COURT OF SESSION.

Tuesday, July 14.

FIRST DIVISION.

THE HERITABLE REVERSIONARY COMPANY, LIMITED *v.* MILLAR (M'KAY'S TRUSTEE).

Sequestration—Heritable Property—Latent Trust—Tantum et tale—Bankruptcy Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 102.

M, the manager of an investment company, purchased some property for behoof of the company, and in implement of the sale the sellers granted a disposition in favour of M, *privato nomine*, which was recorded. M having afterwards ceased to be manager, granted a declaration of trust acknowledging that he held the property in trust for the company, but this deed was not recorded. Subsequently he became bankrupt and was sequestrated.

Held, in a question with the company (*diss.* Lord M'Laren), that the trustee on his sequestrated estate took the property mentioned free of the latent trust in favour of the company, in respect that by the 102nd section of the Bankruptcy Act the whole heritable property of the bankrupt was transferred to his trustee, subject only to such limitations as appeared on the face of the records.

Observed that the doctrine of *tantum et tale* had no application to the case of heritable rights perfected by sasine.

Observations (by the Lord President, Lord M'Laren, and Lord Kinnear) on Lord Westbury's opinion in the case of *Fleeming* v. *Howden*, 6 Macph. (H. of L.) 113.

The Heritable Reversionary Company, Limited, was incorporated in 1880 with the object of acquiring land and house property, and of holding, letting, reselling, or feuing the same. From the time of the company's incorporation down to 1886 Daniel Smith M'Kay acted as its manager.

On 17th May 1882 M'Kay purchased certain tenements of houses in Edinburgh at a sale by public roup, and thereafter the subjects were conveyed to M'Kay by the sellers by disposition, dated 16th and 17th July 1882, and he was duly infeft in the same by recording that disposition on 14th September 1882. This purchase was made by M'Kay for behoof of the company, and on the instructions of its directors, and the price was provided partly by M'Kay's granting a bond and disposition over the subjects, and the balance out of funds belonging to the company. In February 1886 M'Kay ceased to be manager of the company, and on 17th May of that year he executed a declaration of trust to the effect that he held the said subjects "in trust only for behoof of the said Heritable Reversionary Company," and binding himself to denude in favour of the company on being reimbursed of all expenses incurred by him in connection with the subjects, and relieved of all obligations undertaken by him thereanent.

The Heritable Reversionary Company were not, *ex facie* of the deeds above referred to, parties to the purchase of said subjects, or to the bond and disposition in security granted over the same. The declaration of trust was not recorded in the Register of Sasines, and there was nothing appearing on the public records to show that the company were connected with or interested in the property.

On 2nd December 1890 the estates of Daniel Smith M'Kay were sequestrated, and Robert Cockburn Millar, C.A., was thereafter duly appointed trustee thereon. At a meeting of the shareholders of the Heritable Reversionary Company, held on 16th February 1891, it was resolved that the company should be wound up voluntarily, and Mr Millar was appointed liquidator.

In these circumstances the question arose whether the subjects above mentioned formed part of M'Kay's sequestrated estate and passed to the trustee thereon, or whether the company were entitled to vindicate their right to that property under sec. 104 of the Bankruptcy Act or otherwise.

In March 1891 the subjects were sold of consent of parties, and after paying off the bond affecting them there remained a surplus of about £365.

A special case was thereafter presented, the parties thereto being (1) The Heritable Reversionary Company, and (2) Mr Millar, as the trustee in M'Kay's sequestration, in order to obtain the judgment of the Court on the following questions:—"(1) Whether the second party, as trustee on the sequestrated estate of the said Daniel Smith M'Kay, took said subjects in Balfour Street, Edinburgh, which were vested *ex facie* absolutely in the bankrupt, free of the latent trust in favour of the first parties, and whether the first parties are entitled only to rank on the sequestrated estate for the value of the subjects, or were entitled to recover said subjects from the second party as their own property? (2) Whether the surplus price of said subjects belongs to the second party as trustee foresaid, or to the first parties?"

By the 102nd section of the Bankruptcy Act it is enacted as follows:—"The Act and warrant of confirmation in favour of the trustee shall *ipso jure* transfer to and vest in him or any succeeding trustee, for behoof of the creditors, absolutely and irredeemably, as at the date of the sequestration, with all right, title, and interest, the whole property of the debtor, to the effect following:— . . . 2. *Vesting of Heritable Estate in Scotland*—The whole heritable estate belonging to the bankrupt in Scotland, to the same effect as if a decree of adjudication in implement of sale, as well as a decree of adjudication for payment and in security of debt, subject to no legal reversion, had been pronounced in favour of the trustee, and recorded at the date of

the sequestration, and as if a poinding of the ground had then been executed, subject always to such preferable securities as existed at the date of the sequestration, and are not null and reducible, and the creditors' right to poind the ground as hereinafter provided; and the right of the trustee shall not be challengeable on the ground of any prior inhibition (saving the effect which such inhibition may be entitled to in the ranking of the creditors): Provided always that such transfer and vesting of the heritable estate shall have no effect upon the rights of the superior, nor upon any question of succession between the heir and executor of any creditor claiming on the sequestrated estate, nor upon the rights of the creditors of the ancestor (except that the act and warrant of confirmation shall operate in their favour as complete diligence); and if any part of the bankrupt's estate be held under an entail, or by a title otherwise limited, the right vested in the trustee shall be effectual only to the extent of the interest in the estate which the bankrupt might legally convey or the creditors attach."

Argued for first parties—The property belonged to the company, and they were entitled to the surplus price. In the case of moveable property it was quite settled that the trustee only took it *tantum et tale* as it stood in the bankrupt. No doubt in the case of heritable property there was some authority in text writers and old decisions for the view that adjudgers took it as it stood on record, *e.g.*, Bell's Comm. (7th ed.) i. 301; Goudy on Bankruptcy, 251; *Mitchells* v. *Ferguson*, 1781, M. 10,296, and Lord Hailes' Dec. 879; *Thomson* v. *Douglas, Heron, & Company*, 1786, M. 10,299; *Russell and Others* v. *Ross' Creditors*, 1792, M. 10,300; *Wylie* v. *Duncan*, 1803, M. 10,269; *Jeffrey* v. *Paul*, May 15, 1835, 1 Sh. & M'L. 767. In subsequent cases on this branch of the law the ground of decision had been that the trust might have been ascertained by an examination of the record—*Fleeming* v. *Howden*, July 16, 1868, 6 Macph. (H. of L.) 113, commented on in *Graeme's Trustee* v. *Giersberg*, June 1, 1888, 15 R. 691. There was a strong case in equity against the right of the second party being upheld, and the older decisions if held to favour the view of the second party were worthy of reconsideration. It was, however, maintained that there was nothing in positive law requiring the Court to arrive at a conclusion in the trustee's favour. The records were intended for the protection of purchasers and mortgagees, and the question here was not with such persons. Further, the property had never been held by M'Kay as his own, but always in trust for the company, and the right thereto had been vested in the company by possession so as to exclude M'Kay's trustee—*Watson* v. *Duncan*, July 12, 1879, 6 R. 1247. M'Kay could not have disposed of the property without committing a breach of trust, and the trust qualified and was inherent in the right which passed to the trustee. It was to be distinguished from a merely personal obligation in the bankrupt, which did not pass to or affect the trustee—*Molleson* v. *Challis, &c.*, March 11, 1873, 11 Macph. 510; *Graeme's Trustee* v. *Giersberg*, *supra*. Besides, by the terms of the 102nd section of the Bankruptcy Act, only such heritable property passed to the trustee in a sequestration as belonged to the bankrupt. Where property could not be converted by a bankrupt without a breach of trust, it could not be said to be property "belonging to him." In all the cases dealing with the rights of adjudging creditors, there had practically been a competition on the part of creditors to take out of the bankrupt what was vested in him, and the result of these cases was inapplicable here where there was no right of property in the bankrupt.

Argued for the second party—It was a rule established by authority that the trustee in a sequestration took the heritable property as it stood in the bankrupt on record—*vide* authorities quoted by first parties on this point, and also *Mansfield* v. *Walker's Trustee*, June 28, 1833, 11 S. 813—*aff.* April 10, 1835, 1 S. & M'L. 203, *per* Lord Brougham, 333; *Lawrie* v. *Lawrie*, March 10, 1854, 16 D. 860, *per* Lord Cowan, 862. The cases of moveable property requiring registration, such as *Watson* v. *Duncan*, *supra*, were entirely inapplicable, as moveable property stood in a totally different position from heritable. The maxim *assignatus utitur jure auctoris* did not apply to heritable property—*Scottish Widows' Fund* v. *Buist*, July 14, 1876, 3 R. 1078, *per* Lord President, 1082. It could even be said that the equity was all on the side of the first parties, because if the property had depreciated below the value of the bond, M'Kay's heirs and successors who were bound in the bond might have been bound to make good the deficit. The second party was therefore entitled to succeed.

At advising—

LORD ADAM—The parties to this case are, in the first place, the Heritable Reversionary Company, Limited, and in the second place, the trustee on the sequestrated estate of Daniel Smith M'Kay.

It appears that M'Kay was sequestrated on 2nd December 1890, and that he was then infeft in certain houses in Balfour Street, Edinburgh, as absolute proprietor, conform to disposition thereof in his favour, recorded in the register of sasines on 14th September 1882. These subjects, however, were in fact held by him in trust for the Reversionary Company, in whose favour he had executed a declaration of trust dated 17th May 1886. It is made matter of statement in the case that this declaration of trust was not recorded in the register of sasines, and that there was nothing appearing in the public records to show that the company was connected with or in any way interested in the property. It is in these circumstances that we are asked whether the trustee on M'Kay's sequestrated estate took the property free from the latent trust in favour of the Reversionary Company, or whether he took it *tantum et tale* as it stood in the person of the bankrupt, and affected by that trust.

The question primarily depends on the section 102 or vesting clause of the Bankruptcy Act, which provides that "the Act and warrant of confirmation in favour of the trustee shall *ipso jure* transfer to and vest in him, for behoof of the creditors, absolutely and irredeemably, as at the date of the sequestration . . . the whole heritable estate belonging to the bankrupt in Scotland to the same effect as if a decree of adjudication in implement of sale, as well as a decree of adjudication in payment and in security of debt subject to no legal reversion, had been pronounced in favour of the trustee and recorded at the date of the sequestration, and as if a poinding of the ground had been executed, subject always to such preferable securities as existed at the date of the sequestration, and are not null and reducible, and the creditors' right to poind the ground"—and at the end of the section there is the qualification that "if any part of the bankrupt's estate be held under an entail, or by a title otherwise limited, the right vested in the trustee shall be effectual only to the extent of the interest in the estate which the bankrupt might legally convey or the creditors attach."

It cannot, I think, be maintained that the property was held by the bankrupt on a title limited so as to prevent him from legally conveying it, or, so far as I can see, from creditors attaching it. The bankrupt's title was not *ex facie* limited in any way, and I do not understand it to be disputed that he could have given a perfectly good title to a disponee free from the latent trust. But it was said that a creditor, and therefore the bankrupt's trustee as having the same rights as a creditor, could not attach it except under burden of the trust, but must take it *tantum et tale* as it stood in the person of the bankrupt.

I understand that this is maintained on the ground that the trust was an inherent qualification of the bankrupt's right, and therefore affected the subjects in the hands of anyone deriving right from or through the bankrupt.

If the trust be an inherent qualification of the bankrupt's right, it is difficult to see why it should not affect the subjects in the grounds of a disponee as well as of a creditor. But however that may be, in my opinion the doctrine of *tantum et tale* has no application in the case of real rights perfected by sasine.

I have always understood that any person, whether creditor or purchaser, dealing with a proprietor infeft, was entitled to rely on the public records, and was not affected by any qualification, burden, or condition on the real right not there appearing. It appears to me that to give effect to the claim of the Reversionary Company would be to violate this well-settled principle—and I see no reason why an exception should be made in the case of a latent trust any more than in the case of any other latent qualification or obligation of an *ex facie* absolute proprietor.

On this subject Mr Bell in his Comm., i. 300, says—"A right as it stands in the bankrupt's person may be limited or qualified by certain conditions and stipulations, and in general the qualification if inherent in the constitution of the right and apparent on the face of it is effectual against third parties." Then after stating the difficulty of distinguishing between conditions limiting the right of the holder, and those which resolve into mere personal obligations, he adds—"But wherever the right itself is qualified or limited, the condition is effectual, with the exceptions." He then states the exceptions, and the first which he states is that "of real rights to lands where the limitation does not appear in the infeftment." Then he adds, I think quite accurately—"The statutes relative to the records have the effect of protecting creditors and purchasers against such burdens and qualifications of the real right of a proprietor infeft as are not of the nature of a radical defect in his title." One of the illustrations which he gives of the application of this doctrine is the case we have here—"Where lands and houses are vested in one individual intending that he shall hold as a trustee for a company." In support of this doctrine Mr Bell refers to the case of *Wylie* v. *Duncan*, M. 10,269.

In this case Wylie disponed to Archibald absolutely certain subjects at a price. At the same time Archibald granted to Wylie a missive obliging himself to redispone the subjects to him on repayment of the price, and upon being allowed the expense of repairs and meliorations. Archibald was infeft on this disposition. Wylie remained in possession, and there is no doubt that the transaction was one of loan. Archibald, the disponee, was sequestrated, and the question arose between Duncan, the trustee on his sequestrated estate, who claimed the subjects, and Wylie, the disponer, who claimed to be entitled to redeem them on repayment of the price, and who pleaded that the trustee could only take them *tantum et tale* as they stood in the person of the bankrupt. The decision was, that the Lords considered the burden as personal, and not good against creditors.

I cannot distinguish that case from the present. In both cases the bankrupt was infeft absolutely in the subjects, and in both cases he was under a personal obligation to convey on certain conditions the subjects to the true owners. That the conditions were different on which the bankrupt was bound to redispone does not appear to me to make any difference in principle.

In the case of *Fleeming* v. *Howden*, 6 Macph. 113, to which we were referred, an heir of entail in possession and infeft in an estate was bound to denude in favour of the next heir of entail on succeeding to a peerage. He succeeded to the peerage, and some months afterwards died without having denuded himself of the estate. The trustee for his creditors claimed the estate, but the House of Lords repelled the claim, holding that he, the heir in possession, held the estate in trust for the next heir from the date of his succession to the peerage.

The present question, however, did not arise for decision in that case, because the trust was patent on the face of the title. Lord Cranworth, who delivered the leading judgment, says — "This was apparent on the face of the title as recorded in the register of sasines, and any person becoming his creditor after that event must have known, if he looked to that register, that he was trusting a person who was no longer tenant in tail, for an event had occurred which made it his duty to denude in favour of another person."

But the case is important in respect of the view expressed in the House of Lords, that an obligation to do an act with respect to property creates a trust in the holder. If that be so, I do not see that any distinction can be maintained between the present case and *Wylie* v. *Duncan*, because in that view the bankrupt in *Wylie's* case was as much a trustee as the bankrupt in this case.

But I think, further, that the question raised in the present case was decided in the House of Lords in the case of *Paul* v. *Jeffrey*, 1 S. & M'L. 767. That case related to three bonds and dispositions in security for £3000, £400, and £1925 respectively. It appears that a certain William Harley having become insolvent, granted a conveyance of his whole estates, heritable and moveable, to certain trustees for the purpose of selling them and applying the proceeds in payment of the expenses of the trust, the advances made by them, and of paying the balance to the truster. The three bonds in question were all granted by purchasers of portions of the trust property in security of payment of part of the purchase price. The bond for £3000 was taken in the names of two of the trustees—James Cook and Archibald Cuthill—but *privatis nominibus*, and not as trustees. The bond for £400 was also taken in the names of Cook and Cuthill and of another trustee—Henry Paul—but also as individuals and not as trustees. The bond for £1925 was taken in names of the same three trustees, but expressly as trustees. It was not disputed that the bonds were in fact the property of the trust. Cuthill became bankrupt and was sequestrated, and a Mr Jeffrey was appointed trustee on his sequestrated estates. The two solvent trustees—Cook and Paul—raised an action in which, *inter alia*, they claimed right to the three bonds. The trustee on Cuthill's sequestrated estate put in defences, in which he maintained that as the bonds for £3000 and £400 were taken in favour of Cuthill as an individual, and appeared so on the register of sasines, he, on behalf of the creditors, was entitled to the benefit of them to the extent of Cuthill's share, and that the alleged trust was of no relevancy in a question with him.

This plea was not given effect to in the Court of Session, in which an interlocutor was pronounced finding "that the sums contained in the securities are applicable, in the first place, for payment of the outstanding debts of the trust;" in the second place, in relief of any superadvances made by Cook, &c., thereby affirming, as it appears to me, that the bonds for £3000 and £400, although standing partly in the name of Cuthill as an individual, were yet to be considered as the property of the trust, and liable for the trust debts. The case was, however, appealed by Jeffrey to the House of Lords, with the result that this interlocutor was varied, and it was declared that the "said appellant is entitled and ought to receive one-third part or share of the principal sum of £400 contained in the heritable bond by William Ewing in the said proceedings mentioned, with a proportionate part or share of such interest as may have been received or may be due and payable thereupon." No reasons are given for the judgment, but the judgment itself appears to me clearly to import that the right of Cuthill's trustee was held not to be affected by the latent trust in the person of Cuthill. I see no other ground on which the judgment can be rested.

But if this be so, the question occurs, why the same principle was not applied to the bond for £3000, which was also taken to the trustees as individuals. I have read the session papers, and the reason is no doubt that the bond for £3000 was not granted for an independent debt of that amount, but merely in corroboration for a prior debt of £3000 which had been created a real burden in favour of the trustees over the portion of the trust property sold by them to the granters of the bond, and with which it was identified.

It appears to me, therefore, that the present question was decided in the House of Lords in the case of *Jeffrey* v. *Paul*, and I am of opinion—both on authority and principle—that the trustee on M'Kay's sequestrated estate is entitled to the subjects in question free from the latent trust in the person of the bankrupt.

LORD M'LAREN—Without attempting a full discussion of the question in issue, I should desire to state my reasons for respectfully but very firmly dissenting from the judgment proposed.

If it were possible to approach this question uninfluenced by the supposed tendency of previous decisions and professional impressions, I can hardly conceive that a court of justice would give countenance to the proposal to divide trust property amongst the creditors of a trustee.

It is true that where a trustee is infeft in trust-estate on an *ex facie* absolute title, and afterwards sells or mortgages this property, dealing with it as his own, the title of the purchaser or mortgagee will be sustained against the competing claim of the truster or beneficiary. For this apparently inequitable conclusion two reasons may be given—First, because it is the act of the truster that has enabled the trustee to commit the fraud, and it is therefore considered proper that the loss should fall upon him rather than on the innocent purchaser or mortgagee who has advanced his money in reliance on the apparently unqualified title of the granter of the conveyance to him. The second reason which is sometimes given is, that the security of

our system of records requires that a purchaser on the faith of the records should be kept safe. But this second reason does not appear to me to add anything to the force of the first reason, and this is evident when we consider that an *ex facie* absolute holder of personal estate, such as shares or moveable bonds, may also give a good title to a purchaser, although in this case the element of registration in a public register is wanting.

Passing to the case before us of a bankrupt trustee whose estate is to be divided amongst his creditors, I should imagine that the property available for distribution would be the property which the bankrupt holds in his own right, and that on proof that any estate vested in the bankrupt is trust-estate it ought to be struck out of the sequestration. It is admitted that this is the law in relation to personal estate, and no reason has been given satisfactory to my mind why it should not be the law in relation to heritable estate which may be vested in the bankrupt in trust. The rule is expressed in older decisions in the maxim that creditors and adjudgers take the debtor's estate *tantum et tale* as it stands in his person. In other words, they take the estate affected by all latent equities which were binding on the bankrupt himself. This rule is illustrated by the leading case of *Thomson* v. *Douglas, Heron, & Company*, M. 10,229. Thomson disponed his lands to a trustee in trust that he might sell the same and apply the proceeds "for the disponer's behoof." The disponee omitted the qualifying declaration from his title, and used the estate as a fund of credit for himself, borrowing money on heritable security, and afterwards became insolvent. The heritable creditors were held to have a good title against the truster, but the truster's right was held to be preferable as against adjudging creditors; and it was observed on the bench that "by decisions which for the stability of the law ought not to be departed from, they (the adjudging creditors) must take the right of their debtor *tantum et tale* as it was in his person."

It appears that some doubts have been expressed as to the soundness of this decision by Professor Bell in his Commentaries (5th ed.), 282-3.

I have the greatest respect for the views of Professor Bell, but I do not hold him to be infallible. I will add, that I am not satisfied that in the passage referred to Professor Bell was contemplating the case of proper trust-estate, because the case he puts is that of a disponee who is "under a relative personal obligation," and the case he quotes—*Wylie* v. *Duncan*—is not a case of a trust qualifying the title of the trustee, but is the case of a bankrupt disponee who had purchased an estate out and out, at the same time coming under a collateral personal obligation to reconvey on demand. The case is correctly summarised by Professor Bell himself in a footnote thus—"*Pactum de retrovendendo* contained in a back-bond was held merely personal, and not effectual against creditors." From my point of view the decision in *Wylie* v. *Duncan* is unimpeachable. The bankrupt's title was essentially an individual title, and did not lose that character by reason of his having come under a separate and independent obligation (which might never be put in force) to reconvey on demand. But the estate of a trustee does not depend on the future action or resolution of the truster. It is essentially qualified, and it is as much the right of the trustee to require the truster to take back the estate and repay him his advances, as it is the right of the truster to call for a reconveyance on tendering payment of the advances. If the Judges who decided *Wylie* v. *Duncan* meant to disaffirm the principle which was solemnly laid down in the case of *Douglas, Heron, & Company*, it is extraordinary that the report should contain no trace of such an intention. The two cases appear to me to be quite consistent, and the principle is this, that where the bankrupt's right is qualified, the creditors take subject to the qualification, but that creditors are not affected by separate personal obligations which do not qualify the estate and are only intended to bind the disponee personally.

Since 1803, when the last of these cases was decided, I cannot find that this question has been the subject of direct decision. But there are two decisions of the House of Lords in which it has been raised.

In *Jeffrey* v. *Paul*, 1 S. & M'L. 767, as I read it, the right of the truster was not in question at all. There were three trustees, who together had made advances exceeding the value of the estate, and the competition was between these trustees. Now, it is a known principle of trust law that every trustee has a lien over the trust-estate for his advances, and where trustees have advanced money in different proportions, there may be difficulty in explicating their rights over the insolvent estate. A decision on such a question would not in my judgment be an authority applicable to the present case. If Lord Brougham had supposed he was dealing with so large a question as the claim of the creditors of a bankrupt trustee to divide the trust-estate amongst them, it is inconceivable that the noble Lord would have decided the case without making a single observation regarding this point. But if the case involved nothing more than the settlement of rights arising out of the trustee's lien (which I take to be its real nature), it did not call for any discussion of matters of principle, and in this view the case has no bearing on the present dispute. I understand that some of your Lordships take the view that the facts in *Jeffrey* v. *Paul* raise this question, and that the judgment of the House of Lords can only be explained or supported by supposing that the House did not recognise the latent trust. If this view does not truly involve an assumption of the question—as I think it does—it is at least open to the observation that the precedent proposed to be established is not founded on

any expression of judicial opinion to be found in the case. Now, as I see no reason to believe that Lord Brougham really entertained the opinion that is attributed to him, I cannot regard this case as an authority for the proposition for which it is cited.

The other case in the House of Lords is *Fleeming* v. *Howden*, L.R., 1 Sc. App. 372. In that case Lord Westbury observed—"The right of a trustee under a sequestration is very different from the right of a singular successor, for it is a rule common both to English and Scotch bankruptcy law that the trustee or assignee takes the property of the bankrupt subject to all the rights and equities that affected it at the time of the bankruptcy. But the singular successor is not bound by a trust or duty of which he had no notice. The trustee under a sequestration is in the same position as a gratuitous alienee. He takes such estate or interest only as the bankrupt can lawfully convey" (p. 382). Similar observations, though less pointedly expressed, are to be found in the opinions of Lords Cranworth and Chelmsford. It was argued to the House of Lords that the vesting clauses of the Scottish Bankruptcy Act gave to the creditors of the bankrupt all the estate that was vested in him in title. The House rejected that construction, and held that the statute only gave the creditors what was vested in their debtor as of right, Lord Chelmsford observing on the words "estate capable of being affected by diligence or attached for debt," that these words are "nothing more than a general description of the species of property which the sequestration is to embrace." This leads me to observe that the present question is not, as I think, in any way touched by the vesting clause of the Bankruptcy Act. Suppose the trust purposes to be engrossed in the trustee's title. On his bankruptcy the vesting clause takes effect on the property. But then the estate acquired by the creditors in virtue of that clause is of no value to them, because it is a mere legal estate affected by a trust. The question here is, whether the right is not so qualified where the conditions of the trust are contained in a separate writing? Now, the Bankruptcy Act does not profess to solve this question, but leaves it to be determined according to known principles of law and equity. Exception has been taken to the expression used by Lord Westbury, that "the trustee under a sequestration is in the same position as a gratuitous alienee." It may be that the words were not the best that could be chosen to express the quality of the right of creditors in the estate of their debtor. But there can be little doubt as to Lord Westbury's meaning. He meant to emphasise the distinction that creditors in a bankruptcy are not in the position of a purchaser who has advanced money on the faith of the seller's or mortgagor's title, but are only in the position of a disponee who takes his debtor's estate for whatever it is worth in security or satisfaction of a pre-existing claim. Lord Westbury uses the words of the statute when he says that the trustee in a sequestration takes such interest as the bankrupt might "lawfully convey." His Lordship evidently understands these words as meaning such estate as the bankrupt could honestly convey—not as meaning that the creditors would be in the position of a purchaser to whom the bankrupt had fraudulently conveyed. A fraudulent conveyance is not a "lawful" conveyance, although it may have the effect of vesting the property in a purchaser who has paid a full price, and who was not cognisant of the fraud. Why creditors should be put in this position I am unable to understand. It has been pointed out that in the case of *Fleeming* v. *Howden*, although the right was not perfected by being recorded in the register of entails, yet creditors might have discovered by examining the register of sasines that the entail contained a clause of devolution, and that therefore the heir in possession after succeeding to the peerage held the estate as a *quasi*-trustee for the next heir in succession. It may be that this circumstance renders the case of *Fleeming* v. *Howden* a less direct authority than it otherwise would be for the doctrines which are there laid down. But this specialty was fully in view of the Lords who took part in the decision, and while they certainly refer in their judicial opinions to the specialty, they nevertheless profess to lay down a general rule of bankruptcy law in the passages which I have referred to.

I may conclude by observing that I am unable to see how any practical inconvenience or injustice to anyone can result from the recognition, in a question with creditors, of the inherent qualification of the title of a trustee to trust-estate. Creditors in general do not give credit to a bankrupt in reliance on any supposed presumption that property standing in his name is his private property. Unless they are going to advance money on heritable security, they know nothing of his title-deeds, and trust only to his personal credit. The security offered by our system of records is an excellent thing to those who desire to take advantage of it, and I should be the last person to wish to impair its efficiency. But it is not at all involved in the present case. No just expectations can be disappointed by withdrawing from a sequestration estate to which the bankrupt never had anything more than an administrative title, and I should think less highly than I do of our system of property law if I believed that it compelled us to give to creditors a right which the bankrupt himself could not conscientiously give, and which he never professed to be able to convey.

LORD KINNEAR—If this were an open question, I should have thought that a great deal of weight must be attached to certain considerations which have been stated by Lord M'Laren. But I take it to be settled law that a trustee for creditors under the Bankruptcy Acts takes the heritable estate in which the bankrupt was in-

feft subject to no limitations or burdens which do not appear on the face of the record, and therefore that his right is in no way affected by a latent trust such as that which is alleged in the present case. I think the question arises in a somewhat simpler form than in the earlier cases to which your Lordships have referred, because although the present Bankruptcy Act is in substance the same as the previous statutes for the same purpose, still the vesting clauses are not expressed in the same way as the corresponding clauses of the previous Acts; and I think that the vesting clauses of the present Act are so expressed as to leave very little room for difficulties that may have been found, in the construction of the previous statutes. The trustee's right appears to me to be measured by the heritable diligences which are specified in the second sub-section of section 102 of the Bankrupt Act of 1856. The heritable estate under that sub-section is vested in the trustee to the same effect "as if a decree of adjudication in implement of sale as well as a decree of adjudication for payment and in security of debt subject to no legal reversion had been pronounced in favour of the trustee and recorded at the date of the sequestration." Now, as I understand the argument, it has not been suggested that any question could be raised as to the effect of a duly recorded decree of adjudication in implement of a contract of sale. It is admitted to be well settled in law that no condition or obligation not incorporated in the infeftment can have any effect in a question with a purchaser in good faith from a feudal proprietor. A proprietor infeft as of fee by an absolute title is in a position to make a perfectly effectual contract for the sale of the estate, notwithstanding that his right may in fact be qualified by some latent trust or personal obligation. It is of no consequence whether the purchaser may have completed his title by a voluntary or by a judicial conveyance, provided that he has taken infeftment before the true owner has taken the necessary steps for vindicating his right. But the statute gives to the trustee for creditors all the right which the common law gives to a *bona fide* purchaser. It appears to me to follow from the enactment which I have quoted, that heritable property in which a bankrupt stands infeft by an absolute title, so that it could be made the subject of an effectual contract of sale, and adjudged by the purchaser in implement of such a contract, must necessarily be vested in the trustee by force of the statute to the same effect as it would be vested in the purchaser by force of his decree of adjudication.

But while it is very material to observe that the trustee is in the same position as if he had adjudged the bankrupt's heritable estate in implement of a contract of sale, I am disposed to think that the other heritable diligence which is specified in the second sub-section would be equally effectual, because in bankruptcy an adjudger for debt stands in as good a position as an adjudger in implement. Mr Bell states the law thus—"As in bankruptcy there is no true distinctio namong creditors, who hitherto held nothing but a mere personal obligation, whether that obligation be to pay money, or to convey land, or to perform any other specific act—a creditor for a money debt being just as well entitled to have direct execution against the debtor's land as one who holds an obligation from the debtor to convey land to him; so a creditor obtaining an adjudication in implement will not have preference over a creditor for debt who, with a decree of adjudication in payment, has previously completed his security by sasine." It is true that there was at one time some doubt whether a distinction in this respect ought not to be taken between purchasers and adjudgers for debt; and the case of *Thomson* v. *Douglas, Heron, & Company* has been cited as an authority in support of that distinction. It is said to have been decided in this case that an adjudging creditor will be affected by a latent trust which will not be effectual against a purchaser. The decision has been overruled on the assumption that this is its import. But it does not appear to me that that case could very well be accepted as an authority upon the point even if it had never been challenged. In the report of the case in the Folio Dictionary, it is stated that the point now in question was very little discussed, as the fund was said to be exhausted by preferable debts, and that the Court did not mean to lay down a general rule. I think the fuller report (M. 10,229) seems very much to bear out that statement in the Folio Dictionary. It appears that there were two specialties upon which it is quite possible that the case might have been decided without trenching in any degree upon the doctrine that neither adjudgers nor purchasers shall be affected by the latent obligations of a proprietor infeft. In the first place, the adjudging creditors had not taken infeftment, and therefore they had no real right in the land. In the second place, the latent trust which was held to be effectual against them, but ineffectual against disponees, had been omitted from the trustee's infeftment by fraud, but it was a trust for sale, so that the trustee's title to dispone could not have successfully challenged if the trust had been expressed in the sasine. A disposition had been granted by a proprietor infeft to his man of business, "heritably and irredeemably, in order that he might sell the estate and apply the proceeds for behoof of the granter." The disponee executed the procuratory of resignation, and obtained a Crown charter, but omitted to insert in the procuratory the above qualification of his right, so that it did not appear in the record. He thereafter disponed the estate in security of a loan, and certain of his creditors to whom he had given no such security adjudged the estate as being the property of their debtor. The original owner brought an action for the reduction of his trustee's infeftment, and all the rights derived from him; and his argument was that his trustee's assumption of the

character of an unlimited proprietor, by the omission to engross the conditions of his right in the procuratory of resignation, was a fraud which must import *labes realis*, and invalidate the titles derived from him, as well as his own title. Now, that would have been a perfectly sound argument if the Court had thought the conveyance in trust disabled the trustee from disponing in security of his own debt. It proceeds upon a distinction which is explained in the very learned and valuable dissertation on this subject which Baron Hume has appended to his report of the case of *Calder* v. *Stewart*. Baron Hume expounds very clearly the true ground of distinction between those cases in which purchasers or creditors of a proprietor infeft will be affected by latent defects or limitations of his right, and those cases in which they will not be so affected. He gives as an illustration the case of a proprietor infeft disponing his lands really in trust but in terms absolute, and taking at the same time a back-bond from his disponee. In that case he says a purchaser from the disponee cannot be affected by the personal obligations of his author, because the author is infeft as absolute fiar with the concurrence and by the act of the true owner, and his absolute right is therefore unqualified by any limitation which enters the record or affects the estate. But then, on the other hand, if the author's feudal investiture, although *ex facie* regular, is intrinsically vicious, as involving falsehood in its texture, or forgery, the title so acquired by fraud will be altogether ineffectual against the true owner. Now, in *Thomson* v. *Douglas, Heron, & Company*, the Court gave effect to that distinction, for what the Judges are reported to have said is this—"If a disponee omit to engross in his infeftment those clauses which were meant by the disponer to limit or qualify his right, the disponer by this fraud can in no shape be hurt. The right will not be unlimited, because what was truly bestowed on the disponee was only a limited right. But in the present case the disposition imported absolute and unlimited property, although as a counterpart of this grant there arose a personal obligation on the disponee to render account, and whether this has been justly fulfilled or fraudulently violated, the right of property remains unaffected." The question therefore was considered on the assumption that the infeftment had been taken, as it ought to have been taken, in the same terms as the conveyance; and what was decided was merely this, that a disponee with a power of sale but under an obligation to account may infeft a lender as well as a purchaser, neither having any concern with the application of the price or of the loan. It was held that adjudging creditors were in a different position, and must take *tantum et tale* as the right stood in their debtor. But I apprehend that if that observation is to be referred to the particular facts of the case in which it is made, it means *tantum et tale* as the right would have stood in the debtor had his title been truly and honestly completed; and in that case it might very well be held that the diligence of an ordinary creditor for an unsecured debt would not carry land that was held under a title qualified as in the case supposed, although it might at the same time be held that conveyances to purchasers and lenders upon security of the estate were perfectly effectual. I am quite unable, therefore, if there were nothing else to be said, to accept the decision in the case of *Douglas, Heron, & Company* as a leading authority upon the point for which it has been cited. But it must be admitted that it has been referred to by subsequent writers, and in subsequent decisions, as a case that was intended to settle the general point. But if that be the import of the decision, I think it clear that its authority has been very distinctly and decidedly rejected. Mr Bell says in a passage to which Lord Adam referred, that the decision was disapproved and departed from; and that appears to me to be a perfectly accurate statement. It appears to me that the case of *Duncan* v. *Wylie* and the case of *Douglas, Heron, & Company* cannot stand together if the latter case means that land held by a title *ex facie* absolute, but subject to a latent and personal obligation to account as for a trust, cannot be adjudged by the creditors of the proprietor infeft. In *Douglas, Heron, & Company* the true owner conveyed his estate to a trustee to sell it for him and account to him for the proceeds. In *Duncan* v. *Wylie*, the owner remained in possession of the estate and granted a disposition in terms absolute, but really in security to a creditor, who was to pay himself, and was bound by the terms of an extrinsic agreement to reconvey. Both of these were cases which involved not a direct but a constructive trust in the ostensible owner of the estate, and therefore I cannot doubt that Mr Bell was right in saying, on the assumption to which I have referred, that they are inconsistent. If I am right in the view I have taken of *Douglas, Heron, & Company*, they are quite reconcilable. But in that view *Douglas, Heron, & Company* has no bearing upon the present question.

But Mr Bell does not stand alone. The doctrine laid down by him is stated with very great clearness and precision in the dissertation of Baron Hume to which I have already referred. He lays down the doctrine in the clearest possible terms, and illustrates it, as I have observed, by the case of a conveyance *ex facie* absolute qualified by a back-bond of trust; and then he goes on to say that the position of a trustee for personal creditors, infeft under a judicial sequestration of their debtor's estate, had been at one time thought to be different in this respect from that of purchasers obtaining a conveyance, but that it was now settled, on the contrary, that they stood exactly in the same situation, and as his authority for that statement he quotes *Duncan* v. *Wylie* as a decision of which he clearly approves.

The whole question was made the

subject of elaborate discussion in the very important case of *Mansfield* v. *Inglis*, both here and in the House of Lords. There was a point in that case with which at present we have no concern—the question how far the Act of 1696, cap. 6, was applicable to the circumstances. But both here and in the House of Lords it was thought necessary to determine whether the effect of the Bankruptcy Statutes was to convey to a trustee for creditors heritable estate which the bankrupt himself could not convey to a lender or a purchaser without fraud; and in considering that question, the effect which our law allows to an unqualified infeftment was defined after full examination of the previous decisions. The conclusion at which the majority of the Court arrived, as expressed in the opinion of Lord Corehouse, was that a trustee in a sequestration, like a purchaser, takes the heritable estate free from all qualifications and limitations which do not appear on the record. Lord Corehouse observes—"It is said that although a *bona fide* purchaser is exposed to no objections but those which constitute a radical defect in the title of the seller, or in feudal property which appear on the face of the records, a creditor adjudging stands in a different situation and takes the right adjudged subject to the conditions and under the equities, though latent, by which it was qualified in the person of the debtor, or, in technical phraseology, he takes it *tantum et tale* as his debtor had it. That this was at one time the doctrine of the law of Scotland, though not to the extent to which it is now maintained by the defender, may be granted. But the law has been settled otherwise by a numerous and consistent train of decisions, which are not now to be called in question." There can be no doubt that the case of *Douglas, Heron, & Company* was brought under consideration of the Court on this occasion, because it is mentioned in the opinion of the dissentient Judges as an authority against the conclusion to which the majority of the Court arrived. In the House of Lords the Lord Chancellor states the general rule of law quite as emphatically as Lord Corehouse states it in the Court below. He says—"Much of the argument in this case seems to have been rested on the analogy of our equitable estates in England, but the Scotch law holds no resemblance now with the law of England in this particular." And then his Lordship goes on to say—"This consideration too is an answer to the argument that the trustee takes the estate of the bankrupt *tantum et tale*. He does so, and the estate was not affected in the bankrupt's hands by the personal obligations which were sufficiently valid and binding against the bankrupt. Between the bankrupt and the trustee there can be no privity such as to affect the latter with any personal obligation incurred by the former, and the land not being affected by such obligations the trustee taking it *tantum et tale* takes it discharged of any real burden." I think the case of *Jeffrey* v. *Paul*, which was decided by the same Lord Chancellor within a very few weeks of the decision of *Mansfield* v. *Inglis*, is an authority to the same effect; and I think with Lord Adam, for the reasons he has given, that it is a direct authority to the effect that the doctrine in question must apply to the case of a latent trust, just as clearly as to the case of any personal obligation arising from contract. I cannot see that we can draw any useful inference from the brevity of the Lord Chancellor's opinion as it is reported. It is evident from what is stated by the reporter that the Lord Chancellor did give his reasons for his judgment, although the reporter does not tell us what they were, because in the few words quoted his Lordship says he is now giving effect to the reasons he has stated previously. But however that may be, the argument shows that the very point which had been rejected in *Mansfield* v. *Inglis*, that creditors take *tantum et tale* as their debtor held, was again urged upon the House in the case of *Jeffrey* v. *Paul*, and again rejected. I think, therefore, that the latter case is directly in point; and apart from that decision I must say I should have held the doctrine to be well established by authorities in our own books, which, as Lord Corehouse says, are not now to be called in question.

It has been said—and Lord M'Laren is disposed to give effect to the argument—that there is a material distinction between the case of a personal obligation arising in any other way and a personal obligation arising from a trust reposed by the true owner of land in the ostensible owner. I confess I am unable to see any solid ground of distinction between these two cases. Every obligation which might have entered the record, but which the creditor in the obligation is content to leave standing upon the personal responsibility of the proprietor infeft, necessarily involves a trust in the latter; and accordingly Lord Westbury says, in the passage to which Lord Adam referred, that every obligation made in respect of land creates a trust. The true distinction is between those obligations which by their constitution are merely personal, and those, on the other hand, which have either been expressed in the title to land, or have only been omitted from the title by fraud, and in violation of the contract upon which they rest. It is well stated by Baron Hume. If the ground of challenge affects the honesty and validity of the title, so as to follow the land into whose hands soever it may come, then it may be effectual whether it enters the record or not; but if the ostensible owner is infeft as absolute fiar of the land without fraud or deceit, and under a title which the true owner has voluntarily conferred upon him, neither his disponees nor adjudgers on him will be affected by conditions or limitations which have not been made to affect the land itself. It is said that a trust operates as an inherent qualification of the title of the trustee. But an inherent qualification of

the seller's right and title must affect the subject in the hands of a purchaser. An inherent trust which affects the title of a bankrupt, and yet which does not prevent him from making a conveyance contrary to the trust, is a contradiction in terms. Now, it is admitted that a *bona fide* purchaser would take the subjects in question free from all limitations or qualifications not expressed upon record, and it follows that these qualifications do not affect the legal right and title of the bankrupt, whatever validity they may have as personal obligations upon the bankrupt himself.

The case of *Fleeming* v. *Howden* does not appear to me to present any real difficulty, for the reason stated by Lord Adam. All the learned Judges who took part in the decision based their judgment on the ground which Lord Adam has stated. Lord Westbury, indeed, uses some general expressions which might have a wider scope, but these expressions must be construed with reference to the case in which they were used, and if they should be read as having any wider effect than was necessary for the judgment in that case, then they would be inconsistent with the law previously laid down by the House of Lords in the case to which I have referred. But I think Lord Westbury makes it clear that it was not his intention to decide any other question except that which was before the House, because he refers to the words of the statute, by which it is provided that if any part of the bankruptcy estate be held under an entail or by a title otherwise limited, the right vested in the trustee shall be effectual only to the extent of the interest in the estate which the bankrupt might legally convey or the creditors attach. Now, according to that enactment the trustee's right depends upon the bankrupt's title, and his consequent capacity to make a legal and effectual conveyance on a sale; and in *Howden's* case the House of Lords held that the bankrupt could not have sold. But if that criterion be applied to the present case, the trustee must prevail, because nobody disputes that the bankrupt might have given a good legal conveyance to a purchaser. Of course it is not disputed that his doing so would have been a fraud, but I take it to be settled law that notwithstanding that he could not himself have conveyed to a purchaser or to an individual creditor without fraud, the statute will carry his estate to the general body of creditors, to be equally distributed amongst them all. I therefore concur in the conclusion at which Lord Adam has arrived.

Lord President—I concur in the judgment of Lord Adam and also in the views of Lord Kinnear, and I should hardly have thought it necessary to add anything to what has fallen from my two colleagues but for the importance of the case and the fact that there is a division of opinion on the bench, but in these circumstances I shall beg leave to add a few observations.

It appears to me that there is a principle in the law of Scotland which affirms that where a party has a legal title in writing, whether he be disponee or assignee, and that title has been perfected by sasine in the one case and intimation of the assignation in the other, the title is not defeasible by reference to any latent equities. I say that principle exists in the law of Scotland outside altogether of the statutory rules of bankruptcy, and there is no better illustration of this than in the judgment of the House of Lords in the case of *Sommervails* v. *Redfearn*, 1 Dow's Rep. 50. In that case a share in a joint-stock company had formed the subject of an assignation which was duly intimated. The cedent had held the subjects originally as trustee for another party, but that did not appear upon the face of any title, and particularly did not appear on the face of the title which he gave to his assignee. In these circumstances the House of Lords held that the assignee having intimated his assignation could not be affected by any latent trust or latent equity. Lord Eldon, who along with Lord Redesdale gave the judgment in that case, puts the case thus—"There were cases of back-bonds upon assignments of back-bonds, but he had looked very anxiously and carefully to see whether there were any cases where latent equities had prevailed against intimated assignations, but he had found none. An assignation would even defeat an arrestment if intimated before the arrestment, as an arrestment was only a prohibitory diligence. If latent equities were suffered to prevail against assignations, the effect would be that nothing could ever be assigned, for so long as their Scottish neighbours retained any part of their characteristic shrewdness, they would never take an assignment if they were aware that by means of latent defects such assignments might go for nothing." Now, it is very true that that question arose out of the bankruptcy of the cedent, but it occurred so far back as the year 1813, before any of the new statutes—if I may so call them—of bankruptcy were passed by the Legislature, and I think it proceeds entirely from beginning to end not upon any reference or allusion to the bankrupt law then in existence, but entirely upon the general principle to which I have referred.

Now, if that be the general principle of the law of Scotland, it seems to me that a reference to the statutory rules of bankruptcy shows that that principle has been enforced and extended by these rules. I am not sure that people always attach an adequate value to the words of the vesting clause in the Bankruptcy Act of 1856, and I rather think they were not mentioned in the course of the argument, but I take leave to call attention to them for the purpose of seeing what is the nature and extent of the title that a trustee in a sequestration obtains by means of this clause. As regards the heritable estate of the bankrupt, he is said to be vested to the same effect as if a decree of adjudication in implement of sale, as well as a decree of adjudication for payment and in security of debt, subject to no legal reversion, had

been pronounced in favour of the trustee, and recorded at the date of the sequestration." Now, that seems to me to be as comprehensive a title as any statute could possibly confer upon a trustee. He has an adjudication in implement of sale. That immediately constitutes an absolute title to the property. He has a decree of adjudication for payment and in security of debt, subject to no legal reversion. That is to say, he is in the same position as an adjudger upon an adjudication whose legal has expired. I can hardly conceive any stronger title to heritage than that is. So in like manner as regards the moveable estate of a bankrupt, although that is not in question in the present case, it is transferred, "so far as attachable for debt, to the same effect as if actual delivery or possession had been obtained or intimation made at that date, subject always to such preferable securities as existed at the date of the sequestration and are not null or reducible." Now, could anything more forcibly enact that the principle embodied in the case of *Sommervails* v. *Redfearn* should have effect as regards the vesting of the moveable estate of the bankrupt in the trustee. It is to be vested in him, "so far as attachable for debt," and all moveable estate is attachable for debt unless something in the title—something that is published and made known to the world—appears to prevent that moveable estate from being attached and from being brought within the operation of the sequestration. But with that single exception everything in the nature of moveable estate attaches absolutely to the trustee.

I think the reference to the vesting clause of the statute is very conclusive of the whole of this matter. But a great many cases have been referred to which I am not going to enumerate. They have been referred to by my brother Lord Kinnear so far as of importance in the present case, but I take leave to observe that the case of an adjudger is a totally different case from that which we have to deal with here. The cases which refer to adjudications for debt are cases dealing with adjudications in which the legal had not expired, and therefore they gave no light at all. But in the present case we have a statute to guide us and to tell us that the adjudication in favour of the trustee in a sequestration is an adjudication which has no legal, or is the same as one in which the legal has expired, and so cases of adjudication where the legal has not expired, and where there is after all nothing but a decree of adjudication, which may form a good security upon the estate, do not help us.

It seems to me that the case of *Fleeming* v. *Howden* has been somewhat misunderstood, not by my brethren who concur with me in this case, but elsewhere. The heir of entail in possession in that case, Mr John Howden, was infeft of the estate, and upon the face of his title it appeared quite clearly that he was not a fee-simple proprietor. No doubt, as the entail had not been recorded, there were certain infirmities in his title as proprietor, but there was nothing in the entail that made his right more extensive than it would otherwise have been, or more extensive than it appeared to be on the face of his recorded infeftment. Therefore that case appears to me to have no application here, unless it be that there is in the opinion of Lord Westbury a doctrine which I must say I find for the first time in that noble and learned Lord's judgment, and which I have always had some difficulty in completely understanding. He says that "the right of a trustee in a sequestration is very different from the right of a singular successor, for it is a rule common to both English and Scotch bankruptcy law that the trustee or assignee takes the property of the bankrupt subject to all the rights and equities that affected it at the time of the bankruptcy." Now, I take upon me to question the soundness of that law so far as it regards the existing Bankruptcy Statute. The right of a trustee in a sequestration is not different from the right of a singular successor, because he is made a singular successor *vi statuti*. He is in the same position as if he had an adjudication in implement of sale, and an adjudication for debt with an expired legal, consequently the rights of property are vested in him just as completely as the right of any singular successor. His Lordship goes on to say that "the trustee in a sequestration is in the same position as a gratuitous alienee. He takes such estate or interest only as the bankrupt can lawfully convey. So in England the assignee only as the bankrupt can lawfully depart withal. The force of the two expressions is the same, and the implied conveyance to the trustee or assignee ranks no higher than a gratuitous alienation." Now, what is meant in that passage of Lord Westbury's opinion by gratuitous alienation? If it means that the trustee gave nothing for the property, but has right to it by the operation of the Bankruptcy Act, then I assent to it, but it is irrelevant. But if, on the other hand, it is meant in a more substantial sense to express that there is no onerous consideration for the transference of the right of property from the bankrupt to the trustee, that admits, I think, of a very simple answer. The onerous consideration there is the vesting in the trustee of the estate for the purpose of paying the debts of the bankrupt. That I apprehend to be a most onerous consideration. The estate is given to him in trust no doubt, but it is a trust for a purpose, and for a purpose expressed, and the onerous consideration of a conveyance in trust is generally to be found in the trust purposes. The trust purposes here are that the debts of the creditors shall be paid and the bankrupt ultimately discharged. I cannot see how it is possible in any view to reconcile the *dicta* of Lord Westbury with the judgment pronounced by the Lord Chancellor and Lord Chelmsford in the same case, and still less are his *dicta* reconcilable with the precise terms of the Bankruptcy Act of 1856. I have thought it right to add these observations to what your Lordships have said—not that

I think the views of your Lordships require any strengthening, but that I might pay due deference to the opinion of my brother on the left and to the importance of the case.

The Court found and declared that the second party, as trustee on the sequestrated estate of Daniel Smith M'Kay, took the subjects in Balfour Street, Edinburgh, which were vested *ex facie* absolutely in the bankrupt, free of the latent trust in favour of the first parties, and that the first parties were entitled only to rank on the sequestrated estate for the value of said subjects, and were not entitled to recover the same from the second party as their own property: Further, found and declared that the surplus price of said subjects belonged to the second party as trustee foresaid, and decerned.

Counsel for the First Parties—H. Johnston—Shennan. Agents—Watt & Anderson, S.S.C.

Counsel for the Second Party—Lorimer—Hunter. Agents—Morton, Smart, & Macdonald, W.S.

HOUSE OF LORDS.

Friday, July 17.

(Before the Lord Chancellor (Halsbury), and Lords Watson, Herschell, and Morris.)

HOLMES OIL COMPANY *v.* PUMPHERSTON OIL COMPANY.

(*Ante*, vol. xxvii. p. 563, and 17 R. 642.)

Contract — Agreement — Arbitration — Award — Corruption — Fraud — Reduction.

By agreement between the parties in 1884 it was provided that the Holmes Oil Company should sell to the Pumpherston Oil Company the whole crude oil distilled by them for a period of three years; that the price to be paid therefor should be the one-half of the average net naked price received by the Pumpherston Oil Company for the products obtained by them from the crude oil; that this average net naked price should be ascertained by an accountant named, acting for and on behalf of both parties, who should be bound to accept the Pumpherston Oil Company's business books "as final and conclusive evidence of the varying prices received by them during the year for the said products;" and that all questions as to the meaning or due implement of the contract should be referred to an arbiter named. One of the products obtained from crude oil is paraffin scale, which itself yields hard scale and soft scale, of which two the former is considerably the more valuable commodity. In 1886 the Holmes Oil Company objected that the accountant had included in his report products not sold by the Pumpherston Oil Company but retained by them in stock. The arbiter sustained the objection and declared as follows:—"In ascertaining the net naked price it is not competent under the agreement to take into account a valuation of unsold stocks or anything else than prices received during the year." The arbiter thereafter refused a motion by the Holmes Oil Company that the accountant should be ordered to furnish the proportions of hard and soft scale sold by the defenders during the past year, and the prices obtained therefor.

The Holmes Oil Company again objected to the report for 1887, and maintained to the arbiter that the Pumpherston Oil Company had only sold the soft scale, and had retained for their own purposes the hard scale, worked it into other products, and sold it beyond the market price of hard scale, and that the hard scale though not sold must be included in fixing the average price. The objectors moved for a proof, but the arbiter disallowed it, and thus disposed of the objection—"The admissibility of taking into consideration the different qualities of scale was decided by me in the negative in a previous stage of the reference. . . . In the absence of any allegation of fraudulent dealing, I think the principle must be followed of estimating the price according to the amount received from the various products during each year."

The Holmes Oil Company sued the Pumpherston Oil Company for reduction of the decree-arbitral and the accountant's reports on the grounds (1) that the arbiter had acted corruptly in not allowing proof, and (2) that the defenders obtained the reports by fraudulently and falsely stating to the accountant that the amount of crude scale actually appearing in the books as sold consisted in fair proportions of hard and soft scale. There was no averment of error either in the accountant's statements or his calculations.

Held (*aff.* the decision of the Court of Session) that the arbiter had pronounced judgment on a question fairly raised by the parties before him, and (2) that the reporter had settled the average price in conformity with the provisions of the contract; that therefore the averments of the pursuers were irrelevant, and the action fell to be *dismissed.*

This case is reported *ante*, vol. xxvii. p. 563, and 17 R. 642.

The Holmes Oil Company appealed.

At delivering judgment—

LORD CHANCELLOR—My Lords, I agree with a remark which was made by the learned counsel as to doing justice in this case, and I have approached the case with the strongest possible desire if I could