clude all fishings not prosecuted by any other than a particular mode of fishing pointed out in the grant. Mussel-fishings are certainly one of several kinds of *fishings*. If *fishings* generally be the subject of the grant, and mussel-fishings fall under the general term; and if it is offered to be made clear, by unequivocal acts of possession involving the exclusion of all other persons for forty years, that there has been possession of this special description of fishings in virtue of the general grant, how can the offer be rejected as irrelevant? A general grant may surely be individualised in reference to a particular right truly falling under the general expression by a prescriptive enjoyment of the particular for forty years. I can find no authority and no principle which can prevent the Crown granting, under the general term, any particular description of fishings competent to form the subject of a grant of fishings. It would seem to be conclusive of the meaning of such a grant in a question with the Crown, or with any other party, that during the years of prescription, there has been a possession under the grant. There is no reason why a different rule should prevail than is found to prevail in such grants generally. I subscribe to the view of Crown grants generally given by Lord Cowan, and, so concurring, I come to a clear opinion adverse on that point to that of the Lord Ordinary, and favourable to the pursuer.

The Lord Ordinary's interlocutor was accordingly altered.

Agent for pursuer—Colin Mackenzie, W.S.

Agent for defenders—L. M. Macara, W.S.

Friday, January 10.

SECOND DIVISION.

STAINTON'S TRUSTEES *v.* TOPHAM AND OTHERS.

Trust—Payment of Debts—Legacies—Direction to Entail—Surrogatum. A party by his trust-deed directed his trustees to pay his debts and a number of legacies, and, after payment of these, to make over the balance of his personal estate and the lands and heritages belonging to him, or "such part thereof as they might not find necessary to dispose of for answering the purposes of said trust," to and in favour of a certain series of heirs, under a deed of strict entail. In terms of these directions, the trustees proceeded to realise the estate, and to pay the debts and legacies as provided, and in the course of doing so it became necessary to sell part of the lands, as the personal estate was insufficient to carry out the purposes of the trust. By the subsequent recovery of a certain sum from the shares of a company, the personal estate proved to be more than sufficient for carrying out the purposes of the trust, and it became evident that the sale of lands was unnecessary. *Held*, upon equitable principles (Lord Neaves diss.), that a portion of the sum recovered fell to be dealt with as a *surrogatum* for the lands sold.

This was an action of multiplepoinding brought by the trustees of the late Joseph Stainton, of Biggarshiels, and the question was as to the rights of parties in a sum of £13,000 recovered some years ago from Carron Company, in respect of certain shares of that company belonging to the trust-estate which the trustees had been induced, by misrepresentation and concealments, to sell at a price much below their real value.

Mr Stainton by his trust-deed directed his trustees to pay his debts and a number of legacies, and after payment of these to make over the balance of his personal estate, and the lands and heritages belonging to him, or "such part thereof as they might not find necessary to dispose of for answering the purposes of said trust," to and in favour of a certain series of heirs under a settlement of strict entail. In terms of these directions, the trustees proceeded to realise the estate, and to pay the debts and legacies as provided; and, in the course of doing so, it became necessary to sell part of the lands, as the personal estate, including the Carron stock, proved insufficient for the purpose. The question now was whether the heirs of entail were entitled to have the lands so sold replaced out of the £13,000 now recovered from Carron Company. It was, on the one hand, contended that a portion of that sum fell on equitable principles to be dealt with as a *surrogatum* for the lands sold, in respect, that the sum in question being added to the personal estate, it now appeared that that estate was more than sufficient to pay all the debts and legacies. It was on the other hand contended that there was no direction to entail any lands but those conveyed in the deed; and that the meaning of the truster was that the trustees should exercise their powers of administration in the realisation and disposal of the estate, and that those lands only should be entailed which remained after these powers of administration had been fairly exercised according to what seemed best at the time.

The Lord Ordinary (Barcaple) sustained the claim of the trustees, who sought to have the sum in question dealt with as a *surrogatum* for the lands sold. His Lordship added the following note to his interlocutor:—

"The trustees have now recovered £13,000, constituting part of the truster's moveable estate. They formerly sold part of the heritage for £7433, 2s. 6d., under the belief that it was required to pay debts and provisions—the moveable estate, which was primarily liable for these purposes, being, as they then supposed, exhausted. By the trust settlement, after the fulfilment of the other trust purposes, the whole lands and heritages disponed to the trustees, or such part thereof as they may not find necessary to dispose of for answering the purposes of the trust, were to be entailed upon the heirs-male of the body of the entailer, whom failing, the heirs-female of his body, and a series of substitute heirs of entail. The residue of the personal estate was to be paid and made over to the same parties. The truster left an only son, who survived the period when the trustees were bound to make over to him the residue of the trust-estate, heritable and moveable, in terms of the trust, but died before they had actually done so. He left an only daughter, the claimant, Miss Josephine Stainton, in whose favour the trustees have, under authority of the Court, executed a deed of entail of the lands remaining unsold. It is in these circumstances that the trustees have now in their hands a sum of £13,000, realised from the moveable estate, while they have, in ignorance of the true value of that part of the estate, sold heritage to the extent of £7433, 2s. 6d. to meet purposes of the trust for which the moveable estate was primarily liable. If it had not been for the error into which the trustees were unavoidably led, it would have been apparent from the first that there

was no necessity, and they were not entitled to sell any part of the heritage, and that there was a free surplus of the moveable estate falling to be disposed of under the residuary clause in the trust-settlement.

"The effect of the residuary clause is to throw the burden of debts, and of the prior purposes of the trust, primarily upon the moveable estate. If the estate had been entirely moveable, and the direction as to residue had given it in separate portions to two different legatees, or classes of legatees, but laying the burden of debts and prior trust purposes primarily on one of these portions; and if an error as to the value of that portion, such as occurred in the present case, had led the trustees to apply part of the other portion for answering the prior purposes of the trust, there can be no doubt that the trustees would have been entitled and bound, out of the fund now unexpectedly recovered by them, to reimburse to the parties interested the sum which they had erroneously appropriated. The objection stated to the application of this plain principle of equity in the present case is of a somewhat technical kind. It is said that the trust-deed contains no direction to convey or entail any lands except those which were disponed by the truster to the trustees, and that part of the lands so disponed having been, in the circumstances as they then appeared, necessarily and properly sold for fulfilling the purposes of the trust, there is no direction or power given to the trustees to entail lands now to be purchased by them for that purpose.

"The Lord Ordinary thinks this is not an effectual answer to the equitable demand of the heirs of entail. In the first place, as regards the position of Miss Stainton, who, as representing her father, is entitled to the free balance of the moveable residue, she has right to it only after payment out of the moveables of the whole debts and prior provisions. The claim, therefore, which is now made by the executrix on behalf of Miss Stainton, is liable to the objection that it asks for her as moveable residue what the truster directed should be applied to a different purpose, so as to relieve the parties who were to take the heritage. If the trustees had been directed to convey the heritage in fee simple to a party different from the residuary legatee of the moveable estate, it does not appear that the latter, in the circumstances now existing, could have had any answer to the equitable claim to compensation out of the moveable estate for the price of the heritage which was sold under error. In such a case, there being no entail and no substitute heirs having an interest, the claim might have been simply for payment of the amount of the price to the party having right to the heritage. Indeed, even in the present case, that is truly the nature of the claim in its first aspect, and as regards the question between the heirs of entail and the residuary legatee of the moveables. The heirs of entail complain that a portion of the heritage which should have been settled on them has been sold, and the price applied to pay debts and provisions for which the moveable estate was primarily liable. They ask to have that price replaced, for their behoof, out of the moveable estate now recovered. If that is a well-founded demand, it is *jus tertii* to the residuary legatees in what way the fund to be thus replaced shall be dealt with so as to protect the interests of the heirs of entail *inter se*. If the direction had been to convey in fee simple, or in terms that would not have constituted an effectual entail, there would have been no such interests to protect. In the present case, the substitute heirs have legal interests which must be protected, and that is fully provided for by the terms of the claim made by the trustees on their behalf. It cannot be alleged that there will be any invalidity, for want of power or otherwise, in an entail executed by the trustees of land purchased with the fund in question. The circumstance that Miss Stainton happens to combine the character of representative of the residuary legatee of the moveables with that of heiress of entail in possession, cannot in any way affect the present question."

The opposing claimant reclaimed.

Pyper and Watson for him.

Hall for heirs of entail.

Clark and Lee for trustees.

At advising—

Lord Justice-Clerk—The circumstances under which the action arises have been already detailed. The trustees admittedly have, in the state of facts upon record, under misconception and error sold a portion of the heritable estate to meet debts and legacies, which, had they been aware of the true state of the fact as to the value and amount of the executry, would not have been so sold. The sale was effected on what was held at the time to be a due administration of the estate, but not in conformity with the views which the trustees entertain as to their duty in administration. Had they not laboured under essential error as to the true position of the estate, their acting would have been different. It was their duty to entail the whole heritable estate conveyed to them by the truster, if such estate should not be required to meet debts and legacies. This is plain according to the plain construction of the truster's directions. It truly was not required to be sold in order to pay debts and legacies; but, instead of entailing it, they sold it; but they sold it under the belief that they must do so, because there was an insufficiency of executry. In point of fact, as it now unexpectedly turns out, there is executry not only sufficient to have rendered such sale unnecessary, but to leave a very large surplus of moveable funds. The result of the error is, unless redress be given, that the series of heirs of entail will be disappointed in that no interest is given to them, in accordance with the truster's views, to the extent of the heritage sold; and unless something be done, they will fail to be placed in the enjoyment of their just rights as donees under the will by a mere unintentional mistake of the parties administering the estate.

The state of the fact, as admitted upon the record, makes no distinction in reference to any portion of the heritage sold. I should have inferred from the details given as to the subjects of the sales, and the times at which they were effected, that there were certain portions of the heritage as to which it might have been said that they were properly disposed of in the course of a due administration of the estate, irrespective of any error. Some portions of them, for which large sums appear to have been obtained, have had no real patrimonial value—I point at the superiorities, the sale of which at the time was judicious; but there is no distinction made in the record, and none has been attempted in the argument; and I am constrained, therefore, to deal with the whole as governed by the same principle.

The trustees have now got executry in their hands greatly more in the amount than the sum realised by these sales of heritage, and they propose to restore matters in so far as possible by giving to these heirs an interest in land to the same amount

as the land sold, or to apply it otherwise by enhancement of the value of the estate actually conveyed, or redemption of the burdens applying to it. They propose a rectification of the error they have been led into by making a sum equal to the price a *surrogatum* for the land sold, and dealing with it so as to give to the body of heirs of entail the same benefit, or as nearly as possible, which they would have had in the land had that been extant. To this it is objected that the trustees have no power under the instructions by which their administration is to be governed to buy land, and no power to entail land bought by them, and, consequently, that the trustees cannot adopt the course which they propose to follow. It is argued, in like manner, that the enhancement of value by implement on the estate actually entailed, or relief of burden, or under the general expression, any application for the interest of the heirs of entail, is not warranted by the deed. Now, it is certain that the trustees are not specially empowered by the terms of the instructions under which they act to employ executry funds in the purchase of land, and are not directed to entail land so acquired, and are not authorised to improve the entailed estate, or to clear it from burdens, or to hold executry generally for the benefit of the heirs. The specialty here arises from the fact of the trustees having been led by error to do an act prejudicial to the interests of these parties, which requires to be undone in order to rectify this error, and carry out the true views of the truster. They, by mistake, sold land which should have been disponed; and, having a fund to which no other parties have any just claim, they propose to place parties under the trust, so far as possible, to the position in which they would have stood but for the error in dealing with that fund to carry out the truster's intention. Such a case as has occurred was not expressly provided for by the truster; it was not contemplated, and therefore there is no specific direction in the matter; but the truster certainly did contemplate that the heirs of entail should have an interest in property, the value of which is £7430; and, as the views of the truster can only be carried out by having matters, so far as possible, placed in the situation in which the truster placed them, their proposed act appears to me to be in perfect conformity with the truster's views and their rights and duties as trustees. I shall suppose the case of the heritage sold being a single subject, and in a position to be repurchased by the trustees at the price received. An error has been committed, but the purchaser is willing to resell for the same consideration which he gave. I presume that it will be admitted that the trustees might in that case re-purchase and dispone in favour of the heirs of entail. I cannot suppose that in such a case the trustees should not be held entitled and bound to invest the necessary funds to make the re-purchase, and execute the necessary deed of entail. In that assumed case the trustees would have made an accidental error, which they had the means of repairing in their hands. It would seem to me in such a case to be absolutely required of them in following out the trust purposes that they should apply a portion of the executry to buy back the land, and entail it. But for such an act they would have no express warrant in the trust-deed—the application of executry funds in the purchase of lands would be in express terms unauthorised. It would be an act supported, not because done under express power, but because done in the execution of the general purposes of the truster. The trustees would not even then exactly carry out the purpose of the truster. There would be two entails with different dates, and it might possibly be subject to different conditions, as being before or after the passing of a particular Act of Parliament. It might, and I should suppose it would, be impossible to make a contravention, as for example, in the sale of a portion of the land entailed in the second deed, operate as a forfeiture of the right of the heir to lands held under the first. Other differences may be figured; but if no such considerations could operate against the trustees so acting in that special case, I see no reason why they should operate where the requisition of the special heritable subject is impossible. In the one case there is a nearer approximation to the truster's wishes than there can be in the other, but the differences are differences in degree. Where error has been committed prejudicially affecting the rights of the parties, and there are means for correcting it in the hands of those who have done it; the right or duty of adopting them flows from the right and duty of one who has acted in error, to rectify the mistake so far as possible. In sanctioning the act it does not appear to me that our exercise of equitable power is evoked, but that our act is judicial and giving effect to rules of equity, which, as a Court, we recognise and enforce. If the £7430 is not to be applied as proposed, what is to become of it? Is the executrix of Joseph Stainton to get it? That is the claim preferred, the only claim in competition with the trustees. The pleas at page 43 are as follows [*reads*]. The substance of these pleas is that the heritage has been, no matter how, made executry, and cannot be taken out of executry, because there is no power to do so. The claim is not a claim of an heir *in mobilibus* to residue said to be undisposed of from the absence of direction. It is a claim under this very deed. It would surely be not only most unjust that there should be so material a prejudice caused to the heirs of entail, but so material a benefit acquired from such a cause as an innocent blunder of the trustees. Strange, indeed, it would be if a legatee of executry should be able to maintain a successful competition for an amount of executry which a blunder only put into that form, and which should have been heritage all along. Yet this is the only case presented, and it is sought to be established by the supposed authority of the case of *Mount Greenan*, where an heir-at-law succeeded in vindicating an heritable subject in the person of his ancestor, as to which the truster had given no power of sale, and therefore no power to bring it into a position, in which the price could be invested in the purchase of land to be entailed. I see no manner of analogy between that case and the present. I have not to deal with the rights of heirs-at-law. In the view which I understand the present case, to present a right under the deed that would otherwise be defeated, is proposed to be made good in the only way in which it can be given effect to. I do not see how otherwise there could be compensation for the error made. I think that in holding or applying the fund to the interest of these heirs by substituting new heritage for old seems an infinitely simpler and plainer way of reaching the result than any other which has been or can be suggested; and, where the trustees are called upon, as I think they are to do their best to replace matters where they stood, I see no other course open to us than to affirm the interlocutor. I see no reason to apprehend that the

trustees will abuse their trust by a misapplication of the fund; if they do they are responsible, and any party interested may, by representation to us, prevent the evil. We have no such case raised on record or any matter before us other than the power of redressing the error by making the money a *surrogatum*, or the alternative of paying over the money to the executrix, a result which, I think, would be unjust and inconsistent with the truster's wishes.

Lord Cowan and Lord Benholme concurred with Lord Justice-Clerk.

Lord Neaves dissented, holding that there was no direction to entail any lands but those mentioned in the deed, and also holding that the trustees were now *functi* in this matter, in respect of certain proceedings in an action brought in 1845, under which they were decerned to denude of the trust-estate.

Agent for Reclaimer—John Gillespie, W.S.

Agents for Stainton's Trustees—Tawse & Bonar, W.S.

Agents for Heirs of Entail—Tawse & Bonar, W.S.

Tuesday, January 14.

FIRST DIVISION.

SHAW AND MANDATORY, PETITIONERS.

Bankruptcy—Bankruptcy Act (England) 1861—Bankruptcy (Scotland) Act 1856—Bankruptcy and Real Securities (Scotland) Act 1857—Mandate—Foreign. Petition for sequestration of estates of foreign bankrupt, under sect. 218 of English Bankruptcy Act 1861, 24 and 25 Vict., cap. 134, presented by official assignee of bankrupt and his mandatory, *refused,* on the ground that the mandatory had no authority to present the petition. *Opinion,* that the Court are not bound under section 218 of 24 and 25 Vict., c. 134, to award sequestration without inquiry and exercise of discretion.

This was a petition for sequestration of the estates of George Millar, sometime of Collingwood, and afterwards of Castlemaine, in the colony of Victoria, Australia, presented by Henry Steel Shaw, of Melbourne, official assignee of Millar's estate, and by Andrew Hendry, solicitor in Dundee, factor, commissioner, and attorney of the said Henry Steel Shaw, conform to factory, commission, and power of attorney dated 25th April 1865.

It appeared from the petition that, on 10th June 1864, the Insolvency Court of the colony of Victoria "ordered, adjudged, and finally declared that the estate of the said George Millar be sequestrated for the benefit of his creditors, according to law," conform to certified copy of the orders, adjudication, and deliverances produced. The petition then sets forth that by sect. 218 of the English Bankruptcy Act, 24 and 25 Victoria, cap. 134, entituled, The Bankruptcy Act 1661, it is enacted that, "if any person who shall have been adjudged or declared bankrupt or insolvent in India, or any of the foreign dominions, plantations, or colonies of her Majesty, shall be resident or shall be possessed of property in England, Ireland, or Scotland, or in any colony, plantation, or foreign possession of the Crown, it shall be lawful for the official assignee, trustee, or other representative of the creditors of such bankrupt or insolvent to apply for and obtain an adjudication of bankruptcy, sequestration, or insolvency against such person in the Court of Bankruptcy in England, and in the proper Court in Scotland, Ireland, and such colony, plantation, or foreign possession of the Crown respectively; and by virtue thereof the same order and disposition shall be had and taken with respect to the person and property of the bankrupt or insolvent as would have been if he had been originally adjudged bankrupt or insolvent by the Court or tribunal so applied to;" and that "upon such application, it shall not be necessary for the assignee, trustee, or other representative of the creditors of the person so declare dbankrupt or insolvent as aforesaid, to give proof of any act of bankruptcy, or petitioning creditors' debt, or to produce any other evidence than a duly certified copy under the seal of the Court of the order or adjudication by which such person was found or adjudged bankrupt or insolvent."

The petitioners then stated that Millar had lately succeeded to a sum of £300, which now belonged to his creditors, and craved the Court to award sequestration of Millar's estates, heritable and moveable, situated in Scotland, in conformity with the provisions of the Bankruptcy (Scotland) Act 1856, and the Bankruptcy and Real Securities (Scotland) Act 1857.

Lord Mure reported the case.

Mair for petitioners.

Lord Deas indicated an opinion that the terms of the mandate did not authorise the present application.

Lord President—I am for refusing this petition on the ground suggested by Lord Deas, that the attorney in this country has no authority to present it. But I take leave to say, at the same time, that the remedy asked in it is of so peculiar a kind that it would require a very special case to entitle any one to apply for it, particularly in such circumstances as the present. What is asked is, that sequestration should be awarded of the estates of a person domiciled in Australia, and who, for anything we know, has been there all his life, and the whole object is to recover certain debts said to be due to him in this country. The object is quite incommensurate with the magnitude of the machinery sought to be put in motion. The object of a sequestration, with all the statutory forms, is to produce a *concursus* of creditors in the country where the estates of the bankrupt are mostly situated. In some cases such an application may be expedient; but I should be sorry to think that we were under any obligation, without leave to exercise our discretion or to inquire into the circumstances, to award sequestration under that section whenever any one came from a colony and demanded it. That would be too strict a construction of the statute. But I merely say that for the purpose of strengthening the ground of judgment, that the petitioner has no authority for taking the present step.

Lord Curriehill—I concur. If the authority had been explicit, it would have given rise to important questions, such as arose in the case of *Stein*, but these questions cannot arise under the present application.

Lord Deas—I agree that if this could be held to be a petition by the official assignee, important