pressly sought or not, would be to establish a ground-annual or rent charge, not necessarily connected with the tenure, but assignable to any one, with the quality of being in any assignee's person a real burden, leviable by real diligence.

I think it settled by the opinions in the well-known case of the *Tailors of Aberdeen* v. *Coutts*, that to establish a real burden it is not necessary that it should be declared such in express terms, but that it may be constituted by words distinctly importing its imposition. But I do not think that the present case comes within the rule of the authority. Although it may not be necessary to declare a real burden in express terms to be such, there must be *habile* words used for the purpose of operating the intention. This is not done in the present case, which attempts to reach the result, not by the imposition of a real burden standing independent of tenure, but by the creation of a feu-right, of which a feu-duty and duplicand are set forth as elements. It may be guessed that the parties intended to make these payments real burdens, but only because they have used the word "feu-duty," thereby referring to a payment which is commonly considered such. I do not think that this satisfies the requirement of the reported case. It is not the creation of a real burden by clear and distinct words, though not imposing it in express terms. It is an attempt to create an illegitimate tenure, of which feu-duty is an element; and when this attempt is foiled, to set up the feu-duty as a real burden apart from all tenure. This I think inadmissible. When the attempt to make a feu-holding fails, all the incidents of the holding must fall to the ground. The pursuers cannot make one thing, and when that is found ineffectual, then, by a sort of pantomimic procedure, convert it into another. They cannot change a feu-duty, which is only effectual as an incident of a feu-holding, into a wholly different real burden, which is effectual apart from all tenure. The pursuers, in short, have not made the thing which they aimed at, but have made something else which does not suit their purpose, and which they cannot now transform into the other.

What the pursuers now seek to establish is a totally different thing from a feu-duty; it is a ground-annual, not payable to a superior, but payable out of the lands to any appointed creditor. I shall not inquire whether the pursuers would have succeeded had they used the word "ground-annual" in place of "feu-duty." I am not prepared to say, after the opinion in the *Tailors of Aberdeen*, that a ground-annual distinctly imposed would require, for legal effect, to be expressly declared a real burden; though it commonly is, and will always be most safely declared so. The answer to the pursuers is that they have not created a ground-annual, but attempted to create a feu-duty; and when the thing cannot be sustained as a feu-duty, it cannot subsist as anything. They did not make a ground-annual, and cannot therefore have such sustained.

I am of opinion that the Lord Ordinary's interlocutor should be in substance adhered to.

After the case had been advised, counsel for the defender objected to that part of the Lord Ordinary's interlocutor finding no expenses due.

The COURT—The motion is too late. We can give you expenses since the date of the Lord Ordinary's interlocutor. It should be known, if it is not already known, that when a party intends to reclaim only against the part of the Lord Ordinary's interlocutor dealing with expenses, he must bring it under the notice of the Court before the case is advised on the merits. It is different from the case of a party who has been unsuccessful on the merits in the Outer House, for he cannot anticipate that the Lord Ordinary's judgment will be reversed.

The Court recalled the interlocutor of the Lord Ordinary in so far as it finds that the obligation for annual payments and duplications thereof at the entry of each heir and singular successor contained in the defender's titles is binding on the defender, and found in lieu thereof that the defender, as proprietor for the time being of the subjects, is personally liable for the annual payment and duplication thereof; *quoad ultra* adhered; and found the defender entitled to expenses since the date of the Lord Ordinary's interlocutor.

Agents for Pursuers—G. & J. Binny, W.S.
Agents for Defender—Webster & Will, S.S.C.

Saturday, March 16.

SCOTT AND CAMPBELL, APPELLANTS, (IN SEQR. THOMAS COUPER).

Bankrupt—Discharge—Consent of Creditors—19 *and* 20 *Vict. c.* 79, § 146.

Held that the clauses of the 146th section of the Bankruptcy Act, which require—(1) that the trustee shall prepare a report upon the conduct of the bankrupt before it shall be competent for the bankrupt to present a petition for his discharge, or to obtain any consent of any creditors to such discharge, and (2) that "such report shall be produced in the proceedings for the bankrupt's discharge, and shall be referred to by its date, or by other direct reference in any consent to his discharge,"—are imperative, and not directory merely. And that where the consents had preceded the trustee's report, the bankrupt's discharge could not be granted.

This was an appeal from the Sheriff-court of Edinburgh (Sheriff-Substitute HALLARD) in a petition for the discharge of a bankrupt after the lapse of eighteen months from his sequestration. The bankrupt had obtained a report from the trustee in his sequestration, and also the consent of a majority of his creditors in number and value.

The Sheriff-Substitute found the petitioner entitled to discharge.

Two of the creditors, Thomas Scott and Robert Campbell, being dissatisfied with this deliverance, appealed.

They objected—(1) The creditors' consents were given before the report of the trustee was prepared—contrary to the 146th section of the statute. (2) The creditors' consents do not refer to the trustee's report, as required by the said section. (3) The trustee's report is not properly dated, nor referred to distinctly in the proceedings for the bankrupt's discharge.

M'KECHNIE, for the appellants, referred to *Dickson's Trustees* v. *Campbell*, 5 Macph. 767.

At advising—

LORD PRESIDENT—I think the objection fatal, and cannot at all acceed to the contention of the

bankrupt's counsel, that the clause regulating the consents of creditors is a direction or directory provision merely. It is distinctly imperative, both from the words used in the clause itself, and from the objects which, it is apparent throughout the whole, were in the view of the Legislature. It is the policy of this statutory enactment, and it is a sound one, that the bankrupt shall not be allowed to deal or transact with his creditors with a view to his discharge, until the trustee's report has been laid before them. This is set out distinctly and imperatively in the clause referred to. And the reason for requiring that the creditors' consents shall bear distinct reference to the report is to make sure that the report shall have been previously made, in accordance with the policy and intention of the Legislature in framing this statute. I think we must therefore alter; and remit to the Sheriff to refuse the petition,

The other Judges concurred.

Agent for the Appellant—William Black, S.S.C.
Agents for the Bankrupt—Menzies & Cameron, S.S.C.

Saturday, March 16.

SECOND DIVISION.

SPECIAL CASE—DR CONNEL'S TRUSTEES.

Testament—Disposition—31 *and* 32 *Vict. c.* 101, § 20.

A will executed according to the law of England (the place of execution), disponing heritable estate in Scotland, sustained as sufficient to convey heritage.

This Special Case was presented by the trustees and the heirs-at-law of the late Dr Abraham James Nisbet Connel, who died at London on the 9th of March 1871. At the time of his death he was possessed of considerable personal estate, and some freehold and leasehold property in England, and he also died possessed of a large number of shares in the British Linen Company's Bank, and some heritable property in Edinburgh. Dr Connel, by his will, dated 6th February 1871, after appointing trustees and executors, provided as follows:—"As to all my real estate and my personal estate (except such plate as is hereinafter specifically bequeathed) whatsoever and wheresoever, over which I now have, or at the time of my decease may have, any power of gift, devise, bequest, disponement, conveyance, disposition, and appointment (but as to estates vested in me upon trust or by way of mortgage, subject to the trusts and equities affecting the same respectively), all which said real and personal estate is hereinafter referred to as my said trust-estate, I give, devise, bequeath, dispose, dispone, appoint, and convey the same unto my said trustees, their heirs, executors, and administrators respectively, upon trust that they, or the survivors or survivor of them, or the heirs, executors, or administrators of such survivor, shall, in such manner and under such stipulations, and upon such terms and conditions in all respects, as they or he shall in their or his discretion think fit, sell, collect, or otherwise convert into money, according to the nature of the premises, all such parts of the same premises as shall not consist of money, and shall buy in or rescind or vary any contract for sale, and resell, without being answerable for loss; and may, for the purposes aforesaid, or any of them, execute and do all such assurances and things as they or he shall think fit: And I declare that my said trustees shall, out of the monies to be produced by such sale, collection, and conversion, after payment of my just debts, funeral and testamentary expenses, pay the legacies or sums of sterling money," &c.

Dr Connel was of Scotch origin, and for many years was a medical officer in the Rifle Brigade, and afterwards served in the 2d Regiment of Horse Guards.

The will was executed according to the law of England, and was valid to include and pass all the real and personal estate of the deceased situated in England.

The second parties to the case were the persons who would be entitled to succeed to Dr Connel's heritable estate in Scotland in the event of its being held that it was not validly conveyed to his trustees by the will in question.

The question on which the opinion and judgment of the Court was requested was—

"Whether the will of the testator operates, under the Act 31 and 32 Vict. c. 101, § 20, a conveyance to the trustees therein named of his heritable estate in Scotland?"

Solicitor-General (CLARK) and BROWN for the Trustees.

FRASER and R. V. CAMPBELL for the Heirs.

At advising—

LORD JUSTICE-CLERK—This Special Case raises a point of general application and of some importance. The question rests on this state of facts. Dr Connel died, having executed in England, according to the forms of the law of England, a will, which contains the following clause:—"As to all my real estate and my personal estate (except such plate as is hereinafter specifically bequeathed) whatsoever and wheresoever, over which I now have, or at the time of my decease may have, any power of gift, devise, bequest, disponement, conveyance, disposition, and appointment (but as to estates vested in me upon trust or by way of mortgage, subject to the trusts and equities affecting the same respectively) all which said real and personal estate is hereinafter referred to as my said trust-estate, I give, devise, bequeath, dispose, dispone, appoint, and convey the same unto my said trustees, their heirs, executors," &c. It is certain, as regards the heritable estate thereby attempted to be conveyed, the will would not have been effectual prior to 1868. By the law of Scotland, however, a will executed according to the law of the place of execution would be effectual as regards moveables. This principle was given effect to in the case of *Purvis*, in which it was unanimously held that it had always been the law of Scotland that a will executed according to the law of the place of execution was effectual as to moveables. Thereafter the Act 24 and 25 Vict. was passed, extending this principle of law to the three parts of the kingdom. By that enactment a will executed according to the law of England will enable an executor to obtain confirmation in Scotland, and a will executed according to the law of Scotland will enable the testator to obtain letters of administration in England. But that statute made no change in the law as to the conveyance of heritage. The Act 31 and 32 Vict. § 20, deals with this matter. The primary object of the enactment was to alter the law of Scotland, which required words of *de præsenti* conveyance in a disposition of heritage. The other object of the statute was to do away with the necessity for dis-