new works. At all events, it is not stated in the case that they had any such consent when they appropriated these funds to the construction of new works. Now, it is admitted by Mr Guthrie—and he could not help admitting it—that that money could only be held by them to have been borrowed for that purpose, and that it would need to be restored. The question which the ordinary shareholders ask is, whether they are entitled to the amount of these reserve and depreciation funds, as they existed in the accounts at the time when the company came to an end, and my opinion is that they are. It is to be kept in view that, as regards the capital price of the works, it must be held to have been increased by the amount of the value of those new works upon which the reserve and depreciation funds were spent. There is, therefore, no loss to anybody else in taking the amount necessary to replace those funds, and dividing it as what it really was—profits put aside to meet contingencies, which in the circumstances that have occurred—viz., the company's ceasing to exist on 30th June 1891—those funds cannot now be spent in meeting. I think, therefore, that the first alternative of this question must be answered in the affirmative.

The second question is more difficult, because it relates to matters about which there is very little authority, and it is peculiar in that it has to do with the entirely exceptional expenses incurred in opposing and promoting bills in Parliament. Now, in so far as such expenses were charged to revenue in the year 1890, I understand that no question is raised. The question relates to a considerable sum, amounting to about £4000, which was expended in connection with the proceedings both in 1890 and in 1891, and which proceedings have resulted in the arrangement by which this company is bought up by the Glasgow Corporation. We do not have to inquire whether the bargain has been a good one or a bad one; we have only to deal with the question whether the expenses of the proceedings which resulted in that arrangement are expenses properly chargeable against capital—whether they ought to be deducted from the amount obtained from the Corporation for the works. I think that they do form a charge against the amount obtained from the Corporation for the works, and that therefore we must answer the first part of this question in the negative.

LORD YOUNG, LORD RUTHERFURD CLARK, and LORD TRAYNER concurred.

The Court answered the first alternative of the first question in the affirmative, and the first alternative of the second question in the negative.

Counsel for the First Parties—Lorimer—Younger. Agents — Morton, Smart, & Macdonald, W.S.

Counsel for the Second Party—Guthrie—Mark Davidson. Agents—Bruce & Kerr, W.S.

Saturday, July 4.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

RUTHERFURD *v.* MACGREGOR & COMPANY.

Bankruptcy — Sequestration — Sale — Purchase by Agent—Bankruptcy Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 120.

An agent employed by the trustee in a sequestration having purchased certain sequestrated effects exposed for sale by the trustee, an unsuccessful bidder brought an action for reduction of the sale, averring that the price of the subjects sold was the sole asset which the agent had to look to for payment of his account against the trustee, as he had arranged not to hold the latter personally liable for payment; that the value of the subjects in question did not exceed the amount of said account, and that the agent was thus the sole party interested in the result of the sale. The Court *repelled* the reasons for reduction.

Opinion by Lord Kyllachy that an agent employed by the trustee in a sequestration was in respect of his account a creditor in the sequestration in the sense of the 120th section of the Bankruptcy Act 1856.

Observations on this point by Lord Justice-Clerk, Lord Young, and Lord Rutherfurd Clark.

On 17th December 1890 Richard Brown, trustee on the sequestrated estate of J. Young Guthrie, exposed for sale by public roup the book debts, books, papers, and accounts belonging to the sequestrated estate. The only parties who bid at the sale were MacGregor & Company, W.S., Edinburgh, who had been employed by Richard Brown, the trustee, as law-agents, and James Rutherfurd. The subjects were ultimately knocked down to MacGregor and Company at the price of £23.

James Rutherfurd thereafter brought an action against Brown and MacGregor & Company for reduction of the sale, for declarator that the said subjects had been purchased by him at the upset price of £5, which had been first offered by him, and for decree ordaining Brown on payment of said sum to deliver to him an assignation of said subjects.

The pursuer averred—(Cond. 3) That the defenders MacGregor & Company had unpaid accounts against the trustee amounting to upwards of £200, for services rendered by them as law-agents on his employment. . . . "There were no assets available for the payment of those accounts, but the price which might be obtained for said book-debts, books, accounts, papers and others exposed for sale as aforesaid. The trustee had an arrangement with his said agents that he should not be personally liable for their accounts, but should be liable only for the amount of assets in his

hands belonging to the said sequestrated estate. (Cond. 4) The said exposure for sale was thus truly made for behoof of the trustee's said law-agents. They were virtually the sellers. The price to be got was all to go to them towards payment of their account up to the full amount thereof. They received it accordingly. Any increase of price up to the amount of their accounts was solely for their benefit. It was all the same to them whether they offered at the sale the full amount of their accounts or any less sum. They could, without injury to themselves, have run up the bidding against a competitor to upwards of £200, and might then have dropped the sale into his hands at that figure. All the offers made on behalf of the said law-agents were illegal and invalid, and the sale to them was illegal and invalid. Their bidding was unfair to the pursuer."

MacGregor & Company lodged defences. They explained that the circumstances attending the sale had been explained to a meeting of creditors held on 19th January 1891, that the sale to the defenders had been approved by the meeting, and the trustee had been instructed to grant the necessary conveyance. They produced an extract from the minute of meeting. They admitted that they did not hold the trustee liable for their accounts beyond the amount of the assets of the estate in his hands.

They pleaded that the pursuer's statements were irrelevant.

On 22nd May 1891 the Lord Ordinary (KYLLACHY) repelled the reasons of reduction and assoilzied the defenders.

"*Opinion.*—I have considered the argument in the case which I heard on Saturday last, and have referred to the authorities; but the conclusion to which I come is, that the question here is solved by the provision of the Bankrupt Act, which gives creditors a right to purchase at public sales of the bankrupt estate. I incline to accept the pursuer's view that the defenders here had, as law-agents in the sequestration, and as such entitled to payment of their accounts out of the first end of the estate, substantially the sole interest in the result of the sale, and that at common law that was a sufficient disqualification as against their bidding or purchasing. But, conceding this, I see no reason for reading the statutory exemption in favour of creditors so narrowly as to exclude the agent in the sequestration, who although he does not rank as an ordinary creditor, and has no doubt also a claim against the trustee personally, is yet to all intents and purposes a creditor in the sequestration, having a claim against the assets of the estate, which is none the worse because it is preferable.

"It may be that the result is to innovate on the common law rule applicable to sales by auction, but that is just what the statutory provision was designed to do. Nor is there any hardship to intending purchasers, because they knew, or are bound to know, that in sales of a sequestrated estate they were open to competition from creditors, including, it may be, sole creditors, who may often have the sole interest in the price.

"I shall therefore assoilzie the defenders, with expenses."

The pursuer reclaimed, and at the discussion in the Inner House proposed to amend his record by adding the averment that the value of the estate in the hands of the trustee at the date of the sale was not more than the amount of the defenders' account.

Argued for the pursuer—The Lord Ordinary's decision was unsound. The agent in a sequestration was not a creditor in the sense of the 126th section of the Bankruptcy Act, that section only applying to creditors at the date of sequestration. The defenders having given up their claim against the trustee, the subjects sold were the sole asset they could look to for payment of their account, and they were the only parties interested in the result of the sale. They were thus virtually the sellers, and were on that ground precluded from buying, or at any rate their interest in the price disqualified them from bidding at the sale or buying—*Faulds* v. *Corbet*, February 25, 1889, 21 D. 587, *per* Lord Wood 593; *Watson* v. *Maule*, January 19, 1743, M. 4892; *Grey* v. *Stewart & Company*, July 7, 1753, M. 9560; More's Notes on Stair, lix.

Argued for the defenders—The Lord Ordinary's construction of the 120th section of the Bankruptcy Act was sound—Bankruptcy Act, sec. 57; *Cruickshank* v. *Williams*, February 15, 1848, 11 D. 614. Assuming that the defenders were not creditors in the sense of that Act, there was no objection to their bidding for and buying the estate—*Noble* v. *Campbell*, November 4, 1876, 4 R. 77. They were not disqualified by their interest in the result of the sale, or by their arrangement with the trustee—*Shiell* v. *Guthrie's Trustees*, June 26, 1876, 1 R. 1083.

At advising—

LORD JUSTICE-CLERK—I do not think there are any features of serious difficulty in this case. Mr Comrie Thomson candidly admitted that, apart from the arrangement made by the defender with the trustee in the sequestration to the effect that he would not insist on his claim against the trustee personally, but rely solely on the assets of the estate—he would not have a stateable case. In other words, he admitted that he would not maintain in the ordinary case that the agent in a sequestration might not bid for and purchase an asset of the sequestrated estate. I am quite unable to see how the arrangement made by the defender can make any difference in the case of his making a *bona fide* bid for and buying an asset of the trust-estate. I see no distinction in the fact that he has given up what was his legal right, if the assets of the sequestrated estate should prove insufficient to meet his claim. I do not think that the present case is at

all the same as *Faulds* v. *Corbet*. I think it is more like *Shiells* v. *Guthrie*. But it is not necessary in my view to consider the distinction between these cases, because, if I am right in thinking that the arrangement made by the defender with the trustee makes no difference, I think the case of *Noble* v. *Campbell* is absolutely in point. The Lord President then points out that there is no such officer known to the law as the agent in a sequestration, and the person who acquires that title is simply the person employed by the trustee to do business for him in matters in which he is entitled to employ others to assist him. I think the case of *Noble* effectually disposes of this case, and I see no ground stated on record to suggest that the defender was not a *bona fide* purchaser of the asset in question. It is said that his account was larger than the value of the asset, but he, knowing that he had a claim against the estate, and that he was entitled to get payment in money, wanted to get the estate into his own hands, as he thought he could make something of it. I see no reason to doubt that the defender was acting with anything but an honest desire to get the asset knocked down to him at such a price that he could make something out of it.

With regard to the ground on which the Lord Ordinary has disposed of the case, I desire to add that I am not prepared to proceed upon that ground, though I am not prepared to say that it is wrong.

Lord Young—I have come to the same conclusion. The case is interesting chiefly owing to the singularity of the circumstances, but when understood, it is simple enough. The bankrupt was a solicitor in Edinburgh, and in the result the whole estate left in the hands of the trustee consisted of the book debts, books, accounts, and papers of the bankrupt. That was a speculative estate, and in the end all the creditors were satisfied that it would not yield more than would satisfy the trustee's claims, and the trustee's claims for cost of management must be met before the claims of creditors. That being their view the next fact to be noted is that the chief, if not the only party with whom the trustee had to deal, was the defender, who had, and there is no reason to doubt very properly, arranged that he would not hold the trustee personally liable for any claims he might have for services rendered, if the estate should not prove sufficient to meet these claims.

Such being the state of affairs, the estate in the hands of the trustee was exposed for sale, and as was very proper for sale by public roup, though I think, the creditors being willing, there would have been no objection at common law—there may be perhaps under the statute—to the estate being handed over by the trustee to the agent, and in my opinion there is nothing in the common law of Scotland to prevent the defender being a bidder at the sale. If he had bid beyond the amount of his account, the surplus after payment of his account would have gone to the creditors. If anyone had been prepared to give more than he was, there would have been no obstacle to such a purchaser acquiring the subjects. I see, therefore, no objection at common law to the defender's buying the subjects.

As at present advised, I could not assent to the ground on which the Lord Ordinary has put his judgment. I do not think the authority of the Bankruptcy Act is necessary to sanction the course taken by the defender, but if the sanction of the estate was necessary, I should not, as at present advised, be able to find such sanction in the statute, for I incline to the view that the defender was not a creditor in the sequestration in the sense of the Act.

Lord Rutherfurd Clark—I am of the same opinion. The subject of the sale in this case was an asset of a sequestrated estate. I think that simple statement shows that this case does not fall within the rule of *Faulds* v. *Corbet*, because it is perfectly obvious from that statement that the subject of the sale was the property of the trustee in the sequestration, and not in any sense of the agent in the sequestration. It is said that a difference arises in consequence of the arrangement made between the agent and the trustee, under which the liability of the trustee to the agent was limited to the value of the assets of the estate. I see no difference which that can make in regard to the matter of which I am now speaking. The trustee did not give the agent anything, and so the property of the estate necessarily remained in the trustee. The agent had nothing more than a personal claim against the trustee, that claim, however, being limited to the value of the assets of the sequestrated estate. The present case therefore is, in no way similar to the case of *Faulds* v. *Corbet*, which proceeded on the ground that a seller may not himself buy the subject which he is selling.

It is further provided that the defender's interest in the value of the asset sold disqualified him from bidding at the sale. I have shown that he was not disqualified in the sense of being owner of that asset either in title or fact, and, if he was not owner, I can see no other disqualification which would prevent him from bidding at the sale. It was held in the case of *Noble* v. *Campbell* that the law-agent of the trustee in a sequestration might lawfully purchase an asset of the sequestrated estate, and I do not think that it makes any difference whether the agent is or is not a creditor of the trustee personally at the time of the purchase, or whether his contract with the trustee is of the usual kind, or his claim is limited as it was in this case. I can understand that a very different case might arise if it were averred that the agent, having such an interest that the estate should realise a large value, had not bid at the sale from a *bona fide* desire to purchase, but in order to increase the price. That might have been a very different case, but it is not averred. I assume, and I have no doubt that my assumption is in accord-

ance with the fact, that the defender was a *bona fide* purchaser at the sale desiring to make the purchase which he made, and I see nothing to prevent him becoming a purchaser.

I concur with Lord Young in what he said with regard to the Lord Ordinary's judgment. I am not satisfied that the defender is a creditor in the sequestration in the meaning of the Bankruptcy Act, and though I do not express a definite opinion on the matter, I am not prepared to proceed on the ground on which the Lord Ordinary has decided the case.

LORD TRAYNER was absent on Circuit.

The Court adhered.

Counsel for Pursuer—Comrie Thomson—Salvesen. Agents—Gill & Pringle, W.S.

Counsel for Defenders—Asher, Q.C.—C. S. Dickson. Agents—M. MacGregor & Company, W.S.

Tuesday, June 30.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

CRICHTON AND OTHERS (CAMPBELL'S TRUSTEES) *v.* CRICHTON AND OTHERS.

Succession—Rents—Accumulations—Thellusson Act (39 *and* 40 *Geo. III. cap.* 98).

A testator by trust-disposition and settlement directed his trustees to pay the free annual income of his heritable estate to his wife, if she should survive him, during her life, and after her death to retain and accumulate the free rents and annual produce thereof until the death of the longest liver of certain of his nephews and nieces. The testator's wife survived him for more than twenty-one years, during which time she duly received the free annual income of the heritable estate.

In a multiplepoinding raised after her death—*held* that the direction to the trustees to accumulate was ineffectual, in respect that the period of twenty-one years during which accumulation was permitted by the Thellusson Act must be reckoned from the date of the testator's death.

Succession—Trust-Disposition and Settlement—Direction to Entail after Period of Accumulation—Right to Rents not Disposed of by Settlement.

A truster died leaving a trust-disposition and settlement by which he appointed his trustees to pay the free annual income of his heritable estate to his widow, after her death to accumulate the rents of said heritable estate until the death of the longest liver of certain nephews and nieces, and then to execute an entail of said estate upon a series of heirs specified. The direction to accumulate after the widow's death was rendered ineffectual under the provisions of the Thellusson Act, and the question arose, to whom the rents thus set free should belong.

Held (*altering* judgment of Lord Kincairney) that as there was no direction in the settlement regarding the disposal of these rents, they belonged to the heir-at-law of the truster as at the date when they became due—*diss.* Lord Young, who *held* that, the direction to accumulate the rents being ineffectual, the only reason for deferring the execution of the deed of entail had disappeared, and that, as it was clear who was the party pointed out in the settlement as the institute of the entail, he was entitled to the rents in question.

Opinion by Lord Kincairney, that the rents in question belonged to the representative in heritage of the person who was the heir-at-law of the truster at the date of truster's death.

Opinion by Lord Young to same effect, it being assumed that the time for the execution of the deed of entail had not arrived.

William Gunning Campbell, Esq. of Fairfield, died upon 24th November 1857, leaving a trust-disposition and settlement dated 7th July 1857, with three codicils. By this settlement he disponed to certain persons named therein as trustees his whole property, heritable and moveable, (1) for payment of his debts and certain legacies, (2) to pay his wife Mrs Maria Anna Menzies or Campbell, if she should survive him, the free annual income of his heritable estate of Fairfield thereby disponed during her lifetime. In the third place, he directed his trustees, as soon as convenient after the decease of the said Mrs Maria Anna Menzies or Campbell, and after the decease of the longest liver of my nephews, nieces, sons and daughters of his late brothers Charles Hay Campbell and Napier Campbell, to execute a deed of entail of his whole lands, in terms specified in the trust-disposition of his father, and deed of entail executed by his trustees in implement thereof, the said deed of entail to be granted "to and in favour of the heirs whatsoever of my body, and the heirs of their bodies, the eldest daughter or heir-female always succeeding without division, and excluding heirs-portioners during the whole course of succession, whom failing to and in favour of the heirs-male of the body of my nephew Leveson Granville Alexander Campbell, eldest son of the late Charles Hay Campbell, sometime major in the East India Company's Service, and the heirs-male of their bodies; whom failing to and in favour of the heirs-male of the body of my nephew George Gunning John Campbell, second son of the said Charles Hay Campbell, and the heirs-male of their bodies; whom failing to and in favour of the persons, heirs, and substitutes specified and contained or pointed out in the aforesaid trust-disposition and settlement by my said father, and thereby and by the said disposition and