because it is a jurisdiction only over those small parcels of personal property; but I do not enter upon that at all. It is wholly unnecessary for us to decide whether this goes beyond the goods arrested, or the debt arrested, if it happens to be a debt that is arrested; the only question for us to decide is, Does *arrestum jurisdictionis fundandæ causâ* exist in the law of Scotland? and, where it has been used, does it give jurisdiction? Beyond that it is wholly unnecessary for us to go. I am clearly of opinion that, upon the authorities, and above all, upon the authority of the cases to which we have been referred, it has been, for the last 100 years, on all hands acknowledged to be the law of Scotland. In my own recollection, I have often heard the question mooted among Scotch lawyers; certainly, when the subject has been mentioned since, some regret may have been expressed, and some doubt may have been expressed, whether it ought to have been the law, and whether, if it were a question now of introducing it, it would be a law that ought to be introduced; but I have no recollection of ever having heard it doubted, that the law has for a century existed.

Interlocutors affirmed, with costs.

Hope, Oliphant, and Mackay, W.S., *Appellants' Agents.*—Lindsay and Paterson, W.S., *Respondent's Agents.*

FEBRUARY 26, 1858.

FRANCIS EDMOND, (Nicol's Trustee in Bankruptcy,) *Appellant*, *v.* FRANCIS GORDON and Others, (Nicol's Marriage Trustees,) and the TOWN of ABERDEEN, *Respondents.*

Assignation—Intimation—Jus Crediti—Jus ad Rem—Superior and Vassal—Obligation—Bankrupt—*A party in possession of lands, which he held on a blundered title by progress, executed a bond and disposition in security in favour of his marriage trustees, who, after infeftment, had the seisin duly recorded. Thereafter, the granter of the bond having become bankrupt, his trustee brought an action against the superiors to compel them to grant to him, as vested in all the bankrupt's rights, a charter of the lands, in fulfilment of the personal obligation originally constituted in favour of the bankrupt. In a competition between the bankrupt's trustee and the marriage trustees:*

HELD (affirming judgment), *That the marriage trustees were preferable to the bankrupt's trustee in respect of their bond, which imported a conveyance of the personal right in the bankrupt, and which assignation was sufficiently intimated by the registration of the infeftment on the bond; and, consequently, that the superiors could not be compelled to grant a charter, except under burden of the right of the marriage trustees.*[1]

In the year 1768 the Town Council of the Burgh of Aberdeen appointed the lands of Sheddockslay to be feued, and for that purpose to be exposed to public roup in certain lots. Certain of the lots were knocked down to Robert Dyce, and a minute signed by him was annexed to the articles of roup, containing the conditions of the contract. In conformity to an act of the Town Council a feu charter was then executed, dated 16th December 1777, by William Duguid, then treasurer of the burgh, in his official capacity, in favour of Dyce. The *tenendas* of the charter was in these terms:—"To be holden of me, the said William Duguid, and my successors in office, treasurers of Aberdeen, for payment of the yearly feu duty above written, &c. &c."

Dyce was infeft on 27th January 1778, and the sasine was recorded in the "Particular Register of Sasines by Alexander Carnegy, town clerk of Aberdeen," although the lands were held by ordinary feudal tenure, and not *more burgi*. A portion of the lands were, in 1802, disponed to Alexander Hector, who, resigning upon the procuratory of Robert Dyce, obtained from the burgh a new charter of resignation and *novodamus*, dated September 1804, in which the holding was changed from feu to blench, and upon it he was infeft on the 11th September 1804. In this charter William Johnstone, then treasurer of the burgh, was set forth as the superior of the lands, and in the *tenendas* they are set forth as to be held of him, "as treasurer foresaid, and his successors in office, treasurers of the said burgh of Aberdeen, feoffees in trust, immediate lawful superiors thereof." Hector's sasine was also recorded in the Burgh Register. Upon Hector's death in 1823 his daughter Mrs. Richardson expede a general service, and took infeftment on the precept contained in the charter of resignation and *novodamus*, and her sasine was recorded in the Particular Register of Sasines at Aberdeen.

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[1] See previous report 18 D. 347; 28 Sc. Jur. 10; S. C. 3 Macq. Ap. 116: 30 Sc. Jur. 365.

Mrs. Richardson disponed the lands to another party, who, without taking infeftment, in turn disponed to James Nicol, who was infeft under the unexecuted precept in Mrs. Richardson's disposition.

James Nicol, in 1849, granted in favour of the trustees under his marriage contract an heritable bond for £2500, which conveyed to them "all right, title and interest, claim of right, &c. which the granter, his predecessors or authors, had to the lands conveyed."

In 1850 James Nicol became bankrupt, and the pursuer was appointed trustee on his sequestrated estate. He raised the present action against the Provost and Town Council of Aberdeen, concluding that they should be decerned to execute directly in his favour, as trustee, a valid feudal charter of the subjects in question, in terms of the original charter of 1777, but with blench holding. He alleged a nullity in Dyce's original infeftment and in the subsequent progress, including the charter of 1804, in respect of the peculiarity in the *tenendas* mentioned above, but maintained that notwithstanding that nullity, a personal right had been effectually transmitted to him, so as to entitle him to a charter.

No defences were lodged by the town council, but a minute of compearance was given in by Messrs. F. Gordon and John Brown, the creditors in the heritable bond granted by Nicol. In this minute they stated, that two other actions were now pending at the instance of the pursuer, in one of which he sought to reduce the bond granted by Nicol in their favour, on the ground, *inter alia*, that the feu charter of 1777 was not extinguished by the charter of 1804; and in the other, he sought a proving of the tenor of the feu contract of 1777, on the ground of illegibility —in both of which actions they were defenders. They maintained that both charters were validly granted, though the first was never validly feudalized, and that it was extinguished by the second: and that, even assuming both charters to be invalid, and that the magistrates were still bound to grant a valid charter, the right to demand it was vested in them (the compearers) in virtue of their heritable bond, and in respect that the recorded infeftment expede by them was equivalent to intimation to the burgh of their personal right to the lands in question.

The Lord Ordinary (Rutherfurd) pronounced an interlocutor on the 19th July 1853, in which he sustained the compearers' title to appear, and allowed them to lodge defences, which judgment was acquiesced in.

A record was now made up between the pursuer and the compearers, in which, on the narrative of the progress and transactions above stated, the pursuer pleaded—1st, his right to have a valid charter from the town; and, 2ndly, as against the compearers, that they could not, in any view, claim more than a redeemable right in security over the lands; that it was incompetent for them to demand, and they were not entitled to obtain, from the superiors a new and absolute charter; and that they were not entitled to have their bond and disposition in security made a real burden upon the charter sought by the pursuer, or upon the lands, in respect that these lands and all interest therein had been absolutely vested in him, in virtue of the statutory adjudication in his favour as trustee; and further, that in the view of the compearers being assignees, it was not an assignation capable of being completed by intimation. The compearers pleaded in terms of their minute stated above.

The Court of Session held that the superiors were not bound to grant the charter, except under burden of the right acquired by the bondholders, and that the registration of the bondholders' infeftment was equivalent to intimation to the superior of the bankrupt's assignation.

The pursuer having appealed, he pleaded in his case, that the interlocutors of the Court of Session should be reversed:—"I. Because the alleged assignation of the right to the lands contained in the respondents' heritable bond, through the effect of the infeftment following on it, did not divest the bankrupt (Nicol), or confer any complete right upon the respondents; and any assignation of the right was incapable of completion otherwise than by special conveyance and infeftment." Kames' Remarkable Decisions, vol. ii. p. 16. Ross's Leading Cases, Land Rights, p. 410. Lord Kilkerran's Manuscript Notes, Session Papers, reported in Brown's Supplement, vol. v. p. 199. Ross, 2d vol. p. 414. Ersk. 2, 7, 26. Ersk. 3, 5, 5. II. Because even on the assumption that the right to the land was capable of transmission by assignation in the manner contended for, such assignation was incomplete without intimation; the registration of the respondents' bond in a register not intended as a record for intimation to any party of the transference of land rights, not being equivalent to the intimation required by law in such cases. III. Because the right acquired by the appellant, as statutory trustee, vested in him Nicol's right to the lands, to the exclusion of the respondents, who were not entitled to obstruct him in completing a feudal title in his own person for the purpose of making the land available for division among the general body of creditors of the bankrupt. Bell's Com. ii. 404."

The respondents supported the interlocutors on the following grounds:—"I. Because the appellant having no means of completing a right to the lands without the assistance of the Court, it was entitled to pronounce such a decree as should not prejudice the right of the respondents, who had lent money to the bankrupt on the faith of obtaining all right which he had to the lands, and had accordingly obtained from him a bond and disposition in security, by which his right was transferred to them a year prior to the sequestration of the bankrupt. II. Because, if

intimation of the execution of the bond and transference of the right to the burgh of Aberdeen was necessary to complete the transferences by the bankrupt to the respondents, such intimation was effectually made by recording the bond and disposition in security in the Register of Sasines."

Attorney-General (Bethell), and *Anderson* Q.C., for the appellant.—It is admitted by the respondents, that the charters granted by the treasurer of Aberdeen were invalid, because it was not the treasurer but the town of Aberdeen who were the superiors ; and as all the subsequent titles were made up on the assumption of the validity of those charters, no valid title had ever been made up to the lands, either by Dyce or any of his successors. The question then arises, what was the nature of the right existing in Nicol as standing in the place of Hector? It was clearly a *jus ad rem*, and not a *jus crediti*. It was a personal right to the lands much more extensive than the mere right to demand a charter. It resembled the right of a party under a minute of sale or general disposition by which the lands were conveyed, but without the proper feudal clauses for completing the right. Such a right to the lands could only be completed by the infeftment of the assignee, and until such infeftment, the cedent is never divested—*Bell* v. *Gartshore*, M. 2848; 2 Ross' L. C. 410; 2 Kames' Decis. 16; 5 Brown's Sup. 199. The *case of Gartshore* was one similar in its circumstances, and ought to govern the present. If, therefore, this was a right which required infeftment to complete it, the respondents had never been infeft, and the trustee had a right to go on and complete his title. At all events, whether this was a *jus crediti* or a *jus ad rem* in the respondents, it was obvious it required something more than a mere assignation or conveyance to divest the granter. That something more, was intimation to the cedent. It is well established, that in all competing assignations, it is not the priority of date of the assignation, but the priority of intimation that gives the preference—Ersk. 3, 5, 3; *ibid.* 2, 3, 48. It is said that the bond and disposition in security to the respondents was an implied assignation of the right of Nicol. That was not admitted; but even admitting it, there had been no intimation by the respondents to the town of Aberdeen. It was admitted by the respondents, that they had given no formal intimation ; but they said, that the registration of the bond in the register of sasines was an implied intimation. There is no authority, however, for holding such registration as an implied intimation of the transference of a land right. The bond itself was a nullity, as granted by one who was not infeft in the lands, and, consequently, its registration could be good for nothing, for it had no proper warrant. At all events, this bond was not registered with a view to intimation, nor did the registration convey any information whatever to the sellers in the right alleged to be assigned. Registration cannot be deemed an equipollent of intimation. There is no such equipollent mentioned as competent either by Ersk. 3, 5, 3 and 4, or by Bell (2 Bell's Com. 17). In England a vicious practice had prevailed of giving effect to all kinds of informal or constructive notices of this kind ; but in Scotland constructive notice was not allowed except in one or two cases, and this was not one of them. It is a mischievous practice to allow constructive notice at all; and to allow registration of a null bond to be deemed an implied intimation would be only introducing into Scotland the mischiefs of English practice. In a late case, *Lang* v. *Hislop*, 16 D. 908 ; 26 Sc. Jur. 475 ; this doctrine was repudiated. The respondents rely on *Paul* v. *Boyd's Trustees*, 1 Ross' L. C. 511, as shewing that the right of Nicol was a *jus crediti* transmissible by assignation ; that a heritable bond was a good assignation of such *jus crediti*, and that the registered infeftment on such assignation, though bad as a sasine, may be good as an intimation. But that case was wrongly decided. Even if rightly decided, it was not applicable to the present, for there the right was clearly a *jus crediti*, while here it is a *jus ad rem*. In that case there was a good intimation without calling in aid the registration of an *inhabile* bond ; and lastly, neither of the parties there could have completed his right by infeftment. Moreover, the party giving the intimation was the same party who was to receive it, and, therefore, there was good reason for holding that no formal intimation was necessary. If, therefore, there was no infeftment or no intimation by the respondents, it follows, that our right is superior, being a statutory title conferred by the Sequestration Act 2 and 3 Vict. c. 41. If the right of Nicol was part of his moveable estate, it vested in the trustee by § 78, as at the date of the sequestration, that being taken to be the date of any intimation which was necessary. If, on the other hand, the right of Nicol was part of his heritable estate, then it vested in the trustee under § 79 ; and by § 25, the sequestration operated as intimation. A legal transference required no intimation—Bell's Prin. § 1466; 2 Bell's Com. 18. If the trustee was still bound to complete his right by infeftment, then he is entitled to go on and complete his titles as he was doing when the present respondents were allowed to compear and prevent him. The Court had no right to interfere and stop him ; and, therefore, the interlocutor ought to be reversed.

Rolt Q.C., and *Ross*, for the respondents.—The interlocutor of the Court below is right. By the bond and disposition in security, Nicol purported to convey, and did in fact convey, to the respondents his whole right to the lands, whatever that was, in security of the sum of £2500. The *jus crediti* or *jus exigendi*, or whatever it was, for it is difficult to say what precise description it fell under, was transferred to the respondents at that date, and it is competent by

the law of Scotland so to transfer such a right—*Gordon's Trustees* v. *Harper*, 1 Ross' L. C. 499; 1 S. 185. *Russell* v. *M'Dowell*, 1 Ross' L. C. 505; 2 S. 682. At all events, if it was not an express and formal conveyance, it impliedly conveyed the right.—*Per* Lord Corehouse in *Paul* v. *Boya's Trustees*; *M'Gregor* v. *M'Donald*, 2 Ross' L. C. 489. The sequestration was nothing more than a judicial conveyance, or a conveyance by force of law, of what was in the bankrupt; and as the conveyance to the respondents was prior in date to that of the trustee, the respondents must be preferred in any competition between them and the appellant. Where competing parties have inchoate or incomplete feudal rights, and one objects to the title of the other being completed, the sole test of preference is the priority of conveyance—*Livingstone* v. *Creditors of Grange*, M. 10,200; 3 Ross' L. C. 114. The Court in such a competition will give effect to the equity of one of the parties—*Tatnall* v. *Reid*, 5 S. 277; and there can be no doubt that, in point of equity, the respondents had the advantage. But they had the further advantage, that their assignation was intimated, while that of the appellant was not. Mere sequestration may be a transference, but intimation was required to complete the title thereby acquired by the appellant. The intimation by the registration of the respondents' bond was prior in date, and it was equivalent to intimation. Registration of the bond and infeftment was notice to all the world; and such was assumed by Lord Corehouse to be an equipollent of proper intimation.—*Paul* v. *Boyd's Trustees*, 1 Ross' L. C. 515. See also *Giles* v. *Lindsay*, 6 D. 817.

Cur. adv. vult.

LORD CHANCELLOR CRANWORTH.—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 one 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?

The claim of the appellant is founded upon the Bankrupt Act of Scotland, 2d and 3d Vict. c. 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 shall, 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, 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 the charter.

The respondents, on the other hand, are bondholders, claiming under a bond executed by Nicol, the bankrupt, 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 Vict. c. 50, § 1. By that section it was enacted, (I read it shortly,) that it should be lawful for any person entitled to grant bond and 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 bond and disposition in security had contained, in the case of subjects held by the ordinary tenures, an obligation to infeft *a me vel de me* procuratory of resignation and precept of sasine; and in the case of burgage subjects," and so on; "and as if sasine, or resignation and sasine, as the case may be, had been duly made, accepted, and given thereon in favour of the original creditor, and an instrument of sasine, or of resignation as the case may be, had been duly recorded of the date of the registration of the said bond and disposition in security."

The first question that was argued was this—Was the right of Nicol the bankrupt in the lands, and of the bondholders having the assignation of his right, in respect to the security for their bond, a *jus ad rem* or a *jus crediti?* Now, I must confess, that upon this subject I think there is a good deal of doubt and obscurity from the want of anything definitely explaining the distinction between a *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 to property which the person possessing, though it is not a complete right, 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 the right perfect. I think, therefore, either that there is no distinction, or that it is within the latter description, that this case comes, and that this is to be considered as a *jus crediti*, and that 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 derived nearly a century ago in the year 1777, but it had never been perfected, because there was a defect in the original charter. The *tenendas* 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 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 it was resisted, could only be obtained by an action, and what is called adjudication in implement.

Now that being the state of things, the question is, Who had the preferable right; whether the bondholders, who had the *jus crediti* under Nicol, or Nicol's creditors, who had the *jus crediti* in respect of his right, to have a charter granted to them to give them legal sasine of the land? Treating it as a *jus crediti*, 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; and their right (it was agreed) was invalid for want of intimation, and we were referred to a passage in Erskine's Institutes on the subject of intimation. What Mr. Erskine says is this: "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 an 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 creditor, but for completing the conveyance." (Erskine's Institutes, 3, 5, 3.)

That being the doctrine laid down by Erskine, and followed by Bell in his Commentaries, (and I think I have discovered it in other writers also,) 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* of a debtor 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,) I think it extremely doubtful whether the principle that requires an intimation in the case of an assignment of the debt properly so called is at all applicable to such a case as the present, I do not proceed upon that doctrine, but, I must confess, I think that 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 parties are not to be put, as the Scotch say, in *malâ fide*, as if there had been no assignation, if they had never had notice given them, that there has been intimation. But taking that to be the law with regard to debts, I confess it seems to me extremely difficult to understand upon what principle it should be applicable to a *jus crediti* of this sort, which is technically only 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. I concur in opinion with all the Judges in the Court below, for all four concur upon that point, and the Lord Ordinary also concurred, in thinking, that this was not a defective intimation, and in my opinion it was the very best intimation that, considering the subject matter, could have been made.

Now, what is this? 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. Well, then, although the title was defective, all the cases shew that you may deal with this defective title, so that it may be made good afterwards. In the mean time, parties are in the habit of granting bonds, making assignments, and executing trust deeds, just as though they had got the whole legal title. Then, how is it to be presumed, that they will deal with it? Why, as if they were the owners, by making a resignation and by putting their deeds upon the register, just as if they had been owners. That is the very place you would look to, in order to see 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 into, and an instrument of sasine had been actually recorded. Now, if the whole 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 of the land. If that had been done, that would have been a notorious 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 *in 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 way of dealing with land. But the cases that have been referred to

of *Paul* v. *Boyd's Trustees*, and of *Giles* v. *Lindsay*, entirely warrant the conclusion at which the Judges arrived in this case, which appears to me in conformity with principle.

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 canvass 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 perfectly 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 decided, and probably upon good grounds. I do not inquire into 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 a 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 a 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. *M'Dowall*, 1 Ross, 505, seems to me to shew 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 ground which I have stated, I suggest to your Lordships that this judgment ought to be affirmed, and, consequently, I move accordingly.

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 who is now upon the woolsack, also agrees. There is no disputed fact in this case, and the question of law lies within a very narrow compass.

The pursuer claims as trustee under the sequestration of the bankrupt's estate against the Burgh of Aberdeen, the grant of a valid and effectual charter of certain lands by virtue of his personal 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 burgh on the sale of the property to him.

The compearers, the trustees of the marriage settlement of the bankrupt, insisted upon their right to compear and object to the granting 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 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 (Benholme) pronounced the interlocutor, finding that the Magistrates of Aberdeen were not bound to grant the charter concluded for in the summons, except under the burden of the compearers' preferable right. The appellants having reclaimed against the 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 interlocutor appealed against ought to be affirmed.

The personal right claimed by the compearers was under an heritable bond and disposition in security, executed by the bankrupt and delivered to the trustees of his marriage settlement, on the 19th November 1849, long 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 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 pursuers had been feudalized, whilst that of the compearers had remained personal, the pursuers' title would have prevailed according to the doctrine in the case of *Bell* v. *Gartshore*, and others 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 pursuers 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.

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*, namely, 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 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 equivalent 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 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, if 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 a mere *jus crediti*, there would be room to contend that it did not require any intimation at all; and then the next, and most 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 10 and 11 Vict. c. 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 that 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 obligor had.

The next question is, Whether intimation was necessary? I apprehend that it was; and that it is a general rule, that every assignation of a right in the nature of *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, § 4, and in Bell's Principles, 1462-65.

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 sequestration, where the trustees are in a position of adjudgers, and are not subject to all the equities to which the bankrupt was. See the cases of *Steward's Trustees*, *Walker's Trustees*, in 3 Ross's L. C. 139, 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 the 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 10 and 11 Vict. c. 50, is equipollent to an intimation; though I have felt some little doubt on that part of the case.

There is, however, no difference upon this point in the Court below. All agree (the four Judges) upon it, and their opinion is in conformity with that of LORD COREHOUSE and LORD MONCREIFF 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. Sect. 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 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 equivalent 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 complete; and it is therefore a preferable security under the 79th section of 2 and 3 Vict. c. 41. It follows that the charter ought not to be granted except subject to the burden of the compearer's right, and the interlocutors must be affirmed.

LORD BROUGHAM.—I entirely agree with my noble and learned friends who have addressed your Lordships in favour of the motion of my noble and learned friend who first addressed you, that these interlocutors ought to be affirmed. My Lords, 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; but there can be no doubt whatever

as to 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 same 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.

It must not be supposed, from the reference that has been made by my noble and learned friend who first addressed you, to the analogy of our delivery 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 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.

Appellant's Agents, Morton, Whitehead, and Greig, W.S.—*Respondents' Agents*, Mackenzie, and Baillie, W.S.

MARCH 25, 1858.

CHARLES JAMES TENNANT, Trust Assignee of Mrs. Jane Pollok or Tennant, *Appellant*, *v.* Dr. WILLIAM POLLOK MORRIS and Others, Trustees of the late James Pollok, *Respondents.*

Trust Settlement—Construction—Fee and Liferent—Survivor—Faculty—*A trust deed provided that the truster's two daughters should each have the liferent of half of the free residue, and that in the event of neither of them leaving children, or in the event of such children dying before majority, the daughters were to have the power of conveying the fee of the share liferented by them respectively to such persons, and in such manner, as they should think fit, under burden of the survivor's liferent; and failing the daughters exercising such power, the fee of the shares was to go to the brother and sister of the truster.*

HELD (affirming judgment), *That there was conferred upon each of the daughters, in the event of neither of them having children, a right to dispose of the fee of her own share, but that no right was conferred upon the survivor to dispose of the share of her deceased sister.*

Appeal—Costs—Trust Estate—Obscure deed.

QUESTION—*How far costs are allowed out of the estate, when litigation is caused by an obscure trust disposition?*[1]

The pursuer appealed, pleading, in his *printed case*, that the judgment of the Court of Session ought to be reversed for the following reasons:—"I. Because, according to the sound construction of the trust deed, Mrs. Tennant, the surviving daughter of the testator, was entitled to exercise a power and faculty to settle, destine, and convey the fee of the whole residue to the appellant. II. Because the testator died intestate with regard to the fee of one half of the residue; and Mrs. Tennant being his heir at law and next of kin, succeeded thereto according to the law of succession to intestate estate, and duly conveyed it to the appellant."

The *respondents*, in their *printed case*, supported the judgment on the following grounds:—"I. Because, on a sound construction of the sixth clause of the trust deed, the power or faculty of appointment conferred on each of the truster's daughters was expressly limited in its application to that moiety of the residue of his estate which was separately devised in liferent to each daughter. II. Because that power and faculty of appointment was not a new faculty created by the sixth clause, but was simply an extension or enlargement of the faculty previously conferred on his daughters respectively by the fourth and fifth clauses, intended to be available to each of them under the different contingencies contemplated by the sixth clause, and to affect (although to a greater amount) the same portion of his estate, viz., that half share devised in liferent to each. III. Because, throughout the whole clauses of the trust deed which affect the destination of the residue of his estate, Mr. Pollok is dealing with that residue as consisting of two separate

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[1] See previous report 18 D. 382; 27 Sc. Jur. 546; 28 Sc. Jur. 173. S. C. 30 Sc. Jur. 493.