the Act bring a process of *cessio* against his debtor. But I cannot see how the apprehension of the debtor, subject to his right of being liberated on caution *judicio sisti*, would aid the creditor. A process of *cessio* at the instance of the creditor is the creature of the Act of 1880. But it can only proceed before the Sheriff of the county in which the debtor has his ordinary domicile. If the debtor has such a domicile his apprehension is not necessary. If he has not, the process cannot proceed. In short, it is a process which is intended to be directed against Scotch debtors only, against whom the Sheriff has jurisdiction *ratione domicilii*. Hence the present application can be in no sense available to the appellant.

I am therefore of opinion that the petition is incompetent, and that it should be dismissed.

LORD CRAIGHILL—I concur.

LORD JUSTICE-CLERK—I concur substantially in the opinion which has been delivered by Lord Rutherfurd Clark, but I am not sure that I share his doubts as to the competency of entertaining this application, in respect that the special warrant which the pursuer asks cannot be granted.

The Court found the petition incompetent, and dismissed the appeal.

Counsel for Pursuer (Appellant)—Millie. Agents—M'Caskie & Brown, S.S.C.

Counsel for Defender (Respondent)—Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Friday, May 19.

SECOND DIVISION.

[Lord Adam, Ordinary.

MORTON *v.* THE NATIONAL BANK OF SCOTLAND, LIMITED.

(Before the Lord Justice-Clerk, Lord Craighill, and Lord Rutherfurd Clark).

Bankruptcy—Valuation and Deduction—Bankruptcy Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 65 *—Bill—Right in Security—Deed of Arrangement.*

In a deed of arrangement between a sequestrated bankrupt and his creditors, the bankrupt agreed to pay a certain composition, and renounced all objections to claims lodged by the creditors in the sequestration, under reservation, in the case of current or past-due bills, of his right to credit for any sums that might be recovered by the holders from acceptors or prior obligants; the creditors reserved any claims that any of them might have against collateral securities or co-obligants in any securities they might hold; one of the creditors, a bank, besides other claims, held bills endorsed to them by the bankrupt which they had discounted. *Held* that they were not bound to impute sums recovered from other obligants in such bills towards payment of the composition due to them for their claim in respect of these bills and for their other claims, but were entitled to apply them towards payment of the bills until they should operate full payment thereof, on the ground that the bills were the property of the bank, and the reservation by the deed of arrangement was inapplicable to the payments received from co-obligants therein.

The facts out of which this case arose are stated in the note to the Lord Ordinary's interlocutor as follows:—"On the 18th June 1879 the firm of Kimball & Morton, of which the pursuer John Morton was the sole partner, was sequestrated.

"The sequestration was superseded by a deed of arrangement which was entered into between the pursuer and his creditors, dated 27th August 1879.

"By this deed the pursuer bound himself to pay to the creditors of John Morton and Kimball & Morton 9s. per pound of the debts for which he or they were liable at the date of sequestration, and that by instalments, the first of 7s. 6d. per pound in cash seven days after the deed of arrangement was approved of and the sequestration declared at an end, and 6d. per pound at six months, 6d. per pound at twelve months, and 6d. per pound at eighteen months after said date, with interest from and after the respective terms of payment. The pursuer and his cautioner renounced all objections to claims which had been lodged by creditors, or entered in the bankrupt's state of affairs, under reservation, in the case of current or past-due bills, of their right to credit for any sums that might be recovered by the holders from acceptors or prior obligants thereon.

"On the other hand, the creditors exonered and discharged Kimball & Morton and John Morton of all debts and obligations contracted by them or him, or for which they were liable at the date of the sequestration, but under reservation of the claims of the creditors for the composition, and also under reservation to such of them as held collateral securities or obligations for the debts owing by Kimball & Morton and John Morton, of their claims against such collateral securities or obligants.

"At the date of the sequestration the defenders, the National Bank, were creditors of the pursuer on an account-current to the amount of over £12,551, 4s. 2d. They also held bills endorsed to them by the pursuer for value to the amount of £6839, 4s. 5d. The net amount of the defenders' claim appears to have been adjusted at £18,333, 9s. 4d."

It was also stipulated in the deed of arrangement that bills receivable belonging to the estate, and not discounted by the bank, were to remain in the hands of the judicial factor on the sequestrated estate until maturity, the proceeds to be applied in implement of the bankrupt's obligations in the deed of arrangement.

The pursuer pleaded, *inter alia*, that he was entitled, in terms of the deed of arrangement, to credit in account with the defenders for all sums received by them from acceptors or prior obligants.

The defenders pleaded in answer that they were entitled to rank for the full amount of the debt in each bill, until they should operate full payment, and until they should have done so they were not bound to allow sums recovered from other obligants to be deducted from the composition payable by the pursuer.

The Lord Ordinary at the first hearing of the cause sustained the above plea for the defenders, appointed further procedure, and on a re-hearing assoilzied the defenders.

The remainder of his note, in addition to the narrative quoted above, was as follows:—"The only question argued to me was, whether under the agreement the defenders were bound to impute all sums which they might recover from the obligants in the bills held by them as aforesaid towards payment of the composition due to them by the pursuer upon their debt?

"I am of opinion that they are not so bound. The defenders and the other creditors only discharged the pursuer of their claims under reservation to such of them as held collateral securities or obligations for the debts owing by Kimball & Morton, or John Morton, of their claims against such collateral securities or obligants. I think, therefore, that the defenders are entitled to apply such sums as they may recover from other obligants in the bills in question towards payment of the amount of the bills until they operate full payment, and that it is only any surplus that may remain after that that they are bound to apply towards payment of the composition. To put the construction on the agreement contended for by the pursuer would be to put secured and unsecured creditors on the same footing, denying the former any benefit from their securities. The pursuer founded on the clause in the agreement by which he reserved, in the case of current or past-due bills, his right to credit for any sums that might be recovered by the holders from acceptors or prior obligants thereon. It appears to me that what is here reserved is the pursuer's right to credit for any sums that may be recovered, exceeding, with the composition, 20s. per pound on the defenders' debt."

The pursuer reclaimed, and after some argument confined to the above pleas, the Court being of opinion that the case was primarily one of liability to account, and that the procedure thitherto had been informal, recalled both interlocutors and ordained the defenders to lodge their accounts, and accounts were lodged by them accordingly. The pursuer also lodged an abstract of accounts, in which he claimed a balance due to him of £191, 18s. 10d. When the case was again heard the pursuer argued that bills discounted by a bank did not become the property of the bank, as by sale, but were merely assigned to it in security of the advance made by the bank, and remained the property of the drawer subject to the bank's security. The bills on which the bank claimed here were therefore part of the bankrupt estate, and were to be imputed to composition. Should he fail in this argument he was entitled to his claim in respect of contract under the deed of arrangement—at all events, to a particular sum of £272, received on bills which fell due after the date of the sequestration, and had not been discounted by the bank, and which he maintained were specifically appropriated to composition by said deed.

Authority—*Black* v. *Melrose*, Feb. 29, 1840, 2 D. 706.

The defender argued—The pursuer's contention that the bills are only a security in the hands of the bank raises a question under sec. 65 of the Bankruptcy Act, and apart from contract, and at common law, his claim is untenable according to the common law rules as to securities over a bankrupt estate formulated by the Lord President in the recent case of *Stewart* v. *Ferguson*, Feb. 10, 1882, 19 Scot. Law Rep. 429. It is settled law that a bill discounted by a bank becomes the bank's property—(Bell's Com. i. 290, Prin. 1415). The agreement in the deed of arrangement is expressly made not to apply to bills discounted by the bank.

At advising—

Lord Justice-Clerk—In this case three questions have been argued. The first was, whether the bills on which the National Bank claim in the bankruptcy of Morton were or were not part of the bankrupt estate? the second, whether the provision in the deed of arrangement reserving the claim of the bankrupt in regard to bills where payment had been recovered, amounts to the creation of a right to have payments so made deducted from the amount claimed? and thirdly, in regard to the special sum of £272, whether under the deed of arrangement a specific appropriation of that sum, or proceeds of bills to that amount, refers to payment of composition, and is not to be taken as part of the general assets?

On the first question we have listened to an able argument on the part of the reclaimer's counsel, in support of a proposition as untenable as any I ever heard at the bar, because it has been settled law for more than a century that a bill discounted by the bank is substantially the property of the bank; in the words of the English lawyers, "a banker discounting a bill is the purchaser of it." The doctrine came from England in this shape. That will be found laid down in the clearest terms in Thomson's work, at p. 548 of the last edition, and a reference is there made to Lord Ellenborough's opinion, who was the real author of the doctrine under that name, in the case of *Giles* v. *Perkins*, followed by that of *Carstairs* v. *Bates*. The last edition of Mr Thomson's work contains this note:—"The circumstances and the decision, as well as the ground of judgment, were as stated in the text in *Carstairs* v. *Bates*, 3 Camp. 301, *per* Lord Ellenborough. His Lordship referred to the doctrine which he had laid down in the preceding case of *Giles* v. *Perkins*, that a banker discounting a bill was the purchaser of it." There can be no doubt of that now. The bank is endorsee for value. If that be the case, it is in vain to say that these bills were part of the assets of the bankrupt, and that the bank were merely security-holders. That being the state of the matter, it is surely quite settled that where a creditor is the holder of the bill and proprietor of it, although there be several obligants on it, he is entitled to rank on the estate for the full sum. And that disposes satisfactorily and conclusively of the argument we heard on that general question.

In regard to the second point—the plea founded on the reservation in the deed of arrangement—I am of opinion that it must be read according to its terms, and being read according to its terms I think the meaning to be attached to it is quite plain. It is a reservation introduced for the benefit, no doubt, of the bankrupt, to make certain claims and demands, and also to make objections to the claims lodged by creditors. But having made that objection, the reservation may be said to be purified. Besides, although he has made an objection here, his objection is not good, and I do not think he can press the reservation to the effect of not only reserving his right to object at any time, but making it imperative on us to sustain his objection.

In regard to the third point, I was at first inclined to think there was something in it, but on looking more closely into it, it is clear that the bills were not bills in the hands of the National Bank, to which that provision applied, but were in the hands of Mr Gourlay, which he would have to collect.

On these three matters, for the reasons I have now shortly stated, I am of opinion that nothing has been put before us to induce us to alter the Lord Ordinary's interlocutor.

Lord Craighill—I listened with great interest and attention to the argument from the bar, but at the end of that argument I confess I was in no manner of doubt on any of the three questions submitted to us, and I entirely concur in the views on which your Lordship proposes to base the judgment of the Court.

Lord Rutherfurd Clark concurred.

Lord Young was absent.

The Lords of new assoilzied the defenders.

Counsel for Pursuer (Appellant)—Trayner—J. A. Reid. Agent—J. Smith Clark, S.S.C.

Counsel for Defenders (Respondents)—Robertson—Pearson. Agents—Dove & Lockhart, S.S.C.

Tuesday, February 7.

SECOND DIVISION.

(Before Lords Young, Craighill, and Rutherfurd Clark.)

EWING *v.* EWING'S TRUSTEES.

Succession—Payment—Interest—Instalments.

A contract of copartnery provided that in the event of the death of any of the partners the surviving and solvent partners who should continue the business should pay out to the representatives of the deceased the amount at his credit in the books of the firm by ten biennial instalments, "with interest thereon at the rate of five per cent. per annum from the date of the balance." *Held* (*diss.* Lord Craighill, and *rev.* Lord Lee) that at each payment interest must be paid upon the whole balance of the debt then remaining unpaid, and not upon the instalment.

The firm of John Orr Ewing & Company carried on business in Glasgow as Turkey-red dyers and manufacturers under a contract of copartnery dated 15th and 16th January 1878. By the 16th article of this copartnery it was provided that "In the event of the death, bankruptcy, or declared insolvency of any of the partners during the subsistence of the copartnership, the surviving or solvent actual partners at the time shall be allowed the period of three months from the date of such death, bankruptcy, or insolvency to consider and determine whether they shall continue to carry on the business and pay out the share and interest of such deceasing bankrupt or insolvent partner, as the case may be, or whether the business shall be wound up, which option shall be declared at the end of the said period of three months, or sooner if the surviving and solvent partners shall find it suitable to do so, and during the interval the business shall be continued by the surviving and solvent partners. In the event of the surviving and solvent partners electing to continue the business, the amount at the credit of the deceasing or insolvent partner as at the last balance of the company's books, taken as at the 31st December preceding such death or insolvency, when the books are balanced or ought to have been balanced as hereinbefore provided, together with any sum subsequently paid to the firm by him, and in the case of the said John Christie, the balance of salary, if any due to him, shall, under deduction of any sums withdrawn by such deceasing or insolvent partner, be paid out to his representatives (except the representatives of the said John Orr Ewing) or creditors, as the case may be, by instalments of equal amount at six, twelve, eighteen, twenty-four, thirty, and thirty-six months' date, from the date of the surviving and solvent partners declaring their election, or at shorter periods if the solvent and remaining partners shall so determine, with interest thereon at the rate of five per cent. per annum from the date of the balance in the event of the death, but without interest in the event of insolvency or bankruptcy, and for these instalments bills with sufficient security shall be granted. But provided always, that in case of the death of the said John Orr Ewing, his interest in the company, ascertained as aforesaid, shall be paid out to his representatives by instalments of equal amount at six, twelve, eighteen, twenty-four, thirty, thirty-six, forty-two, forty-eight, fifty-four, and sixty months' date as aforesaid, with interest as aforesaid, and for these instalments bills of the company shall be granted, with the security of the works and lands in Dumbartonshire, being the property included in the company's books under the names of 'Field Account' and 'Land Account,' and also the property numbered 46 and 44 West George Street, Glasgow, and all other heritable property which may belong to the company. But in the event of the said John Orr Ewing dying before his nephews, the said Archibald Orr Ewing junior and Hugh Moodie Robertson Ewing, or either of them, are assumed, and in the event of his not having terminated the contract as regards the said nephews or either of them, in virtue of article tenth hereof, his trustees or representatives shall be bound to allow a sum of £100,000 if both nephews have still to be assumed, but if only one of the said nephews has still to be assumed, £50,000 of the said John Orr Ewing's capital to remain in the business as a loan to the company by such trustees or representatives, bearing interest at five per cent. per annum until the assumption of such nephews or nephew; and on each nephew being assumed as aforesaid £50,000 of the money so lent shall be transferred by the said trustees or representatives to the credit of such nephew as his own absolute property; but in the event of either of the said nephews dying before being assumed, the sum of £50,000 set free by his death, or in the event of both dying before being assumed the sum of £100,000 set free by their deaths, shall be repaid to the trustees or representatives of the said John Orr Ewing in the same manner as the remainder of the said John Orr Ewing's capital is before directed to be paid out."

John Orr Ewing, one of the partners, died on