1858.
February 19*th*,
22*nd*, 23*rd*, 26*th*.

EDMOND, ... APPELLANT.
GORDON ET AL., ... RESPONDENTS (*a*).

Bankruptcy—Sequestration.—Circumstances under which it was held, that the trustee was not entitled to demand a charter from the superior, except subject to a prior right in favour of a third party constituted by bond and disposition in security from the bankrupt, though not followed by infeftment.

Held, that the registration of the bond and disposition in security was equivalent to the most formal intimation.

Per Lord Cranworth: Where the right to an estate is personal in the bankrupt, it passes to the trustee *tantum et tale.*

Jus ad rem and *jus crediti.* — Observations by Lord Cranworth and Lord Wensleydale as to the distinction between these rights as understood in Scotch law.

THE Appellant brought his action in the Court of Session to compel the Magistrates of Aberdeen to execute in his favour a feudal charter of certain lands lying within the liberties of the burgh, to be holden by him under them as the superiors thereof, in free blench, fee, and heritage for ever; but upon trust for the sequestrated or bankrupt estate in the pleadings mentioned.

The Magistrates did not think proper to grant the charter without the sanction of the Court. They, however, did not resist the proceeding; and decree was about to pass against them in absence, when the Respondents intervened, and craved leave to sist themselves as Defenders to the action. Permission was granted them, and, in the language of Scotch law, they "compeared" accordingly.

(*a*) This Case is very fully reported as decided in the Court of Session. See 18 Sec. Ser. 47.

The Respondents or Compearers put their case thus:—They stated—1. That on the 16th December 1777 a feu charter of the lands in question had been granted by the burgh of Aberdeen in favour of one Robert Dyce, but that no valid infeftment was expede in his favour.

2. That by disposition and settlement of the 18th June 1796, the said Robert Dyce conveyed the said lands to his sons William and Andrew; and, by disposition of 27th December 1802, the lands in question were conveyed by the said William, for himself and as attorney for his brother, to Alexander Hector.

3. That on the 7th September 1804 the said Alexander Hector, in consideration of the sum of 336*l.* paid by him, obtained from the burgh of Aberdeen a charter of resignation and *novodamus* of the said lands, by which the holding was altered from feu to blench. When this blench charter was granted the feu charter of 1777 had not been feudalized.

4. That no valid infeftment was expede by the said Alexander Hector on the said blench charter of *novodamus*, but he was succeeded by his only child Margaret, who, on the 30th August 1823, expede a general service to her father, and was on the 16th December 1845, infeft on the unexecuted precept contained in the said blench charter of *novodamus*.

5. That on the 11th November 1846 the said Margaret conveyed the said lands to Messrs. Murray and M'Combie, who, on the 16th November 1849, conveyed them to the bankrupt; and on the same 16th November 1849 infeftment passed in his favour.

6. That the bankrupt on the 19th November 1849, after being infeft, granted a bond for 2,500*l.* to the Respondents as trustees of his marriage contract; and this bond was duly recorded in the General Register of Sasines.

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7. That the said bond was sought to be reduced by the Appellant in an action of reduction, now in dependence, on the ground, *inter alia*, that the feu charter of 1777 was not sopited or extinguished by the charter of resignation and *novodamus* of 1804.

8. That in another action the Appellant was seeking to obtain a proving of the tenor of the feu contract of 1777, on the ground that it is illegible; and to this action the Respondents were made Defenders, and lodged defences.

9. That the said feu charter of 1777 was validly granted by the burgh of Aberdeen; that it was never validly feudalized, and was sopited and extinguished by the blench charter of *novodamus* and resignation of 1804, which was also validly granted by the said burgh.

10. That the present action was grounded on the allegation that the feu charter of 1777, and also the blench charter of resignation and *novodamus* of 1804, were not validly granted; but that although ineffectual to constitute a valid feudal title to the lands, they constitute a valid obligation upon the burgh to grant a valid charter in favour of any party standing in the right of the disponee under the charter of 1777, and the disponee under the charter of 1804.

11. That, assuming that the said charters were invalid, and that the town of Aberdeen were still liable to grant a valid charter, the right to demand such charter was in the Respondents, in virtue of the heritable bond and infeftment aforesaid.

The Respondents upon these averments insisted that the charter of resignation and *novodamus* was a valid charter, and that therefore they had an interest to object to any other charter being granted, or to any other infeftment being taken in the said lands; and they further urged that the recorded infeftment was

equivalent to intimation to the Magistrates of their claim; and that therefore the right to demand a new charter was vested in them, and not in the Appellants.

The Appellants, on the other hand, maintained the following propositions in the numerical order of the Respondents' points. Thus :—

1. Admitted, with the explanation, that the feu charter here referred to was granted by a party who had no feudal title to the lands therein contained.

2. Admitted.

3. Admitted that a deed bearing to be a charter of resignation and *novodamus* was granted of the date here mentioned; that the said deed, besides being null and void on other grounds, as a feudal grant of the lands therein contained, was, moreover, granted by a party having no valid feudal title as superior of the said lands.

4. Admitted to the effect only that the instruments mentioned in this article were expede.

5. Admitted, under reference to the deeds.

6. Admitted to the effect only that the bond here mentioned was expede.

7. Admitted that the Appellant is seeking to reduce the said bond in an action for that purpose; with the explanation, that it has been defended by the Respondents, on the ground that they have a valid feudal title to the lands in question, in virtue of the pretended charter of resignation and *novodamus*.

8. Admitted, with the explanation, that the action referred to in this article was brought for the purpose of proving the tenor of the precept of sasine contained in the charter of 1777, which is the only part of said deed which is illegible; and that the action has been defended by the Respondents on the grounds maintained by them in the said process of reduction.

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9. Admitted, but only to this effect, that the charter of 1777 was not valid as a feudal grant or warrant for infeftment, and that it was not feudalized.

10. Admitted, under reference to the summons for its terms.

11. Denied.

The Lord Ordinary *Benholme*, on the 20th July 1854, found that the Respondents' claim was preferable to that of the Appellant "in respect of their heritable bond, which imported a conveyance of the bankrupt's personal right, and which must be held as sufficiently intimated by registration in the general register." The learned Judge therefore decided that "the Magistrates were not bound to grant the charter concluded for in the summons, except under the burden of the Respondents' preferable right."

To this decision the Inner House (First Division), on the 16th November 1855, adhered. Hence the Appeal.

The *Attorney-General* (*a*) and Mr. *Anderson*, for the Appellant, contended mainly that the Appellant's right constituted a *jus ad rem*, and was of a higher character than that of the Respondents, which they averred was but a *jus crediti*. They further insisted that the Respondents' right was defective for want of due intimation.

Mr. *Rolt* and Mr. *Ross*, for the Respondents, urged that although they had not a conveyance of the land, yet they were entitled to the charter, and the Appellant could only obtain one subject to their claim,—which was sufficiently intimated by the registration.

The arguments on both sides, as well as the authorities, are very fully gone into by the Peers in delivering the following opinions.

(*a*) Sir R. Bethell.

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Lord Cranworth's opinion.

Lord CRANWORTH (*a*).

My Lords, this case was argued at your Lordships' bar a few days since, the question being whether the Appellant, Edmond, who is trustee under the sequestration of a gentleman of the name of Nicol, or the Respondents, Gordon and another, who are bondholders, claiming under a bond executed by Nicol before he became bankrupt, have the preferable right to call upon the magistrates of Aberdeen for a charter under which to obtain infeftment.

My Lords, the claim of the Appellant is founded upon the Bankrupt Act of Scotland, the 2nd and 3rd Victoria, chapter 41, which was in force at the time when these transactions arose. By the 79th section of that Act, it was enacted that the whole heritable estates belonging to the bankrupt should, by virtue of the Act, be transferred to and vested in the trustee absolutely, subject always to such preferable securities as existed at the date of the sequestration.

The Appellant's claim is founded upon that statute, because he says the right which he seeks to assert, and in respect of which he claims to have a charter from the magistrates of Aberdeen, was a heritable estate vested in the bankrupt, and he claims therefore in respect of it to be entitled to a charter.

The Respondents are bondholders, claiming under a bond executed by Nicol the year before he became bankrupt, which bond was framed according to the provisions of the Statute passed in the year 1847, the 10th and 11th of the Queen, chapter 50, section 1 (*b*). By that section it was enacted, that it should be lawful for any person entitled to grant bond and

(*a*) His Lordship had resigned the Great Seal between the argument and the judgment, and was succeeded as Chancellor by Lord Chelmsford.

(*b*) "An Act to facilitate the Constitution and Transmission of Heritable Securities in Scotland." The 1st section provides that

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disposition in security in favour of his creditors, to grant the same in the form that is given in the schedule. Then it says,—"The registration of such bond and disposition in security in the General Register of Sasines, or particular Register of Sasines, or Burgh Register of Sasines, as the tenure of the lands embraced in the security may require, shall be as effectual and operative to all intents and purposes as if such sasine, or resignation and sasine, had been duly made, accepted, and given thereon in favour of the original creditor, and an instrument of sasine, or of resignation and sāsine, had been duly recorded of the date of the registration of the said bond and disposition in security."

Distinction between *jus ad rem* and *jus crediti*. See *infrà*, p. 129.

The first question that was argued was this,—Was the right of Nicol, the bankrupt, in the lands, and of the bondholders in the assignation in the possession under him in respect to the security for their bond, a *jus ad rem* or a *jus crediti?* I must confess that upon this subject I think there is a great deal of doubt and obscurity, from the want of anything definitely explaining the distinction between *jus ad rem* and *jus crediti*, because I think I find that these words have been used in many cases interchangeably, without any clear distinction of the one from the other; but there may be this practical distinction, that the *jus ad rem* is a right which the person possessing it may make a complete right by his own act, or by some act which he may compel another, without a suit, to perform; whereas a *jus crediti* may be defined to be a right which the holder of it cannot make available, if it is resisted, without a suit, to compel persons to do something else in order to make

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bonds and dispositions in security may be registered, and thereupon have the same effect as if seisin had followed.

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the right perfect. Either, therefore, I think there is no distinction between the two things, or if there is a distinction, it is within the latter description, that of *jus crediti*, that this case comes; and neither Nicol nor the bondholders could have obtained a valid feudal infeftment under any existing charter.

I do not go into the circumstances of the case, which has been so recently before your Lordships that the facts are well known; all that I need remark is, that Nicol was entitled to this land by a title commencing in the year 1777, but it had never been perfected because there was a defect in the original charter. The *tenendas* clause was wrong, and consequently, though there had been enjoyment of this land for at least three-quarters of a century, there had been in truth no valid infeftment, so as to give to the party in possession of the land what in England we should call the legal estate. It is clear that there was no charter which entitled the party to make his own title good by obtaining infeftment, and consequently, in that sense, I think his title was a *jus crediti*, and not a *jus ad rem*, and a new precept of sasine was necessary; and this, if the demand of it were resisted, could only be obtained by an adjudication in implement.

Now, that being the state of things, the question is, Who had the preferable right, whether the bondholders or the trustee, to have a charter granted to them, so as to give them legal sasine of the land?

The trustee had a right to call for a charter, but then that right was a right subject to the prior right which Nicol, the bankrupt, had given to the Respondents. It was, however, argued that their right was invalid for want of intimation, and we were referred to a passage in Erskine's Institutes (*a*) on the subject of

(*a*) B. 3, t. 5, s. 3.

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intimation, to the following effect:—"As debtors, who are not presumed to know that their debt has been made over to a third party, cannot, by the conveyance, be put in *malâ fide* to pay to the original creditor, it was thought necessary that the assignation should be intimated or notified to the debtor, to let him know that he must make payment, not to the first creditor, but to his assignee. But though this seems to have given the first rise to intimations, it is certain that, by inveterate custom, intimation made under form of instrument by the assignee or his procurator to the debtor, or at least some notification which the law accounts equivalent to it, is an essential requisite, not only for interpelling the debtor from making payment to his first creditor, but for completing the conveyance."

That being the doctrine laid down by Erskine, and followed by Bell in his Commentaries, I do not presume to question the propriety of that law; but I must remark that Erskine in the passage which I have quoted, and Bell in his Commentaries, are referring, when they speak of *jus crediti*, to the *jus crediti* properly so called, and if the question is not concluded (and I confess I hardly think that the question has ever been concluded by any ultimate decision upon the point), it seems extremely doubtful whether the principle that requires an intimation in the case of an assignment of debt, properly so called, is applicable to such a case as the present. I do not proceed upon that doctrine; the Judges below all seem to assume that that is the law of Scotland. The law is carried to a great extent when it is said that intimation is necessary to make an assignment valid, because the only principle is that which Erskine adverts to, namely, that debtors are not to be put, as the Scotch say, in *malâ fide*, if they had never

had notice given to them of the assignation. But taking that to be the law with regard to debts, it is extremely difficult to understand upon what principle it should be applicable to a *jus crediti* of this sort, which is only technically a *jus crediti*. The parties are in possession of the land, and they have a right to call for something which is to perfect their title; that is a very different thing, indeed, from a mere debt.

However, I shall assume that intimation is necessary; but if it be necessary, I concur in opinion with all the Judges in the Court below in thinking that there was a sufficient intimation in the present case, and in my opinion it was the very best intimation that, considering the subject matter, could have been made.

Nicol was for a short time, and those under whom he derived his title had been for more than three-quarters of a century, in possession of this land, although the title was defective. But all the cases show that you may deal with this defective title, and that it may be made good afterwards. In the meantime parties are in the habit of granting bonds, making assignations, and executing trust deeds, just as if they had got the feudal title; then how is it to be presumed that they would deal with this defective title? Why by making assignments, and by putting their deeds upon the register, just as if they had been owners. You would look to the register, in order to see in what way persons had been dealing with interests of this nature; therefore, in my opinion, that was a most reasonable mode of giving intimation in a case like the present. The bond, your Lordships observe, by the particular provisions of the Statute when registered, is to have the same effect as if all the old forms had been gone through, and as if an instrument of sasine had been actually recorded. Now, if the whole

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of the old forms had been gone through, there would have been an actual going upon the land; the parties there, *coram testibus*, delivering symbolically actual possession. If that had been done there would have been a notorious intimation, an intimation which, whether rightly or wrongly, we in England cannot complain of as being an absurd mode of giving notice of the act, because it is that particular act *en pais*, as we call it on this side of the Tweed, which in ancient times was presumed to be notice to all the world; it was in truth the ordinary mode of dealing with land. But the cases which have been referred to, of *Paul* v. *Boyd's Trustees* (*a*), and of *Giles* v. *Lindsay* (*b*), fully warrant the conclusion at which the Judges arrived in this case, which appears to me in conformity with principle.

Lord Cranworth's opinion that in the case of a personal right to land, the trustee under a sequestration takes the interest of the bankrupt *tantum et tale*. This Lord Brougham's opinion. See *infrà*, p 132.

Upon these grounds, I am prepared to move your Lordships to affirm these interlocutors; but before I do so I must take the liberty of expressing my opinion that I am very far from satisfied that the case might not have been decided upon much more general grounds. If it had been necessary to consider that question I would have done so, but as I come to a conclusion in agreement with the Judges in the Court below upon the points upon which they have put it, I do not think it necessary to canvas a point which may be open to much doubt and difficulty, namely, whether a trustee does not take an interest of this sort *tantum et tale* as the bankrupt held it. I am aware that the law of Scotland differs from the law of England with respect to defects in feudal sasine, that a trustee under a sequestration does not take *tantum et tale*; that has been so decided, and probably upon good grounds. I do not inquire into

(*a*) 22nd May 1835, 13 Shaw, 818; 1 Ross's Leading Cases, 511.

(*b*) 27th February 1814, 6 Dun. 817.

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that; it was so decided by the Court of Session, and I think affirmed by your Lordships' House. But with respect to an equitable right of this nature, namely, a personal right to land, upon what principle is a trustee under sequestration not to take that just as the bankrupt held it? It is a mere personal right in the bankrupt, and so I should have thought it would be exactly the same personal right in the trustee under sequestration. If that be so, it puts an end to all the other questions mooted in this case, and I must confess that the case of *Russell* v. *McDowall* (*a*), which is reported in that very valuable collection, Mr. Ross's Leading Cases, page 505, seems to me to show that the authorities very strongly point to the correctness of that view which I venture respectfully to suggest to your Lordships, though it is not the ground upon which I rest in this case.

Upon the preceding ground which I have stated, I suggest to your Lordships that this judgment ought to be affirmed, and consequently I move accordingly.

Lord Wensleydale's opinion.

Lord WENSLEYDALE:

My Lords, I agree in the result at which my noble and learned friend who has just addressed you has arrived in this case, and in which I believe the noble and learned lord (*b*) who is now upon the woolsack also agrees. There is no disputed fact in this case, and the questions of law lie within a very narrow compass.

The Appellant claims as trustee under the sequestration of the bankrupt's estate, against the borough of Aberdeen, the execution and delivery of a valid and effectual charter of certain lands, by virtue of his per-

(*a*) 6th February 1823, 2 Shaw, 682. *See* 1 Ross's Leading Cases, 511.

(*b*) Lord Brougham.

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sonal right to those lands, arising from the transactions between the burgh and Robert Dyce, who was the original purchaser, under whom the bankrupt claims, or by virtue of the warrandices or conveyances in the original defective charter, granted to him by the borough on the sale of the property to him.

The Compearers, trustees of the marriage settlement of the bankrupt, insisted upon their right to compear, and objected to the grant of the charter absolutely. Lord *Rutherfurd*, the Lord Ordinary, allowed the right to compear, and his interlocutor not being reclaimed against, the only question is whether the case made by the Compearers, affords a legal ground, to prevent a decreet in favour of the charter altogether, or to cause it to be granted, subject to the burthen of the right claimed by the Compearers.

The *Lord Ordinary* (Lord Benholme) pronounced his interlocutor, finding that the magistrates of Aberdeen were not bound to grant the charter concluded for in the summons, except under the burthen of the Compearers' preferable right.

The Appellants having reclaimed against this Interlocutor to the First Division of the Court of Session, their Lordships, by a majority of three to one, adhered to the interlocutor reclaimed against. This interlocutor is the subject of this Appeal; and I agree with my noble and learned friends that the Interlocutors appealed against ought to be affirmed.

The personal right claimed by the Compearers, was under a heritable bond and disposition in security, executed by the bankrupt, and delivered to the trustees of his marriage settlement, on the 19th November 1849, before the date of the sequestration, which was the 18th November 1850. This bond was thereafter, and before the date of the sequestration, recorded in the General Register of Sasines; and

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no other intimation of the transaction was given to the magistrates of the burgh of Aberdeen, than the registration of the bond. There is no doubt, that if the title of the Pursuer had been feudalized, whilst that of the Compearers had remained personal, the Pursuer's title would have prevailed, according to the doctrine in the case of *Bell* v. *Gartshore and others* (*a*), cited in the course of the argument. That is a point perfectly settled in the law of Scotland. But the charter which is concluded for in this suit, has not been granted; the respective claims of the Pursuer and Compearers are still personal rights, and in competition, and the question is, which claim is the preferable one? a question which would have been precluded, if the Pursuer had already obtained a charter, and had his personal rights feudalized.

Distinction between *jus ad rem* and *jus crediti*. See *infrà*, p. 122.

In this state of the question, it is contended on behalf of the Appellant, first, that he had a right of a higher class than a mere *jus crediti*, viz., a *jus ad rem*; secondly, that if it was a mere *jus crediti*, it had never been assigned by the bankrupt to his trustees, the Compearers, the heritable bond not having that operation; thirdly, that if it had been assigned, the assignation was incomplete, by reason of the want of intimation to the magistrates, who stood in the relation of the persons under the obligation, or debtors.

It was answered on the part of the Compearers, that the bond and disposition in security amounted to an assignment of the personal right, and that if intimation was necessary, the registration in the General Register of Sasines was equipollent to an intimation, at the date of the registration.

The only one of these questions on which I have felt a doubt is the last. I think that whether this

(*a*) 22nd June 1737, Morr. 2848; 2 Ross's Ca. 410.

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personal right, which the bankrupt unquestionably had to the lands, is treated as a *jus ad rem* or as a *jus crediti*, by reason of the obligation entered into on behalf of the burgh, is immaterial. It is at all events clearly nothing but a personal right, and if, whatever may be its proper designation, it passed by the assignation contained in the heritable bond, it can make no difference in the case. If, indeed, it did pass under the bond, and was not a mere *jus crediti*, there would be room to contend that it did not require any intimation at all; and then the next and the more doubtful question would not arise.

The terms of the bond are very strong; they operate to convey "all right, title, and interest, claim of right, property, and possession, petitory or possessory, which I, my predecessors or authors, had, have, or can pretend to the lands and others above disponed, or any part thereof, and that in real security." No terms can be more comprehensive than these; and why should we deny them their proper effect according to the ordinary meaning of the words?

But it was argued that the bond was invalid, because the Statute 10th and 11th Victoria, chapter 50, applied only to the case of the owner of an estate already feudalized. But surely it would operate and be rendered valid, if the owner had at the date of the bond a personal right, and that right was afterwards feudalized. It would then operate *jure accretionis*. As the bond would be valid in that case, it must be that the words in the bond are sufficient to carry the personal right in the state in which it was, at the time of the execution of the instrument. The bond therefore operated as an assignation of the right which the obligeant then had.

The next question is, whether intimation was necessary. I apprehend that it was; and that it is a gene-

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ral rule that every assignation of a right in the nature a *jus crediti* requires an intimation. It is so laid down in the passage to which my noble and learned friend referred in Erskine's Institutes, Book 3, Title 5, Section 3, and in Bell's Principles, 1462, 63, 64, and 65.

I apprehend that the rule of English law that assignees of a bankrupt can claim only those effects to which the bankrupt was entitled, both at law and in equity, does not apply in all cases to sequestrations where the trustees are in the position of adjudgers, and are not subject to all the equities to which the bankrupt was. See the cases of *Stewart's Trustees* v. *Walker's Trustees* (*a*), (where the subject was fully considered; and Lord *Brougham*, on the part of the House of Lords, in reversing the judgment, entered largely into the law of Scotland upon this subject), and therefore the necessity of intimation is not dispensed with in the case of bankruptcy. It is not, however, necessary to discuss this point, because my opinion is that the effect of the registration of the bond under the 10th and 11th Victoria, chapter 50, is equipollent to an intimation, though I have felt some little doubt on that part of the case.

There is, however, no difference of opinion upon this point in the Court below. All the four Judges agree upon it, and their opinion is in conformity with that of Lord *Corehouse*, and Lord *Moncrieff*, in the prior cases of *Paul* v. *Boyd's Trustees*, and *Giles* v. *Lindsay*, and I do not see sufficient reason not to accede to the opinion of such eminent Judges.

The words of the Statute are very clear. Section 1 enacts "That the registration of such bond and disposition in security in the General Register of Sasines shall be as effectual and operative to all intents and purposes as if" (amongst other things) "sasine had

(*a*) 3 Ross's Leading Ca. 139.

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been duly made, accepted, and given thereon in favour of the original creditor, and an instrument of sasine duly recorded of the date of the registration." These words, therefore, give the registration all the same effect, to every intent and purpose, as if the ceremonies of giving sasine had been performed on the lands, and that would have constituted an act of possession and have been equipollent to a formal intimation.

It might be doubtful whether the real meaning of the clause was not to give registration the effect of a complete conveyance of the feudal title, where the obligant had one, just as if the ceremonies of sasine had actually been performed; but the words being general, "to all intents and purposes," they ought, *primâ facie*, to have been construed according to their ordinary sense, and there seems no reason to the contrary; and the opinion of the whole Court upon this question ought therefore to be supported.

The assignation, therefore, must be considered as intimated to the magistrates of the burgh, and was consequently thereby complete, and it is therefore a preferable security under the 79th section of 2nd and 3rd Victoria, chapter 41. It follows that the charter ought not to be granted except subject to the burthen of the Compearers' right, and the Interlocutors must be affirmed.

Lord Brougham's opinion.

Lord BROUGHAM:

My Lords, I entirely agree that these Interlocutors ought to be affirmed. I could have gone as far as my noble and learned friend who first addressed your Lordships, in being inclined to affirm these Interlocutors upon the more general grounds to which he adverted (*a*); but there can be no doubt whatever as to

(*a*) *Suprà*, p. 126.

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the ground upon which we affirm them. It is one upon which there was no difference of opinion among the learned Judges in the Court below, either in the Court itself among the four Judges of the First Division, or on the part of the *Lord Ordinary*. In affirming the Interlocutors upon this ground, I think there can be no doubt whatever. With respect to what both my noble and learned friends have said upon the main point that now arises as to whether the registration was a sufficient intimation, I do not see how it is possible, after reading the words of the Act, to have the least doubt that to all intents and purposes whatsoever this registration was a sufficient intimation.

My Lords, it must not be supposed from the reference which has been made by my noble and learned friend who first addressed you to the analogy of our livery of sasine as a public intimation of the transfer of lands, it must not be supposed in Scotland that we are at all giving our judgment upon English law upon the subject; on the contrary, this is merely used as an illustration and analogy, for it is upon Scotch law principles, and Scotch law cases, and Scotch law text writers, and upon the Statute, that we agree with the Judges of the Court below, and are disposed to affirm these Interlocutors. I therefore join with my noble and learned friends in advising your Lordships to dismiss this Appeal and to affirm the Interlocutors.

Interlocutors affirmed, and the Appeal dismissed, with Costs.

DODDS AND GREIG—RICHARDSON, LOCH, AND MCLAURIN.