to except the sum now claimed from the general rule. However that may be, the conclusion of the petition is not for a particular sum of money in the hands of the respondent, but for payment of a sum of specified amount out of the general funds of the sequestrated estate. I think there is no authority for proceeding under section 86 for such a purpose.

There is a minor objection which would be equally good if this had been an action for payment at common law. The objection is that the action is essentially a claim for relief concluding for payment to the person primarily liable, while there is no statement that he has paid the sum in question or been distressed for payment. Such a statement is essential in an action for relief, and I can find nothing here in the way of a statement of that nature to support the present claim. I think we should adhere to the Lord Ordinary's interlocutor.

The Court adhered.

Counsel for the Petitioner — Macphail—Hon. W. Watson. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Respondent—Blackburn. Agents—Dundas & Wilson, C.S.

Friday, December 18.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

CLELAND TRUSTEES *v.* DALRYMPLE.

Bankruptcy—Vesting of Bankrupt Estate—Preferable Claims—Assignations ex facie in Security Duly Intimated—Right of Trustee in Bankruptcy to Administer Estate and Give Effect to Preferences by Ranking—Multiplepoinding—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c* 79), *sec.* 102.

In a multiplepoinding the fund *in medio*, consisting of the accumulated income of moveable estate in the hands of trustees, was claimed by the beneficiary entitled to the income under the trust, and by a number of persons to whom at various dates the beneficiary had assigned his interests in security of debts, the assignations being duly intimated. After the record was closed the beneficiary was sequestrated, and intimation being made to the trustee on the sequestrated estate, the trustee claimed "to be ranked and preferred to the whole fund *in medio* for the purpose of administering the same as part of the bankrupt estate, without prejudice to such preferences as may be established in the bankruptcy proceedings."

The Court *sustained* the claim of the trustee in the sequestration, on the ground that, under sec. 102 of the Bankruptcy (Scotland) Act 1856, the *universitas* of the estate of the bankrupt vested in the trustee, and that the proper mode of giving effect to preferable claims existing at the date of the sequestration was by the trustee giving the creditors holding securities a preferable ranking in the sequestration, and not by the Court in the process of multiplepoinding deciding questions as to the rights and preferences of creditors.

This was a multiplepoinding, brought of date September 8, 1902, in which the pursuers and nominal raisers were the trustees of the Cleland Trust, and the real raiser was Roland Barnett, 3 Duke Street, London.

The Cleland Trust was created under the testamentary writings of the ninth Earl of Stair, and an act and decree of the Court of Session, dated December 7, 1899, and March 20, 1900. The original object of the trust, as created by the ninth Earl of Stair, was the purchase of land to be settled under strict entail. The trust came into operation in 1864. No land had been entailed or purchased between that date and 1899. In the latter year the Hon. George Grey Dalrymple, who would have been heir in possession if an entail had been executed, presented a petition to the Court under the Entail (Scotland) Act 1882 for the purpose of having the funds vested in trustees under secs. 23 and 26 of the statute. Thereupon the testamentary trustees of the ninth Earl of Stair brought an action of multiplepoinding. Under those proceedings the funds were made over to the pursuers as the Cleland Trustees, to be held as entailed money in terms of the Entail (Scotland) Act 1882 in trust for the Hon. George Grey Dalrymple, and the heirs whatsoever of his body, whom failing for the other heirs who would or might have become heirs in possession if an entail had been executed. The Hon. George Grey Dalrymple was the person first entitled to the income of the funds of the Cleland Trust. He died on 30th November 1900. His son George North Dalrymple was, at the date of the present action, the person entitled to the income of the trust, subject to (1) the various securities and interests created by himself, and (2) the provisions in favour of the widow and younger children of the Hon. George Grey Dalrymple so far as not already satisfied.

The fund *in medio* consisted (1) of the income of the Cleland Trust funds and estates from November 30, 1900, to September 8, 1902, so far as falling to George North Dalrymple or those deriving right from him, and amounting, subject to certain payments, to £3247, and (2) the additional free income which had accrued or would accrue on the Cleland Trust funds from September 8, 1902, until the present action was finally disposed of, or until the death of George North Dalrymple, whichever of these events should first happen.

The real raiser claimed to be ranked and preferred on the fund *in medio* to the extent of £4579, with interest at 5 per cent., in respect of bonds and assignations in security granted by George North Dal-

rymple in his favour, dated respectively April 30, 1878, and August 14, 1878.

The defenders who were claimants in the multiplepoinding were the said George North Dalrymple and certain financiers, including Joseph Alexander, banker, Sudbury, who claimed to hold assignations of the interest of George North Dalrymple in the Cleland Trust—the assignations being all assignations in security, alleged to have been duly intimated.

The estate of the claimant George North Dalrymple was subsequently sequestrated, and James Craig, C.A., Edinburgh, was appointed trustee on the sequestrated estate conform to act and warrant of confirmation in his favour, dated 4th April 1903. The trustee lodged a claim in the multiplepoinding, in which he claimed to be ranked and preferred to the whole fund *in medio* for the purpose of administering the same as part of the bankrupt estate, without prejudice to such preferences as might be established in the bankruptcy proceedings.

The claimant, the trustee on the sequestrated estate of George North Dalrymple, pleaded—"(1) The claimant's title to administer being preferable to a title founded either upon inhibition or upon an assignation in security, the claimant should be ranked and preferred in terms of his claim. (2) The estates of the bankrupt having been sequestrated, the rights and rankings of the creditors fall to be regulated by the Bankruptcy Statutes. (3) The claimant's claim to a ranking for the purpose of administration should be sustained, in respect that the disposal of the competing claims upon their merits in the present process will prevent the claimant from exercising his rights and performing his duties under the Bankruptcy Acts for behoof of the creditors generally."

On 24th June 1903 the Lord Ordinary (STORMONTH DARLING) pronounced an interlocutor ranking and preferring the claimant James Craig to the whole fund *in medio* in terms of his condescendence and claim, and repelling all the other claims in process to the said fund.

Opinion.—"I am not here called upon to decide anything as to the ultimate rights of the claimants in this multiplepoinding, but only as to the procedure by which these rights are to be determined.

"This multiplepoinding was brought in September 1902 by certain financiers in London in name of the Cleland Trustees, who hold a large sum of entailed money under the will of the 9th Earl of Stair. The person who was originally entitled to the income of the trust funds was the Honourable George Grey Dalrymple, who died on 30th November 1900. The person now entitled is his son Mr George North Dalrymple, and the fund *in medio* consists of the income falling to him since his father's death. Claims have been lodged in the process amounting *in cumulo* to a very large sum, with interest at varying rates for periods all of them more than twenty years ago, in respect of advances said to have been made to Mr George Dalrymple between 1878 and 1880 shortly after he attained majority, and to be vouched chiefly by assignations duly intimated. A claim has also been lodged by Mr Dalrymple himself, in which he disputes the other claims on various grounds affecting both principal and interest. After the record in the competition was closed Mr Dalrymple was sequestrated, and intimation was made to the trustee on the sequestrated estate. The trustee has now lodged a claim by which he 'claims to be ranked and preferred to the whole fund *in medio* for the purpose of administering the same as part of the bankrupt estate, without prejudice to such preferences as may be established in the bankruptcy proceedings.' In support of his claim he says that he is unable to state in detail his position with regard to the other claims, and that the present process is a bar to his doing so. Further, he says that it would be contrary to his duty to take up a hostile attitude to claims which in the sequestration he is bound to investigate and adjudicate upon impartially, but if his claim is sustained he undertakes to make the necessary investigation, and to give effect by his deliverances to any preferences that may be established. The claimants who oppose him reply that if he has any objections to their demands he may take up and be heard on the claim for the bankrupt, but that, in any event, this process, and not the sequestration, ought to be used for determining the rights of parties.

"There thus arises a question which turns mainly on the construction of section 102 of the Bankruptcy Act, and in considering it, the chief point to be kept in view is that the claimants (other than the bankrupt and the trustee) all claim in the character of creditors of the bankrupt, being merely holders of securities over his estate.

"Now, undoubtedly the purpose of that section is to vest in the trustee for behoof of the creditors 'the whole property' belonging to the debtor at the date of the sequestration. As regards the moveable estate this vesting is declared to be 'subject always to such preferable securities as existed at the date of the sequestration, and are not null or reducible.' What is the meaning of these latter words? Clearly I think that the trustee holds the estate for those entitled to a preferable as well as an ordinary ranking, and that there is carried into the sequestration not merely property which is free from encumbrance, and is in that sense 'attachable for debt,' but property which has already been attached, and is thus the subject of securities to which effect must be given. It seems to me an inadmissible reading of the words to hold them as excluding from the scope of the sequestration property affected by such securities, for 'subject always to such preferable securities' just means 'under the burden of such preferable securities.' The sections dealing with the valuation and purchase of securities were appealed to as inconsistent with the trustee's claim. I do not think they are. They rather tend to show that the sequestration is the proper

place for a security-holder to make good his claim to a preference, and the right of the trustee to purchase an assignation to a security is quite consistent with his being already vested in the property to which the security applies. No aid can be derived from the special provisions in the statute about heritable securities, for here the fund *in medio* is moveable estate.

"The point to be determined is, I think, clear on the statute itself. But the decisions, so far as they go, support the claim of the trustee. The case of *Gordon* v. *Miller*, 4 D. 352, was a case on the Bankruptcy Act of 1839, in which a trustee was held entitled to carry off the whole fund *in medio* in a multiplepoinding leaving the competing creditor to claim his alleged preference in the sequestration. From the short report of the case in 4 D. it would appear as if the creditor had only used arrestments. But Lord Kinloch, in the case of *Carter* v. *Mackintosh*, 24 D. (at p. 931), having examined the Session-Papers in *Gordon* v. *Miller*, explains that the competing claim was rested partially on an assignation in security, and his Lordship explains how completely, as regards the vesting of the trustee, an assignation in security differs from an absolute assignation. Accordingly, in the case of *Carter* the persons who were in the same position as the claimants here (*i.e.*, the holders of assignations in security) withdrew their claims from the multiplepoinding, reserving right to urge them in the sequestration. Lord Kinloch expressed his approval of that proceeding, and it is plain that Lord Justice-Clerk Inglis took the same view, for at p. 933 he narrates the sequestration, and the demand of the trustee that the claims of the other parties should be disposed of by himself in the sequestration, and then his Lordship adds —'If the whole parties claiming the one-half of the fund belonging to Mrs Eliza Ducat were merely creditors of Mrs Ducat, the trustee's contention would be well founded.'

"Lastly, the case of *Littlejohn* v. *Black*, 18 D. 207, although not an express decision on the present question, contains two very significant passages, one in the opinion of Lord Deas and the other in the detailed interlocutor pronounced by the First Division under the Presidency of Lord Colonsay. The process was a multiplepoinding, and the competition was between a trustee in a sequestration and certain secondary creditors heritably secured, who insisted that the catholic creditors should make good their debt in the first instance out of the moveable property, leaving the heritable subjects as far as possible available for the claims of the secondary creditors. The trustee thus took up a position of active hostility to the secondary creditors, and the judgment was that the attachment effected by the sequestration in favour of the trustee did not disturb the respective rights of the catholic and secondary creditors as these stood at the date of sequestration. That being so, the Court thought it expedient to make use of the multiplepoinding for deciding the question at issue between the trustee and the secondary creditors. But in the interlocutor they expressly saved the title of the trustee to the fund *in medio*, for after making a finding in favour of the secondary creditors the interlocutor bore, 'but in respect their said claim partakes substantially of the nature of a security over a portion of the sequestrated estate, and that the sequestrated estate, subject to all such securities, falls to be administered and wound up through the person of the trustee, find that in the present competition it is expedient, and will be in more strict conformity with the requirement of the Bankruptcy Statute, that decree should go out so as to leave the management and administration in the trustee's hands: Accordingly rank and prefer the said William Littlejohn *pro forma* over the whole fund *in medio* in the present competition' (and then follows a proviso as to the ranking which he was to give in the sequestration to the secondary creditors in accordance with the previous part of the judgment). This express declaration as to the effect of the vesting clause is all the more significant that, as appears from Lord Deas' opinion, the trustee did not take up, even as an alternative, the position which the trustee maintains here. Lord Deas says—'I give no opinion upon the question whether the trustee might have claimed possession of the fund *in medio* subject to his own decision in the first instance upon the right of the competing claimants in the sequestration. There is no plea to that effect in the record. His leading plea there is that he is entitled to the fund *in medio* free from any preferable security in favour of the competing claimants.' In short, the case of *Littlejohn* shows that, where a trustee chooses to litigate in a multiplepoinding with creditors claiming a preference, that process may be used for convenience to settle the question, but that his statutory right to administer the fund, whether he insists upon it or not, is clear.

"Here the trustee does not insist upon it, and so far as I can see for perfectly valid reasons. This is no case of a security undisputed in its origin and incidents, and requiring only the decision of some sharply raised point of law. It is the case of a host of claims disputed by the debtor in nearly every particular, and obviously requiring the strictest investigation. The trustee is the proper person to make the investigation, and to make it in the character of trustee and not of litigant. I see no convenience to be put against his statutory right, but even if I did the latter must prevail. I therefore sustain the claim of the trustee."

The claimant Joseph Alexander reclaimed, and argued—The rights of parties should be determined in this process and not in the sequestration. The proper course for the trustee in bankruptcy was to take up the bankrupt's claim, and in this way effect would be given in the multiplepoinding to all objections which the bankrupt or his trustee could

state to the claims of the other claimants. It was not within the right of the trustee to take the whole fund. His right was merely to take the property *tantum et tale* as it was in the bankrupt. He came in the bankrupt's room and place, and could have no higher right than the bankrupt—*Scottish Provident Institution* v. *Cohen*, November 20, 1888, 16 R. 112, 26 S.L.R. 73. The effect of the intimation of the reclaimer's assignation was to operate a preference in his favour effectual in competition with the trustee in the sequestration. The "property" which vested in the trustee in such a case, under section 102 of the Bankruptcy Act, was nothing except the reversionary right which the bankrupt held. This construction was borne out by the provisions of secs. 59, 62, and 65 of the Bankruptcy Act. All the cases referred to by the Lord Ordinary dealt with rights different in character and effect from an intimated assignation. *Gordon* v. *Millar*, January 12, 1842, 4 D. 352, was the case of a creditor who had only used arrestment. The distinction between an arrestment and a voluntary security duly completed was clearly pointed out by Lord Fullerton in *Brown* v. *Blaikie*, February 1, 11 D. 474, at p. 479. The decision in *Carter* v. *Mackintosh*, 1862, 24 D. 925, was in favour of the reclaimer's contention, and the observations by the judges in that case on this subject were *obiter*. If effect was given to the trustee's contention, the result would be to cut down the preference acquired by the reclaimer through his intimated assignation. As a matter of convenience the multiplepoinding was the best method of determining the question in dispute, and the case should be remitted to the Lord Ordinary to hear the parties on their claims.

Argued for the claimant, the trustee in bankruptcy—The real question was as to administration, viz., whether the competing rights of the creditor-claimants should be determined in the sequestration or in this process. The rights of the several creditors, if they were valid, were not endangered by the fund *in medio* passing to the trustee, for the vesting in the trustee was, as provided in section 102 of the Act, "subject always to such preferable securities as existed at the date of the sequestration." These words, as well as the provisions of secs. 80, 96, 115, 116, and 126, showed that the scheme of the statute was that the right and duty of realising the bankrupt's estate and distributing it were conferred on the trustee. The provisions in these sections proceeded on the assumption that the "estate" or "property" of the bankrupt was vested in the trustee and not a mere reversionary right. The assignations on which the competing claims were founded were all assignations *ex facie* in security, and not *ex facie* absolute. The debtor had not, accordingly, transferred the *dominium*, but had merely constituted incumbrances on his right. The doctrine of *tantum et tale* had no application in the sense of depriving the trustee of the whole administration—*Gordon* v. *Millar* (*supra*); *Skinner* v. *Henderson*, June 2, 1865, 3 Macph. 867; *Baird & Brown* v. *Sterrat's Trustees*, June 28, 1872, 10 Macph. 414, *per* Lord President at p. 419. As matter of convenience, the investigation of the claims could be made much more easily and promptly by the trustee in the sequestration than by the trustee stating separate cases in this multiplepoinding with regard to each of the claims that had been lodged. In *Carter* v. *Mackintosh* (*supra*) the assignees in security withdrew their claim in the multiplepoinding, these claims being reserved to be adjudicated upon in the sequestration. This course was expressly approved by Lord Kinloch and Lord Justice-Clerk Inglis in that case. In *Littlejohn* v. *Black*, December 13, 1855, 18 D. 207, section 102 of the Act was clearly construed by the judges as providing for the vesting of the estate in the trustee and the giving effect to the claims of all creditors in the ranking in the sequestration.

LORD PRESIDENT—The question in this case is whether the trustee on the sequestrated estates of George North Dalrymple, is entitled to be ranked and preferred to the fund *in medio*, to be by him administered and paid to the creditors of George North Dalrymple according to their rights and preferences, or whether these creditors should be, in this action of multiplepoinding and exoneration, ranked directly upon the fund in the hands of the nominal raisers, the Cleland Trustees.

The Cleland Trust was created by the testamentary writings of the ninth Earl of Stair and an act and decree of this Court. The original object of the Trust, as created by the ninth Earl of Stair, was the purchase of land to be settled and held under strict entail. The Trust came into operation in 1864, but no land had been purchased and entailed between that date and 1899.

In the latter year, the Hon. George Grey Dalrymple, who would have been the heir in possession if an entail had been executed, presented a petition to this Court under the Entail (Scotland) Act 1882, for the purpose of having the funds vested in trustees under secs. 23 and 26 of the Act, and the testamentary trustees of the ninth Earl of Stair brought an action of multiplepoinding and exoneration applicable to the funds in this Court. Under the proceedings in this action the funds were made over to the nominal raisers, the Cleland Trustees, to be held as entailed money in terms of the Entail (Scotland) Act 1882, in trust for the Hon. George Grey Dalrymple, and the heirs whatsoever of his body, whom failing for the other heirs who would or might have become heirs in possession if an entail had been executed.

The Hon. George Grey Dalrymple was the person who would have been first entitled to the income of the funds, but he died on 13th November 1900, and his son the defender George North Dalrymple is the person now entitled to the income of these funds, subject to (1) the interest on various securities created by himself, (2) the provisions in favour of the widow and

younger children of the Hon. George Grey Dalrymple, in so far as not already satisfied.

The defenders who are claimants, other than George North Dalrymple, claim to hold assignations of, or claims against, his interest in the funds held under the Cleland Trust or in the income of these funds. They are nearly thirty in number.

The nominal raisers, the trustees of the Cleland Trust, state in their condescendence of the first fund *in medio*, that that fund consisting of the income of the Cleland Trust funds and estate from 30th November 1900 to 8th September 1902, so far as falling to George North Dalrymple or those deriving right from him, amounts, subject to certain payments, to upwards of £3200.

The second fund *in medio* is the additional free income which has accrued or will accrue on the Cleland trust funds from 8th September 1902 until this action is finally disposed of, or until the death of George North Dalrymple, whichever of these events shall first happen.

The claim of the real raiser is founded upon two bonds and assignations in security granted by George North Dalrymple in his favour, dated respectively 30th April 1878 and 14th August 1878, each with interest at the rate of 5 per cent. per annum, and he alleges that the sums due under these bonds amounted at the date of signeting the summons in this action to £4558, 15s. 1d.

The estates of George North Dalrymple were sequestrated, and on 4th April 1903 James Craig was appointed trustee in the sequestration. He has lodged a claim in the multiplepoinding in which he claims to be ranked and preferred to the whole fund *in medio*, for the purpose of administering it as part of the bankrupt estate, without prejudice to such preferences (if any) as may be established in the sequestration, and the important question now arises whether the creditors of George North Dalrymple are entitled to claim directly upon the fund *in medio* in this process, in respect of the obligations and assignations which they hold, or whether the whole estate is vested in the trustee in the sequestration to be by him distributed amongst the creditors, or other persons interested in it, according to their respective rights, as these may be established in the sequestration.

The question chiefly depends upon the construction and effect of sec. 102 of the Bankruptcy Act of 1856, by which it is provided that the act and warrant in favour of the trustee shall, *ipso jure*, transfer to and vest in him, or any succeeding trustee, for behoof of the creditors, absolutely and irredeemably, as at the date of the sequestration, with all right title and interest, the whole property of the debtor to the effect following, (1) the moveable estate and effects of the bankrupt, wherever situated so far as attachable for debt, to the same effect as if actual delivery or possession had been obtained, or intimation made at that date, subject always to such preferable securities as existed at the date of the sequestration, and are not null or reducible, and (2) the whole heritable estate belonging to the bankrupt in Scotland, to the same effect as if a decree of adjudication in implement of sale, as well as a decree of adjudication for payment, and in security of debt, subject to no legal reversion, had been pronounced in favour of the trustee, and recorded at the date of the sequestration, and as if a poinding of the ground had been executed, subject always to such preferable securities as existed at the date of the sequestration, and are not null or reducible, and the creditor's right to poind the ground, as thereinafter provided.

The trustee claims "to be ranked and preferred to the whole fund *in medio*, in order that he may administer it as part of the bankrupt estate, without prejudice to such preferences as may be established in the bankruptcy proceedings and are not null or reducible," and I am of opinion, agreeing with the Lord Ordinary, that this claim of the trustee is well founded and should be sustained. I think that the policy and the effect of the Bankruptcy Act was to vest the whole estate of the bankrupt in the trustee, whose duty it is to consider the claims made on it in an impartial and judicial spirit, and to pronounce decisions upon them, subject to the right of appeal to this Court by the creditors who are dissatisfied with his decisions. It is declared by section 102 that the vesting of the moveable estate in a trustee is, as already stated, to be subject always to such preferable securities as existed at the date of the sequestration and are not null or reducible. This clearly shows that the existence of such preferable securities was not to prevent the general vesting of the estates in the trustee, and if the general estates thus vest in him, subject to such preferable securities, the natural mode of giving effect to the preference is for the trustee, in distributing the estate, to recognise it by giving a preferable ranking in the sequestration. It is evident that there would be great inconvenience and cost if it was necessary to decide all questions as to the rights and preferences of creditors in an action of multiplepoinding and exoneration in this Court instead of in the sequestration. Even therefore if there had been no decisions upon the question I should have considered that, upon a true construction of section 102, it is for the trustee in the sequestration in the first instance to rank and prefer the creditors, giving effect in his ranking to any preference which they might have obtained either by priority of their securities or by any diligence which they might have used.

But I think that the Lord Ordinary is well founded in saying that the decisions, so far as they go, support the view that the *universitas* of the estate of the bankrupt vests in the trustee under the Bankruptcy Acts and should be administered by him. The case of *Gordon* v. *Millar*, 4 D. 352, referred to by his Lordship, was decided under the Bankruptcy Act of 1839, but the main scope of that Act was similar to that of the later Act of 1856, under which the present question arises, and the claim of

the trustee to hold and administer the entire fund *in medio* was upheld. This view seems to have been recognised as early as the case of *Carter* v. *Mackintosh*, 24 D. 931, in which trustees holding assignations in security, like the present claimants, withdrew their claims in the multiplepoinding, reserving right to insist in them in the sequestration.

In the case of *Littlejohn* v. *Black*, 18 D. 207, the same view as to the effect of the vesting in the trustee under section 102 of the Act of 1856, and the duties of the trustee in the sequestration, was taken, it having been there held that the vesting in the trustee did not affect the rights of the various classes of creditors, *inter se*, and that these rights should receive effect in the ranking of the various creditors and classes of creditors in the sequestration. The opinions of the judges in that case, to which the Lord Ordinary refers, appear to me to lend strong support to the view which his Lordship has taken in the present case.

For these reasons I am of opinion that the judgment of the Lord Ordinary, sustaining the claim of the trustee, should be adhered to.

LORD ADAM—There is no doubt at all that the fund *in medio* in this case was the personal or moveable estate of the bankrupt at the date of his bankruptcy, and that being so I entertain no doubt that under the 102nd section of the Bankruptcy Act of 1856 that moveable estate vested in the trustee, subject to all preferences that may have been acquired. Now, the claimants here claim no security, preferable or otherwise, over this estate, and it therefore appears to me to fall strictly under the 102nd section of the Act. I cannot entertain any doubt about that. The trustee will administer the estate looking to the various claims on the bankrupt estate according to their preferences, and the claims in question will receive due attention just as any others.

I concur with the Lord Ordinary, and have nothing to add to what your Lordship and the Lord Ordinary have said.

LORD M'LAREN — I am of the same opinion. The effect of sequestration is to displace all existing trust management with regard to such property as the bankrupt possesses by an unqualified title. Where the title is qualified either by being limited to a life interest or being declared alimentary, there may be room for question, and all such cases must be determined with reference to their own special circumstances. There is nothing in this case, I think, to displace the rule that a trustee in virtue of his statutory power has a claim preferable to but not necessarily inconsistent with the claims of secured creditors.

LORD KINNEAR—I also think that this case is perfectly clear. If a creditor had a real right which he could make good by his own action against either the debtor or anybody else it might very well be that it would not be necessary for him to come into the sequestration, but that he might proceed to dispose of the subject of the security and make good his own claim. But the reclaimer here has nothing but a personal right—as indeed the bankrupt when he derived it had nothing himself but a personal right—to claim on the trustees, and it is impossible to make that right effectual except by taking some action either by claiming in the sequestration or otherwise. Therefore it appears to me to be quite clear that although the security which the reclaimer has obtained may be perfectly good and preferable to the claims of ordinary creditors, it is a security which can only be made effectual in the sequestration, because the whole estate is vested in the trustee in the sequestration, and creditors in the position of this reclaimer must go to the trustee and present their claims to him.

The Court adhered.

Counsel for the Claimant and Reclaimer Alexander—Younger—Hunter—Malcolm. Agents—Carmichael & Miller, W.S.

Counsel for the Pursuers and Nominal Raisers the Cleland Trustees—Blackburn. Agents—Dundas & Wilson, C.S.

Counsel for the Claimant Craig (Dalrymple's Trustee)—Campbell, K.C.—Constable. Agents—Purves & Barbour, S.S.C.

Counsel for Other Claimants—Chree—W. J. Robertson—Guy—Cowan—D. Anderson—Wark—Christie—W. T. Watson—Forbes. Agents—Bruce Kerr & Burns, W.S.—J. A. Campbell & Lamond, C.S.—Cowan & Dalmahoy, W.S.—F. M. H. Young, S.S.C.—James F. Mackay, W.S.—A. W. Gordon, Solicitor—Gordon, Petrie, & Shand, S.S.C.—J. & J. Galletly, S.S.C.—J. M. Glass, Solicitor—Robert Anderson, S.S.C.—A. P. Purves & Aitken, W.S.—L. M. Mackenzie, W.S.

Thursday, December 10.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

MACFARLANE'S TRUSTEE *v.* MACFARLANE.

Succession—Vesting—Discretion of Trustees—Exercise of Power of Apportionment by Trustees—Protected Succession.

A testator by trust-disposition and settlement conveyed his whole estate to trustees, directing them to divide the proceeds among, *inter alios*, the children of his deceased brother. By a subsequent codicil he directed that the trustees should hold the share of residue falling to these children, and should give and make over to and apply it for behoof of such of these children, or the issue of any of them predeceased, as the trustees might think proper, in such way and manner as to the trustees should seem proper, with special power