March 1855, in selling part of the sequestrated effects under the said warrant, did illegally and oppressively sell the same in disregard of the interests of the pursuer, and in a manner to produce loss, injury, and damage to the pursuer?" The question here is, Whether the defender Douglas, having procured a warrant to poind, did, in carrying out that procedure act illegally and oppressively in disregard of the interests of the pursuer? The statute no doubt provides for a summary mode of carrying out such a poinding, and I do not mean to say that, particularly where the debt is small, and the articles poinded of trifling value, we can require a minute and detailed valuation. But it would be a serious thing if the officer were to be allowed to include every article in the house so as to inventory and have the power of selling all the debtor possesses. There must be reasonable procedure in the way of valuing the effects, for the valuation is only a step towards transferring to the creditor the property of the debtor at the amount of the valuation. The statute provides for a notice of two hours before the goods are exposed for sale by the officer, and if no one appears to offer the appraised value, the property is handed to the creditor at that value as his own. It therefore is clear that there must be a substantial, if a rough and ready, valuation of the goods poinded. But here the evidence shows that no serious attempt was made to put a fair value on the effects. I shall only add, in addition to the item already referred to by your Lordship in the chair, that in article 5 of the report of poinding we have "Twenty pictures in gilt frames, five oil paintings, at £5." These works appear to have been of substantial value, and we find that the articles realised upwards of £36 at the sale, and were thought by the purchasers to have been bought at a bargain. As to the oath which should have been administered to the appraisers, the officer appears to have thought it a mere matter of form, but whatever was his motive in omitting it, there can be no doubt that the proceedings were illegal and oppressive, in disregard of the interests of the debtor, and to his loss, injury, and damage. And I am not disposed to interfere with the Lord Ordinary's valuation of that loss. As to the responsibility for it, which the Lord Ordinary has found conjunct and several, the employer maintained he was not liable, but I think it unnecessary to give any opinion on the general case, for in this case the creditor was duly warned of the nature of the proceedings, and must be held to have adopted them. The other defence, that the pursuer was not entitled to lie by and allow the articles to be sold, but should have brought a suspension, I am not prepared to sustain, as in my opinion he was not bound to involve himself in a dispute at that stage. The case discloses a very loose practice in regard to sales of this kind. The defence practically amounts to this, that the defenders were only doing what other people did. If that be so, all I can say is that the sooner such practices are put a stop to the better, by regulations issued by the Sheriffs, in virtue of their powers under the statute, or from the Crown office if necessary.

Lord Mure was absent.

The Court adhered to the interlocutor of the Lord Ordinary, finding the defenders liable to the pursuer in three-fourths of the expenses in the Outer, and the whole of those in the Inner House.

Counsel for Pursuers—Scott—Shaw. Agent—P. Morison, S.S.C.

Counsel for Defender Richardson—Lord-Advocate (M'Laren, Q.C.)—J. C. Smith.

Counsel for Defender Douglas — Dean of Faculty (Fraser, Q.C.) Agent for Defenders and Reclaimers—Daniel Turner, S.L.

Wednesday, December 1.

FIRST DIVISION.

IRELAND (IRELAND'S EXECUTRIX) AND FLEMING *v.* THE NORTH OF SCOTLAND BANKING COMPANY.

Deposit—Account-Current—Title to Sue.

A bank having funds in its possession on account-current belonging to an executry estate, sufficient to meet the sum contained in a cheque signed by the executrix and her agent, in whose name the funds were lodged for behoof of the estate, and who was also her cautioner, *held* bound to honour the cheque, although the agent and cautioner had executed a trust-deed for behoof of his creditors and the executry estate had subsequently been sequestrated.

Certain moneys were lodged in the defenders' branch bank at Dundee on account-current in the name of "A. G. Fleming, for behoof of the representatives of the late William Ireland, hardware merchant, Dundee." The amount standing at Fleming's credit on 30th January 1880 was £413, 5s. 3d., and on that date he presented a cheque, as factor and agent for Mrs Ireland and the executry estate, and countersigned by her as executrix foresaid, for £100, payment of which was refused, and the present action was raised in the Sheriff Court of Forfarshire at Dundee for payment of that sum with interest from that date. The defenders resisted the action, on the ground that the late Mr Ireland died indebted to them in £130, and his estates were sequestrated at their instance on 29th April 1880, and that the pursuer Fleming having executed a trust-deed for behoof of his creditors, they were entitled to retain the funds in their hands until payment, or as security for the payment of their debt or the dividend effeiring thereto, or at least until the pursuers were able to give them a valid and sufficient discharge. They also pleaded that the pursuers had no title to sue, and that the petition was incompetent, in respect that Fleming being insolvent should be required to find caution for expenses. The Sheriff-Substitute (Cheyne) repelled the defences and decerned in favour of the pursuer Fleming for the contents of the cheque with interest and expenses. "*Note.*—As the balance in defenders' hands is upwards of £400, and as their agent admitted at the discussion that their claim against the estate of the deceased was not above £130, there is plainly nothing in their plea of retention, and that plea being out of the way, I fail to see any excuse for their refusal to honour the cheque, or to find any

ground on which they can resist decree passing against them in favour of the pursuer Fleming. Mr Hunter relied mainly upon the fact that Mr Fleming had granted a trust-deed for behoof of his creditors, and was still under trust, arguing that this necessitated either that the trustee should be made a party to the action, or that Mr Fleming should be called upon to find caution for expenses; but the simple answer to their argument is, that the trustee has no interest whatever in the money now in question, which is admittedly held by Mr Fleming in trust for others, and that in view of the large sum in the defenders' hands, their demand for caution for expenses is utterly unreasonable and unnecessary. My only doubt in regard to the disposal of the case is occasioned by the fact that since the record was closed the estates of the deceased William Ireland have been sequestrated, but on consideration I do not think that this constitutes a sufficient reason for my sisting the process or refraining from at once giving decree. The executrix's title is no doubt superseded pending the sequestration, and therefore I have not given decree in her favour, but Mr Fleming being the party with whom the defenders contracted, had a perfectly good title to sue by himself, and it seems to me that his receipt will be a sufficient discharge to the defenders, even in a question with the person who may be appointed trustee in the sequestration. It is said, that even granting the propriety of the action at the time it was brought, and the defenders' consequent liability for expenses, Mr Fleming can have no legitimate reason in pressing for decree, as he will be liable to account for the money to the trustee; but I am not quite sure about that. For all I know, Mr Fleming may have a claim against the estate for services rendered, and assuming that to be so, I am not prepared to say that his wish to get this money into his hands is unnatural or illegitimate. Be that, however, as it may, I should be doing him a grievous injustice if I were to act upon the assumption that there was any risk of him not faithfully accounting for all moneys paid over to him for behoof of the estate." On a reclaiming petition and answers the Sheriff (MAITLAND HERIOT) adhered. In his note the Sheriff said:—"On the whole, the Sheriff fails to discover any good reason for the defenders' conduct in dishonouring Mr Fleming's cheque. No doubt the estates of the late William Ireland have since been sequestrated at the defenders' instance on the 29th April, but that does not appear to the Sheriff to be any good reason for dishonouring Mr Fleming's cheque on the 30th January; under this sequestration it may be that Mr Fleming or Mrs Ireland may be bound to draw this money from the defenders' bank and convey it to a trustee when appointed. The defenders themselves cannot convey it to the trustee. The money must be drawn out of the bank by those entitled to do so. It seems to the Sheriff that it would lead to great confusion in business if banks were to be entitled to inquire how funds lodged with them by a trustee were to be applied by such trustee. A bank is discharged by the signature of the party who lodged the money. The trustee is liable to account not to the bank but to the beneficiaries under the trust."

The defenders appealed to the First Division, and argued—The right of the executrix to demand payment is superseded by the bankruptcy; Fleming's right is no higher than hers, and the cause should be sisted till a judicial factor is appointed on the deceased's estate, and intimation ordered to be made to him of the process—*Gray* v. *Johnston*, L.R., 3 E. & I. App. 1—this is the ordinary course in a depending process.

Answered for pursuers—The bank was not entitled to refuse payment; they do not aver any grounds of suspicion; as depositaries they cannot object to the title of the depositor—*Lopez* v. *Stewart*, 1871, 9 Macph. 957.

At advising—

LORD PRESIDENT—This is a very clear case. One of the pursuers is widow and executrix of her deceased husband, a merchant in Dundee; the other, Mr Fleming, was her cautioner and her confidential agent. The executry estate consisted in part of funds lodged on account-current which this lady had opened in the usual way with the North of Scotland Banking Company. The money was lodged in the name of Mr Fleming for behoof of the representatives of the late William Ireland, and the reason of this is plain, to secure Mr Fleming as cautioner for the executrix—quite a natural and proper arrangement. Of course Mr Fleming could draw on the account while the funds lasted, and what are the averments of the pursuers and the defenders' answers on this point? They say—"That the pursuer Alexander Gilruth Fleming lodged the said moneys so collected and recovered by him on behalf of the co-pursuer, as executrix foresaid, on account-current with the defenders, at their branch office at Dundee, in name of 'A. G. Fleming, for behoof of the representatives of the late William Ireland, hardware merchant, Dundee.' The amount standing at the credit of that account at this date, exclusive of interest, is £413, 5s. 3d. sterling, and this sum is due by the defenders to the pursuer Alexander Gilruth Fleming, on behalf of the co-pursuer Isabella Rogers Butchart or Ireland, as executrix foresaid and the sole representative of the said deceased William Ireland. (*Ans.*) Admitted that the male pursuer lodged certain moneys in an account-current in his name, 'for behoof of the representatives of the late William Ireland, hardware merchant, Dundee,' with the defenders' branch at Dundee, and that on 30th January 1880 the balance at the credit of that account, exclusive of interest, amounted to £413, 5s. 3d." Then the pursuers further aver that in these circumstances "The pursuer Isabella Rogers Butchart or Ireland, requiring the sum of £100 sterling for the purposes of the said executry, got her agent, the pursuer Alexander Gilruth Fleming, to draw a cheque upon the said account for said sum, which he accordingly did, and which she countersigned as executrix of the said deceased William Ireland; said cheque, which is dated 29th January 1880, and is herewith produced, was on 30th January 1880 duly presented for payment at the defenders' said branch office at Dundee, but payment thereof was illegally and unwarrantably refused, and the said cheque was duly protested for non-payment, in consequence of which the pursuers have sustained loss." Now, on these facts, I think it is plain that the bank were wrong in refusing to cash the pursuers' cheque; for let us consider the circumstances at the time

it was presented. The funds to meet it were there, and the cheque was drawn by the person in whose name they were lodged, and countersigned by the executrix, to whom they belonged. Was there anything to justify the refusal? It is not said that William Ireland's estate was sequestrated, for that had not then been done, and was not done till the month of March subsequent. There was then nothing to interfere with the management of the executrix or to prevent her agent drawing funds for her. It is said, however, that he had executed a trust-deed for behoof of his creditors. But the bank has nothing to do with that. They are not entitled to assume that when a man becomes insolvent he is going to commit fraud, and while funds are in a bank the banker cannot set up a title in anyone else so as to refuse the owner's cheque or himself to account as depositary for the funds.

Lord Deas—I am entirely of the same opinion. The point of time at which the question is to be taken is the date of presentation of the cheque, and I think it was then the duty of the bank to pay it.

Lord Mure—I am of the same opinion.

Lord Shand—I am of the same opinion. If there had been an averment to the effect that the bank were aware that the depositor who asked back the money he had deposited was about to commit a breach of trust, then there might have been something said for their right to retain the funds. But all that is said is that he had executed a trust-deed, and the bank are bound to fulfil their contract of deposit.

Their Lordships dismissed the appeal.

Counsel for the Appellants and Defenders—Kinnear—H. J. Moncreiff. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for Respondents and Pursuers—Rhind. Agent—Robert Menzies, S.S.C.

Tuesday, December 7.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

MILLER *v.* THE GIRVAN AND PORTPATRICK JUNCTION RAILWAY COMPANY AND HALDANE (THEIR JUDICIAL FACTOR), AND THE COMMERCIAL BANK OF SCOTLAND.

Arrestment — Railway Bond — Railway Clauses Act 1845 (8 *Vict. c.* 77).

A bond granted by a railway company to a bank, accepted and registered in the books of the company, in security of future advances to be made by the bank, does not constitute a debt due by the bank to the company, so as to entitle a creditor of the company to use arrestments in the hands of the bank, and obtain decree of forthcoming for the amount of the sum contained in the bond.

The pursuer of this action was an ordinary shareholder of the Girvan and Portpatrick Junction Railway Coy., and a creditor of the company for, *inter alia*, the sum of £3000, together with the sum of £594, 8s. of expenses, and £1, 3s. for dues of extract, contained in a decree obtained by him in the Court of Session against the said company, dated the 16th October and 8th November 1879, and on 3d April 1880 he used arrestments by virtue of the warrant in the decree in the hands of the Commercial Bank of Scotland. On or about 17th December 1878 the railway company issued and granted to and in favour of the said bank a bond or mortgage for £3000, which was accepted by the bank and registered in the books of the railway company as due on 11th November 1881. It was this mortgage that the pursuer claimed to have attached by his arrestments, and he brought the present action to have the sum contained in it made forthcoming to him in satisfaction of his decree, and alternatively, in case it should befound that no sum was due by the bank to the railway company, and that he was consequently not entitled to have any sum made forthcoming to him in virtue of his arrestments, to have it found and declared that the said mortgage was illegal, and *ultra vires* of the granters thereof, and ineffectual as a charge upon the railway company or its assets, and the bank ordained to deliver it up to the railway company to be cancelled or otherwise validly discharged. The pursuer further averred that no consideration was paid or granted for the said mortgage, and the bank were still bound to pay its par value to the railway company, or if no sum were due under it, then its issue was *ultra vires* of the officials of the company, and it was ineffectual to constitute any indebtedness or security in favour of the bank. The defenders averred that the mortgage was granted in security of an overdraft to the railway company, who were now indebted to them in upwards of £2000. They denied that the arrestment used by the pursuer had attached anything, and pleaded—(1) The arrestment in question having attached nothing, the action is incompetent, and should be dismissed.

The Lord Ordinary (Curriehill) allowed the parties a proof of their respective averments, adding this note to his interlocutor:—"This is an action of a somewhat peculiar character. The pursuer is a shareholder of the Girvan and Portpatrick Railway Company, and he is also a creditor of the company in virtue of a decree of this Court, dated 16th October and 8th November 1879, for payment of £3000, with £594, 8s. of expenses. Upon that decree the pursuer, as creditor of the company, arrested in the hands of the Commercial Bank the sum of £3000 alleged to be due by the bank to the railway company. The fund so said to be arrested is the amount of a debenture bond or mortgage for £3000 granted by the railway company to, and now held by, the bank, and it is not said that the bank is otherwise indebted to the railway company.

"*Prima facie*, the bank is not debtor, but creditor in the mortgage, and in that view nothing was attachable or attached by the arrestments. But the pursuer alleges, in the first place, that no consideration was given by the bank for the mortgage, and that if the mortgage is to be regarded as valid, the bank is still bound to advance the amount to the railway company, or, in other words, is debtor to the railway company in the