doubt, in some cases very coarse, and is therefore less effective for its purpose than more delicate insinuation. But unless the pursuer undertook to prove that the whole series of writings was not the honest outspoken commentary of a citizen anxious for the public interest, but the work of one who seeks the gratification of private malice, this action cannot be allowed to proceed.

"There are three cases which have a somewhat similar aspect to the present one, but can all be distinguished from it. The first of these is *Cunningham* v. *Phillips*, 6 M. 926, which was an action for defamation by the minister of Crieff against a newspaper proprietor. In one of the articles it was insinuated that the manse was a grossly immoral and ill-regulated house, and the other articles held the minister up to ridicule and contempt. The Court settled an issue in nearly the same terms as that now proposed by the pursuer in the present case. It will be observed, however, that in the case of *Cunningham*, while the articles were written in reference to a controversy as to the introduction of an organ into the church, the defender did not confine himself to comments on this subject, but went into the interior of the manse and pointed his slanders by a calumnious description of the domestic life there.

"The next case is *Dun* v. *Bain*, 4 R. 317, where the defender, the writer of a newspaper article, assaulted a man in very figurative language, which was innuendoed to mean dishonesty in the performance of his duty. The Court held that the innuendo was not too far-fetched nor unreasonable, and allowed an issue—'Whether the said article or part thereof is of and concerning the pursuer, and falsely and calumniously represented the pursuer as being dishonest, or makes similar false and calumnious representations of and concerning the pursuer.' The pursuer in the case of *Dun* had the courage to do what the pursuer in the present case will not do—he directly undertook to prove the innuendo of dishonesty.

"The nearest case to the present known to the Lord Ordinary is *M'Laren* v. *Ritchie*, which is unreported. The issue was adjusted by the Court on 8th July 1856, and was in the following terms:—'Whether the said articles, passages, verses, and fictitious advertisement, or any parts thereof, are of and concerning the pursuer, and whether the pursuer is thereby calumniously and injuriously held up to public hatred, contempt, and ridicule, to his loss and damage.' The articles so described appeared in the *Scotsman* newspaper, and were directed against a prominent public citizen, who had been a candidate for the representation of the City of Edinburgh in Parliament. He was in these articles called 'snake,' 'serpent,' and 'viper.' He was described as deserting principle, traducing friends, deceiving enemies, and 'acting only for his own malignities.' The defence was that the articles were written with the view of promoting the interests of the candidate for Edinburgh of whom Mr M'Laren was the opponent, and they referred to him solely as a public man, and were within the range of legitimate speech.

"Without in any way venturing to impugn the authority of this precedent, the Lord Ordinary thinks that it may be distinguished from the present case, in the circumstances that there was in it an amount of insinuation and abuse which took the case out of the privilege given to the press even with reference to public men who were candidates for seats in parliament, and in regard to whom it is quite the traditional custom to use language of a very depreciatory nature.

"No doubt there is no privilege in journalism which would excuse a newspaper when any other publication of libels would not be excused. The greater the extent of circulation is, it makes the journalist libels more damaging, and imposes special duties as to care to prevent the risk of such mischief. But then, on the other hand, the wise and liberal rule is not to be unduly restricted, which entitles citizens to speak of persons in public employment, to criticise their conduct in matters in which the public are interested, and more especially when the person criticised is elected to his office by the citizens themselves. The benefits of free discussion and free criticism are so great that privilege must be admitted, even though individual injury may be serious, the one overshadowing the other to such a degree that only the public interest can be regarded when it appears that the discussion or publication has been in good faith.

"The pursuer must therefore tender some other issue than that which he proposes, and if he does not do so the action will be dismissed."

The following amended issue was afterwards put in by the pursuer and was, by interlocutor dated 18th October 1881, approved of by the Lord Ordinary for the trial of the case:—"Whether the said letters and paragraphs, or part thereof, are of and concerning the pursuer, and were published or caused to be published by the defender, and falsely and calumniously represented the pursuer as a person who had been guilty of wilful falsehood and of dishonesty, and as a magistrate who disgraced his office and used it for the purpose of gratifying his private spite—to the loss, injury, and damage of the pursuer. Damages laid at £1000."

The action was compromised before the day fixed for the trial of the issue.

Counsel for the Pursuer—Young. Agents—Begg & Murray, solicitors.

Counsel for the Defender—M'Kechnie. Agent—William Gunn, S.S.C.

Wednesday, June 15.

FIRST DIVISION.

[Lord Rutherfurd-Clark, Ordinary.

ROYAL BANK OF SCOTLAND *v.* COMMERCIAL BANK OF SCOTLAND AND OTHERS.

Bankruptcy—Bills—Lien—Pledge—Bankruptcy of both Drawer and Acceptor while Bills in Circle—Equity of Holders.

The drawer of a bill, and the party who has accepted it against goods which he has in his hands belonging to the drawer, being both bankrupt, the bill-holder may rank on both estates for the full amount of the bill, and the acceptor's trustee in sequestration is entitled, as a condition of giving up the

goods, to claim indemnity against the drawer's estate for all claims of the bill-holder enforced against the acceptor's estate.

David Hogg Saunders, a partner of the firm of George Saunders & Sons, mill-spinners, Westfield, Blairgowrie, on the one part, and James Ramsay, merchant in Dundee, on the other part, entered into an agreement, by minute dated 22d April 1870, whereby, on the narrative that Saunders had purchased the Westfield Spinning Works, they agreed, *inter alia*, that he should employ the whole machinery of the said works, or any additions that might be made to it, in heckling and spinning for Ramsay, charging the rates for spinning therein set forth; Ramsay, on the other hand, engaging to supply material sufficient to keep the machinery fully employed. In particular, the agreement set forth (8th)—"All material and yarns sent to Westfield Works by the said James Ramsay junior shall continue to be the sole property of the said James Ramsay junior, subject only to the lien of the said David Hogg Saunders over said material and yarns for the heckling or spinning of the same, or for the advances which he may have made to the said James Ramsay junior, or for debts which in any way the said James Ramsay junior may be resting-owing to the said David Hogg Saunders;" And 9th, that "the said David Hogg Saunders shall be bound, if required by the said James Ramsay junior, to grant his own acceptances, or the acceptances of Messrs G. Saunders & Sons, in the said James Ramsay junior's option, for a sum not exceeding three-fourths of the market value of the raw material and yarns held by him on account of the said James Ramsay junior at Westfield Works; and whether he shall grant his own acceptances or the acceptances of the said G. Saunders & Sons, he shall be entitled to a right of lien or retention of goods to a value sufficient to cover such acceptances." The agreement was to commence as at 1st March 1870, and to subsist, subject to the provisions therein contained as to the death or bankruptcy of either party, for ten years from and after that date. Under this agreement, and under a supplementary memorandum of agreement between the parties, dated 25th June 1872, which introduced some slight modifications, the parties commenced to trade, and continued to do so until their bankruptcy as after-mentioned. On 10th December 1878 Saunders and his firm of George Saunders & Sons granted a trust-deed for behoof of creditors in favour of John Rhind, merchant, Dundee, and John Panton, banker, Blairgowrie, which provided that the estate should be liquidated as far as possible as if sequestration had been awarded under the Bankruptcy Act.

Ramsay was sequestrated on 23d December 1878, and David Myles, accountant, Dundee, appointed trustee on his estate. Ramsay had from time to time drawn bills on Saunders and his firm against yarns and raw material in Saunders' hands, which were accepted by Saunders as provided for in article 9th of the agreement quoted above. These bills were discounted with the Royal Bank of Scotland, and amounted at the date of Ramsay's sequestration to £16,000. Saunders and his firm had also drawn bills on Ramsay, which he accepted mainly for their accommodation, to enable them to extend the Westfield Works, which were discounted with the Commercial Bank of Scotland, and amounted at the date of Saunders' bankruptcy to £10,637, 10s. 8d.

At the date of Ramsay's sequestration Saunders held goods belonging to Ramsay as against his £16,000 of acceptances. These goods were claimed by (1) the Royal Bank, (2) the Commercial Bank, (3) Saunders' trustees, and (4) Ramsay's trustee. By an arrangement of parties they were sold, and the price realised—£4052, 14s. 2d.—was deposited in the Royal Bank, who then raised the present action of multiplepoinding to determine the rights of parties.

Claims were lodged for the following parties:—

1. The Royal Bank claimed the whole of the fund *in medio*. They averred—"(Cond. 2) The bills to the amount of £16,000 discounted by the claimants were so discounted in the belief, founded on the statements both by the drawer and acceptors, that said bills were accepted against stock or other material in the hands of the acceptors belonging to the drawer, and over which the acceptors had and could exercise a lien for all their acceptances to the drawer. In point of fact, it was understood and agreed among all concerned, viz., (1) the drawer, (2) the acceptors, and (3) the claimants as endorsees of the said bills, that the said stock and other materials in the hands of the acceptors should be specially appropriated to providing for the retirement of the said bills, and held by the acceptors primarily in trust for that purpose."

They pleaded—"(1) The goods in question having, by agreement between the drawer and acceptors, been specially appropriated to the retirement of the bills in question, and both drawer and acceptors having become insolvent, the claimants, as holders of the said bills, are entitled to have the said goods applied towards payment of the said bills. (2) The goods in question having been specially appropriated to the retirement of the bills in question by agreement among all concerned, including the claimants, the claimants are entitled to be ranked and preferred to the whole fund *in medio* in terms of their claim."

Proof having been led, on which the bank admittedly failed to prove the averments above quoted, their argument in the Inner House was rested solely on their first plea.

2. The Commercial Bank also claimed the whole fund, or otherwise to be ranked *pari passu* with the Royal Bank thereon, and pleaded—"(2) The goods in question having been pledged to the said David Hogg Saunders in security of all debts resting-owing by the said James Ramsay junior to him, the claimants, as holders of bills accepted by the said James Ramsay junior, as aforesaid, are in right of said pledge or lien, and are entitled to be ranked and preferred in terms of their claim." They did not appear in the Inner House.

3. Ramsay's trustee claimed the whole fund, and pleaded—"The fund *in medio* being the proceeds of a sale, after deducting all charges and expenses of manufacture and otherwise, of property belonging to the said James Ramsay, the claimant, as trustee on his sequestrated estate, is entitled to be ranked and preferred in terms of his claim, with expenses."

4. Saunders' trustees claimed, "as representing David Hogg Saunders and his firm of George Saunders & Sons, to be ranked and preferred *primo loco* on the fund *in medio* in relief of their

obligation to the Royal Bank of Scotland as acceptors of the said £16,000 of bills drawn by James Ramsay junior, and accepted by George Saunders & Sons or David Hogg Saunders, and held by the said bank, in which bills the said James Ramsay junior was the true debtor, and to have the whole of the said fund *in medio* set aside until the amount of dividend to be paid by them to the said Royal Bank of Scotland in respect of the said bills be ascertained."

They pleaded — "The said James Ramsay junior being the true debtor upon the said £16,000 of bills drawn by him, and accepted by David Hogg Saunders or his firm of George Saunders & Sons, and discounted with the Royal Bank of Scotland, the lien which the said David Hogg Saunders held over the goods, for which the fund *in medio* is the *surrogatum* under the 8th and 9th heads of the above-mentioned original agreement of 1870, and at common law is effectual to the claimants, and entitles them to operate their relief by means thereof of all payments made by them in respect of the said £16,000 of bills."

The Lord Ordinary (RUTHERFURD CLARK), after a proof, pronounced this interlocutor :—"Repels the claim for the Royal Bank, the claim for the Commercial Bank, and the claim for David Myles: Finds that the yarns mentioned in the record were pledged with Saunders & Sons as a security for the obligations undertaken by them as acceptors of the bills held by the Royal Bank: Finds that the claimants Rhind & Panton are entitled to the fund *in medio*, in order that they may apply it in operating their relief from the said obligations, but subject to the declaration that the balance, if any, is payable to the claimant Myles: Therefore ranks and prefers the claimants Rhind & Panton to the fund *in medio*, and decerns."

His Lordship added the following note :— "Ramsay drew bills on Saunders & Sons against yarns belonging to him which had been sent to them to be spun. These bills are now in the hands of the Royal Bank.

"Ramsay and Saunders & Sons have become bankrupt. The estates of the former have been sequestrated. The estates of the latter are being wound up under a private trust.

"The yarns against which the bills were drawn, or at least over which a security is said to have been constituted, were sold, and the proceeds form the fund *in medio*.

"1. The Royal Bank at first contended that it held a security over the yarns. But it has yielded this point, and relies exclusively on the English law of *Waring*, 19 Vesey, 345, as giving it a right to be ranked preferably on the fund.

"Though holding no security over the yarns, it maintains that it has a right to the fund, springing out of the equitable rights subsisting between the estates of the drawer and acceptors of the bills held by it. It says that the acceptors are entitled to hold the security as an indemnity against the liability which they have incurred by accepting the bills ; that it is the interest of the acceptors' other creditors that the security should be applied in extinction of the bills ; that it is likewise the interest of the creditors of the drawer that the security should thus be dealt with, and that as the drawer cannot recover the security from the acceptors without relieving them of the obligations undertaken on the bills, he has no interest or title to object to this application of the security. The result is, to use the language of a commentator on the case of *Waring*—'The billholder gets an apparently gratuitous preference, merely because the Court, in administering the two insolvent estates, can by this means alone secure the interests of their respective creditors.'—Eddis, 7.

"It appears to the Lord Ordinary that the case of the Royal Bank is within the rule laid down in *Waring*. But he has grave doubts whether it is possible for him to give effect to this rule. It has existed in England for nearly seventy years, but no Scottish authority has been referred to in which it has been recognised or even mentioned. In these circumstances it cannot be said to have been adopted as a part of the law of Scotland.

"But further, the Lord Ordinary thinks that he cannot give effect to the plea of the Royal Bank in this action. The bank has no right in or over the yarns. The yarns belong to the estate of Ramsay, subject to whatever security has been created over them in favour of Saunders & Sons. In consequence, the bank has only a claim for a ranking, and if it has any preferable claim it must make it good in the sequestration or in the trust if it is an acceding creditor, or by the use of diligence if it is not. There is no more well ascertained rule in bankruptcy than that the trustee ingathers the estate for division among the creditors according to their rights, and that any claim to a preference must be made in the sequestration or in the trust. To give effect to the claim of the bank would be a violation of this rule. It may be that the bank can establish the preference which it claims, but not the less is its claim in this action ill founded.

"2. The claim of the Commercial Bank is founded on the same considerations as that of the Royal Bank. But in the opinion of the Lord Ordinary it fails on the facts.

"3. There remain the claim of the trustees for Saunders & Sons, and the claim for Ramsay's trustee. The latter admits that the former hold a security over the yarns to a certain extent, or, in other words, that they were held in pledge by Saunders & Sons as against their liability on part at least of the bills in the hands of the Royal Bank. But he maintains that he is entitled to the fund because the yarns belonged to Ramsay, and because any preference arising under the pledge must be made good in the sequestration.

"It is no doubt settled that any money attached by arrestment must be paid to the trustee in bankruptcy, subject to any preference created by the arrestment. And it has been held that when a law agent has a hypothec over the title-deeds of the bankrupt, he must give up the deeds and claim his preference in the sequestration—see *Johnstone*, 2 S. 133 ; *Paul*, 4 S. 424 ; *Skinner*, 3 Macph. 867. It has thence been argued that the Court has recognised the right of the trustee to ingather the whole estate of the bankrupt, so that the security holder can never himself realise his security, but must make his claim in the sequestration for a preference.

"The argument goes too far. It is certain that in the case of a heritable security the creditor is entitled to realise it. No doubt there is a statutory power to this effect given by the 112th

section of the Act, and but for this power it may be urged that the creditor could sell. But then the 62d and 65th sections, which are applicable to all classes of security, give a title to the trustee to require a conveyance of the security on payment of the value put on it by the creditor, with 20 per cent. added in the case mentioned in the former section. These clauses seem to the Lord Ordinary to be inconsistent with the claim made for Ramsay's trustee. For his argument is that he is entitled to a conveyance or a surrender of the security in all cases, subject only to the preference which the security may create. And this leads the Lord Ordinary to think that the 112th section is to be read—not as creating the right of the creditor, but as a mere recognition of it.

"It appears to him, therefore, that the vesting clause must be construed as giving the estate to the trustee, subject to such real rights as have been created over it, and that where, as here, the creditor has a right of pledge, he cannot be required to surrender the subject of the pledge so long as his debt is unpaid.

"4. The only remaining question is, whether Saunders & Sons' right of security covered the whole bills held by the Royal Bank, or only a part. The Lord Ordinary thinks that on a fair construction of the agreement of 22d April 1870, this question must be answered in the affirmative."

The Royal Bank reclaimed, and argued—This case fell within the English rule of *ex parte Waring*, 19 Ves. 345, which was introduced by Lord Eldon, and had been sanctioned by a long course of English decisions and authority; Eddis on the Rule of *ex parte Waring*, ed. 1876; *Paules* v. *Hargreaves*, 23 L.J. Chan. 1; *City Bank* v. *Lachie*, L.R. 5 Ch. App. 773; *Banner* v. *Johnstone*, L.R. 5 E. and I. App. 174; *Bank of Ireland* v. *Perry*, L.R. 7 Exch. 14; *in re Barneds' Banking Company*, L.R. 19 Eq. 1, and 10 Ch App. 198. There was no specialty in Scotch bankruptcy law to render the adoption of the rule in this country inadvisable. The price of the goods ought to be applied *pro tanto* in payment of the bills, not from favour to the bill-holder, but as the only equitable way of working out the administration of the two bankrupt estates.

Argued for Ramsay's trustee—(1) The rule of *ex parte Waring* should be applied as above; (2) *separatim*, by the agreement Saunders had only to accept bills to the value of three-fourths of the goods in his hands; that, therefore, was the limit of his security. There must, in any view, be a balancing of accounts between Saunders' trustees and Ramsay's trustee—*Christie* v. *Keith*, June 29, 1838, 16 S. 1224; *Anderson* v. *Mackinnon*, March 17, 1876, 3 R. 608. Ramsay still remained the radical owner of the goods, and his trustee, as representing him under the Bankruptcy Act of 1856, was therefore entitled to have the proceeds handed over to him to administer in the sequestration. Any creditor claiming a preference could only do so in that sequestration in the ordinary way.—*Skinner* v. *Henderson*, June 2, 1865, 3 Macph. 867.

Saunders' trustees argued—The terms of the agreement were the measure of Saunders' obligation, not of his right; his lien covered the whole goods in his hands at any one time. The fund *in medio* was subject to a preferable security by way of pledge, and the radical right, if any, remaining in Ramsay could not take away the force of the security. The question of accounting between the two trustees was not raised on record nor in the Outer House, and could not be entertained. The rule of *ex parte Waring* had never been adopted in Scotland, and should not now be followed.

At advising—

LORD PRESIDENT—By agreement, dated 23d April 1870, between James Ramsay, merchant in Dundee, and David Saunders, mill-spinner in Blairgowrie, the latter undertook, for a period of ten years, to hackle and spin yarns for the former at certain specified rates. It was further provided that the latter should have a lien over all materials and yarns sent to his works by the former for the charges of spinning, for any advances made, and for any debts that may be due by the former to the latter. Saunders also became bound to grant his acceptances to Ramsay for a sum not exceeding three-fourths of the market value of goods in Saunders' hands, and for relief of these acceptances he was to be entitled to hold the goods in security.

In the month of December 1878 (while the agreement was still in subsistence) both Ramsay and Saunders became bankrupt, Ramsay being sequestrated on the 23d of that month, and Saunders having executed a deed of trust for his creditors on the 10th.

At this time the Royal Bank were holders of bills to the amount of £16,000, drawn by Ramsay, and accepted by Saunders, on the security of the goods in his hands. The value of Ramsay's goods at the same time impledged in Saunder's hands was only of £4000. These goods, of course, belonged in property to Ramsay and his bankrupt estate; but Saunders and his estate, in virtue of the contract of pledge, were entitled to be indemnified out of the price of the goods to the last farthing of what Saunders or his trustee was made to pay to the holders of the bills.

The holders of the bills had no security whatever over the goods in the hands of Saunders and his trustees.

It seems to be thought by the parties, or some of them, that this state of the facts gives rise to difficulty and embarrassment in the settlement of accounts among the two bankrupt estates and the bill-holders, and so great is this difficulty represented to be that the Court has been invited, for the purpose of solving it, to import into the law of Scotland a rule of English bankruptcy called the Rule of *ex parte Waring*, introduced by Lord Eldon more than seventy years ago to solve a difficulty which appeared to him to be otherwise insoluble, but of which in this country we have never found the need, because the class of cases to which it is applied in England are with us settled without difficulty on the much more simple and equitable principles of our own bankruptcy system. We can hardly estimate too highly the aid we receive in almost all departments of mercantile law from the judgments of the English Courts. But nothing could be more dangerous than to rely, in any question of difficulty which occurs in the management and distribution of bankrupt estates, on the rules or principles of the English bankrupt law, which

has been built on lines eminently different from those of the bankrupt law of Scotland, and of all countries whose systems of jurisprudence are founded on the Roman law. We may safely seek light in developing and applying the principles of equity which underlie our bankruptcy system from the laws of Holland or of France, because these are founded on the same general principles with our own. But the rules of English bankrupt law are in many essential particulars not only inconsistent with those which we follow in practice, but contradictory to them.

But this is not a case in which there arise such difficulties as to induce us to resort to any principles but those which are of constant application in settling accounts in bankruptcy.

Professor Bell (1 Comm., 7th ed., 294) states the principle which must guide us here very clearly in a case closely analogous to the present, and indeed identical in its legal character, where goods are consigned by a merchant to a factor for sale, and the owner of the goods is allowed to draw on the factor for a certain proportion of the value, less or more, according to the prospects of the markets. In such a case he says—"If both houses fail while the goods are unsold, and the bills are in the circle, the bill-holder, in the first place, makes claim against each for the amount of the bill, to the effect of recovering on the whole full payment; secondly, the factor's estate has a lien over the goods to the effect of entire relief and indemnification; and thirdly, the estate of the principal is entitled to demand the goods after such indemnification has been given from the proceeds, or on full security given to relieve the factor and his estate of the bills."

It will be observed that the bill-holder, having no security over any part of either of the bankrupt estates, is entitled to rank on each of the bankrupt estates for the full amount of his debt (as it stood at the dates of the two bankruptcies respectively, and without deducting any recoveries made since these dates) to the effect of obtaining thereby full payment, but no more, so that if each estate paid a dividend of 10s. per pound the bill-holder would receive precisely full payment.

The Royal Bank in the present case, ranking for the full £16,000 on the estate of Saunders, will receive a dividend on that amount *pari passu* with the other unsecured creditors of Saunders. The estate of Saunders will then be entitled to be indemnified out of the price of the impledged goods to the amount of the dividend so paid, and the sum thus obtained as indemnity will then become an asset of Saunders' estate, out of which the Royal Bank and the other creditors of Saunders will receive a further dividend, and this process will be repeated until the price or value of the goods has been exhausted. If the value had exceeded the amount of the bill debt, the process would have been continued till the bill debt was extinguished and the acceptor's liability discharged by full payment, and the balance, if any, of the price or value of the impledged goods would be returned to the estate of Ramsay, the owner of them. But whatever may be the relative amount of the bill debt and the value of the goods impledged, the principle is the same; the subject of the pledge (in strict conformity with the contract of pledge) is applied exclusively to indemnify the pledgee and his estate for what he and it have been made to pay in respect of his liability as acceptor.

No doubt the bill-holder in such a case may obtain an incidental advantage from the security that the acceptor has over the drawer's goods. For the bankrupt acceptor and his estate being undoubtedly entitled to resist any demand by the drawer and his trustee to have back the goods till the last farthing of the debt for which he is liable be paid, the bill-holder, to the extent to which the acceptor is enabled to pay by working out his right of indemnity, has indirectly to some extent the benefit of the pledge.

But this result is brought about, not by virtue of any security held by the bill-holder, or of any active title in him to affect the goods impledged, but through the natural operation of the contract of pledge putting the bankrupt pledgee in a better position to meet his obligation as acceptor than he would have been if he had had no such power to indemnify himself at the expense of the drawer and pledger. The result thus brought about does not put the bill-holder in the position of a secured creditor of the bankrupt acceptor or of the bankrupt drawer, nor has he any preference in either bankruptcy. In ranking on the drawer's estate he ranks *pari passu* with the drawer's other unsecured creditors, and in ranking on the acceptor's estate he gets no more benefit from the proceeds of the impledged goods than the other unsecured creditors of the acceptor.

The result seems perfectly equitable. The subject of the pledge is made available to the estate and the creditors of the pledgee as an indemnity to the extent to which it and they are made to pay money to the bill-holder, in a way precisely corresponding to that in which the pledgee would have been entitled to work out his indemnity if he had remained solvent.

It has been contended that a hardship is thus inflicted on the estate and creditors of Ramsay, the drawer; because if, in conformity with the rule of *ex parte Waring*, the value of the goods impledged were paid over in slump to the bill-holder, his debt would be to that extent reduced, and he could then rank on Ramsay's estate for £12,000 only, in place of £16,000, and also because the mode proposed of dealing with the proceeds of the impledged goods gives to the general creditors of Saunders a dividend along with the Royal Bank on these proceeds at the expense of the creditors of Ramsay.

But the answer to both of these objections is obvious.

1. The payment to the Royal Bank of the £4000 (in accordance with the rule *ex parte Waring*), while it would partially satisfy the claim of the bank in other respects, would not prevent them from ranking on the estates of Ramsay and Saunders for their full debt of £16,000, to the effect of operating payment from all sources of not more than 20s. in the pound; for it is quite settled that in the case of co-obligants who are both bankrupt, the right of the creditor is to rank on each estate for the full debt, deducting only payments or recoveries made to account before bankruptcy, but not deducting payments or recoveries from any source after the bankruptcy, except only the produce or value of a security held by the creditor before bankruptcy over the

estate of the bankrupt—*Robertson* v. *The Bank of Scotland*, 2 S. 450; *Mein* v. *Sanders*, 2 S. 778; *Houston's Executors* v. *Speirs' Trustees*, 13 S. 945. Something was said about the bank, in consideration of recovering the price of the impledged goods, agreeing to deduct the £4000 from the amount of their debt, and ranking on both estates for £12,000 only. Parties, of course, by mutual agreement may make a law for themselves. We can only administer the law as we find it.

2. The supposed injustice to the creditors of Ramsay is purely imaginary. They are bound by the contract of pledge made by the bankrupt debtor to submit to the impledged goods being made available to relieve the pledgee of all payments made by him to account of the debt of the co-obligants, and the circumstance of the pledgee being bankrupt does not affect the extent or nature of the obligation of the pledger and his estate and creditors. The creditors of the pledgee get the benefit of the pledge because they come in his place, and are entitled through their trustee to his right of indemnity, and all other legal rights which belonged to the bankrupt debtor.

3. Handing over the £4000 to the Royal Bank would operate most inequitably against the estate and creditors of Saunders, because it would deprive them of all benefit of the contract of pledge, and leave them exposed to a ranking by the Royal Bank for the full debt of £16,000. At the same time, they could not have even a ranking in relief against the estate of the principal debtor Ramsay, because the bill-holders being entitled to a ranking for their full debt against that estate, to admit a claim of relief by the trustees of Saunders would involve a double ranking on one bankrupt estate for the same debt—See *Anderson* v. *Mackinnon*, 3 R. 608, and authorities there cited.

It is thus clear that the rule of *ex parte Waring* is not only inconsistent with the best settled rules and principles of our bankrupt law, but if adopted would be of no practical benefit to the creditors of the pledger, and inflict gross injustice on the creditors of the pledgee, and would confer a gratuitous benefit on the bill-holder to which he has no right either by law or contract.

The Lord Ordinary has, in the circumstances, preferred the trustees of Saunders, to enable them to work out their right of indemnity, so far as the produce of the goods will enable them to do so. In that judgment I concur without the slightest hesitation.

Lord Mure—I also am of opinion that the judgment of the Lord Ordinary ought to be adhered to, and substantially on the grounds stated in the note appended to the interlocutor, the operation of which has been so well explained by your Lordship, in an exposition of the law in which I entirely concur. The passage from Mr Bell's Commentaries which your Lordship has just read, in which he deals with the question of adjustment of claims in bankruptcy, in the case where, as here, both the drawers and acceptors of bills accepted as against goods impledged with the acceptors, who have become bankrupt, is to be found with slight alteration in all the later editions of the Commentaries, and since 1821, at all events, has been recognised as the mode in which such questions should in this country be adjusted. It is, in short, the rule of law in Scotland in such matters.

The main point, therefore, which we have here to dispose of is, whether this rule should now be displaced, and its operations superseded by what is called the rule in *ex parte Waring*, which appears to have been for about the same period in operation in England. I am of opinion that it ought not. That rule was, as I understand, introduced by Lord Eldon as an equitable remedy, with a view to obviate certain difficulties which had occurred in England in adjusting claims in bankruptcy in cases of this description, and which difficulties had arisen from some peculiarities in the working of the rules of the bankruptcy law of England.

As your Lordship has remarked, no such difficulties have been experienced in this country, and no injustice has been done in adjusting accounts in bankruptcies under the operation of the rule of the law of Scotland as laid down by Mr Bell, and I agree with your Lordship that the rule ought not to be displaced.

Lord Shand—The important question to be determined in this case is, whether the rule of *ex parte Waring*, which has been in force for upwards of half a century, and is now of constant application in favour of bill-holders in England, is to be introduced in this country? It is clear, and indeed not disputed, that on the facts of this case the law of England would give the Royal Bank, the bill-holders, the benefit of the sum realised for the goods which Messrs Saunders & Sons held to cover their acceptances to Ramsay, to be applied by the bank in part extinction of the £16,000 debt due to them on the bills in their hands drawn by Ramsay on Saunders & Sons, and accepted by them, and to this extent to reduce the ranking on both estates; and the bank and Ramsay's trustee, on the second alternative of his pleading, have maintained that the law in this country ought now to be declared or applied to that effect. It is argued that the rule in England rests on a clear principle of equity of general application in such circumstances as occur in this case; that if the rule be here applied, justice will be done between all the parties interested; that otherwise a dead lock has occurred which creates an inextricable difficulty, and that any other mode of solving the difficulty will do violence to equitable principles and produce injustice. If I had been of opinion that the views so maintained were sound, I should have come to the conclusion that although there is no trace of such a rule as is contended for in our law—and indeed some authority rather adverse to it—yet in the absence of any decision precluding the Court from taking that course, the rule should receive effect in this case, for it is the aim and end of the system of bankruptcy jurisprudence existing in this country to do justice and give effect to principles of equity in the distribution of bankrupt or insolvent estates. But after full consideration of the argument and of the numerous authorities, particularly in the law of England, which were cited, I have formed a clear opinion that the Court ought not here to introduce the rule contended for; that its application in this case would be inequitable, because it would be in violation of the agreement made between the parties; and that, on the contrary, the rule laid down by Professor Bell, the highest authority to which it is possible to appeal in such

questions as applicable to the circumstances which here occur, and which has no doubt been followed in innumerable instances, ought again to be followed now, with the result, as I believe, of carrying out the agreement into which the parties concerned entered, and at the same time—and indeed because of this—with the result also of doing complete justice.

The Royal Bank, in the second article of their condescendence and claim, averred that in point of fact it was understood and agreed among all concerned, viz. (1) the drawer, (2) the acceptors, and (3) the claimants, as indorsees of the bills in question, that the goods, consisting of stock and materials in the hands of the acceptors, should be specially appropriated to providing for the retirement of the bills, and held by the acceptors primarily in trust for that purpose; and their second plea-in-law founded on that statement is, that "the goods in question having been specially appropriated to the retirement of the bills in question by agreement among all concerned, including the claimants, the claimants are entitled to be ranked and preferred to the whole fund *in medio* in terms of their claim." It was quite open to the bank to stipulate as a condition of their discounting the bills that Saunders & Sons should hold the goods of Ramsay for the bank's behoof as well as their own, and that the goods should be sold and the proceeds applied to extinguish the bills, in default of payment on their reaching maturity, and this might have been agreed to by Ramsay and Saunders & Sons. It is clear, however, that the proof entirely fails to establish any such agreement or arrangement, and none of your Lordships have had any difficulty, more than I have had, in coming to this conclusion. It is true the bank-agent was made fully aware of the arrangement that subsisted between Ramsay, the bank's customer, and Saunders & Sons, and indeed he had the agreement between these parties for some time in his possession. But the purpose for which full information was given to him was not to make the bank a party to any arrangement giving them a security to cover the bills discounted, but merely to satisfy them, in accordance with a very common practice in the case of mercantile transactions, that the bills offered for discount represented real business, having been accepted wholly or in great part against goods placed in the hands of the acceptors as a security for their acceptances.

In these circumstances it is not possible to maintain successfully that the bank has any title or right to ask that the goods held by Saunders & Sons, or the proceeds, shall be handed over to them in extinction *pro tanto* of the bill debt due to them. It has never been said, so far as I am aware, that in such circumstances the bank can plead any equity giving them such a right or claim. To give such a right to the bank would simply be to give them the right to a security for which they never stipulated, and this, carrying out the same principle, might even be carried the length of giving them the right to a security of the existence of which they were entirely ignorant. Accordingly, Lord Eldon in *ex parte Waring* observed that "If these bill-holders are to have payment in preference to the other creditors, it must be by the effect of an equity between these two parties" (*i.e.*, between the drawers and acceptors), "rather than by any demand directly in their own right." While in the case of *Banner* v. *Johnston*, L.R. 5 E. and I. Apps. 174, Lord Cairns observed—"It has always been most carefully said that the right of the bill-holder under *ex parte Waring* is not a right founded on contract; it does not spring out of the contract, but it springs out of the necessities connected with the administration of the two insolvent estates."

If, then, the bank is to obtain the direct benefit of the goods or proceeds of the goods in question, it is not because they have any legal right or claim to it. They would obtain a resulting benefit entirely because in the settlement of accounts between the two insolvent estates the interests of the creditors on these estates respectively would be thereby secured. If the trustees on these respective estates, in the interests of the creditors whom they severally represent, should arrange to dispose of the proceeds of the goods between themselves in a way satisfactory to them in the fair discharge of their respective duties, it follows that the bank could not maintain any such direct claim to the proceeds of the goods as they here assert.

The question remains, Are they entitled to the resulting benefit asked because the trustee on the estate of Ramsay, the owner of the goods, demands that the proceeds of the goods should be applied at once to the part payment of the bill debt, so as to reduce the ranking on Ramsay's estate?

The answer to that question seems to me to depend entirely on the terms of the agreement on which the goods were placed in the hands of Saunders & Sons, and I think there is no difficulty in determining what these terms were. The acceptances of Saunders and his firm were given on the agreement that they should hold the goods in hand at anytime as a security in relief of their obligations, or, in other words, to indemnify them for any payments they might be required to make in respect of their acceptances. Although they became acceptors of the bills, it was quite understood and agreed, in a question between them and Ramsay, that Ramsay, the true debtor, should retire the bills at maturity—and in point of fact he did retire them till his bankruptcy occurred, when the bills then in the circle were dishonoured. The case is not one in which goods were put into the hands of the acceptor of a bill on the agreement that as he was to pay the bill at maturity he should in the meantime sell the goods and apply the proceeds to the purpose of meeting the bill. According to the agreement, it was not contemplated that the acceptors should have any payment to make, but if through the default of Ramsay, the drawer, Saunders & Sons, the acceptors, had to make such payment, then they were to be entitled to have recourse to their security for reimbursement.

This being the agreement of the parties, there can be no doubt as to what are their respective rights, or rather, as to what are the respective rights of their creditors, according to the law of Scotland, in the circumstances that have occurred. These rights are clearly stated in the passage from Bell's Commentaries which your Lordship has quoted (i. p. 294), and the same view is expressed in a subsequent part of his work, volume ii. p. 522.

In the first place, in a question between both

parties and the bank, they must equally submit to a ranking for the full amount of the bills, for the simple reason that they have each granted a personal obligation—the one as drawer and the other as acceptor for that amount. When, however, the bank obtains a ranking on each estate, it receives all that was stipulated for as the consideration of discounting the bills, viz., the full effect of the personal obligation of each of the parties. The drawer, the owner of the goods, can have no good reason for complaint against a ranking to the full extent, for he not only drew the bills for his own behoof, but actually received the money for them for which the bank ranks. The acceptors must submit to a ranking, because *ex facie* of the bills they are the primary obligants for their contents.

Again, as regards the acceptors, the goods they hold are not their property, and the trustee for their creditors is no more entitled to throw them into their general estate than they themselves were entitled to do so. He must keep the goods, in terms of the agreement on which they were obtained, as a security merely to indemnify the estate against such loss as may arise to it from the non-payment of the bills and the consequent ranking of the bank, but it seems to me to be clear that he is entitled to keep the goods and apply the proceeds to the last farthing, in so far as necessary, to recoup every payment of a dividend made to the bank. When no further payment can be demanded, he is bound to restore to the owner the remainder of the goods, or of the proceeds, in his hands. There is, I conceive, no difficulty in carrying this out practically in the way described by your Lordship, and shown in the illustrative states used on behalf of the trustee on Saunders & Sons' estate in the course of the argument; and though in this way and in these states, for the purpose of clearness, it is shown that after a payment of each of several dividends on the estate of Saunders & Sons, paid out of their own proper funds or estate, recourse is had to the proceeds of the security in order to recoup or reimburse the estate to the extent of the dividends paid to the bank, I do not doubt that a formula could be supplied by an accountant which would simplify the process, so as to admit of the sum to be drawn from the proceeds of the goods being ascertained at once, or, at all events, finally on the payment of a second dividend. It will be observed that in this way the creditors on the estate of Saunders & Sons get no benefit from the goods beyond the security for which their debtor stipulated, and to which he was entitled under his agreement with the owner of the goods. No part of the proceeds is taken possession of and distributed by them as part of the general estate of their debtors liable for their debts. What really occurs is this, that they are relieved of the effects of the bank's ranking in carrying off part of the general estate; for to the extent of the ranking the security is made available. And it is so made available, not by the operation of any special rule in bankruptcy, but simply and solely in carrying out to the letter and in the spirit the agreement under which their debtor got possession of a security or indemnity fund.

It follows, as regards the owner of the goods, or his creditors in bankruptcy in his place, that their only claim is for the balance of the proceeds of the goods remaining after the security has served its purpose of indemnifying the estate which held the goods in security. It is conceded that the owner or his creditors could only demand the delivery of the goods on securing total relief from the obligations in respect of which they were given over. The concession seems to me to lead directly to the inference that till such relief is obtained the security-holder cannot be required to part with the goods to the bill-holder or anyone else.

The trustee on Ramsay's estate claims that in order to give effect to a rule of equity the proceeds of the goods should be paid over to the bank in diminution of their ranking on both estates. The answer to the proposal is, in my opinion, conclusive that in asking this to be done the creditors of Saunders & Sons, who are precluded from ranking on the estate of Ramsay because of the rule against double ranking, are required to forego to a great extent the benefit of the agreement under which their debtors acquired the goods, viz., as an indemnity to them against all loss they might sustain through their being called on to pay the debt truly due by Ramsay. I confess I am unable to appreciate the reasoning which can justify this demand on any principle of equity.

I observe that in the case *in re Barnes' Banking Company, ex parte Joint Stock Discount Company*, 1875, L.R. 10 Ch. App. 200, the bill-holders went so far as to maintain that they should not even deduct the proceeds of securities of which they had got the benefit under the rule of *ex parte Waring*, but should be entitled to rank for their full debt without such deduction, but the opinion of the Master of the Rolls to a contrary effect was affirmed. That opinion was thus expressed:—"If I apply *ex parte Waring* for the benefit of the bill-holder, the bill-holder must take it, with the limitation and under the conditions expressed in the order *ex parte Waring*—that is to say, the security is to be considered as having been applied in the first instance. I have no disposition myself to give a bill-holder any further benefit than that he has already obtained under it." In that case Lord Justice Mellish observed—"I am entirely of the same opinion. It appears to me that if any other rule prevailed, we should be taking away from the persons who really owned the security the value of it. As it is, they only get it very imperfectly, but still to a certain extent they do get it by the diminution of the sum which may be proved against the estate. If it were not to be diminished, it might wholly, in some cases, be given to the bill-holder, and taken away from them altogether."

The opinion of this very learned Judge evidently was, that the effect of the rule *ex parte Waring* in that case was to give the security-holder a very imperfect benefit for his security. That would certainly be the result of applying the rule in this case, and I can see no good reason either in law or equity for giving the holders of the security an imperfect or partial right only to the benefit of the security, when the agreement of the parties was that they should have the benefit of the security to its full value.

There were three other matters upon which argument was offered, and upon each of which I desire to say a single word.

In the first place, it was maintained that what-

ever right in security Saunders & Sons had over these goods, they were bound to deliver over the goods to the trustee on Ramsay's estate, because Ramsay was the owner of that estate, and his trustee was, under the Bankrupt Statute, vested with the right of the whole creditors of that estate, wherever situated. I agree with the Lord Ordinary in thinking, that although, no doubt, the trustee, by virtue of the title he acquired under the Bankrupt Statute, is in the general case entitled to ingather the whole of the bankrupt's property, the right conferred on him is subject to such securities as existed on that estate, and any goods or real security, such as we have here—for in point of fact these goods are a real security pledged to a creditor who has made advances or undertaken an obligation on the security of that pledge,—I cannot read that as entitling the trustee to take away that pledge, over which the creditor has been secured in his advance.

In the next place, it was maintained that Saunders & Sons in this case were not entitled to hold the goods in question for so large a sum as the amount of the acceptances for which they were pledged, in terms of the agreement under which the advance was made, and contend that they were only entitled to retain goods to the extent of three-fourths of the market value under the agreement. It appears to me that the Lord Ordinary is right in the view he takes of articles 8 and 9 of this agreement—that it was clearly stipulated that whatever obligation Messrs Saunders & Sons undertook should be covered by any goods belonging to Ramsay that were to be in their hands.

A third point was also made the subject of argument on behalf of Ramsay's trustee, arising in this way:—It was said that although Saunders & Sons had accepted bills, which I may call accommodation bills, in favour of Ramsay to the extent of £16,000, yet, on the other hand, it appears upon the proof that Ramsay had accepted accommodation bills in favour of Saunders & Sons to the amount of £10,600, and that on that account the trustee on Saunders & Sons' estate should only be held to be entitled to retain goods of the value of the difference between these two sums, and that goods should not be retained to the full value of £16,000, because Saunders & Sons had themselves obtained accommodation bills to the extent of £10,600. I refrain from expressing my opinion on this point, because I do not think it is raised under this action. These Commercial Bank bills for £10,600 were expressly mentioned in the condescendence of the fund *in medio*, article 6th; but if we turn to the claim which is made on behalf of Mr Myles (Ramsay's trustee) I find the claimant adopts articles 1 to 4 inclusive, and also article 9 of the condescendence annexed to the summons expressly—therefore, and I must assume designedly, omitting all reference to the 6th article of the condescendence of the fund *in medio*, which is the only article which throws light on the matter at all; and turning again to the pleas of Mr Myles, I find no indication of any point being intended to be raised in regard to it, and therefore it is inconsistent to propose that the Court should give this point or question—which was neither raised in the record nor alluded to in the proof, and as to which a good deal of light might have been shed — any consideration at all. And upon that ground, while I agree with your Lordships in thinking that the interlocutor of the Lord Ordinary should be adhered to, I expressly refrain from stating my opinion on this third point.

The Lords adhered.

Counsel for Royal Bank—Asher—A. G. Murray. Agents—Dundas & Wilson, C.S.

Counsel for Ramsay's Trustee—R. Johnstone—Macfarlane. Agent—J. Smith Clark, S.S.C.

Counsel for Saunders' Trustees—D.-F. Kinnear, Q.C.—H. Johnston. [Agents—Morton, Neilson, & Smart, W.S.

Thursday, November 3.

OUTER HOUSE.

[Junior Lord Ordinary.

THOMSON AND OTHERS, PETITIONERS.

Curator Bonis—Minor Pubes.

In a petition presented by three minors who had attained puberty, with consent of their mother, praying for the appointment of a *curator bonis* to themselves, the Court made the appointment.

This was an application presented by William Malcolm Thomson, his brother and sister, whose father was dead, and who were all in minority but above pupillarity, with the concurrence and consent of their mother and paternal aunts, praying for the appointment of a *curator bonis* to themselves. The petitioners were unable to find any person who would act as curator to them in a process of choosing curators. They had claims upon the trust estate of one of the next-of-kin of their deceased father, but the trustees declined to pay them the money until a guardian was lawfully appointed to them and their estate, and this application therefore became necessary.

The Lord Ordinary (M'Laren) appointed John Wilson, C.A., Glasgow, as craved.

Counsel for Petitioners — R. V. Campbell. Agents—Campbell & Smith, S.S.C.

Wednesday, November 16.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

LITTLE AND OTHERS *v.* BURNS AND ANOTHER.

Reparation—Damages—Ship—Collision—Fault.

A collision took place on the Clyde between two steam vessels, the "Owl" going down, and the "Ariadne" going up the river. The weather was foggy. On sighting one another the "Owl" had ported her helm and reversed engines, in terms of the Admiralty regulations (arts. 13 and 16); the "Ariadne" had kept on the starboard tack, on which she was at the time, and had not slackened speed. In the collision which then took place the