The Court pronounced this interlocutor—

"The Lords having considered the reclaiming note for the pursuers against the interlocutor of Lord Low, dated 3rd July 1902, and heard counsel for the parties, Recal said interlocutor so far as regards the first declaratory conclusion of the summons, and assoilzie the defenders therefrom: *Quoad ultra* adhere to said interlocutor, and decern."

Counsel for the Pursuers and Reclaimers —Cooper — Welsh. Agent — R. Ainslie Brown, S.S.C.

Counsel for the Defenders and Respondents—Guthrie, K.C.—W. Harvey. Agents W. & J. Burness, W.S.

Thursday, June 4.

SECOND DIVISION.

WARREN'S JUDICIAL FACTOR *v.* WARREN'S EXECUTRIX.

Trust—Administration of Trust—Investment of Trust Funds—Personal Liability of Trustees.

Where a trustee had made a certain investment in the *bona fide* belief that such an investment was authorised by the power conferred upon him in the trust-deed, *held* that as the terms of the power were such as to make it reasonable for him to interpret them as he did, he was not liable for loss on the investment, even if the Court were of opinion that his interpretation of the power was erroneous, such an error not being one which should involve him in personal liability.

Mrs Agnes Rutherford or Warren died on 26th March 1879, leaving a trust-disposition and settlement dated 21st August 1878, by which she conveyed her whole means and estate, heritable and moveable, to trustees for the purposes therein specified. The trust deed contained the following clause:—"And I hereby confer on my said trustees all the powers and privileges conferred or to be conferred by statute or at common law on gratuitous trustees in Scotland, and over and above these powers, power to sell the trust estate, either by public roup or private bargain, to allow the trust estate, or any part thereof, to remain on the obligations and securities upon which the same may stand at the time of my death, and to lend out the trust funds to persons or corporations on any form of obligation or kind of security they deem fit, or to invest the same in the purchase of preference or debenture stocks of any established railways in the United Kingdom, or in the stocks or shares of any Scotch banks or gas or water companies in Scotland, or place the same on deposit with bankers in Great Britain or with established Indian or Colonial banks, and to alter or vary the loans and investments from time to time; declaring that my said trustees shall not be liable for the sufficiency of the investments or the securities upon which the trust funds may be lent or laid out."

In June 1899 Andrew Rutherford Warren, who was then the sole surviving trustee foresaid, invested £3000 of the trust funds in £3000 4½ per cent. first mortgage debenture stock of the Credit Foncier of Mauritius, Limited. The said company was a limited company registered under the Companies Acts, and carrying on business in London. Among the objects specified by the memorandum of association of the said company there was, *inter alia*, "the raising of money by share capital and by the issue or sale of bonds, debentures, or other obligations." By its articles of association the following regulations applied to the borrowing of money:—"*Borrowing Powers.* — 42. The company may issue debenture stock, bonds, debentures, or other obligations at any time and in any form or manner and for any amount which the board may from time to time determine, subject to the following condition:—The total amount of such debenture stock, bonds, debentures, or obligations for the time being shall not exceed the amount of the subscribed nominal capital of the company for the time being. 42*a*. The borrowing powers of the company shall be subject to the restrictions imposed by the trust-deed executed or intended to be executed in or about April 1899 upon the creation of £400,000 debenture stock, so long as any of that debenture stock remains outstanding, and the company shall not meanwhile, save as therein appears, issue any debentures or debenture stock ranking in priority thereto or *pari passu* therewith." In June 1899 the company made an issue to the public of £300,000 first mortgage debenture stock bearing interest at 4½ per cent., part of a total amount limited to £400,000. The said debenture stock was, together with the debentures of the company, secured by a trust-deed, whereby the company charged, in favour of trustees for behoof of its debenture and debenture stockholders, its whole undertaking, capital, assets, and rights, both present and future, other than its uncalled capital for the time being. Article 3 of the said trust-deed was in the following terms:—"The debenture stock shall be represented by certificates in the form already prepared and set out in the second schedule hereto, and shall be subject to the conditions and provisions already prepared and set out in the third and fourth schedules hereto, which conditions and provisions shall be endorsed on each certificate, and shall be binding on the company and on the trustees and on the holders of debenture stock, and on all persons claiming through them respectively." The said fourth schedule contained the following provision:—"12. Upon due notice given a general meeting of the debenture stockholders shall have the following powers exerciseable by extraordinary resolution, namely:— . . . (2) To release any property charged to the trustees, and to accept any other securities or shares in

substitution for the debenture stock." The said trust-deed, *inter alia*, provided that (1) the amount of the debenture stock to be issued from time to time should in no case, when added to the amount of debentures for the time being outstanding and the debenture stock then already issued, exceed £400,000 in all; (2) the said debenture stock should be paid off at par on 1st January 1940, but should be redeemable on or after 1st January 1915 at £105 per £100 if the company should elect so to do; and (3) the security constituted by the trust-deed should become enforceable in the event of default in the payment of interest; if an execution or distress was levied for a sum exceeding £500, unless paid out or got rid of in one week; if the company committed any breach of any of the obligations in the trust-deed, and for three calendar months after it was required by the trustees to make good the same failed to comply therewith; if an order was made or a resolution passed for the winding-up of the company; and if the total borrowings of the company, other than on debenture or debenture stock, exceeded at any one time £100,000. The sum of £3000 invested in the foresaid first mortgage debenture stock by the said Andrew Rutherford Warren was so invested on application made by him in the ordinary way, in terms of the prospectus issued to the public.

Andrew Rutherfurd Warren died on 18th July 1902 and on 18th August James Alexander Robertson Durham, C.A., Edinburgh, was appointed judicial factor on the trust estate.

Thereafter various questions arose in relation to the trust-estate, and *inter alia*, a question between the judicial factor and Mrs Sarah Lucy Rhind or Warren, the executrix of Andrew Rutherfurd Warren, as to the right of Andrew Rutherfurd Warren to invest £3000 of the capital of the estate in £3000 4½ per cent. debenture stock of the Credit Foncier of Mauritius, Limited. The said debenture stock could not now be realised without loss.

For the settlement of this question among others a special case was presented for the opinion and judgment of the Court.

The parties to the special case were, *inter alios*, (1) the judicial factor, and (3) Andrew Rutherfurd Warren's executrix.

The fourth question of law was—"Was the investment on the debenture stock of the Credit Foncier of Mauritius, Limited, one authorised by the terms of Mrs Warren's settlement?"

Argued for the first party—The investment in question was not authorised by the trust-disposition and settlement. The authority given to lend the trust funds to persons or corporations did not give authority to lend the trust funds to a company registered under the Companies Act 1862 — *In re Smith; Davidson* v. *Myrtle* [1896], 2 Ch. 590, opinion of Kekewich, J., 594. This investment was not a loan in the true sense of the word. The lender had no real security for the repayment of his money. Besides, the power to invest was qualified by the specification in the clause of certain debenture stock in which investment might be made. Further, the investment was not a prudent one, as the trustee might have been compelled under section 12 of Schedule 4 to accept speculative shares in place of the debenture stock. The third party was therefore bound to restore to the trust estate the £3000 so invested in exchange for a transfer in her favour of the said stock.

Argued for the third party—The Credit Foncier of Mauritius, Limited, was a corporation within the meaning of the trust-deed. Investing money in debenture stock was lending money to the company. The money lent was repayable in 1940. The case of *in re Smith, supra*, had no bearing. It only decided that a company incorporated by Act of Parliament signified a company incorporated by Special Act of Parliament.

LORD JUSTICE-CLERK— . . . There is also a question with regard to certain funds invested in debenture stock of the Credit Foncier of Mauritius, Limited. The clause of the deed relating to investment is complicated and not easy to interpret, and I think that the trustee might have been wiser if he had held that he was not entitled to invest the money as he did. But I think it was a mistake which a trustee might make quite innocently, and so I think he should not be made personally liable for the loss on the investment, which it is satisfactory to know from what has been stated in debate can only be trifling if the security is now realised.

LORD YOUNG concurred.

LORD TRAYNER— . . . With regard to the fourth question, I am not to be understood as holding that the investment in the debentures of the Credit Foncier of Mauritius was authorised by the terms of Mrs Warren's settlement. I say no more than this, that looking to the terms in which the power to invest is conferred on the trustees, they might reasonably so interpret those terms as to cover and regard as authorised the investment in question. But if in this the trustees erred, it was an error which should not involve the trustees (acting in *bona fide* as they did) in personal responsibility for any loss which followed on that investment.

LORD MONCREIFF concurred.

The Court pronounced this interlocutor:—

"Allow the parties to amend the fourth question of law by adding thereto the words, 'and if not, is the third party liable for any loss that has arisen or may arise on said investment,' and the amendment having been made, answer the said question as amended by declaring that the third party is not liable for any such loss: *Quoad ultra* find it unnecessary to determine the remainder of the question: Find and declare accordingly, and decern," &c.

Counsel for the First Party—Hunter. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Third Party—Campbell, K.C.—Cullen. Agents—Wallace & Guthrie, W.S.

Tuesday, June 9.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

MACDOUGALL'S TRUSTEE *v.* LOCKHART.

Bankruptcy — Sequestration — Valuation and Deduction of Security—Withdrawal of Claim by Creditor after Assignation of Security Demanded by Trustee — Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 65.

A bankrupt's estate was sequestrated on 23rd June 1900. The creditor in a heritable bond for £1000, granted by the bankrupt, lodged a claim under section 65 of the Bankruptcy (Scotland) Act 1856, valuing the security at £850, and claiming to be ranked for the balance of £150. On 31st December 1901 that claim was admitted to a ranking. On 22nd January 1902 the trustee on the sequestrated estate intimated to the creditor that he desired an assignation of the security in terms of section 65. On 25th January, before any dividend had been paid, the creditor withdrew his claim. The trustee maintained that it was too late for the claim to be withdrawn, and raised an action for declarator that he was entitled to an assignation. *Held* that the creditor, by valuing the security for the purpose of ranking, virtually offered the security to the sequestrated estate at the value put upon it; that the trustee's intimation that he desired to take over the security at that value was an acceptance of the offer; and that the creditor could not after such acceptance withdraw his claim for a ranking to the effect of disentitling the trustee to an assignation.

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79) enacts, section 65:—"To entitle any creditor who holds a security over any part of the estate of the bankrupt to be ranked in order to draw a dividend, he shall, on oath, put a specified value on such security and deduct such value from his debt and specify the balance; and the trustee, with consent of the commissioners, shall be entitled to a conveyance or assignation of such security, at the expense of the estate, on payment of the value so specified out of the first of the common fund, or to reserve to such creditor the full benefit of such security; and in either case the creditor shall be ranked for and receive a dividend on the said balance and no more, without prejudice to the amount of his debt in other respects."

James Landells Selkirk, C.A., Glasgow, trustee on the sequestrated estate of Robert Macdougall, Sghor Bheann, Dunoon, raised an action against Mrs Agnes Gardner Dalziel or Lockhart, 26 Dryburgh Avenue, Rutherglen, concluding, *inter alia*, for declarator that the pursuer was entitled to an assignation from the defender of a bond and disposition in security for £1000 granted by the bankrupt Macdougall in in her favour over subjects in Glasgow.

The bankrupt's estates were sequestrated on 23rd June 1900, and the pursuer was thereafter appointed trustee thereon.

On 29th January 1901 the defender lodged an affidavit and claim on the sequestrated estate, under section 65 of the Bankruptcy (Scotland) Act 1856, in which she valued the security held by her under the bond referred to at £850, and claimed a ranking for a dividend on the balance of £150.

On 31st December 1901 the pursuer adjudicated on the claims lodged in the sequestration, and the defender was admitted to a ranking in terms of her claim under deduction of the value put by her on her heritable security. The pursuer's adjudication on this claim was not appealed against, and became final.

On 22nd January 1902, before any dividend had been paid by the pursuer, he intimated to the defender that he and his commissioners had resolved to take over her bond above referred to in terms of section 65 of the Bankruptcy Act 1856.

On 25th January 1902 the defender, through her agent, withdrew the claim lodged by her in the sequestration in so far as it related to the bond over the subjects in main street. The pursuer thereupon informed the defender's agent that it was too late for the defender to withdraw her claim, he having adjudicated thereon.

In the present action the pursuer averred —"(Cond. 7) The pursuer is ready and offers to pay the said sum of £850, with any interest and charges the defenders may establish to be due to them under said bond and disposition in security, in exchange for the conveyance or assignation thereof, which is to be at the expense of the sequestrated estate, all in terms of said section 65. The defenders were not entitled to withdraw their claim at the time they attempted to do so, to the effect of preventing the pursuer from demanding an assignation or conveyance of said security subjects in terms of the resolution."

The pursuer pleaded—"(1) The defender having in her affidavit and claim put a value of £850 upon her security, the pursuer became entitled to a conveyance or assignation thereof, and having validly claimed the same, is entitled to declarator of his right thereto, with expenses. (2) The pursuer having become entitled under section 65 of the Bankruptcy Act 1856 to a conveyance or assignation of said security, the defender should be ordained to grant the same, and failing her doing so the security falls to be adjudged to the pursuer."

The defender pleaded—"(2) The pursuer's statements are irrelevant and insufficient to support the conclusions of the summons. (3) The defender having validly withdrawn her claim to rank in the sequestration in so