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

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

LORD YOUNG having been absent at the debate gave no opinion.

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

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

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

Friday, March 3.

FIRST DIVISION.

[Sheriff-Substitute of Lanarkshire.

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

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

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

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

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

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

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

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

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

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

expenses of the action at the instance of Turnbull's trustees, as the bank should have at once paid the feu-duty, and, if so advised, thereafter brought its action of relief."

The Sheriff-Substitute (GUTHRIE), after a proof had been led which established that the conveyance by M'Kissock to the bank, though in form absolute, was in reality only in security, found the defenders liable to the pursuers in relief of the said feu-duty, and decerned against them accordingly; *quoad ultra* assoilzied the defenders, and decerned.

He added the following note:—"It is not pleaded that the pursuers have not obtained an assignation from the superior to enable them to effect their relief. That technical objection may therefore be set aside, and the case determined according to the equities between the parties. It is sufficiently proved that the infeftment of the pursuers is truly an infeftment in security as well as that of the defenders. Its form of an absolute infeftment has, however, involved the bank in responsibility to the superior of the ground, who is not bound to look beyond the formal title, but is entitled to recover his feu-duty from the person who becomes in feudal form his vassal. The bank, however, while it is under this liability, arising from its relation to Mr M'Kissock, the original vassal, has as yet enjoyed none of the advantages of the position of vassal, and it claims to be relieved of the burden to which it has been subjected by the defenders, who have the sole beneficial possession of the subjects pledged to both parties in security of their debts. The defenders are in possession under the assignation to rents in Mr M'Kissock's prior disposition in security to them; but they say that they are entitled to appropriate the whole rents in payment of the interest on their own bond without deduction of the feu-duty paid by the pursuers. They refer in support of their contention to such cases as *Clark* v. *City of Glasgow Assurance Company*, 12 D. 1047—*aff.* 15 D. (H. of L.); and *Gardyne* v. *Royal Bank*, 13 D. 912—15 D. (H. of L.) 45. But it seems to me that these cases go no further than to fix the liability of an *ex facie* absolute disponee in a question with the superior, and do not touch the present question, in which the real nature of the rights of the parties and the equities between them can be considered. Here the defenders are in possession by virtue of Mr M'Kissock's assignation to the rents, and they can have no higher right than their author. The bank paying the feu-duty would have a claim of relief against him if he were still in possession of the subjects, because, although the bank is feudally proprietor, yet in the case supposed the true owner is yet in the actual possession, and the bank's right is truly but a burden on his right of property. The disposition in security to the defenders is in its very nature subject to the superior's claim for feu-duty, so that it would be giving them more than their just right if they were allowed to throw that burden upon the holder of a postponed security, besides inflicting injustice on the latter, who is deriving no benefit from his security.

"I do not think that the pursuers should be allowed the expenses incurred in defending the action against them by the superior, which was useless."

Nicolson's trustees appealed to the Court of Session, and argued—The bank by recording their disposition, with warrant of registration thereon, became, in terms of the 1874 Conveyancing Act, the vassal in these subjects, and if vassal in a question with the superior they must be held as vassal in a question with all the world. The bank might or might not have relief against M'Kissock; that did not concern the appellants. Even if the bank had obtained an assignation from the superior, and sued as in his right, they could not prevail, for the superior could assign no rights enforceable against the appellants. The superior's proper remedy was by poinding the ground—he had a right against the ground and against his vassal for the feu-duty, but none against the appellants as bondholders or intromitters with the rents.

Replied for the bank—The bank had relief against these bondholders. Though they must in a question with the superior be dealt with on feudal principles, yet they were entitled to their equities in a question with the appellants, being themselves in reality (as appeared from the proof) only security-holders. A superior had a direct right of action against any intromitter with the rents.

Authorities quoted—Stair, ii. 4, 7; Bell's Prin. sec. 62 and sec. 698; *Wylie* v. *Heritable Securities Investment Association*, December 22, 1871, 10 Macph. 253; *Guthrie* v. *Smith*, November 19, 1880, 8 R. 107; *Marquis of Tweeddale's Trustees* v. *Earl of Haddington*, February 25, 1880, 7 R. 620; *Hislop* v. *Shaw*, May 13, 1863, 1 Macph. 535.

At advising—

LORD PRESIDENT—The sum involved in this case is very small, but the principle on which the Sheriff-Substitute has based his interlocutor is very important. The facts are very simple. A certain person of the name of Peter M'Kissock was the owner of subjects at Partick, over which he had granted a bond and disposition in favour of the appellants, dated 8th October 1877, for £2000, which was immediately thereafter recorded in the register of sasines; and subsequently, in the year 1879, there was an *ex facie* absolute disposition granted by the said Peter M'Kissock of these subjects in favour of the City of Glasgow Bank. This disposition was registered on 7th August 1879. M'Kissock became bankrupt, and the bondholders, the defenders in this action, entered into possession in November 1880, and drew the rents which fell due at Martinmas of that year. These rents were not sufficient to pay the full interest due to the bondholders in addition to the feu-duty which was due to the superior for the half-year, and what the bondholders did was this—They appropriated the rents entirely to their own purposes to extinguish *pro tanto* the interest which was due to them, and they did not pay the feu-duty which was due to the superior. In these circumstances the superior brought his action against the City of Glasgow Bank for payment of the feu-duty, and quite competently. The bank was liable to the superior, because the disposition in favour of the bank was *ex facie* absolute. It had been recorded in the register of sasines, and the effect of that under the Act of 1874 was to make the bank the entered vassal of the superior. The superior, so long as that infeftment stood, had no other vassal but the bank, and therefore

the liability of the bank to the superior is beyond all question. But the bank having been made to pay this feu-duty, have brought this action against the bondholders for relief, upon the ground that it was the duty of the bondholders to pay the feu-duty out of the first of the rents for the half-year. And the question is, whether the bondholders were under an obligation so to do, or whether they were justified in acting as they did in appropriating the whole rents to extinguish the interest on their bonds without providing for the feu-duty or public burdens? Now, the defence which the bondholders make here is, that the bank is the proper debtor, being the vassal of the superior; that the debt having been paid by the proper debtor it was extinguished, and that the proper debtor could have no relief against anybody else merely because he has paid his own debt. Now, I think that defence is founded upon a fallacy. It is quite true that as in a question between the superior and the bank the vassal was the proper and only debtor in the first instance to the superior, although the superior could, of course, have had recourse for the feu against the bondholder as intromitter with the rents; but in a question between the bank and the debtor—Mr M'Kissock, or anyone coming in his place, as the bondholder undoubtedly does by his bond and disposition in security—the bank's position is not that of an entered vassal, but of a mere security-holder. The qualification of the absolute disposition is quite sufficiently instructed by the bank's books, but really in a question between the bank and this bondholder I am not at all prepared to say that the qualification of the disposition may not be proved otherwise. At all events, it is abundantly clear, and is instructed by competent evidence, that the disposition held by the bank as in a question with the debtor and anyone coming in his place is a security merely. Now, that being so, the question comes to be, whether the bondholders were entitled to do what they did so as to cast the burden of feu-duty upon the postponed creditor? In a question with the superior the burden was cast upon the proper vassal; in a question with the bondholders they by their contract cast the burden of feu-duty upon the postponed security-holder, and I am of opinion that they were not entitled to do so. If the question had occurred between the bank as disponee and the entered vassal M'Kissock, there could be no doubt whatever that the bank would be entitled to be relieved of the payment of this feu-duty by M'Kissock. Now, these bondholders really come into the position of the debtors. They take the debtor's estate just upon the same terms that the debtor himself held it in security of the sum advanced, and among other things they took it under the obligation to provide out of the rents the payment of all proper burdens which fall to be discharged out of the rents, and that this is the inveterate rule upon the subject, and the inveterate practice also, has been very well demonstrated by reference to the clause of assignation of rent which occurred in the absolute disposition in security anterior to the statutes which were passed for the purpose of shortening the clauses of heritable writs. The assignation in the defenders' bond is expressed merely in the terms "I assign the rents," but then the statute has attached to that the full meaning of the old clause of assignation of rents which has been used in this country from a very early period—indeed, from the introduction of that form of security which is now so common, the bond and disposition in security. As early as the year 1787, I find, in the first edition of the "Juridical Styles," a clause in these terms:—"I make and constitute" so-and-so "and his foresaids my lawful cessioners and assignees, not only in and to the whole writs and evidents, writs, titles, and securities of and concerning the lands, mills, teinds, fishings, and other heritages before specified, but also in and to the whole rents," or otherwise. Now, these are the terms upon which the bondholder in possession is bound to account to the debtor or anyone coming in his place. And the position of the bank is certainly such that they can represent themselves as coming in the place of the debtor with all the rights to demand an accounting against the bondholder which he would have, and if the bondholder is bound to account to the bank as absolute disponee in terms of that clause, then the account must be stated in such a way as to represent the intromissions with the rents, and the application of the rents after paying all feu-duties, public burdens, and expenses. I think that clearly leads to the conclusion that these bondholders were under the obligation of paying feu-duties, and public burdens, and expenses out of the first of the rents, and to appropriate only what remains to payment of interest on their part. Therefore I am for adhering to the interlocutor of the Sheriff-Substitute.

Lord Deas—We have here two heritable creditors. One of them, the bank, has a security constituted in the form of an absolute disposition, qualified very distinctly by the writing in the bank's book, which of itself shows that it is a security merely. The other creditors' security (Mr and Mrs Nicolson's) is constituted in the form of a written bond and disposition in security, or what used to be a bond and disposition in security, which formerly expressed, and now implies, an assignation of the rents. Mr and Mrs Nicolson's bond is followed by the first infeftment, and if the deed in favour of the bank be, as I have no doubt whatever it is, a security merely, then Mr and Mrs Nicolson's security is preferable to the debt in favour of the bank. In short, the debt in favour of the bank is proved by competent written evidence to be a security merely, and therefore Mr and Mrs Nicolson having first infeftment are out and out preferable to the bank. Well, Mr and Mrs Nicolson enter into possession and draw the rents, which they are quite entitled to do, being preferable to the bank, and they proceed to recover the interest upon their bond, and they do recover the interest upon their bond. I have no doubt whatever that the first thing they have to do before they apply the rents in relief is to pay the burden of feu-duty. Whatever else there may be, in point of law this is a debt that anyone in the position of a preferable creditor recovering rents and applying them to the interest of his bond is bound to pay out of the first half of the rent. I think that is the whole case. They cannot appropriate the rents to their interest without being liable to pay that duty. If there is any order taken between them and the other creditors, it would be just pay and pay back again. It is their debt undoubtedly, and I have no doubt the

judgment is right that finds that they must pay that duty. I think that an assignation of the rents is sufficient to recover interest, and to bind them to pay feu-duty before applying the proceeds to pay interest.

Lord Mure—The fact referred to by Lord Deas of an assignation having been granted to the bank simplifies the case as regards the claim which they make to be relieved of the feu-duty, although if the superior agreed to give that assignation the question might have been raised as to whether, the feu-duty having been paid, he should be obliged to do so. However, the superior granted it, and there it is. But apart from the assignation, I should have been of opinion that the Sheriff-Substitute is right substantially. The whole difficulty has arisen from the operation of the implied entry clause introduced into the Act of 1874, under which the claim is made by the superior against the bank because they hold an *ex facie* absolute right. But for that clause it would be very doubtful if any claim could have arisen against the bank as the holder of the second security, on the part of the superior, upon the ground that they did hold that in truth as a security, though their title is *ex facie* absolute, if the security-holder had not entered into actual possession and drawn the rents of the property. Had not this security-holder entered into possession the question might have been one with the superior, and, on the other hand, the superior would have had clearly a claim against the first bondholder, who had entered into possession as here, and under some arrangement or under a decree of maills and duties drew the rents of the property. The bondholder in possession drawing the rents of the property is liable to the duty under the rules explained by your Lordship as having been framed so far back as 1787. If the Act of 1874 had not been passed introducing the regulation referred to, there could have been no doubt that the first bondholders (Nicolson), would have been, as intromitters with the rents, liable to pay the feu-duty, and to relieve subsequent bondholders, whether their security was *ex facie* absolute or not, of any such burden. Although the implied entry clause may give the superior right to proceed against the *ex facie* proprietor, it did not deprive the second bondholder of his right to be relieved by the first bondholder, who had intromitted with the estate and drew the rents, of the feu-duty, and I think on that ground the pursuers are entitled to be relieved of that judgment.

Lord Shand—I am of the same opinion. It would be an extraordinary result of the law that in the case of two holders of securities over heritable properties the holder of the earlier security in possession and drawing the rents should be able to throw the liability for payment of the feu-duty and public burdens of the property on the second security-holder, who is deriving no benefit whatever from his security. And so soon as it appeared on the papers in the case to be clear that the bank were security-holders only, it seemed to me there must be an end of the question.

That the bank are holders of a security only is clear—clear even if the question were between the owner of the property and the bank to whom he granted the security, and the proof limited to writ or oath under the statute. In a question with third parties, as the appellants are here, the rules of evidence are not so restricted, and there is no doubt on the proof that although the bank held an absolute disposition the conveyance was in security only of the bank's advances. Taking it accordingly, that both parties are holders of securities, and that the first security-holder is in possession under a decree of maills and duties, I agree with your Lordships in holding that he has thereby acquired a limited or qualified right only to the rents of the property. To a certain extent a creditor in that position is an administrator. Having, no doubt, right to obtain what his security gives him, viz., the rents, he is bound, in the first instance, as intromitter with the gross rents, to meet the primary claims affecting these rents, viz., public burdens and feu-duty or ground rent. It was disputed at the bar that there was liability even to the superior for the feu-duty, but the authorities, I think, are perfectly clear upon that point. Intromitters with rents, in respect of their intromission, are liable directly to the superior for his feu-duty. The law is so stated both by the institutional writers and in cases that have occurred, particularly in recent years. It follows that the superior could have required the appellants as intromitters with the rents to pay the feu-duty as a first charge on the rents, and if the appellants had made the payment, could it possibly be maintained that they could have called upon the bank to relieve them of the payment because they had taken a title in the form of an absolute disposition. It would obviously be a conclusive answer that in truth the bank were postponed creditors only, deriving no return from their security. The superior had, no doubt, right to treat anyone who has registered an *ex facie* absolute disposition as the proprietor of the lands, for the disponee has practically made himself an entered vassal. But this result which flows from the relation between superior or vassal can have no bearing on a question between two holders of securities over the same property. It happens that from the shape in which the second security-holder has taken his title he has been obliged to pay the feu-duty. It appears to me that just as the superior had a right to make the claim against the security-holder in possession, so the respondent, having paid the amount, may enforce repayment by the respondents, the true and primary debtors; and I agree in thinking that the right to repayment may be enforced without any special title of assignation from the superior. I think it right, however, to add that at the best it appears to me the appellants' argument could only be one founded on want of title, and I am of opinion that in a case of this kind the person making payment of the feu-duty to the superior would be entitled to an assignation of the superior's personal claim for the amount against the intromitters with the rents, assuming that a special title to recover was necessary. The appellants being the principal or primary obligants, the respondents, though also liable to the superior, were in my opinion entitled to an assignation on payment of the debt to enable them to operate relief—Bell's Prin., sec. 558. The Sheriff-Substitute in the note to his judgment says:—"It is not pleaded that the pursuers have not obtained an assignation from the superior to

enable them to effect their relief. That technical objection may therefore be set aside, and the case determined according to the equities between the parties." There was a question raised at the bar as to how far this statement was warranted, but it was explained that the bank could obtain such an assignation at once, and we have since been informed that an assignation has been prepared, and is in the course of being signed and executed. Having got that assignation, the only point which could be possibly pleaded in defence I think would be obviated, namely, that payment of itself would not give a title. This plea, even if well founded, is obviated by the assignation which gives the respondents the superior right to enforce payment. I see no answer to the claim so presented, for the parties who have paid the feu-duty demand payment in the superior's right, and the respondents as primary obligants cannot refuse payment merely because the respondents were also liable to the superior. I put my judgment on these two separate grounds—first, I think the first bondholder in possession intromitting with the rents is liable for the feu-duty to a party who has paid the superior the amount, even without special title; and second, even assuming a special title to be necessary, the respondents in this appeal have such a title which gives them both the right and title of the superior.

LORD PRESIDENT — To prevent misunderstanding I think it right to say that I attach no importance whatever to any assignation by the superior. If the bank has the right of relief which it seeks here, it has it independently of the superior. It cannot derive any such right from the superior. And I may add, that I have considerable doubt of the competency of a superior granting an assignation to his vassal on payment of the feu-duty.

LORD DEAS—I desire the same explanation to be introduced into my opinion. I am clearly of opinion that there is no room for an assignation at all.

The Lords dismissed the appeal.

Counsel for Pursuers — Gloag — Lorimer. Agents—Davidson & Syme, W.S.

Counsel for Defenders—Trayner—Robertson. Agents—Webster, Will, & Ritchie, S.S.C.

Friday, March 3.

FIRST DIVISION.

[Sheriff of Aberdeenshire.

FERGUSON *v.* BOTHWELL.

Process — Diligence — Poinding — Arrestment — Suspension.

A creditor who had obtained a decree against his debtor, and followed it up by a charge, proceeded to execute a poinding of the debtor's effects. Between the date of the poinding and the sale following thereon, in consequence of an arrestment of funds due to the poinding creditor used in his hands by a third party, the debtor raised a process of multiplepoinding to have it ascertained to whom he should pay the amount contained in the decree. The poinding creditor proceeded with his diligence notwithstanding the multiplepoinding, and sold the poinded effects. *Held* that an action at the instance of the debtor for damages was irrelevant, the poinding creditor being entitled to proceed with his diligence, which was unaffected by the multiplepoinding.

George Bothwell sued Robert Ferguson for a sum of £16 in the Sheriff Court of Aberdeenshire, and got decree for a sum, including expenses, of £6, 6s. 10d. ; on 13th December 1880 he charged Ferguson to make payment of this sum. On 22d January 1881 the sum was arrested in the hands of Ferguson on the dependence of an action at the instance of William Keith, who had or pretended to have a claim against Bothwell. This arrestment was intimated to Bothwell, who took no notice of it, but on 9th April caused an entire horse belonging to Ferguson to be poinded. On 22d April Ferguson raised a process of multiplepoinding in the Sheriff Court, and alleged that he was doubly distressed in consequence of the charge and poinding and of Keith's arrestment. Notwithstanding this process Bothwell caused the diligence at his instance to proceed, and on 9th May the horse was sold for £8.

Ferguson then raised this action for £100 of damages against Bothwell, averring that the defender had illegally sold the horse after he had been duly interpelled by the process of multiplepoinding. He also averred that the poinding was otherwise incompetently and irregularly executed, with the result that the horse had been sold for a sum greatly under its real value. The defender maintained that he was not bound to stop his diligence because of the multiplepoinding. He denied that there was any double distress, and further alleged that the arrestments were merely collusive, and had been used by Keith in consequence of a pretended claim in an action of which Ferguson was the real *dominus*.

The pursuer pleaded—"(1) The pursuer being lawfully interpelled from paying the sum due to the defender, the defender acted illegally in carrying out the warrants obtained by him in the knowledge of such legal interpellation."

The Sheriff-Substitute (COMRIE THOMSON) allowed a proof. He added this note to his interlocutor:—"The pursuer has not specified any irregularity in the procedure adopted by the defender in carrying out diligence under the decree which the latter had obtained against the former; but I am unable to disregard the allegation that the defender proceeded in disregard of the *ex facie* regular arrestment used in the pursuer's hands at the instance of a person claiming to be a creditor of the defender, and of the action of multiplepoinding. It may turn out that the defender's averments as to the use of that arrestment being a mere trick are well founded, and it may also be that even if there be *damnum* there is no *injuria;* but I am not at liberty to assume this."

On appeal the Sheriff recalled this interlocutor, and dismissed the action as irrelevant, adding this note:—[*After stating the facts*]—"This is an action of damages at Ferguson's instance, because he says that on 22d January he was interpelled from paying the debt by its being ar-