[*8th April* 1835.]

WILLIAM TAYLOR, for himself, and as trustee of his wife Mrs. ELIZA FLETCHER TAYLOR; and she with concurrence of her curator ad litem, Appellants.—*Shand.*

JAMES KERR, trustee on William Taylor's sequestrated estate, Respondent.—*Keay.*

*Bankruptcy—Sequestration.* 1. Circumstances under which a transaction entered into by creditors on a sequestrated estate, for taking a lease of part of a coal field adjacent to and forming part of a coal field belonging to the bankrupt, with a view to the beneficial working of the coal, was, in a question with the bankrupt and his wife as a contingent creditor, sustained.

2. Where a question as to compromising claims on a sequestrated estate, and counter claims by the bankrupt by executing mutual discharges, had been repeatedly under consideration of meetings of creditors, and the matter was adjourned for further consideration, an objection by the bankrupt and his wife to a resolution of a meeting of the creditors to enter into the compromise, that the advertisement did not specially bear that the meeting was called for this purpose, repelled.

1ST DIVISION. BY marriage contract in 1814, between William Taylor, then of Nethermains, and Miss Eliza Fletcher, he became bound, in the event of her survivance, to pay to her 1,000*l.* a year, and to secure certain sums for the children of the marriage. In security of these provisions, he conveyed his estate of Nethermains, under a reservation of his own liferent, to himself, his wife, and the late Mr. Miles Angus Fletcher advocate, her brother, as

trustees, with a claim of absolute warrandice, and an obligation to free and disencumber the estate of Nethermains to the extent of 7,500*l.* within three years. The trustees were infeft in Nethermains, but the obligation to disencumber the estate was never complied with, and it was sold for payment of the encumbrances at a price only about equal to their amount.

At this time Mr. Taylor was in possession of a lease of the Bartonholm colliery in Ayrshire, of which the period of expiry was in 1835, the rent being payable by a fixed money rent, or, in the option of the landlord, a lordship on the coal raised; and it was provided that, in the event of the coal becoming unworkable to profit, the lease should then be at an end. A power to subset was granted, but assignations were specially prohibited. The coal consisted of two distinct seams — the one called the parrot seam, and the other the five-quarter seam; the former was the most valuable of the two; insomuch that the latter, or five-quarter seam, was by itself not saleable, and had never been brought to market without a certain proportion of the parrot seam mixed with it. Adjacent to the parrot seam there was a small field of coal belonging to Lord Eglinton, which was a continuation of the parrot seam, and was supposed to extend to about two or three acres.

In 1816 Mr. Taylor became bankrupt; and he then conveyed his property and effects by a deed of trust in favour of John Neilson and John Fulton, engine-makers in Glasgow, with general powers of management, sale, and distribution among his creditors. This trust was superseded in February 1819, by a sequestration under the bankrupt statute awarded by the Court of Session, which met with the most determined opposition from

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Mr. Taylor. In May of the same year he presented a petition to the Court, praying for its recall, but the petition was refused, and the judgment was affirmed by the House of Lords on 26th May 1822.[1] Pending the appeal, the respondent, Mr. Kerr, had been elected and confirmed trustee, and he presented a petition to the Court, praying for authority to call meetings for choosing commissioners and taking other steps prescribed by the bankrupt act in the meantime, until the appeal should be discussed. This petition was also resisted by Mr. Taylor, but the Court granted the prayer of it; against which judgment Mr. Taylor presented a second appeal, which was also dismissed on 9th March 1824.[2] The respondent in the meanwhile had obtained a warrant from the Court, ordering Mr. Taylor to appear for examination on certain days; against which order he also entered an appeal, but it was likewise dismissed on 2d March 1825.[3]

Mr. Taylor was examined in 1831, and took the statutory oath; in the meanwhile a claim had been lodged on the sequestration by the marriage trustees, for 20,000*l.* on behalf of Mrs. Taylor, in respect of her contingent provision of 1,000*l.* per annum. Certain complicated transactions had taken place between Mr. Taylor and his brothers John and George, and it was uncertain in whose favour the balance stood; he was also indebted to his sister Mrs. Maxwell Gordon and her family, but he alleged that he had counter-claims.

In the month of May 1829, the respondent laid before the creditors a report upon the general state of the affairs,

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[1] 1 Shaw's Appeal Cases, p. 254.
[2] 2 Shaw's Appeal Cases, p. 30.
[3] 1 Wilson & Shaw, p. 30.

exhibiting, in particular, a view of the mutual claims between Mr. Taylor and his relations, and a suggestion was made that they should be settled by a compromise, on the basis that both parties should agree to extinguish at once all claim on either side by a general discharge. A motion was then made by Mr. Miles Fletcher on behalf of his sister, Mrs. Taylor,—" That, in order to " satisfy the creditors and the friends of Mrs. Taylor, " whether it be expedient to enter into the proposed " mutual discharges between the trustee and Mr. George " Taylor, the consideration of this part of the report be " adjourned till a meeting to be held on Wednesday " the 26th day of August next; the meeting to instruct " Mr. Kerr to transmit to Mr. William Taylor copies " of the accounts rendered by Mr. George Taylor, and " particularly referred to in the report, a copy of which " will also be transmitted. Mr. Kerr will accompany " these papers with an earnest request on the part of " the creditors, that Mr. Taylor should furnish him with " a full statement of the objections which he has to the " accounts, and also a detail of his counter-claims. " Mr. Kerr will call the particular attention of Mr. Tay- " lor to the deed of agreement between himself and his " brothers in 1814, and require Mr. Taylor to show the " amount of his claim against his brothers, arising out " of that transaction;—which motion being seconded by " Mr. King is unanimously agreed to, and the trustee " is instructed accordingly; and the meeting add, that " they trust the trustee will send off his communication " to Mr. Taylor with as little delay as possible." The respondent made these communications as directed, and he framed a new report, which was taken into consideration at the adjourned meeting held on 26th August 1829;

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and the creditors then resolved "to be regulated by the "opinion of counsel as to the proper construction of a "certain deed of agreement, and if that opinion should be "adverse to the creditors, then the compromise for a "mutual discharge of all claims should be entered into, "it being understood that the discharge to be granted "by the trustee on this estate will bear, that he does "not interfere with the claims of the trustees under the "contract of marriage of Mr. and Mrs. Taylor in any "respect."

Against this resolution a petition and complaint to the Court of Session was presented in the name of Mrs. Taylor, and was superseded for some time. In the meantime the opinion of counsel was taken, and was unfavourable to the creditors.

The respondent on entering on his duties as trustee, being unable to dispose of the lease of the Bartonholm colliery, proceeded, with the sanction of the creditors, to work the coal, which, in so far as regarded the parrot seam, was said to have been highly beneficial to the estate; but that seam becoming nearly exhausted, the respondent, on the 30th August 1833, entered into a preliminary memorandum of agreement with the factor of Lord Eglinton for a lease of that part of the parrot coal seam which extended into the lands of Snodgrass, forming part of the Eglinton property, during the currency of the Bartonholm lease; and he also made an arrangement with the proprietor of Bartonholm, by which the latter agreed that the coal might be worked and brought up by means of the pits on his estate, but "under the following conditions and "reservations:—1st, That if under any circumstances "the lease of Bartonholm colliery should during the

" currency thereof devolve on William Taylor the
" bankrupt, that in such event this consent shall eo ipso
" become void and null; and, 2dly, That it shall not
" be in your power, nor that of any other individual
" now, or who may hereafter be connected with the said
" lease of Bartonholm, or who may claim any privilege
" under this missive, to cut through the dyke or stone
" barrier understood to run through the Snodgrass coal
" field, and to be the means of preventing the water
" supposed to be in the Misk workings to the west and
" south-west from finding their way into the Bartonholm
" workings; on the contrary, that if said dyke or stone
" barrier shall at any time hereafter be cut through by
" you, that this permission shall not only become void,
" but, at the same time, that it will be in my power to
" adopt all competent legal measures for redress, and
" for recovery of damage which may be established to
" be sustained by your cutting through said dyke; but
" this condition is not to prevent you from working up
" to the said dyke and along it. Further, it is to be
" understood that you join me in boring at and from
" the bottom of the workings of the present parrot seam,
" to such a depth, not exceeding fifty fathoms, as may
" ascertain whether what is called the main coal in that
" district of country exists in Bartonholm field; said
" boring to be under the immediate direction of
" Mr. Dodd, your coal manager, and the expence to be
" mutually defrayed, that is, one half by me, and the
" other half by you. In conclusion, I acknowledge
" having seen your memorandum of agreement with
" Lord Eglinton's factor, subscribed in initials by you
" and Mr. Johnston, and that the present consent is
" given in reference thereto."

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In October thereafter the respondent published this advertisement in the Gazette:—"The trustee requests "the creditors of Mr. Taylor to attend an adjourned "general meeting in the trustee's office, No. 11, Miller "Street, Glasgow, on Monday the 22d day of October "instant, at twelve o'clock noon, to consider a proposal "for a lease of coal, to be wrought in the lands of "Snodgrass, adjoining the Bartonholm coal workings, "by the creditors of Mr. Taylor, and by the present "machinery at Bartonholm; and, if considered advan-"tageous for the creditors, to authorize the trustee and "commissioners to enter into the proposed lease; also "said meeting of creditors to instruct the trustee gene-"rally upon the affairs of the estate."

At this meeting, (which was attended by Mr. Taylor as trustee under the marriage contract, and by a Mr. Lamond for Mrs. Taylor individually,) the transaction with Lord Eglinton was made the subject of the following motion:—"And the said proposal for a lease "of the coal belonging to Lord Eglinton, as set forth "in a memorandum initialed by Lord Eglinton's factor, "and Mr. Kerr, the trustee on this estate, of date the "30th day of August last, having been taken up and "discussed at great length, as also the minute of con-"sent by the landlord of Bartonholm also produced to "this meeting, Mr. Gibb motioned, that the trustee "and commissioners on this estate be instructed to enter "into said bargain and transaction for working said coal "belonging to Lord Eglinton, in the terms expressed "in the said memorandum, and in the minute of the "landlord of Bartonholm; which motion was seconded "by Mr. Montgomery, mandatory of Mr. Burns. "Whereupon the said Robert Lamond protested against

"the preses putting the said motion to the vote, in "respect of its being incompetent for a meeting of the "creditors to authorize the entering into a lease for the "working of new coal; and further protested, whatever "result the meeting might come to, his constituent and "the absent creditors shall not be held bound by any "contract that may be entered into; but the creditors "who sanction the same shall do so on their own indi-"vidual responsibility, and that they shall relieve the "others of all expences that may be thereby occasioned." Further, "Mr. Archibald Young, as mandatory of the "Kilmarnock Foundery Company, protested in the "name of his said constituents, and for all others who "might adhere thereto, against said motion being put "to the vote, as ultra vires of the trustee and creditors, "and inexpedient; and that they should not in any "manner be held bound by any consequences which "might follow said motion being carried, but should be "free therefrom; and that they should not be liable in "any expence which might follow from said motion "being carried; but that the trustee and creditors "acceding to said motion shall be obliged to free and "relieve them of all such consequences and expences.

"To both of which protests against putting the "motion the said William Taylor adhered."

The subject of the mutual discharges was then made the subject of the following motion:—"Thereafter "Mr. John Taylor Gordon motioned, that this meeting "shall come to the following resolution, viz., 'That "'having considered the former reports of the trustee, "'the resolutions of the creditors, and the late reports "'of the committee of creditors, all in regard to the "'proposed mutual discharges betwixt William Taylor

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" ' the bankrupt, represented by his trustee on the one
" ' part, and, on the other part, the partners or repre-
" ' sentatives of the partners of John Taylor and Sons;
" ' also the representatives of John Taylor, the father
" ' of the bankrupt, and of John Taylor of Blackhouse,
" ' his brother; also Mrs. Gordon his sister, and her
" ' family; also Mr. George Taylor, for all and sundry
" ' claims of every description for and against each
" ' other,—this meeting, without prejudice to the former
" ' resolutions approving of said mutual discharges at a
" ' meeting of creditors held on the 26th day of August
" ' 1829, not only corroborate the same, but do now agree
" ' to the same, and authorize and instruct the trustee
" ' to carry deeds to that end into effect: farther, in re-
" ' gard that Mrs. Taylor's petition against the said reso-
" ' lutions is still in dependence, authorize and instruct
" ' the trustee to bring it to an immediate close.' Which
" motion was seconded by Mr. Archibald Kenneth.

" Which motion having been put, after the subject
" was fully discussed, the following creditors or manda-
" tories for creditors voted for it, subject to the con-
" ditions expressed in the minute of the meeting of
" creditors held on the 26th August 1829; viz., that the
" counter mutual discharge shall include a discharge of
" the arrear of rent for Fairlie coal and Peatland farm,
" prosecuted for by Sir William Cunninghame, and
" arrear of the rent of Doura farm and coal, claimed by
" Sir James Cunninghame; and also under this addi-
" tional condition, that said counter discharge shall
" include a discharge by Mrs. Burnett, claiming to have
" right to a large sum of arrears for the Dalhousie
" colliery, as set forth in her claim and affidavit of date
" the 10th day of August last, lodged with the trustee;

" that is, said motion was agreed to under these con-
" ditions by Mr. James Dunlop, John Neilson, Anthony
" Dodds, John Fulton, James Gibb, William Young,
" Mathew Montgomerie, and the said John Taylor
" Gordon, and opposed by the said Robert Lamond
" and the said William Taylor, who severally protested
" against the validity of the votes given for the motion;
" whereupon Mr. Gibb of new protested against the
" validity of the votes of the said Robert Lamond and
" William Taylor.

" The preses now declares, that said motion, seconded
" as aforesaid, and subject to said condition, is carried
" by a majority."

Against these resolutions a petition and complaint was presented to the Court of Session at the instance of Mr. Taylor and his wife, praying the Court to declare the same void and null, or to recall them as inexpedient, and to prohibit the trustee from acting upon them; and to remit to him, with instructions to cause full and sufficient inquiry to be made into his claims proposed to be included in the general discharge; and thereafter to take proper measures for making the same available to the estate.

The petition and complaint which had been presented against the resolutions to enter into the compromise, if the opinion of counsel should be adverse to the creditors, was now resumed, and was advised along with the second petition. The Court, on the 17th January 1833, by separate interlocutors, dismissed both of the petitions.[1]

Mr. and Mrs. Taylor appealed.[2]

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[1] 11 S., D., & B., 250.

[2] No appeal was entered against the judgment dismissing the first petition.

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*Appellants*.—1. The resolution to enter into a new lease of a different subject, for behoof of and at the risk of the creditors ranked on the estate, was under any circumstances incompetent, and ultra vires of the meeting. The main object of the bankrupt statute is to realize and distribute, as quickly as is consistent with the interest of creditors, the funds of the bankrupt, such as they are.[1] The whole tenor and spirit of the act obviously is, that sequestrations shall be brought to a close within a few years at the utmost, and that no delay in realizing and distributing the funds shall be permitted, except under circumstances where that delay is unavoidable. But more particularly is it adverse to the spirit and intention of that statute to allow the trustee, or the majority of creditors, to convert the sequestration into a mercantile adventure, and to employ the funds of the estate as a means of speculation, even were the chance of profit very considerable and the risk exceedingly small. Its object is to wind up old concerns, not to embark in new; nor within the whole scope of the statute is there any thing to countenance the idea, that a majority of the creditors have it in their power to enter upon new contracts of lease, and compel the minority, however small, to enter upon a joint stock speculation in an agricultural, manufacturing, or mining lease, as the case may be. This case must be settled on general principles which will apply to all sequestrations, and not on any adventitious circumstance, such as that of the comparative value of the majority and minority, or the comparative risk of the contract to be undertaken.

[1] Sect. 41 and 75; 2 Bell, 726.

Looking to the object and intent of the bankrupt statute, which, instead of prolonging sequestrations indefinitely, contemplates their termination as speedily as possible, and gives the most express directions for that purpose, the rule must be, that no majority of creditors shall have it in their power to hang up the sequestration,—to hazard the funds of the sequestrated estate, in which all the creditors have an interest, and even to subject the objecting creditors to personal responsibility by embarking in new contracts, which, if on the one hand they may turn out to be advantageous, are, on the other, undeniably subject to hazards, the extent of which cannot possibly be foreseen. Whatever may be the nature of the contract the case is truly the same, provided it be a new contract and entered into with the view of speculation. A lease of a farm may be attended with less risk than that of a colliery; a speculation in railway shares may be more precarious than either; these are matters of opinion, as to which no rule can be laid down beforehand; but all are objectionable, not because they are more or less hazardous, but because all of them are opposed to the true intent of a sequestration, which is simply a process of distribution; they are all attended with risk, and are calculated to divert the funds of the bankrupt from their legitimate purpose into a channel of mere speculation and adventure, in which the minority are compelled, whether they will or no, to become partners. It is true that there may be cases in which it would be most injurious to creditors to bring the sequestration to an immediate termination; and where the trustee may even continue to conduct contracts entered into by the bankrupt for years, and

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where his doing so may subject the sequestrated fund or the creditors to some risk. But these cases, so far from being inconsistent with the general principle, that the trustee is not to embark the creditors in new contracts, only show more strongly the reason and principle of the rule. Take the case of a lease of a farm prohibiting assignees, or of extensive manufacturing concerns, of which several years are current at the date of the sequestration. If the trustee cannot dispose of the leases, the funds of the bankrupt must continue liable for the rent during the currency of the contract; and, therefore, there must either be an immediate and certain loss to the estate, by abandoning the contracts and paying damages or rents, or else the trustee and creditors must go on to make the most of the leases for the remainder of the period, though there may be some risk to the estate from their doing so. To prevent a certain and immediate loss to the estate, the risk of some contingent loss must be run; but that exception arises out of and is limited by the necessity of the case. The trustee and creditors go on with the contracts, making such purchases as may be required for carrying them on, only because they cannot avoid it without ruin to the estate.[1] Such was the nature of the cases of Reid, 25th May 1830[2]; of Wilson, 17th May 1822[3]; and of Bland, 11th January 1825.[4] But here the trustee and creditors had it in their power to throw up the old lease the moment they could show that the coal was no longer workable to profit; and it is ad-

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[1] 2 Bell, 412. [2] 8 S., D., & B., 793.
[3] 1 S. & D., 417, old edition; 389, new edition.
[4] 3 S. & D., 419, old edition; 294, new edition.

mitted that when they chose to enter into this new lease of the Snodgrass field with Lord Eglinton, the coal in Bartonholm was almost worked out, and was no longer workable to profit. That was the very basis on which the proposal for the new lease was recommended to the creditors; there was, therefore, no necessity whatever for entering on any new lease of coal in order to keep the machinery of Bartonholm still on the ground and employed. If there remained coal in Bartonholm sufficient to employ the machinery, then there was no need of taking a new field; if there remained no coal which could be worked to profit, they had only to get this ascertained by a proper survey, and the lease was at an end. The machinery could then have been brought to sale, and that would then have been done to far greater advantage than is likely to be the case in 1835, when, after all, it must be brought to sale for behoof of the creditors.

But even, if under peculiar circumstances a trustee and majority of creditors under a sequestration can enter upon a new contract, their doing so in this case was peculiarly inexpedient and improper. Of all contracts, coal leases are the most speculative and hazardous, both from the absolute impossibility of foreseeing beforehand either the extent or quality of the field, or the risks to which, from local circumstances, the workings are to be exposed. But there are special hazards attending the speculation in question still more formidable; the acceptance of the offer of the proprietor of Bartonholm proceeds upon two conditions:—he stipulates, in the first place, that it shall not be in the power of the trustee to cut through the dyke or stone barrier understood to run through the Snodgrass coal field; and if so cut down, he stipulates for a reservation of his right to claim

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damages; and secondly, he stipulates that a boring shall take place at the joint expence of himself and the trustee, to the depth of fifty fathoms, with a view to discover whether a particular species of coal may be found in the collieries. The dangers arising from these contingencies have been demonstrated in the most conclusive manner by the total destruction of the Bartonholm colliery itself, from an accident which, though not foreseen, only shows the more strongly the very extensive and multiplied hazards to which these speculations are exposed. The main recommendation to the creditors to take the Snodgrass field was, that the coal could be worked and raised through the Bartonholm pits, and without removing the machinery from its present position; but, in consequence, (as is stated by the trustee,) of the improper workings of Lord Eglinton's colliery, an irruption of the river Garnock into that colliery took place, from which it penetrated into and totally filled and rendered useless the workings of Bartonholm. The machinery, therefore, and the pits by which it was proposed to work the Snodgrass coal, are now totally useless; and the very first step which would now require to be taken would be to put on additional engines, at a large expence, to drain the colliery before the works were commenced. The very inductive cause, therefore, of the new undertaking is gone; for the expence of the preliminary step of clearing the Bartonholm waste would in itself be enormous.

2. The resolution by which it was resolved to compromise the claims of the appellant upon the footing of mutual discharges was null and void, in respect the meeting at which said resolution was put and carried was not duly called by advertisement in terms of the

statute. By sect. 41 of the statute, as to occasional meetings, it is provided that the trustee shall, "if required at any time by one fourth of the creditors in "value, who have produced and proved their claims, "be obliged to call a general meeting, or he may himself, on any emergency, call such meetings, sufficient "previous intimation of every occasional meeting, and "the purpose of calling it, being always given by "advertisement in the Edinburgh Gazette and London "Gazette a fortnight at least before the meeting." On this provision Mr. Bell [1] observes, that "the power "given to meetings called for the purpose of regulating "any part of the management can be effectually exercised only if the creditors shall be made aware, in the "advertisement, of the purpose of the meeting. This "is implied in the expression, 'called for the purpose.'" But the advertisement calling the meeting, though it specially called the attention of the creditors to the proposed new lease of the Snodgrass coal, was totally silent as to the important matter of the compromise of the whole claims of the bankrupt against his brothers. The words, "and to instruct the trustee generally "as to the management of the estate," could never make the creditors aware that so important a step as this was about to be discussed and decided on at that meeting; and coupled as it was with the special enumeration of one subject of discussion, namely, the proposal for the lease, it was in the highest degree calculated to mislead.

In the Court below the respondent attempted to evade the merits of the points at issue, by pleading that

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[1] 2 Bell, 726.

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the appellants had no lawful title to complain. It was assumed that the complaint was by the bankrupt, whereas in fact he appeared and acted exclusively as the trustee under the marriage contract, and therefore no objection could be made to his title. Then it was alleged that his wife was merely a contingent creditor, and it was said she had no lawful title to interfere with the management of the estate in opposition to the great body of the creditors. But although a contingent creditor does not possess all the rights of an absolute creditor, he is undoubtedly entitled to interpose so as to prevent any thing being done which may be injurious to the estate out of which payment is contingently to be made.

*Respondent.*—1. The appellants have no legal title to oppose the resolutions, or to sue and insist in the petition and complaint. The present is the first instance which the records of the Court exhibit, of any attempt by a bankrupt, in the shape of legal proceedings, to disturb or resist his creditors in the measures which they deem necessary for realizing the trust property in payment of their debts. The only case in which it has ever been maintained that the bankrupt has a title to sue, or appear in any matter connected with the estate, is that of the dereliction or abandonment of claims by the creditors; but even in that situation, the party against whom the proceedings are directed is held entitled to insist in limine that the bankrupt shall find security for expences.[1] The present is not the case of an abandonment of a debt; it is the case of an act of management for the beneficial administration of the estate; and in regard to the discharge it is

[1] 2 Bell, 461.

the compromise of a debt in consideration of a discharge by the other party of counter-claims, and consequently comes within the operation of the rule laid down by Mr. Bell,—" If they (the creditors) compound or com-" promise the claim, he (the bankrupt) must submit."

Again, the title of the bankrupt's wife is equally objectionable. Her appearance is founded on the eventual provisions stipulated in her contract of marriage, at the date of which the bankrupt was in a state of utter insolvency, so as to render any such provisions totally nugatory and unavailing. But, at all events, these provisions are in their own nature uncertain and contingent, depending entirely on the wife's chance of survivance, and therefore not furnishing an interest sufficient to qualify her to vote at, nor by consequence to give her a legal title to challenge the proceedings of meetings. By section 24 of the bankrupt act it is enacted,—" That no " person, whose claim upon the bankrupt estate is merely " contingent, or depending upon an uncertain condition, " shall be entitled either to join in the petition above " mentioned for sequestration, or to vote in the choice " of factor or trustee, or in the other steps of proceeding " herein specified;" agreeably to which Mr. Bell lays it down, that " no contingent creditor can vote for " interim factor;" and again, as to the election of trustee, " a contingent creditor cannot vote." And therefore, as a contingent creditor has no voice in the deliberations of the creditors as to the appointment of their managers, it is a necessary consequence that such a creditor can have no legal title under the statute to challenge the result of their deliberations as to the management.

But even if they had a title to complain, there are no just or legal grounds for their complaint; and the

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measures adopted by the creditors were wise, prudent, and beneficial for their interest, and formed the only safe or expedient course that could be followed under the circumstances. The lease could not be assigned, because assignations were prohibited; and although the parrot seam of coal was nearly exhausted, yet the other was not, and the adjoining coal belonging to Lord Eglinton, being a continuation of the parrot seam, not only afforded a lucrative subject of itself, but the profitable means of pushing off the produce of the five-quarter seam, and keeping the present machinery employed to the end of the lease of Bartonholm. The advantages of the transaction with Lord Eglinton have been estimated as amounting to not less than from 1,200*l.* or 1,600*l.* per annum until the end of the lease in 1835.

There is nothing in the spirit or letter of the bankrupt statute in the slightest degree inimical to such a transaction. It may be true, as a general observation, that the creditors, as a body, ought not to embark in mercantile adventures, or run the hazard of mere speculations, under whatever temptation of seeming profit. But nothing is more common than for a body of creditors to carry on the business of the bankrupt for a time, where they think it for their advantage to do so. Valuable subjects may be thus gained or secured to the trust estate; machinery may be kept going; and where there is a great deal of raw material on hand, it may be wrought up, and most advantageously sold. In all such cases where profit is to be gained, or great loss to be avoided by a temporary continuance of the bankrupt's business, such a course is quite common among creditors, who are the best judges of the circumstances under which it may be advisable, and of the proper limits

within which it should be restrained, and accordingly the Court have uniformly refused to interfere with creditors in such matters.[1] It is true that the transaction is subject to the conditions which the proprietor of Bartonholm attached to his consent, which are the price or consideration for which that consent is given; but they are in themselves fair and reasonable, and in no respect prejudicial to the trust estate. The first of these is, that the creditors shall join in boring to the extent of fifty fathoms in search of the main coal, and the whole expence has not only been estimated, but the work offered to be contracted for by a most respectable tradesman for 75*l.*, one half of which would be the proportion payable by the creditors. But even against this expence there is to be set off an advantage of the most material kind, regarding the machinery, which, by the present lease, the landlord, though he has an option, is under no obligation to take at a valuation at the end of the lease. But by going on with the present agreement, the machinery will be in a state of activity and efficiency at the end of the lease; and the landlord, if either the main coal be discovered in Bartonholm, or if he can obtain a renewal of the agreement with Lord Eglinton, has then the strongest possible inducement to take the machinery at a valuation, which would be a saving to the creditors of not less than 1,000*l.*

By the other condition, the creditors are restrained from cutting the dyke or stratum of stone running through the Snodgrass field, and separating it from the Misk field, which is supposed to be overflowed with

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[1] Reid, 25 May 1830, 8 Shaw, 793; 17 May 1822, 1 Shaw & Dunlop, 417 old edition, 389 new edition; 11 Jan. 1825, 3 Shaw, 419 old edition, 394 new edition.

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water. That there exists such a stratum or natural barrier is a fact well known, and it is not to be supposed that the creditors or their managers will drive rashly forward with their operations until they run upon the dyke or barrier, or that these workings would not be carried on with due precaution, so as effectually to guard against any sudden irruption of water from deserted fields. Numerous most valuable coal fields are wrought under the known vicinity of great bodies of water, attended with circumstances of much nicety, and requiring the most careful combination of skill and vigilance to protect the workings; but in the present case the workings were not intended to have been carried farther forward than about 200 yards of the distance within which they had hitherto been conducted with perfect safety, and there was not even an apprehension of water on a level with the workings; while, on the other hand, those precautions were to be used which are known to be effectual even in the most difficult cases.

It is true (though the fact can have no relevant application to the present question,) that about six months after the judgments under review were pronounced, the works belonging to the estate were involved in the destruction brought upon several other works by a totally different cause, from which no danger was or could have been apprehended by any party concerned, viz. the sudden bursting in of the river Garnoch upon the neighbouring works of Snodgrass. This accident happened at the distance of from 400 to 500 yards from the nearest point of the Bartonholm workings carried on by the respondent, and was occasioned by the operations of other parties in pushing their workings from below so close upon the bed of the river Garnoch, that it suddenly burst

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through and involved all the neighbouring works, including those of the respondent, in a common destruction.

2. The objection that the advertisement contained no special intimation that the matter of the compromise was to be brought under consideration of the creditors, is a mere cavil; it is a subject which had been before the creditors for years past, having been considered by various general meetings, and referred to special committees. It was no new matter, but part of the general business of the estate, adjourned from previous general meetings specially advertised, and on which the trustee was fully warranted to demand the instructions of the creditors. Besides, Mrs. Taylor has taken no appeal against the judgment of the Court dismissing her petition and complaint against the resolution of the meeting of 26th August 1829. But the resolution, respecting this matter of the mutual discharges, was identically the same as those of the meeting now complained of. It is true that the former resolution was to depend on the opinion of counsel, which was to be taken upon the proper construction of the agreement; but in the event of the opinion proving unfavourable to the bankrupt's view of that question, the meeting resolved to agree to the proposal of the mutual discharges. Now, the opinion was against the construction of the agreement contended for by the bankrupt, and consequently the resolution approving of the settlement by mutual discharges took effect. The petition and complaint, therefore, presented by the bankrupt's wife against that resolution having been refused by a judgment, final and acquiesced in by her, she cannot now be permitted to advance the very same pleas which were repelled by that judgment.

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Lord Brougham moved and the House of Lords pronounced this judgment:—

It is ordered and adjudged, by the Lords Spiritual and Temporal, in Parliament assembled, "That the said petition "and appeal, be, and is hereby dismissed this House, and that "the interlocutors therein complained of, be, and the same "are hereby affirmed."

ANDREW M. M'CRAE—A. DOBIE,—Solicitors.