eyes, roads," &c., for the purpose of working the minerals, whereby the real purpose of this clause is shewn to be, that each party should retain the right, not only to the minerals, subject to the excambion of the surface, but subject also to certain restrictions as to working and mode of access. It is not to my mind unimportant to see how this contract came into existence. The valuators to whom the Sheriff made a remit under the Montgomery Act do not appear to have paid the slightest attention to the value of the minerals in coming to their valuation, but assumed that each party was left in possession of his own minerals as fully as he had had them before the excambion.

Lord Young—I am of the same opinion, and I think it is a very simple case. Smiddy Croft, which formerly belonged to Mr Dunlop, lay in the vicinity of Hamilton Palace and policies, and the Duke naturally desired to possess it. It contained minerals—at least if it did not the whole question is at an end—but probably the Duke had no desire to work these minerals himself, and as there was no risk of anyone else doing so, he had no occasion to buy them. But he wanted the surface, and so he agreed to give in exchange part of the lands of Mid and East Coatts. The minerals of these lands were then under lease, held of the Duke as proprietor, and the bargain was for the excambion of the surface, or rather of the property of part of Smiddy Croft, against that of part of Mid and East Coatts—excluding the minerals. Dunlop was not to part with the minerals of Smiddy Croft, and the Duke was not to part with those of Mid and East Coatts, —that is to say, each was to reserve them, and they did so. The reservation of the minerals of Smiddy Croft by Dunlop was practically useless unless he acquired ground from which to work them, because he had bargained away the right to work them from the surface of Smiddy Croft, and had bound himself not to do that, but otherwise he remained proprietor as before, the prospect of ever making anything of the minerals being either a sale to the Duke or himself acquiring some lands in the neighbourhood through which he might work them. The reservation of the minerals of Smiddy Croft corresponded to that of those of Mid and East Coatts. Suppose that Dunlop had brought a declarator that the right to these minerals was reserved to him on the very day after the contract of excambion had been signed, what answer would the Duke have had? Suppose Dunlop brought a declarator that he and his heirs and successors in Mid and East Coatts, or anyone to whom he might communicate the privilege, had exclusive right of working the coal in these lands, that would just be a declarator of what the deed itself says, and would indeed on that account be of a kind too obvious to found any decree, unless the Duke was disputing Dunlop's right. But if Dunlop could in 1793, immediately after the excambion, have negatived the Duke's right in respect of the reservation, there is nothing in the world to prevent his successor doing it now, unless the existence of the reservation depended on the condition that it was to be prolonged only for such time as Dunlop and his heirs should remain proprietors of Mid and East Coatts, or unless Dunlop sold that property to some-one else, with an express conveyance of the reserved right to work the coals. That was the defender's second point, and I agree with your Lordship and the Lord Ordinary that it is entirely untenable.

Lord Craighill concurred.

Lord Rutherfurd Clark—I also agree. I think that according to the true construction of this contract of excambion, the property of the minerals in Smiddy Croft was reserved to Dunlop, and the moment that is determined all difficulty ceases, because the property was with Dunlop, and must be held by some-one, and must descend to some heirs. It is said that a certain series of heirs is pointed out here, and that these only were intended to take, and as they have not done so it must pass somewhere or other. Wherever it goes it certainly cannot pass to the Duke, except on the footing that he is the heir of provision of John Dunlop. So that I am not affected by the difficulty of that construction of the deed.

The Court adhered.

Counsel for Pursuers (Respondents)—Keir—Pearson. Agents—John Clerk Brodie & Sons, W.S.

Counsel for Defender (Reclaimer)—Mackintosh—Low. Agents—Tods, Murray, & Jamieson, W.S.

Wednesday, June 25.

FIRST DIVISION.

[Lord Ordinary on the Bills.

STEWART, PETITIONER.

Writ—Erasure in essentialibus—*Testing Clause—False Description.*

The trustee on a sequestrated estate refused to rank preferably one of the heritable creditors of the bankrupt, on the ground that the bond and disposition in security which had been granted in his favour was erased and vitiated *in essentialibus*, and that the testing-clause was manifestly false. The bond contained a description of the subjects disponed in security, after which it was stated that these were the subjects more particularly described in a disposition in favour of the granter, "dated the twenty-seventh September and recorded . . . the twelfth day of November in the year 1880." The testing-clause ran as follows:—"In witness whereof, I have subscribed these presents . . . (the words the 'twenty-seventh September, &' on the thirty-fourth line, the word 'Twelfth' on the thirty-fifth line, and the word 'November' on the thirty-sixth line, all of page first hereof, and counting from the top thereof, being written on erasures before signing, and one word on the thirty-sixth line of said first page, counting as aforesaid, being delete before signing), at Aberdeen the 5th day of October 1880, before these witnesses." *Held* that as the subjects of the security could be identified from the rest of the deed, even if the words written

on erasure were held *pro non scriptis*, these words were not *in essentialibus;* that the deed was not rendered improbative by a reference in the testing-clause to a part of the deed which was not material; and that the creditor was therefore entitled to be ranked preferably.

This petition was presented under sec. 116 of the Bankruptcy (Scotland) Act 1856, by David Stewart, Advocate in Aberdeen, as trustee on the sequestrated estates of John Cattanach, for approval of a scheme of ranking and division of the heritable creditors of the bankrupt on the price of the heritable subjects sold, and for warrant of payment in accordance with the scheme.

The bankrupt had granted over certain heritable subjects belonging to him two bonds and dispositions in security containing clauses providing that they should be ranked *pari passu*. One of these bonds was for £400, and was granted in favour of the trustees of the deceased Alexander Hector, dated 30th November, and recorded 1st December 1880; the other bond was for £500 granted in favour of Dr Robert Jamieson, dated 5th October, and recorded 19th November 1880. The subjects over which the securities were granted were sold by the trustee for £700.

In the report and scheme of ranking the trustee stated:—"In the opinion of the trustee the bond and disposition in security in favour of Dr Jamieson is erased and vitiated *in essentialibus*, the testing-clause is contradicted by other parts of the deed, and is manifestly false in its terms; and it appears to the trustee that for these and other reasons this bond can bear no faith in judgment and is invalid. The bond and disposition in security in favour of Alexander Hector's trustees does not seem to the trustee to be open to any objection." The trustee accordingly refused to rank Dr Jamieson preferably for the amount contained in his bond.

The disposition in security contained in Dr Jamieson's bond was in these terms (the words in italics were those written on erasure):—"I dispone to and in favour of the said Robert Jamieson and his foresaids, heritably but redeemably, as after mentioned, yet irredeemably in the event of a sale by virtue hereof, All and Whole that southmost house or tenement of foreland lately belonging to John Webster, weaver in Aberdeen, thereafter to John Webster, porter at the custom-house of Aberdeen, thereafter to William Milne, meal-seller in Aberdeen, and disponed by him to the deceased George Brown, sometime meal-seller in Aberdeen, lying on the north side of the back causeway of Aberdeen, in the burgh of Aberdeen and county of Aberdeen, being the subjects and others particularly described in the disposition, granted by Angus Macdonald, sometime residing at No. 7 Roslin Terrace, Aberdeen, now at No. 4 South Crown Street, Aberdeen, in my favour, dated the *twenty-seventh September and* recorded in the Register of Sasines, Reversions, &c., kept for the burgh of Aberdeen the *twelfth* day of *November*, in the year 1880, but always with and under the burdens, conditions, provisions, and declarations specified and at more length set forth in an instrument of sasine of the subjects and others above disponed in favour of Grizel M'Queen, spouse of James Scott, meal-seller in Aberdeen, and the said James Scott, her husband, dated and registered in the Register of Sasines kept for the burgh of Aberdeen the 22d day of November 1792, and that in real security to the said Robert Jamieson and his foresaids," &c.

The testing-clause was in these terms:—"In witness whereof, I have subscribed these presents . . . all written by Andrew Hinchliffe, writer in Aberdeen (the words the 'Twenty-seventh September &' on the thirty-fourth line, the word 'Twelfth' on the thirty-fifth line, and the word 'November' on the thirty-sixth line, all of page first hereof, and counting from the top thereof, being written on erasures before signing, and one word on the thirty-sixth line of said first page, counting as aforesaid, being delete before signing), at Aberdeen the 5th day of October 1880, before these witnesses, the said Andrew Hinchliffe, and Angus Fowler, writer in Aberdeen."

Dr Jamieson lodged objections to the trustee's report, in which he stated:—"The bond in question is not erased and vitiated *in essentialibus* as alleged by the trustee. The only words written on erasure in the deed are those specifying the day and the month on which the disposition in favour of the granter of the bond was executed and recorded.

"The reference to this disposition, however, is unnecessary, the subject of the security being sufficiently described and identified, and being also referred to as contained in an instrument of sasine in favour of Grizel M'Queen.

"The reference to the disposition being unnecessary and immaterial, the statement in the testing-clause applicable to the alterations thereon, assuming its inaccuracy, is also unnecessary and immaterial. Both the reference and statement in regard to it may therefore be held *pro non scriptis*, as not being *in essentialibus*. The date of executing the bond and disposition in security is of no importance, the date of recording being that which, in questions under the Bankruptcy Statutes, is to be held the date of the deed—31 and 32 Vict. c. 101, sec. 148; and the record is conform to the deed. In any view, the inaccuracy in the testing-clause is a mere informality of execution within the meaning of the 'Conveyancing (Scotland) Act, 1874,' sec. 39, and the objector avers that the bond was duly executed by the granter in presence of the subscribing witnesses." The objector therefore submitted that the trustee was not entitled to refuse to rank him on the purchase price *pari passu* with Hector's trustees, and that he should be directed to rank him accordingly.

On 7th June 1884 the Lord Ordinary (KINNEAR) pronounced this interlocutor:—"Finds that the petitioner, in making up a scheme of ranking and division of the price of the heritable property belonging to the bankrupt estate, is bound to rank the objector Dr Jamieson as an heritable creditor thereon *pari passu* with the trustees of Alexander Hector, mentioned in the said scheme: Remits to the trustee to amend the scheme in conformity with this finding: Finds no expenses due to either party: and upon the amendment being made, remits to the Clerk of the Bills to inquire into the facts set forth in the petition, and to report whether the provisions of the 'Bankruptcy (Scotland) Act 1856,' have been complied with."

The trustee reclaimed, and argued—The deed had been vitiated *in essentialibus* after subscrip-

tion. The testing clause asserted a falsehood, stating, as it did, that before the bond was signed on the 5th October, a later date—that of the recording the disposition—had been written on erasure, and therefore the probative character of the deed was destroyed.—*Reid* v. *Kidder*, June 24, 1834, 12 S. 781, Mar. 6, 1835, 13 S. 619, *aff.* July 30, 1840, 1 Rob. App. 183; *Dunlop* v. *Greenlees' Trustees*, Nov. 2, 1863, 2 Macph. 1, *aff.* 3 Macph. (H. of L.) 46; *Chambers' Trustees* v. *Smith*, Nov. 9, 1877, 5 R. 97, *rev.* April 15, 1878, 5 R. (H. of L.) 151.

The respondent replied—The words written on erasures were not *in essentialibus*—Bell's Lect, pp. 582, 1150. There was in the deed a sufficient description without reading the words written on erasures. An immaterial inaccuracy in the testing clause would not vitiate a deed.—Conveyancing (Scotland) Act 1874, secs. 38 and 39.

At advising—

Lord President—This case originated in the Outer House in the form of a petition presented in the Bill Chamber by David Stewart, the reclaimer, as trustee on the sequestrated estates of John Cattanach, for approval of a scheme of ranking and division of the heritable creditors on the price of certain heritable property belonging to the bankrupt estate. There were two heritable securities affecting these subjects, the one in favour of Alexander Hector's trustees, and the other in favour of Dr Jamieson. The trustee ranked Hector's trustees in terms of their bond for the principal sum therein contained with interest, and so forth; but in regard to the security in favour of Dr Jamieson he declined to rank him preferably, because, as he himself states —"In the opinion of the trustee, the bond and disposition in security in favour of Dr Jamieson is erased and vitiated *in essentialibus*, the testing clause is contradicted by other parts of the deed, and is manifestly false in its terms." And therefore he holds that the bond can bear no faith in judgment. The Lord Ordinary has found that the bond in favour of Dr Jamieson is not objectionable but is valid as a security, and has remitted to the trustee to rank him *pari passu* with Hector's trustees, and we have now to consider whether the conclusion of the Lord Ordinary is well founded.

The bond is certainly open to some very peculiar criticisms, for there are certain erasures in the deed which are thus noticed in the testing clause:—"The words 'Twenty-seventh September, &' on the thirty-fourth line, the word 'Twelfth' on the thirty-fifth line, and the word 'November' on the thirty-sixth line, all of page first hereof, and counting from the top thereof, being written on erasures before signing, and one word on the thirty-sixth line of said first page, counting as aforesaid, being delete before signing." Now, the words written on erasures make the deed read thus:—In describing the disposition by Angus Macdonald in favour of the granter, it is described as dated the twenty-seventh September and recorded the twelfth day of November 1880. The words written upon erasures therefore represent the disposition as being dated on the 27th of September 1880 and recorded on the 12th of November 1880. But the date of the execution of the bond itself, as proved by the testing clause, was the 5th of October 1880, and therefore the trustee is so far quite right in saying that the statement that the erasures were made before signing is impossible, and therefore false. The deed could not have been signed after the erasures were made, for the erasures must have been made and the substituted words written thereon after the subscription of the deed. The testing clause therefore affirms a falsehood, and that is a startling fact in the first instance. It appears to me, however, that the only effect of this is that the testing clause gives no aid, in so far as it is objectionable on the ground of erasure, and that it cannot have any further or greater effect than that; it is just as if the testing clause said nothing about the erasures. The question therefore is, Were these erasures, not being noticed in the testing clause, fatal to the validity of the deed? I think that depends upon whether they were in an essential part of the deed—that is to say, whether, on striking them out, the deed can receive effect?—I am of opinion that the words written on erasure are not *inter essentialia*. If they had been necessary to complete the description of the subjects—that is to say, if, without these words, the description would have been insufficient—then I think the objection would be very fatal. But it appears to me that the subjects are sufficiently identified without these words, for the description is, "All and Whole that southmost house or tenement of foreland lately belonging to John Webster, weaver in Aberdeen, thereafter to John Webster, porter at the custom-house of Aberdeen, thereafter to William Milne, meal-seller in Aberdeen, and disponed by him to the deceased George Brown, sometime meal-seller in Aberdeen, lying on the north side of the back causeway of Aberdeen, in the burgh of Aberdeen and county of Aberdeen." It appears to me that such a description very easily identifies the subjects conveyed, for the southmost house lying on the north side of the back causeway of Aberdeen is surely a house that can be found; further, it is the house that belonged to four persons in succession, who are all here described, John Webster, weaver in Aberdeen, then another John Webster, porter at the custom house of Aberdeen, William Milne, meal-seller in Aberdeen, and George Brown meal-seller in Aberdeen. Now, subjects may be conveyed by a description which makes it not very easy to identify them. We have seen cases where the description has been borrowed from former titles, and is not accurate at the time of the conveyance, and yet it has been held competent to prove that the subjects were lying in a certain locality, and bounded in a certain way. But here there can be no difficulty at all. Moreover, the description does not stop there, for it goes on thus—"being the subjects and others particularly described in the disposition granted by Angus Macdonald, sometime residing at No. 7 Roslin Terrace, Aberdeen, now at No. 4 South Crown Street, Aberdeen, in my favour," that is to say, in favour of Cattanach, the granter of the bond. If we stop there we have not got the erasures, and yet we have another mode of identifying the subjects, for surely that deed can be identified, and the subjects are said to be particularly therein described. Further, reference is made to another deed for the burdens, conditions, provisions, and declarations applicable to the subjects, and the date of that deed is correctly stated to be the 22d

of November 1792. Suppose, then, that we hold that the disposition by Angus Macdonald in favour of the granter of the bond contains no mention of the date of recording at all, still we have in the words I have read a sufficient and complete description of the subject, and therefore I do not think that the words written on the erasures are *inter essentialia*. I therefore think that the Lord Ordinary is right in the conclusion at which he has arrived.

LORD MURE—I agree with your Lordship for the reasons stated, that the words written upon the erasures are not in essential parts of the deed. If we assume that the words after "dated" down to "November" are not in the deed, then the deed will run thus, "being the subjects and others particularly described in the disposition granted by Angus Macdonald, sometime residing at No. 7 Roslin Terrace, Aberdeen, now at No. 4 South Crown Street, Aberdeen, in my favour, dated . . . in the year 1880." And the subjects being sufficiently described elsewhere in the bond, I think that the words written on erasures, are not in an essential part of the deed.

Then the only question is, whether a statement contained in the testing clause, which is incorrect *ex facie* of the deed, but relative to matters not essential, must be held to invalidate the deed? If the deed were good without the words written on erasures, and if it were good without any mention of the erasures in the testing clause, I cannot see how it is not to receive effect. The testing clause states incorrectly that something was done, but if the reference is to a part of the deed which is not essential, then I do not think that invalidates the deed.

LORD SHAND—The decision in this case seems to turn entirely upon the question whether the erasures are in an essential part of the deed. If the words written on the erasures had been essential in order to have a complete description of the subjects, so that without them there would not be a proper description, then I think the trustee would have been right. But if the words are not essential, then I think the deed is good as a security. It appears to me that omitting the date of the execution and recording of the deed in favour of the granter, there is a sufficient description of the subjects, and therefore that these words are not essential.

LORD DEAS was absent.

The Court adhered.

Counsel for Trustee—Shaw. Agent—R. C. Gray, S.S.C.

Counsel for Objector—Keir. Agents—Stuart & Stuart, W.S.

Friday, June 27.

FIRST DIVISION.

[Lord Adam, Ordinary.

CROSSE (BANKES' EXECUTOR) *v.* BANKES.

Agreement — Obligation — Whether Transmissible or purely Personal—Mutual Contract.

A brother and sister who were at issue as to which of them had right to succeed to an entailed estate, entered into a formal agreement that the brother, in case he should be found to have right to the estate, "shall during his own lifetime allow" the sister "one-half of the free rental of the said estate, and he binds and obliges himself, his heirs and successors, to make payment to her of the said free rental accordingly." On the other part, the sister, in case she should be found entitled to the estate, undertook to "allow" to the brother "the one-half of the free rental of the said estates during all the days and years of her life, and she binds and obliges herself, and her representatives, to make payment to him of the said free rental accordingly." The sister was found entitled to the estates, and paid the brother half the rents till his death. *Held* (*aff.* Lord Adam, —*diss.* Lord Shand), in an action against the sister by his executor, that the obligation in his favour was personal, and did not transmit to his executor.

The late Meyrick Bankes of Winstanley, Lancashire, and of Letterewe and Gruinard, Ross-shire, died on 16th June 1881, survived by his wife and six children. A question arose as to the meaning and effect of Mr Bankes' testamentary writings, in regard to the respective rights of Thomas Holme Bankes, his second son, and Mrs Maria Anne Liot Bankes, his second daughter, that question being whether under his settlements the estates of Letterewe and Gruinard were directed to be entailed on the brother or the sister. The brother and sister accordingly entered into the following agreement:—"We, the parties following, viz., Mrs Maria Anne Bankes, residing in London, daughter of the late Meyrick Bankes, Esquire, of Winstanley, Lancashire, and of Letterewe and Gruinard, Ross-shire, on the first part, and Thomas Holme Bankes, residing in London, second son of the said Meyrick Bankes, on the second part, considering that their said father lately died leaving a trust-disposition and settlement disposing of the estates of Letterewe and Gruinard, in Scotland, which belonged to him, and a will in the English form disposing of his properties in England, and also a codicil, whereby he is said to have made certain alterations on one or both of these settlements, in connection with which codicil a question has arisen whether the estates of Letterewe and Gruinard were intended to be given to the said Thomas Holme Bankes or to the said Maria Anne Bankes, which question, it is intended, shall forthwith be submitted to the Court of Session in Scotland for decision; and seeing that in these circumstances the parties hereto have agreed to enter into these presents: Therefore they do hereby agree as follows, namely—(First) That the said Thomas Holme