

it, and although I entertain some doubts, I am not disposed to differ from the result which has been come to by my two noble and learned friends.

Mr. Cotton.—Would your Lordship pardon me for mentioning, that certain costs have been paid under the orders which have been reversed by your Lordships. Of course an order will be made for the repayment of those costs.

LORD CHANCELLOR.—That is always a matter of course.

Certain interlocutors reversed, and defenders below assoilzied, with expenses.

Appellants' Solicitors, Gibson-Craig, Dalziel, and Brodies, W.S.; Grahames and Wardlaw, Westminster.—*Respondents' Solicitors*, Duncan, Dewar, and Black, W.S.; Loch and Maclaurin, Westminster.

JULY 16, 1868.

The Hon. CORNWALLIS FLEEMING, *Appellant*, v. JAMES HOWDEN, Accountant, Edinburgh, *Respondent*.

Entail—Clause of Devolution on succeeding to Peerage—Bankruptcy—Right of Succession—Declarator—*F. was heir of entail of D. estate under a deed made in 1847, but not recorded in the Register of Tailties, providing, that if he succeeded to a peerage, he should be bound to denude, and the lands should thenceforth ipso facto devolve on the next heir. F., on succeeding to a peerage, did not denude, but remained in possession till his death, and was deeply involved in debt, and after his death his estates were sequestrated. The trustee claimed to have the D. estate transferred to him, which the next heir, who had been served heir to F., resisted.*

HELD (reversing judgment), *That, at the moment of F. succeeding to a peerage, he ceased to be tenant in tail, and became trustee for the next heir, though the deed of 1847 was not recorded, and therefore the lands of D. were not part of the heritable estate of F. at the date of the sequestration.*

QUESTION, *Whether the deed of 1847 being made in pursuance of 20 Geo. II. c. 50, and the estate of D. being purchased with tailzied funds arising from the sale of lands held under a clause of devolution, the heir was not bound by the conditions of the former entail of 1741?—Per LORDS CRANWORTH and WESTBURY.*¹

The estates of John Fleeming, Lord Elphinstone, who died in 1861, were sequestrated in 1862, and Mr. Howden, C.A., was appointed trustee. Lord Elphinstone had succeeded to the title on 19th July 1860, and was then heir of entail in possession of the lands of Duntiblae. The deed of entail was executed in 1847 by George Turnbull, who was a trustee acting under 20 Geo. II. c. 50, whereby he disposed the lands to John Fleeming, and the deed was never recorded in the Register of Tailties. It contained this clause:—"And further providing, that in case the said John Fleeming, or any of the heirs of tailtie before mentioned, shall succeed to the title and dignity of peerage, then and in that case, and how soon the person so succeeding, or having right to succeed, to the said lands and others, shall also succeed, or have right to succeed, to the said title and dignity of peerage, they shall be bound and obliged to denude themselves of all right, title, and interest which may be competent to them of the said lands and others, and the same shall thenceforth *ipso facto* accresce and devolve upon the next heir of tailtie in existence for the time being, sicklike as if the person so succeeding and bound to denude were naturally dead."

In 1859 John Fleeming disposed the said lands to George Dunlop in security for certain debts as far as he could convey the lands. When John Fleeming succeeded to the peerage in 1860, the next heir of entail, namely, his sister Viscountess Hawarden, considered, that the lands *ipso facto* vested in her; and the Court had so declared with respect to certain other estates, in the deed of entail of which a similar clause was found (see 38 Sc. Jur. 175). Viscountess Hawarden died in 1865, and her son, the present appellant, was the next heir.

The trustee in the sequestration petitioned the Court, that the said estate of Duntiblae should be transferred to him as representing the creditors as being part of the property of the late Lord Elphinstone—(Bankruptcy (Scotland) Act 1856, § 106). The Hon. C. Fleeming opposed.

¹ See previous report 5 Macph. 658: 39 Sc. Jur. 312. S. C. L. R. 1 Sc. Ap. 372: 6 Macph. H. L. 113; 40 Sc. Jur. 616.

The Second Division repelled the pleas of Mr. Fleeming, and made the order transferring the estate to the trustee. These interlocutors were now appealed against.

Sir R. Palmer Q.C., M. Lloyd, and Pattison, for the appellant.—Under the devolution clause in the deed of entail, the estate *ipso facto* devolved on Lady Hawarden, when John Fleeming succeeded to the peerage. The bankruptcy only operates to transfer the property held by the debtor, *tantum et tale*—*Littlejohn v. Black*, 18 D. 207. Lord Elphinstone's title was made up under the conditions and limitations of the deed of tailie. It is true the deed was not registered, but the destination in the investiture is nevertheless effectual. The clause does not belong to the class of forfeitures or irritant and resolute clauses. *Lockhart v. Gilmour*, M. 15,404; *Bruce v. Henderson*, M. 15,439; M. 4215; *Marquis of Bute v. Marquis of Hastings*, 7 D. 1; 6 Bell, App. 30; *Earl of Eglinton v. Hamilton*, 9 D. 1167; *Hawarden v. Dunlop*, 4 Macph. 353. At all events, the lands cannot be attached for debts contracted by Lord Elphinstone subsequent to his succession to the peerage. Even irrespective of the deed of 1847, the Statute 20 Geo. II. c. 50, taken with the deed of entail of 1741, impressed the devolution clause as a condition on the estate of Duntiblae, and the heir was bound to treat that which he was bound to do under the Statute as already done. In that view it was of no consequence, whether the deed of 1847 was recorded or not. For the purpose of this case it must be taken as recorded and effectual.

Dean of Faculty (Moncreiff), and J. Pearson Q.C., for the respondent.—The entail of 1847 not being recorded, was null and void, and therefore Lord Elphinstone held the estate in fee simple—*Smollett v. Smollett*, M. App. Tailie, No. 12; *Rose v. Drummond*, 6 S. 945; *Ross v. Drummond*, 14 S. 454; *Graham v. Graham*, 5 W.S. 759; *Williamson v. Sharp*, 14 D. 127. As he was owner in fee simple, all debts contracted by him may be made effectual against the estate—*Fleming v. Elphinstone*, M. 15,559; *Eglinton v. Montgomery*, 9 D. 1167; 6 Bell, Ap. 136; *Campbell v. Dunn*, 2 S. 341; *Campbell v. Harley*, 1 W. S. 690; 6 S. 679. The estate having been conveyed to Mr. Dunlop, this evacuated the clause of devolution in the deed of tailie—*Gardyne v. Royal Bank*, 13 D. 939.

Cur. adv. vult.

LORD CRANWORTH.—My Lords, the question in this appeal arises upon the Scotch Sequestration Act, the 19th and 20th Vict. cap. 79. The material facts are as follows:—It appears, that on the 24th of June in the year 1741, John, then Earl of Wigtoun, settled very extensive real estates in Scotland in tailie with a certain succession of heirs, and after various provisions, which it is not necessary to enumerate, there was a clause in the deed not of a very usual character, but not at all unprecedented, providing, that if any of the heirs in tail before mentioned should succeed to the dignity of the peerage, “in that case, and so soon as the person succeeding or having right to succeed to my said estate shall also succeed or have right to succeed to the said title and dignity of the peerage, they shall be bound and obliged to denude themselves of all right, title, or interest, which may be competent to them of my said estate, and the same shall from thenceforth, *ipso facto*, accrue and devolve upon the next heir of tailie.” That was the provision, that was contained in the deed of entail of 1741. That deed of entail was duly fenced with all proper irritant and resolute clauses, and was duly recorded.

The next matter to which it is necessary to call your Lordships' attention is an Act of Parliament which was passed soon after the Rebellion of 1745, the object of which was to put on a better footing the feudal relations of the great Lords in Scotland with their vassals. It provided among other things, “that it shall be lawful for any person possessed of a tailzied estate in Scotland, comprehending lands or superiorities of vassals under a holding of him, to sell to such vassals or any of them the superiorities over their respective lands at such prices as the parties shall agree for, and thereupon to resign such land for new infestment to be granted to such buyer if his own superiority shall be good and valid, provided always, that the monies paid as the price of such superiority or superiorities, being part of a tailzied estate, shall be laid out and settled to the same uses and with the same limitations and restrictions as such superiority was settled before the sale thereof as aforesaid.”

Under the provisions of that Act of Parliament, from time to time between the date of that Act of Parliament in the 20th of Geo. II. and the year 1847, several sales were made under the provisions of that Act, and the moneys that were produced by those sales were, according to the provisions of the Act, put into the hands of trustees, and eventually in the year 1847 it came into the hands of a gentleman of the name of Turnbull, whose duty it was to invest it according to the provisions of the Act. At that time John Fleeming was the tenant in tail in possession. The lands that were so purchased we will designate by the general name of the lands of Duntiblae; they were settled upon precisely the same destination as the original settlement in 1741, but the deed was not recorded. Therefore, unless there was something special in it, it would have no operation against creditors or persons who purchase from the tenant in tail.

John Fleeming remained in possession of these settled estates, as well of the original lands as of the lands of Duntiblae, until the 19th July 1860, when he succeeded to a peerage, and then the question arose as to what was to be the effect of what we in England call a shifting clause, but

what, I believe, in Scotland is called a conditional destination, viz. the clause which on that event carried over the entailed lands to the next heir of tailie from the date of his succeeding to the peerage. Lord Elphinstone, having thus succeeded to the peerage, lived to enjoy it a very short time, for he, having succeeded in July 1860, died in the following month of January, leaving Lady Hawarden, his sister, the next heir of entail. She was served as supposed heir of tailzie and provision both to the originally settled lands and to the Duntiblae lands. John Fleeming, who had thus succeeded to the peerage as Lord Elphinstone, died in very embarrassed circumstances, and on the 19th of June 1862 a creditor presented a petition under the Scotch Sequestration Act to have his lands sequestrated. Your Lordships are aware, that by the Scotch Statute, unlike the English law of bankruptcy, a person may be made a bankrupt after his death, whereas in England it can only be done during his lifetime. That power is given by the 13th clause of the Scotch Sequestration Act, which enacts among other things, that sequestration may be awarded of the estate of any person in the following cases, and several are enumerated, amongst others—"in the case of a deceased debtor, who, at the date of his death, was subject to the jurisdiction of the Supreme Court of Scotland." It may be awarded on the petition of a creditor duly qualified, that is, being a creditor to the requisite amount. A creditor duly qualified did present such a petition, and the result was that, according to the provisions of the Act, a trustee was appointed, and when a trustee is appointed, all the estate of the debtor, if it is a proceeding against a living bankrupt, vests in the trustee, but as against a deceased debtor there is a special provision made in the 106th clause of the Act, which provides, that, when sequestration is awarded against the estate of a person after his death, and his successor has made up a title to his heritable estate, the trustee may apply by petition to the Lord Ordinary, praying, that such estate shall be transferred to and vested in him. Then certain proceedings are to take place, and, unless cause is shewn to the contrary, the Lord Ordinary is authorized to make a declaration, that the estate shall vest in the trustee.

Under the provisions of that section, a petition was presented by the trustee, praying, that the estate of the deceased Lord Elphinstone might be vested in him. The matter came by petition before the Lord Ordinary, and the Lord Ordinary, on looking into the case, was of opinion, that this case did not come within the Statute, and refused to make any order. From that decision, however, the trustee presented a reclaiming note to the Inner House. The record was made up, and eventually the Inner House came to a contrary conclusion, differing in opinion from the Lord Ordinary, their opinion being, that the case was within the Statute, and they made an interlocutor, that the Lord Ordinary should make a declaration according to the terms of the Statute, vesting the lands in the trustee under the sequestration. The Lord Ordinary did so in obedience to the interlocutors of the Inner House. Of course it was reported by him to the Inner House, who affirmed it, and against those interlocutors overruling the Lord Ordinary, and directing the estate to be vested in the trustee, this appeal has been presented to this House; and whether those interlocutors were or were not right is the question which your Lordships have now to determine. Before going into the immediate question in this case, I think it is necessary to call your Lordships' attention to what was done with reference to the settled estates of Wigtoun, because it appears to me, that the decision in that case has a most material bearing on what ought to be decided in the present case. When John Fleeming, who was tenant in tail in possession in July 1860, became a peer, the next heir of entail, his sister Lady Hawarden, contended, that in consequence of his having so become a peer, his estate *ipso facto* ceased, and that from that moment she was entitled to that estate as her own. The question was, whether the effect of that shifting clause was *instantanter* to transfer the property from Lord Elphinstone to his sister Lady Hawarden, or whether there was to be an action of declarator raised in order to entitle her to have the transfer of the estate made to her in the same way as if she were claiming on the ground of a violation of any of the clauses of the deed of entail. That question was very much discussed in the Court below, all the Judges were consulted, and they came to a clear opinion unanimously, that, in point of fact, the moment John Fleeming became Lord Elphinstone, he *ipso facto* became as it were trustee for the next heir of entail, and that the next heir of entail had nothing to do with proving due irritancy of the entail, but that *ipso facto* his title and interest as tenant in tail had ceased, and that he was bound *instantanter* to denude in favour of his sister, the next heir, and that, consequently, the sister was entitled to the whole rents and profits which accrued in respect of the lands subsequently to the time when John Fleeming became a peer. In that case no question arose about the validity of the entail, because the proceeding related solely and exclusively to the originally settled estates of the Earl of Wigtoun, and as to those there was no question, that the entail had been validly recorded.

The question for decision in this case now under appeal is, whether, in the circumstances of this case, the appellant, Cornwallis Fleeming, being now tenant in tail of Duntiblae, according to the unrecorded deed of entail of the 4th of October 1847, the Court had or had not power to declare those lands, in the language of the 106th section of the Act, to be transferred to and vested in the respondent, as the trustee in the sequestration against the estate of the late Lord Elphinstone. The Court of Session decided, that it had such power, and against that decision the present tenant in tail appeals to your Lordships.

If John Fleeming had died without succeeding to a peerage, the right of the trustee to call for a transfer would have been clear, subject to the argument of the appellant, that it was unnecessary to record the entail of Duntiblae, to which I will presently advert; for when Lady Hawarden, after the death of her brother, made up her title to those lands of Duntiblae, as his heir of tailie and provision, it would in such case have been clear, that she had made up a title to what was his heritable estate at his death, and it would have been heritable estate which his creditors might attach.

The question is, how this right is affected by the clause in the deed of entail carrying over the estate to the next heir in tail on the heir in possession succeeding to a peerage. The Lord Ordinary was of opinion, that, from the time when that event happened, Lord Elphinstone ceased to be in possession as tenant in tail; that from that time till his death he was a mere trustee for Lady Hawarden, and so that the lands in question were not at his death his heritable estate, within the true intent and meaning of the 106th section of the Sequestration Act. The Inner House, however, were of a different opinion. They, by a majority of three to one, came to the conclusion, that as the entail of Duntiblae was not recorded, the creditors of Lord Elphinstone, who became creditors after his accession to the peerage, were entitled to regard him as fee simple proprietor, and so to rely on the fee of the lands as a fund of credit. They held, that though the clause of the devolution imposed on Lord Elphinstone a personal obligation, when he succeeded to the peerage, to denude in favour of the next heir of tailie, yet, till this had been done, the rights of creditors were not affected. The three learned Judges all expressed their opinion, that this was the true legal effect of what had been done; and so that the lands in question were liable to all the debts of Lord Elphinstone, as well those incurred after as those incurred before he became a peer. They did not, however, think it necessary to decide this question as to debts incurred after the accession to the peerage, inasmuch as there were certainly debts incurred prior to that event, the existence of which would, they thought, warrant the trustee in the prayer of his petition. The interlocutor now under appeal leaves this question open as to debts incurred after the accession to the peerage, for it merely directs the lands to be transferred and vested in the respondent as trustee on the sequestered estate of Lord Elphinstone, leaving him to deal with it as the law may require.

Although, however, the interlocutor is properly silent as to what creditors will be entitled to resort to these lands for payment of their debts, yet, unless the Court was right in the opinion, that the lands remained liable to all Lord Elphinstone's creditors who became such after his accession to the peerage, I do not see how the interlocutor can be supported. What the Court is called on to do is to exercise a power given by Statute, and unless the case is brought within the terms of the Statute, the power does not exist. The Statute enacts, that when sequestration is awarded against estates of a person after his death, and his successor has made up a title to his heritable estate, the trustees may apply to the Lord Ordinary, praying that such estate shall be transferred to and vested in him, and power is given to the Lord Ordinary to make such order accordingly. This power is confined to the case where a successor has made up his title to the heritable estate of the deceased. If, therefore, in this case, John Fleeming, on succeeding to the peerage, had, according to the provisions of the entail, conveyed the Duntiblae lands to his sister, they would not at his death have been part of his heritable estate, and so would not have been within the provisions of the 106th clause. It may be conceded that, subject to the argument of the appellant, that no recording of the entail of Duntiblae was necessary, no creditors of Lord Elphinstone who were creditors before he had conveyed to his sister would have had rights against them in the hands of Lady Hawarden, but the lands themselves certainly would not have formed part of his heritable estate at his death, and so could not have been transferred to the trustee under the sequestration by virtue of an order of the Lord Ordinary. Here, however, Lord Elphinstone did not convey the lands to his sister, but continued to hold them to his death, and she then caused herself to be served in special as heir of tailie and provision to her late brother, and made up her title accordingly. She thus brought these lands within the purview of the 106th section, if they were, within the true intent and meaning of that section, the heritable estate of Lord Elphinstone at his decease. It certainly was his heritable estate, within the meaning of the 106th section, if the Lord Justice Clerk is right in his position, that the legal character of his infestment as it stood before his accession to the peerage did not, by the happening of that event, become, as between him and persons trusting him on the faith of his original title, a mere fiduciary fee. The two other learned Judges who concurred with the Lord Justice Clerk took substantially the same view with him. But Lord Benholme, who, as Lord Ordinary, had refused the application of the trustee, took a different view of the case, adhering to the opinion which he had formed as Lord Ordinary. His opinion was, that though Lord Elphinstone remained feudally vested in the lands of Duntiblae till his death, yet, from the time of his accession to the peerage, he was so vested as a mere trustee.

The question in this case turns entirely on the point, which of these two views of the law is correct. If, at the death of Lord Elphinstone, the lands of Duntiblae were liable to be attached by his creditors for debts incurred after his accession to the peerage, then they constituted part

of his estate at his death within the 106th section of the Act. If, on the other hand, he at his death, though feudally vested in these lands, was only vested as a trustee for his sister, then they would not be, according to the 106th section, part of his heritable estate, and so cannot be transferred by an order of the Lord Ordinary made under that section. The Judges all treat this as a new question; there is little or no authority to guide us, and we must look only to the general principle.

I am of opinion, that the Lord Ordinary was right. In the case on the original entail of the Wigtoun lands, it was decided, that from the time when John Fleeming succeeded to the peerage, he ceased *ipso facto* to be entitled to the rents and profits of the lands comprised in that entail, that an obligation attached on him forthwith to convey to his sister as the next heir of entail, that he thus became a mere trustee, and that she was entitled to all the rents accruing after the happening of that event. The language of the entail of the Duntiblae lands is the same as that of the earldom of Wigtoun, though it never was recorded. Now, concurring as I do in the propriety of the decision which all the Judges came to in the Wigtoun case, I must of necessity hold, that it governs that now before us, unless the circumstance that the entail was not recorded makes a difference. I am unable to come to the conclusion, that this circumstance does make a difference in the question now to be decided. The want of its being recorded, if recording was necessary, left it open to any heir of tailzie in possession to alien, to burden with debts, or to alter the order of succession. But it did not in any other manner affect the entail. It made the irritancies ineffectual, but the clause carrying over the estate in the event of the tenant in tail succeeding to a peerage was no irritancy, it was a condition making it the duty of the tenant, on the happening of the specified event, to denude forthwith, and without further proceedings, in favour of the next heir named in the entail. That next heir took the estate with incidents very different from those affecting the Wigtoun lands. The lands of Duntiblae passed to her burdened with the debts of her predecessor. Still they passed to her, and when she made up a title as heir of tailzie and provision to her brother, she must be considered as clothing herself with the same estate as she would have had if he, on succeeding to the peerage, had at once conveyed the estate to her, and she had made up her title to the same accordingly.

The majority of the Court below seem to me to have fallen into an error in supposing, that this case is governed by those of *Smollett v. Smollett* and *Ross v. Drummond*. It follows certainly from those cases, that, disregarding the argument, that the taillie of Duntiblae must be treated as if it had been recorded so long as John Fleeming stood infest as heir of taillie in possession, his estate was liable to his creditors, but from the moment of his acceding to the peerage he ceased *ipso facto* to be tenant in tail. This was apparent on the face of the title as recorded in the Register of Sasines, and any person becoming his creditor after that event, must have known, if he looked to that register, that he was trusting a person who was no longer tenant in tail, for an event had occurred which made it his duty to denude in favour of another person. On these short grounds, I have come to the conclusion, that the interlocutor of the Lord Ordinary was right, and so that those of the Inner House ought to be reversed.

I have hitherto proceeded on the supposition, that the entail of Duntiblae was not duly recorded, and so that John Fleeming was able, before he became Lord Elphinstone, to burden these lands with his debts. But I must now call the attention of your Lordships to an argument on behalf of the appellant which, if sound, disposes of the whole case in his favour independently of the grounds on which I have proceeded. The Statute 20 Geo. II. cap. 50, which authorized the sale of entailed lands, and under which they were sold, provides expressly, by § 17, that the moneys paid as the price of such superiority or superiorities being part of a tailzied estate, shall be laid out and settled to the same uses and with the same limitations and restrictions, as such superiority was settled before the sale thereof as aforesaid, or applied for payment of the debts, if any such there be, of the maker of entail, or other debts that are effectual burdens on the tailzied estate not contracted by such vendor himself, and for that purpose the moneys shall be paid into the hands of the trustees, who shall be appointed by the vendor of such superiority or superiorities, and the purchaser or purchasers thereof respectively, and such trustees, and the survivor of them, and the executors and administrators of such survivor, shall lay out the moneys arising from such sale in the purchase of other lands or heritages, and settle or procure the same to be settled as aforesaid. It was argued for the appellant, that this section made it unnecessary to record the deed of tailzie by which the lands of Duntiblae were entailed, that every person looking at the Register of Sasines would have express notice, that the lands included in this tailzie were to be treated as if they were to all intents and purposes part of the lands comprised in the original Wigtoun entail, and therefore as if they were only recorded, and so that no creditor or singular successor could acquire any right against the lands of Duntiblae any more than he could against the lands included in the Wigtoun entail. If this argument is well founded, then the creditors of Lord Elphinstone, who became creditors before his accession, have no more right against these lands than those who became so after that event.

This question, however, is not open to us for decision on this appeal. Whether the argument be or be not well founded, I have come to the conclusion, on the ground I have already stated,

that the lands of Duntiblae were not, at the death of Lord Elphinstone, lands which, under the order of the Lord Ordinary, would pass to the trustee under the bankruptcy by virtue of the 106th section of the Sequestration Act. That is all which can be decided in this action. If this latter argument of the appellant be sound, they passed to the appellant free from any claim of creditors; if it be not sound, then they are liable, in the hands of the appellant, to all debts of Lord Elphinstone incurred before his accession to the peerage. Which of these views of the law is correct cannot be decided in this action. At all events, the interlocutors below were wrong, and must be reversed.

LORD CHELMSFORD.—My Lords, the petition to the Lord Ordinary for sequestration in this case prayed for a declaration, that certain lands particularly described should be transferred to and vested in the petitioner as trustee.

The question to be determined is, whether, under the Bankruptcy (Scotland) Act, 1856, the property in question at the date of the sequestration was, within the meaning of the 102d section of the Act, "part of the heritable estate belonging to the bankrupt."

By the 4th Section of the Act it is enacted, that property and "estate" shall, when not expressly restricted, include every kind of property, heritable or moveable, wherever situated, and all rights, powers, and interests therein, capable of legal alienation, or of being affected by diligence, or attached for debt.

There can be no doubt, that, until the event occurred, upon which Lord Elphinstone was bound by the condition in the unregistered tailzie of 1847 to denude in favour of the conditional substitute, he might have charged the estate with his debts to any amount, or have made a disposition of it for onerous causes. But when the succession to the peerage opened to him on 16th July 1860, Lord Elphinstone ceased to have an estate, except as a trustee for the conditional substitute.

This appears to me to have been decided in the case of *Lady Hawarden v. Lord Elphinstone*. For although that case related to the old entail of 1741, which was duly recorded, yet, as the Judges held, that the condition as to the succession to the peerage "was not, in the sense of the entail, or in any proper sense, an irritancy, but a provision or condition for regulating the course of succession, and that the clause took effect *ipso facto* so as to entitle Lady Hawarden to immediate possession of the estates, and to the rents and profits henceforth accruing without any decree of declarator," such immediate effect of the condition could not be destroyed by the subsequent omission to record the entail.

This was the state of things at the time of Lord Elphinstone's death on the 15th January 1861. Down to this period the lands in question might have been attached for debt incurred by him prior to his succession to the peerage. But as upon the happening of the event, upon which *ipso facto* his beneficial interest ceased, Lord Elphinstone became a mere trustee for the conditional substitute, no debts subsequently incurred by him could, in my opinion, have attached upon the lands.

Were these lands, then, at the time of the sequestration, "the heritable estate of the bankrupt within the meaning of the Bankruptcy (Scotland) Act 1856?" The general principle of every Bankrupt Act is, that the person, in whom the estate vests for distribution under the bankruptcy, takes the property of the bankrupt exactly as he himself held it. Lord Elphinstone at the time of his death was a mere trustee under a condition to denude in favour of Lord Hawarden; consequently the estate could only vest in the trustee under the sequestration, subject to this condition. But it is contended, that, by the express words of the Scotch Bankruptcy Act, the lands in question vested in the trustee for the benefit of the creditors, as they were at the time of Lord Elphinstone's death capable of being affected by diligence or attached for debt. But it appears to me, that these words in the interpretation clause of the Act are nothing more than a general description of the species of property which the sequestration is to embrace, and that they apply to the point of time when the sequestration is awarded. Now the lands in question, after the occurrence of the conditional event on which the continuance of Lord Elphinstone's estate depended, could not have been rendered liable to be affected by diligence, or to be attached for debts subsequently incurred by him. Consequently, at the time of his death, the property did not belong to him in this sense, although before his accession to the peerage it was chargeable, and actually charged, by him with his debts.

The question must be determined, not upon the interpretation clause, but upon the 102d section of the Act, which vests the property of the bankrupt in the trustee, and defines the extent of his right. Under this section the whole heritable estate belonging to the bankrupt is to vest in the trustee under the sequestration, with the qualification, that "if any part of the bankrupt's estate be held under an entail, or by a title otherwise limited, the right vested in the trustee shall be effectual only to the extent of the interest in the estate which the bankrupt might legally convey, or the creditors attach.

At the time of his death, (which in the case of a deceased bankrupt is the same as the time of the sequestration,) Lord Elphinstone had an interest in the estate which he could not have legally

conveyed, and which could not have been attached for debts incurred by him while in possession of that interest.

It appears to me, therefore, that the lands in question were not part of the heritable estate of the bankrupt, which, within the meaning of the Bankrupt Act, would vest in the trustee for the benefit of the creditors. If they could, this strange consequence would follow, that although the trustee could only take what belonged to the bankrupt, who was bound to denude in favour of the conditional substitute, the trustee would nevertheless take the estate discharged of this condition; and vesting in him as the estate of the bankrupt, it would necessarily be applicable to the payment of all his debts.

I have confined my opinion entirely to the question as to the estate vesting in the trustee for the benefit of creditors under the sequestration. What rights the creditors either before or after the happening of the event which determined their debtor's interest may have over the estate is unnecessary to be considered. This question will depend upon the effect of the Statute of the 20 Geo. II. c. 50, upon the disposition and deed of tailzie made by the trustee of the estate purchased with the moneys arising out of the sale of lands included in the original of 24th June 1741, and settled according to the provision of the Act to the same uses and with the same limitation and restriction as were contained in that tailzie.

I am of opinion, that the interlocutors appealed from ought to be reversed.

LORD WESTBURY.—My Lords, as the deed of October 1847 was not recorded in the Register of Tailzies, the late Lord Elphinstone was on the face of his titles unlimited fiar of the estate of Duntiblae, subject only to the clause of devolution; but he was personally bound by the obligation arising from the enactment contained in the Public Act of the 20 Geo. II., to the effect, that the estates bought with the proceeds of the sale of the superiorities, by such Act authorized to be sold, should be settled to the same uses, and with the same limitations and restrictions, as the said superiorities were settled by virtue of the original Wigtoun deeds of entail. And the question is, What effect upon Lord Elphinstone's ownership resulted from this obligation?

The doctrine of trusts has the same origin, and rests on the same principles, both in Scotch and English law, and it is desirable, that it should be developed to the same extent in both systems of jurisprudence.

When the Act of the 20 Geo. II. c. 50, enacted, that the moneys to arise from the sale of the superiorities thereby authorized to be sold should be laid out by the trustees in the purchase of other estates to be settled to the same uses, and with the same limitations and restrictions, as the same superiorities were settled before the sale thereof, there was created a valid trust, which bound all persons taking any estate or interest in the newly purchased lands. No persons could rightfully claim or assert an estate or right in or over the purchased estates inconsistent with this obligation. It was the duty of all persons interested to have the purchased lands strictly and validly entailed in like manner, as the heritages sold were entailed. This trust affected not only the trustee Turnbull, but also the heirs of tailzie who became vested and seized in the newly purchased lands by virtue of the Statute, and of the deed of tailzie of the 4th of October 1847.

If that deed had been duly recorded in the Register of Tailzies, as it ought to have been, in pursuance of the Statute, the trust and obligation created and imposed by the Act would have been fulfilled and exhausted. But as this was not done, the trust or obligation to comply with the Statute remained in full force; and although John Fleeming, after he had made up his titles to the newly purchased lands, under the deed of 4th of October 1847, was on the face of his titles unlimited fiar, yet, except in the case of a singular successor, without notice he could not rightfully convey any larger estate in the purchased lands than he would have been enabled to do if the deed of October 1847 had been duly entered in the Register of Tailzies.

The right of a trustee under a sequestration is very different from the right of a singular successor; for it is a rule common both to English and Scotch Bankrupt law, that the trustee or assignee takes the property of the bankrupt subject to all the rights and equities that affected it at the time of the bankruptcy. But the singular successor is not bound by a trust or duty of which he had no notice. The trustee under a sequestration is in the same position as a gratuitous alienee. He takes such estate or interest only as the bankrupt can lawfully convey. So in England the assignee takes such interest only as the bankrupt can lawfully part withal. The force of the two expressions is the same, and the implied conveyance to the trustee or assignee ranks no higher than a gratuitous alienation.

It is said, that the duty imposed by the Statute of Geo. II. was a personal obligation, and not a trust, but an obligation to do an act with respect to property creates a trust, and if a fiar, bound to fulfil an obligation, acquires or retains, by means of his neglect of that duty, a greater estate than he would otherwise have had, he is a trustee of such excess of interest for the benefit of the persons who would have been entitled to it if the obligation had been duly fulfilled.

This is a very plain and righteous principle, which is of the greatest use in the administration of justice. It does not interfere with any system of feudal or legal ownership. It is said, and correctly, that the trustee under a sequestration may claim not only what the bankrupt may

lawfully convey, but also what the creditors might attach. But the same principles apply. The creditors cannot attach, or take in execution, any estate of which the bankrupt is a trustee. They can attach such interest only as the bankrupt is beneficially entitled to.

If these conclusions are well founded, it follows, that no interest whatever in the estate of Duntiblae could pass to the trustee under the sequestration.

The same conclusion is arrived at on another view of the case. According to the true construction of the Scotch Bankruptcy Consolidation Act, (19 and 20 Vict. c. 89,) nothing passes to the trustee under a sequestration against a deceased debtor except such property as the debtor was beneficially entitled to at the time of his decease. This construction seems to be admitted. Had then the debtor (the late Lord Elphinstone) any beneficial estate or interest in the lands of Duntiblae at the time of his decease? By the clause of devolution already referred to, (which is found in the Wigtoun entail, and was repeated in the deed of October 1847, and is set forth in all the titles made up by the late Lord Elphinstone as they are recorded in the Register of Sasines,) the late Lord Elphinstone became bound, on his accession to the peerage, (on the 19th July 1860,) to denude himself of all right, title, and interest which might be competent to him of the lands of Duntiblae. That is simple language: he became bound to convey the lands of Duntiblae to the next heir of tailie. Whilst this obligation remained unfulfilled, Lord Elphinstone was a trustee of the lands included in the obligation. The observations already made are directly applicable. An obligation to convey land to another is, beyond doubt, a trust; and whilst the party bound by the obligation retains possession of the lands, he holds them in a fiduciary character. There would be a great failure of justice, if this were not the conclusion of law.

But this is not the only effect of the clause of devolution, for it goes on to declare, that the same (*i.e.* the lands) shall thenceforth (from the accession to the peerage) *ipso facto* accresce and devolve upon the next heir of tailie in existence for the time being, etc., which is in effect a transfer of the beneficial ownership.

It seems clear, therefore, that the lands of Duntiblae, although the late Lord Elphinstone did not formally and legally denude himself of them during the short time that he lived after his accession to the peerage, formed no part of his heritable estate or property at the time of his decease, and therefore, that no infestment in them passed to the trustee under the sequestration.

I am therefore of opinion, that the interlocutors complained of should be reversed, and the petition of the trustee dismissed with expenses.

LORD COLONSAY.—My Lords, the views which have been now stated with reference to this case are those to which the consideration I have given to it has also led my mind. It appears to me, that the only question we have to determine is, whether, under the provisions of the Scotch Bankruptcy Act, and having regard to the position in which Duntiblae estate stood at the date of John Fleeming's accession to the peerage, the trustee in Bankruptcy is entitled to have that estate conveyed to him in conformity with the provisions of the Bankruptcy Act. Now it appears to me, that that is a demand that he is not entitled to make. I do not wish to say a word that would in any degree interfere with the judgments that were pronounced in the cases of Smollett and Drummond, and some other cases. I hold them to involve a principle which is perfectly sound, namely, that where a party holds an estate under a deed of entail which is not recorded, and where he has contracted debts, the creditors may attach that estate. But that principle is applicable merely to the case, in the first place, of an entail in the ordinary form, and without any special conditions such as occur in this entail; and in the second place, it has reference only to the right of creditors themselves individually to proceed against the estate. It does not necessarily give the right to the trustee in bankruptcy to demand the estate, which is the demand here made. Nor does it necessarily give a right to demand the estate where there are conditions in the deed such as appear here.

I am also of opinion, that the clause of devolution (as it is called here) was one which was of the quality of the right which Fleeming possessed in the estate, and that from the time that that clause became operative by his succeeding to the peerage, the estate was no longer to be regarded as his property. He held it under the feudal title, but he held it merely because the title had been so made up, but made up with the quality to which I have alluded, and from that time forward the real property in the estate belonged to the party to whom it had devolved, and he only held the title as trustee for the benefit of this party. That being so, I think it would follow, that debts contracted by him subsequently to that date could not be made chargeable on the estate.

But perhaps that might not be conclusive of this question, if some of the views that have been stated in the Court below be sound, namely, that whether or not the estate was liable for the debts contracted after he became a peer, at all events the demand of the trustee can be supported for the debts contracted previously to that event. I differ from that entirely. The demand of the trustee is a demand to have possession of the whole estate in order that it may be disposed of and distributed, and it is not a good ground for that demand, that there exists a certain class of creditors who have a right to that estate, and another class who have none. Take, for instance,

this case: Suppose, that at a certain date a party applies to have an unrecorded entail recorded, and it is recorded accordingly, it was liable for debts contracted previously to that date, but it was not liable for the debt contracted after that date. Suppose, in that state of matters, the trustee had demanded the conveyance of the estate to the effect of paying the debts, which had been contracted previously to the recording of the entail, it is quite clear, that he could not have it. I am therefore very clearly of opinion, that this condition or quality of the right, which appeared on the face of the title, was a sufficient obstacle to any demand such as we have here. It has been said, that this was not truly a condition of the right. The expression "condition of the right" is used in various senses, and in certain views it is not similar to certain other conditions. If it was a quality of the right, it was not a matter necessarily connected with the entail, but it was a quality of the right on the face of the title; and if I am right in holding that, from the time that John Fleeming succeeded to the peerage, he held the estate as trustee, then it is clear, that this is a trust not latent, but a trust patent on the face of his right, a trust which every one becoming his creditor on the faith of his having a feudal investiture, was bound to know, for there it stood open and patent.

Questions have been raised as to whether the doctrine of latent trusts does or does not apply in cases of feudal investitures. I do not think it necessary to solve that question here, because here the trust is patent on the face of the title of John Fleeming.

But then another question has been raised here, a very large question, the one which has been particularly spoken to by my noble and learned friend on my right (LORD WESTBURY), as to the effect of the Statute of the 20th of Geo. II. I regard that as a very important question, but it is one that has not been so fully argued before us as to entitle me to pronounce any opinion on it now. Nor do I think it necessary for the present purpose, because I see enough in the trust created by the succession of the peerage to put an end to this demand on the part of the trustee. But I think it quite right, if the case should take another form, as it may do by the demands of individual creditors to proceed against the estate, that that question should be perfectly open for the consideration of the Court, which would have to deal with those demands, and in that view I think it is well, that the question has been so stated by my noble and learned friend on my right, as to put it in the view of all the parties when they proceed further against this estate, that such a question does arise.

With the expression of these views, my Lords, I concur in the judgment proposed in this case.

Interlocutors complained of reversed, and case remitted to the Court of Session with a declaration, that the petition of the trustee ought to be dismissed with expenses, and that any expenses which have been paid ought to be repaid.

Appellant's Solicitors, T. Ranken, S.S.C.; Tatham and Proctor, London.—Respondent's Solicitors, Scott, Moncreiff, and Dalgety, W.S.; Connell and Hope, Westminster.

JULY 21, 1868.

THE HON. SIR J. STUART, Vice Chancellor, *Appellant*, v. LIEUT. COL. A. C. M'BARNET, *Respondent*.

Salmon Fishing—Title—Possession of both sides of River—Opposite Owners—Title to Sue—*Where the opposite banks of a salmon river belong to different owners, and one has a Crown grant of fishing annexed to his lands, this means not the exclusive right of fishing, but only that half of the fishing ad medium filum aquæ available from his own side.*

SEMBLE, *A base title coupled with acts of ownership and exercise of salmon fishing is not sufficient to presume a Crown grant of the salmon fishing.—Per LORD CHANCELLOR CAIRNS.*

QUESTION, *Whether the owner of half the salmon fishings in a river, the opposite bank of which belongs to another proprietor, has a right to challenge such proprietor's claim to fish from such opposite bank.—Per LORD CHANCELLOR CAIRNS, aff.; LORD CHELMSFORD neg.*

SEMBLE, *If fishing by rod and line has been constantly practised, and it is impracticable to fish on that side of the river with net and coble, that will be sufficient to establish a right to salmon fishing under a general grant of fishing.—Per LORDS CHELMSFORD, WESTBURY, and COLONSAY.¹*

¹ See previous report 5 Macph. 753: 39 Sc. Jur. 32. S. C. L. R. 1 Sc. Ap. 387: 6 Macph. H. L. 123: 40 Sc. Jur. 633.