. The creditors therefore are not entitled to the sums so recovered except after providing for the legitimate expenses of the agent in recovering them for their behoof. I am therefore of opinion that on this point also the Lord Ordinary has come to a sound conclusion.

The interlocutor reclaimed against, however, goes beyond the prayer of the petition, for it contains a decree against the Syndicate, the liquidator, and a receiver appointed by the debenture-holders of the Syndicate, for the amount of the taxed account. In my opinion we must vary the interlocutor by deleting this decree. The interlocutor also falls to be corrected in one other particular, by qualifying the words "all other sums due by the Reid Newfoundland Company to the said Syndicate" by adding the words "in terms of the decree of 15th September 1908." No doubt the petitioner will see that this decree is properly described in our interlocutor. *Quoad ultra* I think we should substantially repeat the interlocutor of the Lord Ordinary.

LORD DUNDAS—At the conclusion of the argument I thought that Mr Robertson had not shown any sufficient ground for interfering with the Lord Ordinary's interlocutor—except indeed on the two points in regard to which it falls to be modified. The reasons why I so thought were substantially those which my brother Lord Salvesen has fully expressed, and I am therefore content to say that I concur in his opinion.

The LORD JUSTICE-CLERK concurred.

LORD ARDWALL was absent.

The Court adhered to the Lord Ordinary's interlocutor as varied and corrected to the effect mentioned in the opinion of Lord Salvesen.

Counsel for Petitioner (Respondent)—M'Kechnie, K.C.—Ingram. Agent—Party.

Counsel for Respondents—W. J. Robertson. Agents—Simpson & Marwick, W.S.

Friday, July 14.

SECOND DIVISION.

M'GREGOR'S TRUSTEES *v.* KIMBELL.

Succession—Testament—Partial Intestacy —Provision to Widow in Full of her Legal Claims—Right of Widow to Jus Relictæ out of Undisposed Estate.

A testator by a settlement disposing of his whole estate directed his trustees to pay the annual income thereof to his wife, and in the event of her entering into a second marriage to pay her one-third of the annual income. He further directed that the balance of income forfeited by his widow on re-marriage should fall into the capital of his estate until the period of division, which was the date of her death, should arrive. The settlement, which was signed by the testator's wife as well as by himself, contained a clause in which the wife accepted of the provisions in her favour in lieu of terce, *jus relictæ*, and every other claim competent to her through her husband's death. The testator died in 1881, and his widow thereafter received payment of her conventional provision. She re-married in 1894. In 1902 the direction to accumulate the balance of income set free by her re-marriage became inoperative under the Thellusson Act (39 and 40 Geo. III, cap. 98), and the balance thereafter fell into intestacy.

Held, in a special case, that the clause in the settlement whereby the wife accepted the provisions in her favour in lieu of her legal rights was to be regarded as having been intended solely for the protection of the settlement, and that the widow, in addition to her conventional provision, was entitled *jure relictæ* to one-half of the proportion of income falling into intestacy—*Naismith* v. *Boyes*, July 28, 1899, 1 F. (H.L.) 79, 36 S.L.R. 973, *followed*.

Sim v. *Sim*, December 18, 1901, 4 F. 944, *distinguished*.

On 14th July 1911 a Special Case was presented to the Court by David Edward and another, trustees of the late James M'Gregor, 28 Hamilton Drive, Hillhead, Glasgow, *first parties;* Mrs Alice Jeffs or M'Gregor or Kimbell, widow of the said James M'Gregor, and now wife of William Alfred Kimbell, Herne Hill, London, *second party;* John M'Gregor, San Francisco, U.S.A., and others, the whole brothers or sisters or descendants of brothers and sisters of the said James M'Gregor, *third parties;* and William Jeffs, 34 Testerton Street, Kensington, London, and others, the whole brothers and sisters or descendants of brothers and sisters of