was not bound to find caution, the circumstances showed that the Lord Ordinary had exercised a proper discretion in ordaining him to do so. The Court might in its discretion ordain either party to find caution —*per* Lord Young in *Thom* v. *Andrew*, June 26, 1888, 15 R. 780, 25 S.L.R. 595; and *per* Lord M'Laren in *Ferguson, Lamont, & Company's Trustee* v. *Lamont*, December 21, 1889, 17 R. 282, 27 S.L.R. 227.

The Court (the LORD PRESIDENT, LORD JOHNSTON, and LORD MACKENZIE) continued the case for a week in order that the defender might have a further opportunity of finding caution, and on his failure to do so, adhered, refused the reclaiming note, and decerned. No opinions were delivered.

Counsel for Pursuer (Respondent)—J. R. Christie. Agents — Cumming & Duff, S.S.C.

Counsel for Defender (Reclaimer) — Sandeman, K.C.—Guild. Agents—M. J. Brown, Son, & Company, S.S.C.

Thursday, March 9.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

CHRYSTAL (SMITH'S TRUSTEE) *v.* SMITH.

Proof—Right in Security—Loan—Writ or Oath.

A builder acquired certain subjects in feu, the title to which he took in his son's name. The builder became bankrupt, and his trustee raised an action against the son to have him ordained to convey to him these subjects. The pursuer averred that the bankrupt was insolvent at the time of the conveyance, that he, the trustee, represented a prior creditor, and that the conveyance was without price or other consideration. The defender averred that the conveyance was in security of certain advances for buildings to be erected and since erected on the ground, and further, that he had undertaken the personal obligation in a bond and disposition in security over the subjects, the money being advanced to his father by the lender. The defender accordingly maintained that he was entitled to retain the subjects until these advances were repaid, and he was relieved of the obligation under the bond. The pursuer maintained that the alleged loans could only be proved by writ.

The Court before answer allowed the parties a proof *habili modo* of their averments.

Opinion per the Lord President—"It seems to me that while it is perfectly well settled by the law of Scotland that when a loan is put forward as an isolated transaction it can only be proved by writ or oath, yet that when you have a going series of transactions between parties, then there are many cases in which the proof is not necessarily so limited as it is in the case of an isolated transaction. I do not think we can say more, because I am far from saying that the moment you get into a series of such transactions the door is thrown open, and everything may be proved by parole. I think it all becomes a question of circumstances, and it becomes, I am glad to say for the credit of one's own law, a question, not of absolute rule, but almost of common sense—that is to say, whether the proof is such as would be the natural proof under the circumstances of the transaction alleged."

Res judicata—Bankruptcy—Right to Retain Property of Bankrupt as Security for Advances after Claim for Advances has been Rejected as Unvouched.

A trustee in bankruptcy rejected a claim by the son of the bankrupt for advances made to the father, and on appeal the deliverance was sustained by the Sheriff-Substitute on the ground that the alleged advances were not proved by the vouchers produced. Thereafter the trustee raised an action against the son to have him ordained to convey certain heritable subjects to him, the title to which the bankrupt had taken in his son's name. The son averred that he held these subjects in security for the advances, and maintained that he was not bound to convey to the trustee except on payment of the advances.

Held that the matter was not *res judicata*.

William Gair Chrystal, Chartered Accountant, Glasgow, trustee upon the sequestrated estate of William Smith, builder, Cathcart, raised an action against Henry Gibb Smith, draper, Cowdenbeath, in which he sought declarator that the defender was bound and obliged to dispone to him, as trustee foresaid, certain heritable subjects, so as to enable him to make up in his own name, as trustee foresaid, a valid heritable title thereto, subject to payment by the pursuer of the necessary and proper expenses of the disposition, and to have the defender so decerned and ordained.

The pursuer pleaded, *inter alia*—"(1) The title to the said subjects, which were acquired by the bankrupt William Smith, being presently in the name of the defender, and he being possessed of no good and valid right thereto, whether in absolute ownership or in security, decree of declarator and *ad factum præstandum* should be pronounced as craved. . . . (3) The defender's right and title to the subjects libelled, in so far as proceeding from his father, the bankrupt, being void and null as fraudulent alienations in bankruptcy both at common law and under the Act 1621, cap. 18, he is personally barred from setting them up in answer to the demand of the pursuer. . . . (5) The defender's averments, if and so far as relevant to found a defence to the present action, can only be proved

by writ of the pursuer, or of the said William Smith, or by the oath of the pursuer. (6) *Res judicata* in so far as the alleged cash balance said to be due to the defender is concerned."

The defender pleaded—"(2) The defender being in right to the subjects referred to in security for the amount of his claim against the said William Smith, the defender is entitled to retain said subjects pending the amount of said claim being paid. (3) The said William Smith not having been insolvent at the time the title was taken in name of the defender, and the defender having given just consideration therefor, the transaction was not a fraudulent alienation either at common law or under the Act 1621, cap. 18, and the defender should be assoilzied."

The *nature* of the *averments* appears from the opinion of the Lord Ordinary (SKERRINGTON), who on 9th December 1910 pronounced this interlocutor:—"Repels the sixth plea-in-law for pursuer, and before answer allows the parties a proof *habili modo* of their averments on record, the defender to lead in said proof, and to the defender a conjunct probation," &c.

Opinion.—"The pursuer is the trustee on the estates of William Smith, builder, Cathcart, which were sequestrated on 11th November 1909, and the defender is one of the sons of the said William Smith. The pursuer concludes to have the defender ordained to convey to him certain heritable subjects the title to which stands in the name of the defender. His ground of action is that the subjects in question were acquired by the bankrupt in the year 1907, and that the title thereto, which consisted of a feu-contract, was taken by him in name of his son. The pursuer further alleges that the bankrupt was hopelessly insolvent at the date of this transaction, and that the defender never gave any price or other valuable consideration either to the superior or to the bankrupt in return for the said subjects or for the said title. If these averments are true it seems clear that the pursuer has a good case. But the defender alleges that the transaction was a security one, and that he made advances to his father to the extent of £379, 8s. 9d., conform to an account which he produces, and he claims that in respect of these advances he is entitled to retain the subjects until these advances have been paid off, and also until he has been relieved of an heritable bond for £500 (which sum, as averred by amendment in the Inner House, was paid to the father) which he granted over the subjects and for which he is still liable. Seeing that the defender admits that he is not really proprietor of these subjects as would appear from the title, the legal result is that parole evidence may be adduced to show what was the true contract between the father and son which led to these subjects, which admittedly belong to the father, being acquired in the name and vested in the person of the son. The pursuer has criticised the defender's pleadings—both the portion in which the defender sets forth the arrangement between him and his father, and also the portion in which he sets forth the items of advance in respect of which he claims a right to retain the subjects. I agree with the pursuer's counsel that upon both matters the averments of the defender might have been more distinct, but I think it would have been taking too critical a view of the record to decide that the defender has not relevantly averred that he is entitled to retain possession of the property. It is evident from the discussion that there may be serious questions between the parties, one question being whether the advances in respect of which the pursuer claims to retain the property were loans, and if so, how they may be proved. It would serve no good purpose to attempt at present to anticipate questions of that kind. They will fall to be decided at the proof, and the proper course is to allow parties a proof *habili modo*. But seeing that the questions to be decided relate to matters in the knowledge of the defender, viz., as to his agreement with his father, his alleged advances and his father's solvency, it would be convenient that the defender should lead in the proof. I do not propose at this stage to give any decision as to the *onus* of proof. So far I have said nothing about the plea of *res judicata*—a plea which, if well founded, would lead immediately to the dismissal of the action (*sic?* decree). The meaning of the plea is that the defender has already claimed in the bankruptcy that he is a creditor of his father for the very same sum of £379, 8s. 9d. upon which he founds in the present action as entitling him to retain the subjects as against the pursuer. The account annexed to the affidavit and claim seems to be identically the same as the account upon which the defender founds in the present action. Of course the affidavit and claim is accompanied by certain vouchers (cheques and receipts) as required by the Bankruptcy Act. The trustee in bankruptcy rejected this claim upon the ground that it was not, 'in the opinion of the trustee, properly vouched, and the claimant having been called upon by the trustee to remedy this defect has failed to do so, and the claimant being a conjunct and confident person unto the bankrupt, the trustee rejects this claim *in toto*, and calls upon the claimant to transfer the property to the trustee.' The claimant appealed to the Sheriff-Substitute, who affirmed the deliverance of the trustee. It seems to me to be clear that in these proceedings there was no *judicium* one way or the other as to the merits of the claim at the instance of the defender against the bankrupt. All that the trustee decided was that the claim was not properly vouched in terms of the Bankruptcy Act, and the Sheriff-Substitute affirmed that decision. The situation would have been entirely different if the Sheriff had allowed a proof, and if after ascertaining the facts he had decided that no debt existed between the father and the son. In that case I think there would have been *res judicata*, but I am not prepared to say that the *res* which formed the subject of the adjudication would have been the same as that

which is submitted to the Court in the present question. The question upon which the defender desires a judgment is whether he is entitled to retain the security subjects or not. The answer to that question depends, in the first place, upon the contract between him and his father, and it does not follow that because the defender was unsuccessful in constituting a claim of debt in a litigation with the trustee, he must necessarily be unsuccessful in showing that as a fair result of the contract between him and his father he is entitled to retain the security subjects until certain conditions have been fulfilled. I do not, however, require to express a definite opinion on this last point, because the first ground is sufficient for the decision of this question, viz., That there has been no decision on the merits of the defender's claim one way or the other. The defender referred to section 127 of the Bankruptcy (Scotland) Act 1856 in support of his argument that there had been no *res judicata*, and he maintained that the effect of that section was to entitle him to present a new claim in the sequestration for each dividend, and afterwards to appeal on each claim to the Sheriff, the Court of Session, and the House of Lords. If that was the true meaning of the section, it would be plain that there could be no *res judicata*, but upon the construction of the section I agree with counsel for the pursuer. His argument was to the effect that the right to lodge a new claim with reference to a second or third dividend arose only after the claim had been rejected by the trustee and if no appeal had been taken from his decision.

"I accordingly repel the sixth plea-in-law and allow the parties a proof of their averments, and appoint the defender to lead in the proof."

The pursuer reclaimed, and argued—The claim for advances amounting to £379, 8s. 9d. was the same as that made in the defender's affidavit and claim in bankruptcy for £369, 8s. 9d., with the addition of £10 for judicial expenses. That claim had been repelled by the trustee, and on appeal by the Sheriff-Substitute, and the matter was *res judicata*. The appeal was a *lis*. The parties were the same and the subject-matter was the same. The averments of the defender amounted to an admission that the subjects were not his but were held in security of loans. The defender was bound to convey the subjects to the trustee because of his admission, and if he could it was open to him to establish the alleged loans by writ, but by writ only, for the reference to a bankrupt's oath was incompetent—*Haldane* v. *Spiers*, March 7, 1872, 10 Macph. 537, 9 S.L.R. 317; Goudy on Bankruptcy, p. 343; *Adam* v. *Maclachlan*, January 29, 1847, 9 D. 560; *Thomson* v. *Duncan*, July 10, 1855, 17 D. 1081; and parole proof was incompetent. Reference was made to the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), sections 49, 50, 51, 58, 126, and 127.

Argued for the defender (respondent)—The trustee and the Sheriff had not determined whether the defender had the right to retain the subjects in security until repayment of advances, nor whether the defender fell under the Statute of 1621 as a conjunct and confident person, for all that was before them was whether or not the vouchers produced were or were not sufficient to prove the claim for £369, 8s. 9d. so as to entitle the defender to rank for a dividend. The present question accordingly was not the same as that before the Sheriff, and the requisites of *res judicata* —for which they referred to *Leith Dock Commissioners* v. *Miles and Others*, March 12, 1866, 4 Macph. (H.L.) 14, Lord Chelmsford at p. 19, 1 S.L.R. 213, and *Earl of Perth* v. *Lady Willoughby de Eresby's Trustees*, March 9, 1875, 2 R. 538, Lord Neaves at 545—had not been fulfilled. In any case the plea of *res judicata* could not apply to the matter of the heritable bond, which had not been before the trustee or Sheriff-Substitute. The ground that the Sheriff-Substitute had proceeded upon in rejecting the claim, namely, that the cheques produced merely proved that money passed from the drawer to the payee, and that further proof by parole was incompetent, was wrong in law, for that rule did not apply where there was an account-current between the parties, or indeed where there was more than one isolated transaction—*Miller* v. *Oliphant*, March 7, 1843, 5 D. 856; *Robb* v. *Robb's Trustees*, June 4, 1884, 11 R. 881, 21 S.L.R. 602; *Gill* v. *Gill*, 1907 S.C. 532, 44 S.L.R. 376; *Hope* v. *Derwent Rolling Mills Company, Limited*, June 27, 1905, 7 F. 837, 42 S.L.R. 794. They admitted that reference to the oath of the bankrupt was incompetent — *Adam* v. *Maclachlan* (*cit. sup.*); Murdoch on Bankruptcy, 5th ed., p. 53; Goudy on Bankruptcy, 3rd ed., pp. 178 and 343.

At advising—

LORD PRESIDENT — This is an action brought by the trustee in bankruptcy of a certain William Smith, builder in Cathcart, against the son of this William Smith, and the conclusions of the action are to have the defender ordained to convey to the defender as such trustee certain heritable subjects. The ground of action is that the subjects in question were originally acquired by the bankrupt, and that the title thereto was taken in name of the son at a time when the bankrupt was entirely insolvent, and that the son never gave any price or other consideration in return for the conveyance. The conveyance was not made by direct conveyance from the bankrupt (though the form does not matter); it was effected by the title being taken directly from the superior to the son.

Now the son's defence is that it was matter of arrangement between him and his father that he should be repaid for certain expenses to which he was put in respect of the building that was made upon this ground. As I have already said, the bankrupt was a builder. The son therefore says that before he is ordained to convey the ground he must be entitled to retain, first of all, sums which he can show he made forthcoming to the father for the

purposes of the building that was erected; and secondly, that he must be relieved of the personal obligation under a bond for £500 constituted over the property, the money from which bond had also been expended upon the building speculation.

Now the Lord Ordinary has allowed a proof *habili modo* of the averments of both parties, the defender to lead in the proof.

The argument that was pressed upon your Lordships in the reclaiming note was, that once the defender had admitted that the ground was not truly his own property, but that he held the same in security for his own outgoings, that was in law tantamount to saying, "I admit that I am bound to convey you the ground, but you must repay me loans which I have made to you." And these loans, so it was argued for the pursuer, can only be proved by writ (I do not add "by oath," because it is well established that in bankruptcy the oath of a bankrupt is excluded), and such writ has not been produced. There is also an incidental question with which I shall deal in a moment.

I do not think that in a case like this the matter can be taken in that very strict manner, by dividing the transaction, so to speak, into two and saying, "Here is an obligation to reconvey on the one hand, and against that you can make out what loan you can by the strict proof of writ." The sheet anchor of the argument was the well-known case of *Haldane* v. *Spiers* (1872, 10 Macph. 537). I do not think *Haldane* v. *Spiers* is the case that is most nearly akin to the present. I think that a case which is much more nearly akin to it is the case of *Robb* v. *Robb's Trustees* (1884, 11 R. 1881). It seems to me that while it is perfectly well settled by the law of Scotland that when a loan is put forward as an isolated transaction it can only be proved by writ or oath, yet that when you have a going series of transactions between parties, then there are many cases in which the proof is not necessarily so limited as it is in the case of an isolated transaction.

I do not think we can say more, because I am far from saying that the moment you get into a series of such transactions the door is thrown open, and everything may be proved by parole. I think it all becomes a question of circumstances, and it becomes, I am glad to say for the credit of one's own law, a question, not of absolute rule, but almost of common sense—that is to say, whether the proof adduced is such proof as would be the natural proof under the circumstances of the transaction alleged. Well, you cannot go further than that *ab ante*, and declare that such and such a thing can be proved by parole, and such and such a thing by writ; you must know the whole circumstances, and after you know the circumstances of the whole case I think it must be determined whether the proof has been sufficient to instruct the advance or whatever it was that was made at the time.

Accordingly I think that under that rule the Lord Ordinary's allowance of proof *habili modo* is quite right. I only add this, that by *habili modo* I understand he means the same as I do. There is one sentence in his judgment which I am not going to misunderstand, because I believe the Lord Ordinary is in entire accordance with what I say, but it is a sentence which, so to speak, might be misunderstood by a third party. He says—"It is evident from the discussion that there may be serious questions between the parties, one question being whether the advances in respect of which the pursuer claims to retain the property were loans, and if so, how they may be proved. It would serve no good purpose to attempt at present to anticipate questions of that kind. They will fall to be decided at the proof, and the proper course is to allow parties a proof *habili modo*."

Now I think that might be misinterpreted to mean that each incidental item had to be treated, so to speak, as a separate transaction, and that then the rule of writ or no writ would apply. I do not think that that is his meaning; and, as I have already explained, I think you must take the whole series of transactions as a whole, and then, having in view the nature of the transactions and what would be the natural way of preserving evidence of what was done among ordinary business men, declare at the end whether the advances are made out or not; because it should be kept in view that here the question is not a question of constituting the loan; it is a question of upon what terms this man who has got the property in his own name should be asked to reconvey that property to the person from who he got it.

That disposes of the case except upon what I have called an incidental question. A claim was made in the sequestration for these sums due as for advances, and it was dismissed as improperly vouched. It was argued that that made the whole question *res judicata*. I am of opinion that it certainly did not, and I entirely agree with the way in which the Lord Ordinary has dealt with that matter.

LORD KINNEAR and LORD MACKENZIE concurred.

LORD JOHNSTON was absent.

The Court allowed the amendment above referred to to be made, and adhered to the Lord Ordinary's interlocutor dated 9th December, and remitted to him to proceed as accords.

Counsel for the Pursuer and Reclaimer—Munro, K.C.—A. M. Mackay. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defender and Respondent—Wilson, K.C.—Mair. Agent—D. R. Tullo, S.S.C.