bailies, though they actually granted the charter in these terms, were not really superiors of the vassals whose title they professed to confirm, but that the overlord, the Earl of Wigtown, is the true superior, and consequently that the corporation, and the bailies as representing the corporation, are not entitled to exact the casualty which they here demand, and that this is shown by the titles on which they themselves hold their lands. I doubt if that can be relevantly pleaded in answer to a demand by the person in right of the superiority under the only title which the defender produces. If I am right in this view, I do not think it is necessary to go far into the antiquarian and perhaps more interesting inquiry as to the position of the superior of the burgh of barony as contrasted with the corporation of the burgh. It is contended that the position of the bailies is that only of commissioners of the superior, and that the pursuers have not, and never had, any right except as commissioners. This is said to be the effect of a charter of confirmation and novodamus granted by the then Earl of Wigtown in 1670. I have gone carefully into that charter, and I think that the view of the defender is founded on a misconception. The charter consists of four separate provisions. There seems to have been an ancient charter from the Crown, going as far back as the time of William the Lion, and that Kirkintilloch was possessed of the privileges of a burgh of barony before the charter of 1670. That charter sets out with the narrative of these former grants, and that it was the intention of the granter to confirm and enlarge the rights thereby conferred. It then proceeds, in consideration of the sum of 550 merks paid to him by the bailies on behalf of the burgesses (which shows that it was an onerous transaction on the part of the superior), first to confirm the old rights and titles of the burgesses. The second part is a disposition and alienation from the superior to the burgesses of the whole lands in question. These are the words—"Moreover, witt ye us, the said William Earl of Wigtoune, Lord Superior foresaid, for the said sum of money, and for divers other good onerous causes and considerations well and truly made, done, and performed to us and our honourable predecessors by the said burgesses, heritors, incorporations, and community of said burgh, with which we hold us as well contented, and renounce all objections to the contrary, *de novo* to have given, granted, alienated, and in feu-farm heritably for ever demitted, and by this our present charter confirmed, and also by the tenor of these presents to give, grant, alienate, and in feu-farm heritably for ever demit, and by this our present charter confirm, to the said James Findlay and John Ginding, bailies of the said burgh," &c. This is an alienation to the bailies and the burgh of the land in question. The third part is a re-grant of the privileges of the burgh, including the important one of market. The fourth part is a reservation of certain lands in Kirkintilloch. Then there is a stipulation for a feu-duty to be paid to the superior:—"Paying thence yearly, the said bailies, burgesses, and heritors of Kirkintilloch, or their heirs and successors above written, to us, our heirs and successors, or to our chamberlains in our name, the sum of twelve merks usual money of this kingdom of Scotland, as the yearly rent and feu-duty for the foresaid lands."

Now, the effect of all that is that the burgh as represented by the bailies became the superior of the burgesses as vassals. I do not go into all the clauses; it is enough to indicate the general effect of this charter. From that time the burgh was to pay a feu-duty to the superior of the burgh, and, on the other hand, it was entitled to superior's rights as against the burgesses. It is clear that the bailies do not merely represent the superior, but that the burgh has been given the rights of superior. No doubt if the matter had not been so ancient, and if we could have had access to the original writs, of which the charter of 1670 is a confirmation, the result might have been different, but, on the other hand, I have a strong impression that if the matter could be further looked into the result would rather be to confirm than to set aside the conclusion to which I have felt myself obliged to come.

Lords Young, Craighill, and Rutherfurd Clark concurred.

The Lords adhered.

Counsel for Pursuers (Respondents)—Robertson—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Defender (Reclaimer)—R. V. Campbell. Agents—Maitland & Lyon, W.S.

HOUSE OF LORDS.

Monday, July 10.

(Before Lord Chancellor Selborne, Lords Blackburn and Watson.)

ROYAL BANK OF SCOTLAND *v.* COMMERCIAL BANK OF SCOTLAND AND OTHERS.

(*Ante*, p. 97, and 8 R. 805.)

Bills—Bankruptcy—Lien — Pledge—Bankruptcy of both Drawer and Acceptor while Bills in Circle—Right of Holders.

The drawer and the acceptor of a bill of exchange both fell bankrupt, the acceptor holding certain goods of the drawer in security of his acceptance. *Held (aff.* judgment of the Court of Session) that by the laws and practice of Scotland the holder of the bill must rank for the full amount of the bill on both estates to the effect of obtaining payment in full, but that the acceptor's trustee was entitled to indemnity out of the proceeds of the goods, which had, in the meantime been sold, for all payments made by him to the billholder.

This case was decided on June 15, 1881, by the First Division of the Court of Session, and the circumstances of the bankruptcies in which it took rise will be found reported *ante*, p. 97, and 8 R. 805.

The bank which held the bills appealed.

At delivering judgment—

Lord Chancellor — My Lords, this is an appeal in an action of multiplepoinding arising

out of two Scottish bankruptcies—the one of a person named Saunders who failed in November 1878, and the other of a person named Ramsay who failed in December of the same year. These two parties had dealings together, Ramsay sending raw materials (jute, flax, &c.) to Saunders' spinning works to be converted into yarn, under an agreement in writing which provided that all material and yarn at Saunders' works should continue to be the sole property of Ramsay, subject to the lien of Saunders for whatever might from time to time be due to him, and that Saunders should give acceptances for a sum not exceeding three-fourths of the value of the raw material held by him on Ramsay's account, and should be entitled to "a right of lien or retention of goods to a value sufficient to cover such acceptances."

At the time of each bankruptcy Saunders was liable as acceptor upon the footing of this agreement, on bills drawn by Ramsay to the amount of £16,000, and he held goods belonging to Ramsay (since sold for £4025, 14s. 2d.) on which he had a right of lien or retention to indemnify him from that liability. The appellants are the holders of the £16,000 bills, and as such have proved, or have a right of proof, against both the insolvent estates. In the Court below they claimed to have the whole proceeds applied, in the first place, in payment of the bills as far as they would extend, so as to reduce the amount of their proof against the two estates to about £12,000 instead of £16,000, relying for that purpose upon the English case of *ex parte Waring* (19 Vesey 345, and 2 Rose 182). That claim was rejected by the Court of Session, from whose judgment the present appeal is brought.

The rule laid down by Lord Eldon in *ex parte Waring*, and confirmed by subsequent decisions of the English Courts, is now well established in England; but this cannot be a sufficient reason why your Lordships should also hold it to be the law of Scotland, unless it can be shown that its application to the circumstances of such a case as the present, in the manner for which the appellants contend, is required by those principles of equity which are common to the jurisprudence of both parts of the United Kingdom. The laws which govern the administration in bankruptcy or insolvency are not in all respects the same in Scotland as in England. The rule in question has not, down to the present time, been received or known in Scotland, though it is nearly seventy years since *ex parte Waring* was decided. The Judges of the Court of Session, whose opinions are now under review, all think that if such a rule were applied under the circumstances of the present case it would result in consequences not only not required by any principle of equity, but practically inequitable. After carefully considering the arguments which have been addressed to your Lordships, I am unable to differ from that conclusion.

It is conceded (and it has always been so laid down by all the English authorities) that billholders cannot claim to have securities, deposited with the acceptors by the drawers for the acceptors' indemnity, applied in payment of the bills by virtue of any right or title of their own to the benefit of those securities. They can, at the utmost, only claim to come in under a *jus tertii*, availing themselves of the administration of the insolvent estates (in which they have the ordinary *locus standi* of creditors) to ask that the securities which would be assets of the one estate but for the lien and right of indemnification belonging to the other, but which cannot be realised until that lien and right of indemnification is discharged, may be so applied as to give effect to the contract between the drawers and the acceptors in the way most conveniently practicable.

If the securities were sufficient, or more than sufficient, to cover the whole amount of the acceptances, the acceptors would be fully indemnified by the application of those securities to the payment of the bills, and the drawers (or those representing their estate) might in that case be entitled to require that they should be so applied; while, on the other hand, they could not be entitled to reclaim any part of those securities without (in that or some other way) fully indemnifying the acceptors. It may well be that under such a state of circumstances the appropriation of the securities according to the rule in *ex parte Waring* (both drawers and acceptors being insolvent) might be the most conveniently practicable way of giving effect to the contract between the drawers and acceptors.

This was, in fact, the state of circumstances which, so far as an opinion can be formed either from the report in 19 Vesey or from that in 2 Rose, was directly in the contemplation of Lord Eldon when his judgment in *ex parte Waring* was pronounced; and there is an important passage in that judgment which I cannot myself reconcile with the supposition that the equity there stated could have the consequences contended for by the appellants in the present case. I cite it from Mr Rose's, which seems to me the better report:—"It is impossible to deny that if Bracken & Co. had relieved Brickwood & Co. of the acceptances for £24,000, the short bills and the mortgage must have been restored to Bracken & Co. On the other hand, I take it to be equally clear that Bracken & Co. never could have redemanded the short bills or the mortgage without bringing in, under the estate of Brickwood & Co., funds equal to the claim that Brickwood & Co. had in respect of the short bills and the mortgage; for they were first applicable to the discharge of those acceptances, not for the security of the persons in whose hands those acceptances were, but for that of Brickwood & Co., who had become liable upon them. The liability of Brickwood & Co. must be exonerated before any restitution could be claimed by Bracken & Co. That being the nature of the question from the 7th July 1810 (the date of Brickwood's bankruptcy) to the 2d August 1810 (the date of Bracken's bankruptcy) the consideration arises how far it is altered by the bankruptcy of Bracken & Co. Now, if the assignees of Bracken & Co. are bound to leave the estate of Brickwood & Co. in the same condition as Bracken & Co. were bound to have done before the bankruptcy (and they certainly would be obliged to put the estate of Brickwood & Co. in that condition in order to entitle themselves to the securities), I do not see how the bankruptcy varies the question." That is the passage in Lord Eldon's judgment.

I apprehend it to be clear that Bracken & Co. would not have been entitled, either before or after the bankruptcy of Brickwood & Co., to prescribe in any way to Brickwood & Co. or their assignees any particular mode of appropriating part of the securities, whether by paying off some

(but not all) of the bill-holders, or by paying a dividend to all the bill-holders, leaving Brickwood & Co.'s estate still liable for the balance—much less could they have done so under such circumstances as those of the present case, in which the securities (though it was the intention of the contract that they should be sufficient to cover the acceptances) fall far short of the required amount. To confer a benefit upon the bill-holders, who are no parties to the contract, at the expense of the acceptors, and so to deprive the acceptors to any extent of any part of the indemnity for which they have contracted (whether the drawers or their creditors are also benefited by that deviation from the contract or not), must be (as the Court of Session has considered it) inequitable, nor could it be reconciled, in my opinion, with the reasoning of Lord Eldon's judgment.

It is true, as was stated by Lord Cranworth in *Powles* v. *Hargreaves* (3 Degex, Macnaghten, & Gordon, 453) that the order in *ex parte Waring*, as drawn up, "distinctly provided for the case of the short bills deposited either being equal or more than sufficient, or being insufficient, and expressly provided that if insufficient the parties holding the acceptances were to prove for the deficiency." The authority of Lord Eldon in the English Courts of equity and bankruptcy was very great, and it is therefore in no way surprising that after the lapse of nearly forty years the form of order drawn up to carry his judgment into effect should have been regarded as conclusive in a similar case, and should have been (perhaps too readily) assumed to be consistent with the reasons assigned for that judgment. No man could entertain a more sincere respect than I have always done for the very eminent and learned Judge who decided *Powles* v. *Hargreaves*, and I assume, for the purposes of the present judgment, that the positive rule of administration which has been accepted as law in England since the order in *ex parte Waring* was made must be understood in accordance with the determination in *Powles* v. *Hargreaves*. But so far as it is a positive rule of administration, and not the necessary result of equitable principles, it cannot be held to be of force in Scotland merely because it is so in England. Of the reasons assigned by Lord Cranworth (3 Degex, Macnaghten, & Gordon, 453) to justify the extension of the rule to the case of a deficient security, I cannot but say that they are unsatisfactory to my mind if applied to such a contract as that between Ramsay and Saunders in the present case, and indeed they appear to me to overlook the fact that when the whole benefit of a deficient security is given to the bill-holder the estate of the bankrupt acceptor may lose some part of the indemnity to which by the contract he is entitled.

If in the case before your Lordships the whole fund *in medio* were applied in the first instance towards payment of the bills held by the appellants, and the appellants were then admitted to prove against both the insolvent estates for the difference, viz., £1200, the practical result would be to leave the respondents without any indemnity at all for the dividends which might be paid out of their estate on that £1200. The result, on the other hand, of the decision of the Court of Session is to indemnify them to the full extent of the fund (as under the contract they have a right to be indemnified) for every shilling which their estate may pay on the bills.

Suppose the estate of Saunders to pay a dividend of 5s. in the £, this on £16,000 would be £4000, and the trustee on that estate would have a right, according to the judgment appealed from, to have the whole fund *in medio* (being in round figures £4000) applied for their reimbursement. But if the fund *in medio* were first applied in payment of the bill-holders, Saunders' estate would then pay on the remaining £12,000 (at 5s. in the £) £3000 without any indemnity at all. Can there be a doubt which of these results is the more equitable? The one violates, the other gives effect to the contract. What right can the bill-holders have to ask that it should be violated for their benefit? What right could the trustee of Ramsay, the debtor primarily liable under the contract, have to ask for any appropriation of the securities which would take away from Saunders' estate any part of the indemnity for which he contracted, and at the same time leave that estate liable on the greater part of the bills?

With respect to the argument from convenience in some possible circumstances (as when the party secured might have no assets of his own so as to pay any dividend, and yet might for some reason fail to get his discharge, or when he might have assets falling by driblets so as to pay repeated dividends at uncertain intervals without exhausting the security fund) it is enough to say that a sufficient practical answer seems to me to be given to that argument in the opinion of one of my noble and learned friends which I have had the advantage of seeing in print. It is impossible that mere inconvenience or delay in working out the security can make it necessary or just to infringe the contract in favour of persons who are strangers to it.

I therefore move your Lordships to dismiss this appeal with costs.

Lord Blackburn—My Lords, in this case there were two houses of Ramsay and Saunders & Sons. Saunders & Sons on the 10th December 1878 granted a trust-deed in favour of their creditors; Ramsay was sequestrated on the 23d December 1878—so that the estates of both houses were being wound up compulsorily according to the provisions of the Scotch law.

At the time when Ramsay was sequestrated, the Royal Bank held £16,000 worth of bills drawn by Ramsay on Saunders & Sons, and accepted by the latter house. Saunders & Sons at the time when they executed the trust-deed had in their possession property of considerable value which had been deposited with them by Ramsay, subject to the provisions of an agreement made between the two houses on 22d April 1870. An argument was submitted by Mr Benjamin for the appellants that on the true construction of this agreement the holders of the outstanding bills had a specific hold on this property. He relied on the words at the end of the 9th article, that Saunders "shall be entitled to a right of lien or retention of goods to a value sufficient to cover such acceptances"—if I understand him correctly, founding his argument on the assumption that the word "cover," as used by merchants with reference to a bill, necessarily implied a security for the holders. It may often be used in such a sense, but in this agreement I think it shows no more than that the goods deposited ought to have been kept up to

such an amount as would produce more than the amount of the bills current. The goods deposited have been realised, and either because the parties disregarded that stipulation or miscalculated the value of the goods—instead of producing more than £16,000, they have only produced £4052, 14s. 2d., which is deposited in a bank. I think, agreeing therein with all the Judges below, that the agreement gave the holders no security whatever over the goods either in the hands of Saunders whilst *sui juris* or in the hands of his trustees. It did give Saunders whilst *sui juris* a right to retain the goods until he was indemnified against any claim made on him by the holders of the bills, and it left to Ramsay a right to remove these goods and deal with them in any way he pleased so soon as he had in any way satisfied all claims that were made or could be made upon Saunders, for which he had by agreement a right to retain the goods, but not, except by Saunders' consent, till then. No doubt this considerably increased the probability that the bills would be taken up, and so indirectly gave the bill-holders a better security, but it was only indirectly if Ramsay and Saunders whilst *sui juris* had chosen to abrogate the agreement of 22d April 1870 and appropriate the goods to any other purpose they pleased; the holders of the bills could not have prevented them. I do not inquire what rights to compel the realisation of the security and the application of the proceeds to taking up the bills Ramsay and Saunders might have had whilst *sui juris*, for no such question arises. When both the firms came under the compulsory winding-up the rights which Ramsay and Saunders had whilst *sui juris* passed to the trustees of their estates, who were bound respectively to exercise those powers for the benefit of the creditors of the respective estates of which they were trustees, subject to the control of the Court. The right which the holders of the bills had was to rank as creditors on each of the estates, taking a dividend *pari passu* with the other unsecured creditors on that estate, until they obtained payment of twenty shillings in the pound; they could never take more.

To apply any part of the proceeds of the goods deposited in security for the benefit of the creditors of the estate of Saunders would increase the dividend on Saunders' estate, and so far as the bill-holder was a creditor on that estate that would be the better for him. It would necessarily make the dividend on Ramsay's estate less than if the whole of the proceeds of that property had been applied for the benefit of the creditors on Ramsay's estate, and so far as the bill-holder was a creditor on that estate would be the worse for him. Whether on the balance the bill-holder would gain or lose would depend on the proportion which the assets in the two estates bore to each other, and to that portion of the property applied for the benefit of the creditors on Saunders' estate. But whether it benefitted the holders of the bills or not is not, in my opinion, one of the elements to guide the Court in saying what portion of the proceeds of the security, if any, should be applied for the benefit of Saunders' estate, and what for the benefit of Ramsay's. The Court must act on the rights of the two estates between themselves, and the rules and regulations introduced by the bankrupt law of the country for the administration of such estates.

So far I think there would have been no difference in the law if this had been an English case, but when the Court comes to determine how the proceeds of the securities are to be applied for the benefit of the two estates, according to the rules and regulations of the bankrupt laws of the two countries, there is a difference between what the Court of Session have done, and what since *ex parte Waring* has been the practice in England.

If we view the matter as it would be when the whole value of the assets forming the estate of the firm holding the security, and also the whole amount of the unsecured creditors exclusive of the bill-holders, are ascertained, the justice of the case seems plain enough. The creditors of that estate (in this case that of Saunders), exclusive of the bill-holders, can never have a claim to a greater dividend than they would receive if the bills were paid off. If the amount of that dividend on the bills would not exceed the proceeds of the security, the unsecured creditors and the bill-holders should take that dividend, and so much of those proceeds of the security as will indemnify the estate against the dividend thus paid to bill-holders should be applied for the benefit of the estate, the surplus over that amount being applied for the benefit of the creditors of the other estate. If the proceeds of the security are not sufficient to pay so much, they should be applied as far as they will go for the benefit of that estate, and the dividend be reduced to that amount which the estate could pay after that. In that case there would be no surplus to apply for the benefit of the other estate.

It seems to me that this would be perfect equity, remembering that the right of the creditors on the estate against the proceeds of the security is to an indemnity only, and that they have no right to make a profit.

It may, however, be long before these amounts are absolutely ascertained. The Scottish lawyers seem all to agree that the machinery provided by the Scottish bankrupt laws prevents any real inconvenience arising during the period whilst the actual amounts are not ascertained, or at least any of such magnitude or frequent occurrence as to justify an arbitrary rule applicable to all cases. And I am so far from seeing my way to saying that they are wrong in this, that had it not been for the respect I have for the judgment of Lord Eldon, and of those who have since *ex parte Waring* acted upon his judgment, I should have said the same thing as to the machinery provided by the English bankrupt laws.

If there is no such difficulty, it seems to me that the creditors ought to administer the estate, applying the funds which from time to time come into their hands in the paying of interim dividends in that manner which will be proper, with a view ultimately, when the whole should be ascertained, to that result which I have above expressed, and that is, I think, substantially what the decision in this case amounts to.

The rule in England is different. So long ago as 1815, Lord Eldon in *ex parte Waring*, 19 Vesey 345, in such a case directed the proceeds to be treated as if the security had been realised just before the bankruptcy, and the proceeds then applied as far as they would go in paying the bills rateably, if they were not sufficient to pay the bills in full, the bill-holders proving for the unpaid

portion of their bills; if they were more than sufficient to pay the bills in full, the surplus to be paid to the assignees of Bracken & Co.'s estate, who stood in the position of the trustees of Ramsay in the present case. Such, I think, divesting it of the provisions as to repaying dividends already received, is the effect of the order in *ex parte Waring*.

This rule has the unquestionable advantage of being easily worked. The objection to it is that it alters the distribution of the estate from that which it would be if no such arbitrary rule were introduced, which can only be justified on the ground of necessity or such practical inconvenience in working the administration of the estates as to amount to necessity, and as was said by Lord Justice James in *ex parte Smart*, L.R., Chan. App. 220—"The rule laid down in that case has been often before the Court, and neither the Court nor the Legislature has shown any disapproval of it." Whether it might be advantageously altered is a matter which might be properly considered by those who have the conduct of the next bill for the amendment of the Bankruptcy Laws, but there would be very great difficulty in an English Court departing now from a rule so long acted on, even if convinced that it was originally a mistake. This, however, does not apply when a Scottish Court is asked for the first time to introduce the rule in Scotland. The objection to it is that the amounts in equity receiveable are disturbed—and I think it can easily be shown that they always are disturbed— by the application of the rule.

If the proceeds of the security are more than enough to pay the bills, the application of the rule makes no difference in the amount of the dividend payable to the creditors of the estate who at the time of the sequestration hold the bills (in this case Saunders'), but the bill-holders receive 20s. in the pound on their bills and are so much the better, at the exclusive loss of the creditors of the other estate (in this case Ramsay's); where the amount of the security is less than the amount of the bills the problem is not so simple. The holder of the bill has 20s. in the pound paid him on a portion of the bill, and proves on each estate for the balance only. The dividend on the estate of Ramsay is, in some cases at least, made greater where the assets are unaltered, and the amount proveable is reduced by the application of the rule in *ex parte Waring*. But in all cases where the security is less than the amounts of the bills, which is the present case, the application of the rule reduces the sum payable to the creditors on Saunders' estate, for though the amount proveable on the estate of Saunders is diminished by deducting the proceeds of the security from the bills, the amount of the assets is reduced by precisely the same sum, except where owing to the smallness of the dividend on Saunders' estate the whole of the security, though less than the amount of the bills, is not absorbed in indemnifying Saunders' estate for the dividends which have been paid. In that case, however, the assets of Saunders' estate, which otherwise would be entirely applied to the payment of Saunders' creditors exclusive of the bill-holders, are by the application of the rule in part applied to the payment of a part of the bill.

It seems, therefore, obvious that the result must always be to diminish the amount of the dividend. I have not investigated whether the amount received by the bill-holders is in all such cases increased by the application of the rule, for it is enough to show that the creditors on Saunders' estate are deprived of a part of what they would be otherwise entitled to. That should not be done unless there is a necessity to do so. If there is none, as the Scottish lawyers all agree that in Scotland there is none, I do not think the Judges of the Scottish Court can be asked to pronounce a decision merely for the purpose of producing uniformity with English rules.

I therefore think that the judgment below is right, and should be affirmed.

Lord Watson—My Lords, in dealing with the questions raised in this appeal, it is necessary, first of all, to consider what was the true nature of the so-called right of lien or retention created by the eighth and ninth articles of the agreement of 22d April 1870. The general purpose of the agreement, which was to endure for ten years from its date, unless sooner determined by the death or bankruptcy of either of the parties, was to fix the terms upon which Ramsay, a Dundee merchant, was to supply jute, flax, and cordilla, in quantities sufficient to keep the spinning works at Westfield belonging to Saunders in full employment, and also the remuneration which Saunders was to receive for converting the raw material into yarn. It was obviously for the interest of both parties that some financial arrangements should be made in order to enable Ramsay to raise money for fresh purchases of raw material before he had disposed of the manufactured goods. Accordingly, it was by the eighth article provided that all material and yarn at Westfield works should continue to be the sole property of Ramsay, subject only to the lien of Saunders for the cost of manufacture, and for advances made by him or other debts due to him by Ramsay. By the ninth article Saunders became bound to give his acceptances for a sum not exceeding three-fourths of the value of the raw material and yarn held by him on Ramsay's account, and it was expressly stipulated that he should be "entitled to a right of lien or retention of goods to a value sufficient to cover such acceptances."

It appears to me that the legal effect of these stipulations was not to authorise Saunders to sell the raw materials and goods in his possession, and to apply the proceeds in liquidation of the bills accepted by him when these fell due, or even to place him in the position of a pledgee with a power of sale. They gave Saunders nothing more than a right to retain the goods until relieved of his liability as acceptor of the bills. Both parties being solvent, Ramsay would have had no right to demand delivery of the goods except upon the condition of his first retiring the acceptances against which they were held, and I do not think that Saunders would have been under any obligation to comply with a request by Ramsay that he should sell the goods and apply the proceeds in part payment of these acceptances. It is of the very essence of such a lien that the party in right of it can deprive the owner of the use and benefit of the subject till the debt be paid for which it is retained, and unless the owner makes satisfactory arrangements for relieving him of all liability he is not bound either to part with the subject of the lien or to comply with the owner's directions

as to its disposal. If he pays the whole or part of the debt, he has no right by the law of Scotland to sell and repay himself; but besides a personal action for recovery of what he has paid, he may have his remedy against the goods, either by assigning his lien for a pecuniary consideration, or by applying to the Judge Ordinary for authority to sell as under a contract of pledge. The contract being one of indemnity, he is entitled out of the moneys so raised to recoup himself for all that he has paid or may be called upon to pay, and he is only responsible to the owner for the surplus, if any, which remains in his hands after the debt secured has been fully satisfied.

Saunders became insolvent in November 1878, and in December he conveyed to the respondents, as trustees for behoof of his creditors, his whole assets, including his right to retain certain goods at Westfield Works belonging to Ramsay, against bills to the amount of £16,000 which he had accepted in terms of the agreement, and which had been discounted and were then held by the appellants. These goods were subsequently sold with consent of all parties claiming an interest in them, and the price deposited in bank, and according to my apprehension the effect of that conversion was the same as if the goods had been sold by judicial warrant. The respondents' *nexus* remained, and they were entitled to have the money applied so as to indemnify the estate of the bankrupt for all payments on account of the bills.

Ramsay, by whom the bills were drawn and discounted, became bankrupt in December 1878, and in April 1880 the action of multiplepoinding in which the present appeal is taken was instituted for the purpose of determining rival claims upon the fund obtained by selling the subject of the respondents' lien. The appellants maintained then, as they do now, that the fund, which amounts to £4000 or thereby, must be applied in reduction *pro tanto* of their debt, leaving them to rank for the balance upon the insolvent estates of the drawer and acceptor. The trustee in Ramsay's sequestration claimed the whole fund for distribution amongst the general creditors of the bankrupt, and alternatively, that it should be applied in the manner contended for by the appellants. The respondents, on the other hand, maintained that the appellants must continue to rank on both bankrupt estates for the full amount of the bills, and claimed that all dividends paid by them to the appellants out of Saunders' estate should be repaid to them from the fund *in medio*, the surplus, if any, after satisfying their claims, being payable to Ramsay's estate.

The Judges in the Court below have unanimously given effect to the respondents' contention. The Lord Ordinary, whose interlocutor was affirmed by the First Division of the Court, has found that they are entitled to the fund *in medio*, in order that they may apply it in operating their relief from the payments which they are liable to make in the shape of dividends to the appellants as holders of the bills, subject to the declaration that the balance of the fund, if any, is payable to Ramsay's trustee.

On the assumption that I have rightly construed the agreement of 1870, I do not think it admits of reasonable doubt that the judgment appealed against is in strict accordance with the principles upon which the Bankruptcy Laws have hitherto been administered by the Courts of Scotland. In that view of the agreement, the interlocutor of the Lord Ordinary gives effect to the legal rights of the parties. On the one hand, the respondents are permitted to apply so much of the fund as is necessary for the purpose of indemnifying the estate of Saunders for dividends paid upon the bills; on the other hand, Ramsay's trustee gets the full amount of his interest—the reversion of the fund after that purpose has been fulfilled.

The appellants do not dispute that by the law of Scotland they are entitled to rank for the full amount of the bills held by them upon the bankrupt estates of the drawer and acceptor, to the effect of drawing twenty shillings in the pound, and they do not assert that in their own right they have any claim, legal or equitable, to have this fund applied in reduction of their debt. They maintain, however, that the fact of Saunders' and Ramsay's estates being both insolvent renders it necessary, in order that justice may be done between these estates, that the Court should direct the fund to be appropriated as a payment to account of the bills at or before insolvency. The result of imposing that arrangement upon the parties would be to relieve Ramsay's estate so far by reducing the appellants' ranking upon that estate, and to give the appellants the benefit of getting payment in full of part of their debt; but whatever advantage accrued to Ramsay's estate and to the appellants would be balanced by a corresponding loss of indemnity to the respondents.

It was argued for the appellants that it is desirable to have a uniform rule in all cases like the present, and that the principle adopted by the Court of Session would in very many instances lead to inextricable confusion, and would in others occasion grave inconvenience. It was urged, in the first place, that the system of recouping dividends paid to the bill-holders would lead to an interminable declaration of dividends, each sum recovered by way of indemnity becoming a new fund for division among the creditors, and, in the second place, that if the indemnity fund were not at once exhausted, the reversionary interest of the creditors of the drawer would lead to his sequestration being indefinitely suspended in the event of the acceptor being unable to procure his discharge. I agree with the appellants' argument that one and the same principle ought to regulate all cases like the present, but it appears to me that the difficulties which have been suggested in regard to the principle upon which the Lord Ordinary's interlocutor proceeds are not very formidable.

The subject of the acceptor's lien, when converted into money by consent of parties or by warrant of the Court, becomes a fund to which he may legitimately resort in order to avoid the necessity of making payment out of his own pocket, and the trustees for his creditors are entitled to use it for payment of dividends upon the debt for which it is retained in order to protect his estate from the claim of the creditor in that debt. When the amount of the assets available for dividend has been ascertained, nothing can be more simple than to calculate once for all what sum must be taken from the fund in order to obtain indemnity without resorting to the *toties quoties* method which the appellants seemed to consider indispensable. In the present case the respondents have merely to ascertain the dividend which Saunders' estate will yield to creditors other

than the appellants, and then pay to the appellants out of the indemnity fund a corresponding dividend upon their claim. If the fund prove insufficient for that purpose, they will add it to the dividend fund and divide the total between the creditors of Saunders, including the appellants. By one or other of these processes the respondents will *uno statu* obtain the full measure of relief to which they are entitled under the agreement, and no more.

The other difficulty suggested by the appellants is equally devoid of substance. Should the acceptor be unable to procure his discharge, his creditors would, no doubt, by the judgment under appeal, be entitled to retain their hold upon the fund in case of future dividends becoming payable from estate subsequently accruing to the bankrupt, and it might be productive of very great hardship and inconvenience if that state of matters necessarily prevented the creditors of the drawer from bringing his sequestration to a close. I cannot, however, conceive why the circumstance that an interest such as Ramsay's creditors have in the fund *in medio*, which forms one of the assets of the bankrupt estate, should necessarily delay the winding-up of the sequestration. The trustee, with the concurrence of the commissioners, may either enter into a compromise with the party entitled to retain, or he may sell the interest for ready-money. It frequently happens that a bankrupt estate consists in part of reversionary and, it may be, contingent rights, and when that is the case it is for the trustee and the commissioners to consider and determine whether it is for the interest of the general body of creditors to realise at once or to prolong the sequestration.

The appellants further argued, that "seeing the principle for which they contend was adopted by Lord Eldon in *ex parte Waring* (19 Vesey 345), and has for the last seventy years been recognised as a rule of English law, the same principle ought now to be adopted in Scotland" After the observations which have been made by your Lordships, it is unnecessary for me to examine the rule of *ex parte Waring*, which seems to have become an integral part of the bankruptcy law of England. It humbly appears to me that the fact of the existence of the rule in this country is not *per se* a sufficient reason for introducing it into another legal system, and that the appellants must show that its introduction into the law of Scotland is required either for the due enforcement of legal right or in order to meet the necessities or equities of the case. In my opinion no such cause has been shown. The judgment under appeal gives precise effect to the respective rights of all the parties interested, its application is attended with no practical difficulty or inconvenience, and its operation is not, so far as I can see, inequitable.

The Lord Advocate, in his argument addressed to your Lordships on behalf of the appellants, accepted the view which I have taken in regard to the true import of the agreement, in which I agree with the Court below. It was, however, argued by Mr Benjamin that upon a sound construction of the terms of the agreement the goods were appropriated towards payment of the bills drawn against them, and that it was the right and duty of the acceptor, if the bills on maturing were not retired by the drawer, to realise the goods and pay the proceeds to the holders. Had that been the just construction of the contract between Saunders and Ramsay, it would have been quite unnecessary for the appellants to resort to the authority of *ex parte Waring*. In that case they would have been entitled to a decree in terms of their claim, according to the existing law in Scotland. The principle of that law, as I understand it, is that effect must be given in the two sequestrations to the legal rights of all parties concerned, so long as that object can be attained without practical inconvenience or injustice, and the trustee in Ramsay's sequestration, if Mr Benjamin's argument had been successful, would have had a clear right to insist that the respondents should, in terms of the agreement, pay over the whole fund *in medio* to the appellants in extinction *pro tanto* of their debt.

On these grounds I am of opinion that the Courts below have rightly decided the present case, and that the interlocutor appealed from ought to be affirmed.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Counsel for Appellants—Lord Advocate Balfour—Benjamin, Q.C. Agents—Dundas & Wilson, W.S., and W. A. Loch.

Counsel for Respondents (Saunders' Trustees) —Solicitor-General Asher—Davey, Q.C. Agents —Morton, Neilson, & Smart, W.S., and William Robertson.

COURT OF SESSION.

Saturday, June 24.

OUTER HOUSE.

[Lord Kinnear.

THE CITY OF GLASGOW BANK AND LIQUIDATORS *v.* PALMER AND OTHERS.

Bankruptcy — Reduction — Fraud — Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *secs.* 140, 151—*The Bankruptcy and Real Securities Act* 1857 (20 and 21 *Vict. cap.* 19).

Held that in order to reduce a bankrupt's discharge on the ground that he has not made a full discovery and surrender of his estate to his creditors, he must be proved to have committed fraud in the concealment, and that acts done through ignorance or inadvertence are not enough to entitle a creditor to succeed in an action of reduction of the discharge.

This action was brought by the liquidators of the City of Glasgow Bank against David Palmer and others, to have two deliverances by the Sheriff - Substitute of Midlothian and Haddington in the sequestration of the said David Palmer reduced, and to have it declared that the sequestration still subsisted. The defender David Palmer was a contributory of the said City of Glasgow Bank in respect of £280 of the stock thereof standing in his name as trustee of the late John Clinkscales, along with Mrs Elizabeth Holywell or Clinkscales, Edinburgh. The defender David Palmer was unable to meet