of the tenant, appears to have been had. The opinion of counsel was not taken, and the defender, assuming the law to be in his favour, as he wished it, proceeded at his own hand to take from the pursuer the farm which he legally possessed. Therefore the defender is subject to the inconveniences which the law has attached to possession in *mala fide*. If he did not know what were his powers, and the mode of enforcing them, he ought to have known them, or, at all events, he ought to have taken all the means within his power of ascertaining what were his rights before he resorted to the step he did. Therefore, if it were necessary in this action to pronounce judgment upon these counter claims arising from the cultivation of the farm by Carswell, the Lord Ordinary would be prepared to repel them. The pursuer thus receives all the benefit of the labour and expenditure made by Carswell, and thus he is most amply recompensed for any general damage or annoyance arising out of the invasion of his farm."

The pursuer reclaimed, and argued—A legal wrong had been done to the pursuer, and for that he was entitled to damages even if the damages were only nominal.

Authority—*Webster* v. *Cramond Iron Company*, June 4, 1875, 2 R. 752.

The Court, without calling on counsel for the defender, unanimously adhered to the interlocutor of the Lord Ordinary.

Counsel for Pursuer—Campbell Smith—Rhind. Agent—William Officer, S.S.C.
Counsel for Defender — Mackay — Dundas. Agents—Dundas & Wilson, C.S.

Friday, February 10.

FIRST DIVISION.

[Sheriff-Substitute of Lanarkshire.

STEWART *v.* FERGUSON (YUILL'S TRUSTEE).

Bankrupt—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict c.* 79), *sec.* 65—*Conveyancing (Scotland) Act* 1874 (37 *and* 38 *Vict. c.* 94), *sec.* 47—*Heritable Security—Transmission of Personal Obligation — Valuing and Deducting Security.*

A creditor claiming in a sequestration is not required to value and deduct any security except a security over what is the estate of the bankrupt at the date of the sequestration.

A received £9000 from B, granting him in return a bond and disposition in security over heritable subjects. Thereafter A disponed the said subjects to C, the disposition declaring that C bound and obliged himself, and his heirs, &c., to pay and implement the foresaid "bond and disposition in security, and whole personal obligations therein contained," and so "free and relieve the said A of the same, so that the said bond and disposition in security, together with all personal obligations to pay principal, interest, and penalty therein contained, may transmit against the said C and his foresaids, in terms of the Conveyancing (Scotland) Act 1874, from and after the said term of entry." A became bankrupt, and B claimed to rank on his sequestrated estate for a dividend on his debt of £9000. *Held*, on an appeal against a deliverance by A's trustee, (1) that A's personal obligation to B for the debt was not discharged by his disposition to C, and (2) that B was not bound to "value and deduct" the security in question in ranking on A's estate, that security not being over "any part of the estate of the bankrupt."

By bond and disposition in security, dated 11th and recorded 13th November 1876, John Clark Yuill, wholesale saddlers' ironmonger, Glasgow, acknowledged to have received from the Principal and Professors of the University and College of Glasgow the sum of £9000, which sum he bound himself, his heirs and executors whomsoever, without the necessity of discussing them in their order, to repay with interest and penalty as therein written, and in security of the said personal obligation he disponed in their favour certain heritable subjects belonging to him in Glasgow.

By disposition, dated in May and recorded in June 1877, the said John Clark Yuill, considering that he sold the subjects thereinafter disponed to A. M. Glass, merchant in Glasgow, at the price of £12,200, and the said Glass, without obtaining a title thereto, resold the same to David Horne, builder in Glasgow, at the price of £14,500; and considering that Horne had paid to Yuill £3200, and to Glass £2300, and that the remainder, £9000, was contained in the bond and disposition in security by Yuill in favour of the University of Glasgow, above recited, "which bond and disposition in security, and whole personal obligations therein contained, the said David Horne has become bound, as by acceptance hereof he agrees and binds himself, and his heirs, executors, and successors, to pay and implement, from and after the term of entry after mentioned, and so free and relieve me the said John Clark Yuill of the same, so that the said bond and disposition in security, together with all personal obligations to pay principal, interest, and penalty therein contained, may transmit against the said David Horne and his foresaids, in terms of the Conveyancing (Scotland) Act 1874, as from and after the said term of entry;" therefore Yuill, with consent of Glass, sold and disponed to Horne the said subjects over which security had been created by the previous deed.

Yuill having subsequently become insolvent, and his estates sequestrated, a claim was lodged in his sequestration for William Stewart, D.D., as representing the University of Glasgow, to be ranked and draw a dividend for a debt of £9465, 7s. 8d., in respect of the said bond and disposition in security.

The Conveyancing (Scotland) Act 1874 enacts (section 47) that "Subject to the limitation hereinbefore provided as to the liability of an heir for the debts of his ancestor, an heritable security for money duly constituted upon an estate in land, shall, together with any personal obligation to pay principal, interest, and penalty contained in the deed or instrument whereby the security is constituted, transmit against any person taking such estate by succession, gift, or

bequest, or by conveyance, when an agreement to that effect appears *in gremio* of the conveyance, and shall be a burden upon his title in the same manner as it was upon that of his ancestor or author, without the necessity of a bond of corroboration or other deed of procedure; and the personal obligation may be enforced against such person by summary diligence or otherwise, in the same manner as against the original debtor." . . . .

The Bankruptcy (Scotland) 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; and the trustee, with consent of the commissioners, shall be entitled to a conveyance or assignation of such security at the expense of the estate, on payment of the value so specified out of the first of the common fund, or to reserve to such creditor the full benefit of such security, and in either case the creditor shall be ranked for and receive a dividend on the said balance, and no more, without prejudice to the amount of his debt in other respects."

The trustee rejected the claim made for the University "in respect the claimants have not, for the purpose of ranking, valued and deducted the property . . . . held by them in security, and have not exhausted or discussed the said property, and David Horne, builder, Glasgow, their true and ultimate obligant in the premises."

Against this deliverance the University appealed to the Sheriff-Substitute (ERSKINE MURRAY), who recalled the deliverance of the trustee, and ordained him to admit the claimants to a ranking in terms of their claim.

He added the following note:—"The bankrupt Yuill in 1876 borrowed from the University of Glasgow (for whom the appellant Dr Stewart acts as Clerk to the Senatus) £9000, and granted a bond and disposition in respect thereof over certain house property at the corner of Bath Street and Buchanan Street. In 1877 he sold the property to one Glass, who again, without obtaining a title, sold to David Horne, in favour of whom, in June 1877, the bankrupt granted the disposition, containing a clause by which the personal obligation, as well as the heritable debt, is taken over by Horne, and declared to 'transmit' to him in terms of the Conveyancing Act of 1874. No consent was given by the University to this transaction, and indeed it appears to have been done without their knowledge. Yuill having now become bankrupt, the University through Dr Stewart has claimed on his estate for the amount of the personal obligation in the bond and disposition, with interest. The trustee has rejected their claim, in respect the appellant has not valued and deducted the property in question, held by them in security, and has not exhausted or discussed the said property and David Horne.

"The rejection is under sec. 65 of the Bankruptcy (Act 19 and 20 Vict. c. 79), which provides, that to entitle any creditor who holds a security over any part of *the estate of the bankrupt*, to be ranked, he shall on oath value and deduct the amount, so that the creditor is only to get a dividend on the balance. It is not the holding of any security that obliges the creditor to value it, —it must be a security over the estate of the bankrupt. Now, at the date of the bond and disposition by Yuill to the University in 1876, the security was undoubtedly one over part of Yuill's estate, but at the date of Yuill's sequestration the subjects had ceased to be Yuill's; they had been formally and really disponed to Horne; and therefore at the date of Yuill's sequestration the security was no longer—in any ordinary sense of the word—a security over a part of Yuill's estate. Still the respondent contends that this must, nevertheless, be held to fall under the terms of the Act.

"The three main questions that arise are—(1) Does the personal obligation by the bankrupt still subsist in spite of his disposition to Horne and the clause of transmission therein contained? (2) If it still subsists, is the University bound to discuss Horne first as if Yuill were only a caution? and (3) If it subsists, and the University is not bound to discuss Horne first, are they bound to value and deduct the amount of the security and only rank on the balance?

"The first and second questions depend upon the meaning to be attributed to the Act of 1874 when it says that the personal obligation is to 'transmit'

"It appears to the Sheriff-Substitute that it is impossible that the Legislature meant to enact that the granter of a personal obligation could escape liability under it by simply getting anybody —it may be a man of straw—to undertake the liability in his place. All that can be meant is just that when a party acquires the heritable property over which a bond and disposition in security has been given by a disposition which contains a declaration that the personal obligation in the bond is to 'transmit' to the purchaser, the purchaser agrees to undertake responsibility for the personal obligation, but then that it is only in a question with the seller and his representatives.

"It cannot relieve the seller in a question with a third party, the grantee of the bond and disposition in security, unless he became a consenter to the transmission, and discharged the original borrower. It just gives the seller relief against the purchaser for anything he may have to pay under his personal obligation. No doubt it also provides that the personal obligation may be enforced against the purchaser in the same manner as against the original debtor. This may, perhaps, only refer to the case where the grantee of the bond is a party to the transmission, for except in that case it seems difficult for the grantee of the bond to be able to avail himself of the transmission. But even if the scope of the transmission is wider, it is a privilege given to the grantee of the bond, from which it cannot be inferred that behind his back an act may be done greatly to his prejudice. So the College may claim, in the first instance, against Yuill's estate if they please.

"The first two questions must therefore be decided in favour of the appellant. But the third is more difficult. No doubt the property over which the security exists forms at present no part of the estate of the bankrupt, but can it be held that because at the date of the bond it did form part of the bankrupt's estate it is still so in the eyes of the law, and for the decision of such a case?

"There are several cases more or less bearing on the present. In *M'Clelland* v. *Bank of Scotland*, 19 D. 574, Feb. 27, 1857, a copartnery granted a

cash-credit bond to a bank, and two partners gave the bank in security absolute dispositions (with back-letters) of their own heritable property, and after the death of the original partners the new firm purchased their estate, payable by instalments, with an obligation on their trustees to grant conveyances when the whole was paid. The bank were no parties to the agreement. One instalment was paid when the new company became bankrupt. The bank claimed on the firm's estate for the sum due under the cash-credit. The trustee in the sequestration objected that they should have valued and deducted their security. It was held that the estate as originally conveyed to the bank formed a collateral security, and was separate from and independent of the company estate, and that the partners could not by a transaction to which the bank was not a party injure the position of advantage in which the bank was originally placed, and that therefore the security was not one over the estates of the bankrupt under sec. 37 of 2 and 3 Vict, c 41, and that therefore the bank was not bound to deduct the security.

"The principle thus established was that the granter of a security over a property could not by transferring that property to another prejudice the position of the grantee of the security, and that therefore the transfer was ineffectual in so far as it injured the rights of the grantee. In other respects it might be effectual.

"It was also remarked in that case by the Lord Ordinary that the expression 'estate of the bankrupt' appears to mean nothing more than the estates carried by the sequestration, and available as a fund of division among the creditors, and that no one should be admitted to claim in the sequestration who holds a security over the property of the bankrupt which, but for such security, would go to the trustee for general distribution, without valuing and deducting such security. This view was also adopted by the majority in the Inner House.

"In the case of the *British Linen Company* v. *Gourlay*, March 13, 1877 (4 R. 651), A, the owners of certain goods, got an advance thereon from B, made out the bills of lading in his name, and authorised him to pledge the goods, with liability to account for any surplus. B discounted the bills with the bank, and gave the bills of lading in security. Both A and B failed. The bank claimed in respect of the bills on A's estate. The trustee called upon them to value and deduct the security. It was held that the bank was not bound to do so, as in a question with the bank the goods must be held the property of B.

"This was just a confirmation of the doctrine in *M'Clelland*; for it was held that the bank, receiving as security for bills by A property apparently belonging to B, were not bound to deduct it in claiming on A's estate. On the face of the documents, B's title to the property was absolute.

"In the *Royal Bank* v. *Purdom*, 26th October, 1877 (15 Scot. Law Rep. 13), which was decided by Lord Ordinary Adam and acquiesced in, a bank gave a cash-credit to a firm, and got in security a disposition to subjects *ex facie* of the titles the absolute property of one of the partners. When the firm was sequestrated, the bank claimed, and the trustee called upon the bank to deduct the value of the property forming the security. It was held that the rights of parties fell to be determined by the terms of the cash credit bond, which specified the particular security which the appellants agreed to take and receive; and (2) that it was immaterial whether the bank knew that the partner only held in trust for the firm. In his note Lord Adam remarks that as the company consented to the subjects being disponed in security by a partner, as apparently his absolute property, they, or their trustees as representing them, cannot object to this agreement receiving effect. To do so would be to diminish the security intended to be given at the time by all parties concerned. He adds—'The subjects in question were not at the date of the sequestration, in the sense of the Bankruptcy Act, any part of the estate of the bankrupts. They were then vested in A. J. Donaldson; the right of the trustee was to demand from him a conveyance of the subjects vested in him, but subject only to all rights and burdens, &c., on it, of which this was one.'

"This, therefore, was still a case where the security was over the estate of a third party, and not either in form or in reality over the estate of the bankrupt.

"In all the cases it was held that after a security is granted nothing can be done without consent of the grantee to lessen the security. But it does not follow that the granter may not do something which may increase the value of the security. He may build valuable buildings on the property, or increase the value of the security in many other ways. It seems, therefore, in principle, that there is no bar to his increasing the value of the security by disposing of the property for his own purposes to someone else. He is thereby not lessening his estate, for he is getting a *quid pro quo*, the price of the land. His right course is to get the grantee of the bond to consent to the transaction and to discharge him, which can probably be easily got if the purchaser's personal obligation is as good as his own. If it is not, and if that is the reason why he does try to get such a consent and discharge, this only shows how iniquitous it would be if the original debtor were enabled to get rid of his liability by simply selling the subject of the security to another.

"Altogether, the Sheriff-Substitute sees no reason for holding that by a presumption of law (contrary to the fact) the property in question must be dealt with as still part of the bankrupt's estate. In both *M'Clelland's* and *Purdom's* cases the property formed, as here, no part of the sequestrated estate (though perhaps in *Purdom's* it may originally have done so), and it was held that for this reason, and also because the grantee of the bond ought not to be prejudiced, he was not bound to deduct the security. In the *British Linen Bank* case, though there might be questions as to the real ownership, it was held that as parties had agreed to the property being held B's, the grantee could not be prejudiced by its being held to be A's. But, as above remarked, this only shows that the grantee of the obligation cannot be prejudiced behind his back, but not that he cannot be benefited.

"The bond and disposition to the College was only a burden on the property. It noway affected Yuill's right to dispone the property subject to the burden. By the disposition to Horne the

property became part of Horne's estate. It cannot be held any part of Yuill's estate, which would otherwise form a fund for division among Yuill's creditors. So Yuill's creditors are noway wronged by the security not being deducted, and it is a fallacy to argue that because a presumption beyond the fact may be adopted to prevent prejudice to the grantee of a security through a transaction to which he is not a party, it must also be adopted to prevent his getting any advantage by a similar transaction."

The trustee appealed to the Court of Session, and argued — (1) By the 47th section of the Conveyancing Act, the terms of the disposition of 1877 discharged Yuill's personal obligation to the University, and transmitted it to Horne. Yuill's estate was therefore only liable for the debt after Horne had been discussed. See *dicta* in *Carrick and Others* v. *Rodger, Watt, & Paul*, December 3, 1881, 19 Scot. Law Rep. 179. (2) Under the 65th section of the Bankruptcy Act the University could not rank on Yuill's estate without valuing and deducting this security, which undoubtedly at the time of the contract between them was "over part of the estate of the bankrupt." The radical right was still in the bankrupt. See Lord Shand's opinion in *Gourlay's* case, quoted by the Sheriff-Substitute, and the English case of *Brett*, referred to in his Lordship's opinion. This particular creditor was not entitled to take benefit, to the prejudice of the others, from an accidental and unforeseen advantage happening since the original contract. That would be obviously inequitable, and there was nothing in the statute to warrant it.

The Court having intimated that they desired no reply to the appellant's first point, the respondent replied only on the second branch, and argued—The University were not bound to value and deduct this security. It was over "no part of the bankrupt's estate." These words had been judicially construed in *M'Clelland's* and the other cases cited by the Sheriff-Substitute. The appellant's contention would come to this, that the University was to suffer without any remedy in consequence of a change made by Yuill as to the security for their debt, that change being made without their knowledge or authority. The security was now over a third party's estate. The real right of ownership in the property was in Horne. The debtor had no doubt slightly increased the creditor's security by the addition of Horne's liability, but there was no rule of law against his doing so. The question was not one of equity, but depended on the construction of a statutory provision.

At advising—

Lord President—This question has arisen in the sequestration of the estate of John Clark Yuill, wholesale saddlers' ironmonger, Glasgow, and the creditor who has appealed against a deliverance of the trustee in that sequestration is Dr Stewart, as representing the University of Glasgow, in whose favour the bankrupt granted a bond and disposition in security for £9000 in the year 1876, by which he acknowledged receipt of the money, and conveyed in security to the University certain heritable subjects in Glasgow. In 1877 the bankrupt sold the property which formed this security, and by disposition dated in May of that year, on the narrative that he had sold the said property to Adam Morton Glass, merchant in Glasgow, at the price of £12,200, and that Glass, without obtaining a title thereto, had resold the same to David Horne, builder in Glasgow, at the price of £14,500, the bankrupt conveyed the said subjects, heritably and irredeemably, to the said David Horne. That was long before Yuill became insolvent and was sequestrated, but the trustee has notwithstanding rejected the claim of the creditor here, because he has not valued and deducted from his claim the property forming the security I have mentioned, and the question for our decision is, whether the security is or is not, within the meaning of the 65th section of the Bankruptcy Act of 1856, a security over "any part of the estate of the bankrupt." The 65th section of that Act provides—[*reads section as quoted above*]. Now, I should have thought that the matter was very clear on these words of the statute, but as doubt has been entertained by the parties, and the case has been anxiously argued before us, I shall state my views more at large than I should otherwise have done. The first inquiry which naturally occurs to one is, what is the common law which this clause of the statute was intended to rectify? About that there is no doubt, because at common law where a debtor becomes insolvent, and a competition arises among various classes of his creditors, there are well settled rules of ranking. These rules may be stated shortly as follows—First, a creditor who holds personal or real securities other than the bankrupt and his estate is entitled so to use his various securities as to make them all available to the fullest extent so as to operate payment in full, but no more. Second, if co-obligants, whether as joint debtors or as principal and cautioners bound to the creditor, are all bankrupt, he is entitled to rank on the estate of each for the full amount of his debt so as to operate full payment out of the combined rankings. Third, if a creditor has, in addition to the personal obligation of his debtor, a security over some subject not belonging to his debtor, he is entitled to realise the full value of his security, and (supposing that does not satisfy his claim) to rank on his debtor's estate for the full amount of his debt. And fourth, it is important to observe that it makes no difference though the real security is over a part of the insolvent debtor's estate; he may exhaust that security, and rank, not for the balance, but for the full amount of his debt, on the remainder of the insolvent's estate *pari passu* with the unsecured creditors, so as to operate full payment of his debt. These rules are contained and have been acted on in a series of cases which it would be vain here to cite, but I may refer to two as affording excellent examples of the last of the rules which I have just stated, viz., that in common law ranking when a creditor holds a security over part of the insolvent debtor's estate he is not bound to value and deduct that security, but is entitled to exhaust it first, and then to rank along with other unsecured creditors for the full amount of his claim so as to operate full payment of his debt. The first of these cases was *Boswell* v. *Ayrshire Banking Company*, January 15, 1841, 3 D. 352, which occurred in a process of ranking and sale, and the other was a multiplepoinding—*Kirkaldy* v. *Middleton*, December 8, 1841, 4 D. 202—in which the same principle was laid down,

and in which Lord Fullarton (p. 207) gave a most excellent exposition of the common law rules of ranking In the same way Professor Bell in his Commentaries, vol. ii. p. 526 (p. 419 of 7th edition), expresses himself thus – "It is of some co sequence to determine what shall be the effect in bankruptcy of a creditor secured over a particular estate drawing or being entitled to draw a large part of his debt out of that estate preferably to the personal creditors when he comes to demand payment of what remains still due. It is the right of a creditor by the common law of Scotland to demand payment of his whole debt under the obligation of his debtor, and this right does not bar him from claiming the full benefit of any pledge or security which he may hold, provided from both sources he does not derive more than full payment of his debt."

Now, the next question is, to what extent this common law has been altered or abrogated by statute? It is only in sequestrations, of course, that any change has been introduced. The Bankruptcy Act of 1856 contains two clauses on the matter, and these are substantially the same as the corresponding provisions of the previous Acts. The 60th section deals with the valuation and deduction of securities for purposes of voting, and the 65th section with the valuation and deduction of securities with a view to drawing dividends. As to the first of these sections, its object is to give to a creditor who claims to vote in a sequestration just that legitimate amount of interest and influence in the administration of the bankrupt estate which he truly has, looking to the nature of the security which he holds for his debt. But the principle of the 65th section is that the common law right of the creditor to abstract a part of what would be the divisible fund, and then to rank on what he has left for his whole debt, should be limited by requiring him to deduct from his debt the value or proceeds of the portion abstracted and rank for the balance. But if he abstracts no portion of the divisible fund the principle of this section does not apply. I think the meaning and intention of the 65th section are clear from a consideration of its terms, but the case of *M'Clelland*, which was referred to both in the Sheriff-Substitute's note and in the argument before us, makes them clearer still. The Lord Ordinary in that case was Lord Mackenzie (the second), than whom we have no higher authority on the law of bankruptcy. He says in his note (19 D. 578)—"The expression 'estate of the bankrupt' in the 37th section" (which is the section of the older Act which corresponds to section 65 of the Act of 1856) "appears to the Lord Ordinary to mean nothing more than the estate carried by the sequestration, and available as a fund of division among the creditors. He thinks the principle of the enactment is that no-one should be admitted to claim in the sequestration who holds a security over the property of the bankrupt, which but for such security would go to the trustee for general distribution, without valuing or deducting such security from his debt. Here the appellants are not in that situation. They hold no security over any property belonging to the bankrupt firm, of whom Angus M'Phail is the sole partner. For the heritable subjects conveyed to them in security belonged to the two elder M'Phails, and the radical right subject to that security remains with their representatives, who in this question may justly be regarded as cautioners to the bank for the debt of the bankrupts." And in like manner the case was dealt with in the Inner House. Thus Lord Ivory in his opinion says (p. 582) – "The estate over which the security is constituted is not in the statutory sense the estate of the bankrupt, and therefore, whether upon the grounds which have been explained by the Lord Ordinary, and still further illustrated by your Lordship (the Lord President), or upon the larger ground, as to the manner in which this debt was originally constituted, I agree entirely in your Lordship's conclusions." Lord Curriehill states the matter thus (p. 585)—"In order to solve this question we must ascertain whether or not the subjects of these securities, if they were free from these and similar burdens, would be a part of the sequestrated estate, and as such part of the fund of division among the creditors? If this be the case, these subjects are part of the bankrupt's estate in the meaning of that enactment, the object of which is only to give practical effect to the equitable principle that a creditor on a bankrupt estate, who in virtue of a preferable security over one portion of that estate is entitled to appropriate the same to himself exclusively towards satisfying the debt so secured, shall not likewise get a dividend on the portion of the debt so to be satisfied out of the remainder of the estate. It matters not whether or not a bankrupt's title may have been feudalised, or whether his right to the subjects may have been real or personal. If the subject, even although not burdened with securities for his debts, would not have been alienable by him nor attachable by his creditors (such as a subject held by him in trust or the fee of an entailed estate), it would not be part of his estate in the meaning of this enactment, although it should be vested in him by a complete feudal title. And, on the other hand, the subject, if his right thereto was alienable by him or attachable by his creditors, is transmitted to the trustee as part of the divisible fund by the conveyance and adjudication implied in the sequestration, and is part of the bankrupt's estate in the meaning of the statute, whatever may have been the form or nature of his title at the date of the sequestration." And finally, Lord Deas expresses his entire concurrence in the Lord Ordinary's note, as well as in his interlocutor.

Now, if the meaning of the 65th section of the Bankrupt Act be as I have stated, I think it puts an end to the contention of the trustee in this action. Nor does any difficulty arise from the terms of the 47th section of the Conveyancing Act of 1874. That section no doubt provides that—[*reads as above quoted*]. But that does not extinguish the obligation of the original debtor, but leaves things in substantially the same condition as if before the passing of the 1874 Act the purchaser had granted a bond of corroboration without any discharge of the personal obligation of the debtor in the original bond and disposition in security. As to the policy of the Act it is idle to inquire, but such is its effect. The creditor gets an additional obligant, and so in this case the University has got the security, not only of the bankrupt and his estate, but also the personal obligation of Horne in addition to the real security on the heritable property. But that does not affect the question whether the bankrupt

has sold for onerous considerations a part of his estate to a third party. If the security is not "over any part of the bankrupt's estate," then we are not here within the 65th section of the Act, and the creditor is not bound to value and deduct it in ranking for his debt in the bankrupt's sequestration. I am clearly for affirming the judgment of the Sheriff-Substitute in this case.

Lord Deas—Your Lordship has gone so fully into the details of this case that I need not take up time by resuming them. But the substance of it is this, that the University of Glasgow claims to be ranked on the bankrupt estate of Mr Yuill for a debt of £9000, and the contention on the other side is that they must value and deduct the amount of a security which was originally made over to them by the bankrupt. That contention is based, in the first place, on the terms of the 47th section of the Conveyancing Act of 1874, in virtue of which it is said that the personal obligation of the original debtor has been entirely transmitted by a clause in the disposition in his favour to the purchaser Horne. As regards that matter, I am very clearly of opinion with your Lordship that the whole effect of the transaction is to place things in the same position as if a bond of corroboration had been granted by the purchaser to save the necessity of doing that in fact. But then it is said further that under the 65th section of the Bankruptcy Act 1856 a statutory obligation rests on this creditor to value and deduct this security. That depends on whether it is or is not "a security over any part of the estate of the bankrupt." I am clearly of opinion that the statute was not intended to depend on technicalities of title, and although it was contended for the appellant that the real property was technically still in the bankrupt I think the property of the subjects which form this security is not really with the bankrupt, but with Horne, his disponee, and that there is no fair ground for that contention of the appellant. I therefore agree with your Lordship in thinking that the judgment of the Sheriff-Substitute ought to be affirmed.

Lord Mure—I agree with your Lordships. I think the trustee here has made a mistake by attempting to extend the terms of the 65th section of the Act beyond the construction which the words authorise. If we were to decide this question for the first time, and with no authority to guide us, I think there would be a good deal of equity in the view taken by the trustee; but this is purely a statutory matter, regulated by the provisions of this Act, and of the various Bankruptcy Statutes which existed before that of 1856 with regard to deduction for the purpose of voting, and deduction for drawing dividends. We have the terms of the 65th section to guide us, and they are substantially the same as those of the 37th section of the Act of 1839. When these statutes were passed, the common law rule was clear, and we must hold that still to be binding except in so far as it may have been modified by statutory provision. I think we can have no better exposition of the common law rule than that given by Lord Fullarton in the case of *Kirkaldy* v. *Middleton*, Dec. 8, 1841, 4 D. 207, where his Lordship states the law very fully and clearly, and shows the distinction between deduction in a sequestration and those in competitions of creditors at common law. Reference was made in the argument to the different phraseology of the 60th and 65th sections of the Act of 1856, and I notice that the same difference exists between the 34th and 37th sections, which are the corresponding sections of the earlier statute. Dealing with that matter, Mr Bell, in his Commentaries on the statutes, notes that distinction, and when treating of sec. 37 of the Act of 1839 he says in a note, p. 148—"Mark the difference here from the restriction on the right to vote above, secs. 34 and 35. The creditor is entitled to a full dividend from all co-obligants and collateral securities, without a deduction in ranking, but must deduct the security which he holds over the bankrupt's estate. This rule has long been established in sequestration law, though still the rule is different in other cases." That is the notandum of Professor Bell on this section of the 1839 Act, published very soon after the statute, and I think we should follow the same principle in this case.

Lord Shand—I agree with your Lordships in thinking that the deliverance of the Sheriff-Substitute in this case is right. The first point maintained for the appellant, and on which your Lordships have not thought it necessary to ask the respondent for any argument, was that one of the effects of the Conveyancing Act of 1874 was that the bankrupt should be relieved from his personal obligation in the bond and disposition in security, because the property which constituted the security had been conveyed by him to another person. I am quite clearly of opinion that the sole effect of the transaction was to put the party receiving the property substantially in the position of having granted a bond of corroboration without the original debtor of his obligation. The result of the appellant's view would be that the debtor originally bound by the personal obligation in the case supposed would be entirely freed from it by an act of his own, and without the consent of his creditors. Now, that result could, I think, be sustained only upon the sharpest and most direct authority of statute, and I am clearly of opinion that there is none such. What does result is, that the person who takes the property becomes a co-obligant for the amount of the original obligation.

The second point turns on the construction of the Bankrupt Statutes, and of course there is nothing clearer than that at common law a creditor having the personal obligation of his debtor for the full amount of his debt may use that to the full, though he also holds a security which will enable him to take benefit more than the other creditors. He has the debtor's personal obligation for the full amount of the debt, and is entitled to use it. So far as the statute restricts this right, he is of course bound to give effect to such restrictions, but on looking at the 65th section of the Act we find the provision is that the creditor is to value and deduct any security he may hold over "any part of the estate of the bankrupt," and it seems to me that the purpose of that enactment was just to enable the creditors of the bankrupt to whose benefit such security would inure if discharged to have it valued and deducted in a question with them. I think the only question we have to decide here

is, not whether this property was at one time that of the bankrupt, or was so at the date when the security was given, but whether when the bankruptcy occurred it was or was not the property of the bankrupt? If it was not—if it had been transferred from him prior to that date—I think there is no room for applying the 65th section here; and this view seems to me to become still clearer on a consideration of the latter portion of that section, as to the trustee's right to obtain a conveyance of the security. I have only further to say that I think there is great force in the ingenious reasoning of the Solicitor-General, that this section must be applied even where the property in the security has been changed since the date of the original contract, but that not because there was any contract between the parties all along that a deduction should be made. The deduction is a rule in bankruptcy, not a question of contract at all. And in regard to the case of *M'Clelland*, in so far as there are indications there that one of the grounds of judgment was that "the partners could not thereafter, by any transaction to which the bank was not a party, defeat the position of advantage in which the bank were originally placed," I confess I think it a matter for very serious consideration. I observe that view is put as a secondary ground of their judgment both by the Lord President and Lord Ivory, but it appears to me very doubtful whether we should in a case like this look at any other question than this—Is the property or is it not that of the bankrupt at present? It seems to me very doubtful whether an implied contract between the parties can control a statutory rule of bankruptcy. It might be very reasonable that the statute should provide for the deduction of a security on the ground that it was originally the property of the bankrupt, and so the creditor who holds it has got from the bankrupt an advantage which other creditors have not; but that is a question for future legislation, and cannot, in my view, enter into the merits of this case.

The Lords refused the appeal.

Counsel for Appellants — Solicitor-General (Asher, Q.C.)—Murray. Agents—Dove & Lockhart, S.S.C.

Counsel for Respondents — Robertson—Ure. Agents—Maconochie & Hare, W.S.

Friday, February 10.

OUTER HOUSE.

[Junior Lord Ordinary.

SMITH, PETITIONER.

Judicial Factor—Interim Decree of Exoneration and Discharge.

Discharge and exoneration *ad interim* granted to a judicial factor, who held an estate for the benefit of several liferenters and certain fiars, upon the death of two of the liferenters and payment by the factor of the sum so set free to the fiars.

This was a petition by James Honyman Smith, writer, Leven, judicial factor on the trust-estate of the deceased William Bell, formerly residing in Dysart, and Mrs Elizabeth Bell, his wife, under a mutual trust-disposition and settlement dated 10th February 1837. By this trust-disposition and settlement the trustees were ordered, on the death of both the trusters, to convert the estate into money and to hold the same in two equal divisions, the income of one of which was to be liferented by certain persons named in the deed, and on the death of any or all of the liferenters to pay the shares so set free to the children of the various liferenters, or failing them to their issue. It was on this part of the estate that the petitioner was appointed judicial factor in 1877, in succession to a former factor who had been appointed on the failure of the original trustees to act. Shortly before this application two of the liferenters had died, and an interim division of the estate had become necessary.

The trust-estate in question consisted of two heritable bonds, and also two houses in the town of Kirkcaldy, and the purpose of the present application was (1) to enable the judicial factor to make up a title in his own person to these subjects, (2) to authorise the petitioner to pay over that part of the estate which had now been set free for division, and (3) thereafter to grant interim decree of exoneration and discharge in favour of the factor.

After a remit to a man of business to report whether the parties to whom the petitioner proposed to pay the sums were the parties truly entitled to it, and after payment by the factor to the parties with the approval of the reporter, Lord Kinnear issued the following interlocutor:—"The Lord Ordinary having resumed consideration of the petition, and procedure thereon, and in respect of the discharges, *ad interim* exoners and discharges the petitioner James Honyman Smith of his actings, intromissions, and management as judicial factor on the trust-estate of the deceased William Bell and Mrs Elizabeth Normand or Bell, designed in said petition, and decerns."

Counsel for Petitioner—Russell Bell. Agents—Macrae, Flett, & Rennie, W.S.

HIGH COURT OF JUSTICIARY.

Friday, February 10.

(Before Lords Young, Craighill, and Adam.)

MACRAE *v.* COOPER.

Sheriff — Process — Instance — Procurator-Fiscal appearing by Substitute duly Appointed.

At a criminal diet in the Sheriff Court the Procurator-Fiscal, at whose instance the libel was raised, was absent. Another person holding an appointment as Procurator-Fiscal of Court appeared to proceed with the libel. *Held* that this course was regular and proper.

William Cooper was on 6th December 1881 charged before the Sheriff-Substitute of Orkney and Zetland, at a first diet held at Kirkwall, with the crime of assault, aggravated by its having been committed to the serious injury of the person, effusion of blood, and danger of life. The libel bore to be at the instance of John Macrae, Procurator-Fiscal of the county of Orkney. When