

legacy which we must hold to be void on account of its being so vague as not to constitute a specific gift. If the words "other persons" are left out, the legacy is not vague, but if they are kept in it becomes extremely vague. A legacy to "relatives or other persons" is not a legacy to persons within a particular class, but a legacy to persons without any distinction whatever.

The bequest is simply a direction to the trustees to give the proceeds of the residue to any-one they chose. I think that such a bequest is much too vague to receive effect, and none of the cases cited have gone so far as to hold a legacy in similar terms to be valid.

LORD YOUNG—I arrive at the same conclusion. I think that the Lord Ordinary's view as to the meaning of the clause is erroneous. I think it contains no distinct or intelligible direction restricting the trustees to any use of the money. I cannot read the clause otherwise than as leaving the disposal of the residue entirely in the discretion of the trustees. I am therefore of opinion that the judgment of the Lord Ordinary is wrong, and ought to be reversed.

LORD TRAYNER—I am of the same opinion. There are two distinct classes of legacies, both very general in their terms, one of which the Court will hold valid and the other not. If a testator leave money to a definite class indicated by himself he may validly leave to trustees the selection of the individuals of that class; but if he leave the selection of the class to trustees the bequest is void from uncertainty. I cannot read this clause otherwise than as putting the money at the absolute disposal of the trustees. No definite class is pointed out. It is a bequest to any person to whom the trustees think fit to give it. "Legatees" are mentioned, not for the purpose of indicating that the trustees are to select persons from that class, but to indicate to the trustees that in making their selection such persons are not to be excluded simply because they are legatees.

LORD MONCREIFF was absent.

The Court pronounced this interlocutor:—

"Recal the said interlocutor (1) as regards the third finding thereof; (2) in so far as it ranks and prefers the claimants William Japp and James Thomas Japp, the surviving and accepting trustees of Miss Mary Playfair acting under her trust-disposition and settlement dated 21st July 1894, and codicil dated 5th June 1896, to the whole remainder of the trust-estate not therein before disposed of; and (3) in so far as it repels the first branch of the claim for the said Miss Anne Playfair: Find that the directions in the said trust-disposition and settlement and relative codicil thereto by the said Miss Mary Playfair for the disposal of the residue of her estate are void from uncertainty, and accordingly sustain the first plea-in-law for the said

Miss Anne Playfair, as also the first branch of her claim, and rank and prefer her accordingly. *Quoad ultra* adhere to the said interlocutor reclaimed against, and decern."

Counsel for Claimants Miss Mary Playfair's Trustees — W. Campbell, Q.C. — Grainger Stewart. Agents—Ferguson & Japp, W.S.

Counsel for Claimant Miss Anne Playfair — Guthrie, Q.C. — Cook. Agents — Kinmont & Maxwell, W.S.

Wednesday, March 14.

SECOND DIVISION.

[Lord Stormonth Darling,
Ordinary.

WILSON'S TRUSTEES v. JAMES WATSON & COMPANY.

Bankruptcy—Trust-Deed for Creditors—Appropriation of Payments by Trustees—Principal or Interest—Payment—Appropriation of Payments—Interest.

Under a trust-deed for creditors the trustees paid in all six dividends, of which the first four were made as being payments to account of the amount of the creditors' respective debts as at the date of the deed, the fifth as in payment of the balance of this amount and to account of interest thereon, and the sixth as in payment of the balance of interest thereon from the date of the deed. After paying these dividends it appeared that there was still a surplus. One of the creditors, a firm who had assented to the trust-deed, and who had acquiesced in the method of payment adopted by the trustees in the case of all the dividends except the last, claimed payment out of the surplus of a balance of interest still due to them, which they brought out by attributing the dividends as an extinction *primo loco* of the interest due at the respective dates of payment. *Held* that their claim must be sustained, in respect that the dividends having been paid by the trustees and accepted by the creditors in the course of a realisation under a trust-deed, there had been no such appropriation of the payments as could effectually bar the creditors from claiming full payment of their interest-bearing debts.

By *ex facie* absolute disposition and assignation dated 9th and 11th August 1886 three gentlemen of the name of Wilson disposed and assigned to the disponees and assignees therein named their respective shares of the estate left by their deceased father. By a relative declaration of trust dated 17th, 18th, and 19th August 1886 it was acknowledged and declared by the disponees and assignees that the disposition and assignation was in trust for the following trust purposes, viz.—(1) payment of

the expenses of the trust; (2) payment of advances or obligations undertaken by the trustees; (3) "for payment and division of the balance of the free proceeds of your said shares and interest in your father's trust estate disposed and assigned to us, after paying or providing for the debts recognised as debts due by the trust estate of the said deceased George Wilson, as shown in Schedule No. I. hereto annexed, to and among your whole creditors mentioned in Schedule No. II. hereto annexed, and subject to the proviso appended thereto in Schedule No. III. hereto annexed, equally among them in proportion to the amount of their respective claims, all as shown in the said Schedule; and *Lastly*, we shall hold just count and reckoning with you, and each of you and your respective representatives, for our introductions, and make payment to you, or each of you and your foresaids, in proportion to your several rights and interests of the surplus, if any be, after fulfilment of the foregoing purposes." Annexed to the declaration of trust there were three Schedules. Schedule I. contained a list of debts due by the trustor's father, amounting to £25,921; Schedule II. contained a list of the trustor's own debts, amounting to £39,949, 8s. 9d.; Schedule III. contained a list of debts for which the estate conveyed to the trustees was only contingently liable. All the creditors mentioned in the schedules signed a docket consenting to the arrangement specified in the declaration of trust. Certain powers were conferred on the trustees, including "all powers and privileges competent to the office of trustee under a sequestration."

Among the debts enumerated in Schedule II. were certain debts due to Messrs James Watson & Company, iron merchants in Glasgow, amounting as at 11th August 1886 to £12,674, 8s. 11d.

The trustees realised and ingathered the estate conveyed to them, and paid in all six dividends, with the result that the creditors received payment of sums equal to the amount of their respective debts as at 11th August 1886, with simple interest thereon from that date to 27th May 1898. These dividends were declared payable on 21st January 1889, 23th November 1891, 20th May 1892, 13th February 1895, 27th May 1898, and 15th October 1898 respectively. After making payment of the sixth dividend there remained in the hands of the trustees a sum of about £9500.

In the circular intimating payment of the first four dividends it was stated that the factor had been authorised to make a division "on the trust liabilities as at 11th August 1886." The receipts signed by Messrs James Watson & Company for the first four dividends were in the following form:—"Received the sum of $\frac{\text{dividend}}{\text{per } \pounds}$ on our claim on the above trust, amounting as at 11th August 1886 to \pounds ."

In the circular intimating the fifth dividend it was stated that the factor had been authorised "to make a fifth division of two shillings and threepence per £, con-

sisting of (1) one shilling and ninepence per £ on the trust liabilities as at 11th August 1886, being the balance of the principal of said debts; and (2) sixpence per £ to account of interest at 5 per cent. accrued on said debts to 27th instant, after which date interest will cease to accrue.

The receipts granted by Messrs James Watson & Company for the fifth dividend were in the following form:—"Received the sum of $\frac{\text{dividend}}{\text{per } \pounds}$, being a fifth dividend of two shillings and threepence per £, consisting of one shilling and ninepence per £, being the balance of the principal of our claim under the above trust, amounting as at 11th August 1886 to \pounds , and sixpence per £ to account of interest at 5 per cent. per annum accrued on said debt to 27th May 1898."

In the circular intimating the sixth dividend, it was stated that the factor had been authorised "to make a sixth and final division of five shillings and fourpence and one-third of a penny per £, being the balance of interest accrued on the trust debts to 27th May last, when the balance of principal was paid off," and that documents of debt and securities must be given up, "this being the final payment."

The receipt granted by Messrs James Watson & Company for the sixth dividend was as follows:—"Received . . . the sum of Three thousand three hundred and ninety-seven pounds 9/1 sterling, being a Sixth and Final Dividend of Five Shillings and Fourpence and One-Third of a Penny per £, being the balance of Interest accrued ^{our} to 27th May 1898 on [my] claim under the above Trust, amounting as at 11th August 1886, to £12,674, 8s. 11d. [the whole of which claim, both as regards Principal and Interest is hereby fully discharged], *we reserving to ourselves the right to claim an adjustment of interest.*"

The words within brackets were deleted in the receipt.

The trustees proposed to hand over the free balance in their hands to the trustors or their representatives or such of them as were entitled thereto, but in view of these claims for additional interest they raised the present action of multiplepointing as pursuers and real raisers, and called as defenders all the creditors mentioned in the schedules to the declaration of trust, and also the representatives of two of the trustors who were dead, and John Swanston Wilson the sole surviving trustor. The fund *in medio* was the sum of £9500 above mentioned, under deduction of factor's fee and trust expenses.

Claims were lodged for (1) John Swanston Wilson, (2) the Bank of Scotland, and (3) James Watson & Company.

John Swanston Wilson, who as in a question with the representatives of the other trustors was entitled to the whole surplus, claimed to be ranked and preferred to the whole fund *in medio*.

The Bank of Scotland claimed to be ranked and preferred for one of three alternative sums arrived at by striking balances periodically throughout the years subsequent to 1886, and accumulating with the principal any interest not paid at the date

of each periodical balance in accordance with the custom of bankers.

Messrs James Watson & Company claimed to be ranked and preferred for the sum of £1420, 17s. 3d. The account bringing out this balance as still due was as follows:—

	£	s.	d.	£	s.	d.
1886						
Aug. 11 To amount of account				12,674	8	11
1889						
Jan. 22 To interest	1552	3	8			
" By cash	590	11	8			
				961	12	0
1891						
Nov. 28 To interest	1805	13	5			
				2767	5	5
1892						
" By cash	5413	13	8	2646	8	3
May 18 To interest	236	5	6	10,028	0	8
" By cash	787	8	11	551	3	5
				9476	17	3
1895						
Feb. 13 To interest	1299	10	0			
" By cash	393	14	5			
				905	15	7
1898						
Jan. 31 To interest	1404	13	1			
				2310	8	8
" By cash	1200	0	0			
				1110	8	8
May 27 To interest	150	11	9			
				1261	0	5
" By cash	6010	17	4	4749	16	11
				4727	0	4
Oct. 15 To interest	91	6	0			
" By cash	3397	9	1	3306	3	1
Balance due to J. W. & Co.				£1420	17	3

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), sec. 52, enacts as follows:—"A creditor who has a claim or a debt due shall be entitled to vote and rank for the accumulated sum of principal and interest to the date of the sequestration, but not for any interest accruing after the date of the sequestration, . . . but he shall not be bound to specify separately in his oath or claim for his debt the amount of any interest due thereon . . . or to specify therein any accumulated sum of principal and interest, and if there be any residue of the estate after discharging the debts ranked he shall be entitled to claim out of such residue the full amount of the interest on his debt in terms of law."

On 1st July 1899 the Lord Ordinary (STORMONTH DARLING) issued the following interlocutor—"Repels the claims for the Bank of Scotland and for James Watson & Company respectively: Ranks and prefers John Swanston Wilson to the whole fund *in medio*, in terms of his claim, and decerns: Finds the claimants the said Bank of Scotland and James Watson & Company liable to the said John Swanston Wilson in expenses in the competition," &c.

Opinion.—"In August 1886 three gentlemen of the name of Wilson disposed and assigned to trustees their respective shares of the estate left by their deceased father. The purposes of the trust were for payment (1) of their father's scheduled debts, amount-

ing to £25,921; (2) their own debts, which were also scheduled and amounted to £39,949, 8s. 9d.; and (3) of any surplus to the trustees themselves or their representatives. A list of creditors, with the amounts of their respective debts, and the dates from which interest should run, was appended to the deed, and these creditors all signed a doquet consenting to the arrangement which the deed embodied.

"Certain powers were conferred on the trustees, including 'all powers and privileges competent to the office of a trustee under a sequestration.' From this and from the whole tenor of the deed I gather that the kind of arrangement contemplated was a gradual liquidation, in which it was hardly expected that the principal amount of the debts would be paid in full. But the actual result has been highly satisfactory. After an administration extending over twelve years, the whole principal has been met, with interest at 5 per cent. from 11th August 1886, being the date of the trust-deed, and there remains in the hands of the trustees a surplus of £9500, which forms the fund *in medio* in this action.

"*Prima facie* that surplus belongs to the claimant John Swanston Wilson, who is admitted to be the sole representative of the trusters. But two claimants challenge his right to a portion of the fund. The Bank of Scotland says that they are not bound to be satisfied with simple interest on their debt, but are entitled to claim compound interest amounting to £1043, and Messrs James Watson & Company say that the payments to account made by the trustee having been indefinite, they as creditors are entitled to appropriate these payments to interest rather than to principal, with the result that, according to their contention, a sum of £1420, 17s. 3d. is still due to them.

"The claim of the bank is founded on the well-known custom of bankers to strike a balance at the end of each financial year, and to accumulate with the principal any interest not then paid. This is a custom recognised by law in the case of all open accounts, but it seems to me wholly inapplicable to the case of a liquidation arrangement such as the present. The essence of the arrangement was equal division, and with that view the claims of all the creditors—banks and everybody else—were ascertained at the date of the trust-deed, interest to that date from certain specified dates being accumulated with the principal, as in the case of a sequestration. Plainly the first duty of the trustees was to pay off the principal if they could, and only after that was done to set about meeting the interest.

"Anything else would have been inconsistent with the ascertainment of the debts as at a particular date and the treatment of everybody on an equal footing.

"Accordingly, the trustees acted in that way over a course of years with the assent of all the creditors. The circulars intimating a first dividend in 1889, a second 1891, a third in 1892, and a fourth in 1895, all bore that they were dividends on the trust lia-

bilities as at 11th August 1866—that is to say, on principal. Then came a circular on 25th May 1898 intimating a fifth dividend, part of which represented the balance of the principal and the rest was to account of interest, which, as the circular bore, after payment of this balance of principal, was to cease to accrue. Lastly, came a circular on 13th October 1898 intimating a sixth and final division, being the balance of interest accrued to 27th May preceding, when the balance of principal had been paid off.

“All the receipts granted by the bank were in exact accordance with these intimations, and showed that their debt had been capitalised once for all as at 11th August 1866. Further, the receipt of 27th May acknowledged that the balance of principal had been met, which is quite inconsistent with their claiming now to go back and add to the principal year by year. No doubt the last receipt, that of 15th October, contained a reservation of their present claim. I greatly doubt whether that could avail them after the series of receipts which they had granted without reservation, and on a wholly different footing.

“But I attach importance to these receipts, not so much as barring a claim which otherwise might have been competent (for I do not think the claim could ever have been successfully made after the Bank entered into the liquidation arrangement), but as showing that all the parties understood the arrangement in the same way, which, I humbly think, was the right way.

“The claim of Messrs Watson is founded on the undoubted rule that where a payment to account is made indefinitely, and no appropriation is made in the receipt, the creditor may ascribe it to that part of the debt which is most advantageous to himself, *e.g.*, to a part which does not carry interest rather than to a part which does. But what I have said about the history of the trust in dealing with the Bank's claim affords a sufficient answer to that contention.

“The payments were not indefinite; on the contrary, the debtors expressly appropriated to principal, as they had a right to do, all the payments down to 25th May 1898.

“These claimants therefore can take no aid from a rule applicable only to indefinite payments. I shall repel the claims for the Bank and Messrs Watson & Company, and sustain the claim for Mr Wilson.”

Messrs James Watson & Company reclaimed.

The Bank of Scotland did not reclaim.

Argued for the claimants and reclaimers James Watson & Company—A trustee under a trust-deed for creditors was trustee for the creditors, and until they were paid in full he had no duty to the trustor, and did not represent him—Bell's Comm. (7th ed.), vol. ii. 382. This was not a case of appropriation made by a debtor when paying his creditor, but a case of distribution by a trustee for creditors among these creditors. The trustees were not entitled to appropriate payments against the interests of the creditors, or to bargain with

them as to the terms upon which they were to receive payment, and the creditors were not prejudiced by the terms of the receipts granted to the trustees. There was here, therefore, no appropriation of the payments by the debtors and no appropriation by the trustees which was binding upon the creditors. The payments were consequently to be regarded as indefinite, and a creditor was entitled to appropriate indefinite payments to interest rather than to principal—*Scott v. Sandeman*, Jan. 23, 1849, 11 D. 405, 1 Macq. 293; *Bower v. Marris*, Cr. & Ph. 351; *Warrant Finance Company's case* (1869), L.R., 4 Ch. App. 463, *per Selwyn*, L.J., at p. 645. No doubt in a sequestration creditors were not entitled to claim originally for interest falling due after the date of the sequestration—Bankruptcy (Scotland) Act 1856, sec. 52. But this rule only applied to mercantile sequestrations under the statute, and it did not apply even there when it ultimately appeared that there was a surplus—Bell's Comm. (7th ed.), vol. i. p. 695, and note (2); Bankruptcy (Scotland) Act 1856, sec. 52. The meaning of that section was that the creditors were, in the first place, to be paid the principal of their debts, but if there was a surplus after paying principal, then they would claim for the full interest to which they would have been entitled if there had been no sequestration. Even if it were conceded here that the dividends were paid originally in extinction *primo loco* of principal, whenever it appeared that there was a surplus the creditors were remitted to their original rights, and were entitled to re-state their accounts on the basis of attributing payments *primo loco* to interest—*Warrant Finance Company's case*, *cit.*; *Scott v. Sandeman*, *cit.* In this view the terms of the earlier receipts were of no significance, because when they were granted no surplus was anticipated, and whenever it appeared that there was to be a surplus the reclaimers inserted a reservation in the receipt signed by them. If the respondents' contention were sustained the creditors would suffer great injustice, because they would not get full interest on their debts, although the surplus had only emerged owing to a delay of many years, during which the creditors had lain out of their money.

Argued for the claimant and respondent J. S. Wilson—The true intention and import of the declaration of trust was that the creditors were to get payment of the principal with interest at 5 per cent. thereon from the date of the deed, and no more. The reclaimers had agreed to this, and could not go back upon it now. The emergence of a surplus could not alter the rights of parties. The duty of the trustees was to pay the principal first and then the interest. This is what they had done. But apart from the original agreement between the parties the reclaimers were barred by their actings, and by having accepted payments to account of principal from now attributing these payments to account of interest. The emergence of a surplus did not entitle them to do so. The trustees were acting both for the debtors and the

creditors. In making payments they represented the debtors, and as representing them they were entitled to appropriate the payments made by them. In relation to the question of appropriation the principal and the interest were to be regarded as different debts. If the creditor was entitled to appropriate payments to interest ultimately, the debtor was entitled to appropriate them to principal originally—[LORD TRAYNER referred to Bell's Prin., sec. 63]. There could be no doubt that the trustees had in fact appropriated the payments to extinction of principal, and there could be as little doubt that the reclaimers had assented to this appropriation, and they were now finally bound by it. The trustees were only bound to conform to the Bankruptcy Statutes in so far as they thought proper, and the reclaimers were not entitled to found upon section 52 of the Act of 1856. But in any view, that section only entitled the creditors to claim "interest in terms of law." That expression could only mean either "legal interest" on the amount of their claim as at the date of sequestration—that is, interest at 5 per cent.—or (2) such interest as they might be legally entitled to, which in this case was determined by the agreement and the course of dealing between the parties. In either view the reclaimers had received all the interest which was due to them. In the *Warrant Finance Company's case*, *cit.*, it did not clearly appear upon what statutes the Court proceeded. The case of *Scott v. Sandeman*, *cit.*, was a decision upon the law as to indefinite payments, but here the payments were not indefinite but appropriated.

At advising—

LORD YOUNG—This is a multiplepointing raised by the trustees in trust for creditors, the fund *in medio* being the balance of the trust funds in their hands. The only contesting claimants now before us are the reclaimers James Watson & Company, one of the creditors for whose payment the trust was with their assent created, and their debtors, who created it by conveying their estates to the trustees. It is immaterial that the debtors are three sons who succeeded to their deceased father's property, and that the debts to be met were partly left by their father and partly incurred by themselves. There is no dispute regarding the amount of Watson & Company's debt with interest to 11th August 1886, the date of the trust, or the amount and dates of the payments which have been made to them by the trustees in the course of their administration. The only question is, whether or not their lawful rights as creditors in their admitted debt have been satisfied by these admitted payments. If they have, the Lord Ordinary has rightly sustained the claim of J. S. Wilson to the whole fund *in medio*; but if not, the reclaimers (Watson & Company) must have their rights satisfied out of it in the first instance.

Confining my observations to their (Watson & Company's) claim, I have to

remark that it is not matter of doubt that a creditor in any interest bearing debt is entitled to simple (not compound) interest from the time it becomes due till the date of payment, and that when a partial payment is made he is to be regarded and treated as creditor for the principal plus interest thereon to the date of such payment, which, of whatever amount, is to be imputed not to principal alone but to the debt then due, consisting of principal with simple interest to date.

Such is the position and such the consequent right which Watson & Company here contend was theirs when they assented to the trust. It is not, I understand, disputed, and certainly is not in my opinion disputable, that such was, to begin with, their right against their debtors in the admitted debt, and that not a special or exceptional right, but the common right of every creditor in an interest-bearing debt. Their claim, which is strictly based upon it, is accordingly resisted only on the ground that their assent to the trust, having regard to its terms, and their acceptance of the payments made to them under it, with the receipts granted by them, implied and legally imported a renunciation of it on the doctrine of appropriation of payment. It rather appears from some expressions in the Lord Ordinary's note that his Lordship was under the misapprehension that their claim involved a demand for compound interest. They ask only simple interest on the debt due to them at the date of each payment to account, which is the common law right of every creditor in an interest-bearing debt who has not renounced it.

With respect to the argument founded on the terms of the trust, and of the creditors' assent to it, as importing a renunciation by Watson & Company of any legal right they had as creditors in their admitted debt, I can find nothing to support that argument. That they assented to their debtors' estate being put under trust to be administered in order to pay their debt and the debts of other specified creditors in so far as it might suffice to pay them is plain enough, but that they intended, or were on reasonable grounds understood as intending, to renounce any legal right which they had as creditors for their admitted debts, which the estate when duly administered proved to be sufficient to meet, is a suggestion which I must reject.

The doctrine of appropriation of payment by a debtor making it is, in my opinion, inapplicable. In the first place, the payments which we have to consider were made by trustees under a deed which required them, so far as the funds in their hands went, to pay certain interest-bearing debts specified in the declaration of trust, with the dates from which interest thereon was to run. Watson & Company's debt is one of those thus specified, with August 1886 given as the date from which interest was to run. The amount of that debt with interest to 11th August 1886 (the commencement of the trust) is, I understand, agreed to be £12,674, 8s. 11d. The first

payment by the trustees to account was made on 22nd January 1889, when by the addition of interest from 11th August 1886 (the date from which it was to run), the debt due to them was £14,226, 12s. 7d. That accordingly was the debt to account of which the trustees paid £590, 11s. 8d on 22nd January 1889. Watson & Company's claim shows this distinctly, and, I believe with admitted accuracy, the amount of their debt with interest from the specified date (11th August 1886) at the date of each payment to account. I have probably said enough to explain why I think that simple interest to the date of each payment to account was part of the debt then due, and why I see no good reason for distinguishing in this respect between interest accruing prior to 11th August 1886 and interest subsequently accruing. In the second place, the doctrine of appropriation of payment by a debtor making it is simply this, "that where a party who pays money is indebted in several ways to the party who receives it from him, and it becomes a question to the reduction of which of his debts the payment must be applied, the rule is that the party paying has power to make the application." But the Wilsons (the debtors here) were not indebted in several ways to Watson & Company, and there was no room for question as to which of several debts was to be reduced. It being agreed by the parties to the trust that interest should run from 11th August 1886, it was the right of the creditors to be treated, and the duty of the trustees to treat them, accordingly. The agreed-on amount of their claim on 11th August 1886 consisted of their admitted debt, plus agreed-on interest to that date, and was single and indivisible. Nor can I see any ground for holding that the amount of their claim at any subsequent date when a payment to account was made was not just as single and indivisible. Where a solvent debtor admittedly owes his creditor a certain sum consisting of principal and agreed-on interest to date, the idea of appropriation by him of a payment to account is absurd on the very suggestion of it, unless indeed some tricky cleverness meant to cheat the creditor was part of the suggestion, for no creditor would knowingly assent to the payment being otherwise imputed than as a payment to account of what was admittedly owing to him by the payer at the date of it.

In the third and last place, I am of opinion that the trustees, and those aiding them professionally in the administration of this trust, could not honestly intend to make their payments to Watson & Company in such a manner as to operate a defeasance of their legal rights to interest in the event of the trust funds proving sufficient to meet it, and I therefore assume that they did not. The amount of the payments to account was the only matter of obvious importance to the creditors until it appeared, which it did not for many years, that the trust funds were sufficient to meet their full claims—principal and interest as agreed on. That Watson & Company

meant to renounce a right to interest which was clearly and I think admittedly theirs if they did not renounce it, is a suggestion which I reject even more clearly, if possible, than the suggestion that there was any intention on the part of anyone to trick them into doing so.

Their claim being in strict accordance with their legal rights, if not renounced or defeated by the doctrine of appropriation, I am of opinion that it ought to be sustained.

LORD TRAYNER—I have not been able to form so unhesitating an opinion on this case as some of my brethren, although I have come to the same conclusion. I think the payments made to Watson & Company by Wilson's trustees in the course of the administration of Wilson's trust were appropriated at the time they were made towards the extinction of the debt for which Wilson & Company were ranked, and had this payment been made by the debtors themselves directly to the creditors I should have agreed with the Lord Ordinary. The rule of law which he has applied is too well established to be disputed or gone back upon. My difficulty, however, has arisen on the view that the trustees were not entitled in the circumstances to make any appropriation of their payments to the detriment of the creditors' interests and to the advantage of the debtors.

I agree with Lord Moncreiff (whose opinion I have read) that this case must be dealt with in the same way as if the estate of the Wilsons had been sequestrated and administered by a trustee under the sequestration. The trust-deed granted by the Wilsons was one for behoof of creditors, and in effect surrendered their estates as completely as could have been done by sequestration. Now, I am disposed to think that a trustee making payment to creditors of dividends from a bankrupt's estate from time to time as the realisation of the estate permits, is making, and only entitled to make, such payments generally towards the extinction of the creditors' claims, and cannot appropriate these payments to any specific part of these claims. But if occasion presented itself I should be prepared to reconsider this view. I cannot say that I have been aided in arriving at an opinion on this matter by the consideration of the authorities cited. The decision of this Court in the case of *Scott v. Sandeman* proceeded on the ground that the payments made by the trustees were indefinite payments, and taking that as the fact the decision was right. The House of Lords reversed the judgment on the ground that the payments were not indefinite but appropriated, but that again proceeded on special provisions in certain deeds. Neither Court decided the question on which I have had difficulty. The case of *The Humber Shipbuilding Company* touches this case still less, in my opinion, for it merely lays down a rule (for the first time) as to the mode in which debts of creditors in a winding-up under the Companies Acts are to be treated in so far as interest on these debts

is claimable. The case cannot, I think, have been intended to affect the general rule regarding the effect of appropriated payments—a rule which is the same in England as with us—for that rule is not alluded to.

The 52nd Section of the Bankruptcy Act 1856, in one reading of it, supports the contention of Watson & Company, and I am disposed to accept that reading; but that section might reasonably enough be otherwise construed.

LORD MONCREIFF—This case must be treated as that of a trust for the distribution of an estate which was “actually or in all likelihood insolvent” at the commencement of the trust—Bell’s Comm. (7th ed.) vol. ii. 382. The trustees held *primo loco* for the acceding creditors.

The Lord Ordinary proceeds upon the ground that the trustees, whom he identifies (not correctly, I think) with the debtors, appropriated the payments which they made to the creditors to reduction of the principal of the debts, and that this appropriation was acquiesced in by the creditors as evidenced by the receipts which they granted.

I do not think that this is a correct view of the case. If a solvent debtor is desirous of reducing the principal of his debt, and makes a payment for that specific purpose, the creditor is not bound to accept partial payment, but if he does accept it, he is held bound to appropriate it as proposed by the debtor. He is held by acceptance to have acquiesced in that application of the payment.

But when, as here, an estate is insolvent, and there is not any present prospect that the creditors will be paid even the principal of their debt in full, payments of dividends are made and accepted on a different footing. For the time the creditors’ claim for accruing interest is ignored, and the dividends are paid nominally in extinction of the accumulated debt due at the date of the sequestration or trust for creditors without any reference on either side to an ultimate claim for interest. Therefore the creditor’s acceptance of such payments does not involve his consent to their being appropriated towards extinction of principal.

But if it transpires that there is a surplus sufficient to pay both principal and interest in full, there is no reason why the creditor should be deprived for the debtor’s benefit of any part of his full rights.

The analogy of the law of bankruptcy both here and in England is in accordance with this view. The ranking which the creditor receives is a ranking on the principal of his debt as accumulated at the sequestration. The payments have no reference to interest accrued since that date, but if there is a residue of the estate, he is entitled to claim out of such residue “the full amount of the interest on his debt in terms of law”—Bankruptcy Act 1856, sec. 52; and *in re Humber Ironworks and Shipbuilding Co., Warrant Finance Company’s case*, L.R., 4 Ch. App. 613.

In this case I think the payments made must be held to have been made and received on that footing, and that therefore the claim of Watson & Company should be sustained.

LORD JUSTICE-CLERK—I have come to the same conclusion, although I agree with Lord Trayner that it is not to be arrived at without difficulty.

The Court pronounced this interlocutor—

“Recal the said interlocutor reclaimed against in so far as it repels the claim of James Watson & Company and ranks and prefers John Swanston Wilson to the whole fund *in medio* in terms of his claim, and also in so far as it finds the said claimants James Watson & Company liable to the said John Swanston Wilson in expenses in the competition: Rank and prefer the said James Watson & Company *primo loco* on the fund *in medio* in terms of their claim; and in terms thereof decern against the real raisers for payment to the said James Watson & Company of the sum of £1420, 17s. 3d. sterling with interest thereon at the rate of £5 per centum per annum from the 15th day of October 1898 till payment: Rank and prefer the said John Swanston Wilson to the whole balance of the fund *in medio*: *Quoad ultra* affirm the said interlocutor reclaimed against: Find the claimant John Swanston Wilson liable to the reclaimers in expenses of the competition in the Outer House and in the Inner House: Remit the same to the Auditor to tax and report to the said Lord Ordinary, to whom remit the cause to proceed therein as accords, with power to him to decern for the taxed amount of the expenses hereby found due.”

Counsel for the Claimants and Reclaimers John Watson & Company—Solicitor-General Dickson, Q.C.—Younger. Agents—J. & J. Ross, W.S.

Counsel for the Claimant and Respondent J. S. Wilson—Dundas, Q.C.—Chisholm. Agent—J. Gordon Mason, S.S.C.

Saturday, March 17.

SECOND DIVISION.

[Edinburgh Dean of Guild Court.]

HILL v. MILLAR.

Property—Building Restrictions—One Feu Divided into Different Lots—Title and Interest of One Co-Vassal to Enforce Building Restrictions against Another.

A feu running from a main street up a side street was granted under certain conditions, provisions, and declarations, of which one was that the piece of ground was feued out only for the erec-