which have nothing whatever to do with questions of police. I take it that the words "proprietor and occupier" are inserted because a third person who interferes with any building by affixing a notice to it is doing a disorderly act if he does it without the consent of both these persons. It is disorderly towards the proprietor, because he has a right to prevent his property from being disfigured, and it is disorderly towards the occupier because it is out of the question, even if the proprietor allowed it, that anyone should post up bills upon it without the occupier's consent. I am accordingly of opinion that this clause is not one under which an occupier can be charged for putting up a notice on his premises without the consent of the proprietor.

The only remaining question is, whether this suspension is incompetent in respect of the restrictive provision as regards appeal or review contained in the Glasgow Police Act? That turns upon the question whether the complaint is in its essence a bad complaint, rendering all the proceedings following upon it lawless proceedings. It is quite clear that if all that had been wrong was some matter of detail, such as a defect in specification, then the clause would have applied, and the only course open would have been an appeal to the Circuit Court of Justiciary. But this Court has always held that it is entitled to interfere to prevent the carrying out of a judgment which follows upon proceedings which are in themselves lawless proceedings. As I consider that what is set forth in this complaint is not an offence at all under the Act of Parliament, and that therefore the complaint sets forth nothing which in law could have justified a conviction even if set forth with perfect accuracy, I am of opinion that we can interfere with this conviction and that it ought to be quashed. In coming to this conclusion I go upon the same grounds as were expressed by Lord Young in *Collins* v. *Lang*—"Now, it has been frequently decided in this Court, without referring to Acts of Parliament or any provisions that may be referred to as to the method of review, that if the procedure and conviction upon a complaint are *ex facie* illegal, remedy may be given by way of suspension." We are not proceeding to review this judgment, but to give redress against proceedings which from their commencement were entirely illegal.

Lord Rutherfurd Clark and Lord Lee concurred.

The Court quashed the conviction.

Counsel for Suspender—Rhind. Agent—W. Officer, S.S.C.

Counsel for Respondent—D.-F. Mackintosh—Ure. Agents—Campbell & Smith, S.S.C.

COURT OF SESSION.

Thursday, November 15.

FIRST DIVISION.

[Lord Lee, Ordinary.

WHYTE *v.* MURRAY.

Bankruptcy—Trustee—Discharge—Radical Right of Bankrupt in Estate after Discharge without Composition—Title to Sue.

Where a bankrupt has been discharged without being re-invested in his estate, and the trustee under his sequestration has also been discharged, the radical right of the bankrupt in his estate revives, so as to give him a title to sue an action for recovery of funds belonging to his estate.

Succession — Assignation — Marriage-Contract—Power of Division, Exercise of.

By a marriage-contract the wife conveyed, *inter alia*, to herself in liferent, and failing her to her husband in liferent, exclusive of the *jus mariti*, and in any case to the children of the marriage in fee, certain bank shares, subject to a power in the husband to divide the provisions made for them among the children. There were three daughters and one son. By his settlement the husband conveyed his whole estate to trustees to pay certain special legacies to the daughters, and "the whole residue and remainder of my estate, heritable and moveable, for behoof of my son," declaring that he had made this division in virtue of the powers in the marriage-contract. The husband predeceased the wife, who thereafter executed a transfer of the bank shares to herself in liferent, and the children equally among them in fee. The son conveyed to a creditor his whole interest in the residue of his father's estate. In a question between the son and an assignee of the creditor—*held* that the latter had no right to the bank shares, in respect that they had never formed part of the residue of the father's estate.

This action was raised by George Whyte against the Commercial Bank of Scotland (Limited) and David Hill Murray. The pursuer, *inter alia*, sought for decree of declarator that he had a right to one-fourth part of 12½ shares of Commercial Bank stock, and one-half share of the stock of the same bank, and that the defender Murray had no interest in the same.

By contract of marriage entered into between Gerge Whyte senior, the pursuer's father, and Mrs Isabella Mess or Whyte, the parents of the pursuer, the latter, in consideration of certain provisions granted by the former, disponed and made over, *inter alia*, certain shares of Commercial Bank stock, including those now sued for, "to herself in liferent, but exclusive of the *jus mariti*, and failing her by death to the said George Whyte in liferent, and in either case to the children of the marriage, equally among them if more than one, in fee, subject to the power of division and other conditions" mentioned in the contract. The

power of division was in these terms—"In case there be more than one child of this marriage the said George Whyte shall have the power, and failing his dying without his exercising it, the said Isabella Mess shall have the power while she remains his widow at any time of his or her life, or on deathbed to divide the provisions hereby made for children in such manner as he and, failing him, she may direct by any writing under his or her hand, and failing any such division the said provisions shall divide equally among the children, male and female, the issue of a child dying before receiving its provisions having right to the parent's share."

There were four children of the marriage—the pursuer, an only son, and three daughters—who were all alive, and had attained majority at the date of the action.

George Whyte senior died in 1869.

By trust-disposition and settlement George Whyte senior conveyed his whole estate, heritable and moveable, for certain purposes, *inter alia*—(1) He provided that a liferent of the whole of his estate should be paid to his wife; (2) he made certain special provisions in favour of his daughters; (3) he directed the trustees to hold "the whole residue and remainder of my heritable and moveable estate for behoof of my son George Whyte and the heirs of his body." These provisions were not to vest in the children till they attained majority, and till after the death of the survivor of himself and his wife. It was further declared that these provisions should "be in full of all that they can ask or demand by and through my decease out of my real or personal estate or out of the foresaid sum of £1100 or other parts of my said wife's fortune which may be found standing in her name at the time of my death in name of legitim, portion natural, executry, or otherwise, or by virtue of my said contract of marriage; and I declare that I have made the division above written among my children in terms and in virtue of the powers conferred upon me by said contract of marriage."

By transfer, dated 10th and 11th May 1870, Mrs Whyte, "in implement of the transfer already granted by her in her marriage-contract," transferred and made over to herself in liferent and her children equally in fee, the shares of Commercial Bank Stock conveyed by her in that contract. The children thereby accepted of the assignation so made subject to this condition, that the acceptance of the transfer was not to affect the rights of the children *inter se* under the marriage-contract of their parents and the trust settlement of their father.

By bond, dated 10th February 1876, the pursuer conveyed, in security of the sum of £2000, All and whole the residue and remainder of the heritable and moveable estate of the said deceased George Whyte provided to him by his father's settlement.

The pursuer's estate was sequestrated under the Bankruptcy Act 1856, and J. A. Robertson, C.A., was appointed trustee on 21st June 1882.

Mr Robertson was also trustee on the sequestrated estate of Adam Henderson, to whom had been transmitted the right conveyed by the bond and assignation in security granted by the pursuer. As trustee on Henderson's estate, and with consent of himself as trustee on the pursuer's estate, Mr Robertson exposed for sale under articles of roup dated 18th September 1883, the whole right of succession of George Whyte under his father's settlement, and these articles of roup contained the following clause—"*Sexto*, the exposer submits herewith, and which is referred to as relative hereto, and signed by the exposer, a rental of the lands and others, which he alleges falls under the conveyance of residue in favour of the said George Whyte, with the value of Commercial Bank Stock, which he also alleges falls under said conveyance, and also a note of bonds and burdens affecting the said subjects, but the offerers must be held to have satisfied themselves not only as to the said rental, but as to the rights of the exposer to the said subjects and others, and also to the amount of the said burdens and deductions, the exposer not holding himself bound or responsible for the accuracy of the rental, or the note of bonds and burdens affecting the said subjects, nor warranting his right and title to the said subjects and others. . . . Value of 2½ Commercial Bank shares, £693, 15s."

Under the articles of roup the defender David Hill Murray purchased the pursuer's right of succession under his father's settlement, and following upon the sale, Mr Robertson as trustee for Henderson, with consent of himself as trustee in the pursuer's sequestration, granted an assignation to Murray, dated 13th November 1883, conveying to him the pursuer's right of succession under the settlement of his father, together with the residue and remainder of the heritable and moveable estate provided to the pursuer under that settlement, and his whole right and interest as trustee foresaid, of whatever kind and description under the said trust-disposition and settlement in virtue of the bond granted by the pursuer, and subsequent transmissions of the same. No mention was made in this assignation of any conveyance of the bank shares in question.

The pursuer was discharged without composition on 18th March 1884, and the trustee Mr Robertson on 4th November 1887.

The defender Murray pleaded, *inter alia*—"(1) No title to sue. (5) The said deed of settlement having declared that the provision of residue thereby made in the pursuer's favour was in full of all his rights under the marriage-contract, the pursuer is barred from claiming the bank stock in question as falling under that contract. (6) The pursuer having assigned his reversionary interest in his father's trust-estate in security of advances made to him, and the said bank stock having by the provisions of the deed of settlement been dealt with as forming part of the trust-estate, the defender, as now in right of the reversionary interest, is entitled thereto, and to be assoilzied with expenses. (7) In any event, the said bank stock having vested in the pursuer on the death of his father, passed to the trustee on his sequestrated estate, and the defender as assignee of the trustee is entitled thereto, and to be assoilzied with expenses."

The Lord Ordinary (LEE) on 13th July 1888 pronounced the following interlocutor:—"Finds that the bank shares referred to in the summons formed no part of the estate of the deceased Mr George Whyte: Finds therefore that the assignation founded on by the defender Mr

David Hill Murray is insufficient to support his claim to the said shares, and that he has no title to oppose the conclusions of the summons: Therefore repels the defences for the said David Hill Murray, and decerns and declares in terms of the first and third conclusions of the summons, but without prejudice to any claims upon said shares, so far as belonging to the pursuer, competent to the defenders the Commercial Bank, or to creditors upon the pursuer's sequestrated estate: Finds the defender David Hill Murray liable to the pursuer in the expenses of process, &c.

"*Opinion.*—The pursuer's claim in this case relates to (1) a fourth part of certain shares in the stock of the Commercial Bank, which belonged originally to his mother, and were, along with sundry other properties belonging to her, conveyed by her antenuptial contract with George Whyte to herself in liferent, but 'exclusive of the *jus mariti*, and failing her by death, to the said George Whyte in liferent, and in either case to the children of the marriage, equally among them if more than one, in fee, subject to the powers of division and other conditions' therein mentioned; and (2) to a half share of £100 in the converted stock of the Commercial Bank (Limited), which was purchased in 1881 by the pursuer or on his credit in order to make up, with the shares above referred to, the total amount of thirteen shares now standing registered in the books of the bank as belonging to 'Isabella Mess or Whyte in liferent, for her liferent use allenarly, and to the children of the marriage between her and the said George Whyte (named) in fee.'

"The power of division above referred to was in the following terms:—'And it is further declared that in case there be more than one child of this marriage, the said George Whyte shall have the power, and failing his dying without exercising it, the said Isabella Mess shall have the power, while she remains his widow, at any time of his or her life, or on deathbed, to divide the provisions hereby made for children in such manner as he and, failing him, she may direct, by any writing under his or her hand, and failing any such division, the said provisions shall divide equally among the children, male and female, the issue of a child dying before receiving its provisions having right to the parent's share.'

"The marriage was dissolved by the death of George Whyte in 1869. There were four children (the pursuer and his three sisters), and in 1870 a transfer of the original shares was effected in favour of the widow, 'for her liferent use allenarly,' and to the children *nominatim* in fee, but subject to a declaration that the acceptance of the transfer was 'not to affect the rights and interests of the children of the said deceased George Whyte *inter se*,' under the marriage-contract, and a trust-settlement left by George Whyte.

"The first question raised by the defences for Mr D. Hill Murray is, whether he has shown any title to dispute with the pursuer his right to the shares so standing in name of Mrs Whyte for her liferent use allenarly, and the children of the marriage in fee.

"This question involves a somewhat minute examination of Mr Murray's title and of the deeds to which it refers, but I think it must be answered in the negative.

"The title of the defender Mr Murray is founded on a sale and assignation of the residue of Mr George Whyte senior's estates in 1883 by Mr J. A. Robertson as trustee for the creditors of a Mr Henderson, and Mr Henderson's right is founded on a bond and assignation by the pursuer, of date 10th February 1876 in favour of one James Robertson, banker in Huntly.

"The assignation to Mr James Robertson, banker in Huntly, is limited to 'the residue and remainder of the heritable and moveable estates of the said deceased George Whyte (the father) provided to me (the pursuer) by the trust settlement of the said deceased George Whyte, and of all my right and interest of whatever kind and description under the same.'

"Now, George Whyte's trust-disposition and settlement conveyed to his trustees nothing but the estates therein referred to as his own. These are, in the first place, the lands of Meethill and the other heritable subjects therein described, and also generally his whole estates and effects, heritable and moveable. The deed contains a clause showing that the lands of Meethill had been acquired by the employment of a sum of £1100, which is mentioned as forming 'a part of my wife's fortune settled by our antenuptial contract of marriage' (clause fourth). It contains a direction for payment of a provision of £1000 to each of his daughters, and it provides lastly that the whole residue of his estates, after satisfying his widow's liferent and the other special provisions, should be held for his son the pursuer. As to the vesting of these provisions the deed bears—'And it is hereby specially declared that the foresaid special provisions in favour of my children, as well as the provisions of residue, shall vest in the parties entitled thereto, if sons, on their attaining the age of twenty-one, or if daughters on their attaining said age or being married, whichever shall first happen, but in no case till after the death of the survivor of me and my said wife, or her entering into another marriage, and upon the arrival of the respective periods of vesting of said special provisions in favour of my children and residue, my said trustees shall either pay said provisions or secure the same in manner above mentioned, and shall pay, deliver, or convey the said residue.' But it conveys no estate remaining vested in his wife.

"The deed also contains a clause by which Mr Whyte exercised his power of division as follows:—'And I declare that the provisions above written in favour of my said children shall be in full of all that they can ask or demand by and through my decease out of my real and personal estate or out of the foresaid sum of £1100 or other parts of my said wife's fortune which may be found standing in her name at the time of my death in name of legitim, portion natural, executry, or otherwise, or by virtue of my said contract of marriage; and I declare that I have made the division above written among my children in terms and by virtue of the powers conferred upon me by said contract of marriage.'

"It is said that this division includes a right to the bank shares as part of the residue. But I think that this is a mistake. The marriage contract contains a clause declaring that 'for all the purposes of this contract the capital of the

sums, and the value of the subjects above conveyed by the said Isabella Mess or Whyte to the extent of her interest therein, shall be held to be £1300, be the same more or less.' The contract also contained the following clause:—'Further, the said Isabella Mess hereby dispones, assigns, transfers, and makes over to herself, exclusive of the *jus mariti*, and to her heirs, executors, and assignees whomsoever, all and whatever other estates and effects, real and personal, now belonging to her, or to which she may succeed during the subsistence of the marriage, and particularly, without prejudice to the said generality . . . and for effecting the purposes of this contract, the said George White hereby renounces his *jus mariti* over the subjects and sums of money above conveyed by the said Isabella Mess, exclusive of the *jus mariti*."

"The effect of these clauses, in my opinion, was that the power of division contained in the marriage-contract was limited to the £1300, of which £1100 had been paid over, and the other £200 remained a burden merely on the widow's rights.

"The bank shares, in my opinion, never became a part of the property of the pursuer's father, and formed no part of his residue. They remained vested in the wife, until, by the transfer effected in 1870, her right was limited to a 'liferent allenarly,' and the fee was given to the children.

"Considering the terms of the marriage-contract, I see no reason to doubt that this transfer, after the death of George Whyte senior, was effectual to make them the property of the children, subject to their mother's liferent.

"So stood the title when the pursuer became bankrupt and was sequestrated in 1882. He was discharged on 18th March 1884; but as his discharge was obtained without composition, the sequestration was not thereby ended, and he was not re-invested in his estates. His mother died in January 1887, but as she had previously renounced by the terms of the transfer all but a liferent allenarly in the bank shares, I do not see that this event affected the already vested rights of the children as in right of the bank shares in fee. I think that she had full power on the death of her husband to restrict her right to the bank shares to a mere liferent, and thus to accelerate the vesting of the fee. But the right so vested was a right derived from her.

"Mr Murray's title, therefore, in my opinion, includes no right to these bank shares, for nothing but the residue of the father's estate was conveyed by the bond and assignation to Mr James Robertson, which forms the basis of his right. The fact that Mr J. A. Robertson, as trustee on the pursuer's sequestrated estates, consented in the articles of roup to his own act in selling that residue as trustee on Henderson's estate, seems to be of no effect in enlarging the subject of the conveyance. The same may be said of the consent of the Commercial Bank, who only consented for any interest they had under the bond in favour of James Robertson, banker, Huntly.

"It was contended that because the articles of roup (art. 6) mentioned the bank shares as 'alleged' by Henderson's trustee to fall also under the conveyance to Robertson, therefore the sale and assignation following thereupon must be held to have included these shares. But the terms in which this allegation was made and qualified are sufficient to shew that the measure of the defender's right must be ascertained by reference to the original deeds. The exposer expressly declines to warrant his right and title to the said subjects, and requires purchasers to satisfy themselves.

"I am therefore of opinion that the defender Mr Murray has shown no title to defend.

"It was argued for him that at all events the pursuer had no title to sue, because if the shares were not carried by the sale they must have belonged to the pursuer to the extent of one-fourth part at the date of his sequestration, and must therefore now belong either to his trustee, or if the trustee is *functus* by reason of his discharge, to his creditors in the still unfinished sequestration. My opinion is that this is a matter with which the defender Murray has no concern. The trustee and creditors in the pursuer's sequestration will no doubt attend to their own interest if they have any.

"I am therefore of opinion that, so far as Mr Murray's defence is concerned, the pursuer is entitled to decree in terms of the first and third conclusions of the summons, not only as regards the half share the price of which was paid by him or debited to his account, but also as regards the other twelve and one half shares.

"With regard to the defence of the Commercial Bank, my opinion is that decree in terms of these conclusions will not prejudice any right of lien which they may have. But it can do no harm to make the decree expressly bear to be without prejudice to any claims competent either to the bank or to the other creditors of the pursuer at the date of his sequestration.

"As the second conclusion of the summons appears to ask more than a transfer of the pursuer's shares into his own name, I think that the Commercial Bank have a right to be heard further upon that, and upon the effect of their ranking in the sequestration. This, however, is a point which may stand over until it be seen whether my judgment on the first conclusion of the summons becomes final."

Before the case came up for hearing on the reclaiming-note a petition had been presented to the Court for revival of the pursuer's sequestration.

The defender David Murray reclaimed, and argued—The pursuer had no title to sue. The shares in question, if recovered, could only benefit his creditors, as he had been discharged without composition, and so not re-invested in his estate. These shares were vested in him on the dissolution of the marriage at the latest, and so had passed to his trustee—*Romanes* v. *Riddell*, January 13, 1865, 3 Macph. 348. There was clearly no abandonment here, as a petition for revival of the pursuer's sequestration was before the Court. The case of *Fleming* v. *Walker's Trustees*, November 16, 1876, 4 R. 112, was therefore inapplicable. It was hardly fair to the defender that he should have to argue this question first with the pursuer and afterwards with the creditors. On the merits—In his trust-disposition and settlement George Whyte senior had properly exercised the power of division conferred upon him in the marriage-contract — *Smith* v. *Milne*, June 6,

1826, 4 S. 679; *Mackie* v. *Mackie's Trustees*, July 4, 1885, 12 R. 1230. The shares in question therefore fell into the residue of George Whyte senior's estate, and so were part of the right of succession conveyed by the pursuer under the bond of 1876, and purchased by the defender under the articles of roup and sale in 1883. At all events they were vested in the pursuer at the time of his sequestration, passed to his trustee, and were included in the assignation consented to by the trustee in favour of the defender.

The pursuer (respondent) argued—The pursuer had a title to sue. There was no existing sequestration or trustee. The pursuer's radical right in his estate had therefore revived. Further, the trustee had clearly abandoned any claim to the shares in question—*Fleming* v. *Walker's Trustees*, *supra*. The pursuer had a title to sue were it only for the benefit of his creditors. On the merits—There was no proper exercise of his power of division in the settlement of George Whyte senior. These shares were never part of the residue of his estate, and were therefore not conveyed under the bond of 1876 or purchased by the defender. Under the articles of roup and assignation following thereon, the defender acquired no more than had been conveyed by the pursuer under that bond. On the death of George Whyte senior the fee of these shares remained in his wife, and were not vested in the pursuer. They could never therefore have passed to the trustee in his sequestration, nor have been transferred by him by his consent to the assignation in favour of the defender.

At advising—

Lord President—When Mr George Whyte senior and his wife married, the lady was possessed of some fortune, embracing certain shares in the Commercial Bank of Scotland. The form of marriage-contract which was entered into by the spouses was not a conveyance in trust, but was a direct conveyance whereby the lady, in respect of certain obligations by her husband which are of no materiality, dispones, *inter alia*, these shares "to herself in liferent, but exclusive of the *jus mariti*, and failing her by death, to the said George Whyte in liferent, and in either case to the children of the marriage equally among them, if more than one, in fee, subject to the powers of division and other conditions hereinafter mentioned." I think there is no doubt that the effect of that conveyance was to leave the fee of the bank shares in the lady herself, and to create a prospective right of liferent in the husband, and to settle them subject to that right of liferent upon the children of the marriage in fee. The fee of the shares remained in Mrs Whyte down to 1870, when she conveyed them to herself in liferent for her liferent use allenarly, and to her then existing children in fee. Such is the history of the shares, there has been no change since that date, and the lady dying in 1887, the liferent then came to an end, and they now belong to the children in fee.

The defender Murray has now advanced a claim to the shares, and has intimated it to the Commercial Bank, and accordingly it has been thought necessary by the pursuer to raise an action to have it declared that he has no right to the shares.

The first objection which the defender takes is that the pursuer has no title to sue. I think that objection is ill-founded, and I regret that the Lord Ordinary did not think fit to dispose of it. The pursuer was no doubt sequestrated, and he has not been discharged on a composition or re-invested in his estates. His estates have been ingathered and divided so far as the trustee and creditors desired to do so, and the trustee has been discharged. It is now said that the pursuer's right may still be realised for the benefit of his creditors, and that is true; but at the same time it does not affect his title to sue. No one but the pursuer has at present a title to sue this action. His title is his radical right to the estate, which revives by the trustee's discharge. The discharge of the trustee puts an end to the adjudication in his favour, which transferred to him the estate of every description which belonged to the bankrupt. The trustee's title, then, being at an end, the only person having a right to sue such an action as the present is the bankrupt. No doubt the creditors have claims which are still unsatisfied, but their remedy is to revive the sequestration or proceed against the bankrupt in some other way to make these good. The bankrupt's right has revived and will avail as a title to the shares, except in so far as it may be subject to meet the still outstanding debts of creditors. Accordingly I am for repelling the objection to the pursuer's title to sue.

Upon the merits, although the case has at first sight an appearance of complication, I have not much difficulty in adopting the Lord Ordinary's view. The defender is in right to the subject of a security which is constituted by a deed granted in 1876, by which Mr George Whyte, the pursuer, acknowledged to have borrowed a sum of £2000, and granted, *inter alia*, in security "the residue and remainder of the heritable and moveable estate of the said deceased George Whyte" (who was his father), "provided to me by the said trust-disposition and deed of settlement, and all my right and interest of whatever kind or description in the same." It appears to me that there can be only one construction of these words which I have read. What is conveyed in security by the borrower is his interest, whatever that was, in the residue and remainder of the heritable estate belonging to his father. Of course that must mean the residue and remainder in so far as it was settled upon him, but that residue and remainder could not comprehend what was vested in another. It could not therefore comprehend the bank stock, of which Mrs Whyte the pursuer's mother was undivested owner.

It would be doing violence to the terms of the settlement of Mr Whyte senior if the Court were to hold that it comprehended estate belonging to someone else It is vain to appeal to the authority of the cases of *Smith* and of *Mackie*. In the former case the old lady who was held to have exercised the power of division had no estate of her own, and could only exercise the power of division which was given to her by her husband's will. It was not possible for her to do anything else, for she had no estate to deal with, and when she made a will she could not be supposed to be doing anything else than exercising the power of division. That judgment proceeded upon reasonable and intelligible grounds, but where a person is engaged in disposing of his own

estate by will, and is possessed of a power o dividing his wife's estate, he must exercise that power in a very different way than by leaving the residue and remainder of his estate in general terms to his son, as is done here. No doubt Mr Whyte senior says at the end of the deed that he has exercised the power which was given to him by his wife. The simple answer to that is that he has not exercised it, and that upon no reasonable construction of the deed can it be held that he has exercised such a power. That being the foundation of Mr Murray's title, it being under that conveyance of residue that he lays claim to the bank stock in question, I do not think the bank stock is carried as part of the security held by the creditor. The transmissions are of no consequence until we come to the assignation by Mr Robertson dated 13th November 1883, proceeding upon the narrative of certain articles of roup and sale of the interest of a person named Henderson in the bond in question, which had came to vest in him. Mr Robertson was trustee upon Mr Henderson's sequestrated estate, and in that capacity he brought the bankrupt's right under the bond and disposition to sale, and the defender purchased it. It is said that by the articles of roup a right to the bank stock was included in the subjects exposed. But all that we find in the articles is that the trustee in bringing the subjects to sale says that he thinks the bank stock is included, but he declines to warrant it, and when he makes the conveyance he takes care not to insert the bank stock. All that he conveys is the interest of George Whyte junior in his father's estate. But he has acquired that already under his own title. Nor does it make any difference whatever that this assignation by Henderson's trustee is assented to by George Whyte's trustee. No doubt he did assent to it, but that did not enlarge the subject assigned. The assent given was merely to the effect that the security should be transmitted to the purchaser. I am of opinion that Mr Murray's claim to this bank stock cannot be maintained, and that the defences should be repelled.

Lord Mure—I am of the same opinion. It is quite plain that under the terms of the conveyance of 1883, which is the foundation of Murray's title, there was no conveyance of these bank shares; they were never part of the residue of George Whyte senior's estate. That estate never included these shares. They belonged to his wife, and remained hers till the day of her death, or at all events were never any part of the residue of his estate, and there appear to me to be no possible grounds on which Murray can maintain that he took a portion of these bank shares.

I had a difficulty at first, because the Lord Ordinary has not disposed of the objection that the pursuer had no title to sue. Obviously, from what your Lordship has suggested, Whyte has a good title in the Commercial Bank shares, and it remains for us to repel the plea of no title to sue. No doubt the title to these shares was carried to the trustee under Whyte's sequestration, but the trustee has been discharged. The right must be in somebody. The radical right is in George Whyte, and I think that when the trustee was discharged the right of George Whyte revived.

Lord Adam—I confess that from the time that we were put in possession of the facts of this case I have thought it a simple one. The title of the reclaimer Mr David Hill Murray rests upon an assignation to a bond and disposition by George Whyte, by which he conveyed in security of a sum of £2000 "the residue and remainder of the heritable and moveable estate" as provided to him by the trust-settlement of his father. And the question is, whether the bank shares in question ever were part of the residue of Mr George Whyte senior's estate? I think not. I think they remained part of his wife's estate. And even if he had disposed of them in his trust-settlement, I do not think that would have been a good conveyance of them. Any intention so to do would have been of no avail unless it was shown that the true character of them was other than I have stated. Accordingly, I do not think that the reclaimer has by the assignation any title to these shares.

But it is said that Mr Robertson, as trustee upon the bankrupt George Whyte's estate, consented in selling the residue to the inclusion of the bank shares in the residue, the title to them at that date being in the bankrupt. But even if the title was in the bankrupt, I do not think that the consent in question would have made Mr Murray's title any higher than it stood under the assignation. I therefore agree in the result to which the Lord Ordinary has come.

But I concur with your Lordship in thinking that the Lord Ordinary's interlocutor is defective, for his Lordship ought to have dealt also with the pursuer's title to sue. I have no doubt of that title. The only reason on which it is contended that he had no title is that the bank shares in question passed to the trustee upon the pursuer's sequestrated estates and to his creditors. If there had been an existing trustee he would have been here to vindicate his rights. But the trustee having been discharged the pursuer's radical right revives, and is a sufficient title to him to vindicate the right to these shares either for himself or for his creditors. Even if there had been a trustee, and he had declined to come forward, the bankrupt himself might have came forward to assert his right, and might have insisted—on certain terms as to caution—in pursuing an action of this kind.

Lord Shand was absent.

The Court repelled the objections to the pursuer's title to sue, and *quoad ultra* adhered.

Counsel for the Defender (Reclaimer)—Sol.-Gen. Darling—Sym. Agent—D. Hill Murray, S.S.C.

Counsel for the Pursuer (Respondent)—Gloag——Watt. Agent—Andrew Urquhart, S.S.C.