LORD CRAIGHILL—Without any difficulty I have come to the same conclusion as your Lordship. [*After narrating the facts.*]—The question then is, whether the defender, having drawn this money belonging to the deceased from the bank, is answerable therefor to the executors of the deceased? It is plain that he must show that it was her intention at the time of her death to make donation of the money to him, to take effect immediately after it. The question is, was there here a *donatio mortis causa?* Now, the statement of the defender is of a very extraordinary character. He says the money was a gift to him, to be used for a purpose with which the executors have no concern. This is a very strange statement. He tells us in his evidence what this purpose was—that it was to distribute certain sums of money to certain other persons. Plainly, if this is an effectual way of transferring these sums to these persons—for there is no direct gift to them—then a trust has been created, and if this were to be recognised as a trust, writing would be unnecessary to create a trust. But the defender maintains that whatever may be the rights of these other parties, there was at least a donation *mortis causa* to him of this money. But this depends entirely upon negative evidence. His name was in the pass-book, not because he was associated with the deceased as owner of the money but merely because his services were necessary to enable her to operate on her account. I think it is therefore clear that the defender here has no claim to this money, which therefore belongs to the executors.

LORD RUTHERFURD CLARK concurred.

The LORD JUSTICE-CLERK was absent.

The Court pronounced this interlocutor:—

"Find that it is not proved that the deceased Mrs Mary Thomson or M'Gregor made a donation to the defender of the bank-book mentioned in the record, and the sum thereby ascertained to be due by the bank: Dismiss the appeal: Affirm the judgment of the Sheriff appealed against," &c.

Counsel for Pursuers (Respondents)—Guthrie Smith—Alison. Agent—John Gill, S.S.C.

Counsel for Defender (Appellant)—Rhind—Lang. Agents—Ferguson & Junner, W.S.

Thursday, January 10.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

SCOTT'S TRUSTEES *v.* CARTER (ALEXANDER'S TRUSTEE).

Payment—Indefinite Payment—Appropriation—Account-Current.

A, one of the joint-tenants of a colliery, undertook to buy from S, the other, to whom the plant belonged, the whole plant of the colliery, for which he was to pay in instalments of at least £500 each. He was also to relieve S of various debts and obligations, and work the colliery, and pay the rent, receiving the surplus profit after payment of his various obligations. The property of the plant was to vest in him only on full payment of the price. A having become bankrupt, the trustees of S, who had died, brought an action against A's trustee for declarator that the property of the plant was still theirs, at least so far as the price was unpaid, and produced an account showing a balance due to them. It was in the form of an account-current, the first item in which showed the price of the plant as due by A, and it showed on the other side a variety of payments made by A, some of which in connection with matters unconnected with the colliery, but were not specifically appropriated, and if applied in their order to the price of the plant would extinguish it. *Held* that they must be so applied, and that the price must be held as paid.

By minute of agreement between William Scott and C. J. Alexander, dated 1st and 19th December 1870, on a narrative that the parties were joint-tenants of a colliery at Jawcraig belonging to the Earl of Zetland, that Scott was proprietor of the whole plant, machinery, buildings, and fittings on the colliery, and that Alexander had undertaken, or was about to undertake, certain obligations for behoof of Scott, and to pay certain of his debts and liabilities, and was to work the colliery on the terms contained in the agreement, it was provided that the parties were to hold the colliery, machinery, plant, and lease for behoof of themselves and each other for their respective rights under the agreement, and that the whole machinery and plant was to be purchased by Alexander from Scott at a price to be fixed by valuators, which was, when fixed, to be paid by instalments of at least £500 yearly, making the first payment at Martinmas 1871. Alexander was to pay the rent and implement the other obligations incumbent on the tenants under the lease; to pay interest at five per cent. on the price of the machinery and plant, or on such part as might be unpaid, until paid; also to pay certain royalties on out-put, and a sum of £40 as rent of certain colliers' cottages. The surplus was then to belong to Alexander. By the fifth article it was agreed that the machinery should absolutely vest in the said Charles Jameson Alexander as purchaser at and only on payment of the price, or proportionately and partially to the extent to which the same might be paid, and upon the whole price and interest due thereon at the time being paid by him to Scott, the whole machinery, working plant, and others foresaid should become the absolute property of Alexander, subject to his relieving Scott of his obligations under the agreement. It was also declared that "on the complete payment" by Alexander of the price or value of the machinery, working plant, and others foresaid, Alexander should be deemed the sole party in right of the colliery and lease thereof foresaid. It was also provided that Alexander having undertaken to provide for certain of Scott's debts and obligations, in order to provide for such payment Scott should draw under the agreement a sum of not more than £200 a-year till the same should be paid off, the remainder to be applied by Alexander to these obligations, and Alexander, in order to put him in funds to

pay these debts, being entitled to uplift accounts due to Scott. The ninth article provided that the agreement should, in the option of Scott, fall and become void in the event of the insolvency or notour bankruptcy of Alexander, and, in the option of Scott, the agreement should cease and be at an end whenever Alexander should fail to implement his part thereof. The Commissioners of Lord Zetland concurred in the agreement.

A supplementary agreement fixed the value of the machinery and other plant at £4091, 14s. 4d.

Scott died in 1873 leaving a settlement by which he gave to certain trustees, of whom Alex. Coubrough, Alexander, and two others accepted office, his whole heritable and moveable estate. These trustees were the pursuers of this action.

Various payments were made to account of the price of the machinery, plant, and others, by Alexander to Scott during his lifetime, and to the pursuers as his trustees after his death.

Alexander was sequestrated in November 1882, and F. W. Carter, C.A., the defender, was appointed his trustee.

In May 1883 the pursuers lodged a claim in the sequestration for a preferable ranking for £1062, 11s. 5d., which they alleged to be the balance of the price of the machinery, &c., still due to them under the agreement. Their affidavit stated that the payments to account were made conform to account therewith produced and referred to, bringing out a balance, at the date of the sequestration, of £1062, 11s. 5d. The affidavit deponed that the trustees held the machinery, &c., referred to in the minute of agreement, "as their property, and in security of the said debt."

The account referred to in the affidavit was in the usual form of accounts-current, having debit entries on the left-hand side of the sheet and credit entries on the right-hand side. It was entitled, "Account-Current between the said Charles Jameson Alexander and his trustees (the pursuers), from 30th November 1870 to 15th November 1882, referred to in said affidavit and claim." It was headed, "Charles J. Alexander in account with William Scott." The first entries were—

Dr.				*Cr.*			
1870—Nov. 30.				1870—Nov. 30.			
To Debts due by Wm. Scott so far as they have been ascertained, hereby taken over by C. J. Alexander and held as part payment of plant, viz.:				By Colliery Plant, as per Inventory	£4,091	14	4
The Bank of Scotland	£21,819	17	4	By Debts due to W. Scott and collected by C. J. Alexander, and hereby added to plant, viz.:			
Royal Bank	520	0	0				
Russell & Aitken	83	1	7	A. Cunningham	137	11	0

The debit entries all through the account consisted principally of such payments; but there were also, in and after 1874, and till May 1878, entries of half-yearly payments in advance of £125 each of annuity to Mrs Scott, mother of the deceased William Scott, an entry of January 13, 1880, of £385 "to Mr Scott's trustees," and some other entries of payments to certain other parties who were not business creditors. It showed at May 1882 a balance due to the pursuers of £1056, 13s, 1d., while at the date of Alexander's sequestration the balance was, as stated in the oath above referred to, £1062, 11s. 5d. If, however, the payments to Mrs Scott, and that of £385 to Scott's trustees, just mentioned, were appropriated in their order to Alexander's obligation to pay the price of the machinery, &c., being the first item on the other side, the result was that the payments by Alexander were sufficient, long before the date when the account closed, to pay off that item of £4091, 14s. 4d.

In June 1883 the defender, as Alexander's trustee, having proposed to sell the machinery and plant, the pursuers (Scott's trustees) raised this action for declarator that, in virtue of the minute and supplementary minute of agreement entered into between their author Scott and Alexander, "the whole machinery," &c., "all as described or referred to in the said minute of agreement and supplementary minute of agreement, and thereby ascertained to be of the price or value of £4091, 14s. 4d. sterling, in so far as the same are still extant, belong to and are the sole property of the pursuers, or at least that the pursuers are entitled to a joint property in the same along with the defender to an extent corresponding to the sum of £1062, 11s. 5d., . . . being the amount of the said price or value thereof still unpaid;" and in the event of the machinery, &c., having been sold, for declarator that the pursuers were entitled to the whole proceeds thereof, or at least to the proportion of the same corresponding to the said sum of £1062, 11s. 5d. They also concluded for interdict against the defender selling or otherwise disposing of the said machinery, &c., or exercising any right of property over the same without the express consent and concurrence of the pursuers.

The pursuers pleaded—"(1) The whole price or value of the said machinery and others agreed to be sold by the said William Scott to the said Charles Jameson Alexander not being fully paid, the said machinery and others are still the property of the pursuers, and they are therefore entitled to decree of declarator and interdict as concluded for. (2) In any view, the pursuers have a right of joint property in the said machinery and others, and the defender is not entitled to dispose of the same without the pursuers' consent."

The defender denied that a sum of £1062, 11s. 5d., or any sum whatever, was due by the said Charles Jameson Alexander to the pursuers at the date of his sequestration. "Explained that the pursuers on 15th May 1883 lodged a claim for that sum in the sequestration . . . . which claim will be duly disposed of by the defender. . . . The affidavit and claim and relative account-current are referred to for their terms, and it is explained that they instruct the sum in the valuation to have been all paid by the bankrupt at or shortly after the commencement of the account, except £307, 13s., or thereby, which latter sum was extinguished by subsequent payment by Alexander. Explained that the said C. J. Alexander duly paid the price or value of the different articles of machinery and plant enumerated in the inventory annexed to the supplementary minute of agreement."

He pleaded, *inter alia*—"(6) The bankrupt having been put by the pursuers or the deceased William Scott in ostensible possession of the plant and others libelled, and having been allowed so to continue down to the date of his sequestration, the pursuers are not entitled to vindicate the property of the plant or any portion thereof in a question with the defender. (7) On

a sound construction of the minutes of agreement and other documents libelled, the pursuers have been fully paid for the plant and others referred to, and in any view they are not entitled to decree except as to so much of the plant, &c., as may be held not to have been paid for by the bank rupt."

The Lord Ordinary found that the subjects libelled were not the property of the pursuers, and therefore assoilzied the defenders.

"*Note.*—This is an action to make effectual a claim of preference against the trustee in bankruptcy. The pursuers' author sold the machinery and plant in question to the bankrupt under an agreement that a right of property therein should vest in the bankrupt as payments should be made to account of the price, and the pursuers are now claiming the property under their right of retention for the price. Giving the pursuers the benefit of the assumption that this was an effectual agreement (a point on which I am not expressing an opinion), it is plain that the right of the sellers to the property libelled would cease as soon as the price was fully paid.

"The pursuers have lodged a claim in the sequestration for a balance due to them in account with the bankrupt amounting to £1062, 11s. 5d., the same sum which in their action they allege to be due to them.

"On referring to the account given in by the pursuers in support of their claim, it appears that the account embraces a number of other transactions in addition to the settlement of the plant and the machinery. The account begins under date November 30, 1870, by crediting the pursuers' author with the value of the machinery and plant, and debiting him with the value of debts taken over. By the effect of these two entries the balance due to the pursuers' author is reduced to £317 or thereby, and are subsequent payments by the bankrupt on account of the pursuers' author which go to extinguish this balance. It is not alleged on record that any of the payments were specifically appropriated before Alexander's bankruptcy. That being so, I am of opinion that the payments here appropriated by the operation of bankruptcy, in conformity with the general law of appropriation that all the items on the credit side of the account must be appropriated in their order so far as necessary to the extinction of the first item on the debit side, *videlicet*, the price of the plant and machinery. That operation being performed, the pursuers' right of retention (which was only for the price of the chattels) will necessarily disappear, and I must hold their action to enforce that right is not well founded. I need scarcely add that my decision in no way invalidates the claim of the pursuers to a dividend in bankruptcy."

The pursuers reclaimed, and argued—This was not an ordinary account-current, to which the rule of appropriation of payments in their order was to be applied, and therefore the pursuers or their author were entitled to appropriate the indefinite payments of the bankrupt to what debts they thought best. The result was to leave part of the price still unpaid, and they had therefore a property title in the machinery under the agreement till the whole price was paid. *Devaynes'* case, relied on by the defender, was one of a banking account and did not apply here. None of the cases applied the rule to such an account as the present.

Authorities.—*Campbell* v. *Dent*, 2 Moore's Privy Council Rep. 292; Bell's Com. ii. 535; *Devaynes* v. *Noble*, 1 Merivale, 605; *Lang* v. *Brown*, Dec. 2, 1859, 22 D. 113; *Pollock & Co.* v. *Murray & Spence*, Nov. 6, 1863, 2 Macph. 14.

The defender replied—The real question here was, whether the full price must be held to have been paid or not. If it must be held to have been paid, then the property—the machinery—had passed, and the pursuer had no case, and it must be so held, for the pursuers had themselves, in support of their claim, produced an account which was no more than an ordinary account-current, and to which therefore the ordinary rule as to appropriation of indefinite payments must be applied.

At advising—

Lord Young—Since I have understood this case it has appeared to me a clear one. It has been rightly apprehended and decided by the Lord Ordinary; and I do not think it is necessary for us to do more than the Lord Ordinary has done—that it is not necessary for us to express any opinion as to the validity or legal effect of the agreement between the pursuers' author and the bankrupt, by which it was agreed that the property of the colliery plant was not to pass till the whole price was paid up, for I am of opinion with the Lord Ordinary, on the evidence to which he has referred, that the stipulated price had been paid. Whether it had been paid or not depends on whether the annual payments on his account to the pursuers' author's mother Mrs Scott are to be attributed as payment of the debt or not. All we know about these sums is, that he undertook to pay them and allow a sum of £385 to the deceased's trustees, and give other sums to certain parties interested in some settlement or other. All payments in money must go to extinguish some debt of the payer, or they will create a debit against the payee. The question here is, whether these payments are to go in extinction of the debt for the price of the machinery and plant or of some other debt? Now, that price is entered as the first debt in the account, and other debts subsequent to it, and there are payments entered as payments *per contra*. Now, I cannot think these payments were entered otherwise than as payments of this debt, for they are so dealt with in the first instance on the face of the account. No doubt he might have dealt with them otherwise. He might have said, there is a security for the price of the machinery, and no security for other things, therefore these payments are not to be put to the extinction of this debt but to that of those unsecured. Such an arrangement, if it had been made, would no doubt have had effect, but no reasonable argument was advanced except that it was much in the pursuers' interest to have it so, because they had security for that debt and not for subsequent ones, and they said that because it was in their interest to appropriate for other debts, therefore appropriation had been made. I do not distinguish this case from others of the kind where an account-current is a common feature. Therefore I am of opinion that the Lord Ordinary has rightly decided the case on the simple ground that on the evidence before us the whole price stipulated for the machinery has been paid, and that if so the property has according to the

agreement passed to the bankrupt, and from him to his trustee, and that the pursuers have no right of claim for a preference.

LORD CRAIGHILL—I concur in the judgment which your Lordship has proposed, and my reasons for so doing are shortly these:—In the first place, the account-current, which has been the foundation of the argument on both sides, must be taken to be an account-current between the parties. It is so described by the pursuers themselves on the face of the account, and also in the affidavit which accompanied the claim lodged in the sequestration. Over and above, this appears to me to be its true description. In the next place, though a capital sum is the first entry in the account, yet the way in which the account is kept shows that these and all other items were dealt with as items in an account-current. Had the capital sum been the subject-matter of one account or of one part of an account, and items of income been the subject of another account, or of other parts of an account, the result of course would have been different; but as capital and income in this account are all made items of one account, and are all dealt with as an account-current, there is nothing in the specialty to which I have referred, and on which so much reliance is placed by the defenders. The common rule of law, therefore, as the Lord Ordinary has decided, must be applied. The circumstance that interest on the yearly balance was charged from the beginning of the year did seem at first to suggest that the principle thus followed was different from that which would have been followed had the account been an account-current; but on examination it appears that there is interest charged, at least at times, upon both sides of the account, and, besides, the variance in the amount on which interest was charged betwixt the sum as it stood at the beginning and as it stood in the course of the year was so little at any time, and so seldom occurred, that this specialty comes really to be immaterial. The thing was done obviously for the sake of conveniency rather than for any other consideration by which the character of the account could be affected.

LORD RUTHERFURD CLARK—I am also disposed to think that the Lord Ordinary's judgment should be affirmed. I concur in the observation of Lord Craighill that this account must be regarded as the pursuers' account. No doubt they say the account was actually rendered by the debtor Alexander, but whether that were so or not, the pursuers' author adopted the account alleging that his claim was due. Now, this account is what is commonly called an account-current, containing all sums which are credited.

I could quite have understood that the pursuers should have kept the capital account quite separate. I do not say it was too late for to have separated them when the account was rendered, but I think it was too late when the claim was lodged. All these sums were capital, and I must look at this as nothing but a current account, including all sums put to the credit of the pursuer's author, and all sums put to his debit, and whether any sums remain due or not depends on whether or not the payments have wiped out the debt.

The LORD JUSTICE-CLERK was absent.

The Court refused the reclaiming-note, and adhered to the Lord Ordinary's interlocutor.

Counsel for Pursuers (Reclaimers)—Mackintosh—Wallace. Agent—David Turnbull, W.S.

Counsel for Defender (Respondent)—Pearson—Dundas. Agents—Waddell & M'Intosh, W.S.

Friday, January 11.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

HASTIE AND OTHERS *v.* THE FIRST EDINBURGH AND LEITH 415TH STARR-BOWKETT BUILDING SOCIETY AND ANOTHER.

Building Society — Arbitration — Jurisdiction— Building Societies Act 1874 (37 *and* 38 *Vict. c.* 42), *secs.* 4, 34, 36.

The rules of a building society provided that disputes with regard to certain matters should be referred to arbitration. Circumstances in which *held* that an award bearing to proceed on such a dispute must be set aside on the ground that there was no dispute properly before the arbitrators, since the whole parties appearing before them maintained the same view.

The Court has jurisdiction to give a remedy to a member of a building society registered under the Building Societies Act 1874, when it appears that the act complained of has been wholly outwith the provisions of the statute and the rules of the society.

The 4th section of the Building Societies Act 1874 provides that the expression "Court" as used in the Act means in Scotland the Sheriff Court of the county in which is situated the chief office or place of meeting for the business of the society.

The 21st section of the same Act provides that the rules of a society registered under the Act shall be binding on the several members and officers of the society.

The 34th section (which relates to the settlement of disputes by arbitration) provides that "Whatever award shall be made by the arbitrators, or the major part of them, according to the true purport and meaning of the rules of the society, shall determine the dispute; and should either of the parties to the dispute refuse or neglect to comply with or conform to such award within a time to be limited therein, the Court, upon good and sufficient proof being adduced of such award having been made, and of the refusal of the parties to comply therewith, shall enforce compliance with the same, upon the petition of any person concerned."

Section 36 provides—"Every determination by arbitrators or by the Court, or by the Registrar under this Act, of a dispute, shall be binding and conclusive on all parties, and shall be final to all intents and purposes, and shall not be subject to appeal, and shall not be