the witnesses, John Johnstone, James Cox, James Bowhill, and John M'Gall.

III. The third conclusion of the summons relates to the property of the defender's heirs' trustees.

The case is, if possible, more clear in their favour than in regard to Mr Webster. The lands embraced in the third conclusion of the present summons are what were allotted in the division in lieu of certain runrig acres, stated in the process of division to amount to about 20 acres, belonging to Mr Wilkie of Foulden, being pertinents of the farm of Alemiln, and to be parts of the parish of Coldingham. The lands thus allotted are clearly proved to have always been held as contained within the parish of Coldingham.

I am therefore of opinion that the Lord Ordinary has taken a correct view of this case in all its parts, and that his Lordship's interlocutor ought to be adhered to.

This was the opinion of the Court.

Agents for Pursuer –Adam & Sang, S.S.C.

Agents for Defenders—Robert Hill, W.S.; James Webster, S.S.C.; Hamilton & Kinnear, W.S.

Friday, May 15.

1. ADV. CALDER AND GRANT *v.* MACKENZIE.
2. ADV. CALDER AND GRANT *v.* MACKENZIE.
3. MACGREGOR AND CRUICKSHANKS *v.* MACKENZIE.

Bankrupt—Trust-Deed—Disposition omnium bonorum—*Act of Grace—Acts* 1621 *and* 1696—*Bankrupt Act, 9th section—Action or Exception—Reply.* A debtor after being charged on a bill, granted a trust-deed, and also a disposition *omnium bonorum* in favour of a creditor. On the expiry of the charge the debtor was incarcerated, and, having applied for the benefit of the Act of Grace, he granted a disposition *omnium bonorum* in favour of the incarcerating creditor, in terms of the Act of Grace. *Held* that a disposition *omnium bonorum*, granted under the Act of Grace in favour of an incarcerating creditor, conferred a good title on him to set aside a trust-deed and disposition *omnium bonorum* (1) under the Act 1621, as in defraud of begun diligence, and (2) of the Act 1696, as executed within 60 days of bankruptcy. *Held* that the words "action or exception" in the ninth section of the Bankrupt Act include "reply."

These advocations were from the Sheriff-court of Inverness-shire, and the questions arose out of the following circumstances:—

The advocator Calder, who was a farmer at Crannich, in Strathspey, was indebted to the respondent in the sum of £47, contained in a bill for that amount. On 19th April 1865, Calder was charged at the instance of the respondent to make payment of the contents of the said bill. On 21st April, Calder executed a trust-deed in favour of John Grant, messenger-at-arms, Grantown, for behoof of his creditors. On 27th April, he was incarcerated under Mackenzie's diligence; and, having applied for and obtained the benefit of the Act of Grace, he, on 3d May, at the request of the said John Grant, executed a disposition *omnium bonorum* in his favour. This not satisfying the provisions of the Act, on 11th May 1865, Calder executed in favour of Mackenzie, the incarcerating creditor, a similar disposition *omnium bonorum* as provided for by the Act.

John Grant having advertised the stock on the farm of Crannich to be sold, Mackenzie presented an application to the Sheriff to interdict the said sale. This forms the subject of the process first above mentioned.

Mackenzie, being unable to obtain possession of the effects conveyed to him in the disposition *omnium bonorum* of 11th May 1865, presented an application to the Sheriff for warrant to take possession thereof. This forms the subject of the process second above mentioned.

After this last application was presented, John Grant sold the stock on the farm of Crannich to Macgregor and Cruickshanks. Mackenzie then poinded the effects, and Macgregor and Cruickshanks presented an application to the Sheriff for interdict against any sale under the said poinding. This forms the subject of the third process above mentioned.

The question for the determination of the Court was, Whether the disposition *omnium bonorum* of 11th May 1865, in favour of the incarcerating creditor Mackenzie, superseded the trust-deed of 21st April and the disposition *omnium bonorum* of 3d May 1865 in favour of John Grant,—these having been granted after Mackenzie's diligence had begun, and within sixty days of Calder's bankruptcy.

The Sheriff-substitute (THOMSON) held that the trust-deed and the first disposition were good and effectual. His Lordship observed, in a note to his interlocutor:—

"Taking the two deeds as in competition with each other, the Sheriff-substitute can discover no authority for holding that the disposition executed in prison is entitled to supersede the voluntary trust, which is prior to it in date; and it is only on the ground of fraud, or of its falling under some of the classes of deeds struck at by the Act 1621, or the Act 1696, that the deed in favour of the respondent Grant can be held inoperative. As already observed, there is no reason to be found in the evidence for holding that the whole transaction is not real and in good faith. The trust-deed is not a gratuitous alienation, nor an alienation of a special subject, after diligence suitable for the attachment of that subject has begun in the sense of the Act 1621. It is no doubt a deed granted within sixty days of notour bankruptcy, and might, at some former period in the history of the law, have been held to be reducible under the first branch of the Act 1696. All the more recent authorities and decisions, however, support the view that deeds of this kind, if their *bona fides* be undoubted, and there is no reason to hold that the trustee (*he being fairly invested*) will manage the estate for the equal benefit of all concerned, will be allowed to operate, unless superseded by actual sequestration under the Bankrupt Act. That the trust-deed in favour of Grant is in this position, the Sheriff-substitute sees no reason to doubt."

The Sheriff (IVORY) altered this interlocutor. His Lordship explained his judgment in the following note:—

"It was not disputed at the debate that the respondent was rendered notour bankrupt on the 29th April 1865, and that the two dispositions granted by him in favour of John Grant were executed within sixty days of his bankruptcy. The respondent, however, maintained that as these deeds were granted for the purpose of an equal distribution of his estate among his whole creditors,

and not for the satisfaction or security of any particular creditor or creditors, they were not reducible under the Act 1696, cap. 5. The Sheriff is of opinion that this contention is unsound. It has been repeatedly held that a trust-disposition granted by a bankrupt within sixty days of his bankruptcy to a trustee for behoof of his general creditors, is ineffectual against, and may be reduced at the instance of, non-acceding creditors (*Mudie*, M. 1217; *Peters*, M. 1218; *Johnson*, M. App. Bankrupt, No. 5). The Sheriff is not aware of any recent decisions to a contrary effect. A trust-disposition granted by an insolvent who was not bankrupt in terms of the Statute has, no doubt, been held to be in a different position; but the distinction between the two classes of cases is clearly brought out in the decisions (*Snodgrass*, M. 1209; *Hutchison*, M. 1221). The case of *Ker* v. *Graham's Trustees*, C. S. 73 and 270, does not appear to the Sheriff to be against the above view. In that case the trustees were infeft under the trust-disposition of a life interest of an heir of entail in an entailed estate, and a reduction of that deed under the Act 1696, cap. 5, having been brought by the non-acceding creditors, on the ground that the granter had been made bankrupt within sixty days of its date, and the creditors having also obtained decree of adjudication of the life interest, the Court refused, while the action of reduction was pending, to prevent the trustees from cutting the wood on the estate, the same being thought to be for the advantage of all parties, and the trustees being considered sufficiently responsible for the price,

"If the two deeds in question are void and null under the Act 1696, cap. 5, it seems to be settled that the petitioner is entitled to have them set aside in the present action in the Sheriff-court, by way of exception, including reply (*Dickson*, 4 Macph. 797). No objection was stated by the respondent to the relevancy of the petitioner's averments in regard to the Act 1696, cap. 5, and the Sheriff was unwilling, therefore, where there had been already so much delay by both parties, to open up the record at this late stage in order that the petitioner's averments might be made more precise. These deeds being set aside, it appears to the Sheriff that the petitioner is, in the circumstances, entitled to interdict as craved."

The bankrupt and Grant advocated.

Clark and M'Lennan for them, argued, that the trust-deed and the subsequent disposition in Grant's favour were not of the class of deeds struck at by the Acts 1621 and 1696; and, further, that these deeds could not be set aside except by way of "action or exception" which did not include "reply," but was confined to reduction on the one hand, and exception against a party suing on the deed on the other. The respondent could not succeed without an action of reduction.

Mackenzie and Crichton for respondents, answered, that the trust-deed and the first disposition granted in favour of Grant were both null and reducible under the Act 1696, as being voluntary deeds granted within sixty days of bankruptcy, and under the Act 1621, as being in defraud of begun diligence. The disposition *omnium bonorum* in favour of the incarcerating creditor was a deed which the bankrupt was bound to grant, and which the law recognised as a mode of distributing the estate among the bankrupt's creditors. This gave the incarcerating creditor a statutory title to possession of the estate, subject to the obligation of accounting to the other creditors in terms of law.

The Court held that a trust-deed or other deed in favour of a trustee chosen by the bankrupt himself, after diligence had begun against him, and when he was in contemplation of bankruptcy, and within sixty days of its occurrence, was void both at common law and under the Acts 1621 and 1696. They further held that, while the term action might be held limited to action of reduction, and was therefore not competent in the Sheriff-court, the term "exception," in the modern sense, was sufficiently wide to cover "reply," and so to entitle a pursuer, when a deed of this sort was proponed against him, to object to it, just in the same way as if he were sued upon it directly.

Agents for Advocator—Murdoch, Boyd, & Co., W.S.

Agents for Respondents—D. Crawford & J. Y. Guthrie, S.S.C.

Saturday, May 16.

FIRST DIVISION.

MOOR *v.* OLIVER.

Reparation—Breach of promise to marry—Issue. Issue adjusted in action on breach of promise to marry.

This was an action of damages for breach of promise of marriage. It appeared that at Whitsunday 1855, the pursuer, a domestic servant, entered the service of the defender's father, an innkeeper, and continued in that service until Whitsunday 1857. During that time the defender resided with his father, and the pursuer alleged that about two months before Martinmas 1855 the defender made her an offer of marriage, which she accepted. From about June 1855 to Whitsunday 1857, the pursuer alleged, the defender continued to court her, and, for several years after she left the service of the defender's father, the defender continued his attentions to her, and repeatedly talked of fulfilling his promise of marriage. The pursuer proposed this issue:—

"Whether, between the month of September 1855 and the month of May 1857, both inclusive, the defender promised and engaged to marry the pursuer? And whether the defender has wrongfully failed to implement the said promise, to the loss, injury, and damage of the pursuer?"

The defender objecting to the issue, the Lord Ordinary (Barcaple) reported the case with this note:—

"The defender objects to the latitude of time in the issue in regard to the promise of marriage, on the ground that it is set forth in the record (condescendence 3), as having been made about two months before Martinmas 1855. Though the statements on record are not very clearly expressed in this respect, the Lord Ordinary is disposed to think that they import a promise and engagement, reiterated and kept up during the period from about two months before Martinmas 1855 until the pursuer returned to her father's house at Whitsunday 1857. In this view of the record, he thinks the issue need not be restricted to the point of time first mentioned."

J. C. Smith for defender.

Pattison and Scott for pursuer.

The Court approved of the following issue:—

"Whether, between the month of September 1855