Maccallum, and had broken off the engagement, and declared truly that she would not renew it, that was equivalent to saying that she would not marry Maccallum. Of course, a declaration not to renew her engagement, equally with one not to marry Maccallum, might be broken afterwards, and the engagement renewed or the marriage performed. The intention, then, of the testator was that she should not marry this man. Now, it is a rule of law of the most extensive application in dealing with wills that effect must be given to the intention of the testator as deducible from the whole language used by him, and that one is not to be bound in so dealing with them by particular words which might frustrate the manifest intention. That rule, then, being applied here, and the intention to impose a condition on the legatee that she should not marry Maccallum being judicially deducible from the whole language of the deed, I am not disposed to sanction the view of the Lord Ordinary, according to which she would get the bequest on signing a declaration manifestly inconsistently with the intention of the testator who enforced it. What form our judgment must take so as to give effect to the will of the testator may be a matter for consideration. I myself should rather favour the view that she should sign a declaration to the effect that she will not marry Maccallum. This is, I repeat, what the testator meant, and it will answer every point and carry out his intention exactly. I do not think the words used in the settlement were meant to dictate the exact language of the declaration. Whether, however, it should be varied without some further proof I do not say in the view I take, but if your Lordships concur as to the meaning of the testator and the effect which is in consequence to be given to the declaration, probably the parties will see their way to adjust matters without proof, and indeed without difficulty as to the form of judgment.

Lord Rutherfurd Clark—I am also of the same opinion as your Lordship has just expressed. I think the meaning, and the very plain meaning, of the settlement is, that the legatee was not to obtain the £1000 unless she signed a declaration to the effect that she was not engaged to marry and would not marry Maccallum. I quite accede to what has been said on her part that the testator placed great confidence in her honesty; and if the declaration had been emitted by her, and been consistent with the state of facts existing at the time it was made, I do not think the trustees could refuse to pay her on the ground that there was a question as to whether her intentions were or were not fair and honest as to the marriage. But although the trustees cannot challenge her intentions, I do not think they are barred from taking notice of the true state of affairs and saying that she is married to Maccallum, or that she is under an existing engagement to marry him. I am of opinion, therefore, that the Lord Ordinary's interlocutor must be recalled, though what should be next done may be matter to be reserved.

Lord Craighill—I am of the same opinion. The Lord Ordinary has, I think, taken the letter instead of the spirit of the will, and by so doing has entirely frustrated the intention of the testator. Of course, if we were bound to take the very words of the declaration from the settlement irrespective of the obvious intention, the pursuer would be entitled to prevail; but we must construe the will according to the rule of law quoted by your Lordship, and therefore we must recall the Lord Ordinary's interlocutor. It appears to me that the testator was aware that there had been an engagement between the pursuer and Maccallum, and also that it had been broken off, and what he desired was, that at the date when this legacy was to be paid there was to be no subsisting engagement between these parties, and that it should never be again in existence.

I am therefore clearly of opinion that the Lord Ordinary's judgment cannot stand.

The Lord Justice-Clerk was absent.

The case was continued in order that Miss Forbes might have an opportunity of making the declaration suggested by the Court as the condition of getting payment of the legacy.

Thereafter, her counsel having intimated that she had married Maccallum, the Lords in respect thereof recalled the interlocutor reclaimed against and assoilzied the defenders from the conclusions of the action.

Counsel for Pursuer—Solicitor-General (Asher, Q.C.)—C. J. Guthrie. Agents—J. & A. Peddie & Ivory, W.S.

Counsel for Defenders—Lord Advocate (Balfour, Q.C.)—Jameson. Agents—Thomson, Dickson, & Shaw, W.S.

Tuesday, February 28.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

ROYAL BANK OF SCOTLAND *v.* PENNEY (MILLAR & COMPANY'S TRUSTEE).

Bankruptcy—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 65—*Valuation and Deduction of Security in Ranking for Dividend.*

In determining whether a security must be valued and deducted from the claim of a creditor in a sequestration, as being a security over the estate of the bankrupt, regard is to be had exclusively to the estate of the bankrupt as at the date of the claim, and not at the date of the creation of the security.

Certain Government bonds were deposited with a bank in security of a cash-credit account to be opened in name of a firm. The bank's understanding at the time as to the ownership of the bonds was not clearly established. The firm having become bankrupt, the bank claimed to rank on their estate for a dividend on the sum due to them under the said cash account. The trustee in bankruptcy admitted their claim only under deduction of the value of the securities. It appeared from a proof that the securities were at the date of the loan the property partly of one and partly of another of the three partners of the firm, and were endorsed directly to the bank without ever having become the property of the firm, but that one of these partners having

subsequently retired from the firm, bonds exactly similar to his pledged ones were bought for and given to him by the firm. *Held* (*altering* judgment of Lord M'Laren, Ordinary) that the bank were entitled to rank for their claim under deduction of the value of the securities which had thus become the property of the firm.

The Royal Bank of Scotland raised this action against Joseph Campbell Penney, C.A., trustee on the trust-estate of John Millar & Co., china-merchants in Edinburgh, conform to trust-deed granted by them for behoof of creditors dated 25th August 1880, and William Millar, designed in said trust-deed as sole partner of that firm, for declarator that the defender was bound to rank the bank as creditors on the trust-estate of the said firm for £6163, 5s. 2d., being the full amount of their claim thereon, and to pay them an equal dividend with the other creditors on that amount, and that the bank were not bound nor the defender entitled to deduct from the said claim, previous to the bank being ranked on the estate or drawing dividend therefrom, the sum of £4222, being the estimated value of certain securities consisting of Government bonds held by the bank as afterwards set forth.

The securities in question were at the date of the said trust-deed held by the bank, having been placed in their hands, as after mentioned, as against a cash-credit account which they had in April 1875 allowed the firm of Millar & Co. to open with them, and which at the date of the said deed showed a debt due to the bank of £6163, 5s. 2d.

The firm consisted in April 1875 of three partners, the said William Millar and his two brothers John and Leander. The firm having become bankrupt in 1880, and a trust-deed for behoof of creditors having been granted of date 25th August 1880 by John Millar & Co. and William Millar, then sole partner of the firm, in favour of the defender J. C. Penney, the bank claimed to rank on the trust-estate for the full amount due to them under the said cash-credit.

By the trust-deed it was provided that the ranking of creditors was to be in accordance with the provisions of the Bankruptcy Acts. The Bankruptcy Act 1856 enacts (section 65) that "To entitle any creditor who holds a security over any part of the estate of the bankrupt to be ranked in order to draw a dividend, he shall on oath put a specified value on such security, and deduct such value from his debt, and specify the balance." . . .

The trustee pronounced this deliverance on the bank's claim:—"The trustee admits this claim to the extent of £1941, 5s. 2d. sterling, being £6163, 5s. 2d., the dr. balance on the cash-credit of the firm with the bank, and interest accrued thereon as at 25th August 1880, the date of the trust-deed, under deduction of £4222, being the value of the securities held by the bank. . . . These securities, with the exception of the Russian bond, which bore to be the property of the firm, having been blank indorsed by Leander Miller and delivered to the firm, thus became the property of the firm. These securities were thereafter handed by the firm to the bank as security for the cash-credit in favour of the firm, of which the above sum of £6163, 5s. 2d. is the dr. balance including interest."

The bank accordingly raised this action of declarator to have their claim given full effect to. They stated on record—"It is believed and averred by the pursuers that the said securities belonged at the date when they were handed over to the bank to Leander Millar, or otherwise to John Millar, Madras They were at no time the property of the firm, and do not form securities over the bankrupt estate of John Millar & Company. The bank is therefore not bound to deduct their estimated value in claiming on that estate. The defender having intimated that he refuses to rank the pursuers for the full amount of their claim, or to pay a dividend thereon, the present action has been rendered necessary."

They pleaded—"(1) The pursuers not having received any securities belonging to the firm of John Millar & Company, they are entitled to rank on the estate of said firm for the full amount of their debt. (2) The securities held by the pursuers against advances to the firm of John Millar & Company having been at no time the property of said firm, the bank is entitled to rank on the estate of said firm for the full amount of those advances. (3) The pursuers being creditors of said firm of John Millar & Company in the amount condescended on, they are entitled to draw a dividend on the full amount of their claim. (4) In the circumstances stated the pursuers are entitled to decree as concluded for."

The defender averred—"Explained that in the whole transaction connected with the cash-credit the pursuers knew no other party than the firm of John Millar & Company. The pursuers received the securities in question as being the property of the said firm, and the pursuers have all along held the said securities and dealt with the same as such. The said securities were in point of fact the property of the firm when they were delivered to the bank. The said William Millar was sole partner of the said firm at the date of the said trust-deed."

The defender pleaded—"(2) The securities in question being the property of the firm, and thereafter of the said William Millar as sole partner thereof, the pursuers are bound to value and deduct the same. (3) The pursuers having received and dealt with the said securities as the property of the firm, they are bound to value and deduct the same. (4) Any arrangement between the partners of the said firm regarding the securities is *jus tertii* to the pursuers."

A proof was allowed. It was proved that in 1875 William Millar and his two brothers John (who was absent at Madras, where he held a post under Government, and whose name did not appear in the contract of copartnery) and Leander, being desirous of taking over the then existing china business of John Millar & Company, of which they were thenceforth to be the partners, and having no available cash at their disposal to purchase it, agreed to raise money by means of a cash-credit with the Royal Bank. William and Leander accordingly called on the secretary, and left in his hands, as securities against an account to be opened in the firm's name to the extent of £4000 (afterwards extended to £6000), eight Indian Government bonds for 5000 rupees each at 4 per cent., two for 2000 rupees each at 5½ per cent., two for 1000 rupees each at 5½ per cent., and one Russian Government bond for £500 sterling at 5 per cent., hand

ing him at the same time a letter signed "John Millar & Company," which noted the securities as above, and contained this passage—"The writer, Mr William Millar, having acquired from the trustees of the late Mr John Millar the business for so many years conducted by him as potter and glass merchant, intends to continue it under the same style and designation, viz., that of John Millar & Co." The Russian bond was payable to bearer. The remaining bonds were at the meeting with the bank secretary blank endorsed by Leander (whose name was on them as last endorsee), and the bank thereafter put above his signature their stamp "Payable Royal Bank of Scotland, or order." The four smaller Indian bonds and the Russian bond belonged at that time to Leander. The eight large Indian bonds belonged to John, and were uplifted from the Oriental Bank by Leander, as his brother's attorney, to be placed with the Royal Bank. No part of the paper belonged to William. The interest on each brother's securities was regularly credited to him in the books of the firm. The firm books contained no capital account. In the end of 1876 Leander retired from the firm, and died in 1880. On his retirement he was paid out in full. Certain of his securities were taken over by the company in their books at the price of the day, and securities exactly identical with the others were purchased for him in the market, and given to him, William Millar acquiring his one-third share in the business. No change of proprietorship in any of the securities was at any time intimated to the bank. John Millar died in March 1878.

The bank in their books and in their correspondence dealt with John Millar & Company throughout. William Millar deponed, *inter alia*—"I had power to pledge these securities. I don't think I had power to sell them. They were lent to me for a special purpose. I treated them as capital put in by my brothers. (Q) What do you mean by calling them capital?—(A) As partners my brothers were bound to provide their share of the capital; they had not cash, and I got these in security. (Q) Is this what you mean—that your brothers did not put in any other capital besides these securities?—(A) No other capital. When these securities were left in the bank I treated them and looked upon them as John Millar & Company's securities, just as I looked upon the cash advanced by the bank upon these securities as John Millar & Company's cash." The secretary of the bank was unable to recollect distinctly what was said at the meeting in April 1875 as to the property of the deposited securities. He deponed—"It never occurred to me that the securities belonged to John Millar & Company as a firm. I never inquired who was the real owner. The bank had no interest in that question at that time."

By the contract of copartnery, dated 15th April 1875, between William and Leander (John Millar not appearing therein as a partner), it was provided, *inter alia*—"(4) The partners shall be interested in the nett profit and loss in the following proportions, viz., one-third thereof shall belong to the said William Millar as his share, and two-thirds thereof shall belong to the said Leander Millar as his share; declaring always that notwithstanding what is above written it shall be in the power of the said William Millar at any time during the subsistence of the contract to acquire one-half of the said Leander Millar's share and interest in the capital, stock, and profits of the copartnership. . . . (5) In respect a cash-credit in name of the said copartnery of John Millar & Company has been granted by the Royal Bank of Scotland on deposit of certain securities, it is hereby expressly provided and declared that the proprietary interest in these securities shall not be changed in any way in respect of their being so deposited, and the said copartnery shall be bound, on the said cash-credit being paid up and discharged, to return the said securities to the respective owners thereof free and disencumbered in all respects as if the foresaid cash-credit had not been granted; declaring further, that during the existence of the foresaid copartnery, and so long as the foresaid securities are so deposited, the owners thereof shall be entitled to draw and receive all interest or dividends accruing thereon, the said copartnery being bound to pay all interest on over-drafts in respect of the foresaid cash-credit, and all expenses connected therewith."

The Lord Ordinary (M'Laren) pronounced this interlocutor:—"Finds in fact that the securities of which the pursuers are the holders were not the property of John Millar & Company at the opening of the cash-credit account referred to, but were the property partly of John Millar and partly of Leander Millar, individual partners of the company: Therefore sustains the pursuers' pleas, and finds and declares and decerns in terms of the conclusions of the libel," &c.

His Lordship's opinion was as follows:—"In this case the Royal Bank of Scotland, who are creditors of John Millar & Company, claim to be entitled to rank for the whole balance due to them upon the cash-credit account upon the estate of the insolvent firm, and to operate payment of the remainder out of the securities held by them, treating those securities, which consist of negotiable documents, as securities received from parties independent of the firm. On the other hand, it is contended by the trustee that those securities, which admittedly were antecedently to the constitution of the firm the property of the individual partners, must be considered with reference to this claim as being the property of the firm. Accordingly they say that the rule of the Bankruptcy Act 1856, which is under the provisions of the trust-deed made applicable to this case, should be applied, and that these securities being, according to their contention, the property of the bankrupt firm must be valued and deducted. The question therefore is one of fact—whether at the time when the Royal Bank became vested in security in those Indian and Russian bonds they were either by direct transfer or by agreement the property of the firm?

"Now, apart from whatever light is thrown on the question by documentary evidence, we have only the evidence of one witness—Mr William Millar, the surviving partner. I do not think that the evidence of the accountant who was examined has thrown very much light on the matter, though it has explained the entries in the books and shown their bearing upon the case; and Mr Huie, the secretary of the Royal Bank, really does not seem to recollect very much, except that a cash-credit was negotiated with the bank through him upon the security of those documents. It was immaterial to the bank

whether the documents were the property of the firm or the property of the individuals. So far as they had any interest they had a better security if the documents were the property of the independent parties, as the contention in this case shows. But there is nothing in Mr Huie's evidence or that of Mr Millar to suggest that they had ever considered that question. The arrangement was for a cash-credit for a sum less than the value of the securities, and the bank was therefore amply secured by the documents put into their possession, no matter to whom the property represented by these documents belonged, and this question could never have arisen but for the circumstance that John Millar & Company obtained an overdraft beyond the amount to which the credit was secured.

"Now, it is perfectly clear that antecedently to the agreement to grant a cash-credit the eight Indian bonds for 5000 rupees each were the property of Mr John Millar, of Madras, and that the other securities were the property of Mr Leander Millar, both brothers of William Millar, the acting partner, and the gentleman who alone was authorised to operate upon the cash-credit account; and the question is, whether in the course of the completion of the transaction by which the newly-constituted firm was to obtain a cash-credit these documents had been transferred by Leander and John to the firm with a view to the firm depositing them with the bank in security? The first observation that occurs to one is that such a transfer to the firm was entirely unnecessary for the purposes which the parties had in view. They wanted to give, not personal security, but real security to the bank, and it was utterly unimportant for that object whether the reversionary right after the cash-credit was squared off was to pass to the firm or to the individual partners. It was, however, very material to Mr John Millar and Mr Leander Millar that they should not part with the property of their bonds to a firm of which the only acting partner was a gentleman who had no capital. I do not in the least doubt that they, out of good feeling to their brother, and to put the transaction in a light that would be friendly to him, suggested as a reason for retaining their proprietory interest in the stock that it would be inconvenient to mix up any questions as to the profit or loss that might accrue through a change in the value of the bonds. But when brothers enter into a business transaction they must look to the protection of their own interests just as strangers do; and I cannot in the least doubt that the two brothers who contributed the capital desired, so far as possible, to retain their control over the securities which they were going to impress into the hands of the Royal Bank, and that it would be naturally a motive in their minds that their property would be safer in the form of the transaction that was adopted than by their making it the property of the firm over which the acting partner might operate at his pleasure. Well, what was actually done is just in accordance with what might be expected from business men under such an arrangement. Mr John Millar's securities, he being at the time in India, were in the hands of the Oriental Bank; the bank by his directions endorsed them, not to Mr William Millar, but to Leander Millar, the other contributory, and he goes with his brother William to the bank and is present when the securities are handed over and the cash-credit account opened in terms of the agreement.

"Now, according to the form of the documents, the firm of John Millar & Company never were even *ex facie* proprietors of any of those securities. No doubt they are blank endorsed, and that blank endorsation might have passed the securities to the firm if such had been the intention of the parties, but if the securities had been blank endorsed to the firm with that intention they could not be legally transferred to the bank without the endorsement of the firm, and no endorsement by the firm as bearing to be by anybody on behalf of the firm appears on the back of these documents. So far as the written evidence goes, therefore, these securities were directly assigned by the individual owners of them to the bank as available securities for a cash-credit to be opened in the name of the firm.

"Now, against that the only evidence we have is the impression stated—I have no doubt in perfect good faith—by Mr William Millar that he looked upon these funds as assets of the firm, and that the firm was to give them for the cash-credit. But that is the statement of a party who contributed nothing regarding the dealing with the property of the other parties who were owners, and I cannot receive his evidence in favour of his own claim, and against his brothers, as sufficient to outweigh the conclusions deducible from the real evidence in the case.

"Then, if any doubt can be entertained, I think it is entirely removed by the contract of copartnery. It is rather a curious feature in this contract, which is evidently prepared with considerable care by a law-agent, that it does not say anything about the capital of the firm, and the reason for that apparently is that this firm was not to be constituted on the basis of having a capital, but solely and entirely on credit. There is nothing illegal or strange in that; credit, if perfectly secured, may be quite as good as capital, and quite sufficient for the purposes of carrying on the largest business; and that was the basis of this contract.

"In the 4th article I observe the distinction very clearly marked. It provides, not as is usual in such deeds, that the stock of the company shall be shared in such and such portions, but that the partners shall be interested in the nett profit and loss in the following proportions, which are there stated. But then when the article goes on to provide for the acquisition by Mr William Millar of the half of Leander's share we have the word 'capital' introduced—that it shall be in the power of the said William Millar, with the consent of the said John Millar, at any time during the subsistence of the contract, to acquire one-half of Leander Millar's share of the capital, stock, and properties of the copartnery. So it was in the contemplation of the parties that the concern was to begin without any capital, but that it was to acquire capital through successful trading, and when that change of interest took place the capital as well as the right to the future profits should pass as part of the share and interest to be acquired by W. Millar. Then the 5th article provides in substance, that in respect of the arrangement for a cash-credit on the basis of security there shall be no change in the interest of the individual partners by whom those securities are contributed.

Mr William Millar thinks that was merely for the purpose of excluding the company from gain or loss by any rise or fall in the value of these securities, but the article in the contract is not limited to any such purpose. It is a perfectly absolute and unqualified declaration that those securities shall remain the property of the partners by whom they are assigned to the bank, and that declaration appears to me to be entirely in harmony with the real evidence and with what was the natural and obvious interest of all the persons who were parties to this arrangement.

"The only other point in the case is, whether the right of security on the part of the Royal Bank can be impaired in consequence of the acquisition by Mr William Millar of certain interests in the shares of the partnership and property of his brothers. It appears to me, not only on the authority of the case of *M'Clelland*, cited in argument, but on principle, that where a creditor acquires property by an *ex facie* absolute title, no change in the reversionary interest can lessen his security. It is a well-known principle in regard to all *ex facie* absolute assignations that the assignee is to be treated as a proprietor for every purpose except that of fulfilment of his obligation to restore upon his advances being paid up. Therefore any assignment is merely an assignment of the equitable or reversionary interest, the *ex facie* absolute assignee remaining for all purposes in which he is interested the true owner, with all the rights which an independent owner can maintain against third parties. Now, this is just an *ex facie* absolute assignment, because the securities are endorsed over, and there is no deed qualifying that endorsement.

"I therefore think the bank are entitled to claim their right as it stood at the date when they opened the cash-credit security, and are entitled to hold these documents as securities for any difference between the dividend that may be received from John Millar & Company's estate and the actual amount of their debt."

The defender reclaimed, and argued—The bank were bound to value and deduct these securities in ranking on the firm's estate, they being securities over "part of the estate of the bankrupt." They were given to the bank as the property of the firm, and the firm had at least a limited ownership in them. The bank dealt all along with the firm as owners of the securities; they knew nothing of, and had no concern with, the arrangements of the partners *inter se*, and were not now entitled to reap as a windfall the benefit of their discovery of these arrangements. They did not stipulate for any security other than "over the bankrupt estate." In any view, the securities which originally belonged to Leander, and which had on his retirement became the property of the firm, should be valued and deducted from the bank's claim.

Replied for the bank—They were entitled to a ranking on their full claim. The securities having been at the date of their impignoration the property of the individual partners, who were in such a case "third parties," were over no part of the estate of the bankrupt firm. They were given to the firm for the limited and sole purpose of pledging them to raise money. If the bank's understanding as to the real ownership of the securities in 1875 had been clearly established their case would have been irresistible. Even as it was, *M'Clelland's* case showed that no subsequent dealings of the partners *inter se* could prejudice the advantageous position of the bank.

Authorities—*M'Clelland* v. *Bank of Scotland*, February 27, 1857, 19 D. 574; *British Linen Company* v. *Gourlay*, March 13, 1877, 4 R. 651; *Royal Bank* v. *Purdom*, October 26, 1877, 15 Scot. Law Rep. 13; *ex parte Brett*, L.R. 6 Chan. App. 838; *in re Collie*, L.R. 3 Chan. Div. 481.

The Lords made avizandum.

At advising—

Lord Rutherfurd Clark—The pursuers are creditors of John Millar & Company. They hold certain stocks in security. They claim a ranking on the estate of the company for the full amount of their debt. The defender contends that they are bound to value and deduct the securities,

The company has not been sequestrated, but it has granted a private trust for creditors. It is conceded by both parties that the estate is to be administered, and that the question raised in this action is to be determined as if a sequestration had been awarded.

It follows, in my opinion, that the question is to be determined by reference to the 65th section of the Bankrupt Act. By that section a creditor who holds a security over any part of the estate of the bankrupt is bound, in order to obtain a ranking, to value the security, and to deduct the value from his debt. The principle of the statute is to prevent a double ranking for the same debt. Therefore if a creditor by virtue of his security appropriates a part of the estate of the bankrupt, which but for the security would be divisible amongst the general body of creditors, he must take the value of the part so appropriated in payment *pro tanto* of his debt, and can only rank for the balance. If it were not so he would have a double ranking.

The question then is, whether the stocks which the pursuers hold in security are or are not the property of the company? *Prima facie*, the point of time to which reference is to be made is the date of the sequestration.

The stocks originally belonged in part to John Millar and in part to Leander Millar, who were both partners of the company, although the former did not sign the contract of copartnery. It is said by the pursuers that they transferred the stocks to the company as their contribution to the capital, and that by reason of such transference the company as owners pledged the stocks to the pursuers for the loan which they obtained. But this contention is in direct opposition to the contract of the copartnery, by which it is declared that the proprietory interest in these stocks shall not be changed in any way in respect of their being deposited with the Royal Bank to cover the cash-credit obtained by the company. It is thus a matter of special agreement between the company and the owners that the deposit of the stocks with the bank in security of a loan to the company was not to affect the ownership. It is urged that this was a private agreement between the company and two of its partners. No doubt the pursuers were strangers to the contract of copartnery, and knew nothing of its contents. But in an inquiry into the ownership of the stocks nothing can be more important than the statement of the company, and nothing more conclusive against it than

its own declaration that though the stocks were pledged for a loan to the company the proprietory interest was not changed.

Starting, therefore, with the fact that the stocks belonged to John and Leander Millar, I find nothing to change the ownership. I conceive that nothing more was intended to be done, or done in fact, than that John and Leander Millar agreed that the company should obtain a cash-credit on the pledge of the stocks belonging to them without surrendering any right of ownership. Hence I hold that at the date of the loan the stocks were the property, not of the company, but of John and Leander Millar.

But it has been maintained that the company was invested with the title of ownership, and that the pursuers obtained their security from the company in that character. If that had been so, the case of the pursuers might have been attended with grave difficulty. But in my opinion this defence fails on the fact. The stocks are transferable by endorsement. They were endorsed and delivered to the bank by Leander Millar, acting for himself and as attorney for his brother John. They were never endorsed or delivered to the company, so that the pursuers derived their title, not from the company, but from the true owners.

It is said, however, that after the date of the loan the company acquired the property of the stocks, and that at the date of the trust-deed, or, in other words, at the date of the sequestration, it was the owner of them. I see no evidence to show that the company acquired the stocks which belonged to John Millar. But with respect to Leander Millar the case is different. When he retired from the company his stocks were in pledge to the pursuers, and he received the value of them, or other stocks in lieu of them. I think therefore that at the time when this question arises the company must be held to be the owners of the stocks which were pledged to the bank by Leander Millar.

The question thus arises, whether the pursuers are bound to value and deduct the stocks which at the date of their claim to a ranking belonged to the company? If it were to be decided by a reference to the mere fact of ownership the defender must prevail. But it remains to be considered whether a different principle is to be applied, because at the time of the loan the stocks belonged to Leander Millar, and were only acquired by the company at a later date.

I take it to be the case that when the pursuers took the stocks in security of the cash-credit they believed them to be the property of Leander Millar and not of the company, and that this was the representation of the borrowers. But in my opinion this does not make any difference in settling the manner in which they are to rank on the company estate. The statute furnishes a positive rule which I think must be implicitly obeyed. The condition on which it so admits them to a ranking is that they must value and deduct any security which they hold over the bankrupt estate. It follows, therefore, that they must value and deduct the securities which, though they at one time belonged to Leander Millar, are now the property of the company. To affirm that such is their obligation is no more than to enforce the orders of the statute and to follow an authoritative decision in a similar case in England—*Collie*, 3 Chan. Div. 481. Lord-Justice Mellish expresses the rule in a single sentence, when he says—"They, *i.e*, the bankrupts, cannot by anything which they may have said or done prevent their estate from being distributed according to the law of bankruptcy." The security remains effectual, but the statutory conditions which regulate the ranking must be observed.

It is said that there is authority to the contrary in the case of *M'Clelland*, 19 D. 574. But I do not think that it is conclusive, or that it can be followed in this case. It seems to me that the judgment proceeded on another ground, though there are no doubt *dicta* which may be read as adverse to the opinion which I have expressed. I prefer, however, to follow the plain rule which the statute has laid down for our guidance.

Lord Craighill—I concur in the opinion of Lord Rutherfurd Clark, and think it unnecessary to read that which I had prepared.

Lord Justice-Clerk (whose opinion, in his Lordship's absence, was read by Lord Rutherfurd Clark)—Lord Rutherfurd Clark has been good enough to allow me to peruse his opinion in this case, and I entirely concur in the result at which he has arrived, and in the reasoning on which he proceeds.

It is to be regretted that the facts on which one branch of that opinion proceeds do not appear to have been presented to the Lord Ordinary, and indeed even now our information as to the position of Leander and John Millar is scanty enough. I agree, however, that it is sufficiently established that Leander was paid out before the bankruptcy, and the securities which were the property of Leander became part of the assets of the firm and passed to the trustee by the creditor deed. We must also, I think, assume that the securities which were vested in John Millar remained vested in him at the date of the bankruptcy, and were not the property of the bankrupt firm.

In this state of the fact, I am of opinion that, as regards the securities which belonged to Leander, and which were at the date of the bankruptcy part of the estate of the bankrupt firm, the respondents, the Royal Bank, must specify their value in their claim, and deduct the value from their debt and claim only for the balance, in terms of the 65th section of the Bankruptcy Statute. It is in my opinion quite immaterial at what time the bankrupt firm acquired this property, provided, as required by the statute, it was at the date of the bankruptcy estate of the bankrupt, and would but for the security have been available for payment of the ordinary creditors. The words of the Act are quite unambiguous, and no other test of the application of the clause can be sanctioned.

The case of *M'Clelland*, which was founded on by the respondents, was decided on the ground that in point of fact the property in question was not vested in the bankrupt firm. There were, however, views thrown out by the Court to the effect that even if it had been, the creditor would not have been within the corresponding provision of the prior statute, because the property was acquired, as here, after the date of the security. But with all due respect to those views, I think they proceeded on a false analogy. The provision in the Bankrupt Statute is one *positivi juris*, intended to regulate on an equal footing the rights

of unpaid creditors in the event of supervening insolvency of the debtor. It, of course, operates a restriction of the original and primary right of the secured creditor to operate full payment of his debt by any means in his hand; but that is the effect of the whole system of bankrupt jurisprudence. So far the provision takes no cognisance of the creditor's contract, but exacts compliance with its terms as the condition of the creditor's ranking. But it is an error to suppose that the creditor's security, as he held it, is in any way lessened by this result. On the contrary, this enactment of positive law was necessarily embodied in the contract, and the parties could only contract subject to its provisions.

As regards John Millar's securities, I agree with the result of the Lord Ordinary's judgment.

Lord Young having been absent at the debate gave no opinion.

The Lords recalled the Lord Ordinary's interlocutor, found and declared that before ranking on the estate of John Millar & Co. the bank were bound to value and deduct from their claim the securities which originally belonged to Leander Millar but subsequently were transferred to the firm, and to that extent assoilzied the defender; *quoad ultra*, and subject to the foregoing finding, found and declared in terms of the conclusions of the summons, and found no expenses due to or by either party.

Counsel for Pursuers—J. P. B. Robertson—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for Defender—Guthrie Smith—Pearson. Agents—Curror & Cowper, S.S.C.

Friday, March 3.

FIRST DIVISION.

[Sheriff-Substitute of Lanarkshire.

THE LIQUIDATORS OF THE CITY OF GLASGOW BANK *v.* NICOLSON'S TRUSTEES.

Superior and Vassal—Security-Holder—Liability for Feu-duty—Relief.

A disponed certain heritable subjects to B in security. He afterwards conveyed them to a bank by a disposition *ex facie* absolute, but (as appeared on proof) really in security of advances. This disposition was recorded. The superior having subsequently obtained decree against the bank for a half-year's feu-duty payable to him—*held* that the bank had a good claim of relief against B, who had uplifted the rents of the subjects, and applied them in payment *pro tanto* of the debt and relative interest due to him by A.

By feu-contract, dated 10th and 12th April 1877, James Aiken, engineer, Glasgow, feued out to Peter M'Kissock, builder in Partick, certain heritable subjects situated in Partick for a feu-duty of £27, 11s. 5d., payable in equal portions at Whitsunday and Martinmas yearly.

By bond and disposition in security, dated 8th and recorded 10th October 1877, M'Kissock disponed the said subjects to Thomas Nicolson, writer in Glasgow, in security of a sum of £2200 lent by him to the disponer. Nicolson died, and the defenders in this action were his testamentary trustees.

By disposition, dated 7th and recorded 9th August 1878, M'Kissock conveyed the said subjects to the City of Glasgow Bank. The disposition was *ex facie* absolute, but it was subsequently established by proof that it was really granted to the bank in security of advances made by them to M'Kissock.

By disposition, dated 10th February 1879, and duly recorded, Aiken conveyed the superiority of the said subjects to the marriage-contract trustees of the Rev. T. H. Turnbull and his wife, who raised a Sheriff Court action against the City of Glasgow Bank, in which they obtained decree for payment of £13, 15s. 8½d., being the half-year's feu-duty due at Martinmas 1880. Nicolson's trustees, in virtue of their bond and disposition in security, entered into possession of the subjects, and collected the rents due and payable at Martinmas 1880, which were more in value than the said half-year's feu-duty due at the same term. They applied the whole rents so received towards payment *pro tanto* of their said debt of £2200 and interest.

The present action was raised by the liquidators of the City of Glasgow Bank against Nicolson's trustees, to have the latter ordained to free and relieve the pursuers of the said half-year's feu-duty, and interest thereon from Martinmas 1880 till paid, and of the expenses incurred in the action against them at the instance of Turnbull's trustees.

The pursuers pleaded—"(2) The defenders being in possession of said steading of ground and houses and others erected thereon, and having collected the rents thereof for the period for which the said feu-duty is payable, are liable in the payment of said feu-duty, and are bound to free and relieve the pursuers from payment thereof. (3) The said feu-duty being a real burden on said subjects, preferable to the principal and interest in defenders' bond and disposition in security, they are bound to pay the same out of the rents collected before paying said principal and interest. (4) The defenders having funds wherewith to pay said feu-duty, and being bound so to do, are bound to relieve the pursuers of the whole expenses incurred in the action by Mr and Mrs Turnbull's trustees."

The defenders pleaded—"(1) The City of Glasgow Bank being the proprietor of said subjects, and the last entered vassal, is the proper debtor in the feu-duty, and bound to perform all the conditions of the feu, and has no right of relief for payment of the feu-duty against the defenders, who are merely heritable creditors. (2) Even though the bank, in a question with M'Kissock, is really a creditor, yet, having taken an absolute conveyance, and having been registered and entered as proprietor with the superior, it falls in a question with the superior and all third parties to be treated as absolute proprietor. (3) The defenders having collected the rents in virtue of the assignation to rents in their bond, which is prior to the assignation to rents in the bank's deed, are not bound to pay over any part thereof to the pursuers until they have received full payment of their own debt and interest. (4) In no event should the defenders be held liable in the