of a particular character the right to sue for the reduction of preferences falling within the scope of the Act, and it gives the right to nobody else. It therefore follows that nobody can sue under it unless he can set forth a title giving him right to sue as a prior creditor or as the representative of a prior creditor.

Now, the pursuer sets forth no such title. He is neither the assignee of the general body of creditors nor of particular creditors. He sets forth as his title to sue that he is trustee for creditors, but the averment in fact on which that title is supported is, that the insolvent granted a general conveyance in his favour of his whole estate in order that it might be divided among his creditors. It is very clear that under such a conveyance the trustee is not the assignee of the creditors, and is nothing but the assignee of the insolvent debtor. It is from the insolvent debtor alone that he derives his whole right and title. The accession of the creditors may enable the trust created by the debtor to be carried into practical effect, because, by acceding the creditors have given an undertaking that they will not take separate action for their own interest, but it adds nothing at all to the title of the trustee, nor does it add to or enlarge the rights which the insolvent has conveyed to him. The question must always be, whether the right which a trustee under a deed of this kind is seeking to enforce is included in the aggregate of the rights assigned to him by the insolvent debtor. The right which the trustee is here seeking to enforce is clearly not so included, for the insolvent himself could not set aside his own deed; and he cannot give to another a right which was not vested in himself. I agree that it is possible to put the trustee under a private deed in the same position as a trustee in bankruptcy, as regards his right to reduce illegal preferences, provided his right is derived from creditors who had themselves a good title to reduce. But there is nothing in the conveyance in question which can be construed into such an assignation by creditors.

I agree, therefore, that the defenders' first plea should be sustained.

LORD ADAM—I am of the same opinion, and only wish to say that I proceed upon the supposition and assumption that the proposed amendment had been made. It seems to me that to allow the amendment to be made and then to dismiss the case would not have been quite right.

LORD M'LAREN—I quite agree that the right to reduce preferences flows from the particular creditors who have acceded. If the deed contains such a power they by their accession are held to have conferred it on the trustee, but if the deed contains no such power, then their accession does not imply their assent to anything beyond what is contained in the deed.

The LORD PRESIDENT was absent.

The Court recalled the interlocutor of the Lord Ordinary, sustained the first plea-in-law for the defender, and dismissed the action.

Counsel for Pursuers — D.-F. Balfour, Q.C.—M'Lennan. Agents—Macpherson & Mackay, W.S.

Counsel for Defenders—Jameson—C. S. Dickson. Agents—Henry & Scott, W.S.

Thursday, March 3.

SECOND DIVISION.

[Sheriff of Caithness, &c.

HENRY *v.* SCOTT.

Minor — Curators — Fee and Liferent — Meliorations.

A son succeeded to an estate which his father enjoyed in liferent. The father, according to a custom of the district in which the estate lay, had received certain sums as deposits by the tenants, on which interest was paid. At the father's death the son was in minority, but his curators entered into an arrangement whereby they intended to take over liability for the deposits on his behalf. The father was insolvent, and the son did not represent him. After he reached majority he raised an action to set aside the transaction, which was in dependence when one of the tenants raised an action against him to remove the deposit. *Held* that liability for the deposit had not validly been imposed on the son.

Homologation—Adoption of Liability.

The son in the course of an application by him to set aside a sequestration of his estates had requested the tenant who was claiming as a creditor to consent to it being recalled. The tenant had not consented to do so. *Held* that the son had not by such application barred himself from denying liability for the deposit.

The late Dr R. T. C. Scott was liferenter of the estate of Melby under the settlement of the estate. He enjoyed the liferent of Melby from 1852 till his death in 6th January 1875. On his death his son R. T. C. Scott succeeded to the estate as fiar under the settlement of the estate; he was then about eleven years of age.

In June 1888 Umphray Henry, formerly a small tenant on the estate, raised an action against Mr Scott, concluding for £83, 10s. He stated that in 1854 he lodged £14 with Dr Scott's factor, which sum was increased by small payments till it reached £90 at January 1875, "when the account was taken over by James Garriock, factor for the defender's curators;" that £10 had been repaid on 7th January 1882; that interest had been paid till January 1887, but that no interest had since been paid.

The defender stated that Garriock had no power to borrow money or take over

obligations for borrowed money; that Dr Scott was only a liferenter, and the deposit in question was due among his liabilities and was not a burden on the defender's estate.

He pleaded—"(1) The obligation for the sum here sued for not having been granted by the defender, or those for whom he is responsible, he should be assoilzied from the conclusions of the action."

The pursuer pleaded with regard to this defence that the defender had in any view homologated the debt since coming of age, in the circumstances which are narrated below.

A proof was led. The following facts were found by the Sheriff in an interlocutor, which practically affirmed the interlocutor of the Sheriff-Substitute . . . "(6) that the defender attained twenty-one years of age on 16th July 1885; (7) that up to that date interest at the said rate of 2½ per centum per annum was paid by the defender's curators on £80, being the amount deposited and remaining in the defender's hands since 7th January 1882, in each year on 30th September; (8) that since 16th July 1885 interest at the said rate of 2½ per centum per annum on £80 has been accruing, and interest at that rate was on 7th January 1887 paid by the defender to the pursuer up to 30th September 1886; (9) that no payment to the pursuer by the defender to account of either principal or interest has been made since; (10) that on 26th September 1887 the pursuer applied to the defender for payment of the capital sum deposited, with the interest thereof, and on 8th October 1887 the defender wrote to the pursuer that he would attend to the pursuer's request as soon as possible, and added, 'It would be better perhaps to have chosen some other time to have drawn your money, as of course you are aware these have on the whole been bad years for getting money,' and thereby the defender acknowledged his individual liability and indebtedness to the pursuer; (11) that the defender having by that time got possession of the Melby estate deposit ledger, knew when he so acknowledged indebtedness to the pursuer of the deposits by him and other tenants, and that interest had as aforesaid been paid, and was due and payable on these deposits; (12) that in October 1887 the defender's estates were sequestrated; (13) that in October 1887 he petitioned for recal of the sequestration, and on 9th November 1887 the defender's agent sent to the pursuer a letter asking the pursuer, as a creditor of the defender in respect of said deposit of £80, to consent to recal of the sequestration, and stating 'that the following Melby depositors, viz., George Cheyne, Greendykes, Sandness, Robert Reid, Sandness, Gideon Sinclair, Sandness, have all signed it, they being of opinion that their money is quite secure in Mr Scott's hands.' (14) That in the proceedings for recal of the sequestration, four depositors, in consequence of similar appeals to them by the defender, acted with the defender, and supported the defender's petition, being the said George Cheyne, Robert Reid, Gideon Sinclair, and Jane Reid, who are all entered in the Melby deposit ledger, wherein also is entered the pursuer's deposit of £80; (15) that the defender in his evidence says—'I took advantage of their assistance if they were willing to give it, notwithstanding I understood at the time I was not liable for their deposits. I did not understand that to be fraudulent;' (16) that on or about 14th January 1888, with the assistance of the Melby depositors, who were in the same situation as the pursuer, the defender obtained recal of the said sequestration of his estates; and (17) that in the above circumstances the defender is liable to the pursuer for his said deposit of £80, with interest thereon at 2½ per centum per annum, since 30th September 1886 to the date of citation in this action, amounting to £3, 10s.: Therefore of new decerns and ordains the defender to make payment to the pursuer of the sum of £83, 10s. sterling, concluded for, with interest thereon at 5 per cent. per annum until paid, and of the expenses of process, including those of this appeal, as the same may be taxed, all as prayed for in the petition."

"*Note.*—In 1854, when the pursuer made his laird his banker, there was no Post Office Savings Banks in Foula, or in many districts in Zetland. The lairds generally thus became, and have continued through successive generations, the tenants' bankers, and hence the importance of this case. On this estate of Melby alone, No. 17 of process shows that there were in 1854 £1184 of deposits by small tenants. Mr Scott, to do him credit, says in his evidence 'at that time' (his majority) 'I understood I was liable for them' (the tenants' deposits). 'I had no idea of repudiating payment of these deposits. I have not denied responsibility, except in so far as this case is concerned. If this case is decided against me, I am prepared, if able, to pay all the depositors.'"

The defender appealed to the Court of Session. By agreement of parties certain minutes of the testamentary and marriage-contract trustees of Dr Scott, and minutes of the curators of the defender, were admitted as evidence in the appeal. The affairs of Dr Scott were considerably embarrassed, and it appeared to have been arranged between these parties that (1) the defender should take over certain fee-simple lands which lay contiguous to Melby, which Dr Scott had acquired; (2) the defender should take over the deposits made by tenants; (3) the defender should pay to Dr Scott's trustee a certain sum for meliorations on the estate. These arrangements were approved by the defender by docquets signed during his minority. It is sufficient to say that these arrangements were brought under reduction by the defender in an action which was pending in the Outer House. The circumstances founded on by the pursuer as showing that the defender had in any view made himself liable for the deposits are fully stated in the Sheriff's interlocutor.

The defender argued—The curators of

a minor could not make him liable for borrowed money—Bell's Prin., 2100; *Harkness* v. *Graham*, June 20, 1833, 11 S. 760; *Ferguson* v. *Yuill and his Curators*, June 10, 1835, 13 S. 886; Fraser, 408. It was impossible to support the claim for meliorations made against the defender by his father's trustees. The presumption was that the meliorations were made for the benefit of the liferenter himself. At any rate the transaction was the subject of reduction.

The pursuer argued—That the Sheriff's judgment was right. As to the defender's liability as fiar for what the liferenter had done to meliorate the property, the law was that he must pay for the meliorations, and his guardians had been satisfied that they were made. But apart from that the defender's own conduct since coming of age barred him from disputing the debt—*Forbes*, March 5, 1755, M. 8278; Rankine on Land Ownership (3rd ed.), 619; *Nelson* v. *Gordon*, June 26, 1874, 1 R. 1093.

At advising—

LORD YOUNG—It is impossible not to feel sympathy for the pursuer of this action, who was in the same position as the bulk of tenants like himself in Shetland, who had been in the way of depositing their spare money in the hands of their landlord in the expectation of receiving regularly a very moderate sum of interest and having the capital paid off, and who relied on the custom of the island, which is really in accordance with the custom of honest and honourable people elsewhere, that the successors of the landlords, especially their near relatives, and sons above all others, would, irrespective of any question of legal obligation or liability at all, pay up the deposit if they had the means. I firmly believe that the pursuer from the first parted with his money and left it where he put it in reliance that that was his position, that no legal question would or could arise, and that he would in the end receive his capital.

But we have to consider a somewhat important legal question here, namely, what is the legal liability of a son who succeeds to an estate of which his father was the liferenter, and during the period of whose liferent such deposits as I have referred to were made? Now, to begin with, the liferenting father was undoubtedly liable to all the depositors with him who were able to establish according to the rules of law the fact that they had made such deposits with him. I think a book kept by the proprietor or his factor for the purpose of entering therein the deposits which were so made, and the payments of interest and the repayment of capital, would afford sufficient evidence of such deposits; and I think it is quite clear that the deposit of the present pursuer, upon which the action is founded, was made with the defender's father when he was liferenter of the estate, and that he and his estate, and anyone who represents him, will be liable accordingly; and if this action had been brought against the defender, his son, as having benefited by his father's succession, and as being his representative, there would be no doubt about his liability; but without that, and we are without that—he took nothing from his father, and does not represent him—he is under no liability. We could not impose liability upon him according to the custom of the island. Therefore he is under no liability at all unless he undertook it, which would be a voluntary undertaking, or unless his curators validly undertook it for him.

Now, I am clearly of opinion that during his pupilarity and minority his curators did not and could not undertake liability for him so as to put it upon him. Then did he undertake it for himself? I am very clearly of opinion that he undertook no liability on his own account. I cannot read the letter which is referred to as any undertaking of liability, or say that the request which was made in his name, and I suppose with his authority, that any claims should be sent in, addressed to depositors including the pursuer, was an acknowledgment of liability, there being no previous or existing liability upon the subject.

It is a proposition unsustainable, in my opinion, that if a debtor sends circular-letters, or any particular letter, to anyone or any number of people who are claiming to be creditors upon the estate, asking them if they will agree to such a thing, that it is an establishment of their debts, or an undertaking of liability for the debts, it being admitted that, irrespective of the undertaking to be implied from that, there was no liability. I think it is not an acknowledgment of debt at all, and still less an undertaking of liability admittedly not previously existing.

A case of this kind was attempted to be made out, that the curators of the defender here, during his minority, agreed to purchase the father's separate estate, not that which he liferented and to which the son succeeded in fee through his grandfather, but a separate estate, I think it was explained, lying into the other, and therefore desirable and likely to be coveted by the proprietor of the other; that the curators agreed to purchase that for the sum of £1800; and it is said that accompanying that there was an undertaking to pay something for meliorations on the one side, and an agreement upon the other that the liability for the deposits to the father, for which the trustees were responsible to the extent of any estate which they had, should be taken over by the pupil son, the agreed-on price of the land, about £1800, being abated to that extent, or held to be paid to that extent. I think there is no evidence of that upon which we can proceed. I think there is no evidence upon which we can proceed that the curators in the discharge of their legal duty and within their legal powers, or that they, with the consent of the minor after he attained minority, agreed to take over the liability for these sums at all. I think there is no evidence of any agreement that taking over liability, not previouly existing, should be taken as payment *pro tanto* of the amount of the

deposits the liability of which was taken over, or about £1100 of the agreed-on price of the lands, of £1800. If such a case had been made out it might have been sufficient, but there is no such case made out.

Therefore, upon the whole matter, I am of opinion there was no original liability upon the son when he succeeded his grandfather or when his father died, and that no such liability was subsequently put upon him either by his guardian during pupilarity, or by his curators, with his consent, after he emerged from pupilarity into the condition which we term minority, when a minor may, if there is no lesion to him, come under obligation with the consent of his curators.

That disposes of the whole case. It is an action against him as under liability, either original or subsequently assumed, or put upon him to this depositor for £80. I think there was no such original liability, and that the liability was subsequently put upon him or assumed by him.

My opinion therefore is, that upon findings to that effect we should alter the judgment of the Sheriff, and sustain the defences to the present action.

LORD RUTHERFURD CLARK, LORD TRAYNER, and the LORD JUSTICE-CLERK concurred.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties on the appeal, Find that the sum of £80 sued for consists of sums deposited with the liferenter of the lands of Melby, the defender's father, between the year 1854 and the year 1875: Find that the defender's said father died in 1875, at which date the defender was a pupil: Find that thereupon the defender, the fiar of said lands, came into possession thereof: Find that the defender did not succeed to any estate through his father, and does not represent him: Find that the pursuer, after the defender attained minority, obtained from James Garriock, factor for the curators, the receipt for £90, contained in the document No. 2 of process: Find that the defender, after attaining majority wrote to the pursuer the letter No. 3 of process, dated 8th October 1887: Find that his agent sent to the pursuer and other creditors claiming in the defender's sequestration the circular dated 9th November 1887, No. 15 of process: Find that the pursuer did not accede to the request contained in said circular: Find in law that the defender was not liable at the time of coming into possession of said lands for payment of said deposited sums, that liability therefor was not validly undertaken therefor by his curators, that the said letter and circular do not import an adoption by the defender of liability for said sum sued for: Therefore sustain the appeal; recal the interlocutor of the Sheriff and Sheriff-Substitute appealed against; assoilzie the defender from the conclusions of the summons, and decern: Find him entitled to expenses in this Court and in the Inferior Court," &c.

Counsel for the Pursuer — Salvesen — Greenlees. Agent—Thomas M. Horsburgh, S.S.C.

Counsel for the Defender—Comrie Thomson—Sym. Agents—A. P. Purves & Aitken, W.S.

Saturday, March 12.

FIRST DIVISION.

THE TRUSTEES OF CARNEGIE PARK ORPHANAGE.

Charity—Trust—Nobile Officium.

A testator left certain heritage and the residue of his estate to trustees, directing them to accumulate the annual proceeds of the heritage until with the residue they amounted to the sum of £6000, which was then to be applied in founding an institution for the education of orphans of a specified class between the ages of eight and fourteen. The value of the estate having turned out to be much greater than the testator had anticipated, the trustees found that the resources of the trust were not exhausted in carrying out the directions of the testator. They therefore petitioned the Court to authorise them to receive children into the institution at the age of five, subject to the condition that they should always give a preference to children between eight and fourteen. The Court *granted* the authority craved, *holding* that the proposed extension of the benefits of the trust was in substantial accordance with the intentions of the testator.

James Moffat died on 16th February 1884, leaving a trust-disposition and settlement, dated 24th September 1870, by which he disponed his whole estate, heritable and moveable, to certain trustees for the payment of the legacies and bequests therein set forth.

By the said settlement the testator, *inter alia*, on the narrative that he had for some time past determined to found an institution "for the education and upbringing of orphan children of the age after mentioned, belonging to or resident in the Lower Ward of Renfrewshire, and who are not chargeable to the parochial board," directed and appointed his trustees to make over to and in favour of the Provost and Bailies of Port-Glasgow, the Provost and Senior Bailie of Greenock, and the Sheriff-Substitute of the Lower Ward of Renfrewshire, and their successors in their respective offices for the time being, as trustees, to be known as the Trustees of Carnegie Park Orphanage, All and Whole his lands and estate of Carnegie Park, and also the whole residue and remainder of his other means and estate,