Lord Macnaghten—My Lords, I entirely agree in the proposed judgment.

In societies of this sort the rules form the contract between the members and the society, and that contract can only be altered in the mode prescribed by the Act of Parliament. In this case the respondents have attempted to alter the contract in a manner which appears to me not to be justified or authorised by anything in the Act of Parliament. I therefore entirely agree in the motion which has been made.

Interlocutors appealed from reversed; interlocutor of the Sheriff-Substitute restored; respondents to pay the costs in the Court below and the costs of the appeal.

Counsel for Pursuer (Appellant)—Rhind—R. Wallace. Agent—Andrew Beveridge, for William Officer, S.S.C.

Counsel for Defenders (Respondents)—Sir H. Davey, Q.C.—Haldane. Agents—Hartley, Ross, & Abdale, for Carment, Wedderburn, & Watson, W.S.

COURT OF SESSION.

Friday, April 22.

OUTER HOUSE.

[Lord Kinnear.

THE EARL OF GLASGOW *v.* THE ROYAL BANK OF SCOTLAND.

Bankruptcy—Retention—Compensation—Entail—Consigned Money.

Held (by Lord Kinnear, Ordinary, and *acquiesced* in) that a bank in whose hands money was consigned, being the price of part of an entailed estate taken by corporate bodies under compulsory powers, was not entitled to oppose a petition by the heir of entail in possession of said estate, who was notour bankrupt, for authority to uplift the said money and apply it in payment of unredeemed rent-charges affecting the estate, to the effect of retaining the consigned money in payment of an overdrawn account which the petitioner had with the said bank, but that they were entitled so to retain the interest already accrued thereon.

The Earl of Glasgow was heir of entail in possession of the entailed lands and estate of Hawkhead and others when portions of the said estate were on several occasions compulsorily acquired by incorporated bodies under statutory powers.

In 1879 the Magistrates and Council of the city of Glasgow, as Water Commissioners of the city, acquired a piece of ground forming part of the said estate, and the price as fixed by arbitration, viz., £132, 9s., was on 4th March 1879 consigned on deposit-receipt in the Royal Bank of Scotland, the receipt bearing that the said sum "has been paid into this bank, to the intent that the same shall be applied under the authority of the Court of Session in terms of the Lands Clauses Consolidation (Scotland) Act 1845, the interest on the said sum being payable to the said Earl and his successor in the said estate until the same shall be so applied."

In 1883 the Glasgow and South-Western Railway Company acquired about 10½ acres of the said estate for the purposes of their undertaking, and a sum of £2885, 7s. 6d., being the price as fixed by arbitration, was consigned in the said bank, the deposit-receipt being substantially in the same terms as that above quoted, and "declaring that the said bank have no concern nor interest in the above statements," *i.e.*, those as to the nature and origin of the consigned fund, "and incur no further liability than to hold the amount deposited as above." In 1886 the said railway company acquired certain further portions of the estate, and the price, being £2857, 14s. 3d., was consigned in the said bank on a receipt similarly expressed.

Lord Glasgow thereafter presented a petition for authority to uplift the said sums, amounting in all to £5875, 10s. 9d., and apply them in repayment *pro tanto* of certain rent-charges which affected the fee of the said estate to the extent of over £8000; and further, to have the interest accrued on the said sums paid over to the petitioner himself. The petitioner set forth the 67th and 68th sections of the Lands Clauses Consolidation (Scotland) Act 1845.

The said Royal Bank of Scotland lodged answers to the petition, setting forth as follows—"The petitioner is notour bankrupt, and the respondents are creditors on two separate credit accounts opened with them by him in 1879 and 1883 respectively, the total amount of the balance due by the petitioner, exclusive of interest, being £6840. The respondents claim to be entitled to retain the moneys now sought to be uplifted, with the interest which has accrued and will accrue upon them, to the extent of the interest which the petitioner as heir of entail has in these moneys, and relative interest, but to no further extent." They further explained that the said lands and estate of Hawkhead and others had been sold by authority of the Court, "and the price which has been obtained therefor is more than sufficient to pay off the heritable debts affecting the same and the rent-charges mentioned in the petition." They submitted that in view of their claim of retention the prayer of the petition should be refused.

It was argued for the petitioner—The principle of retention, or of balancing of accounts in bankruptcy, did not here apply. There was no true relation of debtor and creditor between the parties such as would introduce that principle. The money was consigned for certain definite statutory purposes. The petitioner was only nominally creditor, and when he sought to uplift he was only setting in motion statutory machinery for working out a contract to which the purchaser of the land, the bank, and the entailed estate were the parties. He was a trustee in the matter for the entailed estate. As to the argument that the petitioner had here an interest to some extent in the fund as an individual, it was answered (1) that in point of fact it was not so, the whole price being required to pay off the debts affecting the estate; (2) that in any view, that question was one which could not be tried in the present petition. It was conceded that the bank might retain any interest already accrued on the money in satisfaction of their debt.

The Royal Bank argued—The concession with regard to interest already accrued afforded a useful illustration of the principle which should be extended to the whole fund. There was nothing in the terms on which the fund was consigned which amounted to a specific appropriation of the money inconsistent with the bank's claim of retention. The bank averred, though the other side denied, that the petitioner had a considerable, though at present undefined, residual interest in this fund, as an individual. By the 18th section of the Entail Act of 1882 they would be entitled to disentail the fund. That would have the effect of separating and distinguishing the various interests in it. They might yet wish to resort to this remedy. The money should therefore be left *in hoc statu* where it was. The money could not be justly uplifted and applied as proposed in face of the existing admitted debt due by the petitioner to the bank.

The Lord Ordinary officiating on the Bills (Lord Kinnear) pronounced the following interlocutor:—"Finds that the respondents are not entitled to retain the several consigned sums specified in the petition in respect of debts alleged to be due to them by the petitioner, but finds that they are entitled to retain the interest which may have already accrued upon the said several sums, and to apply the same *pro tanto* in extinction of the petitioner's debt: Approves of Mr Deyar's report: . . . Interpones authority: Grants warrant to and authorises the petitioner to uplift from the Royal Bank of Scotland the sums of £132, 9s, £2885, 7s. 6d., and £2857, 14s. 3d., contained in the deposit-receipts, and amounting together to the sum of £5875, 10s. 9d., and to apply the same at the sight of the reporter in payment *pro tanto* of the sum of" the debts after specified. . . . "*Quoad ultra* continues the cause.

"*Note.*—The sums of money which it is proposed to uplift have been deposited in the Royal Bank in terms of the Lands Clauses Consolidation Act. The petitioner is a debtor on the bank on a credit-account, and the bank claims right to retain the deposited sums "to the extent of the interest which the petitioner as heir of entail has in these moneys, and relative interest." In so far as regards the interest which has accrued on the consigned sums in the hands of the bank, and to which the petitioner has right as the person who for the time being would have been entitled to the rents and profits of the lands, the claim of retention appears to me to be well founded, and to this extent I do not understand it to be disputed. But the respondents have in my judgment no right to retain the capital, which belongs to the entailed estate, in order to meet the debts of the heir in possession.

"It is said that although they cannot set off the debt due by the petitioner alone against their liability to account for consigned money in which all the heirs of entail have an interest, they ought to be allowed to retain, in order that they may come into possession of funds which will belong exclusively to the petitioner, either by reason of interest accruing on the money in their hands or by their putting in force, if they should think fit to do so, the powers given to creditors by the Entail Amendment Act, and so separating the interest of the heir in possession from that of the heirs entitled to succeed to him. But the right of retention is a security arising from actual possession, and it would be altogether inconsistent with the principles by which the right is regulated to allow the respondents to retain money which does not belong to their debtor in order that they may hereafter come into possession (if it should so happen) of money which will belong to him. Retention depends upon agreement, express or implied, and if the funds in question had been deposited by the petitioner himself they would not have been subject to retention for his debt, since they are deposited for specific purposes inconsistent with the right to retain. But they are deposited, not by the petitioner, but by corporations which have taken part of the entailed estate under statutory powers, and they must be applied to the purposes prescribed by the statutes and to no others.

"It is said that in equity the respondents should be allowed to retain. But there is no rule of equity to justify our interference with the statutory procedure for the application of consigned money in order to give a creditor a real security which the law has not given to him. If there were room for equitable considerations they must be applied with due regard to all the interests involved; and it would not appear to me to be equitable to keep money lying in bank at deposit rates which is primarily applicable to the payment of debts bearing a higher rate of interest for no other purpose than to give the bank an advantage over unsecured creditors."

The judgment was acquiesced in.

Counsel for Petitioner — D.-F. Mackintosh, Q.C.—Dundas. Agents—J. & F. Anderson, W.S.

Counsel for Respondents—Balfour, Q.C.—Gillespie. Agents—Dundas & Wilson, C.S.