

executed a disposition in favour of Morison, on the narrative that Morison had paid £250 for him, and at the same time a back letter was granted by Morison to the effect that although the disposition was *ex facie* regular it was only in security for £250, and in the letter was a condition on which Grant was to redeem, (on payment of £250), or Morison be entitled to sell. Now, if the case had stood there the Lord Ordinary would have been quite right; but then it is admitted that £250 was not paid, and that all Morison advanced was £125, and the moment that is admitted it is impossible to hold the disposition or letter conclusive. There is another view of the transaction stated by Morison on record which might entitle him to an equally favourable result, viz., that there was an arrangement between him and Grant that Grant should pay him £250 in two years. All we have to do with that is, that it is not the transaction set forth in the disposition and back letter, and it will not enable Morison to stand on those documents. I agree with your Lordship that there ought to be only one action of accounting in the whole matter between these parties, and so I agree in thinking that we should remit to the Lord Ordinary to conjoin the actions.

Lords ARDMILLAN and MURE concurred.

Counsel for Webster—Scott. Agents—Renton & Gray, S.S.C.

Counsel for Morison—Balfour and J. P. B. Robertson. Agents—Webster & Will, S.S.C.

Tuesday, February 2.

## SECOND DIVISION.

[Lord Mackenzie, Ordinary.]

M'KINNON (HANNAY'S TRUSTEES) v.  
ARMSTRONG BROTHERS & CO.

*Settlement—Contra Account.*

A owed B certain sums of money. B was agent for C, who through B owed money to A on a contra account. Circumstances in which held that a settlement did not embrace the contra account.

*Observed (per Lord Gifford)* that a settlement could not take effect without a writing or some specific act, because the debts were not due in the same character.

*Bill—Compensation—Bankruptcy—Retention.*

A B & Co. owed a bankrupt, H, a certain sum of money, but, in an action at the trustee's instance, pleaded compensation, and produced bills drawn by A, M & Co. upon and accepted by H, and endorsed by A, M & Co., and by A B & Co. to a bank. At the date of bankruptcy the bills were not mature, but had been discounted by A B & Co., and were held by the Bank. A B & Co. retired the bills after the bankruptcy—*Held* that this was not a case of retention but of compensation, and that, as before so after bankruptcy, compensation may be pleaded provided the creditor has not acquired the debt on which he pleads subsequent to the bankruptcy.

*Bill—Onerous Holder—Compensation—Retention.*

In the above circumstances, at the date of H's bankruptcy A M & Co. were in liquida-

tion. A B & Co. were their successors in business. A, a partner of A M & Co., was also a partner of A B & Co., and under the deed of dissolution acted as liquidator of A M & Co. It was not alleged that A M & Co. were insolvent. Part of the proceeds of the bills when discounted was applied in paying out the other partner of A M & Co. A M & Co. in liquidation had no separate bank account. A B & Co. retired the bills by cheques on their own bank account. *Held* that A B & Co. were entitled as onerous holders of the bills to plead compensation to the claim of H's trustee.

This was an action raised by William M'Kinnon, trustee on the sequestrated estate of Hannay & Sons, iron masters in Glasgow, against Armstrong Brothers & Company, iron merchants. The circumstances are very fully stated in the note appended to Lord Mackenzie's interlocutor, which is as follows:—

"*Edinburgh, 29th October 1874.*—The Lord Ordinary having heard counsel, &c., decerns against the defenders for the sum of £8501, 7s. 7d., with interest thereon at the rate of five per cent. per annum from 31st March 1874 until payment, and for the sum of £3135, with interest thereon at the rate of five per cent. per annum from 10th April 1874 until payment; but under deduction of the sum of £2301, 8s. 1d., and £90, 0s. 9d. due by Hannay & Sons to the defenders, with interest on said two sums at the rate of five per cent. per annum from 27th March 1874 until payment: Finds the defenders liable in expenses, &c.

"*Note.*—The pursuer is the trustee on the sequestrated estate of Hannay & Sons, iron masters, Glasgow, of which sequestration was awarded on 28th March 1874. The defenders, Armstrong Brothers & Company, are iron merchants and iron brokers in Glasgow, the partners of the firm being W. J. Armstrong and his brother T. N. Armstrong.

"Previous to 31st December 1873 the defender W. J. Armstrong carried on a similar business in Glasgow as a partner of the firm of Armstrong, Muller, & Company, the other partner being C. Muller. That firm was dissolved on that date, and the firm of Armstrong Brothers & Company was then formed, and thereafter carried on the business of iron merchants and brokers formerly carried on by Armstrong, Muller, & Company.

"The firm of Armstrong, Muller, & Company acted for Thomas Vaughan & Company, iron-masters and merchants in Middlesborough, as their agents in Glasgow, up to July 1873; and from that date to 31st December 1873 as their brokers in Glasgow. After 31st December 1873 the defenders Armstrong Brothers & Company acted as the brokers in Glasgow of Thomas Vaughan & Company.

"On 26th June 1872 Armstrong, Muller, & Company entered into a contract with Hannay & Sons for the delivery at their Blochairn Ironworks, near Glasgow, of 6000 tons of No. 4 Middlesborough forge pig-iron, at £4, 12s. per ton, at the rate of about 1000 tons per month, commencing in July in 1873, payment being made in cash on the last cash day of each month for the monthly quantity delivered, or by acceptance at four months' date.

"By a contract bearing date 26th June 1873, Armstrong, Muller, & Company bought from Thos.

Vaughan & Company 6000 tons No. 4 Middlesborough forge pig-iron, at £4, 5s. per ton, f.o.b. at their wharf on the Tees, to be delivered at the rate of about 1000 tons per month, commencing in July 1873, payment being made in cash on the last cash day of each month for the monthly quantity delivered, "or by Messrs Hannay & Sons' acceptance (payable London) at four months' date."

"On 28th August 1873 Armstrong, Muller, & Company purchased on account of Hannay & Sons from Thomas Vaughan & Company 12,000 tons of Middlesborough pig iron, to be delivered in monthly quantities of 1000 tons, commencing in October 1873. This contract was current on 31st December 1873, when the firm of Armstrong, Muller, & Company was dissolved, and the defenders Armstrong Brothers & Company commenced business.

"By contract dated 4th February 1874 the defenders sold for Hannay & Sons to Thomas Vaughan & Company 1500 tons Middlesborough pig-iron, at 79s. 6d. per ton, payable by bill at four months from 10th March 1874.

"By contract dated 6th February 1874 the defenders Armstrong Brothers & Company sold on account of Hannay & Sons, the purchaser's name not being disclosed, 1500 tons of pig iron, at 77s. 6d. per ton, to be paid on 10th March following. And by another contract, dated 16th February 1874, the defenders bought from Hannay & Sons 1000 tons of pig-iron at 75s. per ton, to be paid in cash also on 10th March.

"The questions on which the parties are at issue relate to the six contracts above-mentioned. There were two other pig-iron contracts between Hannay & Sons and the defenders, dated 18th March 1874, under which the defenders became indebted to Hannay & Sons in the sums of £2310 and £825. These are included in the sum now sued for, but there is no dispute between the parties in regard to these two contracts.

"There are two questions raised between the pursuer and defenders in regard to the dealings of Hannay & Sons and the defenders with regard to the six first mentioned contracts.

"The first question is—Whether, on 11th March 1874, being the iron-market account day in Glasgow for the preceding month, no settlement of accounts took place between Hannay & Sons and the defenders, under which, as the defenders maintain, the sum of £7536, 10s. 1d. (consisting of £4125, the price due by Hannay & Sons to Thomas Vaughan & Company for 1000 tons of iron delivered under the contract of 28th August 1873, and of £3336, 10s. 1d., the price of 808 tons 17 cwt. of iron alleged to have been delivered, and to be due by Hannay & Sons to Thomas Vaughan & Company under the same contract, and of £75 due to the defenders for commission on iron sales) was set against £9562, 10s., the amount due by the defenders to Hannay & Sons for the iron contained in the contracts of 6th and 16th February, less £1162, 10s. deducted on account of 300 tons alleged by the defenders to have been short delivered under the contract of 6th February, and the balance of £863, 9s. 11d. was paid by the defenders.

"The second question is—Whether the defenders are entitled to set-off against the sum now sued for the sum of £13,057, 10s. 4d., contained in the seven bills mentioned in the defences (Statements 12 and 13), drawn by Armstrong, Muller & Company upon, and accepted by, Hannay & Sons, and

endorsed to the defenders in January and February 1874 by the then dissolved firm of Armstrong, Muller, & Company, for the purposes of the liquidation of that firm.

"The Lord Ordinary is of opinion that no settlement of accounts took place on 11th March 1874 such as is averred by the defenders. The statements of the witnesses upon this point are very conflicting. But the Lord Ordinary thinks that the actings with reference to the account, No. 115/30 of process, of Hannay & Sons' cashier, and of the defenders' book-keeper (who are averred by the defenders to have made the settlement), support the evidence for the pursuer, and are conclusive against the view that such a settlement of accounts took place.

"Messrs Hannay & Sons sent the account No. 115/30 of process to the defenders on or about 28th February 1874. It then contained three entries, the first being a charge for the 1500 tons of iron sold by the defenders on behalf of Hannay & Sons to Thomas Vaughan & Company on 4th February 1874, and payable by bill at four months from 10th March 1874, and the remaining two entries being the price of the 1500 and 1000 tons of iron sold on 6th and 16th February 1874 by Hannay & Sons, to or through the defenders, for cash on 10th March 1874. These three entries are added together in the account, and amount to £15,525.

"On the 4th March 1874 the defenders sent to Hannay & Sons an account (No. 116/29 of process) containing the sums alleged to be due for the 1000 tons and the 808 tons 17 cwt. of iron delivered under the contract of 28th August, amounting to £7461, 10s. 1d.

"Now, with regard to these two accounts it is important that Hannay & Sons did not admit, as then maintained by the defenders, that 300 tons of the iron sold on 6th February had not been delivered, or that they had received the whole of the above-mentioned 808 tons 17 cwt. of iron. And it is proved that the defenders, who had then got delivery-orders for the whole of the iron sold on 6th February, have received the whole aforesaid 300 tons thereof with the exception of 51 tons, although it does not appear from the proof when these 249 tons were delivered. It is also admitted in the record by the defenders that of the said 808 tons 17 cwt. of iron there have never been delivered to Hannay & Sons 32 tons 13 cwt., the price of which amounts to £134, 13s. 7d.

"When the cashier and the book-keeper of the parties met on 11th March, the cashier of Hannay & Sons received from the book-keeper of the defenders their cheque for £863, 9s. 11d., which the defenders' book-keeper had taken to the meeting with a view to such a settlement as is now maintained by them. But instead of the two accounts, No. 115/30 and No. 116/29 of process, being fitted and settled on that footing, the entry which was made by Hannay & Sons' cashier on 11th March on the first of these documents, in acknowledgment of the cheque for £863, 9s. 11d., is entirely inconsistent with any such fitting or settlement.

"That entry is as follows:—'Mar. 11. By cheque to ac/t, £863, 9s. 11;' and that sum is deducted by Hannay & Sons' cashier from the sum of £15,525 and there is brought out, and entered on the account by him as still due the 'balance, £14,661, 10s. 1d.' The account, with that entry, and with that balance brought out, was then taken away and

retained by the defenders' book-keeper as their voucher. On the following day (12th March) the defenders' book-keeper delivered to Hannay & Sons' cashier bills drawn by Hannay & Sons on, and accepted by, Thomas Vaughan & Company for £4700 to account of the 1500 tons of iron sold to Vaughan & Company on 4th February, and first entered in the account, No. 115/30 of process. And he again produced that account, and got Hannay & Sons' cashier to make the following entries thereon, under date 12th March, in reduction of the foresaid balance of

	£14,661	10	1
'Bills from Vaughan,	4,700	0	0
	£9,961	10	1
Contr ac/t comn.	75	0	0
	£9,886	10	1'

"The defenders' book-keeper then took away with him that account with these entries thereon, and he has since retained it as the defenders' voucher. There were no entries made on that account by which any deduction was made of £1162, 10s. on account of the 300 tons of the contract of 6th February, said to be short delivered. And there were no entries made on that account or on the defenders' account, No. 116/29 of process, by which the price of the 1000 tons and 808 tons 17 cwt. of the iron sold under the August contract by Vaughan & Company to Hannay & Sons were settled or placed against the account No. 115/30 of process.

"Such a settlement of accounts as is contended for by the defenders is quite customary in the iron trade on the settling when the parties are agreed as to the sums due. 1. But the Lord Ordinary considers that such a settlement cannot be held to have taken place when it is denied by Hannay & Sons' cashier, and when the voucher taken does not make any mention of the alleged deduction of the £1162, 10s. on account of the 300 tons said to be short delivered, or of the alleged set-off of the contra account of £7461, 10s. 1d., and where the entries made on that voucher, so far from showing a settlement, bring out, after delivery of the cheque of £863, 9s. 11d., a balance as due by the defenders to Hannay & Sons of £14,661, 10s. 1d. on 11th March; and after delivery of the bills for £4700, a balance of £9961, 10s. 1d. on 12th March; and after crediting the £75 due for commission, a balance of £9886, 10s. 1d., also on that date.

"It appears that Hannay & Sons paid the defenders on 20th March 1874, £555, 17s. 8d.; on 23d March, £1067, 12s. 6d.; and on 24th March, £2500; and the defenders maintain that these payments would never have been made if the alleged settlement of 11th March had not taken place, and if the defenders had on that day remained indebted to Hannay & Sons in the balance of the £9886, 10s. 1d. But it is proved that these three sums were due for differences on speculations in iron warrants, and that such speculations and differences are kept entirely distinct from the ordinary trade transactions, and are settled promptly without reference to the state of other accounts between the parties.

"2. In regard to the defenders' claim to set off the seven bills of Hannay & Sons for £13,057, 10s. 4d. against the sums now sued for, the Lord Ordinary is of opinion that such compensation cannot

take effect, because the sums contained in these bills are not the property of the defenders, but of Thomas Vaughan & Company.

"The Lord Ordinary is satisfied that there were two separate and distinct contracts entered into under date 26th June 1872; the one being entered into on that date by the firm of Armstrong, Muller, & Company, on their own account, for the sale to Hannay & Sons of 6000 tons of iron; and the other being entered into shortly after that date for the purchase on their own account, by Armstrong, Muller, & Company, from Thomas Vaughan & Company, of 6000 tons of the same kind of iron. No doubt, Armstrong, Muller, & Company were then the agents in Glasgow of Thomas Vaughan & Company, but it is established by the proof that in selling the 6000 tons of iron to Hannay & Sons, Armstrong, Muller, & Company acted on their own account, and not as agents for Vaughan & Company. Although this is the case, it was stipulated in the contract between Armstrong, Muller, & Company and Vaughan & Company that payment was to be made either in cash 'or by Messrs Hannay & Sons' acceptance.' When payment fell to be made under this contract, Armstrong, Muller, & Company required Vaughan & Company to draw direct upon Messrs Hannay & Sons. This Vaughan & Company refused to do, and required Armstrong, Muller, & Company to become drawers of the bills upon Hannay & Sons. This dispute was ultimately settled by Vaughan & Company granting the following letter to Armstrong, Muller, & Company on 23d October 1873:—'In consideration of your having to-day agreed to draw upon Messrs Hannay & Sons for all pig-iron delivered and to be delivered under our contract of June 26/72 with you, and hand such drafts over to us when accepted, we hereby agree to indemnify you from any loss in respect of such drafts handed over to us or discounted by you.' On the faith of this letter Armstrong, Muller, & Company drew the seven bills now founded on by the defenders upon Hannay & Sons, and paid Vaughan & Company in cash the price of the 6000 tons of iron. After the dissolution of Armstrong, Muller, & Company these bills were endorsed by that firm to the defenders, as liquidators of Armstrong, Muller, & Company, who discounted them, and applied £5000 of the proceeds in payment of that amount due to Mr Muller under the contract of the dissolution of Armstrong, Muller, & Company, and retained the balance. Before the seven bills became due Hannay & Sons were sequestrated; and these bills were, when due, retired from the bank by the defenders, who received from Vaughan & Company £4207, 10s. on 3d April, and £4207, 10s. on 3d June 1874, to enable them to do so. It is proved that Vaughan & Company admit that they must pay the defenders any balance of these bills which may remain unsatisfied after deduction of the said two sums of £4207, 10s., and of any dividend recovered from Hannay & Sons' sequestrated estate. In short, Vaughan & Company admit that they are the parties truly interested in these bills and the plea of compensation now insisted in by the defenders.

"Such being the case, the Lord Ordinary considers that the defenders have no interest in respect of which they now plead compensation, and that they plead compensation in the interest and for the benefit, not of themselves, but of Vaughan & Company. The letter of indemnity of Vaughan & Company was granted in respect of their obliga-

tion to take, in terms of their contract with Armstrong, Muller, & Company of 26th June, Hannay & Sons' acceptances in payment of the prices of iron delivered under that contract to Armstrong, Muller, & Company—that is, to draw upon Hannay & Sons for these prices. Armstrong, Muller, & Company maintained that they were bound to do so; and they must have admitted that this was the true construction of the contract, because the consideration for granting the indemnity is as set forth in the letter—that Armstrong, Muller, & Company have to-day agreed to draw upon Messrs Hannay & Sons' for all iron delivered by Vaughan & Company to Armstrong, Muller, & Company under their June contract.

“Further, the defenders acted in indorsing and discounting these bills as the liquidators of Armstrong, Muller, & Company, and for behoof of that firm. They were therefore merely the agents or mandataries of that firm in the liquidation. And in that capacity they paid Mr Muller £5000 of the proceeds of the bills, and retained the balance. Armstrong, Muller, & Company, for whom they acted, are bound to relieve them, and have a good claim under the letter of indemnity against Vaughan & Company, for whom Armstrong, Muller, & Company acted on the faith of that letter in drawing the bills.”

The defenders reclaimed, and argued—There was a settlement made of accounts on March 11, 1874, and the evidence supports this view. The claim for compensation under the seven bills of Hannay & Sons is good, as the amount is the defenders' property, and not that of Thomas Vaughan & Company, as the Lord Ordinary has held, and Armstrong Brothers & Company were the onerous holders thereof, and not holders merely as agents for the liquidator of Armstrong, Muller & Company.

Argued for the pursuer—There are three questions which here arise—1. Whether the intermediate endorser, not the holder of the bill at the time of sequestration, can plead compensation upon that bill. As to this point, how would the case stand apart from any speciality? Compensation can only be pleaded as regards debts mutually due by the parties at the time of sequestration. The *concursum debiti et crediti* must be fixed at the date of bankruptcy. There is an extension of this rule allowed in the case of balancing of accounts in bankruptcy. Bell (M'Laren's edition, p. 130) does not say that any endorser can plead the right of set-off; that right is merely extended in this case, and from equitable considerations alone. Bell's whole doctrine is merely an extension of the law of retention. [LORD GIFFORD—You require to show that bankruptcy gives you a right which without bankruptcy you would not have.] We admit that you can buy bills and plead compensation on them, but that cannot be done after bankruptcy. There is not any Scotch authority on the point, and the English cases depend on the construction of statutes; the bankruptcy fixes at its date the rights of parties. 2. According to the original contract of 26th June Vaughan was bound to draw on Hannay. In that case there was only Vaughan's name, and the bills were Vaughan's. A dispute as to the meaning of the contract having arisen between Armstrong and Vaughan, it was arranged that Armstrong was to draw bills, though he was not bound to do so. Vaughan undertaking to hold him *indemnis*. We maintain that truly these were Vaughan's bills, as the Lord Ordinary

has decided—and to establish this contention we appeal to the documentary evidence of the two contracts. 3. Armstrong Brothers in holding these bills were merely holding them as liquidators of Armstrong, Muller, & Company, and they had enough funds to meet them from the estate of that dissolved firm.

At advising—

LORD JUSTICE-CLERK—My Lords, this case raises some important considerations.

The first question that was argued to us, and on which the Lord Ordinary has explained his views very clearly and fully, is how far upon the 11th March there was a settlement of accounts between these two parties, in which the debt due by Armstrong Brothers was discharged by that settlement as part of a contra-account. I do not mean to go into the circumstances connected with this, because I have come to a clear opinion that the Lord Ordinary is right upon it; but in the first place, I have no doubt that Armstrong was in a position to have made such a settlement as is alleged if in point of fact he did so; and, in the second place, I have a little doubt that on 11th March, or rather on the 12th, the parties understood and believed that the £7000 of counter-claim, being debt, had been set off against the larger debt due to Hannay, and that all those suggestions—that there was a dispute as to whether the character of the agency would prevent the settlement on that footing, and the fact that the cheque had been taken from Armstrong only as a payment to account, and that the reason no more was paid, was that he had no more money—all those were pure evasions, and have no foundation whatever in the real substance of what was done. The true account of it is given in Moir's Evidence, at p. 10, where he is asked about the entry which he himself made on that very day. In his own statement—[reads]. So that, in point of fact, there was not, and could not, have been any dispute as to whether the £7000 should be deducted from the larger account, and there never was any. The difference they had was in regard to the sum that remained after that deduction had been made; and I think it right to call attention to that, because, although I have come to the conclusion I have already intimated, and concur with the Lord Ordinary in the view that he takes, I do it with reluctance, as I think it gives effect to a rule of law ordinarily most just and equitable, but somewhat against the justice and equity of this particular case. My view is, that they did not do what they intended, and as the law requires that a discharge of this kind should be evidenced by writ, and upon very clear and manifest principles, I am of opinion that in this part of the case Armstrong Brothers must fail.

The second question, however, raises principles of very great importance, and it is necessary to attend with some care to the facts before proceeding to their consideration. Assuming that the debt which is now claimed must be held to be still due, the defenders, Armstrong Brothers, have raised a plea of compensation on the ground of certain bills of which they are holders and endorsees, and in which the bankrupts stand as acceptors. Now it is necessary to keep certain facts in mind. The bills were granted as the price of iron furnished by the drawers, Armstrong, Muller, & Co., to the bankrupts, under a contract dated 26th June 1872.

That contract embraced a considerable tract of time, and a large portion of the iron was contracted for delivery at different intervals. The partners of the firm of Armstrong, Muller, & Co. were W. J. Armstrong and C. Muller—Mr Armstrong being also a partner of Armstrong Brothers, the defenders in this case. Armstrong, Muller, & Co. dissolved partnership in December 1873, during the currency of the contract in question, and by the terms of the dissolution all current contracts were taken over by W. J. Armstrong on his own behalf, he undertaking to pay £5000 to Muller as his share of the capital, and to account for any further right he might have. This contract had been made in June 1872, and the bills in question were granted after the dissolution of the company; and in the course of winding-up W. J. Armstrong used his new firm of Armstrong Brothers practically for the purpose of obtaining advances for current purposes, and with that view he endorsed the bills of the dissolved firm, which subsisted only for the purpose of winding-up the dissolved company. He endorsed to Armstrong Brothers, the firm of which he was partner, the bills in question, and they discounted them at their own credit with the Clydesdale Bank, and advanced the proceeds to Armstrong, Muller, & Co. The bills were at four months, but before they fell due Hannay & Son became bankrupt on 18th March. The bills were then of course lying discounted in the bank. They were retired at maturity by the last endorser, Armstrong Brothers, who now plead them as compensation against the claim made upon them. There is no doubt that on the face of these documents Armstrong Brothers are the creditors. They are the holders with the legal presumption following from that fact. Now, these are the facts upon which we are to consider this plea of compensation, and I have omitted Vaughan's share in this transaction for the present, because it does not enter into the direct facts which are necessary for the explication of the case. On this state of facts, which is very imperfectly set out on record, the defenders plead that their debt to the pursuer is compensated by certain of the bills in question which were granted to Armstrong, Muller, & Co. in payment of iron delivered to Hannay & Son under this contract of 26th June. There is no dispute that if this plea be well founded it is sufficient to dispose of the case, and therefore I need not go further to show upon what specific bills the plea rests. The legal plea of compensation, as I gather, not from the propositions pleaded and maintained against the record but from the arguments at the bar, seem to be these—*First*, that Armstrong, Muller, & Co. held a guarantee or obligation of indemnity from Vaughan & Co. to keep them free of loss on these bills, and that therefore the plea is truly raised in their interest, and hence they draw the conclusion that it is impossible to compensate the debt, for it is truly a debt due to Vaughan, and not due to Armstrong; *Second*, that the defenders were not holders of the bills at the date of sequestration, but were only prior endorsers to whom the plea of compensation is not competent; *Third*, that the defenders gave no value for the bills, but were only agents or hands of Armstrong, Muller & Co. in liquidation. On these grounds it is maintained that compensation is not pleadable to them in respect of these bills against a debt which their firm

owes to Hannay & Son. Now, in considering these pleas it must be kept in mind, 1st, that Armstrong Brothers are, *ex facie* of the documents, holders and creditors in the bills, and that the law presumes onerosity unless the contrary is proved by the writ or oath of the holder; and 2d, that these pleas are raised on the part of the primary debtor on the bills, who does not dispute that he received value for the obligations. In regard to the first plea, founded on the letter of indemnity, I am of opinion that it is entirely irrelevant. The bankrupt's obligation was undertaken to Armstrong, Muller & Co., and not to Vaughan, and this is the obligation he is now asked to fulfil substantially by the plea of compensation which has been raised in this process. It is nothing to him, it is nothing to Hannay, the acceptor, that others with whom he has no contract have given collateral obligations to take effect solely in the event of his not fulfilling his engagements, and it is quite manifest that the loss against which Vaughan undertakes to indemnify Armstrong need never arise until Armstrong, Muller & Co. were creditors of Hannay in the first instance. It is an obligation indemnifying them from loss, but a loss arising from failure of the acceptor to fulfil his obligation as debtor to his creditor Armstrong, Muller & Co. Indeed the plea was substantially abandoned except upon another ground. If there had been attester or cautioner for the acceptor in this case that would have been an obligation to indemnify or guarantee, but the acceptor would never plead that with respect to them he was not bound to pay. It is said, however, that the real interest in this contract was in Vaughan, and that Armstrong, Muller & Co. were only his agents. But this also is irrelevant as pleaded against Armstrong Brothers, the endorsers of these bills, even if it had been well founded in point of fact. It is enough that the obligations were granted to Armstrong, Muller, & Co. in their own name, and the debtor having so granted them must fulfil them in his turn. If they are in the hands of a third party no such allegation is of any avail against him. And this is manifest. But I am rather of opinion that the plea would have been quite inefficacious even if the question had arisen with Vaughan himself. The contracts are here, and they are solely in the name of Armstrong, Muller, & Co. I have no doubt whatever that the very object of the shape the transaction took was in order that Vaughan might not contract with Hannay, and might keep himself entirely free of loss through him. Armstrong, Muller, & Co. dealt in their own name, and were entitled to fulfil the contract, and entitled to the treatment of principals. If they were agents they do not appear as such, and they could have set off those obligations against any debt due by them to Hannay. But, further, it seems quite clear that Vaughan had no contract with and no liability to Hannay, the contract was with Armstrong, Muller, & Co. solely, and he was quite entitled to deal with the latter. But it is said, in the next place, that at the date of the sequestration the bank was the holder of these bills, and that the defenders, who were only the last endorsers, are not entitled in that character to plead compensation. It was argued that this right was competent only to the actual holder and primary creditor, meaning, I presume, the original creditor. This argument proceeds on a misapprehension of the legal principles applicable to this subject, and now well re-

cognised, summarised in the last edition of Thomson's work on Bills of Exchange, p. 507. The rule which has been laid down is simply this, that there cannot be a double ranking for the same debt in bankruptcy, and a prior endorser who has parted with a bill cannot plead compensation while his endorsee is in possession of the document. But in respect of his contingent right of relief against the holders he is entitled to retain what he owes to the debtor in the bill until he has relief to that amount, and he would in like manner, apart from retention, be entitled to rank and have a dividend set aside to meet this contingency. I think this is well expressed by Thomson in these words, "The holder of such a security, if he has endorsed it to a third party, seems entitled to retain any debt due by him to the other party till he is relieved from his liability." And such also is the doctrine laid down by Bell, and it seems by the terms of the present Bankruptcy Act to be matter of necessary inference. But we have no case of double ranking here. It is the ordinary case where the holder of a bill has discounted it,—retired it from the bank on the acceptor's failure to pay. The debt is precisely the same in the person of the endorsee as it was before the bill was discounted. He remains the acceptor's direct creditor, and is entitled not to retain but to set off the debt he owes against the obligation which he holds. This is a branch of the law upon which there is not a great deal of authority, and in which there seems to be some conflict between the principles applicable in Scotland and those which have been applied in England, but the present case I apprehend not to fall within the more disputed and difficult category, because manifestly, although the bill was lying in the bank when sequestration took place the holder is now in full right, and is entitled therefore to compensate any debt he owes to the bankrupt, for truly he is a creditor in bankruptcy. It is pleaded, in the third place, that the defenders gave no value for this bill, and were only the hands or agents of Armstrong, Muller & Co. in liquidation. Now, this again is irrelevant. It is no concern of the primary debtor in this bill on what terms the holders were. It is enough that they have the right to receive, and the power to discharge, the debt, and the acceptor has neither right nor interest to enquire further, seeing that he got full value for his obligations. It is, however, quite obvious from the facts of this case that the plea of want of value is without any foundation. Armstrong Brothers discounted these bills on their own credit as holders, and handed over the proceeds to their partner for the behoof of the drawers for the winding up of the business of Armstrong, Muller, & Co. The former became directly liable to the bank, and whatever claims or liabilities they may have as with the drawers the transaction was clearly onerous in the strictest sense. They were in truth the bankers of the liquidator of Armstrong, Muller, & Co., and furnished him with funds to carry out the agreement between the partners, and accordingly there can be no question that the £5000 paid to Mr Muller was truly part of the proceeds of this bill discounted upon the credit of Armstrong Brothers. Neither is it relevant to allege that on the failure of the acceptor other parties subsidiarily liable have aided in retiring those bills. The payment of an account for a co-obligant does not deprive the holder of his right to rank on the estate of the bankrupt acceptor if the payment be made after

the date of the sequestration. I can quite understand the plea,—and it is really in this direction that the main difficulty of the case has arisen,—if it were alleged that the endorsement was a mere blind or colour in order to give a nominal title to Armstrong Brothers, and to enable them to plead compensation which otherwise could not have been pleaded. But in this case there is no ground for that, because the transaction was prior to the bankruptcy. Had it been subsequent no doubt compensation would have been excluded, and I could quite understand that if it had been said that Armstrong, Muller, & Co. had retired the bills with their own funds, but had allowed Armstrong Brothers to retain the documents of debt fraudulently for the purpose of this plea. That, however, would require very specific statement, and very clear proof, to overcome the necessary inference from the form of the documents; but the allegation here really amounts to no more than this, that by subsequent transactions in regard to these bills or otherwise, a debt had emerged, due by Armstrong Brothers to Armstrong, Muller, & Co. But manifestly that is entirely irrelevant, and is a matter with which the acceptor has no conceivable interest. It is of no value or significance whatever as against this liquid document of debt, and therefore I find nothing in this case which raises a relevant plea of the description I have referred to, and the state of the account seems to be simply this, that the acceptor having failed to pay, the prior endorsers, Armstrong, Muller & Co., have to a certain extent reimbursed the amount which was got upon the credit of Armstrong Brothers from the bank on this bill. How far it is completely liquidated or not does not appear, but that will never relieve the acceptor from the necessity of paying his own bill; and to the extent of which Armstrong Brothers recover from the bankrupts of course they are bound to reimburse themselves.

I am therefore of opinion that this plea of compensation is well founded. I may observe in closing that even if Armstrong Brothers were only the agents of the dissolved firm of Armstrong, Muller, & Co. in this matter, which is far from being clear—I say no more than that,—W. J. Armstrong, who has the full right to Armstrong, Muller, & Co., might or might not be entitled to set off the Company debt for which he is liable against the bills, and on that assumption he would have the right to recover. That would lead us into another category of law, but it reconciles me to any difficulty that may arise in this case that I think it is plain enough in reality that the true interests—even supposing Armstrong Brothers were only to be looked upon as the hands or agents of Armstrong, Muller, & Co.,—have become so completely blended together that the plea of compensation would be a very formidable one upon the hypothesis which at the same time I have rejected as matter of fact.

On the whole matter, I think that the defenders' plea of compensation is well founded, the result of which is that the pursuer must fail in his action.

LORD NEAVES—This is an action at the instance of Mr M'Kinnon, Hannay, & Son's trustee, against Armstrong Brothers, for the price due upon certain iron contracts. To that claim two main pleas in defence were stated. The one is, that the claim is not competent now by Hannay's trustee, and that it had, while Hannay was solvent, or at least

not declared publicly to be insolvent, been set off against a counter claim which existed on the other side at the instance of Armstrong, Muller, & Co., and which consisted in the parties having made a settlement by which a balance of £863 upon their transactions was brought out and paid. That was the first defence stated by Armstrong Brothers. The next defence of any moment in the case is that which your Lordship has referred to, viz., that at the time when this demand was made, and anterior to the bankruptcy of Hannay & Son, a relation subsisted between these parties under which Hannay & Son were acceptors and debtors in certain bills of theirs now and soon after that time held by Armstrong Brothers, and that that was good as a set-off for claim of compensation or retention to meet the claim of Hannay's trustee. Now, upon the first of these pleas I am inclined to say it is unnecessary to pronounce an opinion, and all I would say further is that I should not see any ground for altering the Lord Ordinary's interlocutor. Whatever may have been intended—and there can be no doubt that the evidence of Moir, who was the negotiator of this business on the part of Hannay & Co., is anything but satisfactory and anything but reliable,—still although some things were done, and £863 seems certainly to have been paid by cheque, no proper document was taken to extinguish the main bulk of what was then due. A receipt was given for this £863, but no document was taken to extinguish the larger sum, and matters remained in a condition leading to this result, that whatever was the intention it was not properly carried out. I cannot help at the same time saying, that as it is plain that in this matter there were other parties interested, it was all the more necessary to take an explicit document in reference to the transaction. Upon the whole, I have come to the conclusion that upon this part of the case we should not disturb the Lord Ordinary's interlocutor.

The case may be decided that there is here a sufficient set off or compensation or retention to afford a good answer to the claim of Hannay's trustee. No doubt the trustee's claim is a claim against Armstrong Brothers for the price of iron furnished by contract. To that Armstrong Brothers say, "Here are the bills of the bankrupt granted anterior to that, held by Armstrong Brothers as indorsees, endorsed no doubt to the Bank to get up the proceeds and dispose of them in a certain manner; but now, upon your becoming bankrupts, with these bills in the Bank, we are in the situation of meeting your proper debt, and may retain our own debt as compensation, or ground of retention, so as to bar you from claiming what you would otherwise have been entitled to claim." I think that is made out more by retention, but to that retention I can see no objection, unless it can be shown that the parties pleading the retention have no interest in the matter at all: and, in the next place, that they have thrust themselves into this predicament in order by some device to put themselves artificially in a situation of pleading the set-off. Now, neither of these appear to me to have been shown. The matter which is involved was going on at the very time when this sequestration took place. The bills had been granted to Armstrong Brothers, who are indorsees upon them, and they were endorsed to the Bank, and now that Hannay & Son are in bankruptcy, it cannot be doubted, I think, that in

common justice the party who is the endorser and discounteer of the bill, when his proper debtor becomes bankrupt, is entitled to retain any funds of that debtor which he may have in his possession, because he is liable to the holder of the bill. These were proper acceptances. They were first held by Armstrong, Muller, & Co., who endorsed them to Armstrong Brothers, who discounted them and applied the money in fulfilment of obligations they had; and nothing has been shown to overcome the presumption that they are onerous *bona fide* holders of these bills. The operation of the power of retention is, I rather think, a favourite of the law, because it is highly useful. The party who endorses a bill is but a subsidiary obligant, and if he is, upon bankruptcy, liable and certain to be distressed for the payment of this bill, how could it be fair or reasonable to refuse him the power of working his own relief when he happens to be indebted to the ultimate debtor, the acceptor in an equal sum or in any sum at all? Accordingly, Bell, both in his Commentaries and Principles, carries out this doctrine of retention very clearly, and the same principle is applied by Erskine. I cannot see any answer to that view.

That part of the Lord Ordinary's interlocutor must be altered, and we are bound to sustain the right of the defenders to hold and apply what they are due under the iron contracts to Hannay's trustee towards their own relief and liberation from the debt under the bill. In regard to Armstrong Brothers, they were not merely liquidators or factors holding a kind of office like a trustee in sequestration. They were personally concerned in this. They took over the business and obligations of Armstrong, Muller, & Co., and either granted bills or paid over money to the parties to whom that applied. In that way they are onerous holders, and the presumption is that they are onerous holders by the fact that the bills stood indorsed to them.

Upon these grounds I am of opinion that the Lord Ordinary's interlocutor should be altered as your Lordship has proposed, to give effect to this plea.

LORD ORMDALE—I am of the same opinion. In regard to the first question, it may be unnecessary, and I do not intend, to enter into any details. I concur, however, with the Lord Ordinary in thinking that the question, were it necessary, ought to be decided as he has decided it. It is quite true there are statements made by Moir which apparently are not very satisfactory, but then, upon the other hand, the same remark may be made in regard to the testimony of Mr Picken. For example, he says "The only document which passed between Moir and me on 11th March was No. 115/30 of process." Now, he was present as representing the defenders, and Mr Moir as representing Hannay & Son. He goes on to state, "What is signed bears date," &c. [reads p. 39]. It is very difficult to reconcile that statement of Picken with what appears and has turned out to be the truth of the case, even as argued and maintained by the defenders. The only other remark I would make on this part of the case is, that those irreconcilable statements on the part of the only persons who represented Hannay and the defenders respectively on 11th March, satisfy me that it would be most dangerous to rely upon parole evidence in regard to

the settlement of such large sums as £14,000 or £15,000. Therefore, without entering into any further detail, I have merely to repeat that I agree with the Lord Ordinary in the view he takes on this branch of the case, and with your Lordships.

The second question, however, raised in the case is undoubtedly attended with some considerations of great importance and delicacy in the law of compensation, or rather of set-off in bankruptcy. All the seven bills referred to bear to be drawn by Armstrong, Muller, & Co. upon and accepted by Hannay & Son, the bankrupts, and if they had remained so till the bankruptcy the present defenders could not have had any ground for their plea of compensation or set-off in respect of them. But it has not been disputed that the defenders had previously to the bankruptcy or known insolvency of Hannay & Son acquired right to the bills by endorsement from Armstrong, Muller, & Co. When, therefore, after the bankruptcy the trustee on Hannay & Son's sequestrated estate insisted against the defenders for payment of a debt due by them to the bankrupts, they defended themselves on the ground that the debt sued for was more than met and extinguished, on the principle of set-off, by the bills. The pursuer maintains on various grounds that the defenders have no good and available defence of set-off. He says, first, that although the defenders are apparently the holders of the seven bills, they in truth and reality hold them, not in their own right, but for and in right of Vaughan & Co.; and this is the pursuer's sole plea on the subject for which any foundation is laid in the record. In regard to the pursuer's plea, as so maintained, I have no difficulty or hesitation in disregarding it. Vaughan & Co. are not parties to the bills at all. Armstrong, Muller & Co. are the drawers, and Hannay & Son are the acceptors. But it is said that though Vaughan & Co. are not parties to the bills, they undertook by the letter in process to indemnify Armstrong, Muller & Co. for any loss they might sustain on the subject. This appears to be so, but I am not aware, and can neither find authority nor see any good reason in equity or otherwise for holding, that the circumstance of a party having a cautioner or collateral security for his debt is destructive of his right of compensation or set-off, supposing it to be otherwise well founded. I do not, indeed, understand that any such contention was ultimately maintained by the pursuer, although it seems to be the ground upon which the Lord Ordinary has proceeded in deciding this branch of the case in his favour. It was, however, strenuously urged, in the second place, for the pursuer, that although his plea to the effect that the defenders are in right of Vaughan & Co. is to be held as ill-founded, still it could not be taken that they hold the bills for their own right, but merely and in right of Armstrong, Muller & Co., who had and still have the sole and exclusive interest in them. But that is a view—irrespective of the circumstance that it is inconsistent with the case of the pursuer as presented by him in Court—which cannot, I think, be maintained. The defenders, in point of fact, are the holders of all the bills in question, and are therefore entitled to insist upon payment, and they alone can deliver them up on payment being made. Nor do I see that any competent evidence has been produced or referred to for the purpose of showing

that the defenders are not onerous and *bona fide* holders of the bills. They must therefore, according to the facts as they have been presented to the Court, be held to be the true creditors in the bills; and if so, it follows that they are entitled to the benefit of the plea of set-off in answer to the demand now made for the debt due by them to Hannay & Son. It is further maintained, in the third place, that in point of law no such plea is available to the defenders in respect that the bills were not due at the date of bankruptcy, and in place of being actually held by the defenders at that date they were held by the Bank, by whom they had been discounted. But it neither was nor could be disputed that the defenders had, as holders of the bills, endorsed them to and discounted them at the Bank, and were to all intents liable to the Bank before the date of bankruptcy. Nor was it disputed that the defenders, when the bills did fall due, after the date of the bankruptcy, retired them, as they were bound to do, and so became holders of them when the pursuer's claim was made against him. And it is clear that all this took place in good faith and according to the ordinary course of business in such matters. Why then should not the defenders' plea of compensation or set-off be available to them as against the pursuer as trustee on Hannay & Son's sequestrated estate,—Hannay & Son being the primary and proper debtors on the bills,—simply because they had not been actually retired and in the hands of the defenders at the time of the bankruptcy? No authority was stated by the pursuer in support of his contention, and he acknowledged he was aware of none. On the other hand, the defenders, besides Thomson, to whom your Lordship has referred, have the high authority of Bell, who, while he states in his Commentaries the ordinary rule of law, that in compensation the debts must both be due, he at the same time goes on to state that, on the principle of balancing of accounts in bankruptcy, if one of the parties became bankrupt, the other might defend himself against present payment by setting-off a debt that is future or contingent, although the term of payment be after the failure. It appears to me, therefore, that to allow the pursuer in the present case to enforce payment of the debt sued for, irrespective of the bills held by the defenders, would be tantamount to allowing Hannay & Son's creditors to be paid with the defender's money, while they are only to receive a dividend on the large debt due to them.

I am therefore, for these reasons, of opinion that the defenders are entitled to set off against the pursuers' claim of debt the counter-debt due to Hannay & Son by them, it not being shown that said debt arose subsequent to the failure, and had not come to be vested in them, and held by them *bona fide* in their own right. The result will be the recal of the Lord Ordinary's interlocutor, and absolvitor in favour of the defenders—their counter-claim, as I understand, being much more than sufficient to cover the claim against them.

LORD GIFFORD—I have come to the same conclusion, and although this case is intricate in many of its details I have come at last to that conclusion without much difficulty. There is no dispute now between the parties as to the amount of the debt sued for by Hannay's Trustee. If all the defences fail which have been referred to by your Lordship, then the sum of about £9000 is due to Hannay & Son



and their trustee by the defenders Armstrong Brothers. The defence is two-fold. In the first place, Armstrong Brothers say that part of that debt was settled on 11th March 1874 to the amount of £7461, 10s. 1d. Now, in regard to that defence I agree entirely with the Lord Ordinary. I think the settlement has not been proved in the only way it could competently be proved. The settlement could not take effect because the debts were not due in the same character; and hence it required a writing or specific act of settlement, assuming the agents to be empowered to carry out such a settlement. Now, so far from there being a written settlement, it appears to me that the only writings founded on prove that there was no settlement. There may have been an understanding between the parties that that sum would be taken as cash at the ultimate settlement, but I think it is as clear as anything can well be that what the parties intended to do, or understood they might do, they did not actually carry out. The only way in which a written settlement could be proved would be by writing, and the only writing is a writing which, so far from being a settlement, shows that there was a balance standing over unsettled, including this sum; and therefore there is no binding settlement between the parties. I think, therefore, that the Lord Ordinary is right in repelling the first plea.

But then the other plea in defence is of a much more formidable and equitable nature, it is this—Hannay's Trustee, as in right of Hannay & Son, sued Armstrong Brothers for £9000, admittedly due. The defence is that Armstrong Brothers produce bills, of which they are the endorsees, and which are now in their hands,—I shall refer immediately to how they came into their hands—for £13,000 odds, of which Hannay & Sons are the acceptors, and they say now—"Well, we owe you, supposing our first defence to be repelled, £9000, but the bankrupts owe us £13,000, and therefore the debt sued for is extinguished." Now, supposing this defence had arisen without any bankruptcy, for that is the way I think it is best and most clearly taken, and with Hannay & Sons at the bar, there would have been no answer to it, nor would there have been room for enquiring how Armstrong Brothers had got the bills. It is sufficient they have got them. It would not have been in the mouth of Hannay & Sons to say, "You got them gratuitously," unless they could add, "and we ourselves got no equivalent for these," for even a gratuitous endorsee is, as against the acceptor, to receive and discharge the debt. Apparently, therefore, it seems to me that if there had been no bankruptcy, no sequestration, no insolvency, Armstrong Brothers, by getting these bills would have been entitled to plead them as a complete and conclusive answer to the claim of debt for which they are sued. Now, let us see whether it makes any difference when Hannay & Sons become bankrupt. When Hannay & Sons became bankrupt the bills due by them, upon which compensation is now pleaded, were in bank in course of their currency. They were not due, and had not attained maturity. Accordingly, compensation in the strict sense of the word could not be pleaded, because the debts must be mature, both instantly executed, and the debts must be legal and in the hands of the same parties, and it is equally plain that the bank, being the only holder, was the only party, who, supposing the term of payment had come, could plead com-

penensation. But when Hannay & Sons became bankrupt certain rights instantly arose to every body interested in those bills. The acceptor was bankrupt, and therefore the holder, the bank, had relief against all previous endorsers up to the drawer. That would not have prevented the bank pleading compensation if the bank had had the means of compensation. For example, if there had been a large balance due by the bank upon account current to Hannay & Sons they would have pleaded compensation. A right arose at the same moment to every previous endorser. The bank would have recourse upon those previous endorsers, and, as a counterpart of that, the previous endorsers were entitled to pay off the bank, and take up the bills. Now, the immediate endorser was Armstrong Brothers, and upon the sequestration of Hannay & Son Armstrong Brothers were entitled to pay off the bank and then to obtain relief by every means in their power, getting payment out of Hannay & Sons. But it so happened that Armstrong Brothers were due Hannay & Sons a considerable sum, nearly approaching the amount of those bills, and I can see no absolute claim they made to set off the one against the other. It is not merely retention, it comes to set-off. It is retention until they take up the bills; but the moment they take them up, then they are fully vested in them and entitled to say, "I owe you, the bankrupt, £9000, and you still owe me £13,000 on these bills in my favour;" and I think it is equally incompetent with a bankruptcy, as it would have been without a bankruptcy, to enquire about previous endorsers through whose hands the bill had come. It is enough that the bills are in the hands of the last endorser, and, in short, I think the law may be stated thus, that compensation or retention to the effect of ultimate compensation may be pleaded after bankruptcy, just as it might have been done before, provided that the creditor pleading has not acquired the debt after the bankruptcy for the purpose of pleading compensation. Now, the previous endorser is not in that position. He might have been compelled, and as the counterpart he is entitled to plead compensation. He is not therefore in the category of those who acquire a right *mala fide* for the purpose of getting payment of compensation, because they happen to be indebted to the bankrupt. In a case of that kind the subsequent acquisition of the debt will be prohibited by law; but that does not apply to the case of endorsers who became obligants upon a bill for its amount before sequestration pleading compensation after sequestration happens. And upon the simple ground that here we have a concurrence of debtor and creditor,—Armstrong Brothers due the bankrupts £9000, and the bankrupts due Armstrong Brothers £13,000,—I think they are entitled to plead compensation, there being nothing established to put them into bad faith, or to show that they had *mala fide* acquired that debt after sequestration with the undoubted purpose of operating compensation. That seems to me to be a complete defence, leading in this case to absolvitor.

LORD JUSTICE-CLERK—Then your Lordships alter the interlocutor and assoilzie the defenders from the conclusions of the summons.

Counsel for defenders asked expenses.

Counsel for pursuer urged that the proof was largely due to the defence founded on a settlement

Replied for defenders—there were no witnesses examined who would not have been necessary upon the other question of fact, which was to try whether the contract of 26th June was not a contract in which Armstrong Brothers were principals. The plea stated against the set-off was, that it was Vaughan's contract and not Armstrong Brothers' contract, and we required to go to proof upon that.

LORD JUSTICE-CLERK—We find the defenders entitled to expenses, under deduction of one-half the expenses of the proof.

Counsel for Reclaimers (Defenders)—Dean of Faculty (Clark), Q.C., Asher and Lorimer. Agents—Webster & Will, S.S.C.

Counsel for Respondent (Pursuer)—Balfour and Mackintosh. Agents—J. & R. D. Ross, W.S.

Tuesday, February 9.

## OUTER HOUSE.

[Lord Curriehill, Ordinary.

PETITION—REV. JAMES STEWART.

*Lands Clauses Act 1845, §§ 67, 79—Compensation Money—Petition—Temporary Investment—Permanent Reinvestment—Expenses.*

A railway company under the Lands Clauses (Scotland) Act 1845 took certain portions of glebe land, and in terms of the statute consigned the price. Thereafter the fund consigned was invested in a heritable bond, the expenses being paid by the company. The estate over which the bond was held having been sold, the bond was cancelled and the money again consigned in bank. Application was made to the Court to authorise the reinvestment of the fund in the purchase of certain feu-duties, and to find the railway company liable in the expenses of this second application. The company opposed the motion. *Held* that the investment in feu-duties was one of a permanent character, and that the railway company were liable in the expense of it as such.

*Observed* (per Lord Curriehill) that feu-duties are truly "lands" under burden of the feu-rights.

This was a petition presented by the Rev. James Stewart, minister of the parish of Wilton, in the Presbytery of Jedburgh, for authority to re-invest consigned money. On 30th April 1867 the petitioner presented a petition setting forth that under two arbitrations and one joint-valuation with the North British Railway Company, under "The Lands Clauses Consolidation (Scotland) Act, 1845," the said Company were held liable in payment of the total sum of £3813, 1s. of compensation for certain portions of the glebe of Wilton taken by them for the purposes of their railways, under the Acts set forth in said petition, which sum was consigned in the Bank of Scotland in name of the Presbytery; and in terms of sections 67 and 68 of the said Lands Clauses Act, 1845, authority was asked, *inter alia*, to invest £2500 of the said sum, by taking an assignation of a bond and disposition in security over the estate of Freeland, in the county of Perth. The authority having been obtained, the £2500 was invested in the manner proposed.

Freeland was sold by the proprietor, Lord Ruthven, with entry to the purchaser at Whitsunday last; the £2500 has been paid up and the burden extinguished. After an unsuccessful attempt to obtain a security over an estate in Fife, a minute was put in by the petitioner proposing an investment of the money in the purchase of feu-duties, as detailed by the Lord Ordinary in the note appended to his interlocutor. This transaction having been sanctioned, the petitioner sought to have the Railway Company found liable in the expenses. This was opposed by the Railway Company.

Argued for them—We rest our case on sections 67 and 79 of the Act. Section 67 provides modes in which purchase money, payable to parties in the Rev. Mr Stewart's position, is to be paid; and the second purpose is for "The purchase of other lands to be conveyed," &c. This, like all statutory enactments, requires to be strictly interpreted, and on a reference to the interpretation clause we find "lands" defined to be "heritages of any description or tenure." Were "heritage" to be deemed equivalent to "heritable property," the term would, in 1868, have embraced "heritable bonds," which could not have been deemed a "permanent investment." Again, under section 79 the Court may order the expenses to be paid by promoters—that is to say, the expenses (1) of investment in Government or real security. This has already been done when we paid the expenses in connection with the bond over Freeland; (2) of "Reinvestment in the purchase of other lands," &c. That is not so here. The meaning of this part of the clause has been explained by two English decisions (*Milward*; *Buckinghamshire Railway Company*). The second part of section 79 clearly provides for the expenses being given against us in two cases, and two only, (1) Where there is a temporary investment, as in the bond over Freeland, already paid for by us; (2) Where there is a permanent investment. This being still of the nature of a temporary investment the petitioner cannot ask for expenses. We might be called on in future to pay for reinvesting the money permanently in "land." No doubt feuing was authorised under the Glebe Lands Act, 1866; but that Act does not in any way refer to the present case—(*Gloag*). If, however, the Court should deem this a permanent investment, see *Lomax*.

Argued for petitioner—This is a permanent investment, and as such we are entitled to claim expenses for it. Feu-duties are heritable, and "lands," as defined by the Act to be "heritages of any description or tenure," include "feu-duties." The owner or creditor of feu-duties is really infeft in the land, and is the superior thereof. It is not admitted, and has not yet been decided, that the Railway Company are liable only in the costs of one investment. The statute gives a discretion to the Court, and in several cases the Court have used it.

Authorities for Railway Company—*Milward v. Oxford, Worcester, and Wolverhampton Railway Company*, 29 L. J. Ch., 245; *Buckinghamshire Railway Company*, 14 Jur., 1065; *Lands Clauses Act*, 8 Vict., c. 19, sections 67 and 79; *Deas on Railways*, 352; *Shelford on Railways*, 366; *Lomax*, 34 Beavan, 294; *Gloag v. Rutherford*, 11 Macph. 261.

Authorities for petitioner—*Grant v. Edinburgh, Perth, and Dundee Railway Company*, May 29, 1851, 13 D. 1015; *Hodge's Law of Railways*, 365 and 366; *In re Incumbent of Whitfield*, 1 Johnson & Hemming, 610; *Rector of Welbourne*, April 25 1868, 3 Weekly Notes, 104.