kept in such a dirty state as to be offensive or injurious to health. This, I think, clearly appears from the fact that there is a separate section (the 145th) which provides for the case of an animal (such as a howling dog) which is a "nuisance or annoyance" to the neighbourhood from its own behaviour, as distinguished from the manner in which it is kept.

Accordingly it seems to me that the general words towards the end of the section, "any matter or thing whatever injurious to health or offensive to such occupiers," must be read as meaning merely any matter or thing *ejusdem generis* with those which have been already specified. If so, the simple storage of an article of commerce, the paraffin, is not covered by the section, for we are not told, and cannot assume, that the offence arose from any want of care or cleanliness in the manner of storing it. On the contrary, it would appear that the storing of any large quantity, however it may done, is calculated to be offensive to the sense of smell and injurious to health.

The Public Health Act 1867 (30 and 31 Vict. cap. 101), by section 16 and following sections provides for the "removal, or remedy, or discontinuance, or interdict" of "any work, manufactory, trade, or business injurious to the health of the neighbourhood, or so conducted as to be offensive or injurious to health," but the procedure provided by the Act requires that the application shall be made only to the Sheriff, and on medical certificate or a requisition in writing by ten inhabitants of the district. There may be very good reasons for providing that a trade or business should not be put down without these precautions being taken, although mere want of cleanliness in the mode of keeping premises within burgh may be reached by a more summary procedure. Even if no statutory enactment applies, I cannot doubt that if any person lays down on his premises what is so offensive to health, he may be interdicted from doing so at common law. But I think we should decide nothing more than this, that the circumstances disclosed in this case do not justify a prosecution under section 140 of the Aberdeen Police Act. I am therefore for quashing the conviction.

The LORD JUSTICE-CLERK and LORD WELLWOOD concurred.

The Court quashed the conviction.

Counsel for the Appellant—Asher, Q.C. —Hunter. Agent — Thomas Dalgleish, S.S.C.

Counsel for the Respondent — Ure. Agent—Alexander Morison, S.S.C.

COURT OF SESSION.

Wednesday, March 2.

FIRST DIVISION.

[Lord Low, Ordinary.

ELLIS AND ANOTHER (FLEMING'S TRUSTEES) *v.* M'HARDY.

Bankruptcy—Trust for Behoof of Creditors —Title of Truster under Private Trust by Debtor to Sue for Reduction of Illegal Preferences.

The accession of creditors does not give the trustee, under a trust voluntarily created by a debtor for behoof of his creditors, the right to sue for the reduction of illegal preferences where the trust-disposition contains no clause specially conferring such right upon the trustee.

This was an action at the instance of John Ellis and John Carmichael Bennet, as trustees acting under a trust-disposition for behoof of creditors, granted by John Fleming, shipowner in Aberdeen, on 3rd June 1891, against David M'Hardy and the Aberdeen Glen Line Steamship Company, Limited.

The following narrative of the circumstances in which the action was brought is taken from the Lord Ordinary's opinion:—"Mr Fleming, who is a shipowner in Aberdeen, was in financial difficulties, and had overdrawn his account with the North of Scotland Bank to the extent of nearly £2000. The bank declined to continue the overdraft except on the guarantee of a third party, and accordingly the defender on 24th August 1887 granted to the bank a letter guaranteeing payment of all sums due, or which might at any time become due to them by Mr Fleming, to an amount not exceeding £2000, with interest. It is averred that the defender neither asked nor received from Mr Fleming any security in consideration of the obligation which he undertook by the letter of guarantee.

"In June 1888, Mr Fleming is said to have been due to the bank upwards of £3000 with interest, in addition to large liabilities to other creditors. He therefore again applied to the defender for assistance, which the defender agreed to give upon condition that Mr Fleming should give him security not only for any additional obligation which he might undertake, but also in respect of his liability under the letter of guarantee. It was arranged accordingly, that the bank should effect an insurance upon Mr Fleming's life for £2000, and that they should give him a further credit to the amount of £1500, upon a separate account in his name, and the defender became bound for payment of the premiums of insurance, and of interest which might become due upon the account.

"In security of the obligations undertaken for him by the defender in 1887 and

1888, Mr Fleming executed in his favour, and delivered to him, a transfer dated 10th July 1888, of 1595 shares for the sum of £2, 10s. each, upon which £2 per share had been paid, of the Aberdeen Glen Line Steamship Company. Mr Fleming also delivered to the defender the certificates of the shares transferred, and further handed to him a policy of insurance upon his life for £500.

"On 3rd June 1891 Mr Fleming granted a trust-deed for creditors in favour of the pursuers, and he was rendered notour bankrupt on 29th July 1891.

"The defender took no steps to have the transfer in his favour registered until 3rd June 1891, when the trust-deed for creditors was granted, Mr Fleming in the interval drawing the dividends. On the day on which the trust-deed was executed, the defender wrote to the chairman of the Glen Line Company enclosing the transfer and share certificates, and intimating his wish to have the transfer completed by registration. I may mention that the defender is himself a director of the Glen Line Company. Before the transfer was registered, the pursuers intimated to the company that they claimed right to the shares, and it was accordingly arranged that nothing should be done by the directors until that question was determined.

"The present action is brought for the purpose of setting aside the transfer as constituting an illegal preference in favour of the defender, and of obtaining delivery from the defender of the share certificates and the policy of insurance for £500."

The pursuers averred, *inter alia*—"(Cond. 1) The pursuers are trustees for behoof of the creditors of John Fleming, shipowner, Aberdeen, acting under a trust-disposition granted by him in their favour on 3rd June 1891. By the said trust-disposition, a copy of which is produced, the truster gave, granted, assigned, disponed, and made over to and in favour of the pursuers all and sundry his whole estates and effects, heritable and moveable, real and personal, of whatever denomination and wherever situated, and power is conferred on the trustees to sue and insist in all actions, and to do every other thing that they shall consider necessary in the execution of the trust, and it is further, *inter alia*, provided that the truster's estate (after deduction of expenses, &c.) shall be divided among his whole just and lawful creditors at the date of the disposition according to their several rights and preferences, and that the said creditors, including any holding securities over the truster's estate, shall be ranked, and the securities valued, in the same manner and to the same effect as if at said date sequestration had been obtained under the Bankruptcy Statutes. (Cond. 4) . . . The said documents (the policy of insurance, the transfer, and the certificates of the shares) were delivered while the said John Fleming was in a state of insolvency, and in pursuance of a fraudulent and collusive scheme formed between him and the defender for the purpose of giving the defender a preference over Fleming's other creditors for the obligations the defender had undertaken under the said guarantee, and for which he held no security, or at least they were accepted by the defender in knowledge of Fleming's insolvency, and for the purpose of obtaining a preference or security for an unsecured obligation upon which the insolvent had already drawn to more than its full extent. It was part of the said fraudulent and collusive scheme between Mr Fleming and the defender, in order that the apparent credit and position of Mr Fleming might not be injuriously affected, and that a false and fictitious appearance of solvency might be maintained by him to the prejudice of those with whom he might transact, that no assignation of the said policy should be executed and intimated to the insurance company at that time, and that the said pretended transfer of shares should not be intimated to the said steamship company or the shares transferred to the defender's name, but that the whole transaction should remain latent, inchoate, and incomplete. In accordance with this arrangement, no assignation of the policy was ever executed, no steps to make the transfer of said shares effectual were taken until 3rd June 1891, as after mentioned, and until that date the said defender, who is himself a director of the said company, not only permitted Mr Fleming to act and draw dividends as the ostensible owner of the said shares, but further represented him as the actual owner thereof to other creditors."

The pursuers pleaded—"(1) The policy of insurance for £500 and the 1595 shares in the Aberdeen Glen Line Steamship Company referred to not having been effectually transferred to the defender, and having been *in bonis* of the truster John Fleming at the date of the trust-disposition by him in favour of the pursuers, the pursuers are entitled to decree of declarator of ownership, and to decree for delivery as concluded for. (3) The said pretended transfer is further null and void and reducible at the instance of the pursuers as trustees foresaid as being *in fraudem* of the creditors of the said John Fleming—1st, At common law, in respect that it was granted to the defender by the said John Fleming when insolvent and in knowledge of his insolvency, and was accepted by the defender in pursuance of a fraudulent and collusive scheme between them to confer on the defender a preference for a prior debt, or at least was accepted by the defender in knowledge of the said insolvency; and 2nd, under the Act 1696, c. 5, in respect that it was granted by the said John Fleming in favour of the defender for his satisfaction or further security in preference to other creditors, and that proceedings requisite for rendering it completely effectual were not commenced until less than sixty days prior to notour bankruptcy."

The defenders pleaded—"(1) No title to sue."

On 16th February 1892 the Lord Ordinary (Low) pronounced this interlocutor:—"Finds that the transfer of 1595 shares of

the Aberdeen Glen Line Steamship Company, granted by John Fleming, shipowner, Aberdeen, to the defender David M'Hardy, which was dated 10th July 1888, and delivered to the said defender on or about the same date, was not granted within sixty days of the notour bankruptcy of the said John Fleming.: Therefore repels the second branch of the third plea-in-law for the pursuers, and assoilzies the defender from the third and fourth conclusions of the summons, and decerns: Finds that the pursuers are not entitled to found upon the alleged informalities in the form and execution of the said transfer: Therefore to that extent and effect sustains the first plea-in-law for the defender, and repels the second plea-in-law for the pursuers: Further, in so far as the first plea-in-law for the defender has not been sustained as aforesaid, repels the same: Finds that the delivery of the said John Fleming of a policy of insurance for £500 with the National Provident Institution to the said defender did not confer upon the said defender right to retain the said policy against assignees for onerous causes of the said John Fleming: Before further answer, allows the pursuers a proof of their averments to the effect that the said transfer was granted by the said John Fleming when he was insolvent, and was accepted by the said defender in knowledge of Fleming's insolvency for the purpose of conferring upon the said defender a fraudulent preference over Fleming's other creditors, and to the defender a conjunct probation, and appoints the cause to be enrolled for further procedure, reserving all questions of expenses.

"*Opinion.*— . . . The first point which I have to consider is the defender's plea of no title to sue. He contended that a trustee for behoof of creditors under a voluntary trust-deed has no title to sue a reduction of a fraudulent preference either at common law or under the statutes. The defender was unable to cite any authority in support of his contention, and in my opinion it cannot be sustained. It seems to be consistent with principle that a trustee for creditors should have a title to challenge illegal alienations or preferences, and all the authorities, including Mr Bell, appear to assume that such a right exists." . . . .

On 20th February, on the motion of the pursuers, the Lord Ordinary granted them leave to reclaim.

The pursuers reclaimed, and in the course of the discussion they craved leave to amend their record by adding to condescendence 1 averments to the following effect—"All the creditors of the said John Fleming except the defender have acceded to the trust-deed, have attended meetings called by the pursuers, and have lodged claims upon the trust-estate."

Before the hearing concluded the Court intimated the opinion that unless the defender could establish that the pursuers had no title to sue, the whole case must go to proof.

Argued for the pursuers—*On the question of title*—Where creditors had acceded to a private trust, the fact of accession bound the creditors to take no separate action for their own interest, and constituted a contract whereby the trustee became the representative of the creditors who had acceded. Such a trustee accordingly, as representing the creditors, had a title to sue for the reduction of illegal preferences, although the trust-deed contained no clause expressly conferring this power upon him.

Argued for the defender—*On the question of title*—The trustee under a private trust-deed for behoof of creditors had no title to sue for the reduction of illegal preferences either at common law or under the Statute 1696, c. 5—Bell's Comm. (7th ed.) ii. 194; Barton, i. 255-7. It was not in the power of the debtor to confer such a right, and the defect was not cured by the mere accession of the creditors. Further, the proposed amendment was incompetent. It was not competent to introduce a new pursuer in the course of an action, and it was just as incompetent for a pursuer to change his title.

At advising—

LORD M'LAREN—If any important pecuniary interest had been involved, I should have preferred to take time to consider this question, but it appears to me that no pecuniary interests beyond the expenses of the present action are affected by the decision on the question of title to sue, and I understand that all your Lordships are agreed that the practice is in accordance with the explanatory statement of Professor Bell, and that the mere granting of a voluntary trust-deed for behoof of creditors without a clause giving express power to reduce illegal preferences, does not give the trustee a title to reduce such preferences. The argument which we heard to the contrary resolved itself into this, that it was expedient that the trustee ought to have this power. But there may be cases in which the debtor has no desire or intention that his trustee should be put in position to reduce preferences where he knows that the first hint of such action on the part of the trustee would result in his sequestration. If such be the debtor's wish, why should he not be allowed to act in accordance with it, and ultimately to extricate himself from his difficulties without putting his creditors at arm's length to one another. Of course no creditor need accede unless he pleases, but the debtor may think that the trust may reasonably be administered without raising questions as to existing preferences. If, on the other hand, it is desired to give the trustee all the powers of a trustee in a sequestration, and only to avoid the stigma of notour bankruptcy, it is easy to insert a clause arming the trustee with the power to cut down preferences. On these grounds I am of opinion that we should sustain the first plea-in-law and dismiss the action.

LORD KINNEAR—I am of the same opinion. The Act of 1696 gives to creditors

of a particular character the right to sue for the reduction of preferences falling within the scope of the Act, and it gives the right to nobody else. It therefore follows that nobody can sue under it unless he can set forth a title giving him right to sue as a prior creditor or as the representative of a prior creditor.

Now, the pursuer sets forth no such title. He is neither the assignee of the general body of creditors nor of particular creditors. He sets forth as his title to sue that he is trustee for creditors, but the averment in fact on which that title is supported is, that the insolvent granted a general conveyance in his favour of his whole estate in order that it might be divided among his creditors. It is very clear that under such a conveyance the trustee is not the assignee of the creditors, and is nothing but the assignee of the insolvent debtor. It is from the insolvent debtor alone that he derives his whole right and title. The accession of the creditors may enable the trust created by the debtor to be carried into practical effect, because, by acceding the creditors have given an undertaking that they will not take separate action for their own interest, but it adds nothing at all to the title of the trustee, nor does it add to or enlarge the rights which the insolvent has conveyed to him. The question must always be, whether the right which a trustee under a deed of this kind is seeking to enforce is included in the aggregate of the rights assigned to him by the insolvent debtor. The right which the trustee is here seeking to enforce is clearly not so included, for the insolvent himself could not set aside his own deed; and he cannot give to another a right which was not vested in himself. I agree that it is possible to put the trustee under a private deed in the same position as a trustee in bankruptcy, as regards his right to reduce illegal preferences, provided his right is derived from creditors who had themselves a good title to reduce. But there is nothing in the conveyance in question which can be construed into such an assignation by creditors.

I agree, therefore, that the defenders' first plea should be sustained.

LORD ADAM—I am of the same opinion, and only wish to say that I proceed upon the supposition and assumption that the proposed amendment had been made. It seems to me that to allow the amendment to be made and then to dismiss the case would not have been quite right.

LORD M'LAREN—I quite agree that the right to reduce preferences flows from the particular creditors who have acceded. If the deed contains such a power they by their accession are held to have conferred it on the trustee, but if the deed contains no such power, then their accession does not imply their assent to anything beyond what is contained in the deed.

The LORD PRESIDENT was absent.

The Court recalled the interlocutor of the Lord Ordinary, sustained the first plea-in-law for the defender, and dismissed the action.

Counsel for Pursuers — D.-F. Balfour, Q.C.—M'Lennan. Agents—Macpherson & Mackay, W.S.

Counsel for Defenders—Jameson—C. S. Dickson. Agents—Henry & Scott, W.S.

Thursday, March 3.

SECOND DIVISION.

[Sheriff of Caithness, &c.

HENRY *v.* SCOTT.

Minor — Curators — Fee and Liferent — Meliorations.

A son succeeded to an estate which his father enjoyed in liferent. The father, according to a custom of the district in which the estate lay, had received certain sums as deposits by the tenants, on which interest was paid. At the father's death the son was in minority, but his curators entered into an arrangement whereby they intended to take over liability for the deposits on his behalf. The father was insolvent, and the son did not represent him. After he reached majority he raised an action to set aside the transaction, which was in dependence when one of the tenants raised an action against him to remove the deposit. *Held* that liability for the deposit had not validly been imposed on the son.

Homologation—Adoption of Liability.

The son in the course of an application by him to set aside a sequestration of his estates had requested the tenant who was claiming as a creditor to consent to it being recalled. The tenant had not consented to do so. *Held* that the son had not by such application barred himself from denying liability for the deposit.

The late Dr R. T. C. Scott was liferenter of the estate of Melby under the settlement of the estate. He enjoyed the liferent of Melby from 1852 till his death in 6th January 1875. On his death his son R. T. C. Scott succeeded to the estate as fiar under the settlement of the estate; he was then about eleven years of age.

In June 1888 Umphray Henry, formerly a small tenant on the estate, raised an action against Mr Scott, concluding for £83, 10s. He stated that in 1854 he lodged £14 with Dr Scott's factor, which sum was increased by small payments till it reached £90 at January 1875, "when the account was taken over by James Garriock, factor for the defender's curators;" that £10 had been repaid on 7th January 1882; that interest had been paid till January 1887, but that no interest had since been paid.

The defender stated that Garriock had no power to borrow money or take over