[*26th March* 1839.]

(Appeal from Court of Session, Scotland.)

WILLIAM MACKENZIE and others, Appellants.— (No. 5.)
Knight Bruce—Dr. Lushington.

MRS. JANET ORR or GORDON, Widow, and others[1], Respondents.—*Sir William Follett—M. Smith.*

Competition. — A party lending a large sum over an estate possessed in fee simple stipulated to receive as part security, in addition to a bond and disposition in security in his favour, assignations to certain incumbrances of a prior date. The incumbrances were paid by the trustee and agent of the borrower, but it did not appear with whose money. In a question between a party holding an incumbrance intervening between the assigned incumbrances and the bond and disposition in security,—Held that the presumption was, that the prior incumbrancers were paid with the money of the assignee; and, as there was no evidence to the contrary, that (affirming the judgment of the Court of Session) the assignment conferred a preference over the intermediate incumbrancer.

Arrears due on the prior incumbrances mentioned above were, from omission, not assigned till a subsequent period, when they were separately conveyed to the same party.—Held (also affirming the judgment of the Court of Session) that the lender was not bound to compute payments of interest, previous to the assignment of the arrears on the sum lent by him towards extinction of these arrears, in diminution of his security.

1st DIVISION.
Lord Ordinary Cockburn.
Statement.

THE late Alexander Hume Macleod, of Harris, by a deed of settlement dated the 17th June 1811, con-

[1] 16. D., B., & M., 311.

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veyed the estate of Harris, in which he was infeft, to his eldest son Alexander Norman Macleod, subject to certain burdens therein specified, and, inter alia, of an annuity of 300*l.* payable to his youngest son Donald Hume Macleod during his life, and in the event of his having lawful children living at the time of his death to such children, equally amongst them, during their respective lives.

On the death of Mr. Macleod, in 1811, he was succeeded by Alexander Norman Macleod, who was infeft on the above disposition and deed of settlement, under the burden of the provision or annuity in favour of his brother Donald Hume Macleod and his children.

On the 17th September 1812 Alexander Norman Macleod executed a heritable bond in corroboration of the annuity of 300*l.* This deed contained warrant for infefting Donald Hume Macleod in the estate of Harris in security of the annuity, and he was duly and validly infeft accordingly, conform to instrument of sasine dated the 13th November 1812.

At Whitsunday 1828, Mr. Donald Hume Macleod conveyed, by a trust disposition, the above annuity and arrears thereof to the appellant and another trustee (since deceased), and the survivor of them. These trustees were duly infeft on the trust disposition in the month of July 1829.

On the 3d November 1817 Alexander Norman Macleod granted a heritable security over the lands of Harris in favour of Mr. Grant of Kilgraston for 25,000*l.*, then borrowed from Mr. Grant, who was infeft thereon on the 9th February 1818. After the death of Mr. Grant the bond passed into the hands of trustees appointed by his settlements, who completed their title

to it, and subsequently granted, in the month of November 1823, a disposition and conveyance thereof in favour of Mr. Gordon of Milrig, who was infeft thereon, and the infeftment duly recorded in the month of March 1824.

Besides the original security thus vested in Mr. Grant, there were in existence four different bonds and infeftments affecting the estate of Harris, which had been granted by Mr. Alexander Hume Macleod in the years 1804, 1807, 1808, and 1810; and it was stipulated in the treaty for the loan of 25,000*l.*, that these securities were to be conveyed to Mr. Grant, and to be held by him as collateral securities for the 25,000*l.* and interest. These securities were conveyed to Mr. Dallas, the trustee and agent of Mr. Macleod, by whom they were conveyed to Mr. Inglis, who succeeded him as agent and trustee, but there was no direct evidence to show with whose money they had been procured from the holders. There were also in existence certain other securities granted in favour of several members of Mr. Macleod's family, which were of a date posterior to the collateral securities thus held by Mr. Grant.

The heritable bond and disposition in security, dated 3d November 1817, as well as the interest of the trustees of Mr. Grant in the collateral securities, are now duly vested in the respondents, who are the accepting trustees under the settlement of the late Mr. Gordon of Milrig.

In a process of ranking and sale instituted by creditors, the estate of Harris was sold to the Earl of Dunmore for 60,000*l.*; but this sum proved insufficient for the payment even of the heritable debts secured over it.

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The appellants claimed to be ranked and preferred on the price obtained by the sale of the estate of Harris, according to the priority of their sasines; while the respondents contended that they were entitled to be ranked, in virtue of the collateral securities vested in them, according to the priority of the sasines in favour of the original creditors therein.

Judgment of Court, 16th Jan. 1838.

On the 6th December 1837 the Lord Ordinary made avizandum to the Lords of the First Division, who, on the 16th January 1838, pronounced the following interlocutor:—"The Lords having advised the "competition with the claim for the trustee of "Mr. Macleod, and also for the trustee of Gordon "of Milrig, repel the objections stated to the interest "and claim of preference for Gordon of Milrig's "trustees, and rank and prefer the said trustees in "terms of their claim, and decern and remit to the Lord "Ordinary in the ranking to proceed farther as shall "be just."

Against this interlocutor the appellants appealed.

Appellants Argument.

Appellants.—The collateral securities founded on by the respondents, which are prior in date to the infeftments founded on by the appellants, were conveyed to trustees for Alexander Norman Macleod, who was the debtor in these securities, and they were thereby extinguished; for the same party is not capable in law of sustaining at one and the same time the characters of debtor and creditor in the same debt, or of being debtor to himself or creditor to himself, and a conveyance to a trustee for a party is in its legal effects the same thing as a conveyance to the party himself.

According to the settled law of Scotland, where debts are acquired by the debtor therein, where "the same "person becomes both debtor and creditor in them, "and so is not only vested activè with the right of "the debt, but passivè subjected to the payment of it," the debt or obligation is dissolved and extinguished confusione, "for no person can be debtor or creditor "to himself."[1]

Appellants Argument.

Supposing that the respondents were entitled to found upon the collateral securities in competition with the appellants, deduction ought to have been made from their amount, or credit given, to the extent of the interests which the respondents have received on the debt for 25,000*l.*, since the said securities were acquired by them, instead of their being allowed to rank for the total amount of the collateral securities, accumulating the annuities and interests from the date at which they were conveyed to them to the present time.

Respondents Argument.

Respondents.—As the collateral securities, with the infeftments thereon, have been transferred to and are now vested in the respondents, they are entitled to be ranked on the price of the estate of Harris, in preference to the appellants.

The infeftments on the collateral securities have never been extinguished by confusion or discharged by deed, and they remain as preferable burdens on the estate, and as such have been validly conveyed and assigned to the respondents, who were entitled, in virtue of the personal obligation contained in their bond, to

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[1] Ersk. b. iii. tit. 4. sec. 23. & 27.; citing 21st Dec. 1680, Cuningham (Dict. 3038), Kerr v. Turnbull, 15th Feb. 1758, Dict. 15551; Devaynes v. Noble (Clayton's Case), 1 Merivale Reports, 604.

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apply the interest received by them in extinction of the interest accruing on the principal debt. They were not bound to apply it in extinction of the annuities or interest due on the collateral securities, which they were entitled to keep up as debts against the estate to their full extent as securities for payment of the principal sum.[1]

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, this case, which was argued before your Lordships some considerable time since, involves a question which appears not to be a subject of much discussion in Scotland, but which is not of unfrequent occurrence in this country, the contest being between different incumbrances on an estate which was made the subject of a family settlement in the year 1811. It appears that the father of the author of that settlement had contracted various debts, which he had made charges upon the estate to which he was absolutely entitled. In 1811 the settlement was made, under which interests are claimed by the younger branches of the family, those parties contesting with a creditor of a subsequent date, that is, of the year 1817, for a sum of 25,000*l.*; the contest not being with respect to the instrument creating the debt of 25,000*l.*, but between the family, who claim under the settlement of 1811, and the creditor for 25,000*l.*, who, in addition to the security which he had taken from the then owner of the estate, had assigned to him the securities for a debt anterior to the year 1811, namely, four securities, one of the year 1804, another of 1810, another of 1807, and another of

[1] Johnston, 20th July 1610, Dict. 3035; Ersk. b. iii. tit. 4. sec. 24, 26, 27.

1808; and the question is, whether as between the parties claiming under the settlement, and the creditor for 25,000*l.* under the instrument of 1817, that creditor for 25,000*l.* is entitled to avail himself of the securities for the debt anterior to 1811? The author of this settlement was absolutely entitled to the estate. If he had not been absolutely entitled to the estate according to the law of Scotland and to the law of this country, there can be no doubt that on paying off the prior debts it would be competent to such a party to deal with these securities, either for his own benefit or for the purpose of conferring a prior claim on other creditors to whom he might become indebted; but the question is, whether he, being the absolute owner of the estate, under the circumstances which appear upon these proceedings, was entitled, by assigning these prior securities to the creditor of 1817, to give him a priority over those who claim under the settlement of 1811.

My Lords, if the case had simply been that the owner of the estate had paid off those debts and taken the assignment for his own benefit, then a question would have arisen under the law of Scotland, which appears not to have been the subject of discussion in that country. I find that the Lord President and the other Judges differ in opinion as to that, and no case was cited at your Lordships bar, or appears to have been cited below, as to what would have been the effect of an assignment under these circumstances. In this country the law would have been perfectly well known, inasmuch as it has been the subject of decision, that, as between parties claiming incumbrances on an estate, the owner of the estate being absolutely entitled

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to it subject to charges, if he pays off the prior charges cannot set up those prior charges for his own benefit as against those who claim subsequent incumbrances upon the estate. My Lords, upon the view I take of this case, after a careful examination of all the papers and all the facts as they appeared before the Court of Session, it does not appear to me that your Lordships will be called upon to consider that question, because one proposition appears to be common to the law of both countries, namely, that if a subsequent incumbrancer advances money, and it is part of his contract that he shall have an assignment of the prior incumbrance, that then he is entitled to stand in the place of that party whose debt is paid off by the money which he advances, and whose incumbrance he procures to be assigned to himself.

One difficulty in this case is, to ascertain accurately and satisfactorily out of what funds these prior incumbrances were paid off; because it is quite clear that the four several securities became the subject of regular conveyance from party to party, without ever having come into the hands of the owner of the estate, Mr. Macleod, but having come certainly into the hands of a Mr. Dallas, who was a trustee and agent for Mr. Macleod. The title to the securities is transferred from the original creditors to other persons, then to Mr. Dallas, then to Mr. Inglis, and ultimately to Mr. Grant, through whom the parties claim the title to the 25,000*l.* Looking, therefore, to the titles as they appear upon the record, the present claimant would appear to be entitled to these incumbrances, which we find vested in certain creditors of debts anterior to the date of the settlement; for instance,

one of the securities was a security of December 1810, which was a heritable bond for 1,500*l.* granted to Mr. Dallas, but not in his character of trustee for Mr. Macleod, but, upon the face of it, as trustee for a person of the name of Bowie. It appears that in 1813, — that is after the settlement, and therefore after the intervention of the now contending claim, — Dallas conveyed to Bowie, son of the party for whom he was originally trustee; that in 1815 Bowie was paid; and in 1817 Bowie conveyed again to Dallas, it then appearing upon the face of the instrument that he had been paid, and it being stated that Dallas had paid that 1,500*l.* From Dallas the security was conveyed to Inglis, from Inglis to Grant, and from Grant the present parties derive their title. I have stated the history of that incumbrance as being one of the most simple; and it is unnecessary for me to occupy your Lordships time in tracing the others, which are, some of them, more complicated in their nature; but the same observation applies to them all, — that they are traced from hand to hand, none of them distinctly coming into the hands of Mr. Macleod.

Then, my Lords, it is said that though they never came into the hands of Mr. Macleod they came into the hands of Dallas, and that they came into the hands of Mr. Inglis, who succeeded Mr. Dallas as agent and trustee for the Macleod family; and that it is therefore the same thing, whether we trace the securities into the hands of Mr. Dallas the trustee, or into the hands of Mr. Macleod, the cestuique trust. My Lords, as I observed in the commencement, if the question turned upon that it would be necessary for your Lordships to consider how the rule of law ought to be laid down as appli-

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cable to these transactions in Scotland; but if, although the securities became vested in Mr. Dallas, who was in fact the trustee for Mr. Macleod, your Lordships have reason to believe, and you are satisfied, that they did not come into the hands of Dallas as trustee for Mr. Macleod, namely, as being the agent who applied the money of Mr. Macleod for the purpose of paying off those incumbrances,—but that it was part of the specific transaction that the other parties who were to advance the money should, for their better security, have that money applied in the payment off of the prior securities, and that they should have an assignment of the securities so paid off, it does not appear that there is any difference between the law of this country and of Scotland upon that subject; but that the law of either of the two countries is, that the party advancing the money would be entitled to have the benefit of the securities paid off with that money, and of which he had obtained an assignment.

My Lords, this creates some difficulty in investigating the facts of the case, inasmuch as it is not very easy to reconcile the dates with the supposition of Mr. Grant's money, in the latter instance, and Mr. Newte's money, in the first instance, having been applied in paying off and satisfying those prior incumbrances. But in dealing with the facts upon which the evidence is not very satisfactory, your Lordships will take into your consideration on whom the burden lies of proving the fact one way or the other. I have stated to your Lordships, that according to the conveyances they are all traced from hand to hand, from those who were clearly entitled to hold them as against those interested under the settlement until they come into

the hands of those now claiming under the settlement. Assuming for that purpose Dallas to be a stranger, and not affected by his character of trustee of Mr. Macleod, the title therefore apparently is good, and it lies upon those who impeach that apparent title to show that those parties, some of them at least,—Dallas, for instance, was not entitled to hold these adversely to those claiming under the settlement, because he was trustee for Mr. Macleod. Now, if those who are to impeach the primâ facie title have not satisfactorily made out a case which would justify your Lordships in considering that primâ facie title as affected by anything appearing upon the record, the title of course will stand, because there is no case in equity to affect that legal right.

Now, in the first place, nothing can be more improbable than that which must be assumed as fact in order to suppose Dallas to have held simply as trustee for Mr. Macleod. It appears that this was a property very much incumbered; it is very evident that the owner of the estate was subsisting in fact by means of what he derived from the estate; he was not a man who had much command of money, and when it was necessary to procure money for the purpose of paying off one incumbrance he was under the necessity of applying elsewhere for a loan of money in order to do it. In short there is nothing which appears to render it probable that Mr. Macleod, the owner of the estate, had money to put into the hands of Dallas, as his agent, to pay off these incumbrances. In some cases,—in the case of the 10,000*l.* procured in the year 1813 from Newte, out of which several prior incumbrances were paid, it is on the face of it stated that the 10,000*l.* was applied

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in paying off Mr. Howard's incumbrance of 2,000*l.* in part; and other advances are subject to the same observation. But then, again, if we merely look to the dates, it will not be very easy to reconcile them with the supposed history of the transaction. But of that fact there is no doubt, because it is actually recited upon the face of the deeds; and when we come to Mr. Grant, who advances 25,000*l.*, there is a great discrepancy between the dates as they appear and the supposed period at which the money must have been advanced to pay off the prior incumbrances. But there is an account stated in the papers showing the periods at which Grant advanced part of the money, and there is a memorandum which shows that although the money came under the administration of Dallas in the first instance, and of Inglis afterwards, that it was money not put into their hands as the money of Mr. Macleod, but put into their hands as money to be applied for the purpose of paying off the prior incumbrances with a view to the security of Mr. Grant, who was advancing the 25,000*l.* It appears, for instance, that in November, 1817, 3,200*l.* was advanced, and that at subsequent periods, going through the latter end of 1817 and into January 1818, other sums were advanced, in the January of 1818 the sum of 10,000*l.* being advanced; and there is this note:—"The loan, with deduction of the "3,200*l.* received on 3d November, was lodged with "the Commercial Bank of that date, on their note pay-"able on demand to Mr. Grant's agents and deposited "with J. R. and W., with declaration of trust that the "money was to be employed at our joint sight in pay-"ing off certain existing incumbrances." Now that corresponds with the statements in some of the deeds,

and is not met by any evidence on the other side, except that which might be derived from the different periods at which the securities appear to have been executed.

Now, that undoubtedly may to a certain degree be accounted for by the necessity of having the money at command before the prior incumbrances could be bought up; and of course those who had the prior incumbrances were not likely to part with the legal security unless they had the money in hand which was to be the purchase money of those securities. But whatever difficulty there may be in reconciling the case, I have in vain looked for any evidence on the part of those interested under the settlement to shake that which not only is the probable state of the case, but which is actually proved to be the case in more instances than one, and which from the memorandum which I have now read appears to have been the course adopted, as naturally might be expected, namely, that the parties advancing the money put the money in medio, not in the possession of the debtor Mr. Macleod, but under the control of persons, and in trust till it could be applied for the purpose for which it was intended, namely, buying up the prior incumbrances, which were to be assigned to the new creditor.

My Lords, in the Court below there was a difference of opinion: the Lord President differed in opinion from the three other learned judges, and in delivering his judgment his Lordship says:—" I consider this case " to be attended with great difficulty; there are ques- " tions of much nicety involved, but the inclination of " my opinion is that the collateral securities were " extinguished at the time the original debts contained " in them were paid and the debts and securities

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" conveyed to Dallas. It is not disputed that Dallas " was the mere trustee of Mr. Macleod." Now, it was not disputed that Dallas was the trustee of Mr. Macleod: he was in one sense undoubtedly acting as the trustee of Mr. Macleod, but it is quite contrary to the whole evidence in the case to assume that he was the mere trustee of Mr. Macleod in this transaction, and that money in the hands of Dallas was as if it had been in the hands of Mr. Macleod. But, however, the Lord President appears to have considered that such was the result of the evidence:—" Dallas did " not advance funds of his own in paying off the debts " of Mr. Macleod which were conveyed to him; these " debts were paid off with money borrowed by " Mr. Macleod under a new loan." His Lordship there says, that the fact was satisfactorily proved to his mind that the debts were paid off with money advanced. Now, if that were the real state of the transaction it is perfectly incredible to suppose that the party advancing the money, intending that the old securities should be bought up, should put that under the control of Mr. Macleod: the two propositions are perfectly irreconcileable with each other; and " it seems to me that " matters are substantially in the same situation as if " Mr. Macleod, being debtor in various heritable debts, " had borrowed money, paid the debts, and been " assigned to them." Undoubtedly, if he had done that, there would have been no title in the parties to stand in the situation of original creditors. But that not only is not proved, but the converse appears, as far as the evidence goes, to be satisfactorily established, and it is that which, according to the ordinary dealings between man and man, would have been the course of

proceeding. "But if that had been the precise shape "of the transaction it is difficult for me to understand "how he could thereby keep up the debts and securities "against himself and his fee simple estate. I never "heard of such an attempt having been made: it is "quite different where there is an entailed estate."

The other learned judges differ in opinion from his Lordship, and seem to me to put it upon a ground which is much more satisfactory, much more consistent with the evidence as it appeared before the Court, and much more free from any of those violent suppositions which must be entertained if you suppose the party to have advanced the money, not taking care to have it kept safe till it was applied in buying up the securities, but putting it at once into the hands of the debtor; the effect of which would have been, that, having no security whatever for the payment off of the prior incumbrances, the 25,000*l.* would have been advanced not only without the security of the earlier deeds, but actually subject both to the incumbrances under the settlement and the charges to the prior creditors. Mr. Grant, and those who acted for him in advancing 25,000*l.* upon the estate although encumbered by creditors to a very great extent and by the charges of the settlement, must be supposed to have advanced that money not only without taking care to stand in the place of the original creditors, but to come third, namely, after the prior creditors and after those named in the prior settlement, inasmuch as he, whatever he might have intended, would have no security for being paid till the other parties had been paid out of the money so advanced.

Now, my Lords, that supposition appears to me

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to be very incredible, and to be contrary to the evidence, as far as it can be considered as proving the nature of the transactions between the parties; and it is contrary to what is proved by some of the deeds; and though there is some confusion in the evidence with respect to the dates, yet I cannot think that your Lordships would feel yourselves safe in proceeding upon an assumption which is totally different from that which appears to be the nature of the transaction in those particulars, so far as you are able to trace it. Upon the law there is no question, because, independently of that point to which I have adverted, which appears to me not to arise in this case, there is no doubt that if the money was advanced for the purpose of taking up the prior securities,—that being part of the contract,—and if the money was applied to that purpose, and those prior securities were afterwards conveyed and assigned to the parties advancing that money, there is no doubt that the original incumbrances existed, and existed for the benefit of the parties who had advanced the 25,000*l.*; and beyond question they would be entitled to preference over those who claim under the settlement.

My Lords, it is said that this is a case of great hardship upon those who claim under the settlement. That argument will not influence your Lordships in your decision upon this case, because that decision must be regulated by the principles of law. But it is not easy to see how the hardship exists: the other parties take under the prior incumbrances, which were effectual for the benefit of those who were the original creditors, namely, Mr. Howard and other persons who held the securities anterior to the date of the settlement: the

interests of those claiming under the settlement are not prejudiced by having the securities transferred to other persons; they come with an equal degree of priority upon the estate; whether Mr. Howard claims his debt, or whether those who now claim the benefit of that incumbrance stand in his place, their interest is the same.

My Lords, there is one other question, and only one, to which I will call your Lordships attention, though it was one not much pressed in the argument, and does not appear to me to create any difficulty in the decision: it is with reference to the interest of those securities. The original debt of 25,000*l.* had interest paid up to a certain time,—the date is not material; the securities were assigned; but it appears there was an omission in the assignment, and there being arrears of interest due upon those securities, it was not until a subsequent period, I think in the year 1834, that the arrears of interest were assigned upon the securities which had been the subject of a prior conveyance. One point which is made is, that the interest which had been paid upon the 25,000*l.* ought to be applied in reduction of the interest upon the securities, and not in reduction of the interest upon the 25,000*l.*, the effect of which of course would be to increase the debt and diminish the securities; whereas it is obviously the interest of those who claim the benefit of the 25,000*l.* to reduce the debt and increase the securities. What appears to me to be a very satisfactory answer, provided the facts were such as to make it necessary to give that answer, is, that the party receiving interest or receiving any money,—there being two accounts to either of which it may be applied, is entitled to refer it to that one for

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which he has the least available security, and of course it would be his interest to apply it to the 25,000*l.*, and not to the reduction of the securities for that 25,000*l.* It appears to me that there is another answer to the argument raised against the party now claiming under the 25,000*l.*, namely, that the interest was paid, and paid upon the 25,000*l.*, anterior to the period at which the securities were assigned. The interest ran upon the securities, and increased the debt secured by those instruments; it was an addition to the heritable bond; it was an additional charge upon the estate; and when they were assigned to the parties now claiming the benefit of them, it was an assignment of that which the parties to whom they were assigned, not having had the possession of, even if they had been compelled so to do, had not the means of applying in satisfaction of the interest of the 25,000*l.* It appears to me, therefore, that they did not come into hands which could have applied them in satisfaction of the interest of the 25,000*l.*; and if they had, the party receiving that interest was undoubtedly entitled to apply it in satisfaction of that debt for which he had the least available security. My Lords, under these circumstances, though it could have been wished that the facts had been such as would have enabled your Lordships to come to a more clear and satisfactory conclusion, yet it does appear to me that there is quite sufficient evidence to lead your Lordships to the conclusion, that the decision of the majority of the learned judges of the Court below is right and that the present interlocutor ought to be affirmed.

My Lords, there having been a division of opinion in the Court below, perhaps your Lordships will be

of opinion that the interlocutor should be affirmed, but with no costs.

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It is ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutor, so far as therein complained of, be and the same is hereby affirmed, without costs.

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL, Solicitors.