by the spouses during their joint lives, and failing such writing, that they are to take equally. Now as the spouses during their joint lives executed no such writing, and as the widow by the present action renounces all purpose of doing so, the distribution fell to be made equally.

But the question comes to be, at what date did vesting take place? It is quite clear, looking to the words of the contract, that the estate given was the estate as at the date of the dissolution of the marriage. It vested at latest at the dissolution of the marriage. Whether it vested in the children at the date when they came into existence there is no need to inquire. There were three children of the marriage. Two of these were daughters who have died unmarried and intestate, and accordingly they are represented by the parties before us. Accordingly, the whole fee vested in Mr Andrew James Knox as one of the three surviving children at the time of the dissolution of the marriage, and as along with his mother representing the children who have since died. The trustees contended that they should hold the estate for the possible event of Mr Knox having children and predeceasing his mother. I do not think that question arises here. It is upon the marriage-contract, and on the marriage-contract alone, that I base my judgment.

LORD MURE concurred.

LORD SHAND—I am of the same opinion, and I concur entirely with what your Lordship has said as to the construction of the marriage-contract. And I am further of opinion that it does not matter upon which deed the view of the Court is rested. For in either case the same result would follow. A liferent is given to the widow, and the fee to the children. There is no indication of there being a purpose of suspending vesting in the truster's mind. The only reason why the children did not get instant distribution on their father's death was the interposition of the widow's liferent. On his death the class is in every respect fixed. And accordingly, even if the destination had been simply to the children of the marriage without reference to issue, and if the widow had renounced her right, the money would have been divisible among the children. I think the money vested in the children as a class *a morte testatoris*, and I think if several of the children had claimed the money, and the widow had renounced, I should have thought the case ruled by the authority of *Newbigging* v. *Russell*, 1853, 15 D. 489.

But here the case is much clearer. The widow is plainly entitled to renounce the liferent, and where is the fee if it is not in the son?

The only other argument that was pressed was that the trust-disposition contained a destination-over. The truster directs his "trustees to realise my whole trust-estate, and to pay, divide, and distribute the same equally among my children who shall then be alive, and the lawful issue of such as may have predeceased leaving issue." But this is nothing more than the condition *si sine liberis*.

LORD ADAM concurred.

The Court found that the second parties as trustees were bound to denude of the trust and make over the trust-estate to A. J. Knox on receiving a renunciation by Mrs Knox of her liferent of the trust-estate and all her interest in the premises, and a discharge of her and Andrew James Knox of the trust and their whole accounts and intromissions, and of all claims under the marriage-contract.

Counsel for the First Parties—A. J. Young. Agents—Duncan & Black, W.S.

Counsel for the Second Parties—Macfarlane. Agents—Macrae, Flett, & Rennie, W.S.

Thursday, January 27.

SECOND DIVISION.

[Sheriff of Lanarkshire.

THOMAS OGILVIE & SON *v.* TAYLOR (BUCHANAN & JOHNSON'S TRUSTEE).

Bankruptcy—Private Trust for Creditors—Accession to Trust-Deed—Right of Non-Acceding Creditor to Sue Trustee directly for a Dividend.

An insolvent debtor conveyed his estate to a trustee for behoof of all his creditors who should accede to the trust, with the powers belonging to a trustee under the Bankruptcy Acts, it being declared a condition of the trust that "creditors who accede hereto, or who shall take a dividend out of my said estate, shall be held to have thereby discharged me of the whole debts due by me to them without the necessity for any formal deed of accession or discharge." A creditor demanded a dividend on his debt, but refused to accede to the trust or to give any discharge further than a simple receipt for the money. *Held* (1) that he was not bound to do so, but was entitled to receive the dividend on his simple receipt therefor, and (2) that he was entitled to sue the trustee directly for the dividend.

On 11th March 1885 John Johnson, tailor, sole partner of the firm of Buchanan & Johnson, Glasgow, executed a trust-deed for behoof of his creditors. By this trust he conveyed to James Taylor, C.A., Glasgow, as trustee, "for behoof of my whole lawful creditors at the date hereof, and who shall accede hereto," his whole estate, heritable and moveable, with the exception of his household furniture, "with the same powers as belong to a trustee under the Bankruptcy Statutes." The trust purposes were—"In the first place, in payment of the expenses hereof. . . . . In the second place, I appoint the said trustee to apply the proceeds that shall remain of the said estate and effects in satisfying and paying the whole debts due by me to my creditors acceding hereto, rateably and proportionally, according to their respective debts, which debts, preferable or ordinary, shall be ranked according to the principles of the Bankruptcy Statutes as if my estate had been sequestrated, or otherwise as the trustee may consider expedient for the estate, and that at such times and by such dividends as the said trustee shall judge proper." The trust-deed contained this clause — "Declaring always, as it is hereby specially provided and declared, that this trust-disposition is granted by me on the condition that the creditors who

accede hereto or who shall take a dividend out of my said estate shall be held to have thereby discharged me of the whole debts due by me to them, without the necessity of any formal deed of accession or discharge being granted; declaring that the acceptance by any creditor of a first dividend from this trust-estate shall import a discharge to the trustee."

Messrs Thomas Ogilvie & Son, merchants, Aberdeen, were creditors to the extent of £273, 5s. The trustee on the insolvent estate made a deliverance which showed that the estate was able to pay a dividend of 5s. 6d. per pound. Messrs Ogilvie did not accede to the trust-deed. They applied, however, for payment of the sum of £75, 1s. 6d., which was the dividend upon their debt, being, as they stated in this action, "willing to accept payment of said dividend towards their debt, and to grant the trustee a simple receipt therefor." The trustee declined to pay it over to them unless they granted a discharge of the debt in terms of the trust-deed, the ground of refusal, as explained by him, being that he was trustee under a trust granted for acceding creditors only, which they were not, and he could only pay a dividend to them subject to the conditions of the trust, which conditions they declined to accept.

Messrs Ogilvie then raised this action in the Sheriff Court of Lanarkshire, concluding against the trustee, as such and as an individual, for £75, 1s. 6d.

The defender pleaded—"(2) The pursuers having declined to accede to said trust-deed, they are not entitled to any benefit therefrom. (3) The defender having all along been willing to pay pursuers' said dividend, subject to said condition, he should be assoilzied with expenses."

On 4th August 1886 the Sheriff-Substitute (Erskine Murray) issued an interlocutor in which he found in law (1) that "the condition as to discharge is one which could not legally in the circumstances be enforced, and must be held *pro non scripto*, (2) that therefore pursuers are entitled to receive a dividend on the debt due to them by Buchanan & Johnson without granting to the latter a full discharge." He therefore decerned in terms of the petition, and found neither party entitled to expeuses.

"*Note.*—In the case of *Long* v. *Wilson*, decided by the present Sheriff-Substitute in 1878, and adhered to by the Sheriff-Principal on appeal, it was held that where in a trust-deed for creditors a clause for discharge to the debtor was inserted, that clause though it did not void the trust-deed, must be considered *pro non scripto*, and that the trustee was not entitled to insist on such a discharge being granted as the condition of giving a dividend. That judgment was based on the views laid down by Professor Bell, vol. ii. pp. 1172 and 1173, Shaw's edition, and the opinion of Lord Deas in the case of *Nicholson*, 6th December 1872, 11 Macph. 179. The same point came up before the same Sheriff-Substitute in the recent small-debt case of *Travers* v. *Bird* in December 1885, which, with the judgment of *Long* v. *Wilson* which it followed, was reported in the Sheriff Court reports of the *Scottish Law Review* for January 1886, p. 3. The same point has been again raised in the present action. It is argued, however, on behalf of the defender, Buchanan & Johnson's trustee, that since the case of *Long* v. *Wilson* was decided the point has been decided differently by the Court of Session in *Henderson* v. *Henderson's Trustee*, Nov. 22, 1882 [10 R. 185]. On a careful examination of that case, however, the point is there seen to be different. The question there was whether a non-acceding creditor could by the use of arrestments secure a preference over the creditors who acceded to the deed. It was held she could not. But that is very different from the circumstances in *Long* v. *Wilson* and the present case, where no preference is sought, and the creditors simply ask a fair share. They have no preference even by getting their share, without giving a discharge, as the same course is open to every creditor. It is true that another mode which the pursuers might have adopted would have been to sequestrate Buchanan & Johnson's estate. But this would have swept away the remaining assets, the sequestration being practically at pursuers' expense. The Sheriff-Substitute does not think they were necessarily obliged to adopt this course. The question, no doubt, arises, how can they take benefit under the trust if they do not comply with all its conditions, including that of discharge? But the answer is that, in the words of Professor Bell, that condition must be held *pro non scripto*. And this seems the only equitable course. Besides, as the Courts now hold that such a trust-deed is binding on non-acceding creditors as well as acceding creditors, non-acceding as well as acceding creditors are entitled to their fair share of the funds."

The defenders appealed to the Court of Session, and argued—The question was whether a creditor was entitled to take the benefit of getting a dividend declared by the trustee under the trust-deed without complying with the conditions of the trust-deed. If the deed were admitted to be good, then the clause could not be held *pro non scripto*. The cases cited by Bell applied only to the state of the law prior to 1814, when sequestration took the place of the other remedies open to creditors—Bell's Comm. (2d. ed.)ii. 382-4,(Shaw's ed.) 1172-73; *Henderson* v. *Henderson's Trustee*, Nov. 22, 1882, 10 R. 185; *Wilson* v. *M'Vicar*, February 18, 1762, M. 1214. The creditors could not have an action against the trustee—*Kyd* v. *Waterson*, *&c.*, June 5, 1880, 7 R. 844; *Robb's Trustees* v. *Robb*, July 3, 1880, 7 R. 1049. The creditors of the insolvent debtor were not bound by the terms of the trust-deed, but they could not approbate and reprobate. They must either take payment of the dividend under the trust-deed, and on condition of complying with its terms, or else they must sequestrate the debtor.

The respondent argued — The fundamental principle of such a trust-deed was, that the property of the debtor became the property of the creditors to be distributed by the trustee to them, and the debtor could not lay down conditions under which their own property was to be given to them—*Lamb's Trustees* v. *Reid*, November 9, 1883, 11 R. 76 (*per* Lord Fraser's note, p. 79). This was not a case of approbate and reprobate; the creditor here was willing to take payment of the dividend as repayment of his debt as far as it went, and sequestration was not the only proper remedy for him to use—*Nicolson* v. *Johnstone & Wright*, December 6, 1872, 11 Macph. 179. The deed might be quite good although some of its

provisions need not be carried out—*M'Kell*, M. 894; *Wilson* v. *M'Vicar* (*quoted supra*).

At advising—

Lord Young—I think that this is a very simple and very clear case. John Johnson, sole partner of the firm of Buchanan & Johnson, finding that he was insolvent, granted a trust-deed in favour of James Taylor. By this trust-deed he conveyed his whole estate, with some exceptions, generally for the purpose of having it realised and applied in payment of his debts. That is quite a common thing for an embarrassed debtor to do—to employ an agent or trustee to make his estate available for payment of his debts as far as it will go. Further, where he and all his creditors agree that it will be more satisfactory to realise and divide his estate, on condition of the creditors granting him a discharge, so that there will be the same result as in a sequestration, they may do so if there is no objection; it is quite legal, and is done every day. But then it is done by agreement between the embarrassed debtor and his creditors, and it cannot be done without agreement. Sometimes a recalcitrant creditor to a very small amount, or several creditors by banding themselves together, may frustrate the object of the trust-deed. Well, there is no remedy for that I know of, as it is a voluntary proceeding altogether. The alternative is that the embarrassed debtor can take out sequestration. I have already said that to realise his estate, and to make it available for payment of his debts, is a common proceeding, and is the duty of every embarrassed debtor, but there is no doubt that an insolvent debtor is not entitled to put his estate beyond the reach of his creditors, or to put conditions upon them for receiving payment of their just debts. But that is what the debtor has attempted to do here. He says he is insolvent, and puts his affairs into the hands of a trustee, but into the trust-deed he, forsooth, has put conditions to which the creditors must accede if they are to receive the share due to them of their just debts. That is just putting his estate beyond the reach of his creditors. Now, I think that a trust-deed, honestly granted, although without the accession of all the creditors, has been upheld by the Court to this extent, and to this extent only, that an individual creditor shall not have it in his power to obtain a preference or to interfere with the equality of division among the creditors. But if he could not use diligence against it at all to the extent of securing his own share, then the estate would be put beyond his reach by the voluntary act of the debtor. This trust-deed prescribes that the creditors shall grant the debtor a discharge of their debt when they receive a share of what is owing to them, viz., 5s. in the pound. I think that to say a creditor must be bound by that is extravagant. The Dean of Faculty said—"If the creditor is not satisfied to take his dividend under the trust-deed he may resort to sequestration." But then he is not bound to resort to sequestration. He may take what the debtor can afford to give him voluntarily just now, and take his chance for the remainder. There is no obligation on the creditor to make the debtor notour bankrupt and sequestrate him. He may say he will take what he can get just now and wait for the remainder. But this debtor answers, "Oh no, if you won't take 5s. in the pound as a discharge in full of your debt you must take out sequestration." What is the obligation on him to do so? If sequestration is taken out it will be a very different thing from a trust-deed. In the first place, discharge is by no means a necessary result of sequestration. Under the latest Bankruptcy Statute the bankrupt has to show that he has been acting honestly. Further, a sequestration includes *acquirenda*. I asked the Dean of Faculty if the creditor had taken a dividend, and granted a discharge under this trust-deed, and the debtor had succeeded to a fortune within six months or twelve months afterwards, the creditor would have any share in it for payment of his debt, and he said he would not.

The only difficulty I have had in regard to this case was, whether a direct action by the debtor against the trustee could be upheld. But I easily overcame that difficulty. If the insolvent debtor puts his whole estate in the hands of a trustee with authority to pay his debts, I think we should hold that a creditor has sufficient title to sue the trustee. It would only be to avoid circuity of action. The circuity would be that the creditor would have an action against the debtor, and then do diligence in the hands of the trustee for his debt. That would not be effectual to form a preference for the creditor, but it would be enough to secure equality. Whenever the arrestment was used the trustee must make good the share applying to the debtor. Under this principle the trustee would be bound to give to the creditor what was due to him, and here he admits that the debt is due. His only answer is that by the direction of his principal and constituent he is debarred from paying to an honest creditor what is due to him. That is illegal. The result is that I agree with the Sheriff-Substitute that the pursuers are entitled to decree for the proportion of the debt due to them. It is their legal right. But I do not agree with the last finding in the interlocutor—"Finds in the circumstances either party entitled to or liable in expenses." I think there is no ground for that. It is, what is not uncommon, a claim which is just in fact and in law resisted upon quite untenable grounds. I think we should give decree for the pursuers with expenses in both Courts.

Lord Craighill—I agree with the opinion expressed by Lord Young, and have nothing to add.

Lord Rutherfurd Clark—I agree also in the opinion. The only difficulty that presented itself to me was the difficulty mentioned by Lord Young. I had doubts whether the creditor was entitled to bring a direct action against the trustee for payment of a dividend on his debt; but I have come to the conclusion that we may, in order to avoid circuity of action, sustain a direct action by the creditor against the trustee. No prejudice can arise by it to the debtor.

The Lord Justice-Clerk concurred.

The Court recalled the interlocutor of the Sheriff-Substitute, and decerned against the defender in terms of the prayer of the petition, with expenses.

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

Counsel for Respondents—Comrie Thomson—Harvey. Agents—Mitchell & Baxter, W.S.