My Lords,—The case undoubtedly must go back again, because there is that other question behind, whether the deed has been obtained by undue means? which I understand is left quite open to the parties after the proceeding on the validity of the instrument shall have been disposed of. The simple question now is, Whether there is sufficient evidence to cut down this deed under the statutes of 1681 and 1696? The case must go back for the appellants to see whether they can make any thing of the other reason of reduction, namely, that they were deceived by the nature of the instrument, and the manner in which it was procured from them. That question undoubtedly will be open on the remit; but as far as the present appeal is concerned, I shall propose to your Lordships that this interlocutor be affirmed, with costs. June 4. 1824.

Appellants' Authorities.—Stevenson, Nov. 1682, (16,886.); Blair, Feb. 12. 1648, (13,942.); Campbell, Nov. 1698, (16,887.); Syme, Nov. 23. 1708, (16,713.); Walker, June 8. 1716, (16,896.); Young, Aug. 2. 1770, (16,905.); Frank, July 9. 1793, (16,882.); Swany, Dec. 12. 1807, (No. 7. App. Writ); Richardson, Nov. 28. 1811, (F. C.).

Respondents' Authorities.—Valence, July 14. 1709, (16,930.); Ogilvie, Feb. 21. 1711, (Ib.); M'Downie, July 1. 1712, (16,931.); 3. Ersk. 2. 14.; 1. Bank. 2. 45.—Robertson, Jan. 7. 1742, (Elchies, voce Writ); Williamson, Dec. 21. 1742, (16,955.); M'Donald, Feb. 14. 1778, (16,942.); Peter, Feb. 19. 1795, (16,957.); 4. Burrough, 2224.; Bell on Testing Deeds, 246. and cases there.

A. MUNDELL—J. CHALMER,—Solicitors.

(Ap. Ca. No. 49.)

MOSES GARDNER, Appellant.—*Clerk—Cranstoun—Adam.* No. 39.

DONALD CUTHBERTSON, (Mennon's Trustee), and Others, Respondents.—*Solicitor-General Wetherell—Greenshields.*

Bankrupt—Sequestration—Heritable Creditor.—Circumstances under which, (reversing the judgment of the Court of Session), a creditor holding a bond and assignation in security of a lease, for payment of a debt due to him by a party whose estates were afterwards sequestrated; and who was ranked, and appointed a commissioner, and received payment of his debt, by a transaction with the other creditors, on the footing of being an heritable creditor, was found not liable for the expenses of the sequestration.

IN 1801, John M'Luckie, Walter M'Alpine, Moses Gardner, and John Mennons, acquired right, in equal shares, to a lease of the coal in the lands of Eastmuir, near Glasgow, together with the whole machinery, and entered into partnership for the purpose of June 9. 1824.

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working the coal, under the firm of John Mennons and Company. In 1803, Gardner sold his fourth share of the lease and machinery at L.1440 to M'Luckie, and granted in his favour an ex facie absolute assignation. In security of payment of the price, (which was to be made by instalments), M'Luckie granted a bond and assignation to Gardner, whereby he conveyed to him both his own fourth share, and the one which he had so acquired from Gardner, with full power to the latter to sell them, in the event of the price not being regularly paid. In the course of the same year M'Luckie purchased M'Alpine's share, so that he and Mennons now became the sole tenants—M'Luckie to the extent of three-fourths, and Mennons of one-fourth. In December thereafter, Gardner raised and executed an inhibition on his bond against M'Luckie; and in January 1804, M'Luckie sold his three-fourth shares to Mennons, who thereupon became bound to relieve M'Luckie of the debt due to Gardner; so that in this way Mennons became sole tenant. Between that period and 1806, M'Luckie had paid up a part of the debt, which left a balance of L.814 due to Gardner. M'Luckie became bankrupt, and his estates having been sequestrated, Gardner claimed, and was ranked as a creditor for the above sum. Thereafter, in 1807, Gardner, founding upon his bond and assignation, and the obligation by Mennons to M'Luckie, raised an action against Mennons, and also against the trustee of M'Luckie, on the dependence of which he executed an inhibition, in July of that year, against Mennons. At the same time M'Luckie's trustee also raised an action, and executed inhibition against Mennons. Gardner then obtained decree for the amount of the debt, and executed diligence against Mennons, who having been rendered bankrupt, Gardner, founding upon his bond and disposition, decree and diligence, concurred with Mennons in applying for a sequestration. This was awarded, and the late William Cuthbertson was elected trustee, and Gardner was appointed one of the commissioners. Besides the above debt, Gardner was also a creditor of Mennons for L.43. 18s. 5d. upon an open account, and for which he was ranked.

After the trustee had taken possession of the colliery, and worked it for some time, the creditors resolved to bring it to sale. It was accordingly exposed under articles of roup, (which were subscribed by Gardner as one of the commissioners), and by which it was stipulated, that the price should be payable to the trustee. Under these articles the works were sold, on the 30th of August 1809, to Charles Hamilton, at L.1680, of which L.500

were paid. A claim of preference was then made by Gardner over the price, for payment of his debt of L.814, with interest; and after consulting Mr Ross, the Dean of Faculty, the trustee and commissioners, on the 14th September 1809, made the following resolution:—'The trustee and commissioners upon the sequestrated estate of the said John Mennons being met, along with Samuel Shanks, one of the creditors, the agent in the sequestration, and Mr Peter Paterson, writer in Glasgow, and having consulted with them respecting Mr Moses Gardner's claim of preference over the Eastmuir coal-works, in virtue of the bond by John M'Luckie and inhibitions used thereon, are unanimously of opinion, that Mr Gardner's claim is preferable over said works, to the extent of the balance thereby owing, being L.814 Sterling, and interest thereof since the 1st day of January 1806; and therefore they authorize the trustee, so soon as he receives the bond for the balance of the price of the coal-works from Charles Hamilton the purchaser, to convey the same to Mr Gardner in payment of his preferable claim. Mr Gardner at same time being bound to concur in the conveyance to the purchaser, and to renounce and discharge his debt, and assign his bond to the trustee. Mr Gardner is also to settle the difference between the sum in said bond and his claim, either by cash, or bills with sufficient security.

'Mr Andrew M'Kendrick, the trustee on John M'Luckie's estate, also hereby becomes bound to remove and discharge all inhibitions used against the works at John M'Luckie's instance, reserving all preferable claims, either by said John M'Luckie against said John Mennons, or by said John Mennons against said John M'Luckie, which it is hereby understood and declared shall in no degree be touched or infringed upon.'

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Accordingly, on the 11th October 1809, Cuthbertson, the trustee, executed an assignation of a bond by Hamilton for L.1180, (being the balance of the price), in favour of Gardner, who, on the other hand, granted an assignation in favour of the trustee of the bond and assignation by M'Luckie, with the relative inhibitions both against him and Mennons, and the decree and subsequent diligence obtained and executed against these parties, and substituted the trustee in his full right of the premises. For the difference between the amount of Hamilton's bond and the debt due to Gardner, the latter became bound, along with a cautioner, to account to the trustee. At this time (as was alleged by Gardner) the trustee had sufficient funds in his hands to pay the whole expenses of the sequestration which had been then incurred.

June 9. 1824. William Cuthbertson, the trustee, having died, his son and heir, Donald Cuthbertson, one of the respondents, was elected in his place; and various expenses were thereafter incurred, part of which arose out of an action instituted against Gardner, concluding for an accounting of the balance due on Hamilton's bond; but which action was ultimately abandoned. These expenses amounted to L.584. 14s. for payment of which the trustee brought an action, in which he concluded, that he was 'entitled to be relieved of the said sums of expenses, and interest thereof, either by the said Moses Gardner, the creditor who 'had obtained the price of the lease, or by the creditors at large, 'in such proportions and on such principles as shall be fixed by 'our said Lords.'

In defence, Gardner admitted his liability, along with the other creditors pro rata, so far as regarded the personal debt of L.43. 18s. 5d.; but he denied his liability in regard to the debt of L.814. Lord Gillies, 'in respect of the decision pronounced 'by the Court in the case of Goodwin against Brown, 1st Feb-'ruary 1815, found, that the pursuer is entitled to be relieved at 'the hands of the defender, Moses Gardner, an heritable creditor on the sequestrated estate of John Mennons, or who, at 'least, claimed and obtained a preference over the same in virtue 'of his grounds of debt and the diligence used by him, and drew 'full payment of his debt in consequence thereof, of the whole 'expenses incurred by the pursuer as trustee in the process of 'sequestration libelled: Found the said defender liable to the 'pursuer in the sum of expenses now pursued for, with interest, 'as libelled, and decerned accordingly.'

Gardner having reclaimed, the Court, on the 13th November 1819, adhered; and on advising a second petition, with answers, they again adhered, 'in so far as the same respects the petitioner 'being found liable in the expenses of the sequestration in pro-'cess, and remitted to the Lord Ordinary to hear parties on the 'amount of the said expenses.'*

Gardner then appealed, and maintained,—

1. That as the trustee had entered into a transaction with him, whereby he had purchased the bond and assignation and relative diligence, together with the debt itself, at a certain price, and by which the trustee was put into his place, and Gardner thereby became disconnected with the estate, except to the extent of the personal debt of L.43. 18s. 5d. he could not, after such a

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* Not reported.

transaction, be made liable for any of the expenses correspond- June 9. 1824.
ing to the debt of L. 814.

2. That, supposing the case of Goodwin *v.* Brown was a well founded decision, it did not support the interlocutors, because in that case the heritable creditor had no power of sale, and consequently could not realize payment of his debt, except by means of an adjudication and ranking and sale, or by a sequestration; and that as the creditor had availed himself of the latter of these processes, there might be some equity for obliging him to pay the expenses; but in the present case Gardner had a power of sale, under which he could, at a very trifling expense, have recovered payment of his debt, and it was therefore not equitable that the expenses of the sequestration should be thrown upon him. That, however, the decision in the case of Goodwin was not authorized either by the common law or by the Sequestration Act. At common law, a creditor having a real security is entitled to recover payment of his debt and expenses out of the estate of his debtor, and cannot be burdened with the expenses of any proceedings which may be adopted by the other creditors; and by the Sequestration Act the estate is conveyed to the trustee under the burden of the heritable debts, so that he is only proprietor under deduction of them, and consequently must pay them to the respective creditors free of all expense. And,

3. That, at all events, Gardner could not be made liable to a greater extent than in proportion to the amount of his debt, along with the other creditors.

On the other hand, it was contended by the respondents,—

1. That as it was enacted by the Bankrupt Act, that the estate should be a fund of division only after payment of all charges, it was plain that it was the intention of the Legislature that these charges should, ante omnia, be paid out of the estate, and that the residue should then be divided among the creditors, according to their respective preferences; and therefore, if, instead of first deducting these charges, the fund was divided among the creditors, they must be liable to repeat to the extent of the amount of them; and consequently, even an heritable creditor was liable for payment of these expenses; and therefore, as in the present case Gardner had drawn the whole funds, while the other creditors had received nothing, it was equitable that he alone should be bound to pay the expenses; and accordingly this point had been so decided in the case of Goodwin.

2. That even supposing that were an erroneous decision, Gardner did not possess the character of an heritable creditor, because

June 9. 1824. the bond and assignation of the lease and machinery could not confer on him a real right without actual possession, which he had not enjoyed; and that he had passed from the inhibitions against M'Luckie, seeing that he had availed himself of the obligation undertaken by Mennons, and concurred in the sequestration.

8. That the arrangement with the creditors had proceeded on an error in point of law, by supposing that Gardner had a preference, when in point of fact he had not; and, at all events, as it was made with him on the footing of his being entitled to a preference as a real creditor, he could only take advantage of it subject to and under the burden imposed by law, of paying the expenses of the sequestration.

The House of Lords found, 'That the appellant is not liable 'to any part of the expenses of the sequestration, in respect of 'the sum of L. 814 received by him under the arrangement be-'tween him and the trustees and commissioners of the seques-'trated estate of John Mennons; and therefore it is ordered 'and adjudged, that the interlocutors complained of be reversed, 'but without prejudice to the claim of the trustee in the se-'questrated estate for any contribution from the appellant to-'wards such expenses, by reason of the debt of L. 43. 18s. 5d. 'due to the appellant from the said John Mennons.'

Lord Gifford, after mentioning the circumstances of the case, and making some observations on the extreme importance of the points which had been stated, observed that, in his opinion, from the peculiar circumstances of this case, which he would afterwards notice more minutely, their Lordships were not called upon actually to decide these questions.

In considering the case it was important to bear in mind, that M'Luckie's estate had been sequestrated; the appellant's claim of preference upon the estate, by virtue of his assignation and inhibition, had been allowed; and that subsequently the estate of Mennons had been sequestrated, and a claim had been lodged by his trustee upon the estate of M'Luckie, in consequence, as the respondents themselves stated, of the preference claimed by the appellant upon the estate of Mennons. In 1809 the coal-works were sold for upwards of L. 1600 to Mr Hamilton, so that the sum which he had to pay was a much larger sum than was due to the appellant; and therefore all the arguments founded on the exorbitancy of the original price stipulated for by the appellant came to nothing. It was admitted that the appellant had a security, and that he claimed a preference over the whole coal-works by virtue of his assignation and inhibition. That his concurrence to the sale was necessary in some shape or another is indisputable. Ac-

cordingly, an arrangement was entered into on the part of the trustee on Mennons' estate; after taking the opinion of Counsel, as it is alleged, but which is of no importance; and thereafter an agreement was made, which forms the important part of this case. It recites the appellant's claim of preference to the extent of L.814, and interest, being the remainder of the instalments due on his original bond from M'Luckie; and proceeds, on the statement of the absolute claim of lien or preference which the appellant had, not only on the coal-works themselves, but over the proceeds. This agreement was soon afterwards carried into effect. Hamilton paid L. 500 to the trustee to account of the price, and assigned his bond to the appellant in satisfaction of his preference. Whether right or wrong, the trustee was a party to, and assenting to this measure. The agreement is recited in the assignation. It gives to the appellant liberty to pay himself out of the proceeds of the bond, accounting to the trustee for the residue. All this is also entered in the sederunt book. The appellant then executed assignments of all his securities and diligence, in pursuance of the same agreement, to the trustee, so as to enable him to convey the coal-works to the purchaser. The appellant then received the amount of the bond, out of which he retained a sum to the extent of his preference; and he seems to have kept the balance, which became the subject of a litigation, but forms no question here. It is next extremely important to see what the respondents themselves state. (His Lordship then read a passage from one of their pleadings in the Court of Session, in which they represented the advantage which the appellant took of the situation of the trustee and creditors, after the contract was made with Mr Hamilton, and which they stated they were compelled to let the appellant have at his own terms.) This rather tells against the respondents. It shews they were quite aware of his having some claim, and that it formed a consideration in inducing him to grant his concurrence to the sale.

Is it then possible that all this can be now again opened up, after many years are elapsed too, and that because certain things have occurred long subsequent to the agreement? Besides Gardner's claims, there were also other preferable creditors on Mennons' estate. These claims also were paid, and considerable sums appear to have been received by the trustee. But the present claim by the trustee is in respect of the proceedings chiefly incurred subsequent to the arrangement in 1809: and yet it is said this makes no difference. It appears that the trustee, in the first instance, raised his action against all the creditors, concluding against all of them pro rata. The action was afterwards amended, by concluding against the appellant alone, and for all expenses, on the authority of the case of Goodwin against Brown in 1815. The opinion of the Lord Ordinary goes entirely upon that case; and if this present case were to be decided upon that authority, undoubtedly the appellant would be liable to the whole. The agreement, however, appears to have been lost sight of in the Court

June 9. 1824. below. With regard to the authority of that case, great doubt appears certainly to have been entertained by the profession at large, and particularly by that most enlightened author, (who, though no authority for their Lordships, is still to be looked to with the greatest deference), namely Mr Bell, in his excellent work; and if the point were to come before the Court again, it would require considerable reconsideration. A great deal of ingenious argument has been used by the respondents' Counsel, as to Mr Gardner's right to preference or not; but whether he is or is not entitled to it, they dealt with him and he with them on that footing. Instead of driving him to try his right, the trustee very prudently entered into the arrangement in question, and they cannot now rescind that agreement. According to the argument which has been maintained, if the expenses had amounted to L.800, he must pay back every shilling he had received under the agreement, in the shape of costs. This could not possibly have been contemplated. It would leave the person in a worse situation than if he had never acceded to the arrangement, and had, instead of doing so, relied upon his right of preference, and his claims upon M'Luckie's estate. Here he suffers L.500 to be appropriated to the purposes of the sequestration; departs from all his remedies, both against the works themselves, and the estate of M'Luckie: and yet is it possible, that if the expenses exceed the whole price, the appellant is, without any stipulation or provision of any sort on the agreement, to be totally deprived of every farthing of his debts? The bankrupt statute, which has been so much dwelt upon, must be very strong indeed to support so monstrous a proposition. The statute says, 'the residue, after 'paying all charges.' But there is another section, 33. (His Lordship then read it). This clearly points out what the statute contemplated in regard to the protection of preferable claims. Without, therefore, wishing voluntarily to impugn the decision of Goodwin and Brown, which, however, ought to have the fullest reconsideration whenever the question actually comes before their Lordships, the agreement puts this case out of all question; and therefore the creditors cannot go back and make him refund. The fact of his being the concurrent creditor in the sequestration is not material, for still the principle of the creditors dealing with him remains. These interlocutors must therefore be reversed. It must be without prejudice, however, to the trustee's claims on the appellant, in respect of his private or simple contract debt of L.43. Indeed the appellant admits and consents to pay what proportion he is liable to in respect of this debt.

EVANS and SHEARMAN—J. BUTT,—Solicitors.

(Ap. Ca. No. 52.)