[Heard, 4*th March*. — Judgment, 2*d August*, 1842.]

JAMES HAMILTON, Clerk to the Signet, *Appellant*.

JOHN WRIGHT and Others, Trustees of the deceased Thomas Wright, *Respondents*.

Trust. — A trustee, under a deed of arrangement between an insolvent and his creditors, whereby the whole of the insolvent's *acquisita et acquirenda*, were vested in the trustee, for payment of the creditors, if, while the trust is subsisting, he acquire right to a subsequent debt contracted by the insolvent, does so for the trust, and must communicate to it all the benefit of the acquisition.

Ibid. — A trustee must not put himself in a position which may have a tendency to injure the trust, or interfere with his duty.

Trust. — *Sale*. — A purchase by a trustee, under a trust for payment of creditors, of a debt owing by the insolvent, will be void by reason of the knowledge which his position as trustee enables the purchaser to acquire.

ON the 16th day of October, 1815, the appellant executed a trust-disposition, whereby, on the narrative that among other creditors enumerated, he owed Thomas Wright L.6000 sterling, he disponed to John Campbell and such person as Campbell might assume into the trust, whom failing, such person as the creditors might appoint "as trustees for and to the use and "behoof of my whole just and lawful creditors, herein specially "before named, and of any others my just and lawful creditors, "at the date hereof, herein omitted, and whom my said trustee "shall assume into the benefit of this disposition, in virtue of the "powers herein after written, — all and sundry lands, heritages, "rights of annualrent or annuities whatsoever belonging to me; "together with insurance policies, rights of redemption, and all

" debts and sums of money due to me by bonds heritable and " moveable, bills, accounts, decreets, or in any other manner of " way whatsoever; and, in general, my whole means and estate, " of whatever nature or description, either at present belonging, " or that may belong to me during the existence of this trust; " together with the whole vouchers and instructions of such " estate, and all bonds, bills, accounts, decreets, and other " grounds of debt, and all that has followed or is competent to " follow thereupon."—" And likewise with power to the said John " Campbell, *quartus*, or his successors in office, to borrow money " for the purposes of this trust, and to grant bonds, either heri- " table or personal, or other securities, over the lands and others " hereby disponed to the persons who shall lend the money, de- " claring that the lenders shall have no concern with the appli- " cation of the money, nor with the conditions of these presents; " with power also to the said trustee to bind me, my heirs and " successors, in payment of such sums of money as may be so " borrowed in virtue hereof, and of the interests to become due " thereupon, and penalties corresponding thereto; with power " also to the said trustee to insure my life in any of the established " insurance offices, to such extent as he shall be advised to do by " the committee hereafter named, provided they see cause; but " in trust always for the uses, ends, and purposes, and under the " conditions, provisions, and reservations after mentioned, viz., " *Primo*, for payment of the expense attending the execution of " this trust, and the regular payment of the public burdens " affecting, or which shall affect the said lands and others. " *Secundo*, for payment to me during my life of a free yearly " annuity of L.600 sterling, payable at four terms in the year, " Candlemas, Whitsunday, Lammas, and Martinmas, by equal " portions, beginning the first term's payment thereof as at the " term of Lammas last, and yearly thereafter at the terms before " mentioned; and I shall be farther allowed to retain my house-

" hold furniture upon a receipt and obligation to re-deliver the " same, or its estimated value, when required to do so by my " said trustee, reserving any preferences which may be acquired " thereon. *Tertio*, it is hereby provided and declared, that " these presents are granted for and to the special end and effect, " that my said trustee shall from time to time apply the prices " and the whole proceeds of the lands, and others above disponed, " and the debts and other effects generally above conveyed, or " prices thereof, for payment to my creditors above named, or " to those who shall appear to my said trustee to have been law- " ful creditors of me at the date hereof, although not herein " before mentioned, whom my said trustee is authorized to assume " into the benefit of this disposition, and that according to the " extent of their several debts, and to their several rights and " preferences, conform to a scheme of division to be made thereof " among my said creditors, duly authorized by the said trustee " for the time, declaring that this disposition shall not import, " or be construed, or understood to prefer any one creditor to " another, or to postpone or annul the rights and diligences of " any creditor already done or acquired, but that the creditors' " preferences among themselves shall remain unhurt, and not " prejudged, in the same manner as if these presents had never " been granted, reserving all objections to such rights and secu- " rities competent at law, and that without in anywise binding " or affecting the said security; as also it is provided and de- " clared, that although the said trustee, or person who may be " assumed as aforesaid, shall resign, which they are to be at liberty " to do, or shall fail to accept, or shall die before the execution of " this trust-right, yet, nevertheless, the same shall nowise cease " or become void, but the present trust-right and the infeftment " to be taken in virtue hereof, and all that may follow hereon, " shall stand and subsist as a security to my whole just and law- " ful creditors preceding this date, as well those that may be

" herein omitted, as those that are herein stated; and, in the " event of such death or resignation, it shall be competent and " lawful to my said creditors, or major part of them, according " to the extent of their principal sums, and not *per capita*, nor " according to the number of names present at a general meeting " to be called for that purpose, upon advertising in such news- " paper as they shall think fit, during three successive weeks, to " choose, from time to time, such trustee or trustees, for exe- " cuting the trust before mentioned, as they shall think proper; " which trustees, so to be named by my said creditors, shall be " fully invested in the rights of the whole lands, and others " hereby conveyed, and in all the powers hereby committed to " my said trustee before named, as if they had been expressly " named and appointed trustees by these presents, or as the said " trustee herein named, might or could have done, had he exe- " cuted the trust herein committed to him: Lastly, It is hereby " expressly understood and conditioned, that after payment of " the debts due by me as said is, or such thereof as shall require " payment, my said trustees shall make payment to me, my " heirs or assignees, of the residue of the money, or other move- " able property in their hands, falling under, or arising out of " this trust, if any shall remain, and shall, when the said debts " are so paid off, convey and re-dispone to me and my foresaids, " the whole of my said lands and estate, and other property " hereby conveyed, in so far as the same shall not have been " disposed of, with warrandice from fact and deed only; declar- " ing, however, as it is hereby expressly provided and declared, " that the said trust, and whole powers vested in the said trustee, " shall subsist and continue in full force, aye and until the said " trustee shall be relieved of all advances of money, and other " obligations that he may have come under on my account, in " the execution and management hereof under these presents: " And the said trustee shall be entitled to hold the subjects

" hereby disponed and made over, till he is relieved thereof, " with and under the burden of which provisions and conditions " these presents are granted, and no otherwise."

On the 28th November, 1815, Thomas Wright, among others, subscribed a deed of accession to the trust-disposition, which, after narrating the latter deed, proceeded in these terms: — " And considering that we, the said creditors, are satisfied that " the foresaid disposition and trust-right is the most speedy and " least expensive method of making effectual the funds for pay- " ment, and for dividing and paying the same to us, do there- " fore accede and agree to, ratify and approve of the foresaid " trust-right and disposition granted by the said James Hamilton, " and whole powers thereby committed to the said trustees, in " the whole articles, heads, and clauses, therein contained, and " consent that the same take effect to all intents and purposes: " And hereby bind and oblige us, and those who may hereafter " have right to our respective debts, to conform thereto, and to " the proceedings to be had in pursuance thereof, in every " respect, as we are severally concerned: And farther, we do " hereby agree, covenant, and oblige ourselves, and those for " whom we act respectively, that we, or our constituents, shall " not raise, commence, or follow forth any action, suit, diligence, " or execution for arresting, attaching, or seizing the person of " the said James Hamilton, or the estate, subject, sums, debts, " and effects belonging to him, during the subsistence of this " trust."

Mr Campbell was infeft and entered into possession under the trust-disposition of the property thereby conveyed, and an arrangement was made whereby the appellant was made agent of the trust, in which character considerable sums were incurred to him.

On the 10th day of December, 1817, the appellant joined the Honourable Thomas Bowes (afterwards Earl of Strathmore) and

Buchan in granting a redeemable bond to Telford for payment of an annuity of L.221, 13s. 4d. during the life of Bowes, in consideration of L.2000 paid to Bowes.

On the 23d January, 1818, upon the resignation of Campbell as trustee under the disposition of 1815, the creditors appointed Thomas Wright to be trustee in his room, and he accepted of the office, and was infeft under the disposition.

On the 22d May, 1822, Thomas Wright took from Telford an assignation to the bond of annuity by Bowes, Buchan, and the appellant, giving as the consideration L.2000, the original price of the annuity.

In May, 1824, Thomas Wright died, leaving a trust-disposition of his whole means and estate in favour of the respondents as his trustees and executors.

In the year 1832, the respondents gave the appellant a charge of horning for payment of the whole annuities under the bond of 1817, with interest on each annuity from the time it became due, and for payment of the annuities to become due during the life of Bowes. At the date of this charge, the trusts of the disposition of 1815 were still unexecuted, but from the time of Wright's death, no step whatever had been taken to appoint a successor to him as trustee.

The appellant brought a suspension of the charge upon the annuity bond, and at the same time he brought an action to set aside the bond as void, under the act 1681. The respondents, on the other hand, with the view of obviating the effect of the suspension, so far as regarded certain defects in the bond, which might have founded a good objection to summary diligence proceeding upon it, brought an ordinary action for payment.

The appellant failed in the reduction, and the case then came on for decision in the suspension and the ordinary action, which had been conjoined. The appellant alleged that he had never received payment of his annuity under the trust-deed, and that

the creditors under it had not been paid their debts, and urged several pleas in support of his suspension, and in defence to the ordinary action; but in the view which ultimately came to be taken of the case, the only plea which it is necessary to notice was the fifth, which was in these terms: —

" V. The said Thomas Wright, as trustee for the suspender, " could only acquire any debt against the suspender, or his " estate, for behoof of the suspender, and in particular, of that " trust over which he presided as trustee; and he was barred, by " his character of trustee, and by having signed the deed of " accession, from making such a debt a ground of proceeding " against the person or estate of the suspender."

The respondents, on the other hand, professed ignorance as to the state of the payments to the appellant, but did not deny that the trust had not been wound up, and pleaded, in answer to the plea stated by the appellant, —

" A trustee, acting under a trust-deed, for behoof of creditors, " is not barred from acquiring and holding debts and obligations, " which do not compete against, or interfere with, the interest of " the creditors for whom he is trustee."

On the 30th November, 1838, the Lord Ordinary (Cockburn) pronounced the following interlocutor, adding a note, which is subjoined so far as relates to the matter decided on the appeal: —

" The Lord Ordinary, having heard the counsel for the parties " on these conjoined processes of ordinary action, reduction, and " suspension, Finds, That the late Thomas Wright, when he " acquired the bond in favour of the late John Telford, which is " the ground of the present charge and ordinary action at the " instance of his (Wright's) trustees, was the trustee of James " Hamilton, one of the debtors in the bond, who now suspends " a charge, and defends an ordinary action thereon: Finds, " That Wright, being trustee for Hamilton, could not compe- " tently acquire the bond for his own benefit: Finds, That the

" suspender offers to repay or to allow credit for the price paid " by Wright for the assignation to the bond, and the interest, if " any, legally exigible under it: Finds, That, on being thus " settled with, the said Thomas Wright was, and that his trustees " now are, bound to communicate any advantage that may have " accrued, or may yet accrue from this transaction to the trust- " estate of the said James Hamilton, and that they cannot sue a " charge upon the bond so acquired for their own behoof: Finds, " That the said James Hamilton is not bound by judgment " hitherto pronounced in any of these processes from maintaining " this plea: Therefore, but under reservation of the chargers " being settled with as above, and of their right to institute any " competent proceeding that may be necessary for enforcing or " securing this right, sustains the above defence against the " ordinary action at the instance of Wright's trustees, and the " above reason of suspension of their charge, and decerns, " reserving consideration of all other points in the cause, " expenses included, until this interlocutor shall become final, or " shall be altered."

" *Note.* — The Lord Ordinary is of opinion, that since Mr Hamilton " offers to account for the price paid for the assignation, and claims " the benefit of it, he is entitled to be settled with on this footing; " and that the chargers cannot insist on securing the benefit of the " transaction for their constituent's estate.

" Mr Wright was not under any legal disqualification from acquir- " ing; but, being trustee for the suspender, and bound as such to " enlarge his and the creditor's funds, he could only acquire for behoof " of the trust-estate. This is the general principle of the law of " Scotland, not merely in the case of direct trustees, but of guardians, " executors, &c. and of all those who are in the situation of being " trusted for behoof of another, and it is a principle which the security " of trustees requires to be strictly enforced. It may not be the duty " of a trustee to purchase or compound debts due by the truster;

" but, if he shall do so, and yet be allowed to appropriate the benefit " to himself, it is impossible not to see the power which this gives " him, and the danger to which the estate is exposed, especially con- " sidering the superior knowledge of the affairs which this office " implies. The chargers argue that this is *jus tertii* to the truster; " and that, provided the creditors are not hurt, he cannot object. " But the trustee is bound to promote the interest of the truster as " well as of the creditors. Mr Wright's duties were not at an end as " soon as he had seen the creditors paid. He was bound to make " over the largest possible reversion to Mr Hamilton; but instead of " doing so, he claims it wholly or partly to himself, as the benefit " arising from a voluntary and unauthorized purchase of a debt due " by the estate. The law presumes, that all the transactions of a " trustee in relation to the trust, are made for behoof of the estate; " and whatever may be the case where benefit arises to a trustee in- " voluntarily, as by succession to a debt, or otherwise, the law requires " every trustee to purify himself by communicating any advantages " for which he transacts, or which accrues from his transactions, to " his constituents.

" The more common case to which this rule is required to be " applied, is the case of a trustee taking advantage of his position to " deal directly with a party to the trust, whether truster or creditor, " and to make a direct acquisition of part of the trust-funds. The " case which has now occurred of his purchasing a claim by a stranger " against the estate, is more rare. But the Lord Ordinary can dis- " cover no ground for hesitation as to extending the principle to this " last case. For the dangers of exposing trust-estates to such opera- " tions by trustees for their own behoof, are the same; and the trustee " who acquires right to lessen the reversion, by taking benefit out of " it for himself, does in reality appropriate the trust-fund. Accord- " ingly, the principle that the trustee shall communicate all such " advantages, has been often acted upon. It is laid down expressly " by Erskine in reference to guardians, (i. 7, 19,) and, besides, the " cases of Maxwell, (15th November, 1667, Dict. 16166,) and of Rae, " (21st February, 1673, Dict. p. 16170,) which were referred to at " the debate, the more recent ones of Wright, (24th June, 1712, Dict.

" 16193) and of Crawford (6th March, 1767, Dict. 16208) all proceed " upon this rule."

The respondents reclaimed against this interlocutor, and on the 26th of February, 1839, the First Division of the Court pronounced this interlocutor: — " The Lords having considered " this reclaiming note, and heard counsel for the parties, recal " the interlocutor reclaimed against, repel the fifth plea in law, " and *quoad ultra*, remit to the Lord Ordinary, all questions of " expenses being reserved."

On the cause returning to the Lord Ordinary, he, on the 5th June, 1839, pronounced this interlocutor: — " The Lord Ordi- " nary having heard counsel for the parties, and considered the " conjoined processes, in the suspension repels the reasons of " suspension, finds the letters orderly proceeded, and decerns: " In the ordinary action repels the defences, and decerns in " terms of the libel, finds the chargers and pursuers entitled to " expenses, appoints an account thereof to be given in, and when " lodged remits the same to the auditor to tax and to report."

The appellant then reclaimed, and on the 28th November, 1839, the Court pronounced this interlocutor: — " The Lords " having advised the reclaiming note, and heard counsel for the " parties, adhere to the interlocutor reclaimed against, and refuse " the desire of the note: Find additional expenses due, appoint " an account thereof to be given in, and when lodged remit the " same to the auditor to tax and to report."

The appeal was against the interlocutors of the 26th February, 5th June, and 28th November, 1839.

Mr Pemberton and Mr Anderson for the appellant. — The trust under the deed of 1815 was for the appellant, in preference to his creditors, to pay him the annuity of L.600, before the

creditors received any thing, so that he has a material interest, independent of his right to any surplus, to control the actings of the trustee. By the law of Scotland, equally with the law of England, a trustee cannot deal with the trust-estate for his individual benefit; he may purchase, no doubt, but the purchase will enure to the *cestui que* trust. *Ersk.* I. 7. 19; Maxwell, *Mor.* 16166; Rae, *Mor.* 16170; Wright, *Mor.* 16193; Crawford, *Mor.* 16208; York Buildings Company *v.* M'Kenzie, *Mor.* 16212; Wilson, *Mor.* 16376; Jeffrey *v.* Aiken, 4 *S.* and *D.* 722. The purchase, therefore, of the bond of annuity by Wright was for the benefit of the appellant and his creditors, and all that the respondents can be entitled to is the price which he paid, with interest.

Mr Stuart and Mr Gordon for respondents. — The bond of annuity was not in existence at the date of the trust-deed, and as the trust was for the benefit of those only who were creditors at its date, the annuity was wholly without the scope of the trust. The obligation, therefore, in the deed of accession, not to do diligence, could have no effect upon the bond of annuity, which had not then any existence, and at its date formed the creation of an entirely new debt. No doubt a trustee cannot deal so as to prejudice the rights of his *cestui que* trusts; he cannot as trustee sell, and as an individual become purchaser, because his duty as vendor is opposed to his interest as purchaser; but nothing of the kind happened here, and it is difficult to see how the rights of the creditors were in any way affected by the purchase. The annuity not being claimable under the trust-deed, the trust-estate was no way concerned in the price which might be paid for it.

But the doctrine in regard to the dealing of trustees with the trust-estate is open to many qualifications. If the transaction be open and fair, and known to the *cestui que* trust, and he lie

by and allow it to be completed, he will not be allowed to challenge it at a subsequent stage, Gregory *v.* Gregory, *Jac.* 631 Randall *v.* Errington, 10 *Ves.* 422. The purchase, in this case, was quite open and known to Hamilton, and was far from being a very advantageous one for the purchaser. The price he paid in 1822 was the same as had been given in 1817, although the annuity had decreased in value by the time which had elapsed between these two periods.

[*Lord Chancellor.* — Wright, while trustee, purchased a claim against the trust-estate, which has turned out an advantageous purchase, and the question is, whether he shall have that advantage or the estate ?]

The claim was not against the estate, but against Hamilton personally, and by the purchase of it Wright could not in any way prejudice the creditors. Accordingly, no creditor complains; but Bowes, on whose life the annuity was payable, having lived longer than was expected, the transaction turns out profitable, and in 1831, Hamilton, seeing this, wishes to redeem on the same terms on which he might have done this in 1822. Can that be permitted ?

[*Lord Brougham.* — Could you have sued upon the bond in 1822 ?]

Unquestionably, and so also could Hamilton have then resisted payment.

[*Lord Chancellor.* — Did not the bond put you in competition with the creditors ? You had a power to borrow money, and make Hamilton liable, or the estates. If the trustee had exercised this power, would he not have come in competition with the creditors ?

Lord Campbell. — Then Hamilton would be less able to pay your bond.

Lord Chancellor. — The trustee was interested not to exercise the power in the deed, because it would raise up the creditors in competition with him.

Lord Brougham. — He has created that interest during the subsistence of the trust.]

There is no case which has pushed the doctrine so far as to make such an interest objectionable, but, at all events, that would be a question proper for the creditors to try; but no creditor complains, and even as between them no case has carried the doctrine so far as is suggested by the question. The trustee was not necessarily in conflict with the creditors, his interest lay with theirs, to clear the surplus, and make it available for his purchase. The only object of the deed of accession was to bind the parties not to impeach the trust-deed, and the mode of arrangement contemplated by it; but this could only be as to claims which had existence at that time.

[*Lord Chancellor.* — Suppose Wright had lent Hamilton L.1000 after the date of the trust-deed, could he have sued for it? Try it that way.]

We apprehend he could. There was nothing in the trust-deed, or deed of accession, to tie up the hands of the parties from all farther transaction. Hamilton, on the contrary, was to carry on his practice, and eventually he became agent under the trust. His annuity under the trust, and the profits of his practice, was estate, which it was perfectly competent for him to bind and transact in regard to.

Mr Pemberton, in reply. — The duty of Wright, under the trust, was to realize the whole estate, or whatever he could acquire; his interest, under the purchase, was to abstract what he had so realized, for his own payment. His interest was thus in direct competition with his duty. He had opportunities of knowing the appellant's means, and of taking advantage of his necessities, which, if he had not been trustee, he would not have possessed. Under the trust he was trustee to pay the appellant the annuity of L.600, preferably to any of the creditors, but the claim under the annuity bond was not subject to any postponement; it was no way affected by the terms of the trust. The

purchase of the annuity, therefore, was to give the trustee an interest not to perform his trust, but to abstract the fund for his own payment, and in preference over all the *cestui que* trusts, and thus to deprive him of that unbiassed independent situation in which alone the law can contemplate an impartial and faithful exercise of his duty. Moreover, the purchase subverted the whole plan of arrangement with the creditors, for under the terms of the trust-deed, no property could be acquired by the appellant which would not have been applicable to the trusts of that deed.

[*Lord Chancellor.* — The effect of your argument is, that no creditor could give him pecuniary assistance.]

Not on any security until payment of the previous debts. The creditors had stipulated, that nothing should be done to interfere with the trust.

LORD BROUGHAM. — My Lords, the appellant, in the year 1815, executed a general trust-disposition of all his estate for the benefit of his creditors. In 1818, Thomas Wright became a trustee under that deed by a clause of devolution, and, in the intermediate time, viz. in 1817, the appellant had become surety, or cautioner, for Mr Bowes, now Earl of Strathmore, in a bond for the payment of an annuity during his life, for L.221, 13s. 4d, the price of which was L.2000, advanced by Thomas Telford to Mr Bowes.

The trustee, Thomas Wright, in 1822, obtained an assignment of this bond for a valuable consideration, and the main question, indeed the only question, and upon which the whole case now turns, is the right which he, as trustee, had to purchase for his own benefit this annuity payable by the appellant. The respondents, as representing Thomas Wright deceased, whose trustees they were, having in vain attempted to obtain payment from the principal debtor, Lord Strathmore, gave a charge against the appellant, of which he brought a suspension. An

ordinary action was then brought against him by the respondents for constitution of the debt, and payment of the arrears of the annuity, to which he urged, in defence, the same matters which formed the ground of his suspension. He also sought to set the bond aside in an action of reduction, but chiefly on the ground of an informality in the execution and testing clause. In this he failed, both below, and when the matter was brought by appeal before your Lordships. But the other question between the parties cannot be considered as concluded by that decision and its affirmance here. For the interlocutor which repelled the reasons of reduction, and assoilzied the defenders, (the present respondents,) also contained an order to hear counsel farther on the suspension and ordinary action, all the three suits having been conjoined. The appellant, therefore, had never been heard, and the Court, whether below or here, had never decided upon any thing but the informal execution of the bond, and no defence of *res judicata* can be allowed to bar his claim upon the other ground.*

In the suspension and action, the Lord Ordinary having decided, that the trustee, Thomas Wright, could not purchase the annuity for his own benefit, with other consequential findings, amounting in substance to giving the appellant the benefit of the purchase upon paying the price given by Thomas Wright, with interest, the Lords of the First Division altered this interlocutor so far as to repel the appellant's fifth plea in law, that is, to find that Thomas Wright had validly purchased the annuity; and they remitted to the Lord Ordinary to proceed farther, who therefore, and on the foot of that finding as to the fifth plea, pronounced the consequential interlocutor appealed from, which was adhered to by the Lords of the First Division: their Lordships having previously refused leave to appeal from their interlocutor, altering the Lord Ordinary's former interlocutor.

* This point was not argued at the Bar.

Thus the question turns upon the trustee's right to purchase the annuity, and that depends upon the nature of the trust.

Now the uses declared in the trust-deed were these: — *First*, To pay the expenses attending the trust, and the burdens affecting the real estate. *Secondly*, To pay the appellant an alimentary annuity of L.600, by four quarterly payments. *Thirdly*, To pay the appellant's debts equally according to their nature and preferences. *Lastly*, To pay over the surplus to the appellant, for whose reversion he was thus a trustee, as much as for his annuity, and as much as for the creditors. It may be added, that before Thomas Wright became trustee, an arrangement had been made, by which the appellant was employed to manage the law business of the trust. Consequently his claim for his expenses, as such, became the very first of all the debts to be discharged by the trustees.

It is material to add, that the deed contains a clause expressly empowering the trustee not only to sell and burden the whole estate, and to sue and compound debts, but to bind the appellant, his heirs and successors, in payment of such sums as may be borrowed, and of the interest that may become due therefrom, and the penalties for non-payment of the same.

Thomas Wright, who afterwards became trustee, and who was a principal creditor, joined in executing a deed of accession to the trust-deed, and bound himself, with the others, not to commence any suit, or sue out any execution against either the person or estate of the appellant, during the subsistence of the trust. When he afterwards accepted the trust, it became his duty, as trustee, to do nothing for the impairing or destruction of the trust, nor to place himself in a position which put his interest in conflict with the interests of the trust.

It seems quite impossible to deny, that when he took an assignment to the annuity, that is, to a bond in which the appellant was an obligor, his interest as assignee became opposed

to the interests of the *cestui que* trusts. The appellant was one of these *cestui que* trusts; he was even the first named. His annuity was preferable to the claim of any creditor. But it was not preferable to the debt which the trustee purchased by the assignment.

In another respect, and still more materially for the present purpose, the appellant was a *cestui que* trust. Thomas Wright was trustee for him of the reversion. It was therefore his duty to make that as large as possible after payment of the creditors. The purchase has been contended to give the trustee an interest in lessening this reversion, and the Lord Ordinary takes this view of it. But one interest it clearly gives the trustee, and an interest in direct conflict with that of the creditors. He had a power to bind the appellant personally and heritably, for the benefit of the trust. But the annuity bond which he purchased made it his interest not to bind the appellant in any way that could give a preference over his obligation in that bond, and give any other person a priority over himself, as purchaser of the annuity bond. The annuity was a debt contracted after the trust-deed, and in respect of which there was a covenant not to sue or to take execution against both person and estate. Surely it cannot be doubted, that a creditor, thus unfettered by the provisions of the deed, and enabled, in a great measure, to defeat its objects, stands in a position adverse to the creditors under the deed. But if so, the trustee under the deed had no right to place himself in that position, and could not do so for his own behoof.

There cannot be a greater mistake than to suppose, as seems to have been done below, that a trustee is only prevented from doing things which bring an actual loss upon the estate under his administration. It is quite enough that the thing which he does has a tendency to injure the trust, a tendency to interfere with his duty. The trustee cannot purchase the trust-estate, though at a sale, without leave of the Court, and yet he might, pro-

bably would, if at an auction, give as good a price as any one else. So he cannot purchase outstanding debts. Glen *v.* Pearson, *Fac. Coll.* March 6, 1817.

Then if it be said that the creditors are not actually injured, or that the fund, either to pay them, or to hand over by way of reversion to the maker of the trust-deed, cannot be lessened by such purchases, inasmuch as the debts must be satisfied whether payment is made to the original creditor, or to the trustee who takes an assignment, the answer is, that he shall not avail himself of rights so purchased by him, although these rights might have come in competition with the trust had he not purchased. And so it has been decided, Wright, *Mor.* 16193; Anderson, 1740, Nov. 21, *Elchies.*

Nor is it only on account of the conflict between his interest and his duty to the trust that such transactions are forbidden. The knowledge which he acquires as trustee is of itself a sufficient ground of disqualification, and of requiring that such knowledge be not only not used to the detriment of the trust, but be not used for his own benefit, because it may, by possibility, injure the trust, rather than because it may give him an undue advantage over others.

In *ex parte* Lacey, 6 *Ves.* 625, and *ex parte* Jones, 8 *Ves.* 328, Lord Eldon denied the doctrine supposed to have been delivered by Lord Loughborough in Whichcote *v.* Lawrence, 3 *Ves.* 740, that a trustee must make some advantage of his purchase before it can be set aside; because, in ninety-nine cases out of every hundred, he held that it might be impossible for the Court to examine into this matter. So the conduct of the trustee not being blameable in the purchase, is nothing to the purpose; for the Court must act, his Lordship said, upon the general principle, and unless the policy of the law make it impossible for the trustees to do any thing for their own benefit, it is impossible for the Court to see in what cases the transaction is morally right, and in what cases it is not.

The ordinary case has been, where the question arose upon a purchase of debts owing at the time of the trust being created. But the purchase of a debt subsequently incurred, if that be relied on as taking the present case out of the general rule, gives the trustee, whose duty it is to keep the residue as large as possible for the debtor, an interest in cutting it down, at least, by the amount of his own debt. It also gives him an interest in keeping as large a fund as possible free from the operation of debts prior to his own, in order that his own may be the more surely and speedily satisfied, and this is an interest directly in conflict with his duty under the trust to the prior creditors.

The interlocutors appealed from must be reversed so far as to restore the interlocutor of the Lord Ordinary, first altered by the Lords of the First Division; and it will not be necessary to reverse or to affirm the interlocutor of the 5th March, 1833, and 24th May, 1839, the first and third appealed from.

Lord Campbell. — My Lords, it is quite enough for me to say, that I entirely concur in the view taken of this subject by my noble and learned friend. It is quite clear, that Thomas Wright, as trustee, could not purchase this bond for his own benefit, and that his representatives could not sue upon it for the benefit of his estate; and that the obligor, the present appellant, having offered to pay, or having paid back all that was paid by Thomas Wright, the purchase money, with interest, the respondents have no farther claim.

Lord Brougham. — My noble and learned friend, the Lord Chancellor, who is not now present, who heard this cause with my noble and learned friend and myself, has no doubt whatever upon the question, and authorized me, this morning, to state as much to your Lordships. There having been no difference of opinion on the part of the Judges of the Inner House, with respect to the judgment, we thought, that before reversing this judgment, we should take time fully to consider it.

Mr Anderson. — Will your Lordships permit me to direct

your attention to the terms of the remit? Lord Cockburn reserved the question of costs by his interlocutor. The remit ought to embrace the costs incurred subsequently to the Lord Ordinary's interlocutor.

Lord Brougham. — Certainly, that must be taken into consideration; but we do not alter the interlocutors, the first and third appealed from. It is quite unnecessary to alter those. For instance, it would be absurd to alter the interlocutor refusing leave to appeal.

Mr Gordon. — May I be permitted to bring under your Lordships' consideration that there were certain points discussed after that fifth plea was repelled by the interlocutor of the Inner House, which is now reversed. No opinion appears to have been given by your Lordships upon those points.

Lord Brougham. — No, certainly not.

Mr Gordon. — Then it will be understood, in reversing the interlocutors which repel the fifth plea in law, your Lordships pronounce no opinion upon those points?

Lord Brougham. — It is to be understood exactly as I have stated, that the interlocutors, with the exceptions I have mentioned, are all reversed.

Ordered and Adjudged, That the interlocutors of the Lords of Session of the First Division, of the 26th of February, and 24th of May, 1839, the said interlocutor of the Lord Ordinary of the 5th of June, 1839, and the said interlocutor of the said Lords of Session of the 28th of November, 1839, complained of in the appeal, be reversed, in so far as the same are inconsistent with, or in any way repugnant to, the interlocutor of the Lord (Cockburn) Ordinary, of date the 30th of November, 1838, recited in the appeal: And it is farther Ordered, That the cause be remitted back to the Court of Session in Scotland, with instructions to adhere to the said interlocutor of the Lord (Cockburn) Ordinary, of date the 30th of November, 1838; and to

find the appellant entitled to his expenses in the said cause in the said Court of Session, as well subsequent as previous to the date of the last mentioned interlocutor; and otherwise to proceed in the said cause as shall be just and consistent with this judgment.

DEANS & DUNLOP — RICHARDSON & CONNELL, Agents.