happen from time to time until at last a serious accident brings it forcibly into notice. On the whole matter, I think the pursuer here is entitled to prevail, and I arrive at the Sheriff-Substitute's result though on somewhat different grounds.

The Lords found that the accident to the pursuer was caused by want of due care on the part of the defenders, and ordained them to pay her £50 as reparation.

Counsel for Appellant and Pursuer—Solicitor General (Balfour, Q.C.)—Keir. Agent—John Gill, S.S.C.

Counsel for Respondents and Defenders—C. J. Guthrie. Agents—John Clerk Brodie & Sons, W.S.

Thursday, June 30.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

MAIN (FLEMING'S TRUSTEE) *v.* GALBRAITH AND OTHERS (FLEMING'S TRUSTEES).

Bankruptcy—Husband and Wife—Conjunct and Confident Persons—Fraud.

In an action at the instance of a trustee on a bankrupt estate it was averred that the bankrupt had, after he knew that he was insolvent, expended large sums on the improvement of heritable estate which had been conveyed to his marriage-contract trustees for behoof of his wife and children, and the Court was asked to declare that the heritable estate so far as so improved was held in trust for the trustee in bankruptcy—*held* (*diss.* Lord Deas) that the amount, if any, by which the value of the marriage trust-estate was enhanced by the expenditure fell under the sequestration as being a fraud at common law on the bankrupt's creditors, and a proof of the averments allowed.

Process—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 62—*Remit to Lord Ordinary to Allow a Proof.*

Where the Court recalled an interlocutor by a Lord Ordinary dismissing an action, the effect of the recall being that the case would be sent to probation, *held* that the 62d section of the Court of Session Act 1868 did not apply, and that it was not necessary that the proof should be taken by one of the Judges of the Division.

The pursuer in this case was the trustee on the sequestrated estate of James Nicol Fleming; the defenders were Mr Fleming's marriage-contract trustees. The following were the material averments of the pursuer:—In 1859 James Nicol Fleming, merchant, Bombay, then residing in Glasgow, was married to Miss Elizabeth Galbraith, daughter of John Galbraith, merchant, Campbeltown. Prior to their marriage an antenuptial marriage-contract was executed on 26th October 1859. By that deed Mr Fleming bound himself, in the event of his predecease, to pay his wife a free yearly annuity of £1000 (restricted to £500 in the event of her entering into a second marriage), payable half-yearly, at Martinmas and Whitsunday, with interest and penalty; also £50 as an allowance for mournings, and interim aliment at the rate of £1000 per annum, from the date of his death till the first term of Martinmas or Whitsunday thereafter. The contract then provided that "for the more effectual securing of the punctual payment of the above provisions in favour of his said intended wife, the said James Nicol Fleming obliges himself, within three months from the date of these presents, to assign, transfer, and make over to" certain persons as trustees—first, "Fifty shares in the Borneo Company, Limited, now belonging to, or which the said James Nicol Fleming has arranged to acquire, and to pay them on or before the 31st day of October 1859 the sum of £4000 in so far as is not already paid; and in the second place, and within twelve months from the date of these presents," Mr Fleming bound himself to effect an insurance on his life for £5000, and to assign the policy or policies to the trustees. He also bound himself to pay all calls or dividends on the Borneo Company shares, and to pay the premiums so as to keep the policy or policies of insurance in force during his life. The contract further contained the following provision in regard to the income of the trust funds:—"And with regard to the dividends, bonuses, or annual profits that may be derived from the said Borneo shares, or others, the same are to be allowed to accumulate in the hands of the said trustees during the life of the said James Nicol Fleming, as an additional and further security for the payment of the provisions hereby made in favour of the said Elizabeth Galbraith; with power, however, to the said trustees, if they think it right and proper or necessary, with consent of the said James Nicol Fleming, to pay to the said Elizabeth Galbraith, during the subsistence of the said marriage, the said dividends, bonuses, or annual proceeds arising from said shares or others, by way of alimentary provision, and exclusive always of him, the said James Nicol Fleming." The following provision related to the disposal of the trust-funds:—"And further, and with regard to the application of the sum or sums to be derived by said trustees from said Borneo Company shares or others, and to the sum or sums which may be received by them under the said policy or policies of insurance, it is hereby declared that the said trustees and their foresaids shall apply the same and interest, bonuses, dividends, and annual profits to be derived therefrom, and remaining in their hands—first, in the securing payment to the said Elizabeth Galbraith of the annuity and other provisions hereby conceived in her favour; and second, the balance, if any, after setting aside a sum sufficient for securing payment of the said annuity, and other provisions conceived in favour of the said Elizabeth Galbraith, shall, at the death of the said James Nicol Fleming, survived by his said intended spouse, be paid, assigned, or disponed to the issue of the said intended marriage, in such shares or proportions as he may direct by any writing under his hand, which failing, equally share and share alike, if more than one, and if only one, then the whole to such one child." There was a similar provi-

sion in regard to the part of the trust-funds set apart to meet the annuity when the same should be set free by the death of Mrs Fleming. In the event of her predeceasing her husband and there being no issue, the Borneo shares and the policies of insurance were directed to be paid to Mr Fleming and assignees. The provisions were declared to be in full of the wife's legal claims, and in full satisfaction to the children of legitim, bairns' part of gear, executry, and everything else they could by law claim through their father's and mother's death. The contract gave "full power to the said trustees to invest the sums that may come into their hands either on heritable or personal security, and to call up and again re-invest the same when they think fit;"—it being also "specially provided and declared that it shall be in the power of the said James Nicol Fleming, with consent of the said trustees and their foresaids, to sell and dispose of the said Borneo shares, and to invest the proceeds thereof in such stocks, shares, or other securities as they the said trustees may think fit."

The fifty shares of the Borneo Company, Limited, then worth about £2500, were transferred to the trustees. These shares yielded large dividends, and from the revenue of the trust the defenders on 14th May 1863 purchased £1000 Glasgow and South-Western Railway stock at 107¾ per cent., amounting with charges to £1088, 10s. 3d. In September 1864 the defenders invested the balance of trust-funds then in their hands in the purchase of two hundred shares of the Great Western Railway Company of Canada, then worth £1900. Mr Fleming advanced what was required to make up the price thereof, about £1347, 12s. 10d., receiving the dividends on the Borneo Company's shares towards repayment.

In 1865 Mr Fleming purchased the estate of Keill, near Campbeltown, at the price of £8680, and it was agreed that the title should be taken in name of the trustees as further security to them for implement of his obligations under the marriage-contract, that the Glasgow and South-Western Railway stock and the 200 shares of the Great Western Railway of Canada should be made over to Mr Fleming, and that the trustees should give him a lease of Keill at the rent of £250 per annum during his life. Mr Fleming also agreed to keep an account with the trustees, and to put to the credit thereof this rent and the dividends of the Borneo shares till the rest of the price of Keill should be paid to him. It was averred, but not admitted, that the total price came to be paid in 1876.

Immediately on obtaining possession of Keill in 1865 Mr Fleming began to lay out large sums in permanently improving the estate. In 1873 he began to build a large mansion-house and to lay out grounds around it. This expenditure continued down to the stoppage of the City of Glasgow Bank in 1878. In 1865, when Mr Fleming began this expenditure, he was believed to have been solvent and possessed of considerable wealth, but extensive speculations led to his insolvency; and in 1871 he was insolvent, as appeared from a balance of his books made by himself as at 31st January 1871. From that date his insolvent condition became worse, but was not publicly known till the failure of the City of Glasgow Bank on 2d October 1878. Mr Fleming's debit balance with that bank steadily increased from 1870, when it was £433,475, to the stoppage of the bank, when his unsecured debit balance was £1,259,546, 16s. 10d. The securities held by the bank had never during any part of that period approached the amount of the debt. Mr Fleming was sequestrated on 13th November 1878, and the pursuer was appointed and confirmed trustee on his estate on 6th January 1879. The defenders were, it was alleged, well aware and approved of the expenditure made by Mr Fleming.

The value of Keill in January 1871 was about £11,000. Between January 1871 and December 1876 the sum of £3917, 19s. 9d. was paid to Mr Fleming from the income of the trust-funds in repayment of the price of Keill. On the other hand, Mr Fleming expended large sums in carrying out improvements at Keill, and after crediting the income of the trust-estate between 1874 and 1878 (including the rent of Keill), amounting to about £2000, the amount expended by him between 1871 and 1878, during all which time, it was alleged, he was and knew himself to be insolvent, was upwards of £28,000, exclusive of interest. The estate of Keill, in the hands of the trustees was increased in value according to the pursuer's estimate to the extent of £10,000 by reason of the expenditure so made upon it between the years 1871 and 1878. This expenditure was accordingly now challenged as having been made by Mr Fleming to conjunct and confident persons, without just, true, and necessary cause, and after the contraction of lawful debts from true creditors. The said payments, the pursuer alleged, were in violation of the Statute of 1621, cap. 18, and were also made fraudulently to disappoint the just rights of prior creditors.

On these averments the pursuer concluded—"(1) It ought and should be found and declared, by decree of the Lords of our Council and Session, that the defenders, as trustees foresaid, are vested in and hold All and Whole the lands of Keill, in the county of Argyll, in trust for behoof of the pursuer, as trustee foresaid, to the extent of £10,000 sterling, or such other sum as may be ascertained in the course of the process to follow hereon to be the extent to which the said lands were improved and the value thereof increased by expenditure made thereon by or on behalf of the said James Nicol Fleming, from and since 31st January 1871; (2) it ought and should be found and declared, by decree foresaid, that the said sum of £10,000 sterling, or such other sum as may be ascertained as aforesaid, forms a real lien and burden in favour of the pursuer as trustee aforesaid, and his successors in office and assignees, upon All and Whole the twenty-shilling land of Kilcolmkeill, lying in the parish of Kilcolmkeill, lordship of Kintyre, and sheriffdom of Argyll, with the mansion-house called Keill or Kilcolmkeill, and the whole houses, biggings, yards, mosses, muirs, grazings, sheillings, and whole parts, pendicles, and pertinents of the same, and shall be inserted or validly referred to in all future deeds, writs, decrees, and instruments relating to or affecting the said lands and others, or any part thereof, otherwise such deeds, writs, decrees, and instruments shall be void and null; (3) or otherwise, in the event of the pursuer not obtaining

decree in terms of the second conclusion hereof, the defenders ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuer of the said sum of £10,000 sterling, or such other sum as may be ascertained as aforesaid, with interest thereon at the rate of five per centum per annum from the date of citation hereto till payment."

Pleaded for the pursuer—"(1) the trust-estate held by the defenders prior to 1871 having been more than sufficient to secure Mr Fleming's obligations under the marriage-contract libelled, the subsequent expenditure by him on the estate of Keill, while to his own knowledge insolvent, is an alienation struck at by the Statute 1621, cap. 18, and a fraud against Mr Fleming's creditors at common law. (2) The pursuer, as trustee on Mr Fleming's estate, and representing creditors prior to 1871, is entitled to declarator as libelled, and to decree under one or other of the remaining alternative conclusions of the summons, with expenses."

The defenders did not admit the averments of insolvency in and after 1871, and explained "that Mr Fleming was ostensibly solvent, and in particular was held and reputed by the defenders and others to be solvent until the stoppage of the said bank." They further admitted that Mr Fleming expended considerable sums on the estate of Keill, but they averred that "the value of Keill has not been enhanced by the expenditure in question to the amount alleged, or to any appreciable extent. The new mansion-house is out of proportion to the size of the estate, and diminishes its marketable value. The estate now in the hands of the defenders is inadequate to meet the purposes of the trust."

The defenders pleaded—"(1) The averments of the pursuer are not relevant or sufficient to support the conclusions of the summons. (2) *Separatim*, No action lies upon the grounds alleged while the defenders are vested in the estate for the purposes of the trust. (3) The expenditure libelled not having been an alienation without true, just, or necessary cause in the sense of the Act 1621, cap. 18, the defenders should be assoilzied. (4) The expenditure libelled having been for behoof of the bankrupt himself as tenant foresaid, the action cannot be maintained. (5) The value of the estate of the defenders not having been increased by the said expenditure, the action cannot be maintained. (6) The material averments of the pursuer being unfounded in fact, the defenders should be assoilzied."

The Lord Ordinary (RUTHERFURD CLARK) assoilzied the defenders and added the following note:—"The estate of Keill is held by the defenders in trust—first, in security of the provisions in favour of Mrs Fleming and her children, contained in the antenuptial contract of marriage between her and her husband James Nicol Fleming, the bankrupt; and secondly, for behoof of James Nicol Fleming and his heirs and disponees.

"Keill was bought by Fleming in 1865. He laid out large sums in improving it. He was insolvent it is said, in 1871, and the pursuers aver that his expenditure on Keill after that date increased its value to the amount of £10,000. That expenditure, it is further averred, was contrary to the Act of 1621, as having been made in favour of conjunct and confident persons, to the defenders, as trustees for the wife and children of the bankrupt; but it is not said that the trustees or the wife and children were in any way parties to the fraud or knew of Fleming's insolvency.

"The purpose of this action is to have it declared that the defenders hold Keill in trust for the pursuer to the extent of £10,000, being the extent to which it was improved by Fleming's expenditure, and to have that sum declared a real burden in favour of the pursuer. There is a petitory conclusion against the defenders for payment of £10,000, but it was not insisted on.

"The pursuer does not disguise that his object is to establish a preferable claim over Keill to the extent of £10,000. This, indeed, as it seems to the Lord Ordinary, is the true meaning of the summons; for if the £10,000 were declared to be a burden on Keill, the necessary consequence would be to give it a preference over the purposes of the trust.

"At the same time, the pursuer does not dispute that the trust was validly constituted, so as to secure the provisions in favour of the wife and children. His case is that the augmented value should form a prior charge.

"To the Lord Ordinary it seems that the case of the pursuer is not well founded. The trust forms the first charge on the estate of Keill, and the bankrupt had a right of reversion only. The trust may not be entitled to the benefit of the increased value, but that is no reason for creating a prior charge in favour of the pursuer. The illegal expenditure which the bankrupt is said to have made cannot destroy the preference which is created by the trust, though it is possible that the defenders cannot take benefit by that expenditure. The right of the pursuer seems to be to prevent his reversion from being unduly encroached on—not to establish a preference.

"It is said by the pursuer that the interests of the children may fluctuate according to the value of the estate of Keill. This is denied by the defenders. But whatever be the merits of that question, it seems to the Lord Ordinary that it is not raised for decision in this action. The pursuer may take the necessary proceedings to fix the limit of the marriage-contract provisions. The Lord Ordinary decides nothing more than that he is not entitled to the preference which he claims."

The pursuer appealed, and argued — The result of the expenditure by Fleming was to enhance the value of the marriage-contract property. That at all events was what the pursuer averred, and what he desired to prove. Therefore, in so far as the expenditure was made after that Fleming knew that he was insolvent, it was a fraud against his creditors and entitled them to a remedy. Now, the pursuer did not desire to establish a preference—that was not what the first conclusion of the summons asked for, and the Lord Ordinary was wrong in supposing that the only object of the action was to establish a preference. A proof ought to be allowed.

Replied for defenders—The only practical effect of giving effect to the pursuer's demand was to establish a preference in his favour, and to this he was not entitled. If that was not what he

desired, it was impossible at present to determine whether he was entitled to anything. If he did not desire to obtain repayment, or security for the £10,000 alleged to have been expended, but only for the increased value of estate, how was the fact and the amount of that increased value to be ascertained except by the sale of the estate; and the trustees could not be compelled to sell.

Authorities—*Selby* v. *Jollie*, June 5, 1795, M. 13,438; *Buchanan* v. *Stewart*, Nov. 10, 1874, 2 R. 78; *Watson* v. *Grant*, May 14, 1874, 1 R. 882; Bell's Comm. ii. 177 (189).

At advising—

Lord President — The impression of the Lord Ordinary appears to have been that the sole object of the pursuer in this action is to establish a preferable claim over the estate of Keill, in the hands of the defenders, to the extent of £10,000. But the case was not so presented to us under this reclaiming-note, and I do not think that is the only claim that is made in the summons. It is quite true that if we gave decree in terms of the second declaratory conclusion there would be a preferable right established in the pursuer—preferable to the rights of the parties for whom the defenders' trust was originally constituted—but that is not so under the first conclusion of the summons, which only asks for a declarator that the defenders as trustees are vested in the estate of Keill, "in trust for behoof of the pursuer, as trustee foresaid, to the extent of £10,000, or such other sum as may be ascertained in the course of the process to follow hereon to be the extent to which the said lands were improved, and the value thereof increased, by expenditure made thereon by or on behalf of James Nicol Fleming from and since 31st January 1871," being the date at which his insolvency commenced. Now, in determining whether there are relevant averments to support that conclusion, and whether the conclusion in itself is a competent demand upon the part of the pursuer, it is necessary to attend very particularly to the constitution of the trust which is in the hands of the defenders, and the obligations and purposes of that trust. It is contained in an antenuptial contract of marriage between Mr Fleming and his spouse Mrs Elizabeth Galbraith, and in security of a personal obligation undertaken by the husband in that contract to pay an annuity of £1000 to his wife if she should become his widow there is an obligation upon Mr Fleming within three months after the date of the contract to transfer to the trustees fifty shares of the Borneo Company, Limited, now belonging to him, or to which he has acquired right, and a sum of £4000 so far as not already paid—that is, so far as not already paid for these Borneo shares; in the second place, within twelve months he binds himself to effect an insurance on his life to the extent of £500, and to transfer the policy to the trustees, and to pay the premiums. And then there is a declaration that it shall be in the power of Mr Fleming, with consent of the trustees, to sell and dispose of the Borneo shares, and to invest the proceeds thereof in such stock, shares, or other securities as they, the trustees, may think fit; also to allow the policy to drop, and to effect other policies, and so forth. In short, there is a general provision that Mr Fleming and the trustees may alter the investments of the funds in their hands. And with regard to the dividends, bonuses, or annual profits that may be derived from the said Borneo shares or others, the same are to be allowed to accumulate in the hands of the trustees during the life of the said James Nicol Fleming as an additional and further security for the payment of the provisions thereby made in favour of Mrs Fleming, with power to the trustees, if they think proper, to pay Mrs Fleming during her lifetime the proceeds of these securities, or any part of them, exclusive of the *jus mariti* of Mr Fleming. And then with regard to the application of the sums to be derived from the Borneo shares and others, and of the sums which may be received by them under the policies of insurance, it is declared that the trustees and their foresaids shall apply the same, and the interest, bonuses, and dividends, and annual profits to be derived therefrom and remaining in their hands—first, to securing payment of the annuity of £1000 a-year; and second, the balance, if any, after setting aside a sum sufficient for securing payment of the annuity, shall at the death of Mr Fleming, survived by his spouse, be paid, assigned, or disponed to the issue of the marriage; and at the death of Mrs Fleming the sums so set aside to secure payment of her annuity shall be paid, assigned, and made over among the issue of the intended marriage; and in the event of Mrs Fleming predeceasing her husband, and there being no child or children of the marriage, or such children predeceasing her, then the trustees are to pay over the same to Mr Fleming and his assignees; and in the event of there being issue of the marriage at the death of Mrs Fleming, survived by her husband, the trustees are to pay to Mr Fleming the interest, dividends, and annual profits of the sums in their hands during his life. Now, the effect of this deed is that certain funds are placed in the hands of the trustees, in the first place, as security for the payment of the widow's jointure of £1000 a-year, and the funds which are so used as a security for the payment of that jointure are ultimately to be divided among the children of the marriage. As regards the widow, these funds are a security; as regards the children, the funds become their provision. And therefore when the annuity is satisfied and has come to an end, the sums which have been used as security for that annuity are just the divisible fund among the children of the marriage. Of course it might so happen, if the funds became depreciated, that the payment of the annuity to Mrs Fleming might encroach largely on the capital of these funds, and so diminish the amount provided to the children. Now, that being the nature of the trust, let us see what it is alleged occurred after the marriage and before the insolvency of Mr Fleming. It is said that the fifty shares of the Borneo Company were worth about £2500 at the time when the marriage-contract was made, but they yielded large dividends, and from the revenue of the trust the defenders on 14th May 1863 purchased £1000 Glasgow and South-Western Railway stock, and then again they purchased other stock of the Great Western Railway of Canada worth £1900, and Mr Fleming advanced a certain sum of £1349 to enable them to make up the price of that stock. Then there was an arrangement made

between Mr Fleming and the trustees in consequence of his having purchased the estate of Keill, in Argyllshire. He had bought that estate for the sum of £8000 odds, and he wished to make a transaction with the trustees by which in the end they should take the estate of Keill in place of the funds that they then had in their hands, over and above the original Borneo shares. It is needless to go into the details of that arrangement. The estate of Keill was of greater value than the funds in their hands other than the Borneo shares; but an arrangement was made by which they were, out of the revenue of the funds in their hands—which by the trust-deed they were enabled to accumulate—to pay year by year to Mr Fleming so much money until the total price of Keill was repaid to him; and that we are informed was finally completed by the year 1876. Then Mr Fleming took a lease—for that was part of the arrangement also—from the trustees of the estate of Keill at a rent of £250 a-year; and having gone to reside there, apparently he proceeded to make very large and important improvements on that estate. That seems to have begun in the year 1865, and therefore there was a good deal of money expended upon the estate before he became insolvent in 1871. But after that date, and when it is alleged he was undoubtedly insolvent, he continued to make large expenditure upon this estate still, and he continued to do so down to the year 1878, when by the failure of the City of Glasgow Bank his complete insolvency became apparent and he left the country. Now the pursuer contends, upon this state of the facts, that by the expenditure which Mr Fleming made upon the estate of Keill, which belongs in property to the trustees, the value of that estate has been largely increased, and the consequence of that is that the trust-funds have become much more valuable—the trust-estate perhaps I should say, including the estate of Keill—have become much more valuable than the original funds put into the hands of the trustees in virtue of the marriage-contract—the consequence of which is not merely that the security is increased for the payment of the annuity, but that there will be a much larger provision for the children of the marriage than was secured to them by the marriage-contract. Now, that is all quite right and proper in so far as Mr Fleming had power to do it, and if he had remained solvent nobody could have found any fault with him for increasing the funds in the hands of the trustees, and so increasing the provision in favour of his children. And down to the year 1871 every shilling that he spent on the estate of Keill does go to increase the value of the estate in the hands of these trustees, and to enlarge the children's provisions. But then the pursuer says, Mr Fleming was not entitled to go on expending money in this way after he became insolvent, because that was simply increasing the provision to his children at the expense of his creditors; and it appears to me that that is quite a sound proposition, and that, so far as this expenditure was made after he became insolvent, it was at common law an unlawful thing for him to do—a fraud upon his creditors in the technical sense of the term, although I am not at all inclined to suppose that any actual fraud was intended. Still it is what the common law calls a fraud against his creditors, because it is taking the money that ought to have gone to pay them to increase gratuitously the provisions in favour of his own children. No doubt, if that money was thrown away—if it did not in point of practical effect increase the value of the estate in the hands of the trustees, and so increase the money value of the provisions for his children—it would be in vain to attempt to charge any part of that against the defenders. But if the defenders as trustees are *lucrati* by that expenditure, or, in other words, if the value of the children's provisions is in point of fact enhanced by the expenditure of that money, then I apprehend to that extent the pursuer, upon the part of the creditors, has a perfectly equitable claim to participate in the trust-estate which is held by them—in short, the estate comes to be in their hands held in trust, first, to provide the annuity settled in the marriage-contract, and the amount of the funds provided in the marriage-contract to the children of the marriage; but *quoad ultra* it is a resulting trust in favour of the creditors. And therefore, upon the averments which are before us, which I am not by any means supposing the pursuer will necessarily be able to prove, and which certainly lay upon him a pretty heavy *onus probandi*—but still upon these averments—I am quite unable to say that there is not a relevant and good claim made for the trustee of the creditors. And if that be so, I confess I do not see any difficulty in declaring their right in terms of the first conclusion of the summons. It may not be precisely in the very terms of that conclusion, but substantially in terms of that conclusion, that to the extent to which the trust-estate is *lucratus* by the expenditure of Mr Fleming after he became insolvent the defenders hold for the creditors and their trustee. And therefore I am for recalling the interlocutor and remit to the Lord Ordinary to allow a proof.

Lord Deas—Mr Fleming was sequestrated under the Bankrupt Statutes on the 13th of November 1878, and this is an action by the trustee upon his sequestrated estate. I need not state the terms of Mr Fleming's contract of marriage, which was entered into a great many years ago, because your Lordship has very distinctly stated what these are. I shall therefore begin by noticing the purchase by him of the estate of Keill, which took place in or about May 1865, at a cost, including expenses connected with it, of £8698. It is stated by the pursuer that in 1865 Mr Fleming was a wealthy man, and that he was solvent till the year 1871. It is also stated that Mr Fleming had begun to lay out money upon the estate at a time when he was perfectly solvent, but it seems to be alleged that he continued that expenditure less or more after he became insolvent in 1871. The summons contains three conclusions, but before entering upon these I may state that I understand the ground upon which the Lord Ordinary proceeds is that he holds the summons, and the whole summons, to be irrelevant. In that opinion I concur. The first conclusion is that it should be found and declared that the trustees hold the estate of Keill to the extent of £10,000. or such other sum as may be ascertained to be the extent to which the said estate was improved—that to that extent they hold the estate in trust for the pursuer. That is

a sort of conclusion I confess I never saw before, and how it is to be extricated I do not understand. They do not hold the estate of Keill in trust for the pursuer to any extent whatever, and my humble opinion is that it is utterly inconsistent with our law of heritable and feudal property to declare in terms of any such conclusion that the estate is held by the trustees to the extent of £10,000 or to such extent as it shall be found that it has been increased in value by these improvements. That is to my mind a conclusion utterly inextricable and utterly inconsistent with all the law of Scotland that I know of as to heritable or feudal property. Then the second conclusion is that it shall be found and declared that the said sum of £10,000, or such other sum as may be ascertained, forms a real lien and burden in favour of the pursuer as trustee foresaid. I think your Lordship is of opinion that that conclusion will not do. I never before saw the attempt made to constitute a real burden by a declaratory conclusion in a summons in place of the feudal titles, in which we all know it requires to be very carefully and very specifically dealt with. That conclusion would give the trustee a preference. A real burden must always be a preferable burden, and that would give him a preference which I think, according to your Lordship's view, he is not entitled to. The only other conclusion is for payment of the sum of £10,000, with interest thereon at 5 per cent, or such other sum as may be ascertained to be the extent to which the estate has been improved. Your Lordship has not said anything in favour of that conclusion, and I do not know anything that could be said in favour of it. The Lord Ordinary says in his note,—"There is a petitory conclusion against the defenders for payment of £10,000, but it was not insisted on." It was not insisted on before the Lord Ordinary. I do not recollect anything being said in favour of it here, and as far as I have observed nothing has been said in favour of it as yet by your Lordship. The whole contest, therefore, seems to be upon that first conclusion, which is the only thing left in the summons, to have it declared that to the extent to which the estate may have been improved, it is held in trust for behoof of the pursuer as trustee on the bankrupt estate. Now that does not recommend itself to my mind as an extricable conclusion at all. Then the first plea-in-law for the pursuer is—"The trust-estate held by the defenders prior to 1871 having been more than sufficient to secure Mr Fleming's obligations under the marriage-contract libelled, the subsequent expenditure by him on the estate of Keill, while to his own knowledge insolvent, is an alienation struck at by the Statute 1621, cap. 18, and a fraud against Mr Fleming's creditors at common law." These are two different things. I heard nothing argued under the Statute 1621. The object of an action under the Statute 1621 would be to reduce something—some alienation. Neither your Lordship, nor anyone at the bar, has said that there is room for a reduction in this case. Therefore the only thing left under that first plea is, that it is a fraud against the creditors at common law. Now, it may be observed that in the summons there is no allegation that Mr Fleming expended a single shilling in bad faith. It is said he happened to be insolvent, and he knew he was insolvent when he was going on with the ordinary administration of the estate. It is not said that he did anything wrong; there is no allegation of that kind. He may have made a mistake in point of law, but how that is to be converted, without any statement to lay the foundation of it, into a fraud at common law, I do not understand, and I did not hear your Lordship say that it is a fraud at common law. Upon these grounds, I entirely concur with the views of the Lord Ordinary, that whether there is a claim here or no, and whether there might be a claim or no, no relevant claim or ground of action has been stated in this summons. It is not necessary to go beyond the conclusions of the summons, but I may just make this observation, that it would be a very peculiar kind of conclusion that would bring this under any legal objection. Nothing being done with a fraudulent intention, and it being necessarily the fact that while this estate might be improved in value to the widow and the children when they came to make their securities available, it is perfectly plain that it may not be improved in value at all. We can take a proof upon things that have happened, but we cannot take a proof on things that have not happened. We have had instances of much more valuable estates than this, particularly in the west country, that have become worth nothing. And if this estate, when the children have to realise their provisions, has become not worth these provisions what is to become of the right of the trustee on the sequestrated estate? I do not see my way through that at all. I mention that as a great difficulty and obstacle that may be in the distance, but it is not necessary to go into it. In my opinion, the Lord Ordinary is right in coming to the conclusion that not one of these conclusions is relevant.

Lord Mure—This case is one of some difficulty, and I have had some hesitation in making up my mind as to the course that we ought to pursue. The estate of Keill is held by trustees in security of marriage-contract provisions of an onerous description, which are very clearly declared in the antenuptial marriage-contract between Mr and Mrs Fleming. The estate was given over to the trustees to be held for behoof of these beneficiaries in the marriage-contract, together with certain Borneo bonds and policies of insurance, which is the capital fund out of which the annuity of £1000 yearly to Mrs Fleming is to be met, and the capital of which was upon her death to go to the children. Now, that is a trust of a very onerous description, and one that I am quite satisfied we are bound to take care is not interfered with by any steps proposed to be taken by Mrs Feming's trustee with a view to acquire an interest in the subject-matter of the trust. It is said that after the estate of Keill was acquired Mr Fleming expended a very large sum of money upon it, and that he did this after 1871, when he was insolvent. At that time it is said the estate was worth about £11,000, it having been purchased for somewhere about £8900. But it is now alleged that by these improvements made upon it, to a very large extent, between 1871 and Mr Fleming's bankruptcy in 1878, the estate is increased in value to the extent of £10,000—that is to say, that it is now worth £21,000. And the object of this action is

to enable the trustee on Mr Fleming's estate to get the benefit of that expenditure to the extent to which the value of the estate has been increased. Now, assuming these facts to be proved, the summons contains three different conclusions—one a simple declarator that the trustees hold the estate in trust to the extent of that excess of the value of £10,000. Then there is a conclusion of declarator that the £10,000 forms a real lien or burden in favour of the pursuer as trustee, and if that is not declared, then that the pursuer as trustee on the estate is entitled to immediate payment of £10,000. Now the Lord Ordinary has assoilzied the defenders from the whole conclusions of the action, holding that the pursuer is here in reality seeking a preference which he considers the pursuer was not entitled to in such a question. I am disposed to agree with the Lord Ordinary in thinking that the pursuer is not entitled to any preference over the marriage-contract trustees, and being of that opinion, I concur with the Lord Ordinary in thinking that neither under the second nor the third conclusions can the trustee on the sequestrated estate take any benefit whatever. I think the Lord Ordinary has been misled as to what the pursuer actually wants, because he assumes throughout in his note that he asks a preference. But it was explained to us during the discussion that that is not what the pursuer wants. The second and third conclusions may perhaps be substantially a preference, but I understand the pursuer does not ask decree in terms of the second conclusion, or assert any preference as against the marriage-contract trustees. That being the case, the question for decision is, whether under the first conclusion of the action the trustee is in the circumstances fairly entitled to have it ascertained that there was this excess of value put upon the estate by Mr Fleming's expenditure after his insolvency; and that being so, whether, when the marriage-contract provisions are satisfied, the trustee on the sequestrated estate shall be entitled to the additional value of the estate as it now stands. Now I think that an action of this sort by a trustee in the position in which the pursuer is—to show that in point of fact there was that expenditure put upon the estate by the bankrupt, which he as trustee for the creditors has a right to claim, subject to any preference there may be over them—I think that is a position which the trustee is entitled to assume, and I think he is entitled in this Court to have it cleared up, whether in point of fact Mr Fleming did lay out this large sum of money upon the estate, and whether in point of fact it has been increased to any extent beyond the value of the £11,000 which it is admitted it bore at the time when Mr Fleming began the expenditure. And if this conclusion of the summons goes no further than that—to have it declared that that sum was laid out, and that upon the marriage contract provisions being discharged the trustee is entitled to the difference between the value of the estate after the provisions are discharged and the improvement made upon it by his expenditure—I think he is entitled to it. But I have some hesitation whether declaring the trust in terms of this first conclusion of the summons may not go a little further than merely constituting the debt as it were, and entitling the trustee to have the use of that increased expenditure when the marriage-contract trustees have discharged their duty under the marriage-contract. If that conclusion were qualified in some way, so as to make it clear that it was only after the marriage-contract provisions have been satisfied that the trustee was entitled to take this additional value, I think the rights of the parties would be fairly and properly adjusted under it. I do not object to a proof in order to have the matter inquired into; but I should be inclined to think that this first conclusion of the summons would require to be qualified somehow or other, so as to show that no trust was created in favour of the pursuer. I think that is the wrong way of viewing it, for it would be holding that there was a trust within a trust for somebody else. If it were put that he held the estate for behoof of the pursuer to the extent of the sum of £10,000 or such other sum as may be proved to be the excess of the value, but subject always to the preferable provisions created upon it by the marriage-contract provisions of Mrs Fleming—if some such words as these were in, I think the rights of the parties would be fairly adjusted; and assuming the question to be open for discussion after the proof, I do not object to the course which your Lordship proposes. I throw out for the consideration of the parties whether they might not qualify it in some such way so as to obviate any difficulty.

Lord Shand—I concur with the majority of your Lordships in thinking that the pursuer is entitled to a proof of his averments in this case, and I entirely agree in the opinion which your Lordship in the chair has delivered. The case is one which seems to me to be really not attended with difficulty. The Lord Ordinary has said at the close of his note:—"The Lord Ordinary decides nothing more than that he (pursuer) is not entitled to the preference which he claims;" and if the effect of the Lord Ordinary's judgment had been to decide nothing more I would have entirely agreed with him. I am clearly of opinion, with all of your Lordships and the Lord Ordinary, that the pursuer is not entitled to any preference, and therefore that we could not give effect to the second conclusion of the summons. But, on the other hand, I am equally clear that if the pursuer succeeds in proving the facts which he alleges, he is entitled to a decree in terms of the first declaratory conclusion. For my part I should be quite content that he should obtain his decree in the words precisely in which it is asked, but I can see no objection to adding some such words as Lord Mure has suggested. That, however, can be done when the case comes to be disposed of on the proof by the judgment to be then pronounced, if the pursuer shall succeed in proving his averments.

For the purpose of a decision on the relevancy of the case I do not think it necessary to look to any period prior to 1871; and to me it is quite immaterial what were the provisions of the marriage-contract relating to the particular purposes for which the trustees held the funds and estate. It is, I think, of no moment in what proportions or in what order the wife or children of the bankrupt were interested in the trust-estate. The fact is this, that the trustees held for the purposes of the trust a property which

in 1871 was of the value of £11,000. That I take from the pursuer's statement, which he offers to prove. He says—"The value of Keill in January 1871 was about £11,000." Now, it is further alleged that the bankrupt, being of course interested in his own family for whose behoof the trust was created, proceeded after 1871 to spend £28,000 upon the property. The pursuer says he did so when he was insolvent, and when he knew he was insolvent. Therefore he just spent so much money that was not his own, and which truly belongs to his creditors on this particular part of the trust-estate. I do not understand it to be disputed that the pursuer's averments would be relevant in the ordinary case of a provision made in favour of a wife or family by one who has afterwards become bankrupt. The creditors in the ordinary case are entitled at common law to be restored against such an act by the bankrupt done in the knowledge of his insolvency. Suppose that, instead of laying out the money upon this estate, Mr Fleming had, in the knowledge of his insolvency, handed to trustees £10,000 for the purposes of their trust, being under no obligation to make any such payment, and they had invested the money upon heritable bonds, and the bonds remained ear-marked at the date of the sequestration, can it be disputed that the trustee on the estate would be entitled to require that the money should be paid back to him for behoof of the creditors to whom it belongs? I think that is too clear to require argument or observation. Well, the case is not quite in that position. The money cannot be identified or got back in the clear and easy way in which it might be recovered in the case I have supposed. But the pursuer says that after and by means of the £28,000 which was expended on Keill the estate in the hands of the defender has been increased in value to the extent of £10,000. What is the result of that? The result is, that assuming the property to have retained its value, there is £10,000 of the creditors' money in that estate at this moment, just as there would be £10,000 in the hands of the trustees if the money had been handed over to them and invested as in the case I have supposed. It appears to be the consequence of that state of matters that there is a resulting trust in the trustees to the extent of this £10,000 for behoof of the creditors of Mr Fleming. The trustees are feudally vested in this property, but what they are entitled to is £11,000 for their own trust, while Mr Fleming's creditors have right to the sum of £10,000, or such other sum as shall appear to be the amount by which the value of the property has been enhanced by the expenditure. The fact that the different funds have been mixed up by their having been spent, one part in buying the property and another in permanently improving it, cannot give the beneficiaries the right to retain money not their own. The pursuer's right must be extricated in some way. He asks a proof in order to show that the trustees are holding money belonging to the creditors which has been sunk in this property, and I confess I have never been able to see any reason, and I do not see any reason now, why he should not be allowed to prove that this is the fact, and that the expenditure thus increased the value of the property as he alleges. Having proved his averments, I think he would be entitled to decree in terms of this declaratory conclusion—as I have said already unqualifiedly—but if he thought safer, to make the matter clear, that it should be qualified in some way so as to save the rights of the wife and children under the marriage-contract provisions, good and well, that may be done. The right, it appears to me, would neither be one of preference nor of a postponed nature, but of a *pari passu* nature to the extent to which it is made out. It is unnecessary to inquire what may be the next steps. The pursuer must make it clear that the facts are as he alleges; but I can only say for my own part that assuming this to be made out, then, whether the subsequent procedure is to be worked out by giving the pursuer a decree against the trustees to find the money, or require them at a suitable time to sell the property or to grant a marketable security over it, the pursuer will, I think, be entitled to have matters somehow put in such a shape that he shall have the fund belonging to the sequestrated estate made available for division among the creditors.

On these grounds, and taking the case as one in which a preference is not now insisted in, I am clearly of opinion that a proof ought to be allowed.

On its being proposed to remit the case to the Lord Ordinary to allow a proof, the Dean of Faculty called attention to the 62d section of the Court of Session Act, and suggested that under this section such a remit would be incompetent. The section was in these terms:—"The 3d section of the Act 29 and 30 Vict. cap. 112, is hereby amended to the effect that, providing that notwithstanding the terms of the said section, 'Where proof shall be ordered by one of the Divisions of the Court,' it shall no longer be competent to remit to one of the Lords Ordinary to take such proof, but it shall be taken before any one of the Judges of the said Division, whose place may for the time be supplied by one of the Lords Ordinary called in for that occasion."

The Court intimated that they would confer on this point with the Lords of the Second Division.

Thereafter—

Lord President—We have conferred with the Second Division on this point of practice, and we are of opinion that the 62d section of the Act of 1868 does not apply. It applies to cases in which a Division orders a proof to be taken, but here we are going to recall an interlocutor of a Lord Ordinary dismissing an action. The case will then proceed as if that interlocutor had never been pronounced, and the next step will be to send the case to probation. This has often been done.

The Court recalled the interlocutor of the Lord Ordinary, and remitted to the Lord Ordinary to allow the parties a proof before answer.

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