nicety, but I have come to be of the same opinion as your Lordship.

The question is a simple one of fact as to the circumstances under which the receipt came into the hands of the defender, and the averment with regard to that is contained in the 6th article of the condescendence—[*reads as above*]. This receipt was dated 15th May 1882, and it is admitted that it is not a receipt for money paid on that day, for the money is not said to have been paid till after the 28th. On the other hand there was a considerable lapse of time before any demand was made for the half-year's rent. Why no demand was made has not been explained in the correspondence which passed between the parties. It was not until a year after, when the clerk was looking at his books, that payment was asked from the defender.

No fraud has been alleged, for it is conceded that if there had been an allegation of fraud the proof would not have been restricted. The rule which limits the proof has been relaxed, not in the case of receipts of this kind but in the case of bills. The practice for long used to be that a person was only entitled to prove resting-owing by the writ or oath of his debtor, but that rule has now been relaxed. And on the same principle upon which the Court proceeded in relaxing the rule with regard to bills, I think the rule as to receipts of this kind should be relaxed also. We were referred to a case in which the question was whether in the case of a bill the proof was limited to the writ or oath of the holder—the case of *Ferguson, Davidson, & Co.*—in which it was observed that if the averment was that the bill had come into the possession of the holder not in the ordinary course of business, then the inquiry into the question whether value had been given would not be limited. That was in reference to a bill of exchange, but I can see no reason why the rule should not be applied to the case of possession of a receipt. I think, therefore, that the circumstances set forth render it necessary that there should be a proof whether the money is due or not, and that the proof should not be limited. On that ground I am of opinion that the Lord Ordinary is right.

Lord Shand—If this question had arisen immediately after the receipt had come into the defender's hands, I should have been of opinion that there was no difficulty, for the point between the parties is really one of fact whether the receipt was ever delivered.

On one side it is said that the receipt was sent in a letter, and that the defender received it with the qualification that he should either send the money, or else send the receipt back. On the other side it is said for the defender that the document was delivered in return for money paid. Therefore on this issue of fact I think parole evidence would have been competent if the dispute had arisen immediately after the defender got the receipt.

The only point of difficulty is the lapse of time which took place between the sending of the receipt in May 1882 and the demand for payment of the rent, which was not made until May 1883. I have come to be of opinion, however, that the delay is not sufficient to bar the pursuer, and regarding the question as one of delivery I think that parole evidence is competent.

Lord Deas was absent.

The Court adhered.

Counsel for Pursuer—Macfarlane. Agents—Macrae, Flett, & Rennie, W.S.

Counsel for Defender—Lang. Agents—Ronald & Ritchie, S.S.C.

Tuesday, March 18.

FIRST DIVISION.

[Sheriff of the Lothians.

MILLER (CHALMERS' TRUSTEE) *v.* M'INTOSH.

Bankruptcy — Ranking — Claim for Damages — Expenses—Action in Dependence at Date of Sequestration.

At the date of the sequestration of a bankrupt's estates an action of damages for £3000 was in dependence against him. The trustee refused to sist himself. The bankrupt defended, without any motion being made to ordain him to find caution for expenses, and thereafter decree was pronounced against him for £20 of damages with £200 of modified expenses. *Held* that the pursuer was entitled to rank in the sequestration for the damages awarded, and also for the expenses, on the ground that they constituted a debt due at the date of the sequestration, the amount of which was subsequently ascertained.

The estates of Walter Chalmers, commission agent, Leith, were sequestrated in March 1882, at which date there was in dependence in the Court of Session an action against him at the instance of William M'Intosh, 1 East Hermitage Place, Leith, concluding for £3000 of damages. Intimation of this action was made on 23d June to Mr Hugh Miller, the trustee on Chalmers' sequestrated estate, but he refused to sist himself, and took no part in the proceedings. On the same day M'Intosh lodged a claim in the sequestration for £3000 damages, but nothing was done on this claim. The bankrupt himself defended the action, and no motion was made that he should be ordained to find caution for expenses.

On 17th October (*ante*, p. 7) the pursuer obtained decree against the bankrupt for £20 damages and expenses as modified. The taxed amount of expenses as modified amounted to £200.

On 12th December M'Intosh lodged a claim in the sequestration, in which he deponed "That Walter Chalmers, commission agent, Yardheads, Leith, is now, and was at the date of the sequestration of his estates, justly indebted and resting-owing to the said deponent the sum of Two hundred and twenty-one pounds and fourpence sterling, as per statement annexed."

On this claim the trustee pronounced this deliverance—"The trustee admits this claim for the sum of £20 sterling, being the amount of damages decerned for in the extract-decree of the Court of Session, dated 17th October 1883. Further, as to the claim for £201, 0s. 4d. sterling,

being the amount of modified expenses of process, and expenses of extract in said decree, the trustee finds, on examination of the account of expenses, the amount of these expenses incurred by the claimant in the action prior to 9th March 1882, the date of the sequestration, amounts to £28 2 4
Off which there was taxed . 10 8 8

Leaving . £17 13 8

But the claimant was found entitled to his expenses subject to modification. The total amount of the account as taxed was £247, 1s. 2d. sterling, and this was modified to £200. The trustee holds that the modification must be applied to the above sum of £17, 13s. 8d., in the proportion it bears to the whole amount of the account as taxed. He therefore admits the claim for expenses to the amount of £14, 6s. 3d. (sterling), being the amount of the taxed expenses to date of sequestration, applying this proportion."

M'Intosh then appealed to the Sheriff-Substitute (Hamilton), who on 15th February 1884 recalled the deliverance of the trustee, and instructed the trustee to rank the appellant in terms of his claim.

"*Note.*—In the opinion of the Sheriff-Substitute, the decree founded on having been pronounced in an action which was raised against the bankrupt before the date of his sequestration, entitles the appellant, pursuer of the action, to be ranked on the bankrupt's estate for the whole sums of damages and expenses found due to him. The decree, he thinks, must be treated as one and indivisible."

The trustee then took this appeal to the First Division. Argued for him—The expenses incurred subsequent to the date of the sequestration were not a debt due at the date of the sequestration, and therefore the claimant was not entitled to a ranking for them—Bell's Comm. (7th ed.) ii. 289, 351; *Torbet* v. *Borthwick*, February 23, 1849, 11 D. 694; *Love* v. *Menzies*, January 23, 1830, 8 S. 380.

The respondent replied that the expenses were merely an incident in ascertaining the amount due—*Baird* v. *M'Ilwham & Company*, June 24, 1830, 8 S. 966; *Mackenzie* v. *Macpherson*, March 10, 1855, 17 D. 751. Arrestment on a depending action will cover the expense of the action—Bell's Comm. (7th ed.) ii. 73 (5th ed.) ii. 76, Ersk. Inst. iii. 6, 8; Murdoch on Bankruptcy, p. 190.

At advising—

Lord President—This case raises a question of some importance in the practice of bankruptcy, and so far as I can see it has never before been fairly raised for determination, though there are various *dicta* scattered through a number of cases. These *dicta* are not very easily reconcileable with each other, and therefore it is necessary that we should be careful as to the rule we lay down.

The estates of Walter Chalmers were sequestrated in March 1882, and at that date there was an action in dependence against him at the instance of Mr William M'Intosh, the respondent here, for £3000 damages, and of course concluding for expenses. The action was in the ordinary form, and was intimated to the trustee in the sequestration, who declined to sist himself, and at the same time M'Intosh lodged a claim in the sequestration for £3000 of damages. Nothing was done upon that claim.

In the action, however, the bankrupt himself appeared, though the trustee declined, and was allowed to do so without any demand being made on him by the pursuer to find caution. Accordingly, the case was tried, with the result that M'Intosh obtained decree for £20, instead of £3000, and the taxed expenses, which were modified at £200. This, together with the dues of extract, amounting to £1, 0s. 4d., makes up the sum of £221, 0s. 4d. now claimed in the sequestration, and for which the pursuer asks the trustee to rank him. He deponed in his affidavit that Walter Chalmers "is now, and was at the date of the sequestration of his estates, justly indebted and resting-owing to the said deponent the sum of two hundred and twenty-one pounds and fourpence sterling, as per statement annexed;" and then follows the statement containing the particulars I have just mentioned.

Now, in one popular sense certainly it was not the case that the bankrupt was owing the sum of £221, 0s. 4d. at the date of his sequestration, but the question is whether in law, and as a matter of legal construction of the affidavit, it is not true that the debt was then owing—that is to say, that the debt was owing then, which has now been found to amount to £221, 0s. 4d? It appears to me that that question must be answered in the affirmative. The debt which the respondent claimed was one of large amount, being £3000 in the form of a claim of damages, and he also claimed the expenses of establishing his right to that sum or to a part of it. No doubt the debt was uncertain, or, in other words, disputed; it was not merely disputed by the bankrupt that he owed anything at all, but, on the assumption that he owed something, he disputed the amount. So also with regard to the expenses. It depended entirely on the pursuer succeeding in the main conclusions of the action whether there were any expenses due to him, and the amount, if they were found due, was of course quite uncertain, It only comes to this, that there was at the date of the sequestration a claim for damages, and for the expenses necessary to establish that claim.

I do not call this debt contingent, for it is not that in a proper and technical sense, and I do not call it future, for it is not due, if due at all, in the future, but in the present. It is a disputed debt, but that only comes to this, that it is open to two defences, first, that nothing is due at all, and second that the amount claimed is too large. That is the nature of the debt.

It is not disputed, I understand, that Mr M'Intosh is entitled to rank for the £20 of damages for which he has got decree, but the trustee refuses to give him a ranking for the expenses incurred after the date of the sequestration. The course he takes as regards the claim for £201, 0s. 4d, is thus explained by him—"As to the claim for £201, 0s. 4d. sterling, being the amount of modified expenses of process, and expenses of extract in said decree, the trustee finds, on examination of the account of expenses, the amount of these expenses, incurred by the claimant in the action prior to 9th March 1882, the date of the sequestration, amounts to . . £28 2 4
Off which there was taxed . 10 8 8

Leaving . £17 13 8

But the claimant was found entitled to his expenses

subject to modification. The total amount of the account as taxed was £247, 1s. 2d. sterling, and this was modified to £200. The trustee holds that the modification must be applied to the above sum of £17, 13s. 8d., in the proportion it bears to the whole amount of the account as taxed." Applying that principle he admits the claim for expenses to the extent of £14, 6s. 3d. The principle is just this, that while the claimant may be entitled to rank for expenses incurred prior to the sequestration, he is not entitled to rank for those incurred subsequent to that date. I do not agree with the trustee with regard to the account of expenses. I think that the expenses as well as the damages constituted a debt due at the date of the sequestration. The amount of that debt has now been ascertained and fixed, and I think M'Intosh is entitled to rank for the one and the other. It seems to be supposed that the trustee and creditors in a sequestration may by the application of this rule be placed in a position of hardship, particularly in an action of this kind which was in dependance at the date of the sequestration. I am not satisfied that there would be any hardship in such a case, but I am satisfied that the trustee and the creditors should very seriously consider their position with regard to defending an action before determining on the course they are to follow. It seems to me that the procedure of the trustee here in declining to sist himself, or to having anything to do with the action, was rather rash; for if Mr M'Intosh had in consequence demanded that the bankrupt should find caution for expenses, and had succeeded in that, and no caution had been found, he would then have obtained a decree by default for £3000. Then when he came with his decree and made affidavit upon it in the sequestration, I confess I do not see what answer the trustee could have made to him. That would have been very important.

I rather think that the course which the trustee and creditors should follow is to make up their minds as to the probable amount the pursuer would get if the case were defended, and then in the one way or the other, either in the sequestration or in the action, make a tender of that amount, with expenses up to date. If the tender be sufficiently large—that is to say, if it be not under the amount the pursuer ultimately obtains, then the trustee will be entitled to full costs against the pursuer. But simply to pass the matter by and not to recognise the action at all seems to be a very dangerous course, and might lead to serious consequences.

The ground upon which I agree with the Sheriff-Substitute is, that I think both the claim for damages and the expenses found due formed a proper debt of the bankrupt which was due at the date of the sequestration, the amount of which was subsequently ascertained.

Lord Mure—The trustee has here ranked the claimant for the sum of £20, awarded to him as damages in the action, and also £14, 6s. 3d, being the proportion of the expenses, as taxed, due at the date of the sequestration. The Sheriff-Substitute has taken a different view, and held that the claimant is entitled to be ranked in terms of his claim.

I am of opinion that the Sheriff-Substitute was right. There appears to be no express decision on the point, but there are various indications of opinion by Judges of eminence, and I think the preponderance of opinion is in favour of the view the Sheriff-Substitute has taken. That, I think, is plain from the opinions expressed in *Baird's* case by Lord Moncreiff and Lord Glenlee.

The question is, whether the decree for expenses incurred subsequent to the date of the sequestration is to be held as a debt due in law at the date of the sequestration? We were referred to passages from the institutional writers, and it seems to me that the observations of Mr Erskine (iii. 6, 8) are here directly in point. He says—"Claims depending on the event of a suit are not, in the judgment of law, future debts; for the sentence of the judge admitting the claim, when it is pronounced, draws back to the period at which the debt became first due." That general proposition applies, I think, to the present case. This was a claim of damages, the amount of which had not been fixed at the date of the sequestration, but the proceedings in which the amount was determined had been raised at that date. True, the claim of damages was reduced by litigation, in which the trustee refused to sist himself, from £3000 to £20; but it is apparent in the circumstances that if in this action of damages decree had been pronounced against the bankrupt for £3000, the party would have been entitled to claim for that. The action was for the purpose of ascertaining what was due, and in principle the amount so ascertained was due at the date of the sequestration. The question of expenses must necessarily follow the same rule, and I think the trustee was bound to give a ranking for them.

I think that the law as to arrestments is similar to this, and although there are, no doubt, difficulties in the case, I am of opinion that the Sheriff-Substitute is right.

Lord Shand—This is certainly a question of nicety, and this will be the first case in which it will have been distinctly settled that in a litigation carried on by a bankrupt, and not by his trustee, the successful party is entitled to a ranking for the expenses of the action in the sequestration.

I have come to be of the same opinion as your Lordships. The question really turns upon the point whether the expenses can be said to be a debt due at the date of the sequestration. The damages claimed were £3000, and the amount found due was £20. It is not disputed that the sum of £20 was due at the date of the sequestration, though not ascertained till long after; but the expenses were all incurred in ascertaining whether damages were due or not, and I do not see that it is possible to separate the expenses from the damages. They were necessarily incurred in ascertaining the amount due, so I think the principal sum and the expenses must go together. The only course a trustee can take if he finds an action of this kind in dependance is to make a tender of what he conceives to be the amount fairly due, with expenses as at that date. If the tender is sufficiently large, that will save him from further charge, and the creditor will then rank for the admitted sum, with expenses to that date.

But where, as here, the trustee allows the bankrupt to litigate, and takes the benefit of that litigation, by which the damages

are cut down from £3000 to £20, I think it is only just that the expenses of the action should form a claim for ranking as well as the principal sum.

Lord Deas was absent.

The Court refused the appeal.

Counsel for Trustee (Appellant)—Trayner—Readman. Agents—Ronald & Ritchie, S.S.C.

Counsel for Claimant (Respondent) — Rhind—Shaw. Agent—P. Morison, S.S.C.

Tuesday, March 18.

FIRST DIVISION.

SCHOOL BOARD OF AIRDRIE AND OTHERS *v.* THE EDUCATIONAL ENDOWMENT COMMISSIONERS.

Trust — Charitable Trust — Educational Mortification, Scheme for Management of—Educational Endowments (Scotland) Act 1882 (45 *and* 46 *Vict. cap.* 59), *secs.* 1, 13, 15, 30—*Person or Body affected by any Scheme—Elementary Education.*

Circumstances in which *held* that a scheme framed by the Educational Endowment Commissioners for the management of an educational mortification intended for the benefit of children in danger by reason of poverty of not obtaining elementary education, and for assisting young men to obtain advanced education, which scheme provided that as much should be spent on elementary education as was being expended thereon when the Educational Endowments Act 1882 passed, and provided for the founding of bursaries for more advanced scholars out of the remaining funds of the endowment, was not contrary to law or disconform to the Act.

Question as to the title of a school board to take a Case for the Court in such circumstances, as being a "body corporate directly affected by the scheme."

The Educational Endowments Act 1882 provides, section 13—"In framing schemes the Commissioners shall save or shall make due compensation for the vested interests of individuals holding any office, place, employment, pension, compensation allowance, bursary, or emolument under or arising out of the educational or other endowment at the date of the passing of this Act, and shall provide that no funds now applied in terms of the founders' directions to free elementary education shall be diverted to any other purpose, except to the extent to which such funds are manifestly in excess of the requirements for the purpose of free elementary education of the localities to which they belong. 'Elementary education' shall mean such education as may be given in the State-aided schools of Scotland pursuant to the provisions of the Education (Scotland) Act 1872, and in terms of the minutes of the Scotch Education Department in force for the time being with respect to the administration of the Parliamentary grant for public education." Section 15 provides—"In framing schemes it shall be the duty of the Commissioners, with respect alike to the constitution of the governing body and to educational provisions, to have regard to the spirit of founders' intentions, and in every scheme which abolishes or modifies any privileges or educational advantages to which a particular class of persons is entitled, whether as inhabitants of a particular area or as belonging to a particular class in life or otherwise, they shall have regard to the educational interests of such class of persons: Provided always, that where the founder of any educational endowment has expressly provided for the education of children belonging to the poorer classes, either generally or within a particular area, or otherwise for their benefit, such endowment for such education or otherwise for their benefit shall continue, so far as requisite, to be applied for the benefit of such children." And section 30 provides—"If the governing body of any endowment to which a scheme relates, or any person or body corporate directly affected by such scheme, feel aggrieved by the scheme on the ground of the scheme being one which is not within the scope of, or made in conformity with this Act, ... such governing body, person, or body corporate may, within one month after the first publication of the scheme or amended scheme, submit a Case to the Court of Session, to which the Commissioners shall, and any others directly interested may be parties, for the opinion of the said Court on the question or questions therein stated; and if the Court is of opinion that the scheme is contrary to law on any of the grounds in this section mentioned, the Scotch Education Department shall not approve thereof, but they may, if they think fit, remit the same to the Commissioners with a declaration as hereinbefore provided. Subject to the provisions of the immediately succeeding section, a Case submitted under this section shall be framed, lodged, amended, heard, and otherwise dealt with in the same manner, as nearly as may be, as a Special Case presented in terms of the sixty-third section of the Court of Session Act 1868."

This was a Case presented to the Court of Session under section 30 of the Educational Endowments (Scotland) Act of 1822, in which the Court was asked to determine whether a scheme proposed by the Commissioners appointed under the said Act for administering a trust left by the late William Forrest of Meadowside, was, in the particulars set forth in the Case, not within the scope of, or made in conformity with, the said Act, and was contrary to law. The truster died on the 23d May 1860, leaving a trust-disposition and deed of mortification executed on 6th March 1858, which proceeded on the narrative that he was desirous "of promoting, providing, and supplying the means of a common elementary education to a limited number of poor or destitute children, or labourers' or workmen's children, who may be in hazard of not receiving an elementary education, and assisting a few young men who might be in want of means for obtaining a more advanced education." The trustees and governing body of the mortification were the Sheriff-Substitute of Lanarkshire at Airdrie, the minister of the parish of New Monkland, the minister of the *quoad sacra* parish of Clarkston, the minister of the West Church at Airdrie, and the Provost of Airdrie *ex officiis*.