applicable to cases of this description, when the jury found that the testator had capacity, but that the deed had been impetrated from him.

LORD ARDMILLAN—I concur. I think that a question of this sort must always be determined by the special circumstances of the case, and that no general rule can be laid down for the guidance of the Court. Upon the circumstances of this case I take the same view as your Lordship.

LORD MURE—I concur with all your Lordships. The question is entirely one of circumstances, and where there is no allegation that the trustees were concerned in the impetration of the deed, and where it is found that the testator was of sound disposing mind, I think the trustees are entitled to their expense out of the trust estate.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the notice of motion for the pursuers, No. 43 of process, to apply the verdict and find expenses due, and also on the notice of motion for the defenders, the trustees of the deceased James Watson, No. 44 of process, to allow the expenses incurred by the pursuers, and also those incurred by the said defenders, out of the trust estate—Apply the verdict found by the jury on the second issue in this cause; and in respect thereof, reduce, decern and declare in terms of the conclusions of the summons; find the pursuers entitled to the expenses incurred by them out of the trust estate of the said deceased James Watson, and find the said defenders also entitled to the expenses incurred by them out of the said trust-estate: Allow accounts of the said expenses to be given in, and remit the same, when lodged, to the Auditor to tax and to report."

Counsel for Pursuers—Balfour. Agent—David Dove, S.S.C,

Counsel for Defenders—Solicitor-General (Watson) and Trayner. Agent—Patrick S. Beveridge, S.S.C.

Friday, January 22.

SECOND DIVISION.

Lord Young, Ordinary.

ANDERSON (WATSON & CAMPBELL'S TR.) *v.* HAMILTON & CO.

Sequestration—Contract—Mora.

A contract was entered into between W. & Co., ironmasters, and H. and Co., shipbuilders, for delivery to H. & Co. of a certain quantity of iron to the specification of H. & Co. within a specified time. Before delivery of the whole iron had been made, W. and Co. became bankrupt. A trustee was appointed in the sequestration in March, and wrote then to H. & Co. refusing to cancel the contract. No further steps were taken until April, when the trustee wrote offering to fulfil the contract, which offer was refused. In an action at the instance of the trustee against H. & Co. for damage for breach of contract,—*held* that the offer to implement the contract was not timeously made, and the defenders were not bound by it.

The summons in this suit, at the instance of William Anderson, trustee on the sequestrated estate of Watson & Campbell, iron merchants, Glasgow, and Colin Campbell, sole partner, with consent and concurrence of certain commissioners on the said estates, against William Hamilton & Company, shipbuilders at Port-Glasgow, concluded for payment of £4000, with interest, in name of damages for breach of a contract with the pursuers.

The facts were as follows—On 4th December 1873 Watson & Campbell, iron merchants in Glasgow, addressed to the defenders a sale note in the following terms:—"Messrs Wm. Hamilton & Co., Port-Glasgow.—*Glasgow, 4th Dec.* 1873.—Dear Sirs,—We have to-day sold you say 2000 tons, more or less, as you may require, best ship plates and angle iron, to your specifications, at the sum of £13 p. ton overhead, also all filling and stanchion iron required for the above quantity of angles and plates, at the sum of £12, 10s. p. ton overhead, all delivered at your works, payable on the following conditions:—Payments to be made after the completion of each specification ('which we guarantee to be delivered *in seriatim*') on the first cash day of the second month following completion of said specifications.—Yours, &c., *pro* WATSON & CAMPBELL, J. C. STEEL. All iron to be delivered not later than six weeks after receipt of specification.—(Initid.) *pro* W. & C., J. C. S." On the same day, 4th December 1873, the defenders addressed to Watson & Campbell a letter in which they said:—"We have your sale note of even date for plate angles, &c., which we hereby accept."

The defenders sent in their first specification of iron on 24th February 1874, and they then specified about 80 tons; on 26th February they specified for about 11 tons; on 7th March for 4 cwt.; on 9th March for about 40 tons; and on 10th March they specified for about 9 tons, making the aggregate quantity specified for about 140 tons 4 cwt.

The pursuer stated that by the 13th of March they had delivered of the 80 tons ordered on 24th February 51 tons: of the 11 tons ordered on 26th February 4 tons; the whole 4 cwt. ordered on 11th March; and no part of the 49 tons ordered on the 9th and 10th March. The aggregate quantity thus delivered was 55 tons 4 cwts., leaving about 85 tons still to be delivered; and such ample time remained, counting six weeks from the receipt of the several specifications, that no difficulty would have been experienced in delivering the whole within the contract period.

On the 14th March the defenders, after having urged upon the pursuer immediate delivery of the floor plate, and receiving no answer to their communication, sent a letter intimating that they had been obliged to cancel the contract.

On 16th March the pursuer wrote the defenders, requesting them to keep the contract on their books for a few days longer, till they should get the necessary arrangements made for its fulfilment; but on the 17th March the defenders wrote stating that they had been obliged to cancel their contract, and place their specifications in other hands. On 17th March 1874 the estates of Watson & Campbell were sequestrated, and the pursuer appointed judicial factor. On 19th March 1874 the pursuer, as judicial factor foresaid, addressed to the defenders a letter in the following terms:—"Gentlemen.—*Watson & Campbell.*—Yours of the 17th inst. addressed to this firm, has been handed

to me. I am not aware that there has been any delay in the execution of your contracts, and I cannot accept your notice of cancelment." To this letter the defenders returned no reply.

At the first general meeting of creditors the pursuer was elected trustee, and certain commissioners were also elected, and their elections were confirmed by the Sheriff. Thereafter, on 8th April 1874, the pursuer wrote the defenders as follows:—"Gentlemen.—*Watson & Campbell's Sequestration.*—As trustee on this estate I am prepared to complete the contract entered into between you and this firm on 4th December last for plates and angles; or, if you prefer it, I am prepared to arrange the terms on which I can cancel the contract." The defenders refused to accept the offer contained in the trustee's letter, and this action was raised.

The plea for the pursuer was—"The defenders having broken their contract as above condescended on, to the serious loss and damage of the pursuer as trustee foresaid, the pursuer ought to have decree for reparation as concluded for, with expenses.

The pleas in law of the defenders were—"(1) The contract founded on being for continuous deliveries of iron over a lengthened period, the defenders were entitled to rescind it on the insolvency of the sellers, and their failure timeously to make and intimate satisfactory arrangements for its being carried on. (2) The bankrupts not being ready and willing to deliver the said iron at the time of their failure, and having acquiesced in the defenders' proposal that the contract should be abandoned, the defenders were thereby discharged from all liability. (3) The pursuer having failed within reasonable time to intimate to the defenders that he was prepared to implement the contract, the defenders are no longer bound thereby. (4) The pursuer was not entitled, after the time for implement of the first specification had elapsed without its being implemented, to insist on the contract being carried on. (5) The defenders, not being bound by the terms of the said contract to take more iron than they might ask to be delivered, are not liable in damages. (6) In any view the damages claimed are excessive.

The Lord Ordinary, on 21st October 1874, assoilzied the defenders, and found the pursuer liable n expenses.

Lord Young delivered the following Opinion on pronouncing interlocutor:—"The pursuer, as trustee in the sequestration of Watson & Campbell, seeks to recover damages from the defenders for breach of the contract contained in the missive offer and acceptance quoted in article 1 of the condescendence.

"The contract was made with the bankrupts, and it is not alleged that there was any breach on the part of the defenders prior to the bankruptcy. The alleged breach on which the action is founded consists in the refusal of the defenders to go on with the contract after the pursuer's letter of 8th April (quoted in article 9), wherein he expressed his readiness to complete it, and their adherence to their determination to cancel notified to the bankrupts on the 14th, and again on the 17th March.

"The defenders contend that they were entitled to cancel the contract on 14th March, and that at all events on 8th April, when the pursuer intimated his election to adopt the contract, they were no longer bound to proceed with it. The pursuer disputes this, and so the main question in the case (for there is a subsidiary question) arises.

"The defenders are iron shipbuilders in Port-Glasgow, and the contract may, for the purposes of the question which I have stated, be represented as made by them with the bankrupts, who were iron-merchants in Glasgow, for the iron that might be required to build certain ships for which, at the date of the contract, they expected (and in the event obtained) orders. This fact, which is clear on the evidence, and was in the knowledge of both parties, explains the language of the missives, and enables the Court to read and understand them as the parties did. It appears that the defenders expected orders for five ships, and that the quantity of iron stated in the missives was the quantity which the parties thought would probably be required for that number, but that in the result they got orders for only three ships. This is important with reference to a subordinate question in the case, but is immaterial to that which I have represented as the main question. It could not be accurately known how long it would take to build the ships, and the views of the parties regarding the period over which the execution of the contract would extend must therefore be taken as only matter of reasonable judgment. From the defenders' statement and evidence it appears that, according to the building contracts as afterwards made, the last of the ships was to be delivered on 14th May 1875, which would give the iron contract a currency of about eighteen months from its date—the supplies of iron under it to be furnished as required during that time.

"Between 24th February and 10th March the defenders specified for, (*i.e.*, required to be supplied with,) 140 tons of the iron contracted for, and received from the bankrupts 55 tons, leaving their specification unfulfilled to the extent of 85 tons. It is the import of the evidence, in my opinion, that the specifications were not fairly answered, and that the defenders suffered considerable inconvenience and detriment in their business in consequence. But although I think the defenders were entitled to complain as they did of a failure on the part of the bankrupts to furnish them with the supplies which they had repeatedly and urgently required, I am not of opinion, and did not understand it to be contended, that the failure prior to the public stoppage of the bankrupts was such as to entitle the defenders to cancel the contract.

"The stoppage of the bankrups became publicly known on 13th March, and the defenders having received no reply to their communications of 12th and 13th March, pressing for deliveries, wrote to them on 14th, cancelling the contract. On the 16th the bankrupts wrote to the defenders, requesting them to keep the contract on their books for a few days longer till they should get the necessary arrangements made for its fulfilment, which, by letter of the 17th the defenders declined to do, intimating that they had placed their specifications in other hands. The sequestration was awarded on that day, 17th March.

Regarding the case as at this date—that of the sequestration—the question occurs, whether or not the defenders were then entitled to cancel the contract. They contend that it was important to their business that they should have a contract on which they could rely for due supplies of the iron required for the ships which they had in hand, and that the contract which they made hav-

ing failed by the stoppage and bankruptcy of the contractors, they were at liberty to make a new one with a responsible party, and were not bound to delay in order to see what might be the views of the trustee or the creditors of the bankrupts, as to the expediency of taking up the contract for the benefit of the estate. To have done so would, they say, have been not only to go in the meantime without the iron which they immediately required, but to take upon themselves the risk of an unfavourable change in the iron market, which is exceedingly uncertain. For although the market was then falling, it might immediately rise, in which case (as the trustee and creditors would then certainly decline to take up the contract) they would be under the necessity of making a more unfavourable contract than it was in their power to make at the date of the failure.

"The pursuer answered that he, as trustee, was entitled to exercise his judgment with reference to the current contracts with the bankrupts, and to take up such of them as he thought advantageous for the estate; that the contract in question was subsisting at the date of the sequestration, the failure of deliveries prior to that time not having been such as to entitle the defenders to cancel it; that the bankruptcy did not itself cancel the contract, and that after his letter (as judicial factor) of 19th March, he was entitled to a reasonable time to exercise his option, which he did without undue delay, on 8th April, when he notified his readiness to fulfil the contract. He admitted that the bankrupts had no iron, and that he had none, but said he was prepared to procure it in the market at the cost of the estate under his charge. It did not appear that the creditors had been consulted, or that the trustee had any authority beyond that conferred on him by the Bankrupt Act.

"My opinion is in favour of the defenders' contention and against that of the pursuer.

"It appears from the evidence that at the date of the bankruptcy iron was lower than at the date of the contract, and that the market was falling, and continued to fall for some time. This circumstance exposes the defenders to the remark that it was their interest to get free of the contract. But I am not of opinion that their conduct ought on that account to be regarded by a court of law with disfavour or suspicion. The exigencies of their business required that they should make themselves secure of supplies of iron sufficient to build the ships for which they had contracted, and the building of which was to extend over a period of about fifteen months from the bankruptcy of Watson and Campbell. Their iron contract was an important matter, and might well make all the difference between profit and loss on their building contracts; and with a market so sensitive and so liable to be affected by speculators as the iron market, the delay of a few weeks or even days might have been ruinous. The rule governing their rights in the circumstances in which they were placed by the bankruptcy of Watson and Campbell, must, I think, be founded on considerations more certain and satisfactory than the momentary condition or probable prospects of the iron market.

"With respect to the right of a trustee in bankruptcy to adopt advantageous contracts made with the bankrupt, and to enforce their execution for the benefit of the estate, I did not understand it to be disputed. But it exists within limits, and without attempting to express and guard a rule on the subject for general guidance, but confining my attention to the particular case, I venture to doubt whether it is according to the right and duty of a trustee in bankruptcy to involve the estate in the risk of a contract of so speculative a character, and having so long currency as that now before the Court. It was not capable of immediate execution with a certain or ascertainable amount of gain or loss, but extended over the period necessary to build the ships, and was to be implemented according to specifications furnished as the work proceeded. He may possibly have found an iron merchant willing to take it over at a premium. But a contract by a shipbuilder for materials, and extending over a period of time, implies confidence in the contractor, and when he is disappointed by the bankruptcy of the party whom he selected, I think he is clearly not bound to submit to a sale of the contract by the trustee, to the effect of making his supply of materials for a considerable time dependent on a party not of his selection, and in whom he may have no confidence. Nor is he bound, in my opinion, to accept of the security of the bankrupt estate for the fulfilment of a contract having a tract of future time. To fulfil or secure the fulfilment of such contracts is beyond the scope and purpose of sequestration in bankruptcy, which is realization and distribution. These considerations are inapplicable to the case of a contract which is capable of immediate execution. In that case the estate on the one hand is involved in no speculation by the adoption of the contract, and the party on the other is exposed to no hardship or risk, for he obtains immediately and certainly what he contracted for. To cases of this class, therefore, I should be inclined to say generally that the right and duty of the trustee to adopt apparently advantageous contracts is limited, though I am indisposed to lay down any rule going beyond the exigencies of the case in hand.

"But whatever opinion may be formed regarding the right of the trustee to adopt the contract, there is and can be none as to his right to repudiate it. The estate might be liable to make good any damage, though, for reasons which it is unnecessary to state, I think this more than doubtful; but the trustee was clearly at liberty to refuse implement, and assuming (contrary to my opinion) his right to bind the estate to give implement, it would have been a strong proceeding on his part to do so without consulting the creditors and obtaining their authority. This suggests the question, How long were the defenders to wait or abstain from protecting what I must regard as their legitimate and reasonable interests by a new contract? The pursuer's answer must be—at least till the 8th of April, for that is the date of his letter announcing his election to adopt the contract. In other words, the pursuer's contention is that the defenders, who had only received about the half of the iron specified for in February (55 out of 91 tons), and no part of that specified for on 9th and 10th March, were bound, on being informed that their contractors had publicly stopped payment, to allow the matter to stand over for three or four weeks longer to allow him as trustee to judge whether or not he would take up the contract for behoof of the creditors. But by that time the market might have so risen that he would certainly or probably have elected otherwise than he did, and left to the defenders the whole loss of the rise, with

only a claim (I think a very problematical one) for a dividend on its amount. I do think that the law on the subject is such as to expose a party to the risk of being placed in such a position. I should have thought the 8th of April too late even for an actual tender of delivery under the specifications of February and March: but it may not be immaterial to remark that the pursuer never tendered delivery, and in fact had no iron to tender. The bankrupts were possessed of none at the date of the sequestration, and the pursuer had, in the exercise of his undoubted right, cancelled their current contract with iron-masters. All he did or could do on the 8th April was to express his willingness to take up the contract with the defenders as a promising speculation for the estate, and for that purpose to go into the market as a purchaser on account of the estate.

"I am therefore of opinion that the defenders acted according to their right, and with no undue disregard of the rights of others, when they cancelled the contract on 14th March and made a new contract with another party. Further, assuming that cancellation to have been premature, and that the trustee was at liberty to adopt the contract (both of which assumptions are contrary to my opinion), I think the trustee's letter of 8th April came too late, and that then, at all events, the deenders were entitled to decline to be longer bound by the contract.

"I may refer to the opinion of the Judges in the case of *Kirkland* v. *Cadel*, 9th March 1838 (16 S. 860), for some important observations generally to the effect that the primary duty of a trustee in bankruptcy is to ingather and distribute the estate, and that he is neither bound nor entitled to adopt the undertakings of the bankrupt 'having a tract of time,' or to carry on any such undertaking as a speculation for behoof of the creditors.

"The importance of this topic in the present case is not, of course, that the defenders were concerned with the interests of the creditors or the duty of the trustee as in a question with them, but that they were entitled to take immediate measures for the protection of themselves and the interests of their business, on the footing that their contract with the bankrupts was not such as the trustee would in the ordinary course of his duty take up and bind the estate to fulfil. With the opinion which I entertain I must approve of and uphold their conduct, proceeding on this view of the matter.

"According to the opinion which I have formed on the main question, the defenders are entitled to absolvitor, and it is unnecessary to decide any question which bears only on the amount of damages. But a subordinate question of this character having been raised and argued, I think it proper to express my opinion upon it. It regards the construction of the contract with respect to the quantity of iron contracted for. The pursuer contends that the contract imports an absolute sale of 2000 tons, or thereby, of plates and angle iron, with the filling and stanchion iron required for that quantity of plates. The defenders, on the other hand, contend that the bargain was conditional on their obtaining contracts to build all or one or more of five ships (four steamers and a sailing vessel) which they had in prospect, and was only for so much iron as might be required for the execution of these contracts, or such of them as they should obtain. The dispute must, of course, be decided upon a just construction of the missives when read in the knowledge of the facts proved to have been known to and in the view of the parties when the missives were written and exchanged. Evidence of such facts is generally admissible with a view to the construction of such missives, and the language of those in question being such as in my opinion to require it in order to enable the Court to read them as the parties certainly or probably did, I admitted the evidence although objected to by the pursuer. The parties between whom the contract was made agree in their evidence as to these facts, and reading the missives with the light thereby thrown on them, I have experienced no difficulty in adopting the construction of the defenders.

"The three steamers for which the defenders obtained contracts required, according to the evidence, about 1050 tons of plates and angle iron, together with about 105 tons of filling and stanchion iron.

"In my view these quantities are to be taken as the limit of the contract, according to which damages for breach, if held to be due, must be estimated."

The pursuer reclaimed.

Cases cited—*Kirkland* v. *Cadell*, 16 S. 860; *Simpson* v. *Griffith*, 8 L. R., Q. B. 14; *Chalmers*, 8 Chancery Appeals, 289; Murdoch on Bankruptcy, 116; Bell's Com. ii., 342.

At advising—

Lord Neaves—This case involves questions of importance and delicacy in matters of bankruptcy and commercial law. The Lord Ordinary has treated the subject very fully in his opinion, and I concur in the result at which he has arrived, but must guard myself against being supposed to agree with all the views he expresses. The general principle in a case of bankruptcy is that all beneficial contracts may be taken up by the trustee on an insolvent estate subject to certain limitations. The first is, that no trustee is entitled to take up a contract the execution of which involves the element of *delectus personæ;* where special skill of any kind is relied upon, such a contract can no more be taken up by the trustee than by the representatives of a party deceased. Reliance is placed on the special skill of the particular party. The second limitation is, that where a trustee takes up a contract, it must be in a manner which imposes no hardship on the other party to the contract. A solvent party cannot reasonably be expected to submit to hardships resulting from the bankruptcy of the other party. A beneficial contract is an asset of the bankrupt estate, and may be taken up by the trustee and creditors, but it is not one of the essentials of the office of trustee to take up every contract; and the case of *Kirkland* is not to be read as condemning a trustee for not taking up every contract. Here it is said six weeks was given by the original contract within which to furnish the iron. I think the meaning of the contract was that the delivery of the iron was to go on continuously, as quickly as possible, in a certain order, and not that the party was entitled to six weeks for furnishing of each lot before furnishing another. The supply was to be regularly made in a reasonable manner by four instalments, so that the whole should be delivered within six weeks; but the meaning was not that the whole might be kept back for six weeks. Then embarrassment arose here—there

was a correspondence—delay was asked—cancellment was proposed—and if the creditors could at that time have said, "we are ready to go on at once," I cannot see that the other party could have refused if the articles were promptly supplied; but were they bound to wait without having any security for the implement of the contract? It is plain that in a contract so urgent as this was it was the business of the bankrupt to make immediate provision that there should be no delay by which the solvent party might suffer. The creditors should have been called together and made aware of the nature of the contract at once, so that some arrangement might be come to so as not to put the solvent party to inconvenience. But fulfilment was not tendered here in a reasonable time. It is not easy to tell what was done when intimation of cancellation of the contract was made; the answer should have been—there shall be no delay, we shall see the contract carried out at once. But nothing was done—no proper tender of fulfilment was made; and when the trustee was elected we do not see that he brought the matter before the creditors. In such a case, as there was a failure in making an immediate arrangement giving security to the solvent party that the contract would be fulfilled, and no tender of the iron already due, the other party was justified in going elsewhere. So far as coincident with these views I agree with the Lord Ordinary; and I think that where a contract does not involve the element of *delectus personæ* the creditors and trustees in a bankrupt estate are entitled to take it up and make profit of it, if it is timeously done, and if there is no equity in the other party preventing them doing so.

Lord Ormidale—I concur so far with Lord Neaves as to the interlocutor of the Lord Ordinary; but that opinion must be taken as given in connection with the special facts of this case. I entirely concur with Lord Neaves that here, where the element of *delectus personæ* does not enter into the matter at all, a trustee and creditors had power to adopt the contract, but they might have repudiated the contract; and this option undoubtedly placed the defenders in a most awkward position. I am satisfied that the pursuer here, being *in petitorio* for damages, must make out his case. How can he do so when, in the first place, he cannot say he timeously offered to implement the contract; and secondly, when it is established he was not in a position to fulfil the contract. Iron was due, and long before the 8th April the building of the ships had come to a stoppage in the building-yards of the defenders owing to delay on the part of the pursuers, and it was not fair to keep them in such a position. Even up to this moment it does not appear that any instructions have been taken from the creditors, or that their attention has been called to the matter. Taking it that on the 8th of April there was an offer to implement the contract, I think it came too late, and that the defenders were not bound by it. But even on the 8th April the iron was not ready, and it would have taken perhaps weeks to furnish it. I think on the whole there is no good ground for sustaining the action. If authority were necessary in support of my view, I think we have it in English case of *Chalmers*, in the eighth volume of Chancery Appeals.

Lord Gifford—I concur in the opinion and in the result at which the Lord Ordinary has arrived. The only point in which I differ is, that he seems to think the contract here was of such a nature as could not have been taken up by a trustee and creditors in a bankrupt estate. Now, I think there was nothing in it to prevent its being so taken up. No doubt sequestration is not intended for carrying on contracts, but for the purpose of winding-up; but that is *jus tertii* of either party to urge, and no doubt a contract can be taken up in a question with the other contracting party. Here the contract had not been fully implemented, and prejudice was being suffered by the defenders. So, when insolvency occurred, the defenders ran great risk. In the first place, they could not compel the bankrupts to go on. In the second place, there was a power in the bankrupt and creditors to go on; but looking to the nature of the contract, it was the duty of the bankrupt to make the creditors aware of the matter at once, and get it at once implemented. But nothing was done from the 16th of March until the 8th of April, which was too long a delay. The defenders' funds could not stand with or bear such a risk.

It is said the defenders themselves terminated the contract, but I do not look on their letter as a breach of contract on their part, it was only a way of saying, "fulfil our contract at once;" and if the trustee had come forward next day and offered the iron, the defenders would have been bound to accept it. The defenders by their letter took the risk of a premature cancellation; but in the answer it was not said the contract would be implemented at once.

Lord Justice-Clerk—I entirely concur. The simple ground of my opinion is, that the defenders here were not bound to wait from the 13th of March to the 8th of April without knowing whether they had a party bound to them or not.

With regard to the question as to a contract bearing a tract of future time, I shall only say that where time is of the essence of a contract it would be much more difficult for a trustee on a bankrupt estate to take it up than where that was not the case, but it is unnecessary to discuss that point.

The Court pronounced the following interlocutor:—

> "The Lords having heard counsel on the reclaiming note for William Anderson against Lord Young's interlocutor of 21st October 1874, refuse said note, and adhere to the interlocutor complained of, with additional expenses, and remit to the Auditor to tax the same and to report."

Counsel for Pursuer—Dean of Faculty (Clark, Q.C.,) and Balfour. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for Defenders—Solicitor-General (Watson) and G. Smith. Agent—W. Archibald, S.S.C.