

cate that he should be entitled to an extension of the time for the work so ordered. It will at once be seen how different this condition is from the condition in *Dodd v. Churton*.

Now, these being the conditions of the pursuer's contract, I think the burden was upon him to show that the alterations ordered by the defender were such as to free him from the penalty clause. This he has failed to do. First, he did not apply for and has not produced any certificates granted by the architect entitling him to an extension of time in respect of alterations; secondly, he has not proved at what dates the alterations were ordered, or afforded us any means of judging what effect they had in delaying the work; and thirdly, it is distinctly proved in the case that during the period before the 1st of May 1897, by which time the whole work should have been completed, the pursuer, notwithstanding repeated remonstrances and orders from the architect, obstinately refused to put sufficient men on the work, with the result that, for instance, the north walls, which should have been ready for the roof on 1st January 1897, were not ready until the month of July of the same year, two months after the whole work should have been completed.

The work was not finally completed until upwards of 400 days beyond the time when it should have been completed. The defender restricts his claim for penalties to 300 days, amounting to £150. We have no means of judging whether the allowance made by the defender correctly represents the additional time which was necessarily occupied by the contractor in consequence of the alterations ordered. But the burden being on the pursuer in this matter, and he having entirely failed to show the extent to which the delay was caused by the alterations, and in particular having failed to show that any alterations were ordered before the 1st of May 1897 which would have prevented him completing the work by that date, I am of opinion that the defender is legally entitled to plead the penalty clause to the extent to which he asks that it should be enforced. Accordingly, I am for recalling the judgment of the Sheriff and reverting to the judgment of the Sheriff-Substitute.

The Court recalled the interlocutor reclaimed against, and, *inter alia*, found that there fell to be deducted from the gross apparent balance due by the defender to the pursuer £150 in name of penalty for breach of contract.

Counsel for the Pursuer—Salvesen, Q.C.
—Guy. Agents—Dalgleish & Dobbie, S.S.C.

Counsel for the Defender—W. Campbell, Q.C. — Chisholm. Agents — Cairns, M'Intosh, & Morton, W.S.

Friday, December 21.

SECOND DIVISION.

[Lord Pearson, Ordinary.]

EARL OF ROSSLYN'S TRUSTEE v.
EARL OF ROSSLYN'S TRUSTEES.

Bankruptcy — Voluntary Trust-Deed — Trust-Deed for Creditors or Onerous Contract — Supervening Bankruptcy in England — Trust-Deed Superseded — Obligation of Trustees to Denude and Account.

A, the proprietor of certain heritable and moveable estate, became involved in large pecuniary liabilities through extravagance. By trust-disposition, which proceeded on the narrative that in order to pay off certain unsecured debts he had arranged to borrow a sum of £40,000, less or more, from B, his father-in-law, who agreed to lend the same upon A's granting securities over his landed estates and other funds, and upon the express condition that A should also grant a trust-disposition in manner and for the purposes underwritten, which A had agreed to do; and in respect that B had already advanced £16,000, and agreed to advance to the trustees under the deed such sums as should be necessary for the payment of A's debts to the amount of £40,000 in all upon the trustees granting bonds therefor, A conveyed to himself, to B, and another, as trustees, his whole estates, heritable and moveable, acquired and to be acquired, with power of sale. The trust purposes were (1) for payment of the trustor's then existing debts, including the advances made and to be made by B; (2) for payment of an alimentary allowance to the trustor or his wife if the trustees thought fit; (3) after these purposes were fulfilled, and after the trustor's death, to hold the residue for behoof of his widow and children. The trustees entered into possession and administered the estate. Subsequently A having contracted further liabilities was on his own petition adjudicated bankrupt in England, and a trustee was appointed. The trustee brought an action against the trustees under the trust-deed granted by A, concluding for (1) reduction of the trust-deed, (2) decree of denuding, and (3) an accounting by the trustees. The trustees maintained that the trust-deed was not a mere trust for creditors, but was an onerous deed granted under contract with B.

Held (affirming Lord Pearson, Ordinary) (1) that although the pursuer had set forth no relevant ground for reduction of the trust-deed, it had been superseded by the supervening bankruptcy of A, and that the trustees were bound to denude of the trust estate in favour of the pursuer subject to any valid securities over the same, and on payment or satisfaction of such rights of lien or indemnity as they

might have; and (2) that the trustees were bound to count and reckon for their intromissions—*diss.* Lord Young, who was of opinion that the effect of the trust-deed was irrevocably to divest A of his whole estates thereby conveyed, and that it was therefore unaffected by his supervening bankruptcy.

Bankruptcy — Voluntary Trust-Deed — Supervening Bankruptcy—Reduction of Trust-Deed.

Averments with regard to the granting of a trust-deed, upon which held that the trustee in the supervening bankruptcy of the granter had not averred any relevant grounds for reducing the trust-deed in question.

The Earl of Rosslyn was married in July 1890 to the daughter of Mr R. C. De Grey Vyner, and he succeeded to the title and estates in September of the same year. His pecuniary affairs became embarrassed, and in January 1893 he was indebted in a sum of £107,000, for which he granted a bond in favour of Mr Samuel Lewis.

On 25th July 1893 Lord Rosslyn executed a trust-disposition, whereby he conveyed the heritable estates therein described, and generally the whole heritable and moveable estate and effects then belonging or which should thereafter belong to him, to certain trustees, viz.—Mr Vyner, Mr R. N. Bennett, and himself, in trust for the purposes therein set forth. The trust-deed proceeded on the following narrative:—“Considering that I have contracted debts and liabilities to a large amount, part of which is secured over my landed estates of Ravenscraig, Dysart, Roslin, Tyrie, and others, in the counties of Fife and Edinburgh, and upon other assets and funds belonging to me, and part of which is unsecured, and that in order to pay off certain unsecured debts I arranged to borrow a sum of £40,000, less or more, from Robert Charles De Grey Vyner of Fairfield, in the county of York, Esquire, my father-in-law, who agreed to lend the same to me upon my granting in his favour a bond and assignation and disposition in security, or bonds and assignations and dispositions in security, over my said landed estates, and certain policies of insurance on my life and other funds and assets, and upon the express condition that I should also grant a trust-disposition in manner and for the purposes underwritten, which I have agreed to do; and further, considering that the said Robert Charles De Grey Vyner has already advanced to me sums amounting to upwards of £16,000 to account of the said sum of £40,000, and that I have at or previous to the date hereof granted and delivered to him a bond and disposition and assignation in security for the said sum of £16,000, and that he agreed to advance to the trustees under these presents, for the purposes of the trust hereby created, such further sums as may be necessary for the payment of my debts, but not exceeding (along with the said sum of £16,000 already advanced) the said sum of

£40,000 in all, unless the said Robert Charles De Grey Vyner shall be willing to make advances to the trustees in excess of that sum — upon the said trustees with or without my concurrence granting in his favour a bond or bonds and dispositions and assignations in security for the sums so to be advanced.”

The dispositive clause bore that the Earl did “therefore, in pursuance of the said arrangement, dispoise, convey, assign, transfer, and make over to and in favour of” the trustees above named, his whole estate and effects as above mentioned.

By the first trust purpose the trustees were directed, during the Earl's life and the subsistence of the trust, to hold the estates and the proceeds thereof “for payment of all the just and lawful debts now due by me, and for fulfilment of all obligations incumbent on me at the date hereof, and all interest due or accruing on such debts, and especially including the said advances made or to be made to me or to the said trustees by the said Robert Charles De Grey Vyner,” and also any sums which might be borrowed by the trustees under the powers thereafter conferred; and the trustees were further directed to pay “the said debts and fulfil the said obligations in such order as they shall think expedient, having always due regard to the legal order and ranking of such debts as are secured on the trust estate or any part thereof.”

By the fourth purpose the trustees were “entitled, but not bound, during my life or the subsistence of the trust, or so long as they think fit, to allow me or my wife and family to occupy and possess rent free the mansion-house of Dysart, offices, and policies, gardens and pleasure-grounds connected therewith, or any other house forming part of the trust-estate, with its offices, policies, and appurtenances, and with the furniture and other effects therein, or, if they shall see fit, to let the same for such period and on such terms as they shall see proper; and further, the trustees shall be entitled during my life or the subsistence of the trust, but shall not be bound, to pay from time to time such sums to me, or if they see fit to my wife, for the purpose of meeting maintenance and housekeeping expenses, as they in their uncontrolled discretion shall see fit; Declaring that any sum or sums so paid shall be held to be paid for alimentary purposes only, and shall not be capable of anticipation or assignment by me, or liable for my debts or deeds or to the diligence of my creditors.”

By the last purpose the trustees were directed, upon the death of the Earl, or as soon thereafter as the advances made by Mr Vyner or the trustees should be paid, to hold “the whole residue of the trust-estate which may then remain under their management for behoof of my widow and children, or such one or more of my widow and children exclusive of the others or other, in such shares and proportions, and subject to such trusts and provisions, limitations, and conditions as to vesting, payment, or otherwise as I shall appoint by any writing

under my hand or by my last will, but not in contravention of any obligations undertaken by me in the settlements made on the occasion of my marriage, or in any relative deed or deeds, and failing such appointment, or in so far as the same shall not extend, then for such one of my issue as shall on my death succeed to the title and dignity of Earl of Rosslyn, and his heirs and assignees; and upon the termination of the trust, in the events before referred to, the trustees shall denude of the residue of the trust-estate, and pay over, dispense, reconvey, and deliver the same to the person or persons entitled thereto under the burden of all debts and charges then affecting the trust-estate."

Among other powers the trustees were given power to sell all or any part of the trust estate, including the heritable properties conveyed, and that either by public roup or private bargain, and power to borrow upon the security of the trust estate for the purposes of the trust.

The trust was declared to be irrevocable by the Earl unless with the consent and concurrence of the trustees, but it was declared that with such consent and concurrence it might at any time be brought to a close, and the residue conveyed and made over to the Earl if the trustees should think that proper or desirable in the circumstances, subject to the debts and liabilities then affecting it.

The trustees entered into possession and management of the estates conveyed by the deed, which was duly recorded in the Register of Sasines on 3rd August 1893.

In 1897 Lord Rosslyn filed a petition in bankruptcy in the High Court of Justice in England, and was adjudicated bankrupt.

On 8th June 1898 Frederick Seymour Salaman was appointed trustee on his estates.

On 30th December 1898 Salaman raised the present action against the trustees under the trust-deed of 25th July 1893, in which he concluded (1) for reduction of the said deed, or alternatively for reduction of the same "at least to the extent to which said pretended disposition exists or is pleaded as a bar to the satisfaction of the pursuer's rights or claims;" (2) for declaration that the trust estate was, so far as unaffected by valid securities, vested in the pursuer as trustee unincumbered by any trust in the person of the defenders; (3) for decree ordaining the defenders to denude of the trust estate in favour of the pursuer, to such extent at least as might be necessary to enable him to pay the Earl's just creditors; and (4) for count and reckoning and payment of £10,000, or such other sum as might be the true balance of the trust estate, or at least of so much thereof as might be required to satisfy the claims of the Earl's just creditors.

The pursuer averred that Lord Rosslyn on succeeding to the title and estates commenced a life of great extravagance, and spent large sums of money in gambling and horse-racing, and that to meet these liabilities he became indebted to Mr Samuel Lewis in

the sum of £107,000, for which he granted the bond above mentioned.

The pursuer further averred—" (Cond. 5) The said Earl continued his course of reckless extravagance and gambling, and by the month of July 1893 he became still further involved in gambling and kindred debts to the amount of over £40,000. . . . The defenders thereupon, in contemplation of the bankruptcy of the said Earl, devised a scheme by which they intended to secure the defender Vyner against the advances he had made or might make to the said Earl, and at the same time prevent the general body of creditors of the said Earl from receiving payment out of his estate by diligence or otherwise in the future, but preserve said estates so far as not dilapidated for the benefit of the said Earl and his family. The said Earl, on or about 20th July 1893, borrowed from Vyner the sum of £16,000, and granted a bond for the same. (Cond. 7) . . . The said deed (that is, the trust-disposition) is in effect a conveyance by the said Earl of his whole heritable and moveable estate wherever situated, acquired and to be acquired, to himself and his father-in-law and the latter's confidential agent. The only consideration given by the defender Vyner was a loan of £16,000, and a promise of a future loan, both of which have been paid or are amply secured. The other defenders gave no consideration. . . . The pursuer believes and avers that the said estates were sufficient if they had been properly managed, or managed in the interests of all creditors, to meet all claims against them. (Cond. 10) Said deed remained a latent deed until it was disclosed in the said Earl's bankruptcy proceedings. The creditors represented by the pursuer contracted with the said Earl on the faith of his being and remaining absolute owner of his whole means and estate. Under the said deed, however, but unknown to the creditors whom the pursuer represents, the defenders entered upon the possession and management of the Rosslyn estates, and they have continued said possession and management ever since. (Cond. 11) In addition to the £16,000 before mentioned, Mr Vyner advanced to the defenders, as trustees under said deed, the sum of £29,000, taking as security a bond and disposition granted by himself and the other defenders to himself as an individual. The said sum was disbursed by the defender Bennett on behalf of the other defenders in payment of gambling and other debts of the said Earl. . . . The defenders were well aware that the said payments . . . were not made in respect of just and lawful debts, but gambling transactions, and they are not entitled to take credit for the same in a question with the lawful creditors of the said Earl. (Cond. 12) From the said 25th of July 1893 the defenders managed the said estates wholly in the interest of the said Earl, his father-in-law, and his family, and without any regard to the interests of the Earl's creditors, who, as the defenders were aware, were dealing with the said

Earl on the footing and in the belief that he was still possessed of the Rosslyn estates. Sums of varying amount were paid to the said Earl who, as the defenders knew when said payments were made, was continuing on his course of extravagance, and was insolvent. Notwithstanding the payments made to him by the other defenders as trustees foresaid, amounting to many thousands of pounds, he found himself in the autumn of 1897 again unable to pay his debts, and he filed a petition in bankruptcy, the receiving order being pronounced on the 11th November 1897. He stated his gross liabilities at £160,022, 4s. 2d. Of these there are returned as fully secured £151,500. The unsecured creditors are chiefly tradesmen, and their debts, along with claims lodged by some moneylenders, amount to about £10,000, none of which have been paid or are secured. These claims extend in date from the year 1891 down to the date of the receiving order. The bankrupt estimated the secured debts as of the amount of £151,500, and returned himself as possessed of estate of only trifling amount. (Cond. 13) The said deed was a fraudulent device concerted between the bankrupt and his father-in-law and his father-in-law's agents in contemplation of the said Earl's bankruptcy, for the purpose, or at all events with the effect of screening the bankrupt's estate and reserving it for the bankrupt and his family's behoof, and of excluding the true and just creditors of the bankrupt from any estate left over after satisfying his father-in-law's advances. (Cond. 16) But for the carrying out of the said scheme the pursuer believes and avers that the Rosslyn estates are even now sufficient to meet the claims of the creditors represented by the pursuer." The pursuer specified in particular certain collieries, and the sums for which the trustees were accountable as having been improperly paid away, as by themselves sufficient to pay the creditors represented by the pursuer.

The defenders admitted that Lord Rosslyn had incurred further debts of £45,000, and that a sum of £16,000 was advanced to him by Mr Vyner, for which he granted a bond on 20th July 1893, and also that Mr Vyner advanced to the trustees a sum of £29,000 for which they granted him a bond.

They further averred (Ans. 7) "that the consideration given by the defender Mr Vyner amounted to £45,000 (inclusive of the said loan of £16,000), together with such other sum or sums as might be advanced by him. Explained further that said loan of £16,000, and the further advances made by him, amounting in all to the said sum of £45,000, have not been paid off, and are not amply or sufficiently secured, and that there is a large arrear of interest thereon. Explained further that Mr Vyner has had to make further advances to meet deficiency of revenue. The total sum now due to Mr Vyner, including arrears of interest, amounts to £58,000 or thereby. Mr Vyner has been paid no interest on any part of the sums due to him since Martinmas 1895. (Ans. 12) Admitted that since July 1893 the

estates have been managed in terms of the trust-deed, and that certain sums were paid to the Earl of Rosslyn out of the income of the trust estate on account of the allowance referred to in the trust-deed. Explained that all such payments ceased from and after Martinmas 1895, when it was found that the revenue of the estates would not admit of their being made any longer. . . . Denied that the claims of the creditors represented by the pursuer extend in date from 1891. Explained that all unsecured debts incurred prior to the date of the trust-deed were paid out of the funds advanced by Mr Vyner."

The defenders denied that the £29,000 advanced by Mr Vyner had been disbursed in payment of Lord Rosslyn's gambling debts.

The pursuer pleaded that the trust-deed ought to be reduced, in respect (1) that it was a fraudulent alienation of the Earl's whole estate executed when insolvent, or at least with the effect of making him insolvent, to the prejudice of his lawful creditors; (2) in respect of the Act 1621, cap. 18; (4) in respect of the Act 1696, cap. 5; (5) in respect that it was a fraudulent device for relieving the bankrupt of his financial embarrassments and preserving his estate for his wife and children to the exclusion of lawful creditors. He also pleaded (3) *separatim*—that the deed ought to be reduced in so far as it conveyed estate belonging to the bankrupt beyond the amount of advances made at its date. He further pleaded as follows:—(6) The said deed being a mere security writ in favour of the defender Vyner, and *separatim*, having been granted without any onerous consideration, except to the extent of £16,000, it ought to be reduced *quoad excessum* and decree pronounced in terms of the declaratory conclusions. (8) The defender the said Earl of Rosslyn having been adjudged bankrupt, and the pursuer being vested in his estate for the benefit of his creditors, the defenders are bound to denude thereof in his favour, and to count and reckon with him in respect of the estate alienated as aforesaid.

The defenders pleaded, *inter alia*—" (1) No title to sue. (2) The pursuer's averments being irrelevant, and insufficient in law to support the conclusions of the summons, the action should be dismissed. (4) The deed under reduction having been granted for full consideration and in *bona fide*, the defenders are entitled to absolvitor. (5) The said deed not being gratuitous, but having been granted in respect of obligations imposed on and undertaken by the Earl of Rosslyn as a condition of the advances made to him by the defender Vyner, is not reducible on the grounds contended for by the pursuer. (6) The said trust-deed having been granted by the Earl of Rosslyn when solvent and for full consideration, and the said Earl being completely divested thereby of his estates, the defenders should be assolizied. (9) In any view, until the advances made by the defender Mr Vyner on the security of, *inter alia*, the said trust-deed and all interest thereon, and all ex-

penses of carrying on the trust, are repaid, the defenders are entitled and bound to continue to administer the estate conveyed thereby, and the said advances, interest, and expenses being still due and unpaid, the present action is premature and should be dismissed."

On 19th April 1900 the Lord Ordinary (PEARSON) pronounced this interlocutor:—"Finds that the pursuer has set forth a sufficient title to sue this action: Finds that no relevant or sufficient grounds are averred for reducing the trust-deed libelled, but that the same has been superseded by the bankruptcy of the Earl of Rosslyn, and that the trustees are bound to denude of the estate and effects thereby conveyed by him and to make over the same to the pursuer for the purposes of the said bankruptcy, subject to any valid securities over the same, and to such rights of lien or indemnity as the trustees may have; and that they are bound to count and reckon with the pursuer for their intromissions as trustees foresaid with the said estate and effects; and before further answer appoints the defenders by the third sederunt-day in May next to lodge (first) a minute condescending on the trust estate presently vested in them or under their control as trustees foresaid, and (second) an account of their intromissions as trustees with the said estate and effects; and thereupon appoints the cause to be enrolled for further procedure; reserves all questions of expenses, and grants leave to reclaim."

Opinion.—"The Earl of Rosslyn was married in July 1890 to the daughter of the defender Mr Vyner, and he succeeded to the title and estates in September of the same year. In January 1893 he was indebted in a sum of £107,000, for which he granted bond in favour of Mr Samuel Lewis.

"On 25th July 1893 he granted a trust-deed in favour of himself and his father-in-law Mr Vyner, and Mr Bennett, solicitor in London. Mr Bennett having resigned in September 1896, was succeeded by Mr Cullimore, solicitor in Chester; and in 1898 Lord Alwyne Compton was assumed into the trust.

"In the autumn of 1897 Lord Rosslyn filed a petition in bankruptcy in London, the receiving order in which was pronounced on 11th November 1897. The adjudication in bankruptcy followed on 8th June 1898, on which date the pursuer was 'duly appointed and approved as trustee of the property of the Earl of Rosslyn' under the Bankruptcy Acts 1883 and 1890. The defenders challenge the pursuer's title to sue. In my opinion, his formal title is sufficiently instructed by the documents produced, taken in connection with the English Bankruptcy Act 1883, and particularly sections 56, 57, and 134, and sections 44, 54, and 168 thereof.

"No question was argued before me as to which law was to be applied in dealing with the merits of the case, on the assumption that the formal title was sustained. It was assumed that the pursuer's position as trustee in an English bankruptcy is

analogous to that of a trustee on a Scottish sequestration; and the questions of relevancy, and also those relating to the position of the various parties interested under the trust-deed as affected by the supervening bankruptcy, were dealt with as questions of Scots law, to be determined by reference to our own authorities.

"The trust-deed sought to be reduced, while it is a unilateral deed, bears to be granted in pursuance of an arrangement between the Earl and Mr Vyner. It narrates that the Earl had contracted debts and liabilities to a large amount, part of which was secured; and that in order to pay off certain unsecured debts he had arranged to borrow a sum of £40,000 from Mr Vyner, who agreed to lend the same upon the Earl granting bonds and assignations and dispositions in security thereof, and upon the express condition that he should also 'grant a trust-disposition in manner and for the purposes under written.' It further relates that Mr Vyner had already advanced to him upwards of £16,000 to account of the £40,000, and had received from the Earl a bond and disposition and assignation in security of the said sum of £16,000, and that he had 'agreed to advance to the trustees under these presents, for the purposes of the trust hereby created, such further sums as may be necessary for the payment of my debts, but not exceeding (along with the said sum of £16,000 already advanced) the said sum of £40,000 in all,' unless Mr Vyner should be willing to make advances to the trustees in excess of that sum, the trustees granting in his favour bonds and dispositions and assignations in security for the sums so to be advanced.

"The Earl thereby disposed and made over to the trustees his whole estates, heritable and moveable, wherever situated, then belonging to him, or which should belong to or be acquired by him during his life. The trustees were directed in the first place to hold the whole trust estate during the Earl's life and the subsistence of the trust 'for payment of all the just and lawful debts now due by me, and for fulfilment of all obligations incumbent on me at the date hereof, and all interest due or accruing on such debts,' including advances made or to be made by the trustees individually, and also any sums which might be borrowed by the trustees under the power thereafter conferred.

"The trustees were directed to pay the said debts and fulfil the said obligations 'in such order as they shall think expedient, having always due regard to the legal order and ranking of such debts as are secured on the trust estate or any part thereof.'

"Subject to the fulfilment of these purposes, the trustees were directed to hold the whole residue of the trust estate for the uses and purposes thereafter mentioned. *Inter alia*, they were to be entitled, but not bound, during his life or the subsistence of the trust, to allow the Earl or his wife and family to occupy a mansion-house with furniture rent free, and also to

pay from time to time such sums to the Earl, or, if they saw fit, to his wife, for maintenance and housekeeping expenses, as they in their uncontrolled discretion should see fit; and it was declared that any sum or sums so paid 'shall be held to be paid for alimentary purposes only, and shall not be capable of anticipation or assignment by me or liable for my debts or deeds or to the diligence of my creditors.' Lastly, subject to the foregoing purposes, and upon the Earl's death, or as soon thereafter as the advances and other sums due to the trustees should be paid, and the trustees should be relieved of all obligations incumbent on them, they are directed to hold the whole residue of the trust-estate 'for behoof of my widow and children, or such one or more of my widow and children, exclusive of the others or other, in such shares and proportions, and subject to such trusts and provisions, limitations, and conditions as to vesting, payment, or otherwise as I shall appoint by any writing under my hand or by my last will, but not in contravention of any obligations undertaken by me in the settlements made on the occasion of my marriage, or in any relative deed or deeds;' and failing such appointment, then for such one of his issue as should succeed him in the title of Earl of Rosslyn and his heirs and assignees. The trust was declared to be irrevocable by the Earl unless with the consent and concurrence of the trustees, but it was declared that with such consent and concurrence it might at any time be brought to a close, and the residue conveyed and made over to the Earl 'if the trustees shall think that proper or desirable in the circumstances,' subject to the debts and liabilities then affecting it.

"Of this trust-deed the pursuer now seeks reduction—either total reduction, or alternatively and at least 'to the extent to which said pretended disposition exists or is pleaded as a bar to the satisfaction of the pursuer's rights in or claims to the property and estate' of Lord Rosslyn. *Secondly*, and whether reduction is granted or not, there is a conclusion for declarator and denuding—for declarator that the trust-estate is now, so far as unaffected by valid securities, vested in the pursuer as trustee, unencumbered by any trust in the person of the defenders, and for denuding thereof 'to such extent at least as may be necessary to enable him to pay the just creditors' of the Earl. *Thirdly* comes a conclusion for count and reckoning, and for payment of £10,000, or such other sum as may be the true balance of the trust estate, 'or at least of so much thereof as may be required to satisfy the claims of the just creditors' of the Earl.

"These conclusions are, upon the statement of them, peculiar and unusual so far as regards the lesser alternative which appears in each. But they are so framed in order to meet the alternative (1) of the deed being reduced absolutely at common law or under the statutes, which would be followed by an accounting for the trustees' whole intromissions, and payment to the

pursuer of the whole balance; and (2) of the deed being held to be merely superseded by the English bankruptcy, so that the estate must be made available to the trustee for the purposes of that bankruptcy, but may revert to the trustees when these purposes are served.

"In considering, first, the relevancy of the statements made in support of the reductive conclusions, I observe that the case for insolvency presented by the pursuer discloses quite clearly a case of practical insolvency or present inability to meet current obligations, and not of absolute or ultimate insolvency. This is plain from the averments contained in the 7th and 16th articles of the condescence, which indeed amount to an affirmation of solvency in the absolute sense of that term. Then, again, this is not a deed which operates to make a solvent person insolvent, or makes any disposition of the estate to the prejudice of the then lawful creditors. On the contrary, its primary purpose is for payment of such creditors, and there is no residue unless and until they are all paid in full with interest. To that extent this is a deed which an insolvent person is quite entitled to grant, and mere insolvency is no bar to the efficacy of it (2 Bell's Comm. 387). These considerations are of themselves sufficient to exclude the remedy of total reduction which the pursuer seeks. Both under the Statute 1621 and at common law the insolvency which must be averred and proved in order to a successful challenge is absolute insolvency. In addition there must be a relevant averment of fraud, and although the word is used in describing what is said to have been a fraudulent device to disappoint just creditors, I am unable to hold that fraud is relevantly averred. It is, indeed, alleged that the intention was to secure Mr Vyner in his advances, and at the same time prevent the general body of creditors from receiving payment out of the estate by diligence or otherwise in the future. But this is negated by the terms of the trust-deed itself. Again, the 13th article of the condescence, which summarises the matter, describes the deed as a fraudulent device concerted in contemplation of bankruptcy for the purpose or at 'all events with the effect' of screening the bankrupt's estate and reserving it for him and his family. Then the deed is said to have remained a latent deed. Yet it is not disputed that it was recorded in the Register of Sasines within a few days after its execution; and the pursuer himself avers that the trustees entered upon the possession and management of the estates, and have so continued ever since. The only other ground of reduction suggested is under the second part of the Act 1696, regarding undue preferences by way of ineffectment for future debts. But the advances which the pursuer founds on in this part of his argument are, as I understand it, advances to the trustees for creditors and not to the bankrupt; and to these the statute seems to have no application. I therefore hold that the pursuer's averments are not

relevant to infer total reduction of the trust-deed on any of the grounds pleaded.

"As to the lesser alternative, of reduction of the trust-deed so far as it constitutes a bar to the pursuer's rights, it appears to me to be quite unnecessary. A supervening sequestration, — and I assume that the same effect must be attributed to an English bankruptcy, — completely supersedes a private trust, and the trustees are bound forthwith instantly to denude in favour of the trustees named in the sequestration (2 Bell's Comm. 391). I am not aware that in practice it has ever been held necessary in such a case to reduce the trust-deed. On the contrary, I apprehend that, according to the statement of the rule, the supervening sequestration does not extinguish the trust but suspends it; and that after the purposes of the sequestration have been served the trust may revive for the attainment of its ulterior purposes. The trust estate will be made accessible to the trustee in bankruptcy, and he will take it subject to all valid securities, constituted either prior to the trust or by virtue of the provisions of the trust-deed itself and the infetment of the trustees, or by the trustees themselves in the exercise of the powers conferred on them. In this view it does not appear to me to be material whether the pursuer in fact represents creditors whose debts were prior to the trust-deed. He represents subsequent creditors, and their interests are not provided for under any of the provisions of the deed, but must be vindicated in the bankruptcy proceedings. I do not know whether there will ultimately be a conflict between their interests and the interests of the bankrupt's wife and children under the residuary purpose of the trust. But I see nothing to prevent that question being worked out in the bankruptcy; for existing preferences will be saved, and, in so far as the wife and children have a valid security by reason of the trust, it will be available to them. At all events, I do not think that question could be properly tried in this action, to which they are not parties. If it were to be tried, it would, I suppose, turn on the onerosity of the reversionary provision regarded either in itself or as the consideration stipulated for by Mr Vyner in favour of his daughter and her issue, as the counterpart of his obligation to advance the £40,000. But even in the latter view I do not see that this would entitle Mr Vyner to have the trust maintained as against a trustee in bankruptcy. Still less can he take up this position in the character of a legally secured creditor, as apparently the defenders do for him in their ninth plea. His preference will be preserved to him so far as it is a legal preference, and he cannot contend that because he stipulated for security the trust must stand until he gets payment. His rights as creditor will be unimpaired, though no doubt in his character of trustee his intromissions with and administration of the money borrowed may, like all other acts of the trustees, be examinable. This, however, is appropriate to an accounting.

"The difficulty presented by the conclusions for count and reckoning is this — that the pursuer does not particularly disclose the extent of his pecuniary interest. He desires to recover such a sum as may be required to satisfy the claims of the Earl's just creditors. But if his right to denuding is absolute, as I think it is, it follows that there must be a general accounting, and if it should turn out that the creditors ranked in the bankruptcy are paid in full, he will hold the reversion for behoof of whom it may concern. That question is not *hujus loci*, as there may be no reversion. Nor do I consider it a good answer to the demand for an accounting to say that the secured debts will in all probability exhaust the estate. If he has a title to sue a count and reckoning, I do not think it is incumbent on him to show beforehand that there will be a balance in his favour.

"I have pronounced findings giving effect to the above views. I would have dismissed the reductive conclusions but for a suggestion on the part of the pursuer that they may prove to be incidentally useful in the accounting, and I am willing to leave that chance open. I am not sure that I appreciate the view so put forward, and I rather think it was based on the possibility of objections to the acts and deeds of the trustees, which, however, would furnish no good ground for reducing the trust-deed in whole or in part.

"As to the matter of procedure, it seems to me the proper course is to ascertain the amount and particulars of the estate held by the defenders. A proof will of course not be excluded if the accounting should raise disputed questions of fact."

The defenders reclaimed, and argued — The Lord Ordinary was right in holding that the pursuer had averred no relevant ground for reduction of the trust deed, but he was wrong in holding that it was superseded by the Earl's bankruptcy. The Lord Ordinary's opinion was based on the erroneous assumption that this was an ordinary trust-deed for creditors. Such was not its character. In its essence it was contractual. It was an onerous contract with a third party who was willing to lend money for the payment of the granter's debts, and who stipulated as part of his security that the estate should be held and administered by his own nominees. The effect was to divest the Earl as completely as if the estate had been conveyed to Mr Vyner alone. It was therefore not affected by the Earl's supervening bankruptcy — *Murray v. Palmer*, December 15, 1864, 3 Macph. 250. If that was the true nature of the deed, the question of a possible reversion did not arise, since the provision of the residue to the widow and children was equally part of Mr Vyner's contract. But in any view, it was unnecessary to consider whether these provisions were good as against creditors until Mr Vyner's advances had been paid off. 2. If there was no possible reversion, it followed that the trustees were under no obligation to account to the pursuer; but while not admitting any such obligation, they had intimated

that their accounts were open to his inspection.

Argued for the pursuer and respondent—The true view of the trust-deed was that taken by the Lord Ordinary, viz., that it was essentially a trust-deed for payment of creditors, and therefore superseded by bankruptcy. If it appeared to be something more, it was an attempt to evade the operation of the bankruptcy law by a semblance of divesting Lord Rosslyn of his estates; but it really left him in possession. No doubt such a trust for payment of creditors, and even for provisions to the grantor's family, was lawful, but it must yield to sequestration—2 Bell's Comm. 391; *Lockie v. Mason*, February 14, 1837, 15 S. 547; *Campbell v. Macfarlane*, June 11, 1862, 24 D. 1097; *Nicolson v. Johnston*, December 6, 1872, 11 Macph. 179. The bankruptcy could not affect Mr Vyner's securities, if these were valid; for the trustee took the estate *tantum et tale*—*Napier's Trustee v. Sawmarez*, February 28, 1899, 1 F. 614. Besides, Mr Vyner was a heritable creditor in respect of his bonds over the estate, and could enter into possession at any time. But he was not entitled to maintain this trust as against Lord Rosslyn's creditors in order to provide for the widow and family at their expense. The pursuer was not satisfied that the estate was being well managed, or that it would not yield a surplus for the creditors if in his hands. The respondent also maintained in argument that the trust deed should be reduced.

At advising—

LORD JUSTICE-CLERK—The Earl of Rosslyn being embarrassed in consequence of the contraction of debt, in 1893 conveyed his whole estates to trustees in consideration of an advance made to him by his father-in-law Mr Vyner of £40,000, for the purpose of meeting his then existing liabilities. Under the conveyance, when the debts were paid the trustees were to hold "the whole residue of the trust estate which may then remain under their management for behoof of my widow and children, or such one or more of my widow and children exclusive of the others or other, in such shares and proportions and subject to such trusts and provisions, limitations and conditions as to vesting, payment, or otherwise, as I shall appoint by any writing under my hand or by my last will, but not in contravention of any obligations undertaken by me in the settlements made on the occasion of my marriage, or in any relative deed or deeds, and failing such appointment, or in so far as the same shall not extend, then for such one of my issue as shall on my death succeed to the title and dignity of Earl of Rosslyn, and his heirs and assignees."

In 1897 the Earl having again become seriously embarrassed, filed a petition in England under which he was sequestered, and the present pursuer was appointed trustee on the bankrupt's estate. The practical question now at issue, is whether the trustee in bankruptcy is entitled to require the trustees to denude of the estate, so

that he may enter into the control and management of the estate in the interest of the creditors whom he represents, and if so on what conditions. On the main question I concur in the Lord Ordinary's opinion, that the Earl's supervening bankruptcy supersedes the private trust established by the unilateral deed of the bankrupt, and that the trustee in bankruptcy is entitled to take possession for the protection and working out of the interests of the creditors who have claims against the Earl. In short, the ingathering of all that can be made available for the creditors is the proper right and duty of the trustee, and a voluntary trust cannot be allowed to stand in the way. The sequestration does not of course destroy the trust created by the trust-deed, nor relieve the bankrupt from his obligations under it. It suspends its operation only, so that the estate may be dealt with now in the interest not only of any persons favoured by the deed, if they can maintain in law in the sequestration any rights against the estate, but of all persons who have legal claims of debt against the bankrupt. After the trustee has fulfilled the duties incumbent on him under the statute, in adjudicating on claims, and satisfying those that are legally established, the trustee will be of course bound to hold for those who have right thereto any reversion that may remain over, and it may be admitted or decided then that he must reconvey to the trustees of the Earl. But that matter is entirely in the future and does not require to be dealt with now. The bankruptcy trustee is now entitled to the declarator that he asks for and to decree of denuding, subject to the reservations contained in the summons, and all reservation of proper outlays which the trustees have made in the management of the estate. And he is also entitled to a full accounting that he may ascertain what, if anything, is available for the creditors now.

All questions of protected security or preferable claim will remain open, and the proper proceeding for having these dealt with is the process of sequestration.

I would move your Lordships to adhere to the decision of the Lord Ordinary.

LORD YOUNG—The pursuer is trustee in the bankruptcy of Lord Rosslyn, appointed in June 1893. The defenders are trust disponees under a disposition by Lord Rosslyn executed in July 1893, and which has been acted on ever since. The purpose of the action is to obtain for the pursuer as trustee in bankruptcy possession of the property disposed to and now possessed by the defenders as trustees under the disposition. Whether that purpose can be attained wholly, or to any and what extent, under all or any of the conclusions of the summons must be the ultimate and only practical question in the case.

The pursuer's title to sue, though objected to in the record, was not disputed in the argument before us. Nor was it, I think, disputed that in so far as we may now consider and dispose of any question in the

case, we must do so on the assumption that at the date of the disposition Lord Rosslyn was *sui juris* and at liberty to dispose of his property as he pleased, gratuitously or onerously. If his circumstances at that time were such as to expose his disposition in whole or in part to challenge by his creditors as having been executed to their prejudice in violation of any statute or rule of the common law, the pursuer's title to sue the action of challenge is, as I have said, admitted. He does so challenge the disposition, and asks decree of reduction accordingly. The Lord Ordinary, however, has held "that no relevant or sufficient grounds are averred for reducing the trust-deed libelled," thus in effect repelling the first seven pleas-in-law for the pursuer, and your Lordship having expressed concurrence in this view, I, for reasons which will appear before I conclude, say no more upon it now, only pointing out, that taking it along with the finding, in which your Lordship also concurs, that the defenders "are bound to denude of the estate and effects thereby conveyed by him, and to make over the same to the pursuer for the purposes of the said bankruptcy subject to any valid securities over the same, and to such rights of lien or indemnity as the trustees may have," the result seems *prima facie* to be that the trust-deed challenged must stand unreduced, but with the pursuer—the trustee in bankruptcy—substituted for the trustees therein named, who must denude in his favour. If the trust purposes expressed in the deed are reduced, the deed is reduced, and if the purposes (or any of them) are to stand unreduced—that is, are to subsist in force—there must be a trustee to execute them.

In the course of the hearing it occurred to me that it would have been more regular if the Lord Ordinary had refrained from pronouncing judgment on the legal merits of the case under any of the conclusions of the summons until the facts had been judicially ascertained. Towards the conclusion of the hearing I ventured to express the impression which I had that it would at least be more satisfactory that before pronouncing any decision under the conclusion for an order to denude we should have distinct information regarding the trust property which the defenders received under the disposition, what at the date of the bankruptcy was and what is now in their possession, and also regarding the trust purposes which have been completely (or partially) executed by them. The Lord Ordinary, indeed, desired this information, as appears from the order with which his interlocutor concludes. It occurred to me that this order ought to have preceded a finding on the legal question whether or not the defenders are bound to denude of the trust property in their possession and transfer it to the pursuer with (or without) the trust duties committed to them, and for the performance of which they received it. The impression remains, although understanding that none of your Lordships share it with me I do not press it or say

more about it, but proceed to state my opinion on the legal findings in the Lord Ordinary's judgment, necessarily on the footing and in the view that we may, and indeed must, give our decision upon them, looking only to the terms of the trust-disposition and the pursuer's averments in so far as, but only in so far as, admitted by the defenders. We can pronounce judgment now on no other footing.

1. The first finding is that the pursuer has a good title to sue, and this is, as I have already said, not disputed.

2. The second is that no relevant grounds of reduction are averred, and your Lordships are, I understand, of opinion that this finding is sound. I should, I incline to think, abstain from expressing any opinion upon it, and for this reason, that as we are deciding the case upon the terms of the deed, and on the footing that the facts are as averred (or admitted by the defenders), it is unnecessary to decide a question of relevancy of averment, the only facts before us, or of which we can now take account, being in my opinion manifestly insufficient to support the conclusion for reduction.

3. The third is, that the trust-deed libelled "has been superseded by the bankruptcy of the Earl of Rosslyn." His Lordship's reason for this finding is thus expressed in his opinion—"A supervening sequestration—and I assume that the same effect must be attributed to an English bankruptcy—*completely supersedes a private trust*, and the trustees are bound forthwith instantly to denude in favour of the trustee named in the sequestration (2 Bell's Comm. 391)." I think his Lordship has misapprehended either the meaning of the passage in Bell's Comm. to which he refers, or the character of the trust-deed in question. The passage in Bell's Comm. occurs in book vi. part iii., which part iii. is titled "Of extrajudicial settlements between insolvent debtors and their creditors." After referring to two decisions, Mr Bell [book vi. part iii., cap. 1, § 3 (4)] proceeds—" . . . It is settled by these cases that when sequestration is awarded after a private trust, it completely supersedes that trust, and that the trustees are bound forthwith instantly to denude in favour of the trustee named in the sequestration." It is too clear to admit of dispute that the "private trust" there referred to as superseded by sequestration is a private trust by an insolvent debtor to realise his estate and divide the proceeds among his creditors. The instances of such trusts are numerous, and the law applicable to them familiar, and indeed trite. That with which we have now to deal is of a different character—so different that I should characterise it, not as an arrangement between an insolvent and his creditors, but as a family trust created by the head of a family (not insolvent) for the purpose of preserving the family estates from dilapidation to which they were exposed, and the reasonably founded apprehension of which had caused alarm to himself and all who were interested in the

welfare of the family. The circumstances may be taken from the pursuer's averments on record, particularly in condescendences 5 and 6, of course rejecting or disregarding any allegations of fraud or deceit, which are all denied. They amount to this, that Lord Rosslyn was a spendthrift, with a propensity, which in the past he had found irresistible, to gambling and costly sports, which had put him into the power of money-lenders, one of whom he had satisfied with a mortgage of family property for over £100,000, leaving others with unsecured claims upon him for over £40,000. Notwithstanding his weaknesses, I should be disposed to credit him with sufficient sense to perceive and realise the pecuniary results of the life which he had been leading for the three preceding years, and to understand and appreciate (at least when pointed out to him) that the continuance of that kind of life, for even a brief future, with the family estates left in his hands exposed to attachment for his future debts, might lead to their exhaustion and the family ruin.

Such are the circumstances in which Lord Rosslyn was in July 1893, five years before his bankruptcy, advised to execute, and did execute, the deed which the Lord Ordinary has held to be superseded by his bankruptcy. We must assume that he knew the circumstances, understood the advice which was given to him by his father-in-law, and his own family solicitors, and was of sound disposing mind. He was by the deed divested absolutely of the Rosslyn family estates (Raveanscraig, Dysart, &c.), and there is nothing else to take account of; for although there is a general disposition of *acquiritenda* there are none in possession or expectation, and if there were I should hold the disposition of them invalid and inoperative. I was indeed surprised when I read it in the deed. I characterise Lord Rosslyn's divestiture as absolute, for although the corresponding investiture of the defenders is in trust, it is by the deed distinctly provided that it shall subsist during his life, however long he may survive, and that there shall never be restoration to him. The language of the deed convinces me that the complete divestiture of Lord Rosslyn was intended; and it seems to me, as it apparently did to the family solicitors, that the estates could not otherwise be protected against the consequences of a continuance or resumption by the Earl of the habits which I need not again characterise.

The questions then are—1st, Was the intended protection lawful so as to be capable of accomplishment? and 2nd, Is the trust-deed in question fitted and adequate to accomplish it?

1st On the first of these questions I have already, sufficiently I think, expressed my opinion. Any proprietor who is *sui juris*, and of sound disposing mind, may lawfully alienate his whole property, or so much of it as he thinks fit, so that it shall no longer be subject to his debts and deeds. It is of course true, that so long and so far as any man's property is left within his power and reach, it is within the power and reach of

his creditors, and can be put beyond their reach only by being put beyond his.

2nd. If the first question is answered in the affirmative, it follows that the second also must be so answered, unless the deed is a gross conveyancing blunder. If the intended lawful and accomplishable purpose is not effected, the deed has certainly been blundered, even though it should be found to affect some other. No other has been suggested, or occurs to me.

In what I have hitherto said I have taken no account of Mr Vyner's part in the deed, and of the onerous contract relation between him and Lord Rosslyn thereby constituted. I thought it right to express my opinion that irrespective of the view of contract and onerosity, and taking the deed as gratuitous on Lord Rosslyn's part, it is valid to divest him of the family estates to the effect which I have pointed out. By "gratuitous" I mean only this, that in executing the deed Lord Rosslyn was influenced only by his own judgment that it was in the circumstances a right and becoming thing for him to do. He was in July 1893 as free to place his property or any portion of it beyond his own and his creditors' reach by putting it into an irrevocable family trust as by putting it into a similar trust for any lawful purpose—religious, charitable, national, or local, or making a direct gift of it to an individual.

But account must be taken of Mr Vyner's position and rights, and the quality of onerosity thereby impressed on the trust in question, with respect not only to his own rights but also to those of the Rosslyn family under it. He was legitimately interested in the family, consisting of his daughter (the Countess) and his grandchildren, and no doubt also in his son-in-law on their account, and possibly his own, notwithstanding his youthful follies which had occasioned so much trouble and alarm. He was willing to advance £40,000 and more if needed to relieve the Earl of the unsecured debts that were pressing upon him, but only on the condition that the Earl should execute the deed which the family solicitors advised for the protection of the family estates against any future indiscretions of his, and secure them to his wife and family after his death. It would not be true or just to Mr Vyner to regard him as a party who desired a good investment for £40,000 or £50,000. His desire plainly was to prevent the Earl again resorting to such lenders as he had been in the habit of doing and even to prevent the estates being burdened to any stranger lender. He could afford, and was willing, which a stranger lender would not be, to lie out of the money, and even to allow the interest to run into arrear for years, hopeful that by good management of the estate by selected trustees, economical family expenditure, and protection against freaks of extravagance by the Earl, he, or others for him, (probably his Countess daughter or her children), might receive as much as he expected when he advanced the money really on their account and prompted by his affectionate interest in them. Be these

views of Mr Vyner's feelings and motives true or imaginary, we must take it as true that he advanced £45,000 on the contract arrangement with Lord Rosslyn expressed in the deed. Of this sum £16,000 was advanced before the deed was executed and £29,000 thereafter. The purpose of the loan is stated in the deed to be "in order to pay off certain unsecured debts" of Lord Rosslyn's.

The pursuer avers (Cond. 7) that "the only consideration given by the defender Vyner was a loan of £16,000 and a promise of a future loan both of which have been paid or are amply secured." The defenders on the other hand aver (Ans. 7) that Mr Vyner's advances amounted to £45,000, that none of the capital has ever been repaid to him or any interest since March 1895; and that the amount now due to him (capital and interest together) is £58,000 or thereby. They also explained (Ans. 13) "that the whole of the Earl of Rosslyn's unsecured debts at the date of said deed (1893) were paid off and discharged by means of the advances obtained from Mr Vyner." For the reasons which I have already stated, I think we can pronounce no judgment now except on the footing that the defenders' averments in fact are or may be true. It was stated to us by their counsel at the hearing and not denied on the part of the pursuer, that the facts I have just referred to as being averred by them appeared on the face of the accounts which they had furnished to the pursuer before this action was raised.

The question which I desire to consider is this—Is the contract between Lord Rosslyn and Mr Vyner under and in pursuance of which the deed of July 1893 was executed by the former a legitimate and valid contract between borrower and lender? If it be, it must be upheld and implemented according to its terms. The pursuer impeaches and asks reduction of it on the seven grounds specified in his first seven pleas-in-law. In these are embraced I think all the grounds on which creditors can impeach an alienation by their debtor of his property to their prejudice. The Lord Ordinary has, as I have already observed, repelled them all by his finding "that no relevant or sufficient grounds are averred for reducing the trust-deed libelled." I have declined to express an opinion on the relevancy of the pursuer's averments for the reason which I have also already explained, viz., that if we are to take the pursuer's case for reduction on the footing that it rests on his averments in so far as admitted by the defenders, and without any evidence beyond the defenders' admissions, it is not even arguable. The result in my opinion is that the contract between Lord Rosslyn and Mr Vyner in pursuance of which the deed was executed was legitimate and valid, the terms of it being of course taken to be as expressed in the deed.

Then it is a Scotch deed regarding chiefly if not exclusively Scotch landed property, and certainly creating a trust to be executed in Scotland, so that in considering its construction and import we are not dealing

with anything foreign to our judicial experience and presumed legal knowledge. What then, in our judgment, is its meaning and import?—for the accomplishment of that is the contract on which Lord Rosslyn borrowed and Mr Vyner lent £45,000. I have, I trust, distinctly stated my opinion that it is a Scotch deed, and that construed according to Scotch law it divests Lord Rosslyn absolutely of the whole family estates so that they were not thereafter subject to his debts and deeds or to attachment by his creditors, and that the defenders cannot terminate the trust and denude of any property held by them so long as Lord Rosslyn lives, or after his death, unless and until the advances made by Mr Vyner shall have been paid. The language of the deed to this effect is clear. The defenders have informed us that the whole debts due by Lord Rosslyn at the date of the deed—not heritably secured on the estates—were paid—I understood in 1893, and certainly long before the bankruptcy. We have not been distinctly informed regarding the extent to which the defenders have hitherto been able by sales and judicious or fortunate administration to pay off and clear the estates of old burdens. That they should, as far as possible, and in their judgment judicious, do so is one of the trust duties put upon them by the deed. Mr Vyner's desire (shared by Lord Rosslyn himself) plainly being that after Lord Rosslyn's death his family should have the estates as lightly burdened as the trustees could make them by their management and administration during his life after 1893. I think this is the import of the deed construed according to the law of Scotland, and that we should, if at any time required to judge of the trustees' duties and of their conduct in the performance of them, do so on that construction of the deed.

The residue clause is not as clearly expressed as it might have been, but without deciding any question that may conceivably arise under it when the time comes—that is, after Lord Rosslyn's death, I may say now that I read it as meaning that the residue shall go to Lord Rosslyn's widow and children subject to his power of selection or apportionment by any writing under his hand or by his last will, and failing any such, then to such one of his issue as shall succeed to the earldom. Questions under this clause may arise when the time comes for acting on it, especially if Lord Rosslyn shall make an obscure apportionment by his last will or other writing. But the time cannot come till his death and the payment of Mr Vyner's debt, which is now over £60,000. Suppose there is no one then in existence to claim the residue under the clause except "such one of my issue as shall on my death succeed to the title and dignity of Earl of Rosslyn," no selection or apportionment could be applicable. The Lord Ordinary, if I rightly apprehend his opinion, supposes a possible conflict between the succeeding Earl or any others claiming the residue and money-lenders to whom the deceased Earl was indebted, and then goes on to say—"I see nothing to prevent that

question being worked out in the bankruptcy"—meaning the existing bankruptcy. He adds—"At all events I do not think that question could be properly tried in this action, to which they are not parties." In the event which I have supposed, the right of the succeeding Earl would rest on an onerous deed executed in pursuance of a contract between his father and grandfather, which, if lawful, it is the duty of the defenders as trustees to protect and satisfy when the time for satisfaction arrives.

The Lord Ordinary has not decided or expressed an opinion on the question whether or not Mr Vyner is entitled as matter of contract right to have the trust continued till the period of termination and denuding specified in the deed, thinking (if I rightly apprehend what he says) that this is a matter for the decision of the pursuer subject to the orders of the English Bankruptcy Court. Should it be held by the proper tribunal having jurisdiction in the matter that it is Mr Vyner's right to have the trust continued while Lord Rosslyn lives and his debt is unpaid, I assume that, in the Lord Ordinary's opinion, it is to be administered, not by the trustees named in the deed, acting subject to the jurisdiction and orders of this Court, but by the pursuer as a trustee in bankruptcy, acting subject to the orders of the English Court having jurisdiction in bankruptcy proceedings. Suppose that the Bankruptcy Court should order the pursuer to use the property of which the defenders on our order had denuded in his favour to pay the claims lodged with him, which he says amount to about £10,000 (Cond. 12), and restore the remainder (if any) to the defenders to be again held by them under the trust-deed. What then? More debts incurred by Lord Rosslyn to tradesmen and money-lenders, another bankruptcy order, with the pursuer or some other nominated as trustee, and, of course, another order of this Court on the defenders to denude, and so on *ad infinitum* or rather *ad finitum* of the Rosslyn estates. In short, it comes to this, that if the Lord Ordinary's view of the law, on which his findings with which I have been dealing proceed, be sound, the trust-deed in question is and was from the first an absolute nullity, at least as regards its expressed and principal if not only objects, viz., the protection of the Rosslyn estates, and the security of Mr Vyner for the large advances made by him on contract for that protection.

With respect to the conclusion for accounting, it is perhaps sufficient to say that the defenders have expressed their willingness to lay their accounts before the pursuer, and have indeed done so. But while I approve of their doing so, and indeed should have preferred to see the accounts, and also any objections which the pursuer might think proper to state before pronouncing any judgment in the case, I am not prepared to hold that the defenders are liable to account to the pursuer. Whatever they received and held as trustees under the deed is, in my opinion, free from

liability for the debts of the disponent contracted subsequent to its execution in July 1893, and as administering trustees they are, so far as I can see, under no liability to account to the pursuer. But the defenders, acting as they are doing, I think very becomingly, in frankly disclosing their accounts, it may be satisfactory to see exactly what they have in possession before deciding whether they are bound to transfer all or any of it to the pursuer. I repeat, however, in conclusion, that assuming the deed of 1893 to stand unaltered, I do not see how they can possibly be possessed of anything of which they are bound to denude in favour of the pursuer.

LORD TRAYNER—I agree practically with the views expressed by the Lord Ordinary, and have little if anything to add. The deed under which the reclaimers derive their title is a conveyance in their favour by Lord Rosslyn of the entirety of his estate, and its purpose, to state it generally, is (1) to secure Mr Vyner's advance of £40,000, and any advance by the trustees; (2) to provide for the payment of creditors of the granter; (3) to provide a certain income (if the trustees think fit) for the benefit of the granter and his family; and (4) to make a provision out of the residue of the estate, if any, for the granter's widow and children, subject to his appointment, and failing such appointment then for the child succeeding to the title. I make no question at present how far these provisions are good against creditors considering the circumstances under which the conveyance was made, for none of these are impaired by anything which the Lord Ordinary has done. All legal and valid rights conferred by said conveyance preferable to the general body of creditors have been in the meantime preserved, and may be made good (if they can ever be made good) in the sequestration.

The chief point urged on behalf of the reclaimers was this—that Mr Vyner would not have made the advances he did except on the condition that the whole estate of Lord Rosslyn was handed over to him or the trustees named in order that they might manage it so as to make it reasonably probable that under such management the estate might be made to yield payment of the advances, and probably produce a reversion. They further urge that this was the contract which Lord Rosslyn made for onerous causes, and that with that contract the Court should not interfere. I am unable to accede to that view. So far as the deed is an effectual conveyance—I mean effectual to constitute rights which are preferable to creditors—it will no doubt be sustained. But I know of no authority for the proposition that any contract, whether of the nature of factory or otherwise, made by a bankrupt (I assume during his solvency) can exclude the control and management of a trustee in bankruptcy when bankruptcy has supervened. The trustee represents the rights and interests of the whole body of creditors, and to him alone is entrusted the

realisation and distribution of the bankrupt's estate. Every other title to manage the bankrupt's estate is superseded by the title which the law confers on the trustee in bankruptcy. The Lord Ordinary's interlocutor appears to me to be carefully expressed, so as to protect all the legitimate interests of the reclaimers. But in case it might be supposed that the trustees are bound to denude in favour of the pursuer before their legitimate claims have been satisfied, I think the finding of the interlocutor might be varied to the extent of finding that the trustees are bound to denude of the estate "subject to any valid securities over the same, and on payment or satisfaction of such right or lien or indemnity" as they may have. With this slight variation, which is nothing more than verbal—for I am satisfied it is what the Lord Ordinary meant—I am of opinion that the interlocutor reclaimed against should be affirmed.

LORD MONCREIFF—The Lord Ordinary has found that there are no relevant or sufficient grounds for reducing the trust-deed libelled, "but that the same has been superseded by the bankruptcy of the Earl of Rosslyn, and that the trustees are bound to denude of the estate and effects thereby conveyed by him, and to make over the same to the pursuer for the purposes of the said bankruptcy, subject to any valid securities over the same, and to such rights of lien and indemnity as the trustees may have."

The Lord Ordinary further finds that the defenders are bound to count and reckon with the pursuer, and orders them to lodge a minute condescending on the trust estate and an account of their intrusions with it. He has pronounced no order of denuding. Subject to a slight qualification I substantially concur in the interlocutor of the Lord Ordinary.

The trust-deed executed by Lord Rosslyn in 1893 is one of an exceptionally wide character. It is a unilateral deed. By it Lord Rosslyn divests himself absolutely of the *universitas* of his estates, present and future, in favour of trustees, of whom he himself is one. He conveys not only specified estates, but all lands and heritages "in Scotland, England, or elsewhere, now belonging to me or which shall belong to or be acquired by me during my life so far as not comprehended in the foregoing special conveyance; and also all moveable or personal estate, funds, property or effects of whatsoever kind or wheresoever situated, now belonging or which shall belong to or be acquired by me during my life." He thus left himself nothing to satisfy any future debts. If not then insolvent, he made himself so by granting the trust. The trust is partly a trust for certain creditors, partly for management and maintenance of Lord Rosslyn himself and his family during his life, and partly for his widow and family after his death. *Prima facie* it is just such a private trust as is necessarily superseded by sequestration (2 Bell's Comm. 391). The law and reasons are

thus stated by Professor Bell:—"A trust-deed completed so as to vest the estate in the trustee beyond the reach of reduction on the bankrupt laws will still be ineffectual to bar those creditors who have not acceded to it from proceeding judicially to have the estate sold and distributed according to the legal rules of ranking and sale or sequestration. The creditors having the radical right under such a trust may not have confidence in the disclosure made or intended, and may think that no means of discovery short of a judicial examination on oath of the bankrupt and his relations and confidants can serve to bring his affairs sufficiently to light; they may not have confidence in the trustee to administer the estate; and above all they may be wearied out by the delay, the expense, and the inefficiency of the ill-adapted processes of the common law for effecting a final distribution of the funds." And again he says—"It is settled that when sequestration is awarded after a private trust it completely supersedes that trust, and that the trustees are bound forthwith instantly to denude in favour of the trustee named in the sequestration." What may have been the inducing cause of granting the deed does not seem to me to affect the question. It is said to be onerous to certain effects. It is not necessary to consider that question at present. If the deed confers any preferential rights on Mr Vynner (who is otherwise secured by heritable bonds for all advances) or others, such rights will receive effect in the sequestration. They are reserved; all that is proposed is to transfer *in hoc statu* the control and management of the trust-estate to the trustee in the sequestration.

At the same time the trustees cannot be called on to denude until they are reimbursed for outlays and expenses which they have incurred for the benefit of the trust-estate (Bell's Pr. sec. 1998-10 and sec. 1453); and it may be that questions of some difficulty will arise in the accounting as to the payments in respect of which they may be entitled to plead retention. I therefore agree that the Lord Ordinary's interlocutor should be affirmed, with a slight variation to the effect that the trustees are only bound to denude after such claims of lien and indemnity as they may succeed in establishing in the accounting have been satisfied.

The Court pronounced this interlocutor:—

"Recal the interlocutor reclaimed against: Find that the pursuer has set forth a sufficient title to sue this action: Find that no relevant or sufficient grounds are averred for reducing the trust-deed libelled, but that the same has been superseded by the bankruptcy of the Earl of Rosslyn, and that the trustees are bound to denude of the estate and effects thereby conveyed by him, and to make over the same to the pursuer for the purposes of the said bankruptcy, subject to any valid securities over the same, and on payment or satisfaction of such rights of lien or

indemnity as the trustees may have, and that they are bound to count and reckon with the pursuer for their intrusions as trustees foresaid with the said estate and effects, and remit to the Lord Ordinary to proceed with the cause," &c.

Counsel for the Pursuer and Respondent—Johnston, Q.C.—J. C. Watt. Agents—Simpson & Marwick, W.S.

Counsel for the Defenders and Reclaimers—Dundas, Q.C.—Clyde. Agents—Dundas & Wilson, C.S.

Wednesday, January 9, 1901.

FIRST DIVISION.

REID v. REID.

Minor and Pupil—Custody—Legitimate Children—Questions between Parents—Procedure—Interim Custody—Petition for Custody Pending Action of Adherence—Parent and Child—Husband and Wife—Guardianship of Infants Act 1886 (49 and 50 Vict. c. 21), sec. 5.

A husband ordered his wife to leave his house, and removed from her custody the three elder children of the marriage, all of whom were girls under seven years of age, leaving with her the youngest child, a boy of a few months old. She brought an action of adherence, and alternatively of separation and aliment, with conclusions for the custody of the children. Shortly after the summons in this action was called she presented a petition to the Inner House for the custody of the three elder children. In answers lodged by the husband no serious allegation was made against the wife's character or her fitness to have the custody of the children. The Court, without ordering inquiry, granted the prayer of the petition *ad interim*.

Mrs Agnes Jane Grant or Reid, wife of Alexander Reid, spirit merchant, residing at Bearsden, Dumbartonshire, presented a petition at common law and under the Guardianship of Infants Act 1886, in which she prayed the Court to find her entitled to the custody of her four children—Agnes, aged six, Sarah, aged four, Ethel, aged three, and Alexander Percy, aged six months.

In the petition Mrs Reid averred that she was married to the said Alexander Reid in 1893, and lived happily with him till August 1900, from which date there had been constant difficulties between them. In December 1900 she received a letter from his law-agent, in which it was stated that her husband insisted upon her leaving his house. She obeyed this order, and found a home with her father. She was allowed to take the youngest child along with her, but before she left her husband's house her other children were removed by the hus-

band from his house, and the petitioner averred that she did not know where they were. She raised an action of adherence, and alternatively for separation and aliment, with conclusions for the custody of the children and aliment for them. She further averred that her husband had an income of £1500 a-year, and that his business was of a nature that necessitated his absence from home the whole day. Her averments concluded with the following statement:—"The petitioner is not in a position to make any averments regarding the fitness or unfitness of her husband for their custody. She believes and avers that they are not in his custody. They are very young girls, and are in need of their mother's care, and it is averred are unhappy away from her, and the petitioner is entitled in the meantime to have their custody, and their interests demand that they should be with her. The petitioner will give her husband such reasonable access to said children as the Court may think proper."

Answers were lodged for the husband, in which he made, *inter alia*, the following statement:—" (Ans. 3) The respondent had serious differences with the petitioner, and was much dissatisfied with her conduct both as a housekeeper and towards their three elder children before as well as after August 1900. The respondent disapproved strongly of corporal punishment, and has had cause frequently to remonstrate with the petitioner for thrashing the three elder children. On several occasions he has had to interfere and take them away from her. She has beaten the eldest daughter, who has always been delicate, with special frequency and severity, and without cause. She has disobeyed the respondent's expressed wishes in this respect, and resented his remonstrances and interference on the child's behalf."

Section 5 of the Guardianship of Infants Act 1886 enacts—"The Court may, on the application of the mother of any infant, make such order as it may think fit regarding the custody of such infant, and the right of access thereto of either parent, having regard to the welfare of the infant and the conduct of the parents and to the wishes as well of the mother as of the father."

Argued for the petitioner—This was a case for the interference of the Court without delay, and a sufficient *prima facie* case had been made for an order for custody *ad interim* without inquiry. The real question in such cases was the interest of the children, and the natural home of three girls under seven was with their mother. The petitioner was not bound to wait until her action for adherence was ready for proof—*Stevenson v. Stevenson*, Jan. 30, 1894, 21 R. 430. The case of *M'Callum v. M'Callum*, Jan. 24, 1893, 20 R. 293, was not in point, because the decision there was that the circumstances required inquiry, and that it would be improper to have two inquiries. Here the conduct of the husband was obviously unreasonable, and the case might be decided on the petitioner's