cause she made her will and died in ignorance of the facts. But still the question requires to be solved, and there may be principles found for solving it. I cannot agree with the pleas maintained by the defenders, that the averments of the pursuers, being substantially groundless and unfounded, the defenders are entitled to absolvitor, because we have not gone into that inquiry. Neither can I agree with the plea that the sale of the shares which is sought to be reduced was a sale for a fair and adequate price, and that therefore the pursuers are not entitled to succeed. If she had made a claim in her lifetime upon these profits, the defenders might have set up these pleas; but these pleas would not have been sufficient to exclude her. An investigation must have taken place, and if Mrs Lothian had established the facts stated on this record, I think she would have prevailed. But, on the other hand, I think that if she had discovered the fraud, it would have been in her option to have insisted upon having the funds distributed, or if she thought it more for her advantage to do so, she might have allowed the funds which had been concealed to be added to the stock of the Company. Now, as she did not know of this fraud, we cannot say how she would have exercised her option if she had known it. Therefore we are placed in a difficulty. *Non constat* that she would have insisted upon the distribution of the funds instead of taking the benefit of them in the increased value of the stock of the Company. I think that the words which she has used, in conveying the shares to her husband, are not necessarily exclusive. I think there is some doubt on the subject as to whether she meant he should take the shares with all the benefits that could be got out of them, whether they were benefits that she ought to have reaped during her lifetime, or benefits which were allowed to remain unreaped. But upon the whole, I think that no violence is done to her will by the construction which is proposed to be put upon 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 Lordships pardon me for mentioning that certain costs have been paid under the orders which have been reversed by your Lordship. 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; defenders below assoilzied with expenses.

Agents for Appellants—Gibson-Craig, Dalziel, & Brodies, W.S., and Grahames & Wardlaw, Westminster.

Agents for Respondent—Duncan, Dewar & Black, W.S.

Thursday, July 16.

FLEEMING *v.* HOWDEN.

(*Vol.* iii, 193.)

Entail—Register of Tailzies—Devolution—Bankruptcy—Trustee—Bankruptcy Act 1856. E was infeft in an estate under an unrecorded deed of entail which provided that on any heir of entail in possession succeeding to a peerage, the estate should thenceforth *ipso facto* accrue to the next heir. E succeeded to a peerage in 1860, and died in 1861, without having denuded, and leaving debts incurred partly before and partly after his succeeding to the peerage. The next heir made up a title to the estate as heir of provision. The estates of the deceased were then sequestrated, and the trustee petitioned, under 102d and 106th sections of the Bankruptcy Act, to have the estate transferred to him. Petition *refused.*

Opinions—that though E remained feudally vested in the lands till his death, yet from the time of his accession to the peerage he was so vested as a mere trustee, and the non-recording of the entail made no difference.

The question in this case was, Whether the respondent, as trustee on the sequestrated estate of the late Lord Elphinstone, was entitled, in terms of the Bankruptcy (Scotland) Act 1856, to have a decree of the Court of Session transferring over and vesting in him a certain heritable estate in which Lord Elphinstone was vest and seised at the time of his death?

The Second Division of the Court, Lord Benholme dissenting, sustained the claim of the trustee.

This appeal was then presented.

Sir Roundell Palmer, Q.C., Pattison and Lloyd, for appellant.

D.-F. Moncreiff and Pearson, Q.C., for respondent.

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 Wigtown, settled very extensive real estates in Scotland in taillie upon 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 of taillie before-mentioned should succeed to the dignity of the peerage, "in that case, and so soon as the person so 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 peerage, they shall be bound and obliged to denude themselves of all right, title or interest which may be competent to them in my said estate, and the same shall from thenceforth, *ipso facto,* accrue and devolve upon the next heir of taillie." 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 resolutive 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 lands for new infeftment, 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."

My Lords, under the provisions of that Act of Parliament, from time to time, between the date of

that Act of Parliament in the 20th of George II. and the year 1847, several sales were made under the provisions of that Act, and the monies 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, they came into the hands of a gentleman of the name of Turnbull, whose duty it was to invest them according to the provisions of that Act. At that time John Fleeming was the tenant in tail in possession. My Lords, 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 purchased from the tenant in tail.

My Lords, 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 in that event carried over the entailed lands to the next heir of taillie 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 heir of taillie 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 shown to the contrary, the Lord Ordinary is authorised to make a declaration that the estate shall vest in the trustee.

My Lords, under the provision of that section, a petition was presented by the trustee praying that the lands of Duntiblae, as forming part of the estate of the deceased Lord Elphinstone, might be transferred to and 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 it did not come within the Statute, and refused the application. From that decision, however, the trustee presented a reclaiming note to the Inner-House. A record was made up, and eventually the Inner-House came to a conclusion differing in opinion from the Lord Ordinary—their opinion being that the case was within the Statute; and they pronounced an interlocutor remitting to the Lord Ordinary on the bills to make a declaration according to the terms of the Statute, vesting the lands in the trustee under the sequestration. The Lord Ordinary (MURE) did so in obedience to the interlocutor of the Inner-House. Against this order the appellant presented a reclaiming note to the Inner-House, who of course affirmed the order; and against those interlocutors—overruling that of 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 necessary to call your Lordships' attention to what was done with reference to the settled estates of Wigtown, 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 right to the estates, *ipso facto*, ceased, and that from that moment she was entitled to the estate as her own. The question was, whether the effect of that shifting clause was *instanter* 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 conditions 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; that, *ipso facto* his title and interest as tenant in tail had ceased, and that he was bound *instanter* to denude in favour of his sister the next heir; 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 proceedings related solely and exclusively to the originally settled estates of the Earl of Wigtown, and as to those there was no question that the entail had been validly recorded.

The question for decision in the 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 terms of the 106th section of the Act, to be transferred to and vested in the respondent as the trustee in the sequestrated estate of the late

Lord Elphinstone. The Court of Session decided that it had such, and against that decision the present tenant in tail ap peals 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 taillie 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, 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 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 devolution imposed on Lord Elphinstone a personal obligation when he succeeded to the peerage to denude in favour of the next heir of taillie, 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 sequestrated 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 interlocutors can be supported. What the Court is called on to do is, to exercise 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 the estate of a person after his death, and his successor has made up a title to his heritable estate, the trustee 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 provision 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, 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 tailzie 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 infeftment as it stood before his succession 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 that 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 so 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 Wigtown 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 to 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 Wigtown, though it never was recorded. Now, concurring as I do in the propriety of the decision which all the Judges came to in the Wigtown 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 either to alienate, to burthen 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 in tail, 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 Wigtown lands. The lands of Duntiblae passed to her burthened with the debts of her predecessor. Still they passed to her, and when she made up a title to them 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 infeft 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.

My Lords, 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 authorised the sale of the entailed lands, and under which they were sold, provides expressly by section 17, "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, or applied for payment of the debts, if any such there be, of the maker of the entail, or other debts that are effectual burdens on the tailzied estate, not contracted by such vendor himself, and for that purpose the monies 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 or survivors of them, and the executors and administrators of such survivor, shall lay out the monies 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 traffic were to be treated as if they were to all intents and purposes part of the lands comprised in the original Wigtown entail, and therefore as if they were duly 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 Wigtown entail. If this argument is well founded, then the creditors of Lord Elphinstone, who became creditors before his accession, have no more right against the 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 not well founded. I have come to the conclusion, on the grounds I have already stated, that the lands of Duntiblae were not, at the death of Lord Elphinstone, lands which under an order of the Lord Ordinary would pass to the trustee under the bankruptcy by virtue of the 106th section of the Sequestration Act. This 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 the 19th July 1860, Lord Elphinstone ceased to have any 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 13th January 1861. Down to this period the lands in question might have been attached for debts 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 demise in favour of Lady 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 this 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 right 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 20th George II., cap. 50, upon the disposition and deed of tailzie made by the trustee of the estate, purchased with the monies arising out of the sale of lands included In the original tailzie of 24th June 1741, and settled, according to the provisions of the Act, to the same uses and with the same limitations and restrictions 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 enactments contained in the public Act of the 20th Geo. II. to the effect that the estates bought with the proceeds of the sale of the superiorities by such Act authorised 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 Wigtown deed 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 20th George II., cap. 50, enacted that the monies to arise from the sale of the superiorities thereby authorised 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 said 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 person 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 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 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. 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 George 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 conditions 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 refered to, (which is found in the Wigtown 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 in the lands of Duntiblae—that is, in simple language, he became bound to convey the lands of Duntiblae to the next heir of taillie. 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 taillie in existence for the time being," &c., 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 interest 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 the 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 which 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 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 be-

came 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 feudal title as trustee for the benefit of that 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 in 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 debts 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 was 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 investiture. 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 George II. I regard that as a very important question, but it is one which 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 to 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.

Agents for Appellant—Thomas Ranken, S.S.C., and Tatham & Procter, Lincolns Inn Fields, London.

Agents for Respondent—Scott, Moncrieff & Dalgety, W.S., and Connel & Hope, Westminster.

Tuesday, July 21.

STUART *v.* M'BARNET.

(*Ante*, iii, 39.)

Salmon-fishing—Title—Crown Charter—Prescription—Net and Coble—Rod and Line. State of titles on which *held* that a proprietor of lands on the bank of a river had right to salmon-fishing in the river in virtue of a charter from the Crown.

Question, as to the effect of fishing with rod and line in establishing a right of salmon-fishing.

This was question as to the right of salmon-fishing in the river Balgy, in Ross-shire, between Colonel M'Barnet, proprietor of the lands of Torridon, on the right bank of the river, and Sir John Stuart, proprietor of Balgy on the left bank.

Sir John Stuart claimed an exclusive right to the salmon fishings in the river, or otherwise a right to the fishing *ex adverso* of his own lands; and asked declarator that M'Barnet had no right to fish for salmon in the river in any way whatever.

The Court, on 23d Nov. 1866, pronounced an interlocutor finding, *inter alia*, that the pursuer had a right to the fishings from the left bank *ex adverso* of his own lands, but *quoad ultra* assoilzing the defender.

Stuart appealed.

Sir R. Palmer and Cotton, Q.C., for him.

Lord Advocate and Balfour for respondent.

At advising—

Lord Chancellor—My Lords, the question in this appeal is as to a right of salmon-fishing in a river in Ross-shire, in Scotland, called the Balgy. The appellant and the respondent are owners of lands upon opposite sides of the river. The lands of Balgy belonged to the appellant, and the lands of Torridon belonged to the respondent. An application for an interdict with reference to this fishing was made by Colonel M'Barnet to the Sheriff of the county. That interdict was advocated to the Court of Session. Thereupon an action of declarator was instituted in the Court of Session by the appellant Sir John Stuart. In that action an interlocutor was pronounced by the Lord Ordinary, which was appealed to the First Division of the Court of Session, and by that Court the interlocutor of the 23d of November 1866 was pronounced, which is now brought by way of appeal before your Lordships.