[15*th May* 1835.]

WILLIAM JEFFREY, Trustee on the Sequestrated Estate of ARCHIBALD CUTHILL, Appellant.—*Lushington* — *Stuart.*

HENRY PAUL, Respondent.—*Knight*—*A. M'Niel.*

*Trust*—*Bankrupt*—*Sequestration*—*Heritable Bond*—Three trustees, to whom certain heritable subjects had been conveyed, with a power of sale, in relief of obligations undertaken by them, having, in a disposition of part of the subjects, granted in their character of trustees, declared 3,000*l.* of the price to be a real burden, and afterwards taken a bond for that sum, payable to them privatis nominibus, their heirs and assignees, but without discharging the real burden; having taken a bond for 400*l.* (part of the price of a second portion of the trust subjects), as for cash instantly advanced, payable to them privatis nominibus, their heirs and assignees; but having taken a bond for 1,925*l.*, part of the price of a third portion of the subjects, payable to them in their character of trustees; on all of which bonds infeftments followed; and one of the trustees having thereafter been sequestrated, and an action of adjudication having been brought by the solvent trustees, to have the three bonds adjudged to them in extinction of the outstanding obligations of the trust, and in order to equalize the superadvances made by them, which greatly exceeded the advances made by the bankrupt trustee:—Held, 1. (reversing the judgment of the Court of Session), that the creditors on the sequestrated estate of the bankrupt trustee were entitled to a third of the 400*l.* bond, as appearing on the face of the records to have been vested in the bankrupt and his co-trustees privatis nominibus. 2. (affirming the judgment of the Court of Session), that

the bonds for 3,000*l.* and 1,925*l.* fell to be applied, in the first place, in extinction of the outstanding obligations of the trust-estate, and in the second place, in relief of the superadvances of the solvent trustees.

2D DIVISION.
Ld. Mackenzie.

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IN the year 1816, William Harley of Willowbank near Glasgow became insolvent, and compounded with his creditors. With the view of securing the cautioners for his composition, he executed a trust disposition of his property in favour of several persons. Thereafter, in December 1819, Harley and his trustees disponed in favour of himself, James Cook, John M'Gavin, Thomas Graham, Archibald Cuthill, and Robert Moffat, and the survivors and survivor of them, all his heritable and moveable estate, " in trust, for the purpose of our said " disponees and their foresaids selling, feuing, or other- " wise disposing of the whole of the said property, or such " parts thereof as they may think proper, absolutely and " irredeemably, either by public roup or private bargain, " for such prices as they may think proper to accept of, " and that with or without the consent or concurrence of " the said William Harley, and for the purpose of borrow- " ing such sums of money as can be obtained on the " security of the said lands, and granting heritable bonds " and dispositions in security for repayment of the same, " and applying the proceeds in payment of the expense " and charges incurred or to be incurred by them in the " premises, in payment of all advances and obligations " already come under by them, or any or either of them, " in relation to said properties or to the affairs of the said " William Harley, and to pay over the balance to the " said William Harley, or his heirs or disponees."

In the year 1820, Mr. M'Gavin retired from the trust, and was succeeded by the respondent Henry Paul,

accountant in Glasgow, who was also appointed factor for the trust, and superintendent of the trust affairs. In the year 1821 the estates of Mr. Graham and Mr. Moffat were sequestrated, and in February 1822 those of Mr. Harley were also sequestrated. Thus, at the latter date, the solvent trustees were Mr. Cook and Mr. Cuthill, who were personally liable in all the trust obligations, and Mr. Paul, the professional trustee, to whom Messrs. Cook and Cuthill had become personally bound in relief of all obligations undertaken or to be undertaken by him on account of the trust.

In July 1822, Messrs. Cook, Cuthill, and Paul, "as "trustees foresaid, and as such vested in certain lands and "others, for the purpose of selling or otherwise disposing "of the same, agreed to sell, and do hereby bargain and "sell to Hamilton William Garden" certain trust subjects, at the price of 15,500*l*. They were to receive payment of this sum in houses to be built by Mr. Garden upon part of the ground purchased by him, which houses were to be transferred to them at a valuation. He built houses accordingly, which were taken from him pro tanto of his purchases. But, for 3,000*l*. of the price which he had engaged to pay, Mr. Garden granted his promissory note to Messrs. Cook, Cuthill, and Paul, and that sum was to be declared a real burden on his purchases. This was done in a disposition in favour of Mr. Garden, granted by Messrs. Cook, Cuthill, and Paul, who were there described as "the only acting trustees for the "creditors of William Harley," with consent of Harley and his judicial trustee, and of Messrs. Graham and Moffat, "nominated, but not now acting as trustees for "the creditors of the said William Harley." Some months after Mr. Garden received this conveyance, he, on the

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narrrative that he had " borrowed, and actually received " from James Cook, civil engineer in Glasgow, and Archi- " bald Cuthill, writer there, the sum of 3,000*l.* " sterling," granted a bond for that sum, and a disposition in security over the heritable property, on which infeftment followed in favour of " the said James Cook and " Archibald Cuthill, and their heirs or assignees, and the " survivor of them, in trust for the heirs of the prior de- " ceaser." This bond was granted solely in consequence of Mr. Garden not having discharged the 3,000*l.* which had been declared a real burden on the same property.

Of the houses which had been received by the trustees from Mr. Garden, in part payment of his purchases, one was sold to William Ewing for 400*l.*, being part of the price, who on 6th September 1825, granted a bond and disposition in security, on which infeftment followed. The inductive clause and the personal obligation are in these terms:—" Know, &c.—I, William Ewing, merchant " in Glasgow, grant me instantly to have borrowed and " actually received from James Cook, civil engineer in " Glasgow, Archibald Cuthill, writer there, and Henry " Paul, accountant there, the sum of 400*l.* sterling, " whereof I do hereby acknowledge the receipt, renouncing " all exceptions to the contrary; which sum of 400*l.* ster- " ling, I, the said William Ewing, bind and oblige me, my " heirs, executors, and successors, to repay to the saids " James Cook, Archibald Cuthill, and Henry Paul, and " their heirs or assignees, and the survivors or survivor of " them, in trust for the heirs of the prior deceaser."

It will be observed that the above bond for 3,000*l.* and the bond for 400*l.* was taken to the parties not as trustees but as individuals. They were, however, prepared by Mr. Cuthill, who was a writer, and the entries in his

books clearly established that they were for behoof of the trustees. In 1826, these trustees sold Mr. Garden certain subjects at Enoch Bank, belonging to Harley's trust, for 1,152*l.* 6*s.* On an accounting between the trustees and Mr. Garden for this and his former purchases, he was found to be indebted to the trustees in 1,927*l.* 0*s.* 1*d.*, for which he granted bond and disposition in security, whereby he acknowledged "to have instantly "borrowed and actually received from James Cook, civil "engineer in Glasgow, Archibald Cuthill, writer there, "and Henry Paul, accountant there, only acting trustees "for the creditors of William Harley, the sum of 1,925*l.*, "and bound himself to repay the same to the said James "Cook, Archibald Cuthill, and Henry Paul, trustees "foresaid, and their assignees, and to the survivors or "survivor of them, and to their or his assignees."

In the same year, and after these deeds were perfected by recorded sasine, Mr. Cuthill became insolvent and absconded. He and Mr. Cook being personally liable in all the trust obligations, had, on that account, paid large sums out of their own funds. In a state of these advances, Mr. Cuthill's advances, at and prior to 24th May 1825, are entered at 6,826*l.* 0*s.* 7*d.*; and Mr. Cook's advances down to the same period amounted to 9,414*l.* 2*s.* 6*d.*, exclusive of which he is also stated to have advanced, since 24th May 1825, 8,545*l.* 9*s.* 2½*d.*, making the total of Mr. Cook's advances, 17,959*l.* 11*s.* 8½*d.* Together, 24,785*l.* 12*s.* 3½*d.*

But these advances, it was alleged, were not adequate to pay the trust deficiencies; in particular it was stated, that not only was Mr. Paul in advance for the trust to the amount of 2,745*l.* 7*s.* 4*d.* exclusive of interest, and his allowances for commission and trouble, but that

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there were also other trust debts outstanding, to the amount of 6,693*l.* 2*s.* 9*d.*, exclusive of interest.

Under these circumstances Messrs. Cook and Paul brought an action before the Court of Session in which they set forth, That, by the arrangement under which the said Henry Paul became one of the trustees for the creditors of the said William Harley, all the other trustees bound themselves, jointly and severally, to free and relieve him of all sums to be advanced, and engagements to be come under by him, in that character: That the sums which have been already advanced by the pursuer, James Cook, from his own private funds, towards payment of the debts and obligations owing and undertaken by him and the other trustees for the creditors of the said William Harley, amount to 17,000*l.* sterling, or thereby; while the advances which have been made by the said Archibald Cuthill, towards payment of the said debts and engagements, only amount to between 8,000*l.* and 9,000*l.*: That the sums still due to the creditors of the trust, and for which the pursuers and the said Archibald Cuthill, as trustees foresaid, have come under engagements, and are responsible as aforesaid, amount to 12,000*l.* sterling, or thereby, and greatly exceed the total amount and value of the trust estate of the said Wiliam Harley, still remaining vested in the pursuers and the said Archibald Cuthill, as aforesaid, including the amount of the sums contained in the three bonds and dispositions in security before narrated; and there will be an enormous deficiency and loss, which must be borne by the said trustees, in manner foresaid: That, in or about the month of February 1826, the said Archibald Cuthill having become insolvent, he absconded from Scotland;

and about, or soon after that time, he was rendered notour bankrupt, and he has not since returned to this country: That the said Archibald Cuthill is bound to relieve the pursuer, James Cook, and to make payment to him of one half of the difference between the amount of the said advances by the said pursuer and the amount of the smaller advances made by the said Archibald Cuthill, as aforesaid, in order to equalize the advances made by them respectively; and the said Archibald Cuthill is also bound, jointly and severally with the said pursuer, to relieve the other pursuer, Henry Paul, of the whole amount of the sums still due to the creditors of the trust, as aforesaid; and he is likewise bound to relieve the pursuer, James Cook, to the extent of one half of the said sums still owing: That the said Archibald Cuthill is further bound to concur in uplifting and discharging the said bonds, in order that the proceeds may be applied towards extinction of the foresaid obligations come under by the pursuers and him the said Archibald Cuthill, as trustees foresaid: And although the pursuers have frequently required the said Archibald Cuthill so to relieve and make payment to them respectively, and to concur with them in granting assignations and translations of the said bonds, or discharge thereof, in order that the sums therein contained might be applied towards extinction and relief of the obligations come under by the pursuers, as trustees foresaid, yet he refuses, or at least delays so to do: That the foresaid sum of 3,000*l.* sterling, and interest thereof, were constituted a real burden, as aforesaid, in favour of the pursuers James Cook and Henry Paul, and the said Archibald Cuthill; and the said three bonds and dispositions in security were granted, the first to the pursuer James

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Cook and the said Archibald Cuthill, and the two others to the pursuers James Cook and Henry Paul, and the said Archibald Cuthill, all as trustees for the creditors of the said William Harley; and the pursuers are legally entitled, when the sums therein contained are recovered, to apply the same towards payment of the sums advanced, or for which they have become bound as trustees foresaid respectively, and towards equalizing the amount of these sums with the smaller amount of advances made by the said Archibald Cuthill in that character: And in order that the pursuers may be enabled to recover and receive the said several sums contained in the said bonds and dispositions in security, and to grant assignations and translations, or discharges and renunciations thereof, and of the lands thereby disponed in security of the said sums respectively, and also of the foresaid real burden, and that they may thus be enabled to relieve themselves pro tanto of the sums advanced or for which they have become bound as trustees aforesaid, with the interest due and to become due thereon, it is necessary that decree should be pronounced in the terms following: Therefore it ought and should be found and declared, by decree of our Lords of Council and Session, that the pursuers, the said James Cook and Henry Paul, have, in the manner before stated, the only good and undoubted right and title to the foresaid principal sum of 3,000*l.* sterling, with interest thereon and penalties, created a real burden by the foresaid disposition granted by the pursuers and the said Archibald Cuthill, with consent foresaid, to the said Hamilton William Garden, and contained in the foresaid bond and disposition in security first above narrated, granted by the said Hamilton William Garden to the pursuer James Cook, and the

said Archibald Cuthill; also to the foresaid principal sum of 400*l.* sterling, interest and penalties, contained in and due by the foresaid bond and disposition in security granted by the said William Ewing to them and the said Archibald Cuthill; and also to the foresaid sum of 1,925*l.* sterling, with interest and penalties, contained in and due by the said other bond and disposition in security granted by the said Hamilton William Garden to the pursuers and the said Archibald Cuthill as aforesaid; and likewise to the lands and others over which the foresaid real burden is constituted, and the lands and others conveyed in security of the said sums respectively by the said bonds and dispositions in security, as the said lands are herein-after particularly described; together with the said real burden, and the said bonds and dispositions in security themselves, and instruments of sasine following thereon, and other writings and title deeds of the premises, and rents, mails, and duties thereof; and that the pursuers are entitled to have feudal titles made up to the said lands and others, so as to divest the said Archibald Cuthill of any title ex facie standing in him, and to vest the same completely in the pursuers' persons, in security of the foresaid sums, and for the purposes mentioned in the foresaid disposition by which the said real burden was constituted, and in the said bonds and dispositions in security respectively: And it ought and should further be found and declared, by decree of our said Lords, that the pursuers have the sole and undoubted right and title to uplift and discharge the sums constituted a real burden by the disposition to the said Hamilton William Garden first above mentioned, and contained in the said bonds, and to renounce, resign, and discharge the real burdens and heritable

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securities thereby created, and also to assign, dispone, and convey the said real burden, and the said bonds and whole heritable subjects therein contained and real security thereby created. And in order that the pursuers may be completely and feudally vested in the foresaid several sums, and in the said several subjects held by them in security thereof, and to which they have right as aforesaid, and in conformity to the laws and daily practice of Scotland, the said several sums, principal, interest, and penalties, constituted a real burden as aforesaid, and contained in and due by the foresaid bonds and dispositions in security respectively, and the foresaid bonds and dispositions in security themselves, and infeftments thereon, and also the lands and others thereby conveyed in security of the said sums respectively,—they then further concluded, that these bonds, with the subjects therein specified, ought and should be decerned, declared, and adjudged to pertain and belong, heritably, but redeemably, and under reversion to the pursuers, their heirs and assignees whomsoever, as having right to the same in manner foresaid, and to establish valid and sufficient feudal titles thereto in their persons.

Defences were lodged by Jeffrey, the trustee in Cuthill's estate, in which he maintained, 1st., that as the bonds for 3,000*l.* and 400*l.* were taken in favour of Cuthill as an individual, and appeared so on the record of sasine, he, on behalf of the creditors, was entitled to the benefit of it to the extent of Cuthill's share, and the alleged trust was of no relevancy in a question with him; 2d, that at all events these bonds must be held to have been granted in liquidation pro tanto of the respective advances by the parties; and as those by Cuthill

exceeded the amount of his share, it was not competent to appropriate the securities to the relief of the alleged superadvances by Cook; and 3d, that there was no evidence of such superadvances by Cook.

The Lord Ordinary pronounced this interlocutor:—"(8th March, 1831.)—The Lord Ordinary "having heard parties' procurators, and thereafter con- "sidered the closed record and whole process, finds no "ground stated on which the pursuers can be found "entitled to more than a rateable share in the funds "libelled, in proportion to the amount of the money "advanced or debt undertaken by the pursuer James "Cook on account of the trust estate libelled, as com- "pared to the money advanced or debts undertaken "for the said estate by Archibald Cuthill; and therefore "finds that effect cannot be given to the conclusions of "the present action, and dismisses the same, and decerns. "Finds no expenses due to either party."

Against this interlocutor both parties presented reclaiming notes (Jeffrey, in so far as it was unfavourable to his pleas, and denied him expenses,) to the Second Division, who ordered the question to be argued in cases, on advising which they pronounced this interlocutor:—"(29th November 1831.)—Recal the "interlocutor complained of, sustain the present action, "and remit to the Lord Ordinary to hear parties as to "the amount of the pursuers' advances in regard to the "affairs of William Harley, referred to in the summons "and pleadings, and to proceed further thereanent as "to his Lordship shall seem just. Reserving to both "parties all claims for expenses."

The case accordingly went back to his lordship, who remitted to Mr. William Keith, accountant, to make up

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a state of accompts between the parties, relative to the affairs of William Harley, with reference to the respective pleas of parties, and to report. He accordingly did so, and, inter alia, reported, that the outstanding trust debts, which yet fall to be paid by Messrs. Cook and Paul, the solvent trustees, exceed the trust funds or subjects sought to be adjudged: that, assuming that the securities sought to be adjudged are liable for the trust debts, it was unnecessary to do more as to Mr. Paul's accounts than to ascertain generally, and it was a fact which he reported as being conclusively ascertained, that Mr. Paul had no trust funds in his hands or under his control wherewith to defray the trust debts: that the advances of Mr. Cook from his own funds, on account of the trust, exceeded those of Mr. Cuthill to the amount of upwards of 10,000*l.* of principal; for the former had advanced nearly 18,000*l.*, and the latter between 7,000*l.* and 8,000*l.* only: that it appeared to be unnecessary to determine the exact excess of advances, because it was certain that the outstanding trust funds were inadequate to discharge the existing trust obligations, and therefore, whatever might have been the respective advances of Mr. Cook and Mr. Cuthill, as nothing could come back either to Mr. Cook or to Mr. Cuthill's trustee in repayment thereof, any further inquiry into the amount would be useless.

On advising the report with objections by Jeffrey, and a minute stating that Cook was dead, and praying to sist Paul in his place, the Lord Ordinary pronounced this interlocutor:—

"(4th March 1834.)—The Lord Ordinary sists the "said Henry Paul in the right and place of the de- "ceased James Cook in this action, and allows the same

" to proceed in Henry Paul's name alone; finds that " the sums contained in the securities libelled are appli- " cable, preferably, not only for payment of any " balance due to the pursuer Henry Paul in his own " right, on account of the trust estate libelled, but also " for payment of the advances made by the late James " Cook on account of the trust estate beyond the ad- " vances made by Archibald Cuthill on account of the " same, as also towards the outstanding debts of the " trust, and in that view repels the objections to the " accountant's report, and decerns in favour of the pre- " sent pursuer, Henry Paul, in terms of the libel, but " this without prejudice to any accounting that may " hereafter take place between him and those interested " in the trust under his charge: Finds the defender " liable to the pursuer in expenses."

Jeffrey presented a reclaiming note against this judgment to the Second Division, on which their lordships pronounced the following interlocutor:—

" (11th June 1834.)—The Lords having advised the " cause, and heard counsel for the parties, find that the " sums contained in the securities are applicable, in the " first place, for payment of the outstanding debts of the " trust; in the second place, in relief and repayment of " any superadvances made by James Cook; and in the " third place, for any balance due to the pursuer " Henry Paul, in his own right; and with this variation " adhere to the interlocutor of the Lord Ordinary sub- " mitted to review. Further, find additional expenses " due since the date of that interlocutor. Allow an " account thereof to be given in," &c.

Jeffrey appealed.

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*Appellant.*—1. In so far as the heritable securities appeared on the face of the records to be in whole or in part the individual property of Cuthill, the appellant, as trustee in his sequestration, was entitled, by virtue of the adjudication in his favour, to claim them on behalf of Mr. Cuthill's creditors; and it was not competent for the Court to give effect to any statements in regard to these securities contradictory of what appeared from the face of the records, or to any latent trust alleged to qualify Mr. Cuthill's ex facie right as shown by these records.

This is now conclusively settled, both with regard to purchasers transacting upon the faith of these records, and also with regard to creditors taking steps of real diligence. At one time, indeed, some doubts existed, now entirely set at rest, how far a distinction might not be drawn betwixt purchasers of real property and creditors adjudgers. In regard to purchasers, the principle had always beensettled from the earliest periods of the law.[1] But in regard to adjudgers, the doctrine was at one time mooted, that they stood differently situated from purchasers, and took the real right, tantum et tale, as it stood in the debtor's person under all the qualifications to which he was himself subjected. And a well-known decision was pronounced, giving some countenance to this doctrine.[2] But subsequent cases very shortly occurred in which, as stated by Mr. Bell, "the decision "in Thomson's case was disapproved of, and departed

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[1] Workman v. Crawford, 20th Nov. 1672, (Mor. 10,208); Ruthven v. Lord Redford, March 1686, (Brown's Supplement, vol. ii. p. 94); Anderson v. Dempster, 14th November 1702,. (Mor. 10,213); M'Cubbins v. Ferguson, 20th July, 1715, (Mor. 10,250.)

[2] Thomson v. Douglas, Heron and Company, 15th Nov. 1786, (Mor. 10,229 and 10,299.)

"from;" and a series of decisions followed, placing adjudgers on precisely the same footing with purchasers, with regard to the faith to be given to the records.[1]

This doctrine has been held applicable to a trustee, under a sequestration.[2] In the present case there were at least two of the securities perfected by infeftment, in which, ex facie of the records, Mr. Cuthill had an unqualified pro indiviso right of property. Such securities are, exfacie, redeemable dispositions of the property, and, except as to the mere right of redemption, stand on precisely the same footing with an absolute conveyance; so that, ex facie of the records, there was an heritable disposition in favour of Mr. Cuthill and the other disponees, altogether unqualified, except by the mere right of redemption. There was not only the usual disposition to "heirs and assignees," (which implies absolute property,) but, in the event of the decease of any of the disponees, the survivors are expressly declared to hold "in trust for the heirs of the prior deceaser." And nothing can be more exclusive of the idea of a trust for Harley, or any third party, than this declaration; for in such an event the trust would have vested absolutely in the survivors or survivor for behoof of the original truster.

In this state of things the respondent claims the securities, on the averment that they did not truly belong to Cuthill individually, as the records represented, but were held by him under the condition of a trust, which

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[1] Russel v. Creditors of Ross, 31st Jan. 1792, (Mor. 10,300, Bell's Cases, p. 166); Bell's Commentaries, vol. i. p. 282. 285. 288; Buchan v. Farquharson, 24th May 1797. (Mor. 2,905.) See also Mitchell v. Ferguson, 13th Feb. 1781, (Mor. 19,296, Hailes, p. 880); Wylie v. Duncan, 8th Dec. 1803. (Mor. 10,269.)

[2] Mansfields v. Walker's Trustees, 28th June 1833, S.& D. vol. xi. p. 813.

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bound him to apply their proceeds for the benefit of Mr. Harley and of his own co-trustees, and in extinction of the debts and obligations arising under that trust. Now, the short answer is, that this averment is altogether irrelevant as against the appellant. His right to the securities as they appeared from the records could not competently be affected by the allegations, whether true or false. In regard to these two securities, the Court ought not to have allowed the averment to have been even made the subject of inquiry. They ought to have held, that, in a question with the appellant, they could not look beyond the records in order to determine that the right in these securities must be allocated as the records pointed out,— that therefore the appellant, as the singular successor of Mr. Cuthill, was at once to be found entitled to the pro indiviso share of the securities which these records exhibited as his, and that any claim inconsistent with this right could not be sustained.

2. But, independently of the faith to be given to the records, these two securities, in as far as they ex facie appear to be the individual property of the parties in whose names they are taken, must be regarded on that footing, and inasmuch as, even though arising out of transactions connected with Harley's estate, they were taken in these terms for the express purpose of constituting them the individual property of the parties, in reimbursement of the advances which each of these parties had, prior to the date of these securities, made in connexion with Harley's affairs. It by no means follows, that merely because the securities arose out of the transactions of Harley's trust, that these securities cannot possibly be the individual property of the parties in whose

names they are taken. On the contrary, it is quite possible that the parties should have had these securities expressly granted to them, as individual property, for the very purpose of reimbursing advances made by them out of their individual estate. Now the appellant says, that the securities in question stand in this precise situation.

Truly and substantially, the arrangement was just of this character,—that the individuals who were disposed to assist Harley, made each, separately, from his own individual funds, such advances as he found convenient, whilst the disposition of his property by Harley was simply held as a security to the parties, as it bears, "of "all advances and obligations already come under, or "to be come under, by them, or any or either of them." There was no prosecution of any definite joint speculation, or even of any definite course of joint management, as is the usual case in a proper trust. The only connexion amongst the parties was, that each of them, being inclined to aid Mr. Harley, made from his own separate funds such advances as he thought proper, the general disposition of Harley's property remaining as security to all concerned. This is proved by the statements of the respondent himself, whose whole case is rested on the allegation of separate advances being made by Messrs. Cook and Cuthill respectively, of which it is said those by the former were by far the more extensive.

Suppose that the transaction had taken a slightly different shape; that there had been one bond for 1,500*l.* granted in favour of James Cook, "his heirs and "assignees;" and another, and a separate bond, also for 1,500*l.* in favour of Archibald Cuthill, "his heirs and "assignees." It is indisputable, that such a separate

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bond in favour of Mr. Cook could be held as nothing else than the individual property of that gentleman, conveyed to him in reimbursement of his separate advances previously made. Or, at all events, it would be held such, until the most distinct written evidence was produced to prove that it was not his individual property, but unappropriated trust funds. In the same way a separate bond for 1,500*l.* in favour of Mr. Cuthill, his heirs and assignees, would have necessarily fallen to be regarded as his individual property, granted for the like purpose of reimbursement of his separate advances previously made, and liable to be attached by his creditors, and taken up under a sequestration, just like any other individual property. But, if this had been the case, it need scarcely be said, that it makes not the slightest difference, that, in place of two separate bonds for 1,500*l.*, there is one bond for 3,000*l.* granted pro indiviso in favour of "the said James Cook and Archi- "bald Cuthill, and their heirs and assignees." The bond is just as much excluded from being trust property, and as much liable to be dealt with as individual property, as if two separate bonds had been granted.

3. Assuming that the securities are to be regarded as subsisting trust estate, still remaining unappropriated, the only correct or just principle in regard to their application is, that they should be shared among the different trustees, pro rata of the advances made or obligation sundertaken by them respectively on account of the trust estate. The question arising in the present case is not raised by third parties, creditors of the trust, or in which such third parties are interested, but is a question amongst the trustees themselves, and exclusively a question inter se; and, as between the trustees them-

selves, there is no other sound principle of apportionment, than that the securities forming the funds of the estate should be allocated amongst them, pro rata of their several advances or obligations on account of the trust. In this respect, the original interlocutor of Lord Mackenzie, of 8th March 1831, was well founded, and ought to be returned to.

The plea which was successfully maintained in the Court below was, that the securities were not to be shared by the trustees pro rata of their respective advances, but that these advances must be equalized; that is to say, if one of the trustees has advanced more than another, the securities were to be applied in the first instance in discharging the surplus advances of the former; and until these were paid off, and the parties reduced to an equality, the other trustee was to have no share whatever in the securities; and the case was assimilated to one of partnership or joint adventure.

But this was a most manifest error, for there is no identity between the situation of partners or joint adventurers and trustees. Partners or joint adventurers are united for the purpose of procuring, by their mutual capital and exertions, a common profit, which is divided amongst them, either in certain agreed on proportions, or, where nothing is said, equally. If, in place of a profit, a loss is made, of course this is shared according to the same rule. But in the present case the parties were not united for the purpose of making a common profit, with its attendant contingency of a common loss. There was no adventure of profit engaged in at all; and no union for that purpose. Each trustee separately made advances, to such extent as he was prevailed on to do; one to a greater, another

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to a smaller amount. Each is entitled just to rank on the trust estate,—which is the common debtor,—for the amount of his separate advance. And there is no sound principle on which any one of them can ask another, personally, to relieve him of a portion of his advances. There was no obligation, express or implied, binding them originally to make equal advances to the trust; and therefore there is no ground on which it can be demanded that the unequal advances should be afterwards equalized. Each advanced so much as he thought prudent, and became a creditor of the trust estate to that amount. But it is inconsistent with legal principle, and would be most unjust, that the man who was so imprudent as to make the larger advances should be entitled to call on his more prudent associate to pay him one half of the surplus, in order to put them on a footing of equality.

Neither can it make any difference in regard to the apportionment of the securities by the trustees inter se, whether the advances of the different trustees consisted of past cash payments or of outstanding obligations. There being no question with the creditors of the trust, but the whole question being one between the trustees inter se, past advances and outstanding obligations by the several trustees stand exactly on the same footing, the whole question being, to what extent, either in the one way or the other, each trustee has respectively advanced, and to what extent, therefore, he is entitled to share in the securities, as divisible inter se.

At any rate, there ought to have been an accurate estimate made of the exact amount of advance by each of the trustees respectively, whether consisting of money paid, or debt undertaken; and the securities declared

to be apportioned accordingly amongst the different trustees, or those in their right; and in particular, before these securities were adjudged to the respondent Mr. Paul, a full investigation ought to have been made into the precise state of that gentleman's accounts with the trust estate; for any balance due to it by Mr. Paul constituted just so much trust funds in his hands applicable to the purposes in question, and which he was bound to see so applied before demanding to be put in possession of these securities.

*Respondent.*—1. The facts altogether include the idea that the securities belonged to the parties individually, and not as part of the trust estate. It is proved that Harley in 1816, with the view to a composition contract with his creditors, conveyed his whole property to certain gentlemen "as trustees and fiduciaries, or trustee and "fiduciary, for behoof of the whole of my just and lawful "creditors; and was to be accepted by the said trus-"tees in trust for the ends, uses, and purposes therein "mentioned," and particularly, that the trustees, in the event of Harley failing to pay either of the instalments of the composition referred to, should have power to sell and convert into money the subjects conveyed to them.

After this trust had been in operation for three years, and the trustees had involved themselves in serious responsibilities, it was arranged that Harley, with their consent, should convey the trust estate to Mr. Cook, Mr. Cuthill, and other gentlemen, one of whom was an original trustee. Accordingly in 1819 a disposition was executed in their favour, "declaring that these presents "are granted, and the said subjects disponed, in trust

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" for the purpose of our said disponees or their fore-
" saids selling, feuing, or otherwise disposing of the
" whole of the said property, or such parts thereof as
" they may think proper, absolutely and irredeemably,
" either by public roup or private bargain, for such
" prices as they may think proper to accept of, and
" that with or without the consent or concurrence of
" the said William Harley, and for the purpose of bor-
" rowing such sums of money as can be obtained on
" the security of the said lands, and granting heritable
" bonds and dispositions in security for repayment of
" the same, and applying the proceeds in payment of
" the expenses and charges incurred or to be incurred
" by them in the premises, in payment of all advances
" and obligations already come under or to be come
" under by them, or any or either of them, in relation
" to the said properties or to the affairs of the said
" William Harley, and to pay over the balance to the
" said William Harley, or his heirs or disponees."

The estate was thus effectually set apart for the trust purposes, and until those were satisfied, it could not be claimed by any party, whether in right of the individual trustees or on behalf of Harley himself. Nor could any distribution of the estate be demanded among the trustees, except on the footing of fair equalization and mutual relief. Numerous other deeds were executed, all on the same footing; and in the course of the trust operations the transactions with Mr. Garden and Mr. Ewing were entered into, under which the securities in question were granted. Mr. Cuthill acted as the law agent in framing them, and the entries in his books represent them as part of the trust estate. Besides, the sum of 3,000*l.* was originally constituted a real burden

on the disposition granted to Garden by the trustees; and the bond, subsequently prepared by Cuthill, cannot affect its true character; and it is admitted that the second bond granted by Garden forms part of the trust estate. But it is pleaded, that whether there was a trust or not, that character did not appear on the face of the bonds in question, and so could not be enforced against Cuthill's creditors.

Now supposing that the whole bonds were expressed in a manner apparently indicating a pro indiviso right in common, in favour of all the parties, there are no grounds for maintaining that the mere terms of a bond are, in such circumstances, to be looked to without reference to the origin, history, and actual destination of the funds. It is impossible, in this case, to say that the form in which these bonds were taken was intended by the parties to exempt them from the operation of the trust. The books and accounts of Cuthill himself, in whose right the appellant now stands, are conclusive of the fact, that the bonds, whatever their terms might be, were all looked upon as belonging to the trust estate, and under the control of the trustees, and as such the expense of them was charged against them by Cuthill. Indeed, it would have been incompetent or highly improper for the trustees to attempt to divide the funds of the trust among themselves individually, while there were still trust purposes to accomplish, and trust creditors to pay. Those creditors, and any others interested in the trust, would have been entitled to complain if their undoubted preference over the trust funds had been prejudiced, or if any thing had been done to destroy the identity of such funds. Nothing of this kind is to be presumed; nothing of this kind was, in

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fact, contemplated. The bonds were taken in forms somewhat differing from each other, probably from carelessness on Cuthill's part, but, at least, under a clear conviction that they were sufficiently distinguished as a part of the trust estate, and set apart for trust purposes.

The fact being thus proved, the respondent maintains that there are no grounds for pleading that the bonâ fide character and destination of those bonds can be evaded and frustrated by a claim founded on the mere absence of a declaration of the trust in the terms of all the bonds, or any of them.[1]

The present case does not relate to land rights, appearing to be vested in the parties in property. The rights that here exist are mere securities for the purpose of making more effectual the payment of a money debt, and it is quite fallacious to maintain that the same principle can be applicable to qualified rights of that description as to rights of property, or that creditors or others are entitled to trust, as here pretended, to the faith of what appears on the records. A party who holds a debt secured over heritable subjects has no independent or self-existent right in those subjects which his creditors can attach as a clear and separate estate, without reference to the facts of the case and the situation of the accounts out of which the debt arises. It is the debt that is the proper and substantive right, and the interest in the land is but an accessory. Accordingly, it is certain, and is so laid down in all the authorities, that the records are no security in such a case. An infeftment may appear on the record as securing

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[1] Crooks against Tawes, 29th Jan. 1799. (Mor. 14,596.)

an heritable debt, apparently subsisting and undischarged, but no party is authorized to acquire that debt in any reliance upon this apparent fact. In every case of a debt, whether secured or not, it is open to inquire upon what precise footing it stands, with reference to the accounts between the parties. A debt that still remains upon the record may have been discharged by payment, or by consent, or it may have been extinguished by compensation, or by the creditor's intromissions with the debtor's funds; and any competent evidence of its extinction will be good and effectual, into whatever hands the debt may have come. Nay, an apparent debt, duly entered on the records, may never have existed at all, or may have existed on a different footing from the ostensible one. The money may never have been received by the debtor, or it may have been paid by a different party from the supposed creditor. It may often be difficult to prove facts of this kind, even where they have occurred; but if they are competently and fully proved, they must receive effect, either as against special assignees or a general body of creditors, and whether that effect shall be to extinguish the debt altogether, or to qualify the terms and conditions on which it exists. The respondent does not admit, that in the present case, and with the appellant, who stands precisely in the bankrupt's right, an inquiry into the fact would be shut out, even in the case of a right to lands apparently absolute. But that is not the question here at issue. The same records which contain the infeftment of Cuthill in these subjects, declare in express terms that the infeftment is merely in security of a debt. The idea of resting on the records alone, therefore, is altogether precluded, and parties are expressly

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directed to inquire into the situation of that debt in security of which merely the infeftment exists. With the extinction of the debt, competently proved, the infeftment would fall, notwithstanding its continuance in the records. With a modification of the terms on which the debt was payable, the accessory security would in the same way come to be effectually qualified.[1]

2. If the respondent be correct in the views which he has submitted, the whole defences of the appellant are fully obviated. There is no objection by the appellant, on the record, as to the mode in which these principles are proposed to be carried into effect by the action in question. The conclusions of that action were framed with the view merely of vesting the trustees then acting with the administration of the funds for trust purposes, and for the discharge of obligations of which they were entitled to be relieved. The action proceeded on the basis that Cuthill refused to concur in uplifting the debts and applying them to the trust purposes. The appellant, as in Cuthill's right, refused in like manner to concur in that object, and the Court have accordingly vested the funds in the person of the respondent, the only party now able or willing to discharge the trust. Their judgment, however, is qualified by a declaration of the purposes for which the funds are so intrusted to him. They have found, "that the sums "contained in the securities are applicable, in the first "place, for payment of the outstanding debts of the "trust; in the second place, in relief and repayment "of any superadvances made by James Cook; and in

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[1] 2 Ersk. 8. 34; Blackwood v. Sutherland, 17th Nov. 1740. (Mor. 14,140.)

" the third place, for any balance due to the pursuer, " Henry Paul, in his own right." And further, while the judgment pronounced decerns in favour of the respondent, it does so expressly " without prejudice to " any accounting that may hereafter take place between " him and those interested in the trust under his " charge." This reservation is to be found in the Lord Ordinary's interlocutor, which was adhered to in that respect by the Court. The effect, therefore, of the judgments under appeal, is merely to recognise the respondent as the only acting surviving and solvent trustee, and to vest him in that character with the right of uplifting the funds in question, and applying them to the purposes of the trust, according to law, subject, at the same time, to an accounting at the instance of all parties having interest for his due application of the funds.

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LORD BROUGHAM,—My Lords, in this case it appeared to your lordships, in the course of the argument, that there were three claims, in respect of which, or in respect of Mr. Jeffrey's right to which, as standing in Mr. Cuthill's shoes, the question arose;—one was the sum of 1,927*l.*, one of 3,400*l.*, and one of a smaller sum of 400*l.* I had some doubt of the sum of 3,400*l.*, and much greater doubt respecting the 400*l.* My doubts respecting the 3,400*l.* were much removed in the course of the argument on the part of the respondent, and, on further consideration, have been entirely done away, and I am entirely prepared to recommend to your lordships to affirm the decree as to the rateable share of 3,400*l.*, and the rateable share of the 1,900*l.*, but I still think, and I have seen nothing to remove the impression upon

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my mind at the close of the argument, that the decision must be altered as to the rateable share of the sum of 400*l.* I said I would look into it, for the reason I then gave, and if I did not find my difficulty removed, I should recommend to your lordships to affirm the decree with that exception, and to declare that the pursuer was entitled to one third of the sum of 400*l.*, and one third of the sum of 133*l.*, with interest, making forty odd pounds; and making altogether a sum of about 176*l.* I have put down the exact figures, and will state them in the order; and with that exception, I move your lordships that this decision be affirmed. The consequence of that judgment of your lordships will be, that there can be no costs of the appeal,—that the decree below must be altered, in so far as there were costs given, and that there must be no costs given against the appellant.

The House of Lords ordered and adjudged, That the interlocutor of the 29th of November 1831 (whereby the interlocutor of the Lord Ordinary of the 8th of March 1831 was recalled), and the interlocutors of the 4th of March and 11th of June 1834, be, and the same are hereby affirmed, with this variation and declaration, That the said appellant is entitled to and ought to receive one third part or share of the principal sum of four hundred pounds contained in the heritable bond by William Ewing in the said proceedings mentioned, with a proportional part or share of such interest as may have been received or may be due and payable therefrom, and also to deduction or repayment of the sum of seventy-four pounds out of the costs found due to the said respondent in the said Court of Session.

A. MACRAE—THOS. DEANS—Solicitors.

[*5th June* 1835.]

JACOB YEATS, Appellant.—*Lushington—J. Parker.*

ALEXANDER THOMSON and others, Respondents.—*Lord Advocate (Murray)—Kenyon Parker.*

*Foreign—Deed, Construction of—Clause.* A domiciled Englishman, who was debtor in an heritable bond over a Scotch estate, the contents of which bond he had consigned in the Bank of Scotland, having executed an English will, by which he declared that the consigned sum should belong to certain trustees; having thereafter executed a Scotch trust deed and settlement, in which he stated that he had, in a separate will as to his property in England, directed that the consigned sum should be transferred to his trustees; and having thereafter executed another English will, which had the effect generally of revoking the first will, and which bequeathed all his personal estate to an executor:—Held (affirming the judgment of the Court of Session,) 1. That the Scotch Court had a right, and were bound to look at the first will in the same way as it would have been looked at in England, in order to discover the testator's intentions as to the consigned sum. 2. That the deeds contained a sufficient declaration of the intention of the testator to appropriate the consigned sum to his trustees; and, therefore, that the trustees fell to be preferred to that sum, and not the executor.

2D DIVISION.
Ld. Mackenzie.

5th June 1835.

THE late James Yeats was a native of Glasgow, but left Scotland when young, and became a merchant in London. In the year 1815 he purchased from Mr. M'Donald of Lynedale the island of Shuna in Scot-