

signed, she could have recalled the trust-disposition. The minute of agreement was signed by both the spouses; it was merely an administrative and not a protective deed, and therefore revocable, so that it was open to reduce the trust-deed. The words of the deed here were not the same as those in *Anderson v. Buchanan*, June 2, 1837, 15 S. 1073, but rather fell under the rule of the following cases—*Menzies v. Murray*, March 5, 1875, 2 R. 507; *Newlands v. Miller*, July 14, 1882, 9 R. 1105; *Laidlaw v. Miller*, February 1, 1884, 11 R. 481; *Mackenzie v. Mackenzie's Trustees*, July 10, 1878, 5 R. 1027; *Ramsay v. Ramsay's Trustees*, November 24, 1871, 10 Macph. 120.

Counsel for respondents were not called on.

At advising—

**LORD JUSTICE-CLERK**—This lady—now Mrs Williamson—some time before her marriage came to the conclusion, acting no doubt upon good advice, that it was necessary to entrust the management of her affairs to persons of greater mental power and experience than herself, and upon 31st May 1886 she executed a trust-disposition, containing a bond of interdiction, by which she appointed certain trustees—the defenders in the present action—to manage her property for the purposes stated therein. There is no doubt that if matters had remained in the same condition she could have recalled this trust-disposition, but when the time came that she was to be married it was thought necessary that the same protection should be extended to her property after her marriage as had existed before that event. She and her husband agreed to that view, and they entered into a minute of agreement by which they ratified and approved of the trust-disposition and bond of interdiction, so that she was placed in this position, that she had her funds protected for her own use.

Now, there is no doubt that if these two people before their marriage had entered into a marriage-contract carrying out in terms the result which has been reached by this trust-disposition and the minute of agreement, that marriage-contract would have been an irrevocable deed. Does it then make any difference that this trust-disposition, with bond of interdiction, has been adopted by the parties as if it was a marriage-contract? It was a simple and easy way of disposing by legal arrangements before her marriage of the funds which the lady had previously disposed of, and in the way which her husband had agreed to accept as a condition of his marriage. I think that these two deeds are just a marriage-contract; that they dispose of the property concerned in a reasonable and unobjectionable manner; and that the trust-disposition is irrevocable. This lady is not entitled to destroy the protection which she herself has created. This fund is reserved "for her liferent alimentary use allenarly." That is a proper antenuptial arrangement. I see no legal ground for disturbing it.

**LORD YOUNG, LORD RUTHERFURD CLARK, and LORD LEE** concurred.

The Court adhered.

Counsel for the Reclaimer—Salvesen—Shennan. Agents—Sturrock & Graham, W.S.

Counsel for the Respondent—Jameson—Dickson. Agents—J. & J. Ross, W.S.

Wednesday, June 11.

## FIRST DIVISION.

[Lord Trayner, Ordinary.]

### WHYTE v. FORBES.

*Bankruptcy—Radical Right of Bankrupt—Title to Sue—Revival of Sequestration.*

A bankrupt who had been discharged without composition, and whose estate had paid 7½d. in the pound, brought an action after the trustee in his sequestration had been discharged, for the purpose of reducing the sale of certain heritable property effected by his trustee, on the ground that it had not been carried out in a legal manner. After the action was brought, the sequestration was revived and the trustee re-appointed.

*Held* (1) that the bankrupt had neither title nor interest to insist in the action for his own behoof, as even if the property were resold there would be no chance of a reversion to himself after payment of his creditors; (2) that he had neither title nor interest to insist in the action for behoof of his creditors.

*Process—Action of Reduction—Action to Reduce Sale quoad Part of Subjects Sold.*

*Held* that an action to reduce a sale quoad part of the subjects sold is incompetent.

*Bankruptcy—Sale of Sequestrated Estate—Purchase by Company whose Managing Partner was Commissioner on the Sequestrated Estate.*

*Opinion* (per Lord Trayner) that the purchase by a company of heritable estate sold under a sequestration is not illegal by reason of the managing partner of the company being a commissioner on the bankrupt estate.

In 1872 George Whyte purchased from the North of Scotland Banking Company the "fifth lot of the lands of Invernettie," 28 acres in extent, at the price of £2250. This price was not paid, but was made in the conveyance to Mr Whyte a real burden on the lands. In 1874 Mr Whyte feued 9½ acres of said subjects to a distillery company, who borrowed on the security thereof, and buildings thereon, the sum of £12,800 from the Northern Heritable Securities Investment Company. The Distillery Company went into liquidation in 1879, and the 9½ acres were conveyed by the liquidator to Mr Whyte in 1880, burdened by the bond to the Investment Company, amounting at that

date to £11,840. In 1876 Mr Whyte borrowed on the security of the said lands (excepting the 9½ acres feued) the sum of £2000 from Mr Robertson, bank agent, Huntly, for which he granted a bond and disposition in security in the usual terms.

In 1882 the estates of George Whyte were sequestrated, and J. A. Robertson, C.A., Edinburgh, was appointed trustee thereon on 21st June 1882. The debts above mentioned, of £2250 and £2000, came to be vested in the Commercial Bank, who assigned them in 1883 to Mr Robertson as the trustee under a voluntary trust of a Mr Henderson. In August 1882 the feu of 9½ acres, with the buildings thereon, were exposed for sale by public roup three times by the trustee in Whyte's sequestration, but no offer was made. In May 1883 the whole 28 acres were exposed as one lot, and were purchased by the Northern Heritable Securities Investment Company at the upset price of £3900. On 15th April 1885 the *dominium directum* of the 9½ acres formerly feued to the Distillery Company was sold to the Investment Company at the price of £2800. The sums of £3900 and £2800 were allocated to the heritable creditors in reduction of their debt. By minute of consolidation dated 22nd and recorded 23rd February 1886, the Investment Company consolidated the *dominium directum* with the *dominium utile* of the 9½ acres, and these along with the 18½ acres were conveyed by the Investment Company to Simon Forbes in 1886.

From the scheme of division prepared by the trustee on Whyte's estate it appears that the amount of debts entitled to rank for dividend was £28,176, 2s. 9d. Two dividends were declared at the rate of 6d. and 1½d. per pound respectively, a sum of £836, 9s. 7d. being so expended, which being deducted from the amount of the debts ranked left a deficiency on the general estate of £27,339, 13s. 2d. In March 1884 George Whyte was discharged without composition, and the trustee was discharged in November 1887.

In February 1888 the present action was raised by George Whyte against Mr Robertson, trustee, and Mr Drummond and Mr Henderson, the two surviving commissioners, on his sequestrated estates, the heritable creditors on the properties which had been sold under his sequestration, and Simon Forbes. The pursuer concluded for reduction of (1) the articles of roup dated in August 1882, and minute of re-exposure dated in May 1883, under which the 18½ acres of the *dominium utile* of the 9½ had been sold to the Northern Heritable Securities Investment Company, and (2) the disposition following thereon in favour of the Northern Heritable Securities Investment Company so far as the 18½ were concerned but not as to the *dominium utile* of the 9½ acres. The pursuer also sought to have it found and declared that the fore-said parts of the fifth lot of the lands of Invernettie, excepting as already mentioned the *dominium utile* of the 9½ acres, were his property, and that he had right to deal with and dispose of them as fully as

if the articles of roup, minute of re-exposure, and disposition mentioned had never been granted.

The pursuer averred, *inter alia*, that the sale had been carried out illegally and in contravention of the Bankruptcy Act 1856, in respect (1) that the trustee and commissioners sold the whole property in slumps to the Investment Company, and without obtaining the consent of Mr Robertson as Henderson's trustee; (2) that James Drummond, who as commissioner consented to the sale, was the managing partner and one of the principal shareholders of the purchasers, the Investment Company. But for the illegal sales of the heritable property, the general creditors would have got full payment of their debts. The total debts of the pursuer were £28,176, 2s. 9½d., and of the creditors who were ranked for £27,005, 16s. 8d. of that amount a portion got full payment of their debts out of the collateral and other securities held by them. Among the creditors ranked for this last-mentioned sum were included the estates of three of the co-obligants (the said James A. Robertson being trustee on each of them), these estates being ranked in relief of dividends paid by them on the debts to the Investment Company and Commercial Bank, which had been already directly ranked for on pursuer's estate. The ranking in these cases was accordingly a double ranking, and as such unjust and improper. By discharging the trustee in the sequestration, and by failing to sist themselves to the present action his creditors had abandoned all right, which might otherwise have been competent to them, to the subjects, the title to which was sought to be reduced.

The pursuer pleaded, *inter alia*—“(1) The pursuer has a good title to insist in the present action in respect—(1st) His radical right and interest in the estate which was sequestrated, and (2nd) the creditors who claimed on said estate not being in a position to sist themselves and follow forth the reduction. (2) The sale of the said parts of the fifth lot of the lands of Invernettie (excepting the *dominium utile* of the subjects feued to the said Distillery Company) having been carried out contrary to the express provisions of the Bankruptcy (Scotland) Act 1856, particularly sections 75, 114, 115, and 120 thereof, and without observance of the statutory forms prescribed for the sale of heritable property under a bond, is null and void and should be reduced. (3) The rights of the heritable creditors to the said 18½ acres of the lands of Invernettie, and to the said superiority of £200 having been preferable to the rights of the trustee and creditors to these subjects under the said sequestration, the sale by the defenders, the said trustee and commissioners, alone was in the circumstances illegal. (4) The said trustee and commissioners had no right or title to burden the sale of the said 18½ acres with the sale of the distillery feu subjects, and privately to allocate the price received for these two separate properties, and the sale and allocation should be set aside as *ultra vires*. (5) It being *ultra vires* and incom-

petent for the said trustee and commissioners to the said Investment Company, without any price or equivalent given therefor, the said buildings erected beyond the boundaries of the distillery feu and the ground on which they stand, and which subjects were not included in those exposed for sale under the said articles of roup and minute of re-exposure relative thereto, the pretended sale and the disposition thereof to the said Investment Company are inept and incompetent, and the same should be reduced and set aside as being void and null. (6) The sale of the said 18½ acres, and of the said *dominium directum* to the defenders' authors, the said Investment Company, having been a statutory nullity, the conveyance by them to the said defender Simon Forbes, which followed thereon, should be set aside as invalid.

Defences to the action were lodged by Simon Forbes.

He pleaded—“(1) No title to sue. (2) The pursuer has no interest to insist in the conclusions of the present action. (3) The pursuer's averments are irrelevant and insufficient to support the conclusions of the action.”

On 23rd June 1888 the Lord Ordinary (TRAYNER) sustained the 1st and 2nd pleas-in-law for the defender Forbes, and dismissed the action.

“*Opinion.*— . . . The pursuer has no title to sue, because he has been divested of all right to the subjects by his sequestration, and he has no interest, because the reduction of the sale, if successful, would not confer benefit on the pursuer. The subjects would then fall back into his sequestration for behoof of his creditors.

“The pursuer seems to think that because he was discharged in 1884 without composition, that he was thereby reinvested with his estates. But this is plainly erroneous. Such reinvestiture only takes place where discharge proceeds upon composition, and where the bankrupt in effect buys back his estates from his creditors. But, further, the pursuer maintains that he is entitled to sue this action because his creditors ‘by their actings abandoned all right, if any, which might otherwise have been competent to them’ to the subjects in question. If that had been so the pursuer would have had a title to sue this action. But it is plainly not so, because on the pursuer's own averments it appears that the trustee and commissioners, acting for the whole body of creditors, sold the subjects in question and received the price. What right they could abandon to the pursuer after they had conveyed their whole right to the Heritable Securities Company it is not easy to see. But the statement that the creditors abandoned any right they had to the subjects in question is a mere inference by the pursuer from the fact that in 1885 the creditors agreed to the trustee's discharge ‘as all the assets had been realised, and all the available funds divided.’ The pursuer seems to overlook the fact that the creditors had by that time received the price of the subjects in question, and were under the belief that the whole assets of

the bankrupt had been realised and divided. They were not agreeing to the trustee's discharge on the ground that all the assets except the heritable subjects had been realised, and that all claim or right to the heritable subjects should be abandoned.” . . .

The pursuer having reclaimed, the First Division on 16th November 1888 recalled the Lord Ordinary's interlocutor, repelled the 1st and 2nd pleas-in-laws for the defender as objections to satisfying the production, reserving their effect on the merits, remitted to the Lord Ordinary to hear parties on the question of satisfying the production, and to proceed further as should be just.

The pursuer's sequestration having been revived, and Mr Robertson reapportioned as trustee, the Lord Ordinary on 14th December ordered intimation of the process to be made to him, that he might sist himself as a party to the cause if so advised.

Mr Robertson thereafter lodged this minute—“Dickson, for the said James Alexander Robertson as trustee foresaid, in view of the fact that the said James Alexander Robertson as trustee foresaid was called as a defender to the action, and of the nature of the allegations made by the pursuer, and considering that the creditors, while they believed that the former sale was not open to challenge, still maintained that if the pursuer's challenge was successful, any benefit from setting aside the sale would fall to the creditors under the sequestration so far as necessary to pay the balance of debt still due to them, in respect the creditors did not abandon the beneficial interest in the subjects, or in the present action so far as that could be vindicated from the defenders other than the said trustee—asked leave to sist himself in order that, in the event of the pursuer succeeding to any extent in the action, the minuter should obtain decree of reduction in his favour as trustee on the pursuer's estates.”

On 9th July 1889 the Lord Ordinary sustained the first, second, and third pleas-in-law for the defender and dismissed the action.

“*Opinion.*—In this action the pursuer seeks to reduce a sale of part of his sequestrated estates carried through by his trustee with consent of the commissioners. I think he has neither title nor interest to insist in such an action for the reasons given by me in pronouncing the interlocutor of 23rd June 1888. I will only note (in addition to what I then said) the fact that since that interlocutor was pronounced, the pursuer's sequestration has been revived and a trustee appointed therein.

“Apart from the question of title I am of opinion that the pursuer has not averred any relevant ground of action. The state of the record makes it necessary that I should explain shortly the circumstances out of which this action has arisen.

“In 1872 the pursuer purchased from the North of Scotland Banking Company the ‘fifth lot of the lands of Invernettie’ extending to 28 acres, at the price of £2250.

This price was not paid, and was made (in the conveyance to the pursuer) a real burden on the lands. In 1874 the pursuer feued 9½ acres of the said subjects to a distillery company, who borrowed on the security thereof and buildings thereon £12,800 from the Northern Heritable Securities Company. The distillery company went into liquidation in 1879, and the 9½ acres, with the distillery buildings, were conveyed by the liquidator to the pursuer in 1880. In 1876 the pursuer borrowed on the security of said lands (excepting the 9½ acres feued) the sum of £2000 from Mr Robertson, bank agent, Huntly, for which he granted a bond and disposition in security in the usual terms. At the date of the pursuer's sequestration in 1882 matters therefore stood in this position: the pursuer was vested in the whole 28 acres originally conveyed to him, burdened with the debt of £2250 due to the Northern Banking Company, the same lands (excepting the feu) were also burdened with the debt of £2000 to Mr Robertson, while the feu was burdened with the debt to the Northern Heritable Securities Company, which then amounted to £11,840. The debts above mentioned of £2250 and £2000 came to be vested in the Commercial Bank, and were by them assigned in 1883 to the defender James A. Robertson as trustee (under voluntary trust) of a Mr Henderson.

"The feu, with the buildings thereon (that is, the distillery lot) were exposed for sale by public roup three times in the course of 1882 by the trustee in the pursuer's sequestration with consent of the commissioners, and also with consent of the heritable creditors, but no offer was made at any of the exposures. It was then considered advisable to expose the whole subjects (28 acres) as one lot, and this was accordingly done in May 1883, when the subjects were purchased at the upset price by the Northern Heritable Securities Company. It is this sale which the pursuer now seeks to reduce, but that only as regards the 18½ acres—the sale so far as regards the 9½ acres forming the distillery lot is not challenged.

"The first ground on which the sale is challenged is that it was *ultra vires* of the trustee to sell the whole subjects as a *unum quid*, and that the sale was carried through by the trustee without the consent of the heritable creditors contrary to the provisions of the Bankruptcy Act 1856. The first branch of this objection is not a ground for setting aside the sale. The trustee and commissioners deemed it to be advantageous to the estate to sell the whole subjects together as they had failed to effect a sale of the feu by itself. But whether their judgment on this matter was right or wrong it was simply an act of management and did not affect the validity of the sale. The trustee was vested with the whole subjects, and was plainly entitled to sell them in one lot. The second branch of the objection seems also groundless. The whole heritable creditors were concurring in the sale. These creditors were the Northern Heritable Securities Company and Mr Robertson as

trustee on Henderson's estate. The 113th section of the Bankruptcy Act provides that where heritable creditors concur with the trustee in bringing the estate to sale, the trustee shall sell the same in his own name; but the "articles of roup and conveyance to the purchaser shall be executed by the trustee with consent of such creditor and the commissioners." The articles of roup and conveyance challenged proceed in the names of the trustee, with consent of the commissioners, and of the Northern Heritable Securities Company. They do not bear in terms to proceed with the consent of Mr Robertson (the trustee) as trustee on Henderson's estate.

"This objection is purely technical, and, at the best, seems to me to be an objection which the purchaser alone has any interest to state. It may affect his title although only in form. If Mr Robertson had signed the conveyance twice—once as Whyte's trustee and again as Henderson's trustee—no objection would have been possible. But if the purchaser is satisfied, I think the pursuer has no ground to object. The estate has not suffered by this technical informality. In fact, all concerned were consenters to the sale.

"The only other objection is that stated in Cond. 12. It appears that James Drummond, one of the commissioners on the pursuer's sequestrated estate, is the manager of and a shareholder in the Northern Heritable Securities Company, who purchased the subjects. It is objected that this rendered the sale invalid as being the purchase of part of the sequestrated estates by one of the commissioners, which is forbidden by statute. But the commissioner on the estate did not buy the subjects. They were bought by the company, which has a separate *persona*. Mr Drummond, the commissioner, acquired no individual interest or right in the purchase. He cannot sell the property or use it for his own purposes; it cannot be attached by his creditors. As a shareholder in the company he will, no doubt, share in the profit or loss of the transaction, as he will share in the profit or loss of all the transactions of the company so long as he is a shareholder; but when he ceases to be a shareholder the property in question will remain the property of the company, no more and no less its property than when Mr Drummond held his shares. I think this transaction cannot be brought within the principle which forbids a person in a fiduciary position purchasing estate under his charge, and when his personal interests conflict with the interests which as trustee he is bound to protect."

The pursuer reclaimed, and argued—the pursuer had a title to sue. He was suing in order to recover an asset which had been abandoned by the trustee and creditors. A trustee could not refuse to sue, and yet say that he would take the benefit of an action by the bankrupt. The pursuer, however, was willing, if necessary, to sue the action for the benefit of his creditors. *Marshall v. Grant*, March 2, 1860, 22 D. 926; *Graham v. Mackenzie*, June 3, 1871, 9

Macph. 798; *Whyte v. Murray*, November 16, 1888, 16 R. 95; *Geddes v. Quistorp*, December 21, 1880, 17 R. 278; *Jackson v. M'Kechnie*, November 13, 1875, 3 R. 130. The present case was distinguished from *Fraser v. Hankey*, as the bankrupt in that case had delayed bringing his action of reduction for 39 years. There had been no such *mora* here. The sale was invalidated by the fact that a commissioner on the sequestrated estate was also manager of the company that purchased the subjects sold. What was illegal for a trustee was illegal for a commissioner—Bankruptcy Act 1856, sec. 120; *Blaikie v. Aberdeen Railway Company*, May 1853 and July 1854, 1 Macq. 461; *Brown v. Burt*, December 23, 1848, 11 D. 338. The sale of the property was under the 113th section of the Bankruptcy Act, but the requirements of that statute had not been satisfied in that Mr Robertson had not consented as Henderson's trustee to the sale. If a statute ordained a sale to be carried out in a particular way and it was not so carried out, a party interested, as the bankrupt was here, had a right to object—*Hope v. Moncrieff*, January 26, 1833, 11 S. 324; *Nisbet v. Cairns*, March 12, 1864, 2 Macph. 863. The defender Forbes must have seen the signature of Drummond to the articles of roup, both as commissioner and also as manager for the purchasers, and that there was no signature of Henderson's trustee, and should have been thereby put on his inquiry—*Petrie v. Forsyth*, December 16, 1874, 2 R. 214.

Argued for the defender—The position of matters was changed since the revival of the sequestration. The trustee in the revived sequestration showed by his minute that he had not abandoned this asset. The bankrupt had therefore no title to sue, and if he ever had a title he had forfeited his right to sue by *mora*—*Fraser v. Hankey & Company*, Jan. 13, 1847, 9 D. 415. The pursuer had no interest to sue, as there could never be any chance of a large enough price being obtained for the properties, if resold, to afford a reversion for him after payment of his creditors. Further, the objections were only technical and formal. The pursuer's trustee was also trustee on Henderson's estate, and though he had not signed the articles of roup in the latter capacity his consent to the sale must be presumed. The purchasers were the Investment Company and not their manager.

At advising—

LORD SHAND—The defender in this case, Simon Forbes, in 1886 purchased from the Northern Heritable Securities Investment Company a property in Peterhead extending to 28 acres for the sum of £7250. Part of this property had been for a considerable time held under separate titles, but the company who sold to the defender Forbes had consolidated the property and superiority in the same hands, and it was the property so consolidated that Mr Forbes purchased. Sometime after this purchase it happened that the Admiralty wanted a

portion of the ground acquired by Mr Forbes, and I cannot read the record in this case without thinking that the true reason for raising this action was that the high price offered by the Admiralty for a portion of the ground led to the hope that a similar offer would be made by them for the other part of the ground.

Mr Whyte, the pursuer, was at one time owner of this property, but his estate was sequestrated, and the property was sold under the sequestration to the Northern Heritable Securities Company in 1883. In 1886 the property was sold, as I have said, to Forbes, and this action is raised by the pursuer to reduce the former sale by the trustee in his sequestration to the Heritable Securities Company. I have come to the conclusion, and without difficulty, that the pursuer has neither title nor interest to insist in this action.

The pursuer's sequestration took place in 1882, and the property was sold to the Securities Company in the following year. It consisted originally, as has been said, of 28 acres, but it had been divided in the manner described in the Lord Ordinary's judgment into two parts by the feuing of 9½ acres, and the 18½ acres along with the *dominium utile* of the 9½ acres were sold to the Securities Company at the price of £3900. The property having been so realised, the price was distributed among the creditors, and the pursuer received his discharge in 1884, not on a composition reinvesting him in his estate, but on a simple discharge which enabled him to begin the world again. The trustee went on administering the estate, and part of his administration was the sale of the *dominium directum* of the 9½ acres, to the Heritable Securities Company in 1885 for the sum of £2800, and this price was also divided among the creditors. The whole subjects, superiority and *dominium utile* of the whole 28 acres were then sold to Mr Forbes.

Now, the first thing proposed in this action is to reduce and set aside the articles of roup of the subjects purchased by the Heritable Securities Company, and the disposition following thereon in their favour. I see no conclusion to reduce the conveyance in favour of Simon Forbes, but of course if the earlier stages of his title are cut away, his title is destroyed, and having been in possession of the property for some time, and having, as he alleges, expended considerable sums on it, he naturally resists the action.

I may now examine the action to see the nature of the pursuer's claim. At the date when he brought this action he was discharged, and the trustee in his sequestration was discharged, and in that state of matters he raised this action for the reduction of the deeds referred to which constitute the title of the company who were the original purchasers from his trustee; and he goes on in the declaratory conclusion to ask that it "should be found and declared by decree of our said Lords that the fore-said parts of the fifth lot of the said lands of Invernettie (excepting the *dominium utile* of the said area of ground feued as above

mentioned) . . . are the property of the pursuer, and that he has right to deal with and dispose of the same as fully as if the articles and conditions of roup and minute of re-exposure relative thereto and the disposition above libelled in favour of the said Investment Company had never been granted." The action as raised and maintained is clearly not for the interest of the pursuer's creditors but for his own interest, and this is made quite clear from two passages in the record. In *Condescendence* 19 the pursuer after narrating the fact of the trustee's discharge continues—"The creditors have thereby, and by their other actings, and particularly by their failure to sist themselves to the present action, abandoned all right, if any, which might otherwise have been competent to them to the subjects, the title to which is sought to be reduced." The action accordingly is presented in respect of abandoned subjects, and the creditors having abandoned them, as he says, the pursuer claims them, in virtue of the radical right in him, for his own behoof. That this is his position is made still more clear by his answer to the third statement of facts for the defender Mr Forbes, where he says, referring to the minute lodged by the trustee in his sequestration—"The defender has no concern whatever with the minute mentioned, but its terms preclude the trustee from being sisted as a party to this action, which of itself is an asset entirely belonging to the pursuer, who was discharged of all his debts in March 1884." I omitted to say that since the action has been raised, the sequestration has been revived, and the allusion in the answer quoted is to a minute lodged in process by the trustee, and the pursuer represents that the present action is an asset entirely belonging to himself. Clearly, then, the pursuer did not bring this action in the interest of his creditors. He was in a position hostile to the creditors, or at least said that an asset had been abandoned, and sought to recover it for himself. I do not mean to overlook the contention of counsel who took the second speech for the pursuer that this action was for behoof of the creditors, but in the meantime I am dealing with it as one which the pursuer is seeking to maintain for his own interest.

Before, however, dealing with the points which the pursuer has raised I wish to make this further observation, that though the Heritable Security Company purchased the whole 28 acres from the trustee in the pursuer's sequestration, the extraordinary proposal made by the pursuer is to have part of the subjects to the Company and to reduce the deeds only in so far as they bear to convey 18½ acres of the subjects sold. The proposal of a partial reduction raises an objection with which I shall deal immediately.

Taking the action as one which the pursuer has raised for his own behoof, I agree with the Lord Ordinary that he has neither title or interest to sue. Of course, the condition of this action, as I am now considering it, is that the trustee and creditors have abandoned their right. I

confess, however, I am at a loss to see what right they have abandoned. The trustee and creditors entered on the properties, exposed them for sale, sold them, and divided the proceeds. Therefore, so far from abandoning the properties, they made all they could out of them. It is an utter confusion to suppose this to be a case of a bankrupt suing for an asset abandoned by his creditors. What the pursuer seeks to do is to challenge a great deal that his creditors did. They sold the properties and divided the proceeds. What the pursuer proposes to do is to cut down all that they have done. I do not see how he can be allowed to interfere. The creditors dealt as they were entitled to deal with these properties, and the pursuer had no right to challenge their action unless he could show two things—first, that there was some illegal dealing with the properties, and second, that the dealing was to his prejudice.

Now, let me take these two points separately. Looking at the record, confused as it is—and one cannot read it without seeing that it was framed by an unprofessional person—it is difficult to lay hold of any point in it which could be used in favour of the pursuer. He first proceeds to object to the mode in which the properties were sold. What interest has he to object to that? The creditors are said first to have exposed them separately and then as a whole, and sold them as a whole. The pursuer has no title to object to their doing so. Again, it is pointed out that by the Bankruptcy Act three ways are provided in which a heritable property belonging to a bankrupt estate and burdened with debt may be sold. It may be sold by the creditor with concurrence of the trustee if he has a preferable right, or it may be sold by the trustee in his own name with consent of the security-holder and the commissioners, or it may be sold by the trustee with the consent of the commissioners in certain circumstances. Now, it is said that the second of these modes was adopted, but that there was an irregularity in carrying it out. But the pursuer has no interest in that matter. It is a matter entirely in the hands of the trustee and the security-holders with which the bankrupt has nothing whatever to do. The creditors are entitled to adopt the mode by which they will get most for the properties, and there is nothing in the record to suggest that they did not do so in this case.

One view in which protection would be given to the bankrupt's title to sue would be if he could show that the properties if fairly dealt with would have afforded a large reversion to himself, that his creditors got 19s. or so in the pound, and that the realisation of an additional sum would have left a balance in his own favour. The case is utterly wanting in anything of the kind. There is not a single averment that he could have obtained any advantage if the properties had been sold otherwise. I see no suggestion of any way in which the properties could have brought more money.

What, again, was the state of the pursuer's sequestration? His estate paid 7½d. in the pound, and what he says on record is this—"Explained that but for the illegal sales of the heritable property the general creditors would have got full payment of their debts," which is unintelligible without the statement of some facts to explain it. There is no averment that a higher price could have been obtained. Then again the pursuer says—"Explained that the total debts of the pursuer were £28,176, 2s. 9½d., and of the creditors who were ranked for £27,005, 16s. 8d. of that amount a portion got full payment of their debts out of the collateral and other securities held by them." He then explains that certain of the creditors should be excluded because they received a double ranking, the persons referred to being obviously in the condition of cautioners for him. But although the question of double ranking might arise in the sequestration, a very different question would arise. So far then from the pursuer getting any advantage if these properties had been sold higher, I am satisfied that the estate was in debt, and that any sum which the estate might have realised would have been needed to pay the creditors and something more as well. If, then, we look at the action as one for the pursuer's own advantage, it is clear that he has neither title or interest to insist in it.

We may next look at the alternative case presented as to the action being one for behoof of his creditors. Taking the action as such, the objections to it are almost more serious than in the other view. What is the position of matters which has been brought about since the action has been raised. The trustee and the creditors have got the sequestration revived, and the trustee is now in office. Can the bankrupt come forward to represent the trustee in the sequestration? The bankrupt's title is excluded by the trustee being now in office. These other formidable observations may be made, that if the trustee and creditors attempt to set aside the obligations they have come under they will have first of all to found on irregularities of their own—though I am far from saying that there have been any irregularities—and in the next place they will have to refund the price. Can the bankrupt who has paid 7½d. in the pound come forward and pursue such an action? It is plain, without saying anything further, that he has neither title nor interest to do so.

One other point there is on which it is right I should say a word. It is said that one of the commissioners who concurred in the sale was also the purchaser. The record presents on this point again a strange medley. In the first place, it is said that Mr Drummond was a commissioner, and should not have been a purchaser at the sale, but in another passage the pursuer says—"The said commissioners were at that time divested of their office by section 75 of the Bankruptcy (Scotland) Act 1856 by reason of their not being creditors or mandatories for creditors. . . . The said James Drummond never did act as manda-

tory for his company, they having in June 1882 granted a mandate in favour of John Stewart Gowans, C.A., Edinburgh, and in July 1882 a mandate in favour of the said Alexander Scott Ireland, who thereafter voted and acted at all meetings of the creditors in the sequestration." So that Mr Drummond is said not to be a commissioner, and the sale is to be set aside because he was the purchaser and also a commissioner. It would be very difficult if one had to deal with the question to see which averment should be taken up. It is enough, however, that Mr Whyte, for the reasons stated, has no interest in the question.

Another fatal objection to the action is that it is a partial reduction; and in conclusion I may say that if we could go further into the merits it is a very late period to bring a reduction. The action is raised in 1888, the sale was in 1883, and the pursuer was discharged in 1884. In the meantime the properties have been dealt with by the Investment Company for four and by Simon Forbes for two years. After all this delay the pursuer brings this action, not averring that anything new has come to his knowledge, and although he knew all along what he knows now, purposes to set aside and reduce this onerous conveyance. That would, I think, be an insuperable objection to the action were there nothing else in the case.

LORD ADAM—The deeds sought to be reduced in this action are (first) articles of roup dated in August 1882 and minute of re-exposure relative thereto dated in May 1883, of in the first place 18½ acres of land, and in the second place the *dominium utile* of 9½ acres near Peterhead, and (second) disposition bearing to be granted in pursuance of the sale under said articles of roup in favour of the Northern Heritable Securities Investment Company, by which the subjects minuted were sold to the Company for £3900.

I agree that there is an insuperable objection at the very outset to the pursuer's case. Whereas the two subjects were sold as one and for one price, the conclusions of the action are only for reduction in part of the deeds by which the sale was carried out—that is to say, the pursuer here proposes to reduce the contract of sale only so far as concerns one of the two subjects in question. If the contract is to be reduced at all it must go altogether. It cannot be partly reduced and partly left standing. This objection alone is, I think, sufficient for the disposal of the action.

Assuming, however, that the action is for reduction of the whole contract of sale, I think that the pursuer has neither title nor interest to insist in it. I may say that matters were in a very different position when we recalled the interlocutor of the Lord Ordinary of 23d June 1888, in which he sustained the first and second pleas for the defender. We recalled that interlocutor to the effect of repelling these pleas as objections to satisfying the production reserving their effect on the merits. The position of the case at that time was this,



the sequestration was not in existence, the trustee was discharged, and there was no one to represent the creditors, and that being so we held that the radical right of the pursuer had revived on the discharge of the trustee, but simply for the reason that there was no trustee and no existing sequestration. Since then the sequestration has been revived, a trustee appointed, and he has put in a minute in this action. Accordingly, just as we held that the pursuer's radical right had revived because there was no trustee, it follows now that there is a trustee that his radical right is extinguished. The right to sue cannot be both in the trustee and the bankrupt at the same time, and I have no hesitation in saying now that it is in the trustee. If the present position of matters had existed formerly we would never have recognised any right in the pursuer's person. This again is, I think, enough for the decision of the case.

It is, I think, clear that the pursuer makes a mistake in thinking that if he could get the reduction craved the estate would revert to him. If the sale were reduced the only effect would be that the estate would fall into the hands of the trustee in the sequestration and be dealt with by him. The only and entire interest in the matter is the creditors, whose actions the bankrupt has no right or title to interfere with. If the pursuer could have said that he was prepared to show that if these subjects were to fall back into the sequestration and be again sold the price to be got for them would be so exceptionally large that after paying the creditors 20s. in the £ there would be a surplus for his benefit; if there were anything to show that that was a possible state of affairs, the pursuer would, I think, be entitled to sue. We have, however, the minutes of the proceedings in the sequestration, and I find it set forth in the minute of 21st May 1884 that—"The claims as ranked by the trustee upon the estate amounted to £28,176, 2s. 9½d., and a dividend thereon at the rate of one penny and an eighth would require £132, 1s. 6d. The commissioners accordingly authorised the sum of £132, 1s. 6d. to be divided among the creditors in terms of the statute." This it appears was the last and final dividend, and as it further appears that the only previous dividend had been 6d. in the £, we have only 7½d. as the total dividend paid on this estate, we have claims ranked to the amount of £28,000 and only about £800 to meet them. How then is it possible to say in such circumstances that the pursuer could show that the estate could be sold for a sum giving him a reversion?

On these grounds accordingly I have no hesitation in saying that the Lord Ordinary has come to a right conclusion.

Of the many objections made to the sale there is one dealt with by the Lord Ordinary with regard to which I do not wish to express any opinion. The objection, though the record is nearly unintelligible on the point, is that one of the commissioners on the pursuer's sequestrated estate was the

manager of the Investment Company who purchased the subjects. The Lord Ordinary, as I have said, has expressed his opinion upon the matter. I do not think, however, that it is desirable that we should decide this question in a case where the pursuer has no title, and therefore I reserve my opinion on the point.

LORD M'LAREN and the LORD PRESIDENT concurred.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Rhind—Party. Agent—J. D. Macaulay, S.S.C.

Counsel for the Defender and Respondent—G. W. Burnet. Agents—Boyd, Jameson, & Kelly, W.S.

Wednesday, June 11.

## SECOND DIVISION.

[Lord Trayner, Ordinary.]

### HENDERSON & SONS v. DOWLING.

*Principal and Agent—Contract—Construction—Dismissal—Reasonable Notice.*

A firm of merchants engaged an agent to sell their goods, and agreed to pay him "monthly at the rate of £200 per annum," and to allow him in addition "5 per cent. on all sales above £300 per month, this to be calculated on the whole year at the end of the first year, and according to arrangement thereafter." Two months thereafter the employers gave a month's notice of dismissal to the agent, who replied that the engagement was for a year. The merchants did not repudiate this construction of the contract, but about a month thereafter they again gave the agent a month's notice of dismissal. In an action at his instance, held that from the terms of the contract and the actings of the parties the period of employment contemplated and agreed to was a year, and that the pursuer was entitled to damages for breach of contract.

Upon 26th February 1889 James Thompson Dowling, commission-agent, Dundela Villa, Shettleston, wrote to Simon Henderson & Sons, Grove Biscuit Factory, Edinburgh, offering his services as agent in Glasgow for the sale of their biscuits. He stated that he had several other commissions in kindred trades, and had an established reliable connection. Upon 13th March Simon Henderson & Sons appointed him agent under the following agreement:—". . . "1. We agree to pay you monthly at the rate of £200 per annum, and to allow you 5 per cent. on all sales of biscuits (tins, &c., not included) above £300 per month, this to be calculated on the whole year, at the end of the first year, and according to arrangement thereafter. 2. Twenty per cent. to be the maximum discount to be