under the marriage-contract." But not the less did the pursuer take a fee. It might have been subject to diminution or even extinction if Mrs Whyte was still entitled to exercise the power of division contained in the marriage-contract. But as she did not attempt to exercise any such power, an equal share in the fee was immediately vested, and remained all along vested in the pursuer.

It is said that Mrs Whyte had no power to execute this transference, in respect that the children of the marriage had no vested interest under the marriage-contract, by reason of the right which was conferred on the issue of a child who died before receiving its provisions. I do not think it necessary to enter into any question of vesting. It might be that the transference was *ultra vires* of Mrs Whyte, but only in the sense that she might thereby be defeating some ulterior right of succession. As fiar it was within her power, and it effectually transferred the fee to her assignees. The pursuer has no title to except to the transference, and as he survived his mother, any right which his children might have had is necessarily extinguished.

Further, in my opinion, the children were entitled to transact with their mother so as to obtain an immediate right of fee in the stock, and to the exclusion of their issue. But it is not necessary to enter into this question. For the other considerations which I have set out are sufficient for the disposal of the case.

A fee in the Commercial Bank stock was vested in the pursuer in May 1870. His estates were sequestrated in 1882, and he was not discharged till November 1884. It follows that that fee fell within the sequestration, and hence the interlocutor of the Lord Ordinary must be adhered to. Indeed, we are only repeating the decision of the First Division in a former case—*Whyte*, 16 R. pp. 95 and 100.

LORD LEE—The argument of the reclaimer, which somewhat impressed me at the time, was to this effect—and it was not stated before the First Division in the previous case—that his mother during her lifetime had no power to deal with the fee of this estate, because it was destined to children, and failing children to the issue of children. It seemed to me that unless there was some law to the effect that under the marriage-contract Mrs Whyte had power to put forward the fee to her children with the result of defeating the interests of grandchildren the reclaimer must succeed. I had that difficulty, for there was no vesting under the marriage-contract by itself.

But on examination of the case of *Routledge*—where the difficulties were very fully explained by Lord Succoth—I have come to be of the same opinion as the Lord Ordinary. I am satisfied that that case settled the point. It was repeatedly considered, and finally decided in the House of Lords affirming the view of the majority of the Court—*Routledge* v. *Carruthers*, May 19, 1812, F.C., and *Majendie* v. *Carruthers*, December 16, 1819, F.C.—*aff.* 6 Pat. App. 597. The case of *Pretty* v. *Newbigging*, March 2, 1854, 16 D. 667, and various other decisions which followed upon it, leave no room for questioning the authority of that case now, although if the point were open I confess to having doubts whether the opinion of Lord Succoth was satisfactorily combated.

LORD JUSTICE-CLERK—I entirely concur with Lord Rutherfurd Clark.

LORD YOUNG—was absent at the hearing.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Party. Agent—Andrew Urquhart, S.S.C.

Counsel for the Defender and Respondent—Ure—Dickson. Agent—Alexander Morison, S.S.C.

Wednesday, March 19.

SECOND DIVISION.

[Lord Trayner, Ordinary.

HOOD *v.* STEWART.

Bill—Accommodation Bill—Transference for Value without Endorsation—Title to Sue—Bills of Exchange Act 1882 (45 *and* 46 *Vict. cap.* 61), *sec.* 31.

By the Bills of Exchange Act 1882, sec. 31, it is provided (§ 4), "Where the holder of a bill payable to his order transfers it for value, without endorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the endorsement of the transferor."

In an action for the amount of a bill of exchange by the transferee for value against the acceptor, the defender pleaded that as the bill was an accommodation bill the pursuer had no higher right against him than the drawers of the bill who had given no value for it. The bill though held by the pursuer for value had not been endorsed on transference by the drawers, who had since become bankrupt.

Held (1) that under the 31st section of the Bills of Exchange Act 1882, the pursuer had a title to sue although the bill was not endorsed, and (2) that although the bill was an accommodation bill it was a good obligation binding on the defender as he had accepted it in order that the drawer might raise money upon it.

In 1887 John Hood, 57 Albert Drive, Pollockshields, in security of an alleged loan of £250, received from M'Guffie, Sillars, & Company, bonded storekeepers, Glasgow, a bill for £210 drawn by them and accepted by John Stewart, spirit merchant, Edinburgh. This bill was not met at maturity, and a bill for £220, dated 28th September 1887,

and payable three months after, was drawn by M'Guffie, Sillars, & Company upon Stewart, and accepted by him. Through an omission on the part of M'Guffie, Sillars, & Company (as Hood alleged) the bill was not endorsed, but was simply handed by them to Hood in exchange for the previous bill. This said bill was transferred and delivered to Hood as security for the foresaid loan, in place of the bill for £210 which he had up to that time held. When the bill became due it was presented to Stewart for payment, but it was not paid. M'Guffie, Sillars, & Company became bankrupt, and their estates were sequestrated on 3rd February 1888, and a trustee was appointed. The estate paid five shillings in the pound.

Mr Hood accepted his dividend of five shillings, but also brought an action against Stewart for the said sum of £220 contained in the bill accepted by him.

The defender answered—"Admitted that the bill for £220 produced was on 28th November 1887 drawn by M'Guffie, Sillars, & Company upon the defender, and was accepted by the latter. Explained that the said acceptance for £220 was one of a series of bills granted for the accommodation of M'Guffie, Sillars, & Company, no value being given for them, and that this was known to the pursuer at the time when (as alleged by him) he took delivery of it. Admitted that the bill is not endorsed."

The pursuer pleaded—"(1) The pursuer being transferee for value of the bill in question, the defender is bound to make payment of the same to him, and the pursuer is therefore entitled to decree in terms of the conclusions."

The defender pleaded—"(1) No title to sue. (3) The pursuer not being the transferee for value of the bill, the contents of which are sued for, and *separatim*, holding no other or higher right or title than that of M'Guffie, Sillars, & Company, the defender should be assoilzied. (4) The pursuer's right being at best no higher or other than the rights, if any, of M'Guffie, Sillars, & Company to sue on the bill, the defender pleads that the bill was for the accommodation of the latter, and also compensation or set off."

By the Bills of Exchange Act 1882, sec. 31, it is provided (§ 4), "Where the holder of a bill payable to his order transfers it for value, without endorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the endorsement of the transferor."

The Lord Ordinary (TRAYNER) upon 10th July 1889 allowed a proof of the pursuer's averment that the bill in question was transferred to him for value, and to the defender a conjunct probation.

"*Opinion.*—I have no doubt the pursuer has a title to sue the defender on the bill in question, although it has not been endorsed. The 31st section of the Bills of Exchange Act 1882 expressly confers such a title. A more difficult question is raised by the defender's fourth plea, viz., whether the transferee for value of an unendorsed bill is open to all the exceptions and objections pleadable against the transferor. I am inclined to think he is not, because the statute does not expressly so provide as it does (sec. 36) with reference to the taking of a bill overdue or which has been dishonoured. But it is not necessary, probably, to decide that question here, because the defence set forward, as one pleadable against the transferor is not one which I think can be pleaded against any transferee for value. It is said that the bill in question was an accommodation bill, for which the acceptor received no value. Assuming it to be so, and that the transferee was aware of the fact, it is still a good obligation, binding upon the acceptor, because the very purpose of giving an accommodation bill is that money may be raised upon it. Therefore if the transferee of the bill gives value for it he is just doing that which the acceptor intended should be done upon the security of the bill which he granted. This is expressly provided by the 28th section of the Act above referred to. But it is provided with regard to the "holders" of a bill for value and the pursuer as transferee of a bill not endorsed does not come within the statutory definition of a "holder." I cannot think, however, that the absence of the endorsement makes any material difference, especially as the transferee of a bill has the right to demand an endorsation. The difficulty in the present case of getting or enforcing an endorsation is that the transferors of the bill have become bankrupt. The bankrupts cannot, after bankruptcy, do anything to make their creditor's position better than it was before; while, on the other hand, it might be said that the endorsation was only the fulfilment of a prior obligation. These questions, however, may, I think, all be saved. The pursuer is the actual holder of the bill, that is, he is in possession of it. If he holds it (in that sense) for value, I think he is entitled to recover the amount from the acceptor, even although it was originally an accommodation bill. This does the defender no injustice, seeing that he gave the bill in order that some one might advance money thereon to the drawer. I shall allow the pursuer a proof of his averment that he holds the bill for value (which is denied), and if that is established, will give decree against the defender."

Upon 19th July the Second Division, on a reclaiming-note, remitted to the Lord Ordinary to allow parties a proof of their averments.

At the proof the pursuer deponed—"I went and saw Mr M'Guffie, and he gave me, in security for the £250, a bill for £210 (No. 12) drawn by his firm upon the defender John Stewart. The bill is dated 25th August. I made the loan upon the 27th. Mr M'Guffie told me I was not to discount the bill, but to keep it as security till the loan was repaid. At that time I had a trade account with M'Guffie, Sillars, & Company, upon which they were due me £177, 7s. 3d. To account of that I received a payment of £100 upon 17th September. When

the bill for £210 was about to become due, I wrote M'Guffie, Sillars, & Company to that effect. I had an interview with Mr M'Guffie on the subject at his request. He was still unable to repay the loan, and he handed me the bill for £220, drawn by the same people and accepted by Stewart, in exchange for which I gave him back the bill for £210. I put the £220 bill in my pocket. I did not know at the time that it was not endorsed. The first bill had been endorsed when I got it, and I expected that the second bill would also be endorsed. I first discovered it was not endorsed about the time of the failure of M'Guffie, Sillars, & Company, in February 1888, when I was looking up as to the due date of the bill."

Alex. M'Guffie, of the firm of M'Guffie, Sillars, & Company, deponed—"I applied to the pursuer for a loan of £250, and got it. I gave him an I O U for the amount when I received it, and a few days afterwards I gave him in security a bill for £210, drawn upon and accepted by the defender. The £250 went into the general business of M'Guffie, Sillars, & Company, and was applied to the purposes of the firm. It is passed through our books in the ordinary way. No arrangement was made between me and the pursuer as to his not discounting the bill. (Q) You don't recollect any?—(A) I don't recollect any. I don't recollect him asking me not to discount it. If he says I did, I have no reason to doubt his word. I had other bill transactions with defender. The bill for £210 was one of a series. . . . These bills originated in this way, that we sold goods to defender, and drew upon him for the amount in the invoice, and he sold goods to us and drew upon us. When these bills fell due they were renewed by both parties down to the date of our sequestration. The two bills for £210 and £220 were just part renewals of the original sums in these transactions. When the £210 bill became due, I handed the pursuer the £220 bill, receiving from him the other bill in return. The £220 bill was not endorsed. I did not abstain intentionally from endorsing it; it was a mere oversight. I would have endorsed it if I had been asked to do so by the pursuer prior to our sequestration. The bills which I got from defender were for the purpose of raising money, and were discounted with the bank. I suppose he, on his side, raised money by our bills. . . . . *Cross.*— . . . The £210 bill forms one of a series of three acceptances we got from defender—£400, £450, and £210—on 26th August. I believe we had on the previous day sent our acceptances to him for exactly the same amount, in three bills for £500, £460, and £100. The £210 bill was therefore a cross bill, for which we gave no value except our own acceptances, and all he gave for our bills was his acceptances. (Q) They had nothing to do with trade transactions between you?—(A) Not in that transaction. I think defender and we started this system of raising money in February 1886. At that time we were due him £957, 1s. 3d., and he was due us £956, 13s. 4d. In the first transaction delivery orders were granted and the goods delivered. I think the goods were principally whisky. (Q) Were they not just fictitious transactions to raise money?—(A) Well, there was a delivery order granted, and we got delivery of his goods, and he got delivery of ours, but I believe it was to raise money. We were accommodating each other with goods when we had goods, and with bills when we had not goods. After that all the transactions were really cross bills. The £220 bill was just in the same position as the £210 bill as between defender and us. When I handed these bills to pursuer, I did not tell him they were merely accommodation bills."

Upon 8th January the Lord Ordinary pronounced this interlocutor:—"Decerns against the defender for payment to the pursuer of the sum of £165 sterling, with interest, as concluded for: Finds the defender liable in expenses.

"*Note.*—Referring to my former opinion in this case, I am now prepared to hold it established that the pursuer is the holder of the bill sued on for value. It appears, however, that the pursuer has surrendered his right to claim on the estate of the drawers of the bill. Their estate has already paid 4/8 per £, and is expected to yield a few pence more. What it may actually yield is not at present ascertainable, but the parties have agreed to hold the entire dividend payable by the drawers' estate as at 5/ per £. That dividend falls to be deducted from the pursuer's claim, because by his surrender of the right to claim it he has deprived the defender from being recouped to that extent. I have therefore given decree for the amount of the bill (£220), less £55, the dividend thereon at 5/ per £."

The defender reclaimed, and argued—It was admitted, after the evidence that had been led at the proof, that the pursuer, the holder of the bill, had given value for it. This would have entitled him to recover without question, because he had acquired the bill in the circle, but the question of law was raised upon the fact that the bill had not been endorsed, and could not now be endorsed because the drawers were bankrupt. It was maintained that an unendorsed bill, even if given for value and acquired during the currency, gave only the same title as the cedent or transferor had, and if this was so Hood was bound to recognise the fact that M'Guffie, Sillars, & Company were debtors to Stewart, and that he had a set-off against them. If this view was sound, then Stewart, the reclaimer, ought to be assoilzied, because the claim of Hood under this bill was no better than if M'Guffie, Sillars, & Company had been claiming payment from the defender.

The respondent argued—The defender had argued that the transference of the bill without endorsation had the effect, under the Bills of Exchange Act of 1852, of divesting M'Guffie, Sillars, & Company of all rights in this bill. If, then, they were totally divested, the result was the complete investiture of Hood with their title, and as

he had acquired the bill for value and in the circle, his investiture was complete and entitled him to recover—Bell's Comms. 420; Byles on Bills, 146.

At advising—

LORD JUSTICE-CLERK—The pursuer is the holder of a bill drawn by M'Guffie, Sillars, & Company—a firm now bankrupt—on the defender, and it has been, in my opinion, clearly proved that the pursuer gave value for it. This bill is not endorsed, and the pursuer alleges that this was an oversight, and upon the evidence I am satisfied that the fact is so, and that the transferors would have endorsed the bill at once had the oversight been pointed out. But however that may be, M'Guffie, Sillars, & Company cannot now place the pursuer in any better position than that which he held at the date of their sequestration. The case must, therefore, be considered upon the footing that the pursuer is the holder of a bill, which he could have called upon the drawers to endorse but failed to do so. Now, had M'Guffie, Sillars, & Company given value for the bill, and then obtained value from the pursuer, it can hardly be questioned that the pursuer would have been entitled to recover as having possession of the bill against the acceptor, even although circumstances prevented him from obtaining endorsation of the drawer. But the defender here pleads that the bill was an accommodation bill, and that as the drawers gave no value for it, the pursuer cannot have any higher right against the acceptor by possession of the bill than the drawer had. The Lord Ordinary, on the other hand, holds that this is not so, and I agree with his Lordship. The bill being an accommodation bill upon the defender's own showing, it was given that the drawers might obtain money upon it from another on the strength of his acceptance. The fact that the drawer gave no value is of no consequence. That was the basis of the transaction, and pleadable against the drawer, but not against the *bona fide* discounter, who gave to the bill the effect intended both by drawer and acceptor by giving the drawer money in exchange for the obligation it contained against them both. Value having been proved, I think the Lord Ordinary has rightly disposed of the case, and move your Lordships to adhere to his interlocutor.

LORD RUTHERFURD CLARK—The pursuer sues the defender on a bill of exchange drawn by M'Guffie, Sillars, & Company, and accepted by the defender. The bill is not endorsed by the drawer. At common law the pursuer could not sue on the bill. His title to sue depends on the 31st section of the Bills of Exchange Act 1882.

I concur with the Lord Ordinary in holding that the bill was transferred by the drawer to the pursuer for value. Indeed that fact was not seriously disputed. Hence by virtue of the section of the Act to which I have referred, the transfer gives the pursuer such title as the transferor had in the bill.

As I read the statute, the transfer divests the transferor of all title to the bill, and invests the transferee with the title of the transferor. The divestiture and investiture are both completed by the act of transference. Henceforward the title of transferor is in the transferee, not in the sense that the latter is entitled to make use of a title which is still in the transferor, but in the sense that the title of the transferor is in the person of the transferee. Nor is the title of the transferee incomplete. It would not be a title if it were. It is as complete in his person as the title of the transferor was in his. In other words, he has a title equivalent to a duly intimated assignation.

It was urged that the change of title to a debt could not be complete without intimation to the debtor. The simple answer is that the statute gives the title to the transferee by the act of transference, and gives him not an incomplete but a completed title. Nor is there anything in this contrary to legal principle. The contract contained in a bill of exchange is of that nature that the *jus crediti* under it is transferable without notice to the debtor. For endorsement at once divests the endorser and invests the endorsee.

But the title obtained by transference is not necessarily the same as the title obtained by endorsement. It is well known that an endorser may confer on an endorsee a better title than he himself possessed. This cannot happen in the case of mere transference. The transferee acquires the title of the transferor and nothing more. Hence such exceptions may be stated to the pursuer's title as might have been stated against the title of transferor, as in an assignation, *utitur jure auctoris*, and if the title of his author is bad his own is no better. But no case of this kind arises here. It is not said that the title of the transferor was bad, and hence no objection can be stated to the title of the pursuer.

The true purpose of the defender is to plead compensation, and this plea might have been good if the pursuer had no title in himself, but was only availing himself of a title which still remained in the transferor. But as I have already said, the title of the pursuer was complete from the date of the transference, and as it is trite law that compensation does not operate *ipso jure*, there is no ground for saying that by reason of the fact that the defender was at the date of the transference a creditor of M'Guffie, Sillars, & Company to an amount equal to the sum contained in the bill, there was no debt to transfer. Compensation must be pleaded in order to be effectual, and as that plea cannot be urged against an assignee holding a duly intimated assignation, so it is equally unavailing against the pursuer. It is equally clear that debts subsequently contracted by M'Guffie, Sillars, & Company to the defender cannot be pleaded against the pursuer.

For these reasons I think that the interlocutor of the Lord Ordinary should be adhered to.

LORD JUSTICE-CLERK — Lord Kinnear

who was present at the hearing has authorised me to say that he concurs in the opinion of the Court.

LORD YOUNG and LORD LEE were absent at the hearing of the cause.

The Court adhered.

Counsel for the Reclaimer — Rhind — M'Kechnie. Agents—Menzies, Bruce Low, & Thomson, W.S.

Counsel for the Respondent — R. V. Campbell — Salvesen. Agent — D. Lister Shand, W.S.

Wednesday, March 19.

SECOND DIVISION.

STEWART *v.* KERR.

Executor-Dative—Confirmation — Competing Claims—Exclusion of Husband—Married Women's Property (Scotland) Act 1881 (44 *and* 45 *Vict. c.* 21), *sec.* 6.

Held that the brother of a married woman dying intestate and without children has a right to be confirmed executor-dative *qua* next of kin to the exclusion of the husband.

Miss Jessie Kerr or Stewart, wife of Kenneth Stewart, 48 Breadalbane Street, Glasgow, died there intestate and without lawful issue on 20th December 1889. Her whole personal estate and effects, without deduction of debts or funeral expenses, did not exceed the value of £300.

The said Kenneth Stewart presented a petition in the Sheriff Court at Glasgow praying to be appointed executor-dative *qua* husband of the deceased. John Kerr, plumber, Springfield Terrace, Dunblane, brother of the deceased, presented a petition in the same Sheriff Court to be appointed executor-dative *qua* one of the next of kin.

The Married Women's Property (Scotland) Act 1881 (44 and 45 Vict. c. 21) enacts by sec. 6 that "after the passing of this Act the husband of any woman who may die domiciled in Scotland shall take by operation of law the same share and interest in her moveable estate as is taken by a widow in her deceased husband's moveable estate, according to the law and practice of Scotland, and subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof, as the case may be."

The Sheriff-Substitute (SPENS) dismissed the husband's petition and decerned the brother executor-dative.

"*Note.*—In this case the husband of the deceased claims to be executor in preference to the next of kin. Such, at all events, is the position taken up, as I understand, by the agent for the husband. The argument addressed to me was, that as everything belonging to the wife previous to the passing of the Married Women's Property Acts of 1877 and 1881 fell under the *jus mariti* of the husband, he was entitled still to the end of his life to administer the whole estate left by his deceased wife, the statutes referred to not affecting his right as to this. I confess I do not follow this argument. The wife being intestate at the date of her death, an executor-dative must be appointed to her estate. The husband, under the Married Women's Property Act of 1881, sec. 6, has a beneficial interest in her estate, the same as she would have had in his estate had he predeceased her. My view has been, on the authority of the principle given effect to in *Webster* v. *Shiress* (25th October 1878, 6 R. 102), that a very substantial beneficial interest in the estate of a deceased person by one not the next of kin, entitled such person to be conjoined as executor along with the next of kin; and giving effect to this view, I would have been inclined to have conjoined the husband and next of kin in this executry. Sheriff Berry, however, takes a different view. He has held, in the case of *Stewart* (1886), that in a competition between the father of a deceased person and a widow, the father, as next of kin, must succeed to the office, to the exclusion of the widow. The husband in this case appears to me to be in *pari casu* to the wife in the case just referred to, and in these circumstances I must just give effect to Sheriff Berry's views."

The husband appealed to the Second Division of the Court of Session, and argued —The passing of the Married Women's Property Act 1881 had materially altered the position of a husband. He had now a substantial beneficial interest in his wife's moveable estate upon her death. If that altered position did not give him the right to exclude the next of kin he ought at least to be conjoined with them. It was always competent to the Court to make a joint appointment. In the case of *Muir*, 3rd November 1876, 4 R. 74, the Court remitted the case back to the Sheriff that the mother might be conjoined with the widow, and in the case of *Webster* v. *Shiress*, 25th October 1878, 6 R. 102, the representative of the father was conjoined with a brother of the deceased.

Argued for the respondent—The order of preference for the office of executor-dative was well established—Bell's Prin. sec. 1894. The next of kin were preferred to the exclusion of the widow, and the 1881 Act only put a widower in the same position as regards rights of succession as a widow. To reverse the judgment here would lead to ordinary creditors constantly petitioning to be conjoined with the next of kin.

At advising—

LORD RUTHERFURD CLARK—The question is whether the husband of the deceased Mrs Stewart is entitled to be conjoined as executor along with her next of kin. The husband maintains that he is, in respect that under the Act of 1881 he takes by operation of law in his wife's estate the same share and interest which is taken by a widow in her deceased husband's moveable estate." In other words, he takes