equality arising at the counting of the votes. The analogy of the Ballot Act, which seems to contemplate that course, favours this view. Besides, he has declared the result of the election, and there is no machinery for his doing so again. In these circumstances the Sheriff-Substitute has arrived at the conclusion that the 15th section of the Education Act applies to the present position of the School Board. His interlocutor is framed accordingly, and he is of opinion that a remit to the School Board is not necessary, as the section in question itself imposes on the School Board the duty of filling up a vacancy when the election of a member has been declared to be invalid. It appears to the Sheriff-Substitute that it is sufficient to order the interlocutor to be intimated to the School Board, a quorum of which is in existence.

"The case, in the opinion of the Sheriff-Substitute, is one in which each party should pay their own expenses."

Counsel for Petitioner—E. E. Harper. Agent—J. Buchan.

Agent for Respondent—J. Bathgate.

COURT OF SESSION.

Tuesday, May 27.

OUTER HOUSE.

[Lord Ormidale.

PATON *v.* NEILL EDGAR & CO.

Process—Competency—English Company.

Held by Lord Ormidale (and acquiesced in) that an unincorporated English firm, against which jurisdiction has been founded by arrestment, may be sued in the Scotch Courts *socio nomine*, although in the English Courts it cannot be so sued.

The defenders in this case were an unincorporated trading company, carrying on business in England, and they were sued *socio nomine*; none of the individual partners being called as defenders. Jurisdiction had been founded by the arrestment of funds in this country belonging to the firm. In the defences it was averred that "by the law of England such companies or firms cannot be sued except by action against the individual partners thereof by their proper christian and surnames;" and it was pleaded—"1. The action is not competently laid, in respect the defenders' firm is an unincorporated English company."

This plea the Lord Ordinary repelled by the following interlocutor, which was acquiesced in:—

"*Edinburgh, 27th May* 1873.—The Lord Ordinary having heard counsel for the parties on the defenders' first plea in law, and having considered the argument and proceedings: Repels said plea and, under a reservation in the meantime of all questions of expenses, appoints the case to be enrolled in the Lord Ordinary's motion roll that a diet of proof may be fixed.

"*Note.*—By their plea in law, now repelled, the defenders mean, as was stated by their counsel, that as by the law of England an ordinary trading company, such as they are, unincorporated by statute or otherwise, cannot be sued in England, and as action in England lies against the individual partners alone, the present action, directed as it is against the ordinary trading firm of Neill Edgar & Coy. is incompetent.

"The Lord Ordinary considers it unnecessary to enquire or determine what the law of England is on the point referred to, as he holds it to be clear that, as matter of remedy and mode of procedure, it must be ruled in the present case by the law of Scotland, where the action has been brought. It is not disputed that there is such a firm or company as Neill Edgar & Coy.; and neither is it disputed that funds belonging to that company have been arrested *juridictionis fundandæ causa*. The action being, therefore, in itself in due and competent form according to the law and practice of Scotland, the Lord Ordinary can entertain no doubt that the *lex fori* applies and must rule the question. All this being so, there was no alternative but to repel the defenders' first plea in law, and were it necessary, the Lord Ordinary might refer as authority for the course he has adopted to the case of *Forsyth* v. *Hare & Coy.*, 18th November 1834, 13 Sh. 42. It is true that the point attempted to be made for the defenders here does not appear to have been raised in that case, for the reason, no doubt, that the law and practice was thought too clear and well settled to admit of its being raised with any chance of success. Cases are accordingly of frequent occurrence in this Court of actions by and against unincorporated English companies. The pursuers were an English unincorporated trading company in *Thomson, Bonar, & Coy* v. *Johnstone*, 30th November 1836, 15 Sh. 173; and in *Wheatcraft & Turner* v. *Hawthorns & Coy., et e contra*, 3 Scottish Law Reporter, p. 30, an English unincorporated company were pursuers of one action, and the defenders in another, but both were sustained as well brought into Court, in respect, among other authorities, of the decision in *Forsyth* v. *Hare & Coy.* In the cases of *Wheatcroft & Turner* v. *Hawthorns & Coy., et e contra*, Lord Barcaple, whose judgment was acquiesced in, appears to have taken the same view of the point in dispute, and disposed of it in the same way as the present Lord Ordinary.

"The case of the *Edinburgh and Glasgow Bank* v. *Ewan*, 14 D. 547, founded on by the defenders, does not appear to the Lord Ordinary to be in point, for there no English or other foreign company were called as defenders,—jurisdiction not having been, as in the present instance, founded against any such company."

Counsel for Pursuer—Mr Burnet. Agent—Mr Macgregor, S.S.C.

Counsel for Defenders—Mr Pearson. Agents—Webster & Will, S.S.C.

Friday, May 30.

FIRST DIVISION.

[Sheriff Court of Aberdeenshire.

TAYLOR *v.* MATHER.

Trustee—Liability—Accounting—Lapse of Time.

Long delay on the part of beneficiaries to demand an accounting from a person acting as trustee does not free the trustee from liability to account; but the trustee must not suffer prejudice on account of the lapse of time.

This was an action of accounting brought in the Sheriff Court of Aberdeenshire by Mrs Margaret Mather or Taylor against Mrs Milne or Mather under the following circumstances:—By mutual trust-disposition and settlement, dated 9th August 1825, John Mather, of Gaberstone Toll-bar, and Mary Weir, his spouse, assigned and disponed to each other, and the longest liver of them, in liferent, for the liferent use of the survivor only, and to their children, James, Mary Ann, Margaret, and Catherine Mather, and to any other child or children that might be procreated between them, equally betwixt them, share and share alike, and their respective heirs and assignees in fee, all and sundry household furniture, goods, gear, debts, and sums of money, and moveable property of every description, then belonging, or that should belong and be due and addebted to them at their death, and nominated and appointed their said disponees, for their respective rights and interests as above mentioned, to be their executors. The said John Mather died on the 9th of April 1826, having been predeceased by the said Mary Weir, his spouse, and was survived by his said four children, James, Mary Ann, Margaret, and Catherine. Catherine died within a week of her father's death, in the years of pupillarity. James Mather assumed to act as executor, but died about seven months after his father, survived by his widow, the defender in this action. On James Mather's death, the family was reduced to two, the pursuer, Margaret Mather, and her sister Mary Ann, who were both in pupillarity. The defender, who had been appointed by James Mather his executrix, brought up these two children, and the pursuer remained with her until her marriage. The pursuer's sister, Mary Ann, also remained with the defender until she was sixteen years of age, when she sailed for Australia, but died on the voyage. When Margaret, the pursuer, married in 1841, she received £5 from the defender, and Mary Ann, when she sailed for Australia, received £40, besides £20 for outfit. The defender had never made any other payments to the pursuer or her sister out of the estate of John Mather, and had never accounted for her intromissions. This action was accordingly raised in 1871, to compel her to account for her intromissions, and pay any balance which might be owing.

In defence, she averred that she had expended all the funds in bringing up the children, and that in fact she was out of pocket by so doing.

After a proof, the Sheriff-Substitute pronounced an interlocutor in which he assoilzied the defender.

On appeal, the Sheriff pronounced the following interlocutors:—

"*Edinburgh, 5th June* 1872.—The Sheriff having considered the reclaiming petition against the interlocutor of 16th April last, with the answers thereto for the defenders, and having considered the record, proof, productions, and whole process, sustains the appeal, recals the interlocutor appealed against: finds that the defender, Isabella Milne or Mather, is the widow of James Mather, eldest son of John Mather, of Gaberstone Toll-bar, in the county of Clackmannan, who died there in 1826, and that the said James Mather died in January 1827, after giving up an inventory of his father John Mather's personal estate; that on her husband's death the defender took possession of both his own estate and the estate falling to the surviving children of the said John Mather; and that she is now bound to account to the female pursuer, as one of the said surviving children, for her intromissions therewith. Before further disposing of the cause, appoints an inquiry to be made by an accountant into—(1) The amount of the estate and effects left by the said deceased John Mather; (2) The amount thereof which came into the hands of the defender, and remained in her possession after payment of debts due by the deceased, and other proper charges; (3) The payments from time to time made by the defender to the pursuer, or her sister, Mary Ann Mather, and the sums expended, or which may reasonably be assumed to have been expended, on their clothing and education; (4) The sum which may be assumed to have been expended on her board, under deduction of the value of her domestic services; and (5) The balance, if any, still due and payable to the pursuer, either in her own right or as representing the other members of the family, who have predeceased. Remits to James Meston, accountant in Aberdeen, to examine the process, hear parties, call for such further documents as may be recoverable and appear to be necessary, and thereafter prepare a report in terms of this interlocutor, the same to be lodged *quam primum.*

"*Note.*—It would have been a very easy thing for the defender and her brother John Milne to have kept an account of their intromissions with the money belonging to the pursuer's father, and if they had done so she would probably have exhibited her accounts and obtained a proper discharge from the pursuer when she married her present husband in 1841. Every person holding a fiduciary position should always be prepared to give an account of his administrations; and it is not for a trustee to say, at the end of a great many years, 'I have never accounted because no account was ever asked, and I am no longer in a position to do so.' The account may never be asked by the beneficiary, for the reason that, having been left an orphan at an early age, he had no idea what his rights were. But the failure of the persons entrusted to make the inquiry can in no way affect the position and legal objections of a trustee, because it is plainly his duty to go and tell the beneficiaries what their rights are, whether the question is put or not. It is, therefore, a rule of familiar application in Courts of Equity, that when the proper occasion arrives a trustee will be expected to tender the exhibition of his account, even although he has received no formal requisition to that effect. For these reasons the Sheriff cannot hold that this action should now be thrown out because it is forty years since that old John Mather died. The pursuer is entitled to know what the defender did with her father's money during her infancy, and as no such account was ever before tendered, the inquiry which has been ordered must proceed."

"*Edinburgh, 21st December* 1872.—The Sheriff having heard parties' procurators on the accountant's report, and considered the record, productions, and whole cause: finds that the free residue of the estate of John Mather, who died on 9th April 1826, amounted in all to the sum of £340; that it was divisible in four equal parts among his children, James, Mary Ann, Margaret, and Catherine Mather; that Catherine having died soon after her father, the share falling to the pursuer

and her sister Mary Ann amounted to £226; that the defender took possession of this sum, and never rendered any account of her intromissions: finds that the pursuer and her sister Mary Ann, having, on the death of their father, been taken charge of by the defender, she is entitled to an allowance for their board and education during their early years; but in all the circumstances, the interest of the money prior to the pursuer's marriage in 1841, taken along with the value of her own services, is reasonably sufficient to cover said outlay and the few gifts given to the pursuer on that occasion: finds that Mary Ann left this country for Australia in 1841, and that on that occasion her passage money and outfit were paid, which may be assumed to have amounted to between £30 and £40, leaving the sum of £80 still due and payable as the balance of her share: finds that, on the death of the said Mary Ann Mather, the pursuer became entitled to this balance, and that, added to her own share of her father's money, the fund to which she was entitled in the year 1841 amounted to £193: finds further that the defender is liable in five per cent. on this sum from the said date down to the date of this action, amounting in all to the sum of £299, 3s., which, added to the said sum of £193, amounts to £492, 3s. Decerns against the defender for the said sum of £492, 3s., with interest at the rate of five per cent. till payment: finds the defender liable in expenses; allows an account thereof to be given in: and remits the same, when lodged, to the Auditor for taxation; and decerns."

The defender appealed.

LORD ARDMILLAN delivered the opinion of the Court in the following terms:—

LORD ARDMILLAN—This was an appeal by Mrs Mather, the defender, against the judgment of the Sheriff of Aberdeenshire, in an action brought by Mrs Taylor against her, to enforce an accounting for the funds of the deceased John Mather, who died near Alloa on the 9th of April 1826, survived by four children, viz., James, the husband of the defender, who died in 1826, Mary Ann who died in 1840, Margaret, the pursuer of this action, who was married in 1841 to Alexander Taylor, and Catherine, a child who died within about a week of her father's death. At the date of the death of John Mather it is now ascertained, and not disputed, that his four children surviving him were entitled equally to a share of his estate; and I agree with the Sheriff in holding that the free residue of his estate must be taken at £230, and I am also disposed to accept as correct the addition which the Sheriff makes to that sum on account of money in the house at the time of the death, and money drawn from the tolls of which John Mather was tenant, up to Whitsunday 1826. The sum so added by the Sheriff is £110 and thus the amount of the succession for distribution is £230 plus £110 equal to £340, divisible as I have stated into four shares. The defender, Mrs James Mather, was left, on the death of her husband, in 1826, in the position af a trustee and almost in *loco parentis* to the two children Mary Ann and Margaret, Catherine being then dead. Mary Ann was then about eight and a-half years of age, and the pursuer Margaret, now Mrs Taylor, was then six years of age. They were orphans, their mother having predeceased their father; and I see no reason to doubt that the defender acted towards them with the best intentions, and with much kindness. The defender had a brother, Mr John Milne, who resided at Forrest of Skene in Aberdeenshire, and she removed there, taking the children with her, and taking charge of their maintenance and upbringing. In 1834 Mary Ann, the eldest of the two children, was sixteen years of age; and under circumstances which it is not necessary here to detail, she left this country for Australia in 1840. It appears, and indeed is not disputed, that the defender advanced the passage money for her, amounting to £40, and I think it also appears that she advanced £20 for her outfit. Mary Ann died on her passage out. The pursuer, as the only surviving child, is entitled to whatever sum was then due to Mary Ann as her share. Margaret, the pursuer, was married in 1841, and at the time of her marriage she received £5 from the defender.

The present action of accounting was raised on 12th January 1871, upwards of forty-four years after the death of John Mather, and above 30 years after the marriage of the pursuer. I agree with the Sheriff in considering that mere lapse of time,—mere delay on the part of the pursuer in demanding an accounting—will not relieve the defender from responsibility, or discharge her obligation to give reasonable account and explanation of her conduct and of her intromissions with the estate of John Mather, for she held a fiduciary character, to which responsibility uniformly and permanently attaches. But, on the other hand, I am not prepared to leave out of view, in disposing of this case, the important fact that the defender acted in good faith, and that accounting might have been demanded, and ought to have been demanded, many years ago. This delay, which is not the fault of the defender, on whom no call for accounting had been made, has placed her in a position of disadvantage, and care must be taken that she does not suffer wrong from a delay for which she is little, if at all, to blame. With such materials as we have before us, I have done the best I can to ascertain the sum due to the pursuer as the result of this accounting. It is scarcely possible to do so with perfect accuracy; but I think I have been able to reach a result according to the justice of the case.

I think that the defender cannot justly be refused credit for a reasonable allowance for maintenance and upbringing of her husband's young sisters, and that the sum of £5 a-year for each under 10 years old, and £10 a-year for each till the girls became fit for service, say till sixteen years of age, is a fair sum. I now proceed to state the result of the rough calculation which I have made.

I commence by deducting from the sum of £340 the value of the furniture with which, as she was keeping house for the benefit of the family, and as it must have been well used up in forty years, it seems hard to charge her. The amount is £17, 10s., and this leaves to be accounted for, £322, 10s. Margaret's share of this is £80, 12s. 6d. Then she has her share of Catherine's portion, that is, one-third of £80, 12s. 6d., which is £26, 17s. 6d., making Margaret's entire share to be accounted for, £107, 10s.

Now, giving Margaret credit for this sum at starting, and for interest annually at 3 per cent, and giving the defender credit for maintenance, &c., at the rate of £5 annually till 1830, when Margaret was ten years old, and after that date giving Margaret credit for interest at 3 per cent annually, and giving the defender credit for £10 annually

till 1836, when Margaret was sixteen and able to earn a fair wage, I think I am very nearly quite correct in stating that the sum due at that time, (1836) to Margaret was £61, 7s., to which add interest at 3 per cent from 1836 to the date of citation being £66, making £127, 7s. as due to Margaret, but from which must be deducted £5 paid to her by the defender at her marriage, leaving £122, 7s.

Then Mary Ann was in like manner supported and educated in the house. Giving her credit for interest at 3 per cent on her portion, the same as her sisters, and giving the defender credit for £5 annually during the first two years or till 1828, when Mary Ann was ten years old, and for £10 a year till 1834, when she was sixteen, I think the sum due to her was £70; and then when she sailed for Australia in 1840, the £60 which was advanced for her benefit must be credited to the defender, leaving £10 then due to Mary Ann's estate, and to the pursuer as representing her; and, adding interest at three per cent from 1834 to the date of citation, the sum due to the pursuer on account of Mary Ann's portion is £21, 2s.

Thus the entire sum, on my view on these transactions, due to the pursuer is £143, 9s. Under all the circumstances, I think that 3 per cent interest is sufficient as a charge against the defender prior to the raising of the action; but of course 5 per cent interest will be due from the date of citation till payment. This result is reached according to the best of my judgment. There are, however, broken periods and minute details of expenditure, and insufficient materials which disturb calculation.

I see no reason whatever to doubt the honest and kindly intentions of the defender, and if she had been asked to account thirty years ago, she would have been better able to do it. We have had two states of accounting laid before us,—the one, prepared by an accountant in Aberdeen, brings out, on principles of strict accounting, with 5 per cent interest all along, £825 due by the defender; the other, prepared by Mr Duncan on behalf of the defender, brings out a very different result, for on his state of accounts the defender owes nothing, but, on the other hand the estate of John Mather is indebted to the defender to a considerable extent.

The Sheriff-Substitute assoilzied the defender; but the Sheriff-Principal decerned against the defender for £492, 3s. In this position of matters, and with very inadequate and unsatisfactory materials for accounting, and desiring to save expense to the parties, I can only say that I have endeavoured to do justice to both parties, and that I think the sum for which I suggest that your Lordships decern, namely £143, 9s., is as close an approximation to the truth and justice of the case as we have the means of making.

The Court pronounced the following interlocutor:—

> "Sustain the appeal and recall the interlocutor of the Sheriff, dated 21st December 1872; find that the free residue of the estate of John Mather, who died on 9th April 1826, amounted to £340, that John Mather was survived by his four children James, Mary Ann, Margaret, and Catherine Mather, who were each entitled to one-fourth part of said sum; find that Catherine died soon after her father in 1826, and her one-fourth share became payable to her brother and two sisters as her next of kin, and that James, whose widow is the defender (appellant), died in the same year find that Mary Ann reached the age of sixteen in 1834, and died in the passage to Australia in 1840, and that Margaret, the female pursuer (respondent), reached the age of sixteen in 1836, and was married to Alexander Taylor in 1841, being then 21 years of age; find that this action was not brought till January 1871; find that the defender, after the death of John Mather, and of her own husband James Mather, took charge of the maintenance and upbringing of Mary Ann and of the female pursuer, and is entitled to take credit for her outlay in their board and education, at the rate of £5 annually, till they respectively reached the age of ten years, and at the rate of £10 annually thereafter, till they respectively reached the age of sixteen years; find that interest at the rate of 3 per cent. per annum must be credited to the portion of Mary Ann and of the female pursuer respectively, including their shares of Catherine's portion; find that the female pursuer succeeded first to one third of Catherine's portion, and then to the balance remaining due to Mary Ann at the date of her death; find that the sums due to the female pursuer in 1836, when she reached sixteen, including her share of Catherine's portion, was £61, 7s., and, adding interest at 3 per cent. till the date of citation in the first action, the sums now due to her by the defender on accounting is £127, 5s., but under deduction of £5, which she received from the defender at the time of her marriage, making thus the balance now due to her on her own portion and her share of Catherine's portion, to which she succeeded, £122, 5s; find that the portion of Mary Ann, including her share of Catherine's portion, after crediting her with interest at 3 per cent., and crediting the defender annually with £5 while Mary Ann was under ten years old and £10 while she was under sixteen, as aforesaid, amounted at the date of her death to £70, but that the sums of £40 and £20 advanced to her by the defender fall to be deducted, thus making the sum remaining due to her at the date of her death £10, and adding interest at 3 per cent. on that sum from the date of her death to the date of citation in the first action, the balance now due on Mary Ann's portion, including her share of Catherine's portion, and payable to the female pursuer, her only surviving sister, is £21, 2s.; find, accordingly, that the sum due to the female pursuer on her own account and as representing Catherine, and also as representing Mary Ann, is £143, 7s.; therefore decern against the defender for payment to the pursuers of £143, 7s. sterling, with interest thereon at 5 per cent. from the date of citation in the first action till payment; find no expenses due to either party either in the Sheriff-court or in this Court."

Counsel for Pursuer—Watson and Macdonald. Agents—Henry & Shiress, S.S.C.

Counsel for Defender—Solicitor-General and Asher. Agents—Webster & Will, S.S.C.

M., Clerk.

the bankrupt, and consequently to his trustee, or which has limited the appellant's right to full payment of a half of the expense of building as a condition of the trustee taking the benefit of the gable. It may be that if a party having such a claim allows the gable to be made use of, and adjoining buildings are erected, completed, and occupied, and thereafter transferred to a singular successor, that a claim against such successor might be excluded, upon the ground referred to by Lord Deas in the case of *Law* v. *Monteath's Trustees*, that in the whole circumstances the successor was entitled to assume that the half of the gable had been already paid for, and that the creditor must look to the person who used and occupied the buildings for reimbursement of his claim. The question which would arise in such a case would be attended with considerable difficulty, for there is much to be said in favour of the view that nothing short of payment, or discharge of the claim for one-half of the expense, will transfer the real right. In any view, the question would turn on the special circumstances, which must amount to a bar of the creditor's claim in respect of his own actings or acquiescence. In the present case there are no circumstances which can create such a bar. It cannot, in the opinion of the Lord Ordinary, be said that there was undue delay to make the claim, or acquiescence in the use of the gable without payment, so that the real right in it was transferred because the creditor did not enforce his claim before the building was roofed in. If he had rendered the account while the building was going up, this would appear to be all that could be expected of even a party very careful of his rights. He was surely not bound to interdict the building in order to preserve his right; and the Lord Ordinary cannot think that in the circumstances his right to full payment was forfeited by delay to make his claim, to the effect of enabling the trustee to acquire a real right in property for which no payment was ever made. Indeed, the principle of the case of *Wallace* v. *Brown*, which is the foundation of all the decisions since its date, seems to exclude the argument maintained by the respondent, that the appellant must be satisfied to rank as a personal creditor, and to accept a composition on his claim. No objection was stated to the amount claimed, assuming liability to exist."

The trustee reclaimed.

Authorities cited—More's Notes on Stair, 196; *Mackenzie*, 8 and 9 Shaw, 74, 144; *Murray* v. *Aytoun*, 21 D. 33; *Law*, 18 D. 125.

At advising—

Lord Justice-Clerk—I am for adhering. I concur in the result at which the Lord Ordinary has arrived in this case, and substantially on the same grounds.

Lord Cowan—The feu-contracts of the parties respectively contain express stipulations that the gable between the building stances shall be a mutual gable, and the cost of erecting it be borne equally by the feuars, to whom the gable shall belong in common. There are other obligations and stipulations connected with the premises, and the contracts contain an express declaration that the obligations, provisions, and others contained in them shall be real liens and burdens affecting the several pieces of ground and buildings erected and to be erected thereon. In this state of the titles there is really no difficulty in the case, having regard to the relative position of the two parties. The right of the respondent, whose house was first erected, to enforce against Wilson, by whom the adjoining site was feued, the half expense of erecting the mutual gable—so soon as the latter made use of the gable in the erection of a house on his feu,—is beyond dispute. As Lord Ivory expresses it in *Law* v. *Monteath*, "all the authorities establish that there is a real right, inherent in the subject itself, to have the value of the gable when the other party comes to use it, and therefore, that right being so inherent, it passes with the property as a necessary adjunct of it." On that principle it was that in the subsequent case of the *Earl of Moray*, which the Court disposed of on the title, I rested my opinion in favour of the defender, Professor Aytoun, to whom the half-cost of the gable had been paid by the feuar who built on the adjoining feu. Now that being the character of the right which the party has to demand payment, it seems clear to me, apart from special stipulation, that the owner of the unbuilt on stance, when he does build, and adopts the mutual gable as part of his building, does so subject to the burden of making payment of one-half of the expense of the gable as a real condition affecting his right and the building erected on the ground. The solum of the gable appears to me to become from the time of its appropriation the *pro indiviso* property of the two parties under their several titles, subject to that real condition of paying for the gable. I think there is difficulty in the view of the Lord Ordinary, that it is only on payment that the *pro indiviso* right passes. No written evidence of payment is required to form part of the title to the property, and to be recorded as such. The more just view is that the feuar who has first built on his ground can demand from the second feuar, on his using the wall, payment of the sum, as being a real condition or burden affecting the subjects; and his right as inherently a preferable real claim can be made effectual as such. And certainly whatever may be said as to the liability of singular successors, where the feu-contract is silent and where there is room from lapse of time or intermediate transmissions for presuming payment by his authors, the circumstances of this case present no such difficulty. For (1) the house erected by Wilson had not been completed when his bankruptcy took place, and the appellant took possession of the premises under the sequestration: it was only after the mere external shell of the building came into his possession that the house was completed, so that it could not but be that he took the property subject to the conditions on which it stood in the bankrupt's person: the subject necessarily vested in him *tantum et tale*. And (2) the express stipulations in the feu-contracts declared this obligation amongst others a real burden affecting the ground and the buildings erected thereon; and it is vain for the appellant to resist implement of this obligation, contained in the contract which is the foundation of his feudal title, and by which the cost of erecting the mutual gable is ordained "to be borne equally by the feuars, to whom they shall belong in common."

I am of opinion that the interlocutor of the Lord Ordinary should be adhered to.

The other Judges concurred.

The Court adhered, with additional expenses.