it would be able to pay the claim in full, and the creditor would have neither title nor interest to ask for a ranking on the estate of an individual partner. The sole purpose of the section was to give effect to a general rule which was established long before the Bankruptcy Act of 1856, namely, that in bankruptcy no claim could be made on the separate estate of a partner of a company for a company debt except for the balance which remained after deduction of all that could be drawn from the company's estate. The question therefore is, whether there are any grounds for holding that this case falls within the provisions of section 66, and I confess I can see none, and cannot see here any claim on the estate of the partner of a company for a company debt. It is said that the facts indicate a joint adventure, to which the bankrupt and another person who is not said to be insolvent were parties. But I cannot see any evidence of a joint adventure. In the first place, it is to be observed that this claim of the bank is not a claim upon a joint adventure, or upon one of two joint adventurers, but it is a claim to enforce the direct liability of the indorser of a bill, who having discounted the bill and received the proceeds, has pledged certain property in security to the indorsee. The claim is clearly on the bill, and is one which could undoubtedly be enforced against the drawer or the indorser of the bill. I cannot see that it has been established that the subjects pledged for the bill were the property of any co-partnery or of any joint-adventure. It may be that they were the common property of the acceptor and the indorser of the bill, but that is a totally different matter, and does not impose any necessity to constitute the debt against a company or co-partnery. For these reasons I am of opinion that the respondent has failed to show that section 66 of the Bankruptcy Act is in any way applicable to the case.

There remains the argument founded on the nature of the transaction between the drawer and indorser of the bill on the one hand and the Commercial Bank on the other. By that transaction the bank was to hold the whisky for that specific transaction only, and was to restore it on the bills being taken up. Then it is said that the trustee in bankruptcy, standing in the place of the bankrupt, is entitled to come in and maintain his right to delivery of the whisky on payment of the bills. I think it is not doubtful that he has that right, and that if he pays the bills the bank must deliver the whisky pledged for them. If there is anything clear in the law of pledge it is that the pledger is entitled on payment of the debt to recover the subjects pledged. But the trustee does not propose to pay the debt, only to pay a dividend on it, and the obligation to restore the pledge only arises on payment of the debt and not on payment of part of it. If it were otherwise, a lender would have very little interest to take a security. The notion that a trustee in bankruptcy is entitled to delivery of a pledge on payment of a dividend which would not have enabled the borrower, in whose shoes he stands, to obtain such delivery, is entirely inconsistent both with law and good sense.

I should only add that it is clear that the creditor cannot by any means of ranking obtain more than full payment of his debt. If it were shown that the bank in the present case proposed to obtain more than full payment, that might be a reason for rejecting their claim. But there is no ground stated in the papers before us for such a supposition, and of course if they did ultimately receive more than their full debt they would be bound to account for the surplus.

LORD ADAM and LORD KINCAIRNEY concurred.

LORD PRESIDENT and LORD M'LAREN were absent.

The Court pronounced this interlocutor:—

"Refuse the Appeal; Find in terms of the findings contained in the interlocutor of the Sheriff-Substitute, dated 7th May 1901, Affirm the same, and of new decern in terms thereof: Find the respondents entitled to the expenses of the appeal," &c.

Counsel for the Appellant — Jameson, K.C. — T. B. Morison. Agents — Millar, Robson, & M'Lean, W.S.

Counsel for the Respondents—Younger—Graham Stewart, Agent—W. Kinniburgh Morton, S.S.C.

Wednesday, July 10.

FIRST DIVISION.

[Dean of Guild Court, Musselburgh.

DOWNIE *v.* FRASER.

(*Ante*, p. 639.)

Police — Burgh — Dean of Guild—Fitness of House for Occupation—Certificate of Burgh Surveyor—Occupation of House—Permission to Occupy — Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 180.

By section 180 of the Burgh Police (Scotland) Act 1892 it is provided, *inter alia*, that every owner of a house or building who shall "permit such house or building or altered building to be occupied" before he has obtained a certificate from the Burgh Surveyor, shall be liable to a penalty.

An owner of certain houses in a tenement, before he had obtained the certificate required by the Act, gave the keys of the houses to his tenants and allowed them to put in their furniture with a view to their occupying the houses, but told them that they must not live in them until the certificate had been obtained. *Held* (1) that it was a question of circumstances in each case whether the mode of use allowed to a

tenant by his landlord amounted to permission to occupy within the meaning of the section; (2) (*dub.* Lord Kincairney) that the permission given in this case amounted to permission to occupy, and that consequently the landlord had been rightly convicted of a contravention of the section.

Process—Penalty—Amount—Appeal—Reduction on Appeal—Discretion of Inferior Court—Maximum Penalty for Technical Contravention.

On a petition under the Burgh Police (Scotland) Act 1892 a builder was convicted of a contravention of section 180 of the Act by permitting his building to be occupied before a certificate from the Burgh Surveyor had been obtained, and was sentenced to pay the maximum penalty of five pounds. In an appeal the Court, *holding* that the contravention had been merely technical, *reduced* the penalty to 2s. 6d., and *found* the appellant entitled to two-thirds of his expenses.

This case is reported *ante ut supra.*

The Burgh Police (Scotland) Act 1892 enacts as follows:—"Section 180. Within one month after any new house or building or any alteration on the structure of any existing house or building has been completed, or before such house or building or any portion thereof has been occupied, the owner or the builder shall give notice to the clerk of the Commissioners that the house or building or any part thereof is ready for inspection before being occupied, and the said clerk shall thereupon transmit such notice to the Surveyor of the Burgh, who shall forthwith proceed to survey such house or building, or alteration; and if he is satisfied that such house or building is fit for occupation, and is in accordance with the provisions of this Act, he shall grant a certificate under his hand to that effect, and all such certificates shall be entered in the register of plans and sections; and every owner or builder who shall fail to give such notice aforesaid, or shall permit such house or building or altered building to be occupied before a certificate applicable thereto has been obtained, shall be liable to a penalty not exceeding five pounds sterling, with an additional penalty of forty shillings for every day during which such occupation shall continue."

Robert Fraser, Burgh Prosecutor, Musselburgh, presented a petition in the Dean of Guild Court there against John Downie, contractor, Fisherrow, in which he prayed the Court "to find the respondent liable in a penalty not exceeding £5 sterling for having failed to give the notice hereinafter referred to, or for permitting the houses or buildings after mentioned, or a part of the same, to be occupied before a certificate applicable thereto and hereinafter referred to, had been obtained by the said respondent, with an additional penalty of 40s. for every day during which such occupation may have continued or shall continue."

In the petition it was averred that Downie had since 22nd March 1901 permitted two houses in a tenement in Fisherrow erected by him to be occupied before he had obtained a certificate from the Burgh Surveyor, contrary to the provisions of section 180 of the Burgh Police (Scotland) Act 1892, quoted *supra.*

Answers were lodged by Downie, in which he stated that he had specially forbidden his tenants to reside in the houses in question until the Burgh Surveyor had granted his certificate.

Proof was allowed and led. George Landale, the Burgh Surveyor of Musselburgh, deponed that on 25th March 1901 he had inspected the houses, found them incomplete, and reported the matter to Downie. On the 28th March he returned and found that the houses were ready for occupation, but were already occupied, and in consequence he declined to grant a certificate and reported the matter to the Procurator-fiscal. He stated that there was no reason for the houses not being certified on 28th March except that they were occupied. Mrs Riach and Mrs M'Alpine, the tenants of the houses, gave evidence to the effect that they had got the keys and received permission from Downie to put their furniture in before the 28th March, but had been told that they were not to reside in the houses until Mr Landale had given his certificate. Mrs M'Alpine deponed that after Mr Landale had been there they went back to the house they had left for two nights and slept there, going back to Downie's house during the day.

On 3rd May 1901 the Dean of Guild Court pronounced the following interlocutor:—"Find that the respondent John Downie has, in contravention of the Burgh Police (Scotland) Act 1892, section 180, permitted the houses or buildings described in the petition to be occupied before the certificate therein referred to had been obtained by the respondent in terms of said Act, as set forth in the petition: Therefore fine and amerciate the said John Downie in the sum of £5 sterling of penalty, payable to the Procurator-Fiscal of Court for the public interest: Find the said John Downie liable in expenses."

Downie appealed to the Court of Session, and argued—On the evidence it was proved that he had not permitted these houses to be occupied. He had refused to allow his tenants to live there. The question as to what amounted to occupation of a building depended on the character of the building. In the case of a dwelling-house it meant living there—not merely putting in some furniture. It was necessary to consider the object of the section, namely, to prevent houses being occupied before they were fitted for human habitation. Furniture could not be injured by incomplete drains. In the least favourable view, the offence was merely a technical contravention, and the penalty imposed was grossly excessive.

Argued for the respondent—It was sufficient for the prosecutor to show that the builder permitted his houses to be occupied, even although he forbade the occupier to sleep in them. The section related to the occupation of buildings, which might be occupied in various ways. But it would

be a contravention of the section if the builder of a house, before he obtained the surveyor's certificate, permitted it to be used as a granary or warehouse. In the same way it was a contravention to permit tenants to establish their furniture there. If the conviction was right, the question of the amount of penalty was in the discretion of the Dean of Guild Court.

LORD ADAM—This is an appeal from a decision of the Dean of Guild Court at Musselburgh in a petition at the instance of the Burgh Prosecutor. The prayer of the petition is in the following terms:—[*His Lordship read the prayer*]. The question in the case is, whether the present appellant, an owner of two houses, permitted these houses to be occupied before a certificate had been obtained from the Burgh Surveyor. The section of the statute which regulates the matter is in the following terms:—[*His Lordship read section* 180]. Now, it appears that the Burgh Surveyor visited these buildings on the 25th March, and returned on the 28th, when he found that two of the houses in the tenement were occupied, and finding people in occupation he declined to give his certificate. But he says the houses were perfectly ready for occupation, and that he would have granted a certificate if he had not found them occupied. The question is whether the appellant permitted these people to occupy his houses, and it appears to me that the answer to that question turns on the true construction of the word "occupy" in the Act. If, as the appellant maintains, a house cannot be said to be occupied unless it is actually used as a human habitation, then the appellant is entitled to succeed, because the evidence shows that the people who were in these houses did not sleep in them. I think it is clear on the evidence that the appellant gave his tenants permission to put their furniture into the houses, but that he told them not to occupy them themselves—that is, not to sleep there—[*His Lordship read the evidence*]. The question is, whether on that evidence it can be held that the appellant gave the tenants permission to occupy in the sense of the statute, the fact being that the tenants' whole furniture was put in, and put in not as into a warehouse but in order that they might come and live in the houses themselves. Did the appellant permit his tenants to occupy his houses when he allowed them to put their furniture in in that way, and only told them that they must not sleep there? On that question I am of opinion that it is not necessary for occupation that a house should be a human habitation—that is, that human beings should sleep there. I think that in the present case the houses were fully occupied although the tenants did not actually sleep in them. I am, however, far from saying that if a tenant left his umbrella or some other articles of his property in the house, that would be occupation within the meaning of section 180. I should hesitate to put any such construction on the section. I think it is a question of circumstances in each case. But when the house is so far occupied that the tenant might have slept there, but did not, I think that that is occupation within the meaning of the section. If that be so. I think the appellant was rightly convicted, because I think he allowed his tenants to occupy his houses in the sense which I have explained.

But looking to the whole circumstances I think the penalty imposed was too severe for what was only a slight error on the appellant's part. I should not be inclined to interfere with the discretion of a magistrate as to the amount of a penalty if it could be said to be reasonable. But when we find here that the maximum penalty has been imposed for a mere mistake, I think it is excessive, and should be reduced to five shillings or half-a-crown.

LORD KINNEAR—I agree with your Lordship. I think the case must be taken on the same footing as if the Surveyor had granted his certificate on the 28th March, and I think Mr Cullen conceded that it must be so taken. On the merits, I agree that the appellant here allowed his tenants to occupy his houses before a certificate had been granted by giving them the keys and allowing them to put in their furniture. I cannot say that I have any doubt that if a tenant sends his furniture into a house on one day and enters himself on the following day, his occupation begins on the day on which he sends in his furniture. I see no sufficient reason for a construction of the word occupation so restricted as to exclude that meaning, and have no doubt that a house is occupied when the tenant has procured the keys and sends in furniture, not as into a warehouse to be stored, but in order to be used as the furniture of a dwelling-house.

But I also entirely agree that if the statute has been violated it has not been a substantial violation, and has been due to a mere mistake, and not to any intention to break the law. On the evidence I think it is clear that the appellant had no intention to disobey the statute, but thought that he was within its requirements when he told his tenants that they might put in their furniture but must not occupy the houses themselves. I therefore agree that this is not a case where the maximum penalty for the greatest and most deliberate offence should have been inflicted. The offence was very slight, and the evidence shows that it was not intentional, but due to an error in law. We are told that the higher penalty imposed was due to the appellant having previously been convicted of offences under the statute. These previous convictions are not before us, and we can pay no attention to that statement, but I would observe that whether the fact of previous offences having been committed may or may not be taken into account in fixing a penalty, the magistrate should be very careful not to allow his mind to be influenced by them when he is considering whether an offence has been committed at all, or what is the character of that offence.

I agree that the penalty should be reduced to one or other of the sums proposed by your Lordship.

LORD KINCAIRNEY—I agree that the breach of the statute, if there was one, was infinitesmal, and that the penalty ought to be reduced as your Lordships have proposed. But I have some doubt whether there was any breach of the statute here—that is, whether it is proved that the appellant permitted his tenants to occupy his houses. It is not proved that he permitted them to live there, but he did permit them to put in their furniture, and they did put in at least a part of it. The statute does not define occupation. It is agreed that it is not every mode of use that would amount to occupation; some may, others may not. If that is so, the question to be solved in every instance is, whether in the circumstances of the particular case permission to put in furniture is equivalent to permission to occupy. In this case there was permission to put in furniture for the purpose of occupying it after a certificate had been granted, and the question is, whether that is permission to occupy or not. I should have been inclined to think that it was not, but as your Lordships have reduced the penalty imposed to a nominal sum I do not dissent from the judgment.

The LORD PRESIDENT and LORD M'LAREN were absent.

The Court pronounced this interlocutor:—

"Sustain the appeal: Recal the interlocutor of the Dean of Guild Court dated 3rd May 1901 appealed against: Of new find that the respondent John Downie has, in contravention of the Burgh Police (Scotland) Act 1892, sec. 180, permitted the houses or buildings described in the petition to be occupied before the certificate by the Burgh Surveyor therein referred to had been obtained by the respondent in terms of said Act as set forth in the petition: Fine and amerciate the said John Downie in the sum of two shillings and sixpence sterling of penalty payable to the Procurator-Fiscal of Court for the public interest, and decern: Find the appellant Downie entitled to expenses in this Court and in the Dean of Guild Court, but modify the same to the amount of two-thirds thereof, and remit the accounts thereof to the Auditor to tax and to report."

Counsel for the Respondent and Appellant—Younger—Cullen. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Petitioner and Respondent—Cooper. Agents—Buik & Henderson, W.S.

Thursday, July 11.

SECOND DIVISION.

[Sheriff-Substitute at Dundee.

THE BOASE SPINNING COMPANY, LIMITED *v.* M'AVAN.

Reparation — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *First Schedule, secs.* 11, *and* 12—*Review of Weekly Payments—Certificate of Medical Practitioner Appointed under the Act Conclusive Evidence of Workman's Condition.*

By section 11 of the First Schedule of the Workmen's Compensation Act it is provided that a workman receiving weekly payments thereunder may be required by his employer to submit himself for examination by a medical practitioner, and may submit himself to a medical practitioner appointed for the purposes of the Act, whose certificate as to the condition of the workman is declared to be conclusive evidence of that condition.

A workman in receipt of weekly payments under the Act was required by his employer to submit himself for medical examination, and was examined by a medical practitioner appointed for the purposes of the Act. His report bore that the workman had recovered from his injuries, that he would probably never be able for hard manual labour, but only for light employment, but that this disability was not connected with his injuries.

In an application by the employer for an order terminating the weekly payments in respect of the said certificate, *held* (*diss.* Lord Young) that the certificate of the medical practitioner was conclusive evidence under the Act not only as to the condition of the injured workman but as to the question whether his condition was due to the accident or to other causes; that consequently the workman here must be held to have recovered from his injuries, and that the Arbitrator was bound in respect of the certificate to pronounce an order terminating the weekly payments.

This was an appeal in an arbitration under the Workmen's Compensation Act 1897 before the Sheriff-Substitute (CAMPBELL SMITH) at Dundee, between the Boase Spinning Company, Limited, appellants, and Peter M'Avan, Dundee, respondent.

On 13th April 1900 the respondent, while in the appellants' employment, fell into the pit or shaft of the elevator in their works, a distance of about 24 feet, and sustained injuries to his head and groin.

On 23rd November 1900 the respondent was certified by Dr David M'Ewan, one of the medical practitioners appointed for the purposes of the Workmen's Compensation Act, to be totally unfit to work.

By interlocutor of date 25th May 1900 the Sheriff-Substitute awarded compensation