day of each year, and we have it stated what were the number, weight, and value of the fish caught on these occasions, so that we have the materials for fixing the sums due to the pursuer, and I presume our course is to substitute these sums for those for which the Lord Ordinary has given decree.

The Court recalled the finding of the Lord Ordinary, to the effect that the pursuer must select his tide before the fishing is begun, and in place thereof found that such selection may be made by the pursuer either before the fishing of such tide is begun or immediately after it is finished, and decerned for payment of £27, 14s. 7½d. in place of the sum of £24 in the Lord Ordinary's interlocutor; *quoad ultra* adhered to the Lord Ordinary's interlocutor.

Counsel for Pursuers (Respondents) — Mackintosh—Darling. Agents—Russell & Nicolson, C.S.

Counsel for Defenders (Reclaimers)—Kinnear —Mackay. Agents—Frasers, Stodart, & Mackenzie, W.S.

Wednesday, May 26.

SECOND DIVISION.

[Sheriff of Midlothian and Haddington.

HUTTONS *v.* DEMPSTER AND OTHERS.

Bankruptcy—Trust-Deed for Behoof of Creditors —Sequestration—Estate Attachable by Trustee.

The right of a trustee under a private trust-deed for behoof of creditors to receive payment of sums earned by him in carrying out the granter's contracts is not superseded by the right of a trustee under a subsequent sequestration—the trustee under the sequestration taking the estate *tantum et tale* as it stood in the bankrupt.

On 18th October 1878 William Tough, builder in Edinburgh, having become insolvent, granted a trust-deed for behoof of his creditors in favour of the appellant Mr Thomson, a chartered accountant in Edinburgh. At the time this deed was granted Tough had a current contract with John and James Hutton, Slateford, for the mason work of tenements which they were building at Slateford. Mr Thomson took up this contract, and the work was concluded by Tough under his supervision. Messrs Hutton paid to Tough, and after the date of the trust-deed to Thomson, as his trustee, the instalments of the price at the dates agreed upon in the contract. Besides the original contract price, certain extra work to the amount of £180, 3s. 8½d. was ordered by Messrs Hutton in consequence of a change in the plans, and Mr Thomson rendered to them an account for the execution of this extra work, having paid the accounts incurred to the different tradesmen therefor as the work proceeded. On 14th June 1879 Tough was sequestrated under the Bankrupt Statutes, and Hugh Miller, C.A. in Edinburgh, was thereafter confirmed trustee on his estate.

The appellant Dempster, a painter in Edinburgh, had been employed by Mr Thomson to execute certain work on some houses in Edinburgh which had been built by Tough, and he held a decree obtained in the Debts Recovery Court for the sum of £26, 10s. 8d., being the balance of his account after deducting payments by Mr Thomson. Dempster after obtaining this decree used arrestments to that amount in the hands of Messrs Hutton, as debtors to Thomson. Mr Thomson and Mr Miller both claimed from Messrs Hutton the sum due for extra work as above narrated. Messrs Hutton thereupon raised this action of multiplepoinding.

Mr Thomson claimed the whole fund *in medio*, and pleaded — "(1) The work libelled having been carried on and completed by the claimant as trustee and as contractor in room and place of the bankrupt, with the funds of the claimant, he is entitled to be ranked and preferred in terms of his claim."

Mr Miller, as trustee in bankruptcy, also claimed the whole fund, and pleaded—"(1) The claimant, as trustee for the creditors, is entitled to be preferred to the sums *in medio* in terms of his claim, subject to such claims of preference as may be instructed in the ranking in the sequestration proceedings."

On 3d March 1880 the Sheriff-Substitute (HALLARD) issued this interlocutor—[*After narrating the facts*] . . . "Finds, in these circumstances as above set forth, that the trust constituted in the person of the claimant Thomson, being separated by an interval of more than seven months from the subsequent sequestration of the truster, is protected against the retrospective operation thereof: Therefore ranks and prefers the said claimant Dempster *primo loco* over the fund *in medio:* Ranks and prefers the claimant Thomson *secundo loco* over said fund, but subject always to any liability to account which the claimant Miller, as trustee foresaid, may instruct against him: Repels the claim of the claimant Miller, but reserving his right to call the claimant Thomson to account as aforesaid, and decerns." He added this note:—

"*Note.*—It was contended by the counsel for the trustee in bankruptcy that a sequestration supersedes a prior private trust, whatever may be the interval between them. Perhaps, as a question of general jurisprudence, it would be better that the law were so. Meantime, the Sheriff-Substitute does not understand the law so to be. Separated from the bankruptcy by such an interval as here occurs, the private trust, it is thought, must be dealt with as subsisting, but subject, of course, to such liabilities in accounting as the trustee in bankruptcy may instruct."

Miller appealed to the Sheriff, who on 23d March recalled the interlocutor of his Substitute, and preferred Miller to the whole fund *in medio*, adding this note:—

"*Note.*—The rights of the other claimants could not be disposed of under this record as it stands, for there are statements made which the trustee in the sequestration has not had an opportunity of meeting. But the case is decided as above on a very plain ground. The fund *in medio* belongs or relates to the estate of the bankrupt; and the management of that estate, and of all claims on it or against it, falls to the

trustee on the sequestration, who necessarily supersedes a trustee previously appointed under a voluntary trust."

Thomson and Dempster appealed, and argued—Subsequent sequestration supersedes a voluntary trust only as to management. Anyone claiming payment for what was done under the contract was bound to repay the appellant Thomson what he had laid out in carrying it on. The trustee in bankruptcy could only take *tantum et tale* as the bankrupt, and against Thomson he had no claim.

Argued for Miller—A voluntary trust is superseded by sequestration. The trustee was entitled to the sum as representing creditors, and Thomson must claim for the amount in the sequestration.

Authority quoted—*Murray* v. *Palmer*, 15th Dec. 1864, 3 Macph. 250.

At advising—

Lord Justice-Clerk—I think that in this case the Sheriff-Substitute is right. The trustee has made no averment that these advances were not made. I do not wonder at that, because there is no doubt that the allegation of Thomson is true that he completed the contracts and made the expenditure for which he claims. The ensuing sequestration makes no difference whatever. I propose, therefore, to recal the interlocutor of the Sheriff and to revert to that of the Sheriff-Substitute, and to find that the money is to be paid to Mr Thomson, reserving to the trustee in the sequestration all questions of accounting.

Lord Ormidale—I agree. I find on the record, in the condescendence of Mr Thomson, an averment that this work was carried on by the claimant as trustee, and as contractor in room and place of the said William Tough, with the funds of the claimant, and was wholly completed before the date of the sequestration. If that be so, it is clear that the trustee in the sequestration is not entitled to supersede the private trustee Mr Thomson, for the fund does not belong to the bankrupt. Now, we have no precise admission that it is so, but we have what perhaps is equivalent to such an admission, for, singularly enough, we find that Mr Miller, the trustee in the bankruptcy, does not aver that he paid the sums which Mr Thomson says he advanced, nor is it said that Tough did so. It can hardly be supposed that Tough had funds to advance, nor does Mr Miller say that anybody but Thomson could or did make the advances, and so we are shut up to the conclusion that Thomson made them. The only difficulty the argument of Mr Gebbie has raised in my mind is that Mr Thomson may have paid them but that he did so out of the realised money of the estate, and so the trustee in bankruptcy would be entitled to supersede him. That may be, but it is not said so on record. I think that the Sheriff-Substitute was right, and that Mr Thomson having made these advances it would be hard were he to be brought under the power of the trustee in the sequestration.

Lord Gifford—I am of the same opinion. A supervening sequestration supersedes a private trust as a means of distribution of the estate, but not in so far as the private trustees had earned and realised funds belonging to it. Now, we have it on record that the whole contract price has been paid. This was extra work and must have been done under the private trust. The trustee in bankruptcy suffers no prejudice, for if the private trustee has funds of the estate he must pay them over; if not, and he is out of pocket, he is entitled to recover them. I think that is the equity of the case.

Lord Young—I am of the same opinion. This is only an illustration of a familiar case. A builder gets into difficulties while some of his contracts are current. Without assistance he cannot complete them, and his estate is exposed to a claim of damages, with great loss and harm to his creditors. He generally applies for assistance, and if his contracts appear reasonably good he frequently gets it, and is allowed to finish the contracts under a trust, in the hope that they will turn out well and that the advances will be repaid. Here Tough was in that position, and he executed a trust-deed conveying his whole estate, consisting of his plant and current contracts, to a trustee, who undertakes the completion of the contracts, paying away money in expectation of getting in its place the contract prices which he was authorised to receive. That, like most other trusts, involved on the one hand expenditure, and on the other drawing in, of money. Here expenditure is made. The trustee incurs liabilities and discharges them, and when he demands payment of the advances which he is entitled to recover, the trustee in bankruptcy says—"No; pay the money to me." But this part of the bankrupt estate consists only of his claim against the private trustee. The bankrupt could not himself ask for this money to be paid to him, and neither can the trustee in bankruptcy do so. There is an interest in the private trustee to take the course he is doing here, but there is none in the trustee in bankruptcy to oppose. It is an idle litigation as to him, for here there is a respectable trustee who will duly account for any balance he may have in hand. Why not call him to account and demand such balance if there is any. That is what the bankrupt could have done, and therefore the trustee in bankruptcy is entirely wrong, and has no possible interest in this litigation, his right being only to call the private trustee to account.

The Court recalled the interlocutorof the Sheriff and reverted to that of the Sheriff-Substitute, reserving to the respondent a claim to call the appellant Thomson to account.

Counsel for Appellant — Asher — Pearson. Agents—Melville & Lindesay, W.S.

Counsel for Respondent—Gebbie. Agents—Macgregor & Ross, S.S.C