statutory words. I do not therefore say that in a charge of having unlawful carnal connection with a girl under the age of sixteen anything more need be stated than the place and date of the offence. Indeed, it is difficult to see that more than this would be useful, because the crime consists in the physical act of connection, which does not need to be described. But an attempt to have unlawful carnal connection may be made in many ways, and it is not to be assumed that everything which in a moral sense may be called an attempt to seduce falls within the scope of the enacting words. If there is a physical attempt, although not by violence such as would constitute an assault with intent, the case is tolerably clear, but the case is not so clear when the object is sought to be accomplished, for example, by an offer of money, or verbal seduction by word or letter, or it might be by the offer or payment of money made through a third person. It is therefore very necessary that the person charged with what is termed an attempt to have unlawful carnal connection should have fair notice of the *species facti* which are intended to be proved against him, that he may be prepared to defend himself. As such notice has not been given in this libel, I concur in holding the objection taken to its relevancy to be well founded.

The Court held the libel irrelevant, and the diet was, on the motion of the Advocate-Depute, deserted *pro loco et tempore.*

The panel was afterwards tried and convicted at the High Court on a libel setting forth the *modus* of the offence.

Counsel for H. M. Advocate—Wallace, A.-D.—Grierson. Agent—R. Blair, P.-F. of Renfrewshire.

Counsel for Panel—M'Clure. Agent—Murray, Writer, Greenock.

COURT OF SESSION.

Wednesday, January 6, 1886.

FIRST DIVISION.

ASSETS COMPANY, PETITIONERS.

Bankruptcy—Discharge—Discharge of Trustee—Funds Vesting in Bankrupt Prior to his Discharge Unknown to Trustee.

A bankrupt was discharged without composition, and his trustee was also discharged. It was subsequently discovered that certain funds had, unknown to the trustee, been vested in the bankrupt prior to the sequestration, and of the existence of which the trustee had not become aware. The Court, on the application of creditors, *remitted* to the Lord Ordinary on the Bills to appoint a meeting of creditors for the election of a trustee on the sequestrated estate with the usual powers.

On 31st October 1878 the estates of Messrs Matthew & Thielmann, and Thomas Matthew and Robert Hardie, the individual partners of that company, were sequestrated, and James Wyllie Guild, chartered accountant, Glasgow, was elected trustee.

On 5th September 1884 Mr Guild, having duly observed all the procedure required by the Bankruptcy Statutes, was duly exonered and discharged of his office of trustee.

By last will dated 30th August 1871 John Robertson Stewart, of the city of Victoria, Vancouver's Island, British Columbia, gave and bequeathed to the said Robert Hardie the sum of £1000. The testator died on 17th September 1873, and the legacy vested in the said Robert Hardie at that time. Owing to a deficiency in the testator's estate the amount actually available in respect of this legacy was only £405, 14s. 5d., which sum was at the date of this petition lying in bank on deposit-receipt. At the date of Mr Guild's discharge he was not aware of the existence of this legacy, which had not been disclosed by the bankrupt.

The liquidators of the City of Glasgow Bank were creditors on the estate of Matthew & Thielmann for £34,984, 10s. 9d. By the City of Glasgow Bank Liquidation Act 1882 (45 and 46 Vict. c. 152) the whole assets of the City of Glasgow Bank were vested in the Assets Company (Limited), who were thus in right of the claim against Hardie's estate, and accordingly on 30th November 1885 they presented the present petition with a view to have distribution made of the funds which had been discovered.

The prayer of the petition craved the Court to order intimation to Mr Guild, and to Hardie, and to remit to the Lord Ordinary on the Bills to appoint a meeting of Hardie's creditors for the election of a trustee, and to appoint such meeting to be advertised in the Gazette, &c.

Authority—*Trappes* v. *Meredith*, Nov. 3, 1871, 10 Macph. 38.

The Court remitted to the Lord Ordinary to proceed in terms of the prayer of the petition.

Counsel for Petitioners—G. Wardlaw Burnet. Agents—Cairns, M'Intosh, & Morton, W.S.

Thursday, January 7.

FIRST DIVISION.

[Lord M'Laren Ordinary.

THE EDINBURGH HERITABLE SECURITY COMPANY (LIMITED) *v.* MILLER (STEVENSON'S TRUSTEE).

Bankruptcy—Trustee—Heritable Security—Personal Liability of Trustee.

A trustee in bankruptcy with a view to the benefit of the estate wrote to bondholders secured over certain of the bankrupt's heritable properties proposing "to adopt" the subjects over which they were secured "as assets in this sequestration" and to pay up arrears of interest on the loans, on condition that a balance of loans still unadvanced by them should be advanced, and that the loans should not be called up before a certain date. This being agreed to,

he drew the rents, and paid them to meet *pro tanto* the interest on the bond over one of the properties, but they did not meet it in full, and the value of the property declined. The bondholders then sought to make the trustee, as such and as an individual, liable for the debt and interest on the ground that he had adopted the subjects as owner. The Court *assoilzied* the trustee on the ground that he had done nothing to take upon himself liability as owner.

In 1877 James Goodwillie, builder, Edinburgh, obtained from the Edinburgh Heritable Security Company a loan of £3700 over certain heritable subjects, 13, 14, and 15 Rosehall Terrace, Dalkeith Road, Edinburgh, which he had begun to erect. The loan was granted by means of a cash-credit bond granted by the company and a disposition in security by Goodwillie.

Thomas Stevenson, joiner, Annandale Street, Leith Walk, was contractor for the joiner work in these tenements. Goodwillie's affairs became embarrassed, and he executed in April 1878 a disposition of them in Stevenson's favour for a price set forth in the deed. The Heritable Company's bond, with its personal obligation, was by agreement taken over *in gremio* of the conveyance under the 47th section of the Conveyancing Act of 1874. At the date of this disposition in May 1878 £3300 had been advanced by the company, and the balance of £400 was subsequently paid over to Stevenson. He completed the buildings, 13, 14, and 15 Rosehall Terrace. He was sequestrated on 16th November 1878, and Hugh Miller, C.A., was appointed trustee in his sequestration.

Stevenson was proprietor of other heritable subjects, over which also there were securities. Miller, as trustee, did not interfere with certain of these, and allowed the bondholders to take their course, but determined, after some communings with regard to (1st) a tenement in Granton Road, (2) 13, 14, and 15 Rosehall Terrace above mentioned, and (3) 19, 20, and 21 Rosehall Terrace, over all which the company held bonds, to make the offer contained in the following letter of 20th December 1878, addressed by him to the agents for the company:—

"*T. Stevenson's Sequestration.*

"Dear Sirs,—Having now examined and advised with the commissioners as to the following properties belonging to this estate, over which the Edinburgh Heritable Security Company (Limited) hold securities for advances, viz.—

1. Subjects in Granton Road;
2. Tenements No. 13, 14, and 15 Rosehall Terrace; and
3. Tenements Nos. 19, 20, and 21 Rosehall Terrace—

I am prepared to ask the creditors for authority to adopt these subjects as assets in this sequestration, provided your company advance the balance of the loan on the Granton Road property, that these may be finished, and that the loans on all the properties are not called up earlier than at Whitsunday 1880—it being a part of course of this arrangement that all arrears of interest or of instalments past due on advances are to be paid; and it may be further understood that I shall in the meantime endeavour to secure the money, or as much of it as possible, at lower rates from private parties, so as to benefit the estate to the extent of the difference of interest on these loans. It is believed that if these properties are held over for a time, till the present depression in trade has passed, considerable reversions will accrue to this estate by so holding. I shall therefore hope that the proposal now made will be favourably considered by your directors," &c. They, in reply, intimated that on payment of arrears, and on the Granton Road property being finished by a certain date—31st March 1879—the balance of the loan on it would be paid.

Miller then sent the amount of arrears, and undertook to finish the Granton Road property by the date named. He finished that property and received the balance of the loans over it from the company. It was further agreed that the loans should remain undisturbed till Whitsunday 1880. From Whitsunday 1879 to Martinmas 1883 he collected the rents of the property 13, 14, and 15 Rosehall Terrace properties, and paid them to the company in payment of the interest on the bond, but the rents were insufficient to meet the interest. After that term they declined to receive them, and he consigned them in bank.

In this action the company, on the ground that Mr Miller had adopted liability for the property by his letter of 20th December 1878 above quoted, and also by acting as proprietor thereof since its date, sought declarator that he as trustee was proprietor of the subjects 13, 14, and 15 Rosehall Terrace, and was as trustee and as an individual liable in all the obligations of the cash-credit bond and the disposition in security granted by Goodwillie and taken over by Stevenson; and further, they concluded for decree against him for £4127, 6s. 4d., the alleged amount due to the pursuers as bondholders, with interest at 6 per cent, the rate in the bond.

They pleaded—"(1) The defender having adopted said subjects as his property, is bound to implement the terms of said bond and disposition in security thereon. (2) The pursuers are entitled to decree in terms of the conclusions of the summons, in respect the defender has adopted said subjects, and is proprietor and owner thereof, and is liable as such under the provisions of the foresaid bond and disposition in security."

The defender averred that the arrangement of 1878 was only one by which, in the interest of all parties, the pursuers undertook not to exercise their powers of sale on certain conditions, and not one by which he undertook any liability as trustee or as an individual for payment of the heritably secured debt, the sole debtor on which was Stevenson, and the sole security the heritable property over which they were secured. The object was, he alleged, to postpone, for the sake of all parties, to a more favourable time a sale of the properties.

He pleaded—"(1) The action is irrelevant. (2) The defender not having, either as trustee or as an individual, become obligant for payment of the sums sued for, he is entitled to absolvitor."

The Lord Ordinary (M'Laren) sustained the defences and assoilzied the defender.

"*Opinion.*—In this case the pursuers, who are heritable creditors holding securities over subjects described in the condescendence, sue the trustee on the sequestrated estate of the last regis-

tered proprietor for payment of the principal and interest secured over those subjects by a cash-credit bond.

"The ground of action is that the trustee has 'adopted' the subjects as his property (condescendence and pleas). I am not sure that I understand exactly what is meant by this expression. It is a metaphorical expression borrowed from a different department of the law; and after hearing argument I am still unable clearly to represent to myself what is the legal obligation whereby the defender is supposed to have rendered himself responsible for the payment of the heritable debt.

"There are, as I conceive, three passive titles under which such a responsibility might possibly be incurred—(1) By acquisition of the subject of the security; (2) by becoming a party to the debtor's obligation; and (3) by granting an independent obligation for the repayment of the borrowed money.

"(1) The defender doubtless acquired the property as trustee under the vesting clause of the Bankruptcy (Scotland) Act 1856, subject to the heritable securities affecting it, and the heritable creditors' preferable diligence. But it is not, and cannot be, maintained that this acquisition made the defender the debtor of the heritable creditor.

"(2) Under the common law applicable to heritable securities a purchaser or disponee did not become responsible for heritable debt unless he granted a bond of corroboration. Under the statutory law now in force a purchaser or disponee will become bound for the debt if the deed of conveyance contains an agreement to that effect. But neither is this ground of liability applicable to the acquisition of estate by a trustee in bankruptcy, because such trustees do not take the estate by purchase or gift, but in the character of adjudgers.

"(3) I presume, therefore, that the defender is only responsible if he has granted a corroborative or independent obligation to pay the heritable debt or to see it paid. I find no evidence of the existence of such an obligation. I may here mention that neither party moved for a proof or diligence, and as all the documents are admitted, there is really no matter of fact to which, in my opinion, a proof would be usefully directed. What the trustee did was to write a letter proposing to take over certain subjects as part of the sequestrated estate, and to pay up the arrears of interest affecting those subjects, on condition that the heritable creditor should not in the meantime exercise his power of sale. It is admitted that the defender paid the arrears of interest, but the property is not expected to produce a reversion, and the trustee is now willing that the heritable creditors should take their course. Now all that the trustee could possibly gain by his agreement with the heritable creditors was a postponement of the sale. He was already reversionary proprietor in virtue of the Bankruptcy Act, and he did not need the consent of the heritable creditors to the assertion of his proprietary interest. But his proprietary interest was liable to be rendered valueless in case of a forced sale, and he could only avoid such a sale by offering to pay the arrears of interest. Having done so, he was in the same position as any other proprietor who has accepted a conveyance of an encumbered estate without granting a corroborative security. Such an estate may be worth very little to the nominal owner, but it does not expose him to loss other than the loss of the estate. I think it would not be fair construction of the trustee's letter to hold it equivalent to a bond of corroboration. I am convinced that such a bond, if asked at the time, would not have been granted by the defender; and that the pursuers did not understand that they had obtained such an obligation.

"Authorities were referred to in which trustees engaging in trade or entering into litigation were held to be responsible as contracting parties, but these authorities appear to have no application to a case where the liability, if it exists, must be constituted by an obligation in writing."

The pursuers reclaimed, and argued—The true construction of the agreement between them and the trustee, constituted by the letter above quoted and what followed on it, was, that he took over the bankrupt's whole obligations. By paying interest on the bond he became the obligant of the principal, and was therefore personally liable.

Authorities—*Torbet* v. *Borthwick*, 1849, 11 D. 694; 2 Bell's Comm. 320; *Balfour* v. *Cook*, Hume's Decisions, 771; *Kirkland* v. *Gibson*, May 17, 1831, 9 S. 596.

Counsel for the defender were not called upon.

Lord President—This is a very clear case, and I do not see how the Lord Ordinary could possibly have decided it otherwise than he has done. The estates of Thomas Stevenson, joiner, were sequestrated on 16th November 1878, and among his other properties were certain heritable subjects over which securities had been granted in favour of the pursuers. House property at the time when these securities were granted was not in a flourishing condition, and great sacrifices were made by those holding this class of property to avoid having at that time to realise in the hope that an improvement in the market would before long take place. It was in these circumstances that the parties interested, namely, the heritable and other creditors, agreed to the proposal made by the trustee, which was in substance this, that if the property was at that time put up for sale a great sacrifice would necessarily result, and the heritable creditors would in all probability not be paid in full, whereas if the trustee was allowed to carry on the completion and management of the house property until better times came round, a reversion might be obtained for behoof of the general body of creditors. What the trustee accordingly proposed was that the pursuers should supply him with enough money to complete the houses [in Granton Road], and that they should refrain from an enforced sale [of the various properties] for a period of eighteen months, that is, down to Whitsunday 1880, while he on his part agreed to pay all arrears of interest past due on advances. It is clear that this arrangement was for the good of all concerned; the pursuers assented to it; and that was the whole agreement between the parties.

There are no doubt some expressions in Mr Miller's letter of 20th December 1878 which at first sight give rise to some ambiguity, and people should certainly be careful, especially in arrangements of this kind, not to make use of any expressions of which they do not fully know the meaning. Thus when Mr Miller says, "I am

prepared to ask the creditors to adopt these subjects as assets in this sequestration" . . . he was clearly making use of an expression of which he really did not know the meaning. What he really meant to say was, that he would allow the estates to remain unsold provided the bondholders would do the same, and he would pay the interest as it fell due out of the rents he obtained from letting the houses. That was all he meant to say in this letter, and in so acting he was just doing what in the circumstances he ought to have done. To extract from such an expression anything calculated to fix on the trustee personal liability for this debt is to my mind extravagant, and I look in vain in the letter for any foundation for such liability. No doubt language might be used in such an arrangement which would have the effect of binding the trustee personally, but it would require to be very explicit, and nothing of that kind is to be found here.

I think, therefore, that the Lord Ordinary's decision is right, and I am for adhering to his interlocutor.

LORDS MURE, SHAND, and ADAM concurred.

The Court adhered.

Counsel for Pursuers—Mackay—J. A. Reid. Agents—Philip, Laing, & Trail, S.S.C.

Counsel for Defender—J. Burnet—M'Neil. Agent—Knight Watson, Solicitor.

Friday, January 8.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

EARL OF MORAY *v.* THE BURGH OF FORRES AND ANOTHER.

Salmon-Fishings—Possession—Ambiguous Title.

In an action to have it declared that the pursuer (Earl of Moray) had exclusive right to the salmon-fishings in a certain portion of the river Findhorn, between a point named Dunduff and a point named the Red Craig, one of the earliest charters produced was a royal charter of the sixteenth century, granting to the pursuer's predecessor the fishings "de Speya, Fyndorn, Slewpule, et Lossy." The defenders contended that the meaning of this title was a bounding title conferring only the right to the Sluiepool in the river Findhorn. Prescriptive possession of the whole fishings claimed was established. *Opinion per curiam* that the charter did not confine the grant to the Sluiepool, but was ambiguous, and had to be construed by possession, but *held* that as the pursuer could produce a charter by progress of 1730, which did not confine the fishings to the "Sluiepool," and on which prescriptive possession for the portion of the Findhorn claimed had followed, he had made out his case.

This was an action at the instance of the Earl of Moray against Peter Higgins, residing in Forres, and the Provost and Magistrates of the royal burgh of Forres, as representing the community, concluding to have it found and declared that the pursuer was heritable proprietor of and had the sole and exclusive right to the salmon-fishings in that part of the river Findhorn from Dunduff (where the boundary between Elgin and Nairn touches the Findhorn) to the Red Craig, a point on his estate of Darnaway, subject to a reservation of such rights as the proprietor of the estate of Relugas might possess, and that defenders had no right or title therein, and for interdict against defenders fishing therein for salmon in any manner of way. The Findhorn flows from south to north at that part.

The immediate title of the pursuer was a Crown writ of *clare constat*, dated on the 13th and recorded in the Register of Sasines on the 17th August 1872. The earliest title upon which he founded in his record was a Crown charter of resignation dated 30th November 1730, on which sasine was expede on 15th February 1731. By this title the pursuer's ancestor was infeft in the Earldom of Moray "cum salmonum piscationibus de Findhorn, Spey, Sluipool, et Lossie," and the subsequent titles were identical in expression. In particular, the Crown writ of *clare constat* of 1872 first mentioned was so expressed. He averred that he and his predecessors had from time immemorial, or at all events for more than forty years, exclusive right of salmon-fishing by net and coble and rod in the part of the Findhorn which was the subject of this action, and that no right by the defenders existed or had till recently been asserted. The water in question was known generally as Darnaway water.

With regard to the ancient documents which he produced, though the summons was not founded upon them, and they did not constitute a continuous title, it appeared that on 1st June 1501 James IV. granted to Janet Kennedy, Lady Bothwell, a liferent conveyance of Darnaway Castle and the fishings of the Slewpule while she should remain there with James Stuart, her son by the king, and afterwards Lord Moray.

In a Crown charter of 12th June 1501, by which he granted to this son the Earldom of Moray, James IV. granted to him the castle of Darnaway with the fishings "de Speya, Fyndorn, Slewpule, et Lossy."

The earliest title with which the pursuer connected himself was a charter by Henry and Mary, dated 1st June 1566, which gave the Earl of Moray the salmon-fishings "in aequis de Spay, Findorne, Slewpule, et Lossy."

The same order is followed in an instrument of sasine in favour of James Earl of Moray and his wife, dated the 25th–28th June 1566, in an Act of Parliament in favour of James Earl of Moray dated 11th August 1607, and in a royal charter in favour of James Earl of Moray dated 19th April 1611. Later titles varied the order in which these words were used.

The defence was a denial that the pursuer's title was sufficient to give him an exclusive right claimed, and a denial of his alleged exclusive possession, and *separatim*, the defenders contended that the pursuer's title gave him no right to salmon-fishing in any portion of the water claimed except the Sluiepool. The burgh maintained right to salmon-fishings from Dunduff House to the "banks of the Findhorn" by a Crown title (except so far as conveyed away by the burgh), followed in any view by immemorial possession. This Crown title is fully discussed in the opinion of Lord Rutherfurd Clark. It