the several legatees the words "and their heirs" are always added. But that addition comes to be of no consequence when we look at the deed as a whole, for throughout all the special legacies bequeathed by the earlier purposes, whether of furniture or of plate, or even in the case of pecuniary legacies, there occurs almost without exception a destination to "his" or "her heirs." The object of these words therefore appears clearly to prevent a lapse of the legacy, and not to postpone vesting. That makes the present case clear as regards the question of vesting, and I have only to add that as a general rule I think the addition of the words "his" or "her heirs" effects no more than a legacy in favour of a party named without mention of his heirs, except of course that it creates a destination-over should the legatee happen to predecease the truster.

That being so, the legatees are entitled to assign their rights so as to make them available as a means of raising money. It is therefore difficult to see why the trustees should not be entitled to pay the residue over in terms of the trust-deed. Had the words simply been "on the expiry of the lease," there would, I think, have been no difficulty. In the absence of any reason for postponing payment. the Court would at once have authorised an immediate division of the estate. The only difficulty arises from the addition of the words on the expiry of the lease "but not sooner." If it could be shown that there was any possible interest in favour of any party, then I should hesitate to disregard these words, but I can find no such interest of any kind—there is no reason to be discovered for postponing the period of distribution. That the money invested in the mill should not be divided until the expiry of the lease is of course perfectly intelligible, and I rather think that the truster overlooked the fact that a large sum beyond what was invested in the mill might form the remaining part of the residue, and has thus appeared to direct a postponement of the period of division for which no intelligible reason can be discovered. On the whole matter I am therefore of opinion that the estate may be divided, subject of course to the qualifications which your Lordship has mentioned.

Lord Deas was absent.

This interlocutor was pronounced:—

"Find and declare that the residue of the trust-estate vested in the residuary legatees at the death of the testator: Find and declare that the first parties are not bound to retain the portion of the residue of the trust-estate other than the Strude Mills and machinery, and to accumulate the income thereof until the expiry of the tack and sub-tack of the said mills: Find and declare that the first parties are entitled to make a division of the said portion of the residue of the trust-estate among the residuary legatees according to their respective rights and interests: Find and declare that the first parties are not bound to retain the rents of the said Strude Mills and machinery, and to accumulate the said rents, until the expiry of the said tack and sub-tack: Find and declare that the first parties are entitled to divide the free rents of the foresaid mills and machinery among the residuary legatees according to their respective rights and interests; but declaring that the trustees are entitled and bound to retain so much of the trust-funds till the expiry of the said tack and sub-tack as will be necessary for carrying on the trust administration and to keep the trustees protected from all personal responsibility: And finding it unnecessary to answer the sixth question."

Counsel for the First Parties—M'Kechnie. Agent—Thomas Carmichael, S.S.C.

Counsel for the Second Parties—J. G. Smith. Agents—Duncan, Archibald, & Cunningham, W.S.

Friday, June 16.

SECOND DIVISION.

(Before Lord Justice-Clerk Moncreiff, Lords Young and Rutherfurd Clark.)

[Sheriff of Berwickshire.

HOGARTH *v.* BROOMFIELD (SMART'S TRUSTEE).

Sale—Conditional Delivery—Possession—Title—"Hire and Purchase."

A farmer engaged a mill-wright to erect on his farm a thrashing-mill and steam-engine, &c., on a verbal agreement, afterwards supplemented by letter, that the price was not to be demandable on delivery, but was to be paid by instalments (for which no definite times were fixed), along with a reasonable yearly sum for use till the price was paid, but that until the price was fully paid the mill, &c., was to remain the property of the maker. More than a year after the mill was erected, and after one payment of a small sum for the past year's use, but before any part of the price was paid, the farmer became insolvent, and granted a voluntary trust-deed for behoof of his creditors. *Held* that there was no completed contract of sale, and that the condition in the agreement suspended the passing of the property in the mill till the price was paid, and this condition not having been purified the maker was entitled to vindicate his right to the mill against the trustee.

Trust for Behoof of Creditors—Title of Trustees under Voluntary Trust-deed.

A trustee under a voluntary trust for behoof of creditors, to which the creditors have not acceded, has no right independent of his author, and in that respect differs from a trustee in bankruptcy, who has separate and independent rights *vi statuti*.

Reputed Ownership.

Where a person possesses upon a definite title short of that of property there is no room for the doctrine of reputed ownership.

William Smart was tenant of the farm of Lauderhaugh from Whitsunday 1878. In June 1879, Smart, who was then in pecuniary embarrassment, applied to the pursuer Andrew Hogarth, engineer and mill-wright in Kelso, to erect for him on his farm a thrashing-mill with a steam-engine and appurtenances. According to the pursuer's allegation at the time when the mill and steam-engine were erected, "a distinct verbal agreement was

come to between the pursuer and the said William Smart that the said thrashing-mill, steam-engine, &c., should be held by the said William Smart on what is well-known in the engineering trade as the "hire and purchase" system, and that so long as the price of the said thrashing-mill, steam-engine, &c., remained unpaid the pursuer should continue to be proprietor of said machinery, and that during that time the said William Smart should be permitted to use the same, he paying a reasonable sum annually for such use." The mill and machinery were accordingly erected by the pursuer on the farm. The thrashing-mill and steam-engine, when erected, bore each a plate with the pursuer's name engraved, and a few days after their erection labels were affixed to them with "proprietor" printed on them. In February 1880 William Smart and his father, who was a party to his son's lease, addressed a letter to the pursuer, in which this contract was confirmed, they undertaking to pay the price of the mill by instalments, which was to become theirs on payment of the final instalment, but to remain the property of the pursuer till then. In June following £7, 10s. was paid by Smart to the pursuer for the use of the mill and engine for the past year.

On the 19th of October of the same year Smart executed a trust-deed for behoof of his creditors in favour of the defender Thomas Broomfield. The present action was raised by Hogarth to interdict him from selling the thrashing-mill and engine, as he had intimated his intention of doing, Hogarth pleading that he was proprietor thereof in virtue of the above agreement. The trustee pleaded a purchaser's title in his cedent on a completed contract of sale followed by delivery.

The Sheriff-Substitute (Dickson) found that under the verbal agreement there was a sale of the mill and engine to Smart, completed by delivery in June 1879; that no change was made in the contract by the letter; and that the defender, as trustee, was in right of the property of the mill and engine, and refused interdict; adding the following note:—"The original verbal agreement is not very clear and definite, for the price was not ascertained, 'only as cheap as possible;' the time of payment was to be 'when the purchaser should be able;' and while the price remained unpaid an annual sum of unascertained amount was to be paid 'for the use, or as interest on the money,' which can only mean interest on so much of the price as remained unpaid. But one thing at least is clear, viz., that this transaction was not one of hire as averred in the condescendence. The word 'hire' is never mentioned at all, either at the verbal agreement or in the subsequent letter. It was evidently a transaction of sale and purchase. It was to be made as 'cheaply as possible;' 'it would be some time before he could pay for the mill;' and after Hogarth's failure 'it would be still longer before he would be able to pay the price.' When Smart signed a bill for pursuer he was to pay what part of it he could, and he expected pursuer to put such payment 'towards payment of the price of the mill.'

"There is nothing here about 'hire and purchase,' and it appears from the proof that that system of hire and purchase is by no means well known in the trade, and the pursuer had never acted upon it elsewhere. It was nothing more or less than a sale followed by delivery, and the only question is whether the condition of reserving right of property was legal and effectual notwithstanding delivery. For under the letter the transaction still remained a sale; the price was to be paid by instalments. The letter is an undertaking to pay the price by instalments of undefined amount, and at undefined intervals. The words are, 'We hereby undertake to pay the price.' The letter was evidently intended as an additional security to the pursuer. But the Sheriff-Substitute holds that he was not entitled in such a manner to retain a security over the mill which he had sold and delivered. The circumstances in this case are much stronger against the right to retain a security than in the recent case of *Cropper* v. *Donaldson*, 7 R. 1108, in which the attempt was made to retain such security. In that case there was express hiring of a machine for nine months, 'with a payment for use by way of rent every three months, and at the end of the nine months, if the payments for use had all been made, the machine was to become the property of the hirer without payment for it. There was also a provision that if default was made by the hirer in any of the three payments the owner should be at liberty to retake possession of the machine.' Notwithstanding this written agreement for hire, in which the party who furnished and delivered the machine is called 'the owner' throughout, and the party to whom it was delivered is called 'the hirer,' it was held that the transaction was truly a sale, and that the agreement was an ineffectual attempt to retain security over the machine till the price was paid, and it was ineffectual against a poinding creditor. Lord Young dissented from that judgment, but upon the ground that the contract was clearly and expressly a contract of hire, and not a contract of sale, implying thereby that if it had been a contract of sale (as the Sheriff-Substitute holds to exist unquestionably in the present case), he would not have dissented. There is not even the disguise of hiring in the present case. In consequence of the views now expressed it becomes unnecessary to enter into the question as to the validity of the letter, No 7 of process, as against creditors, and whether that letter was obtained in consequence of the known or suspected insolvency of the pursuer."

The pursuer appealed to the Sheriff, who found —"that looking at the condition of the original agreement, the possession of the thrashing-machine and steam-engine by Smart, through their having been erected upon his farm, did not pass the property thereof to him, and that the price not having been paid in whole or in part, the same remained the property of the pursuer; that the defender, as a voluntary trust assignee of Smart, had no larger or better right to the thrashing-machine and steam-engine than Smart himself had; and that as the defender had not paid and did not offer to make payment of the price, he was not entitled to the thrashing-mill and engine, or to sell the same." And by a subsequent interlocutor found the pursuer entitled to uplift the price of the thrashing-mill and engine, which had been sold during the dependence of the action by joint agreement,

He added the following note to his prior finding:—"There can be no doubt that the agreement, both as set forth in the record and as proved by the evidence of both parties, consti-

tuted substantially a contract of sale, not a contract of hire. The agreement was, that the pursuer should construct and erect upon the farm of William Smart a steam-engine and thrashing-machine as cheaply as the pursuer could, to be paid for by Smart. This, though in some respects an executory contract, was substantially a contract of sale. But then, according to the evidence of both pursuer and Smart, it was a conditional contract. From the first, and before the pursuer proceeded to act under it, it was stipulated by the pursuer and agreed by Smart, that the mill—that is, the steam-engine and thrashing-machine—should remain the property of the pursuer until it was paid for. This was a condition of the pursuer putting up the mill. Smart says that the pursuer 'consented to erect a mill on condition that I would pay it when I was in a condition to do so.' He (the pursuer) 'said it would be on the footing that it would remain his until it was paid. That was distinctly agreed between us before the work was begun.'

"This was a perfectly lawful and reasonable condition, and was undoubtedly binding and effectual between the pursuer and Smart. Stair, i., 14, 34, says—'As to the pactions adjected to sale, sometimes they are so conceived and mean that thereby the bargain is truly conditional and prudent, and so is not a perfect bargain till the conditions be existent: Neither doth the property of the thing sold pass thereby, though possession follow, till it be performed as if the bargain be condititional only upon payment of the price at such a time—till payment the property passeth not to the buyer.' Erskine, iii., 3, 311, is to the same effect. He says—'If a sale be entered into under condition that the price shall be paid over before a day prefixed, such condition before it be purified is, as Stair justly observes, truely suspensive of the sale, which is not understood to be perfected till the condition exists, insomuch that though the subject should be delivered to the buyer the property continues in the seller till the price be paid.' This has been followed in various cases, beginning with the case of *Young*, 9th March 1799, M. 14,191; *M'Cartney*, 26th November 1797, M. Appendix *voce* Sale, No. 1, which was a question with creditors. See also *Cowan*, 21st May 1824, 3 S. (1st ed.) 42; *Wight*, 10th December 1828, 7 S. 175, both of which cases were also with creditors.

"The case referred to by the Sheriff-Substitute in his note is not similar to the present. Nor does it conflict with the above doctrine and decisions. The question there was whether the contract was one of hire or of sale. The Court held that under the disguise of a contract of hire what was there agreed upon was truly a contract of sale attempted to be concealed under a pretence of hiring. The several instalments stipulated to be paid as hire were truly nothing more than the admitted price divided into three portions. The decision went upon the ground that there was nothing but a mere contract of sale, at a price to be paid by three equal instalments, and that as the buyer had paid one-third of the price and granted his bill for the balance, the property paid passed to him by the delivery. There is also this distinction between that case and the present, that this question is not with creditors doing diligence, which that was, but with a mere voluntary trust-disponee, without, so far as appears, any concurrence of creditors to that trust.

"The Sheriff does not take any notice of letter dated 27th February 1880. He thinks it necessary to look only at the terms of the original agreement, in pursuance of which the mill and machinery were erected. But that letter does not specify any particular price or term for payments of the instalments thereby undertaken to be paid, and it affirms the original condition, that until all the price shall have been paid the mill and machinery shall continue the property of the pursuer. It could not and was not intended to innovate on the original conditions of the agreement, but only to add an additional obligant for payment of the price. Nothing followed upon it, and it seems to be immaterial to the issue.

"There is no question here of preference or of challenge under any of the bankrupt laws. It is simply with the voluntary trustee, who stands in regard to the right to the mill and machinery in the same position as his author.

"Neither is there room for any plea of 'reputed ownership.' That is competent only to creditors doing diligence, and is not pleadable by a voluntary and gratuitous disponee. Besides, there is no ground for the presumption of ownership in the tenant in the case of a thrashing-machine and steam-engine on a farm which are as commonly the property of the landlord as of the tenant.

"As the parties by minute agree that the mill and machinery should be sold and the price consigned in Court to await the decision, the Sheriff cannot pronounce interlocutor disposing of the case under the prayer of the petition until it has been ascertained whether the terms of the minute have been carried into effect."

The defender appealed to the Court of Session, and argued—The contract from the beginning was an out-and-out sale. The condition in the agreement was ineffectual to prevent the right of property passing by force of law, which will not allow such a suspensive condition as is here alleged to be adjected to the contract. The right of action in a trustee under a trust-deed for behoof of creditors was the same as that of a trustee in sequestration, and not merely that of an ordinary assignee.

The pursuer replied—Assuming there was a contract here, it was under a suspensive condition, the effect of which was to prevent the passing of the property if the seller should insist on the right which the condition gave him. A trustee under a voluntary trust-deed has no higher right than his author, and is in a different position from a trustee in sequestration, who is vested with all the diligence rights of the creditors.

Additional authorities—Bell's Comm. i. 257; ii. 382; More's Notes to Stair, p. lxxxviii.; *Globe Insurance Company* v. *Scott's Trustees*, February 16, 1849, 11 D. 618; *Marston* v. *Kerr's Trustee*, May 13, 1879, 6 R. 898; *ex parte Crawcour*, June 27, 1878, 9 Chan. Div. 419; *Howes* v. *Ball*, November 21, 1827, 7 Barn. and Cress. 481; Hunter's Roman Law, p. 411; Bell on Sale, p. 110.

At advising—

Lord Justice-Clerk—This case relates to a transaction belonging to a category which is often

under the consideration of the Court. I am of opinion that the Sheriff's judgment is right, and that the pursuer of the action is entitled to decree. The position of matters as stated on record, and brought out in evidence, comes to this—Smart occupied the farm of Lauderhaugh from Whitsunday 1878, and in June 1879 he ordered the pursuer Hogarth to erect a thrashing-mill and steam-engine on the farm at a cost of £150. The pursuer says that at that time "a verbal agreement was come to between the pursuer and the said William Smart that the said thrashing-mill, steam-engine, &c., should be held by the said William Smart on what is well known in the engineering trade as the 'hire and purchase' system, and that so long as the price of the said thrashing-mill, steam-engine, &c., remained unpaid the pursuer should continue to be proprietor of said machinery, and that during that time the said William Smart should be permitted to use the same, he paying a reasonable sum annually for such use." That is the pursuer's obligation. It is not admitted, but in a somewhat qualified form is substantially borne out by the evidence of both parties. By Smart's own statement, he was pinched for money at the time, and it would be some time before he could pay for the mill. Hogarth says—"I suggested that in his circumstances the mill should remain my property until it was paid for, and he agreed to that, and it was a condition of my putting up the mill." Sometime after the mill was erected Smart executed a trust-deed for behoof of his creditors in favour of the defender. What the terms of this deed are we do not know, for it is not produced. This is all the material we have for deciding the question raised in this case, and it appears to come to this, that the pursuer got an order from Smart to erect a mill on his farm, but under the express condition that his doing so was not to infer that the property of it should pass to Smart, but that the property was to remain with him till the price was paid. There is no condition of payment by instalments, and no stipulation of any period within which payment was to be made. A reasonable payment was to be made for the use of the mill, but if the price was not paid the engine was to return to the man who made it. In order to indicate or vindicate his right to the mill and engine, Hogarth affixed a card on each with the word "proprietor." In these circumstances Smart became insolvent.

Now, the question is, What is the effect of this condition. It is said on the part of the trustee that this is nothing but a contract of sale on which delivery followed, and that there is no obligation on his part to return the article, but only to rank the seller for the price. On the other side, it is said that beyond all question there was a stipulation that the property was not to be held to pass till the price was paid, and that the price not having been paid, the possessor was under a personal obligation to return the mill, and, in the third place, that the trustee is bound, if there was such a personal obligation, to fulfil it. On this last point I am disposed to be of opinion in the circumstances, and without regard to the question of the passing of the property in the mill, that the trustee is in no higher position than the person from whom he takes. I do not say that, where creditors have acceded, a voluntary trustee may not have some rights which he can vindicate against the person from whom he derives his right; and acceding creditors acquire rights against each other which they would not have if there was no accession in the case. But as a general rule the trustee in a private trust derives his right entirely from the truster, and has no right or title independently of him. He is in quite a different position from the trustee in a sequestration. He has a statutory title apart from the bankrupt. He acquires not only all the rights which the bankrupt had, but also rights antagonistic to the bankrupt, and that puts him in a totally different category. I am therefore of opinion that if the property came into the hands of the insolvent on a personal obligation in certain events to return it, this trustee cannot take the property except on that condition.

But, in the second place, I am of opinion that there are no grounds on which the claim of the pursuer can be resisted, or rather that the provision contained in the contract admits of fulfilment being enforced. Two aspects of the case have been presented to us by the appellant. One is, that Smart having been put in possession of this mill on a contract which, if not one of sale *de præsenti*, was at least the analogous one of sale *de futuro*, must be held to be the reputed owner, and that the pursuer cannot now vindicate his right to the article against the creditors of the person whom he has placed in the position of reputed owner. The other is that there was a completed contract of sale, and strong arguments may be urged in favour of either proposition. Now, with regard to the first, I do not think there is any question of reputed ownership in the case. When a person possesses upon a subordinate but definite title short of that of property, there is no room for the doctrine of reputed ownership. That was so in *Cropper* v. *Donaldson* and the other cases cited, and also in the well-known case of *Orr* v. *Tuilis*. It is quite clear that if the possessor has a subordinate and legal title to the possession, and not a full title of property, it is impossible to apply the doctrine. It is not proper to say here that there is not a sufficient title of possession, and quite as good a title for that end as one which should carry the property. The title of possession is a title of hiring which may come to be one of sale, and no one has right to attribute possession to a title which would carry the proprietorship, because there is a subordinate title to which it may be ascribed. The seller was willing to give his friend the hirer the use and benefit before any part of the price was paid; but then he says—"Although I do this, you are not to understand that by having my mill to work in your farm the property of it is to pass to you, and I expressly stipulate that it shall not." It remains my property, and you are bound to return it or pay the price.

In this view of the case two questions arise—First, whether there was a legal contract? and secondly, whether that contract prevents the transaction becoming sale until payment of the price? In regard to the first of these questions, there is a condition in this contract attaching to delivery and not to the sale, and I am not prepared to say that that is not a legal stipulation. I think the seller is entitled to say, "I give use, but not a title;" and the result is that there was no completed contract of sale; that the contract

of sale here was only an inchoate one, which could never be complete till the condition was purified, and the condition never having been purified, there was no contract of sale at all. Hogarth never ceased to be proprietor, and as Smart became insolvent the contract never grew into one of sale, and in consequence the former is entitled to reclaim his property.

Lord Young—I am of the same opinion, and generally on the same grounds as your Lordship. I suppose the question here really refers to the £135 for which the mill was sold, and the question is, whether that sum should be paid to Mr Hogarth or go to the trustee for division among the creditors. That question depends in one sense upon whether or not the machine was the property of Smart. In 1879 it was erected on his farm for his use, but it is not on that account necessarily his. That depends on the contract in all cases where there is a contract. He never had any right except what the contract gave him. The contract here was that Hogarth, the respondent here, should erect a thrashing-mill and machinery on Smart's farm as cheaply as he could, but that it should remain his (Hogarth's) property till paid for, and that was the condition of his putting it up. According to Smart's own evidence—"He said it would be on the footing that it would remain his till it was paid. That was distinctly agreed between us before the work was begun. There was something said about my paying something for the use of the engine and mill. I said it was quite reasonable that I should pay something for the use of the mill, or interest on the money." I see nothing unreasonable or illegal in this arrangement. I am not very careful to inquire whether there was a contract of sale here or not. I think, if the facts are correctly represented, that there has been no contract of sale, which is a contract for the transference of property—for the contract here was that property should not pass. It might be an agreement for a future sale; it certainly was not for a present sale. Then, on the face of the contract, this mill, although erected on Smart's farm, and though he was allowed the use of it, was not his property, for it was contracted that it should become so only on his paying for it. If I make a contract which is not to pass the property of the thing transferred, then I decline to call it sale. The rights of parties cannot depend merely on the words used. To be sure, the word "price" is used. Though that is a term most commonly used in connection with the contract of sale, it is equally applicable to a variety of other contracts as well in which a value for services or for any advantage or privilege or any other like benefit is given—in short, anything which is capable of being estimated by a *pretium*. I cannot say it affects my view in the matter that the word "sale" was used, if the substance of the contract was that no right of property should pass. The pursuer says—"You, without becoming proprietor, are to have the use of this mill, but not the property till you pay the price." Taking it so, this is a legitimate transaction which shows a perfectly honest bargain with no intention of deceiving anybody. It is a perfectly legitimate contract as between the parties, and, *prima facie*, every contract is only effectual between the parties. Suppose here that no trust had intervened, and that two years afterwards, without any payment, the pursuer had come into Court with this statement against Smart himself instead of his trustee—"The defender has refused to make payment to the pursuer of the price of said thrashing-mill, steam-engine, &c., or to allow him to take possession of the same"—Is it in the least doubtful that we should have interfered, and that we should have interdicted the tenant, who declined to pay, from selling the machine,—that we should have done right between the parties according to the terms of the valid contract which they had made, ordaining the party who refused to fulfil his part of the contract—to do justice by restoring the article or paying the price? Is the position changed by the execution of a trust? I think not. There is nothing in the way of bankrupt law on the subject to interfere and alter the rights of the parties. The law of the case and the rights of the parties are as I have stated, and these are not altered by one or other or both executing a trust-deed. There are many rules both of the common law and statute law for the protection of creditors against fraud. But there is no case of that kind made out here. The case is really decided when we determine that there was a valid contract between the parties, and when we determine what are their rights under that contract. That is really the whole case. When you determine against the principal contention of the defender, that here the law should not permit the parties to make the contract as they did, and should set it aside, and declare everything on the farm to be the property of the tenant—when that contention is set aside—the question is solved. I have come to the same conclusion as your Lordship substantially, and almost exactly on the same grounds.

Lord Rutherfurd-Clark—I concur in thinking that the judgment should be affirmed. I agree that there is nothing contrary to law in the transaction which is alleged here, by which the machinery in question was erected on Smart's farm, and by which he got the use of it for a yearly payment, and was to acquire the property on paying the price. I see nothing contrary to law in such a contract, and it prevents the property passing in meantime until the price is paid. Property cannot pass by mere possession contrary to the wish of both giver and receiver. And as Smart never became the owner he could not transfer the property to his trustee. A trustee for creditors has really no higher right than his author. I do not seek to consider whether any other or further remedies might not be open to creditors who had used diligence, or to a trustee in a sequestration. They are both in a different position from a merely voluntary trustee. Nor do I say anything as to the obligation of such a trustee to fulfil the personal obligations of the truster. I think there is a good deal to be said on both sides of these questions. But I rest my judgment on this ground, that by virtue of the contract between the parties the property in the machinery in question remained with Hogarth, and was never transferred to Smart.

The Lords dismissed the appeal.

Counsel for Pursuer (Respondent)—Trayner—Hall. Agents—W. & J. Burness, W.S.

Counsel for Defender (Reclaimer)—Guthrie Smith—Strachan. Agents—Mack & Grant, S.S.C.