Saturday, July 19.

FIRST DIVISION.

[Bill Chamber, Lord Adam.

WATSON *v.* DUNCAN (WATSON'S TRUSTEE).

Shipping Law—Merchant Shipping Acts—Bill of Sale—Requisites for Completing Title to Ship—Bankruptcy.

Under the Merchant Shipping Act of 1854, as interpreted by the 3d section of the Act 25 and 26 Vict. cap. 63 (an Act to amend the Merchant Shipping Act of 1854), the execution and delivery of a bill of sale of shares of a ship vests such a beneficial interest in the grantee as he is entitled to vindicate against the trustee on the granter's sequestrated estates, though the bill of sale has never been registered and the granter remains on the register as owner of the shares down to the date of his sequestration.

Bankruptcy—Tantum et tale.

The trustee on a sequestrated estate takes the moveable estate belonging to the bankrupt *tantum et tale* as it stood in the bankrupt.

Observations by Lord Deas on the case of *Tod's Trustee* v. *Wilson*, July 20, 1869, 7 Macph. 1100.

The ship "John Watson" was built in the year 1875 at Banff by John Watson senior, shipbuilder there. The whole of the shares with the exception of eight were shortly after the completion of the ship sold to various parties, who were duly entered on the ship's register as owners thereof. The name of the builder, John Watson senior, continued on the register as owner of the above-mentioned eight shares down to the date of his sequestration. In point of fact, however, John Watson senior had on 14th July 1875 executed and delivered to his son, who was the petitioner in this case, a bill of sale of four of the eight shares, the price of the shares being duly paid to John Watson senior on or about the same date. From July 1875 the managing owner of the ship paid the proportions of profits earned by the ship effeiring to these four shares to the petitioner, although his name did not appear on the register. The estates of John Watson senior were sequestrated under the Bankruptcy Acts on 7th March 1879, and the respondent Alexander Duncan was duly appointed trustee thereon, and advertised for sale the whole eight shares standing in the bankrupt's name on the register. In these circumstances John Watson junior presented a petition to the Lord Ordinary on the Bills in terms of the 104th section of the Bankruptcy (Scotland) Act 1856 to have it declared that said four shares included in the bill of sale granted to the petitioner were his property, and to have the respondent ordained to grant such deed as should be necessary to obtain the petitioner registered as the owner thereof, and in the meantime to have the respondent interdicted from selling the shares belonging to the petitioner.

The respondent lodged answers, in which he denied "the material statements made in the petition," admitting however the sequestration, his own appointment as trustee, the building of the ship in 1875, the absence of the petitioner's name from the register, and that the bankrupt was entered on the register as owner of the shares in question, and that the respondent claimed right to the four shares. He also set forth that on 21st April 1879 he had upon production of his act and warrant of confirmation been duly entered on the ship's register as owner of the whole of the eight shares, including the four in question. He further stated that the bankrupt in his state of affairs gave up the shares in question as part of his assets; that the bankrupt had been examined on three separate occasions, and had on the first two occasions deponed that the eight shares were his property—only explaining on the last occasion that he had sold four of them to the petitioner in 1875. In these circumstances the respondent submitted—*First*, that the petitioner had no right or title to the four shares in question; *Second*, that the respondent being the registered owner of the shares in room and place of the bankrupt, who was the registered owner, was entitled to sell and dispose of the shares for behoof of the bankrupt's creditors; and further, that the petitioner's statements were irrelevant.

The Lord Ordinary (Adam) on the Bills pronounced an interlocutor refusing the prayer of the petition and decerning. He added this note:—

"*Note.*—The Lord Ordinary does not think that this case can be distinguished from that of *M'Arthurs* v. *M'Brair*, June 20, 1844, 6 D. 1174.

"It was by reason of the petitioner's own negligence that the bill of sale in his favour remained unregistered for nearly five years.

"It appears to the Lord Ordinary that in consequence of this delay the respondent has become the duly registered owner of the shares in question; and if, as the Lord Ordinary thinks, the result is that the petitioner has thereby lost his right to the shares, it is his own fault—Maclachlan on Shipping, p. 36.

"The Lord Ordinary was referred to the cases of *Dingwall*, 6th June 1822, 1 Shaw 463; *Gordon*, 5th February 1824, 2 Shaw 675; and to the cases cited in the notes to Bell's Com., i. 403-7, but none of these referred to the case of property held on a registered title."

The petitioner reclaimed, and argued—The Merchant Shipping Act of 1854 differed in two essential respects from the Shipping Acts previously in force. In the first place, it was no longer declared that a bill of sale should be null if not in the statutory form, nor that a bill of sale should be of no force or effect until registered as had previously been the case; and, in the second place, beneficial or equitable interests in ship property were distinctly recognised by the Act of 1854, as interpreted by the Merchant Shipping Acts Amendment Act 1862, section 3. The execution and delivery of the bill of sale therefore now passed the property to the grantee, or at all events vested him with a beneficial interest, which he could vindicate whatever was the state of the register. The bankrupt after granting the bill of sale could have no higher right than that of a mere trustee for the petitioner, and so the shares in question were not attachable for debt in terms of section 102 of the Bankruptcy (Scotland) Act 1856, and therefore never vested in the respondent, or at all events the respondent could only take the bankrupt's estates *tantum et tale* as they stood in the bankrupt.

Authorities on the Shipping Acts—*Liverpool Borough Bank* v. *Turner*, 29 L.J. (Ch.) 827, 30 L.J. (Ch.) 379; Abbot on Shipping, 55, 56; *Stapleton* v. *Hayman*, 2 H. & C. 918; Lindley on Partnership, 644; *Holderness* v. *Lamport*, 29 Beav. 129. On the respondent's rights under the Bankruptcy Acts—*Mackenzie* v. *Watson and Stuart*, M. 10,108; *Lindsay* v. *London and North-Western Railway Company*, January 27, 1860, 22 D. 571; *Littlejohn* v. *Black*, December 13, 1855, 18 D. 207; *Fleeming* v. *Howden*, July 16, 1868, 6 Macph. (H.L.) 113; *Edmond* v. *Gordon*, 3 Macph. 116, and the cases mentioned by the Lord Ordinary.

The respondent argued—The Merchant Shipping Act of 1854 made it imperative that every bill of sale should be registered. The register of shipping property had really come to be regarded in the same light as the register of land rights—the public looked to it as final, and were entitled to do so. The fact that the petitioner was not registered was due to his own laches—by allowing the bankrupt's name to remain on the register he had enabled him to obtain a false credit, and so had created a sort of reputed ownership whatever effect might be given to the bill of sale. *Stapleton* v. *Hayman* was distinguishable, as there was no negligence on the part of the grantee in that case. There must be some limit to the doctrine of *tantum et tale*. In a sense, every man who was in debt and possessed money, held that money in trust for his creditors, but his trustee in bankruptcy was entitled to it for the general behoof free from any special claims. An unintimated assignation could not compete with the claim of the trustee in bankruptcy—no more could an unregistered conveyance of feudal property if the trustee got his title first put on the register. That was precisely the case here.

Authorities—*Davidson* v. *Boyd*, Nov. 5, 1868, 7 Macph. 77; *Tod's Trustees* v. *Wilson*, July 20, 1869, 7 Macph. 1100; *Wylie* v. *Duncan*, 1803, M. 10,269; *Duffus* v. *Lawson*, February 13, 1857, 19 D. 430; *Morrison* v. *Harrison*, February 3, 1876, 3 R. 406.

At advising—

LORD PRESIDENT—The petitioner in this case, Mr J. Watson junior, claims to have four shares of a ship struck out of the sequestration of his father's estates on the ground that they are his own property. This ship was built in 1875, and was called after its builder the "John Watson." Mr Watson senior seems to have disposed of the greater number of the shares in her, but he retained eight in his own name. About the same time as he disposed of the others he transferred four of the eight to his son, as it is alleged for a price paid, and in respect of an onerous transaction. This he did by means of a bill of sale drawn out in the proper form as required by statute. The petitioner, however, was never registered as owner of these shares. The trustee in the sequestration therefore contended that in the state of the registry he was entitled to hold the whole eight shares on behalf of the creditors. It is not said on his part that there was anything collusive in the transaction between Mr Watson and his son. The latter was at the time *sui juris* and not dependent on his father, and therefore we must take his statement as correct. To this we must add the very important fact that it is not denied by the trustee that from the time at which the bill of sale was delivered to the petitioner he received from a person called G. Steele, who was the managing owner and ship's husband, his proper share of the earnings of the vessel. The petitioner's position, then, is that he had a good bill of sale under the various Merchant Shipping Acts, and that he had also from the time of acquiring it been in possession of the shares, for the only possession possible to a part-owner is the receiving a proportional part of the earnings, unless indeed he was managing owner or the like.

Matters standing so, the Lord Ordinary has refused the petition, holding that the case is not distinguishable from the case of *M'Arthurs* v. *M'Briars*. I cannot however agree with him that this is a good ground for refusing the petition, for the law has been altered since the date of that case, and though no doubt at that time there could be no effectual ownership of shares in a vessel without registration, there is no such rule now. The Act in force at the date of *M'Arthurs'* case was the Act 3 and 4 Will. IV. c. 55, and while the 31st section of that Act provided that transfers of shares in a vessel must be by bill of sale—and that requirement is still in force—the 34th section provided that no bill of sale should be valid to pass property until it had been registered. That quite accounts for the judgment in *M'Arthurs'* case. But it is necessary to trace the progress of legislation since that time, and it appears somewhat complicated at first. That Act of 3 and 4 Will. IV. was repealed in 1845 by the Statute 8 and 9 Vict. c. 84, but in the same year another Act was passed, 8 and 9 Vict. c. 89, regulating the registry of British ships, and the provisions of this Act as regards bills of sale came in the place of those in the Act of William IV. Under this later Act the two sections of the earlier Act to which I have already called attention were substantially repeated, and particularly the 34th section, which said that no bill of sale should be effectual till registration, and therefore in 1845 the law was in the same position upon this point as at the date of the passing of the Act 3 and 4 Will. IV. though that Act was repealed. But this Registration Act of 1845 was in its turn repealed in 1854 by an Act 17 and 18 Vict. c. 120, entitled the "Merchant Shipping Repeal Act 1854." The effect of this was to sweep away all the provisions of the Act of 8 and 9 Vict. Again, in the same year 1854 the Merchant Shipping Act with which we are all acquainted (c. 104) was passed, and in that Act there are remarkable differences as compared with the previous statutes. The 55th section provides, like the corresponding sections in the older statutes, that a registered ship, or a share in one when disposed of, shall be transferred by bill of sale, and then in the 57th section it is provided that every bill of sale when duly executed shall be registered, but there is no clause providing as formerly that a bill of sale shall be of no effect until it is registered. That clause, which is in both the previous Acts, is omitted. There is also another remarkable change, to the effect that beneficial or equitable interests are recognised and dealt with. It therefore came to be thought in the 1854 Act that it was no longer necessary to complete a title to a ship or a share in a ship that there should be registration, though registration is applicable to bills of sale.

That question was in doubt till 1862, when

another Act was passed, entitled "An Act to amend the Merchant Shipping Act of 1854" (25 and 26 Vict. c. 63). On the 3d section of that Act the decision of this question turns. The object of it is to determine what is the operation and effect of the Act of 1854 with regard to registration, and the clause is expressed in the form of a declaration—"It is hereby declared that the expression 'beneficial interest,' whenever used in the second part of the principal Act, includes interests arising under contract, and other equitable interests, and the intention of the said Act is that, without prejudice to the provisions contained in the said Act for preventing notice of trusts from being entered in the register book or recorded by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by the said Act on registered owners and mortgagees, and without prejudice to the provisions contained in the said Act relating to the exclusion of unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their interest therein, in the same manner as equities may be enforced against them in respect of any other personal property." It appears to me that the true construction of this clause is that a person having a beneficial interest in the property of a vessel, though his title to it be not completed by registration, may enforce that right against the registered owner or mortgagee just as he might enforce a right in respect of any other personal property.

There are exceptions, and no doubt important ones, but they do not affect this question. First, the registered owner or mortgagee has power of disposing and giving receipts; second, there is to be no notice on the register of trusts—that is, the circumstance that there is a beneficial interest is not to appear in the register; and third, the clause is not to effect the exclusion of unqualified persons from holding British ships. But with these exceptions the rights which anyone acquires by contract to an interest in a vessel may be enforced.

Now, observe the position of the petitioner here. He has a bill of sale framed in terms of the statutes; that bill of sale is delivered for a full price, and following upon that he has the only possession possible, as I have already pointed out, namely, participation in profits. It is difficult to imagine any right more complete short of absolute registration. Therefore, if any effect is to be given to this 3d section, I think we have the strongest case for giving it here. I am of opinion that against this trustee in bankruptcy this must receive effect, just as it must have received effect against the bankrupt himself when he was solvent. And I am satisfied that by adopting that construction we are giving the effect intended to the words of the statute.

Lord Deas—It appears that in 1875 Mr Watson the elder was possessed of eight shares in this ship, and that he transferred them about that time to Mr Watson junior, the petitioner. If the good faith of this transaction had been doubted, it might have been a material element in the case that it was entered into between father and son; but that is not so. On the contrary, in answer to an express question I got a reply in the negative from the counsel for the trustee. So the question must be dealt with as if the bill of sale had been executed in favour of some third party for a full price paid and duly delivered. That being so, it is not disputed that in 1875 possession in favour of the son followed, and he has continued drawing the profits from the earnings of the ship corresponding to the four shares which had been transferred to him. In that state of circumstances the father was sequestrated in March 1879, and the trustee in his sequestration claims the property of these four shares for the creditors of the father.

Now, it appears perfectly distinct from your Lordship's explanation of the statutes that there is nothing in these provisions which strikes at the validity of the transaction, and unless some other ground on which the trustee can claim is stated, he cannot get the benefit of these shares for those whom he represents. But no other ground is stated except that a trustee in a sequestration is to be in the same position as any individual onerous purchaser or assignee, and therefore is entitled to cut out the real owner. I think the explanations of your Lordship make it perfectly clear that the case depends on the soundness of the doctrine that a trustee in a sequestration takes the moveable estate of a bankrupt *tantum et tale* as it was in the bankrupt, and subject to all equitable exceptions which would apply to him. There have been complications in questions of feudal rights as to how far trustees for creditors are bound to look to anything beyond the public records, and the growing tendency of late in the law is to make no exceptions in such cases; but however that may be, there is here no question of heritable rights. This is a question of moveable estate, and the question simply is, whether the trustee is not really the bankrupt, and subject to all the latent exceptions pleadable against him? The doctrine pleaded here is, that a trustee for creditors in a sequestration represents the bankrupt in his rights and in everything else. That he does so is clear on general principles, and for authority we need go no further than the case of *Davidson* v. *Boyd*, November 5, 1868, 7 Macph. 77, where the judgment of the Court was given very plainly on this point by Lord Kinloch, where he says—"I am of opinion that the trustee sues this claim simply in the bankrupt's right, and can only prosecute the claim to the extent and effect to which the bankrupt himself could enforce it," and "I think in sound principle the trustee must be held to possess no higher right than belonged to the bankrupt." That was a unanimous judgment, and the result was this, that the doctrine of *tantum et tale* rests on general principles, and that the trustee merely represents the bankrupt, and therefore all equitable exceptions pleadable against the bankrupt are pleadable against the trustee.

It is said that the subsequent case of *Tod's Trustees* v. *Wilson*, July 20, 1869, 7 Macph. 1100, is adverse to this doctrine, and if it be really so, I can only say that it must be a mistake, and that it must be an unsound decision. I confess I have great difficulty in seeing that such is not the case, and it rather appears to me that it is in direct conflict with the judgment in *Davidson* v. *Boyd* and with the general doctrine of *tantum et tale*. I shall say no more on the subject, except that if that decision cannot be reconciled with *Davidson's* case it must certainly, in my opinion, be unsound in law. There are other cases where the doctrine of *tantum et tale* is clearly laid down, especially the case of *Edmund* v.

The Provost, &c., of Aberdeen, 18 D. p. 47, affirmed on appeal to House of Lords in 1858 (3 Macq. 116). Here there was some complication on the question of heritable property, but, as I have already said, there is no question of heritable property in the question now before us, and also the law is tending to this, not to carry the exception as regards heritable property very far. There is, too, the case of *Littlejohn* v. *Black*, Dec. 13, 1855, 18 D. 207, and the doctrine has more recently been illustrated in the English case of *Stapleton*. In short, about the general doctrine of *tantum et tale* there can be no doubt whatever, and we must apply it here unless there is anything in the Registration Acts absolutely requiring registration to make a bill of sale valid. But your Lordship has clearly shown that there is not, and I therefore cannot doubt that the claim of the son here is preferable to that of the trustee, and that therefore the prayer of the petition must be granted.

Lord Mure and Lord Shand concurred.

The Court pronounced this interlocutor:—

"The Lords having considered the reclaiming note for John Watson junior against the interlocutor of Lord Adam, Ordinary, dated 24th June last, Recal said interlocutor, and declare that the four shares of the vessel 'John Watson' held by the petitioner under bill of sale dated 14th July 1875, followed by possession, belong to him in property, and are not vested in the respondent as trustee in the sequestration of the registered owner: Therefore grant interdict in terms of the prayer of the petition: Ordain the respondent to grant such deeds as may be necessary to procure the petitioner registered as the owner of the said four shares: Find no expenses due, and decern."

Counsel for Petitioner (Reclaimer)—Dickson. Agent—G. Andrew, S.S.C.

Counsel for Respondent—Pearson. Agent—A. Morison, S.S.C.

Saturday, July 19.*

SECOND DIVISION.

[Sheriff of Perthshire.

ROBERTSON *v.* FOOTE & COMPANY.

*River—Right of Property—*Alveus.

The right of property in the *alveus* of a stream belongs to the riparian owners just as any other proprietary right, subject only to the limitation that nothing be done capable of producing an alteration on the interests of other riparian proprietors, who need not qualify or establish actual injury to these interests in order to have any such operation *interdicted.*

River—Riparian Proprietor — Salmon-fishing—Removal of Boulders.

Twenty tons of ancient boulders and stones which interfered with the sweep of the salmon-nets in a river were removed by the tenants of the fishings by means of blasting by dynamite. *Held* that the opposite riparian proprietor was entitled to interdict against such operations *in alveo,* which were beyond those of an ordinary character, and were such as might possibly have a permanent or appreciable effect on the current, or might injure the rights and interests of the opposite proprietors.

* Decided 16th July.

The pursuer of this action, General Robert Richardson Robertson of Tulliebelton and Ballathie, was heritable proprietor of the lands and estate of Ballathie, and salmon-fishings thereof, situated on the right bank of the Tay. The Baroness Willoughby d'Eresby was proprietrix of the lands and estate of Stobhall, on the left bank of the Tay, opposite the pursuer's lands of Ballathie, and the defenders of the action, Andrew Foote & Company, and the individual partners of that company, were her Ladyship's tenants of the net-fishings *ex adverso* of Stobhall, one of the principal stations on which fishings was that known by the name of the "Pot Shot."

The pursuer averred—"(Cond. 4) About three weeks ago the defenders commenced operations on the *alveus* or bed of the river opposite the Pot Shot. These operations were carried on by means of three or more boats moored on the river and eighteen men. The defenders Alexander Foote, Peter Foote, and Laurence Christie alternately assumed a diving dress and proceeded to the bottom of the river, and there bored large stones and rocks, which were afterwards blown up by means of dynamite or other explosive substance. Chains were then attached to those stones and rocks, which were afterwards, by means of a windlass and platform placed upon two boats, deposited near the Stobhall shore, in the channel of the river." It was further stated that these operations, though at first confined to the defenders' own side of the river, were afterwards extended to the pursuer's side. "(Cond. 6) The effect of these operations may be very seriously to deteriorate pursuer's salmon-fishings both by net and rod, and to alter, divert, or change the course of said river opposite the pursuer's lands. The defenders have no right to conduct such operations, or to interfere in any manner of way with the *alveus* or bed of the river at the place mentioned, and the channel of the river ought to be restored to its former condition, so far as that can now be done." The pursuer therefore brought this action in the Sheriff Court of Perthshire to have the defenders interdicted "from proceeding further with the removal from the *alveus* or bed of the river Tay, opposite the fishing station called the Pot Shot, tenanted by them, of large stones and rocks, and from interfering in any way with said *alveus;* and also for an order upon them to restore the *alveus* to the condition in which it was at the time they commenced the operations after described."

The defenders admitted "that about the time mentioned they commenced operations to remove stones from the *alveus* or bed of the river at the 'Pot Shot,' and that these operations were carried on by means of boats and men, and that a diving dress was used by the defenders Alexander Foote and Peter Foote, who went to the bottom of the river, where they bored two stones, which were blown up with dynamite. Denied that any rocks were bored or blasted." They stated that the result of their operations was to permit the river to