Appellants' Authorities.—3 Stair, 1, 13, Stat: 1617, c. 12; 2 Stair, 12, 15; 3 Ersk. 7, 8; 2 Bank. 12, 16; Younger, Nov. 28, 1665 (10,925); Murray, March 18, 1807 (10,721); Stewart, July 6, 1711 (10,722); Clerk, Jan. 27, 1746 (10,662); Paul, Feb. 8, 1814 (F. C.); M'Donell, Feb. 26, 1828 (6 Shaw and Dun. 600.)

Respondent's Authorities.—Sinclair, July 4, 1781 (6,725); 2 Sandford on Heritable Suc. 127.

Feb. 18, 1831.

RICHARDSON and CONNELL—J. DUTHIE,—Solicitors.

STEIN'S ASSIGNEES, Appellants.—*Knight—Sandford.*

No. 6.

BROWN and GIBSON-CRAIG, Respondents.—*Lord Advocate (Jeffrey)—Solicitor General—(Kaye).*

Foreign—Homologation.—Held (reversing the judgment of the Court of Session), that English assignees under a commission of bankrupt have no power to homologate a trust-deed executed by the bankrupts in relation to their effects in Scotland, which, it was alleged, fell under the commission.

Feb. 23, 1831.

1ST DIVISION.
Ld. Corehouse.

JOHN STEIN, Thomas Smith, Robert Stein, James Stein, and Robert Smith, were partners of a banking company in Fenchurch-street, London, under the firm of Stein, Smith, and Company; and in Edinburgh under that of Scott, Smith, Stein, and Company. These firms were one and the same company, being composed of the same partners.

John Stein, Robert Stein, and James Stein at the same time carried on business in Scotland in partnership, as distillers at Canonmills, under the firm of John Stein, and at Kilbagie under that of Robert Stein and Company. On the 22d of July 1812 the London banking-house stopped payment, and four separate commissions of bankrupt were, on the 23d, issued against Thomas and Robert Smith and Robert and James Stein, who were then in London, but not against John Stein, who was then in Scotland. The Edinburgh house also stopped payment on the 25th.

In consequence of the stoppage of the banking establishment the affairs of the distillery concern became embarrassed; and, on the 3d of August, a meeting of the distillery creditors was held at Edinburgh, when, it appearing that there were sufficient funds to pay them, it was resolved that a trust-deed should be executed in favour of Brown and Gibson-Craig, which accordingly was done on the 6th by John Stein, as the acting partner

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of the distillery concern. On the following day he went to London, and on the 11th the separate commissions of bankrupt were superseded, and a joint commission was taken out against all the partners, including John Stein. The provisional assignee, along with the partners under their several firms, both as bankers and distillers, granted on the 22d a power of attorney to Gibson-Craig to take possession of the whole estates and effects in Scotland; and Cuthbert, Smith, and Duval, on their appointment as assignees, executed, on the 1st of September, a similar power in his favour. In neither of these deeds was any notice taken of the trust. On the 16th the partners, as bankers, executed in favour of the assignees a disposition and assignation of the effects in England and Scotland; and at the same time the partners in the distillery concern executed a similar deed, but in which it was declared that the execution of it should be without prejudice to the trust-disposition, of which the validity was to be determined at law.

In the meanwhile a meeting of the creditors in England had been called, "in order to assent to or dissent from the said "assignees commencing, prosecuting, or defending any suit or "suits at law or in equity, or any other proceedings in England "or Scotland, for the recovery or defence of any part of the said "bankrupts' estate and effects, or either of them, or the com-"pounding, submitting to arbitration, or otherwise agreeing "any matter, cause, or thing relating thereto; also to the assig-"nees paying the salaries or wages of the clerks or servants "of the said bankrupts, or either of them, in full; and other "special affairs." A meeting was accordingly held on the 9th of September, when it was resolved to "authorize and "empower the assignees of the said bankrupts' estate and effects "to commence, prosecute, or defend any suit or suits at law or "in equity, or any other proceedings, in England or Scotland, "for the recovery or defence of any part of the said bankrupts' "estate and effects, or either of them, or to compound, submit to "arbitration, or otherwise agree to any matter, cause, or thing "relating thereto."

At this time there was a large quantity of spirits in the warehouses of the distillery in Scotland, prepared for the English market; and it appeared that, on the supposition that the banking and distillery concerns were separate, there would be sufficient funds to pay the distillery creditors, and leave a reversion, which

would go to the liquidation of the debts due to the creditors of the banking establishment. The trustees proposed to send the spirits to London, and the assignees stated that they would dispose of them; but that, as they conceived the two establishments were identified, they would hold the proceeds for behoof of the party having right to them. The trustees declined to ship on this footing, and Gibson-Craig proceeded to London to have the question settled. While there, an agreement was entered into, on the 24th September, between him (on behalf of himself and Brown as trustees) and the assignees, that the spirits should be shipped to the assignees for sale, without prejudice to their respective rights. He then left London; and on the 26th the assignees addressed to him and Brown this letter:— Feb. 23, 1831.

"Being satisfied that the distillery concerns at Canonmills and "at Kilbagie were carried on by Messrs. John, Robert, and "James Stein, distinct from the concern in Fenchurch-street "under the firm of Stein, Smith, and Company, and that the "creditors of the distillery companies have a preference on the "effects belonging thereto, we hereby authorize you to pay the "distillery creditors the amount of their debts, taking care, in "the first instance, to ascertain the exact amount of such debts. "We beg leave to add, that the assignees of Messrs. Kensington "and Company also approve of your making such payments."

The spirits were shipped to and disposed of by the assignees; and, on a representation from Gibson-Craig that some of the debtors to the distillery hesitated to pay, in respect that their debts were vested in the assignees, they, to obviate this objection, granted to him a power of attorney to receive payment of and discharge the debts. On the faith of the above arrangement the trustees proceeded to execute the trust, and to pay a dividend to the distillery creditors. The assignees insisted that Gibson-Craig was acting merely as their attorney, and ought not to have paid the dividend; and they recalled the power. An arrangement was afterwards entered into between the assignees and the distillery creditors, by which the latter renounced their claims on the distillery effects, on being paid 15*s.* per pound; and new trustees having been appointed, they brought an action of reduction of the trust-deed on various grounds, and concluded that the trustees should be ordained to count and reckon for their intromissions. On the other hand, the trustees raised an action of multiplepoinding and

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exoneration; and these processes having been conjoined, the Lord Ordinary directed the opinion of English counsel to be taken with reference to a plea of homologation maintained by the trustees, — "Whether, on the supposition that the letter "from Messrs. Cuthbert, Smith, and Duval to the defenders "(trustees), dated 26th September 1812, is held to import an "authority to the defenders to settle with the distillery creditors "in the capacity of trustees, and of consequence to be a ho- "mologation of the trust-deed to that effect, such authority is "by the law of England binding on the creditors of Scott, "Smith, Stein, and Company, and on the present assignees, "the pursuers of this action, reference being had to all the "circumstances of the case, and in particular to the minutes of "the meeting of creditors held upon the 9th of that month?"

The record, together with cases for the parties, having then been laid before Mr. Rose, he delivered this opinion:

"On the supposition that the letter from Messrs. Cuthbert, "Smith, and Duval to the defenders, dated the 26th September "1812, is held to import an authority to the defenders to settle "with the distillery creditors in the capacity of trustees, and of "consequence to be a homologation of the trust-deed to that "effect, I am of opinion that such authority is by the law of "England binding on the creditors of Scott, Smith, Stein, and "Company, and on the present assignees, the pursuers in the "action, reference being had to all the circumstances of the case, "and in particular to the minutes of the meeting of creditors "held upon the 9th of that month.

"With regard to the obligation of this transaction upon the "assignees in such their character as assignees, and individually "as creditors, there could not be a question either in law or in "equity.

"With regard to the creditors generally, the question involves "a conclusion rather of fact than of law.

"Assignees under a commission of bankrupt have the com- "plete legal authority and title, charged with a trust or duty to "use them beneficially for the purposes of the commission. They "are primâ facie fully competent to bind the creditors at their "(the assignees) own discretion, and without any previous or "express sanction, either of commissioners or of creditors, except "in those particular instances in which such sanction is required "by statute 6th Geo. IV. c. 16, § 88, viz. compounding with a

" debtor, giving time, taking security, submitting to arbitration, Feb. 23, 1831.
" and commencing suits in equity; any other act relating to the
" property vested in or claimed by them, which an absolute
" owner or claimant may do, they may do effectually and con-
" clusively, provided it be for the benefit, or rather not to the
" detriment, of the creditors. Themselves at all events they bind;
" and if no creditor or creditors come forward to complain, the
" act done is good to all intents and purposes both in law and in
" equity.

" If the question were agitated in this country, it would stand
" thus:—Creditors, one or more of them, would complain, either
" in a court of equity, or to the equitable jurisdiction of the
" Chancellor in bankruptcy, that the assignees had abused their
" legal dominion, to the prejudice of the interests of such creditor
" or creditors. The primâ facie legal validity of the transaction
" would be recognized; the question would be, Is it detrimental
" or not to those on whose behalf the assignees have thus been
" acting? Upon this question, as upon a matter of fact, the
" Court would direct a reference either to the Commissioners or
" to a Master in Chancery; and, upon their returning yea or
" nay to such inquiry, would make its final adjudication. If this
" question were referred to me, or if in this case I am to be
" taken as exercising a similar function, I should, under all the
" circumstances of the case, without hesitation affirm, that the
" assignees and creditors were bound; holding, 1. The assignees
" to be legally competent to homologate the trust-deed; and,
" 2. That there was not in the mode of exercising, or in the
" circumstances attending such exercise, any incident upon
" which the creditors were entitled to disaffirm it."

On resuming consideration of the case, the Lord Ordinary pronounced this interlocutor:—" Finds it proved, that, by the
" law of England, the pursuers, as assignees of Stein, Smith, and
" Company, acting for themselves and the creditors of the
" company, had power to homologate the trust-deed executed
" by John Stein in favour of the defenders for behoof of the
" creditors of the distillery companies: Finds it proved, by the
" documents produced and facts admitted in process, that the
" pursuers did homologate that trust-deed to the effect of autho-
" rizing the defenders to realize and distribute the funds of the
" distillery companies, and for that purpose to ascertain the
" claims against the companies, and to settle with the creditors;

Feb. 23, 1831. "that the defenders are bound to account to the pursuers for "their actings and intromissions only in the character and with "the privilege of trustees under the said trust-deed; and there- "fore assoilzies the defenders from the reductive conclusions of "the libel, and decerns; and in the multiplepoinding appoints "parties to debate; reserving consideration as to expenses until "parties be heard in the multiplepoinding."

Against this judgment the pursuers reclaimed; but the Court, on 2d June 1829, unanimously adhered.*

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* 7 Shaw and Dunlop, No. 352.

The following notes of the opinions of the Judges were laid before the House of Lords:

LORD BALGRAY.—I have no difficulty whatever in this case. There is a great deal of law argued in these papers, and exceedingly well argued too; but it was quite unnecessary, for these points of law have nothing to do with the case.

I have directed myself to the facts of the case, and these are quite sufficient to settle this question. It is just as clear as sunshine that the banking concern and the distillery concerns were separate and distinct concerns, and that they were so ab initio. This is an important fact.

Another fact which strikes me forcibly is, that it is admitted that the distillery concern never was bankrupt, and never was declared bankrupt. There is therefore no question of law here. But let the law be as it may, I do most humbly think that John Stein acted the best and wisest part in granting the trust-deed to Mr. Gibson and Mr. Brown, for the purpose of winding up the concern. This was not only the best plan for the distillery concern, but the wisest for the bankrupt concern, in order that any interest which that concern had in the affairs might be managed at the least possible expense.

Now, that being the case, I need not go into all the after proceedings. In regard to the meeting of the creditors of 9th September, I think that meeting was called for the express purpose of deciding what was to be done with the distillery concern; and I cannot lay out of view the letter of the 26th September, which is quite conclusive in my mind. The assignees there admit that the two concerns were distinct; and there is another letter afterwards from Mr. Gibson, in which he ably and fully explains the whole matter as it stood. Parties were then put completely in the knowledge of their rights; and in such knowledge they did expressly homologate the trust-deed. After Mr. Gibson had thus explained the rights of parties, and of which they could not then be ignorant, the assignees grant a power of attorney to him. This shows that they well knew the situation in which they stood, and were thus supplying any defects in his rights, or removing any difficulty as to his powers (if such had existed), for settling and winding up the separate estate.

I therefore approve highly of the conduct of the trustees; and there is a letter of the 11th of June, which I cannot overlook, and in which the whole matter was explained. Neither can I lay out of view what is stated in the 14th page of the paper for the trustees, that they are, and have been all along, perfectly willing to do any thing not inferring a challenge of their actings under the trust-deed; but they maintain, and I think they maintain rightly and honestly, that the trust-deed shall be held valid in law. A different mode would be most unjust towards them.

Stein's assignees appealed. Feb. 23, 1831.

Appellants.—The original assignees had no power to homologate the trust-deed; that deed was plainly invalid, and there is no authority, and no foundation in principle, for holding that the assignees had power to cure that invalidity by homologation. Assignees cannot compromise or relinquish any right or claim belonging to the bankrupt estate, or give any preference to a claimant over the funds, without directions to that effect of a general meeting of the creditors specially called for the purpose; but no such authority was given at the meeting alluded to, and which, besides, was a mere pro formâ meeting, always held at a certain stage of the proceedings under a commission. The respondents do not pretend that there was an authority given, at a meeting called on notice for that purpose, to consider this particular point; and, unless they say so, they make no advance in their case. What the assignees might have done, if authorized, is a different inquiry; but, on the point of law, it is clear that they had not the power to homologate. The authority of ex parte Whitchurch, 1 Atkyns, 91, is conclusive.

Respondents.—The deed was valid; at all events the assignees have homologated the deed, and cannot now challenge it. They had, in virtue of their office, power to homologate. They are vested with a legal authority to bind the creditors, charged with a trust, to use it beneficially for the purposes of the commission. Besides, here the creditors gave full power to the assignees "to compound, submit to arbitration, or otherwise agree to any matter, cause, or thing relating" to the bankrupt's estate and effects. This being a point of foreign law, the opinion of counsel was taken, and the fact proved that the assignees

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Upon the whole, then, I approve of the conduct of the trustees; and I think the interlocutor of the Lord Ordinary in every respect well founded.

Lord President.—Are any of your Lordships of a different opinion?

Lord Craigie.—I concur entirely with the opinion delivered. It appears to me that the only object of this action is, that the trustees shall be treated in a different way from the assignees. This will never do.

Lord Gillies.—I am of the same opinion. I concur entirely in the interlocutor of the Lord Ordinary, which I think puts the matter on a right footing.

Lord President.—I also concur. Perhaps, if the English Counsel had said that the assignees had no power to homologate the trust-deed, that might have given a different complexion to the business; but they admit that they have such a power, and I fully concur with your Lordships that they exercised this power.

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could homologate. The Court of Session, therefore, could not do otherwise than give effect to that opinion by assoilzieing the respondents; and as this House acts as a Scottish tribunal, it must be regulated in its decision by the same evidence.

LORD CHANCELLOR.—My Lords, in advising your Lordships in this case, I feel relieved from all doubt in my own mind upon some of the complicated questions and arguments that have been raised. I do not rest the judgment which I am now about to advise your Lordships to pronounce, upon them; they are not decisive of the present question, and I put them out of view. I come at once to what is evidently the foundation of this proceeding in the Court below, and which struck me as being the ground whereupon, I think, alone their Lordships rested or could rest in pronouncing this interlocutor, whether I look at the Lord Ordinary's first interlocutor, or to the judgment of the Court before which it was brought by review, or to the reasons given by the learned persons who unanimously pronounced the judgment. I find the Lord President expressly admits—and it is the only reference to the point—that if the law of England touching the power of assignees were other, or should turn out to be other, than it had been represented to him to be, it might alter the complexion of the case. My Lord Corehouse, plainly and explicitly, and in terms, rests it upon the law of England. This House is both a Court of Scotch law and of English law, and can import into its decision of a Scotch question its knowledge—which it must judicially act upon—quasi a Court of Appeal of the English law. No doubt, if it is a question entirely of Scotch law, the House, though ever so knowing in English law, ought not to suffer the English law, or its principles, to modify the Scotch law; and the judge, sitting here as a Scotch lawyer upon a Scotch appeal, does an inaccurate, illogical, and illegal act, if he permits his English law feelings or principles to sway him at all in deciding a Scotch question: For instance, if a judge, deciding upon the Scotch law of entail, which proceeds upon principles entirely different from the English law, was to allow, as has been done, his knowledge of the English law and its principles to come across his mind, and influence his judgment, in pronouncing a decision upon the Scotch law of entail, he would do an inaccurate, an illogical, and, I think, an illegal act. But the question is different here, where the English law is the question—where the question raised in Scotland was, What says the English law? There it was a question of fact; there it was to be ascertained, as a question of fact must always be ascertained, by evidence; and that evidence coming from English statutes to the Scotch Court, and with the lights that they

had, and the only lights that they could have, they would have done an inaccurate, illogical, and illegal act, if they had allowed their minds to be prejudiced by any other representations than by the evidence of that law. But how stands the matter when we come into the Court of Appeal, where the judges are English lawyers as well as Scotch lawyers? Is it not a refinement and subtlety to hold, that they must draw a line in their minds and say, "Though true it is, we all know what the English law is—we are "here not as English lawyers, but as Scotch lawyers—we must para- "lyze one-half of our mind, and throw it into a state of utter dark- "ness; we must only look to the light shed as to the English law in "the mind of a Scotch lawyer." But here the mind is the same—it knows the English law. The judge cannot dismiss from his mind what he knows the English law to be, and of which he is bound to take notice, not to shed a deceitful and misleading light upon Scotch law, which is different; but where the only question is, What is the English law? he cannot shut out that judicial knowledge. That may be a consequence of having a question coming from a Scotch law Court, by appeal, to a Court not composed of Scotch lawyers, but of English and Scotch lawyers. The Consistorial law to the Common-law Courts is a foreign law. The Ecclesiastical Courts act under that law. It is their code, as the statute and common law is ours; and we import the civil law, as a matter of fact, into our Common-law Courts. The practice, well known formerly, and often resorted to by the common-law judges, was, to write to the bishop or his officer, the consistorial judge, to certify what, upon a certain point, the ecclesiastical law provides; and they are bound by that: such is held to be the rule of the Courts. Then we will suppose there could come before the Court of Delegates an appeal, to make it like this case, where there has been manifestly something wrong decided somewhere: would not the Court of Appeal, consisting of common-law judges, with civil-law judges; would not the Dean of the Arches, for example, if sitting there, feel himself called upon to state to his brethren of the common-law Courts, "All this is wrong?" Would he not at once reject the subtlety interposed between them and a right decision? Would he ever think of saying, "Though true it is we are "the consistorial judges in this Court as well as the common-law "judges—though true it is our minds are illuminated by all our "knowledge as civil and as common lawyers—and though our chief "office is to see that justice should be done, and prevent subtleties "and technicalities from leading to gross and manifest error; yet I, "who am both a civil lawyer and a common lawyer, will not listen "to what I know, as a judge of the civil law, to be a manifest error, "which has been certified to the Court of King's Bench?" He

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would say, on the contrary, "No man can blame the Court of "King's Bench, which had not the light I have, for being led by "the light they had; but I am bound to set them right." Then, that point being disposed of, there only remains to consider whether that deed is invalid, upon the ground that it purports to bind the partners in their partnership concerns, whereas this was not any partnership business; and also as being reducible upon the old Scotch Act. The Lord Ordinary presumes it was invalid, or it would not require homologation; and in fact he puts it upon the homologation. Therefore, admitting it to be invalid by itself, which I think it is, has it been homologated? I will assume it has, as far as the assignees had the power. But could they by any act homologate and give force to a deed which they could not validly have executed? If they could not have executed the deed, could they give it validity when it was invalidly executed, or could any other persons acting for them do so? That is so clear as to require no argument. Then, was it originally a valid deed? No, it was not, unless ex-parte Whitchurch has ceased to be law (and unless I am to invent a new law to get rid of ex-parte Whitchurch, which has been acted upon and adopted by the assent of all the judges). Then, acting upon it, I am bound to hold that the assignees had not power to homologate what they could not have executed. I would therefore propose to your Lordships, in consistency with what I have now stated, that this cause be remitted to the Court of Session, with the instruction to which I have adverted—that they are to assume that the assignees had no power to homologate. They have proceeded upon the statement made to them that the assignees had the power—they will now proceed further as they shall be advised, but upon the supposition that the assignees had not the power.

The House of Lords declared, That the assignees of Stein, Smith, and Co. had no power to homologate the trust-deed executed by John Stein in favour of the respondents, for behoof of the creditors of the distillery companies; and it is therefore ordered and adjudged, That the several interlocutors complained of be and the same are hereby reversed; and it is further ordered, That, with the said declaration, the cause be remitted back to the Court of Session, to proceed therein as shall be just.

Appellants' Authorities.—3 Ersk. 3, 20; 2 Bell, p. 618; Miller, Jan. 22, 1811 (F. C.); 2 Espinasse, 523; 1 East, 48; Strother, July 1, 1803 (App. Forum competens); Royal Bank, Jan. 20, 1813 (F. C.); 2 Dow, 230; Cullen, 455; Cooke, 499; Bell, p. 28 (edit. 1810); 10 East, 418; Whitemarsh, p. 303.

Respondents' Authorities.—Cullen, p. 229 (edit. 1800); Hunter and Co. Feb. 25, 1825 (3 Shaw and Dun. No. 395); Dickson, &c. Dec. 2; 2 Shaw's App. No. 33; 1 Rose, 434.

Feb. 23, 1831.

HINDMAN and GODDARD—MONCRIEFF and WEBSTER,—Solicitors.

HUGH ROBERT DUFF, Appellant.

No. 7.

THOMAS ALEXANDER FRASER, Respondent.

Title to pursue—Fishing.—Circumstances under which (affirming the judgment of the Court of Session) a party was found entitled to challenge a yair erected by another in a loch for catching salmon, although it was alleged that it was erected in virtue of a title derived from the predecessor of the objector.

Feb. 23, 1831.

2D DIVISION.
Ld. Mackenzie.

SIMON, Master of Lovat, was infeft in the Lordship of Lovat, comprehending the Barony of Beauly, through which the river Beauly (anciently called the Ferne) flows, and "in totis et "integris salmonum piscationibus super aquam de Ferne a "Carncross usque ad mare cum lie cruives et omnibus aliis "proficuis eisdem pertinen." After passing through part of Inverness-shire, the river enters Loch Beauly, or Beauly Frith. This was said by Duff to be an arm of the sea, while Fraser averred that it formed part of the river. In 1638 the Master of Lovat granted a feu charter to Thomas Sheviz of the estate of Muirton, to which Duff had now right. The charter contained the following clause:—"Ac etiam salmonum piscationes "aliasque piscationes ad dictas terras spectan. ac potestatem "ædificandi lie zairs aut stells, et occidendi et captandi omnia "genera piscium tam salmonum quam leuchpheatorum piscium, "lie blue fishes, cum lie coble vel reta seu aliter intra lie pool "vocat. lie Roodpool, intra omnes bondas predict. terrarum de "Muirtoun, versus illam partem Maris vocat. Roodpool et "utendi omnia genera machinarum ad illud propositum neces-"saria modo in juribus et infeofamentis in favorem dicti Gu-"lielmi Duff mentionatis." The deed also contained a clause of warrandice in these terms: "Et ab omnibus aliis periculis, "damnis, actionibus, impedimentis, et inconvenientiis quibus-"cumque, tam non nominatis quam nominatis, quæ huic "infeomento ledi seu prejudicare poterint dicto contractui "confirmiter in omnibus, contra omnes mortales warrantiza-"bimus ac quietabimus, et in perpetuum defendemus."