ment, according to the law of England, as to entitling the inspectors to demand delivery of the iron due under those warrants, and for whose behoof could they so demand it?

"2. What is its effect in competition with a prior assignment from the bankrupts in security or absolutely, not followed by intimation of that assignment to the warehouse-keepers, where such intimation is necessary in law to complete the right of the assignee?"

The following opinion was returned by Sir Roundell Palmer and Mr de Gex, the counsel consulted:—

"1. On this supposition, we think that the deed of arrangement has no effect, according to the law of England, as to vesting in the inspectors whatever movable subjects may have been the property of the bankrupts, or as to entitling them to recover and take possession of such property from the custodiers of the same under such circumstances as are stated in the case, or as to giving any preference in regard to moveable subjects in competition with other parties holding prior completed rights of pledge over the same, or parties holding prior rights in reference thereto, although depending entirely on personal contract.

"2. On this supposition, we think that the deed has no effect, according to the law of England, as to entitling the inspectors to demand the delivery of the iron due under the warrants, or in competition with a prior assignment from the bankrupts in security or absolutely, although not followed by intimation of that assignment to the warehouse-keepers."

The Court unanimously held that the law of Scotland was to be applied in determining the rights of parties over the iron in question; that the warrants in question were transferrable documents, but that their indorsation required to be followed by intimation to the warehouse-keepers to perfect the right of an indorsee as in a question with competing rights constituted by arrestment or otherwise. They also held, in acordance with the above opinion of English counsel, that the inspectors on Daunt's estate had not by the deeds in their favour any right which could compete with that of Loder; but as the averments made by Loder as to the way in which he had become possessed of the warrants, and as to his having intimated to Connal & Co. that he held them, were not admitted, they allowed him a proof thereof, and to the competing claimants a conjunct probation.

Agent for Loder—John Wright, W.S.

Agent for Daunt & Co.'s Inspectors—Andrew Beveridge, S.S.C.

Agents for Arresting Creditors—Neilson & Cowan, W.S.

HOUSE OF LORDS.

Thursday, June 25.

HUNTER *v.* LOTHIAN.

(4 Macph. p. 216.)

Partnership — Profits — Dividend — Title to Sue — Fraud. L, by the settlement of his deceased wife C, acquired right to certain shares of a joint-stock company, from which, and their profits, his *jus mariti* had been excluded. He sold the shares to the company. After his death his executor sued the company for reduction of the sale, count and reckoning for the profits subsequent to the sale, and damages, alleging that L had been fraudulently deceived by the company as to the true value of the shares. The action was compromised, the company paying a sum of money to L's executor, and getting an assignation of his claim. The executor of C now raised an action against the company for the undivided profits which had accrued during C's life. The company pleaded, *inter alia*, that the pursuer had no title to sue for undivided profits, these having been carried, with the shares, to L by his wife's settlement. Plea *sustained.*

Per Lord Chancellor—Any right of C was a right by virtue of, and attached to, the shares of which she was the owner, and if her settlement passed the shares it passed along with them every incident that properly belonged to them.

The Carron Company was established in the year 1760, and it received a grant of a royal charter in 1773. At that time, and from that time onward, it was regulated by a contract of copartnery, which was dated in the year 1771. As to the constitution of the Company, it is sufficient for the present purpose to say that it was a company of the nature of an incorporated joint stock company. The shares were transferable; but before any transfer or sale they had to be offered to the Company, which might, on certain terms as to price, become the purchasers of the shares. Provisions were made as to the capital and stock of the company, and as to the mode of ascertaining and declaring the dividend; and other provisions such as are usual in similar cases.

In the year 1828 there was a Mrs Caldwell, a widow, who held ten shares in this Company. She was about to be married to Mr Lothian, and by her marriage-contract these ten shares were settled, in substance, upon her for liferent, and then upon her husband for liferent, then upon the children of the marriage, if there should be any; and failing children, one-half of the *corpus* or fee in the shares was to belong to her husband, and the other half was to go as the widow, Mrs Lothian, should dispose of by instruments of the kind described in the contract. In pursuance of this marriage-contract, and of the power contained in it for Mrs Lothian, she made a settlement in the year 1837, and by that settlement, after giving various specific benefits to different persons named in it, which were to be satisfied out of her property, as to the residue of her property she expressed herself thus—I "direct and appoint my trustees to invest the whole residue of my means and estate remaining, after satisfying each and all of the foregoing provisions and appointments, in heritable bonds or such other securities as they may approve of, and that for behoof of my sister Mrs Mary Hunter or Philp, spouse of Charles Philp, merchant, Bonnington, in liferent, for her liferent use allenarly, exclusive of the *jus mariti* of her present or any future husband; and to Charles, Mary, and Jane, the children procreated of my said sister, equally amongst them in fee." Under this residuary gift the respondents in this appeal claim.

To this settlement by Mrs Lothian she added a codicil in the year 1843; upon the construction of which the question in the present case in a great measure turns. In that codicil she made this provision for the benefit of her husband, Mr Lothian. "In the third place, as my said hus-

band thinks highly of the stock of the Carron Company, whereof I hold ten shares, my title to which was completed by confirmation expede by me before the Commissaries of Edinburgh, of date the 29th day of November 1824, I do hereby direct and appoint my said trustees, survivors, or survivor, to allow my husband the option of taking, if he pleases, said ten shares as part of his provitions under said marriage-contract, such ten shares to be estimated to him as not exceeding in value the sum of £6000 sterling, and my said trustees being at the whole expense of completing his title to the same. And in order that the title of the said trustees nominated in said marriage-contract, survivors or survivor, may be complete, I do hereby assign and convey said ten shares over to them in trust for the ends, uses and purposes specified in said marriage-contract, and in these presents, declaring that in the event of the said Carron Company insisting on their right to have the first offer of these shares, any increased price which may be got by said trustees therefor beyond said sum of £6000 shall belong as a gift to my said husband, and that whether he takes said shares or not; and, to carry out my intention, said shares shall, if necessary, be offered to said Company at the market price of the day, or at such price as my said husband shall consider them to be worth. And I do hereby declare that the provisions herein contained in favour of my said husband are in addition to and over and above those previously conceived by me in his favour, and that the same shall be considered preferable to all other provisions made or to be made by me in favour of other parties."

Mrs Lothian, who made this codicil, died in the year 1847. The shares were proposed to be taken by her husband under the codicil, but, the Company electing to become the purchasers, they were sold to the Company for the sum of £6,800, and a tripartite contract was executed between Mr Lothian in his own right, the trustees of his wife, and the Company, dated in the year 1847, by which the shares and all interest in them were conveyed, so far as the parties to the contract could convey them, to the Company.

The question now arises, under these circumstances, between the residuary legatees of Mrs Lothian, taking under her settlement, who are the respondents in the appeal, and the representative of Mr Lothian (who is dead) whose representative is the appellant in the appeal. The way in which the question arises between these parties is this—It appears that in the progress of this Company very large profits were made from time to time beyond those which were acknowledged and brought into the balance sheet and divided among the shareholders. These profits are alleged, as to part, to have been concealed among the assets of the Company, and not brought to light or laid before the shareholders, and, as to the other part, to have been misappropriated and fraudulently abstracted from the funds of the Company. This is alleged to have been done by persons who were agents of the Company, and done by them for their own objects. The funds have since been brought back, and may now be taken to be in the possession and control of the Company. These funds, either in whole or in part, if they had been known at the time at which they came into existence, ought to have been brought into the balance sheets of the Company, and ought to have been, and beyond all doubt would have been divided in the shape of dividends among the shareholders. In point of fact, whatever was the position formerly taken up by the Company in this respect, the Company itself now agrees to this view of the case. They agree, further, that in consequence of these funds having been concealed, they became the purchasers from Mr Lothian of the ten shares in question at what now was an under value. They agree further, that they must make good the difference in value between what was paid for the shares and what ought to have been paid for them. And they allege (and this indeed is not disputed) that this they have already done—that they have paid, by way of compromise to the representatives of Mr Lothian, the additional value which ought to have been placed on the shares. On the other hand, the respondents, the residuary legatees of Mrs Lothian, allege that they are the persons to whom the payment and satisfaction ought to have been made. They allege that these profits were obtained during the lifetime of Mrs Lothian, while she was liferentrix of the shares, and that her representatives and residuary legatees, and not those who represent her husband, are now entitled to the dividends that would represent her share in those profits. It is assumed in the following judgment that if these funds had been known as belonging to the Company they would have been paid, as the respondents insist they ought to have been;—the declaration of the dividend and its payment being prevented by the fraud of the agents of the Company;—that, in consequence of the dividend not having been declared, the Company remained the possessor of those funds, or of a great portion of them; and that the Company must make good these funds to the persons who are entitled to them. The question remains, To whom are they to be made good?

The First Division (Lord Curriehill dissenting) held that the pursuers of the action, Mrs Lothian's representatives, had a sufficient title to sue, and appointed issues to be lodged.

The defenders appealed.

Moncreiff, D.-F., and Cotton, Q.C., for appellants.

Sir Roundell Palmer, Q.C., and Horn for respondents.

Lord Chancellor—My Lords, in this appeal the question which lies at the threshold of the case is as to the right and title of the pursuers to maintain the action which was instituted in the Court of Session. Upon this point the Court of Session were of opinion—(Lord Curriehill differing from the majority of the Court, and, I think, my noble and learned friend, who was then the Lord President, expressing some doubt as to the title of the pursuers)—the majority of the Court were of opinion—that, at all events in that stage, the title of the pursuers to insist in the action should be maintained, and that the action should proceed to trial upon certain issues which were settled by the Court.

My Lords, for the purpose of dealing with this question, upon which the appellants have appealed from the judgment of the Court of Session to your Lordships, the facts which require to be stated are very few in number.

[His Lordship then narrated the facts and arguments as above, and stated the assumptions on which his judgment rested with regard to the funds in dispute, and continued:—] The question remains, To whom are they to be made good?

My Lords, the answer to that question appears to me to depend upon another extremely simple and short question. The question I would put to your Lordships is this—Did the right to compel a division of those newly discovered funds pass as an incident to the shares, or did they remain with the

previous owner of the shares? My Lords, I think beyond all doubt those funds which I have described as the newly discovered funds, remained part of the estate or credit of the Company *de facto* at the time of the execution of the codicil by Mrs Lothian. If there were debts due from the Company, these funds must have gone and been applied to the payment of those debts; and the shareholders for the time being could in my opinion have taken nothing but the surplus assets of the Company, after paying all debts. Any right therefore of Mrs Lothian was a right by virtue of and attached to the ten shares of which she was the owner, and if her codicil passed those ten shares, it appears to me beyond all doubt that it passed along with the shares every incident that properly attached to the shares. Now, that the codicil passed the shares appears to me to be beyond all possibility of argument—it passed them in terms the most general that could be used—and it passed in my opinion along with them every right that was incident to the shares. In order to make the disposition more emphatic, this declaration was added—that the provisions contained in the codicil in favour of the husband should be taken to be in addition to and over and above those previously conceived by her in his favour, and that they shall be considered preferable to all other provisions made or to be made by her in favour of other parties—preferable therefore (if it were necessary to resort to this clause) to the disposition made in the will in favour of the residuary legatees.

My Lords, upon these short and simple grounds, if they meet with your Lordships' approval, I think that the course which your Lordships should adopt (speaking with great respect for the majority of the Court of Session) is, to hold that the pursuers have not made out any title to insist on their claim in this action, and that from the time that the record was closed, the interlocutors pronounced by the Lord Ordinary and by the Court of Session cannot be sustained. I would therefore humbly advise your Lordships to reverse the interlocutors commencing with that of the Lord Ordinary of the 15th May 1865 (the previous interlocutors were merely introductory), and to assoilzie the defenders in the action, with expenses.

Lord Cranworth—My Lords, I concur with my noble and learned friend in the conclusion at which he has arrived, and in the grounds upon which he has proceeded. Mrs Caldwell by her codicil assigns the ten shares to her trustees in order that her husband might, if he thought fit, take them as part of his claim under the marriage-contract at the value of £6000; and she expressly declares that any sum which may be got for the shares beyond £6000 shall belong to her husband as a gift from her. If therefore her claim on the dividends withheld were included in the word "*shares*," that claim passed to her husband.

I cannot doubt that *the share* includes everything effeiring or appertaining to the share, everything which, if the affairs of the Company were wound up, would belong to the shareholder at the time of the winding-up. If at the date of the tripartite contract, in September 1847, Mr Lothian, instead of selling and transferring his shares to the Company, had induced them to bring its affairs to a close, all its assets must have been realised, and its debts paid; and then the surplus would have been divisible into 600 parts, ten of which would have belonged to Mr Lothian as the holder of ten of the 600 shares. This surplus must have included the whole of the profits which had up to that time been kept back from the knowledge of the shareholders; and it can make no difference that the affairs of the Company were not brought to a close, but were continued to be carried on. That which would have belonged to the shareholder as his share of the assets of the Company if its affairs had been wound up, continued to be his though its affairs were not wound up. I am unable to imagine a case in which a person not a shareholder can set up a claim in competition with the shareholders, to funds which are admitted to be funds of the Company. I do not doubt that if Mrs Lothian had in her lifetime taken proper steps, she might have compelled the Company, or those who managed its concerns, to pay over to her the fair proportion of the accumulated profits appertaining to her ten shares. But that would have been a right which she would have possessed as being then a shareholder. So if by her will she had said that she gave the ten shares to her husband, but with a provision that she was only to take the shares to the extent in value of £6000, and that any profits belonging to the shares beyond that sum should go as part of her residue—no doubt that by apt words this might have been done. But she has not done it. She has given the shares to her husband, and this gift must I think include all which the owner of the shares could claim.

I have attentively considered the opinions of the learned Judges below, but I own they do not convince me. I must also observe that they were not unanimous; and the Lord President, who was one of the majority, evidently felt great difficulty, and came to the conclusion in favour of the respondents with much hesitation.

With these few observations, I have only to express my concurrence in the course recommended to your Lordships by my noble and learned friend.

Lord Colonsay—My Lords, I concur in what has been said by my noble and learned friend who last addressed your Lordships, as to the rights which would have belonged to Mrs Lothian had she in her lifetime insisted on them. I think that upon statements such as we find upon this record, Mrs Lothian would have had a right to have insisted on the separation and distribution of the funds which had been so fraudulently withheld from being distributed. I think that she would have been entitled to do that as being the party entitled to the dividends. If these funds attached to the shares entirely, by reason of not having been already distributed, she could not have compelled the Company to distribute these funds. But these funds had lain in a state of suspense and concealment, and she might therefore have insisted on the Company doing that which they contend now they would not have been bound to do, namely, to state a new account, and to pay over to her, as the party who had been from year to year entitled to the dividends, that proportion of the funds so concealed which ought to have been paid to her. But the question comes to be a different one when we are dealing with the matter after her death, and when she has made a settlement of her affairs, and I concur with both my noble and learned friends who have addressed your Lordship, in thinking that the real question to be determined here is—whether by her settlement the fund in question went to Mr Lothian or went to her residuary legatees? Now, it is pretty clear that Mrs Lothian herself had no opinion on this subject, be-

cause she made her will and died in ignorance of the facts. But still the question requires to be solved, and there may be principles found for solving it. I cannot agree with the pleas maintained by the defenders, that the averments of the pursuers, being substantially groundless and unfounded, the defenders are entitled to absolvitor, because we have not gone into that inquiry. Neither can I agree with the plea that the sale of the shares which is sought to be reduced was a sale for a fair and adequate price, and that therefore the pursuers are not entitled to succeed. If she had made a claim in her lifetime upon these profits, the defenders might have set up these pleas; but these pleas would not have been sufficient to exclude her. An investigation must have taken place, and if Mrs Lothian had established the facts stated on this record, I think she would have prevailed. But, on the other hand, I think that if she had discovered the fraud, it would have been in her option to have insisted upon having the funds distributed, or if she thought it more for her advantage to do so, she might have allowed the funds which had been concealed to be added to the stock of the Company. Now, as she did not know of this fraud, we cannot say how she would have exercised her option if she had known it. Therefore we are placed in a difficulty. *Non constat* that she would have insisted upon the distribution of the funds instead of taking the benefit of them in the increased value of the stock of the Company. I think that the words which she has used, in conveying the shares to her husband, are not necessarily exclusive. I think there is some doubt on the subject as to whether she meant he should take the shares with all the benefits that could be got out of them, whether they were benefits that she ought to have reaped during her lifetime, or benefits which were allowed to remain unreaped. But upon the whole, I think that no violence is done to her will by the construction which is proposed to be put upon it; and, although I entertain some doubts, I am not disposed to differ from the result which has been come to by my two noble and learned friends.

Mr Cotton—Would your Lordships pardon me for mentioning that certain costs have been paid under the orders which have been reversed by your Lordship. Of course an order will be made for the repayment of those costs?

Lord Chancellor—That is always a matter of course.

Certain interlocutors reversed; defenders below assoilzied with expenses.

Agents for Appellants—Gibson-Craig, Dalziel, & Brodies, W.S., and Grahames & Wardlaw, Westminster.

Agents for Respondent—Duncan, Dewar & Black, W.S.

Thursday, July 16.

FLEEMING *v.* HOWDEN.

(*Vol.* iii, 193.)

Entail—Register of Tailzies—Devolution—Bankruptcy—Trustee—Bankruptcy Act 1856. E was infeft in an estate under an unrecorded deed of entail which provided that on any heir of entail in possession succeeding to a peerage, the estate should thenceforth *ipso facto* accrue to the next heir. E succeeded to a peerage in 1860, and died in 1861, without having denuded, and leaving debts incurred partly before and partly after his succeeding to the peerage. The next heir made up a title to the estate as heir of provision. The estates of the deceased were then sequestrated, and the trustee petitioned, under 102d and 106th sections of the Bankruptcy Act, to have the estate transferred to him. Petition *refused.*

Opinions—that though E remained feudally vested in the lands till his death, yet from the time of his accession to the peerage he was so vested as a mere trustee, and the non-recording of the entail made no difference.

The question in this case was, Whether the respondent, as trustee on the sequestrated estate of the late Lord Elphinstone, was entitled, in terms of the Bankruptcy (Scotland) Act 1856, to have a decree of the Court of Session transferring over and vesting in him a certain heritable estate in which Lord Elphinstone was vest and seised at the time of his death?

The Second Division of the Court, Lord Benholme dissenting, sustained the claim of the trustee.

This appeal was then presented.

Sir Roundell Palmer, Q.C., Pattison and Lloyd, for appellant.

D.-F. Moncreiff and Pearson, Q.C., for respondent.

Lord Cranworth—My Lords, the question in this appeal arises upon the Scotch Sequestration Act, the 19th and 20th Vict., cap. 79. The material facts are as follows:—It appears that on the 24th of June in the year 1741, John, then Earl of Wigtown, settled very extensive real estates in Scotland in taillie upon a certain succession of heirs; and, after various provisions which it is not necessary to enumerate, there was a clause in the deed not of a very usual character, but not at all unprecedented, providing that if any of the heirs of taillie before-mentioned should succeed to the dignity of the peerage, "in that case, and so soon as the person so succeeding, or having right to succeed, to my said estate, shall also succeed or have right to succeed to the said title and dignity of peerage, they shall be bound and obliged to denude themselves of all right, title or interest which may be competent to them in my said estate, and the same shall from thenceforth, *ipso facto,* accrue and devolve upon the next heir of taillie." That was the provision that was contained in the deed of entail of 1741. That deed of entail was duly fenced with all proper irritant and resolutive clauses and was duly recorded.

The next matter to which it is necessary to call your Lordships' attention is an Act of Parliament which was passed soon after the rebellion of 1745, the object of which was to put on a better footing the feudal relations of the great Lords in Scotland with their vassals. It provided among other things that "it shall be lawful for any person possessed of a tailzied estate in Scotland, comprehending lands or superiorities of vassals under a holding of him, to sell to such vassals, or any of them, the superiorities over their respective lands, at such prices as the parties shall agree for, and thereupon to resign such lands for new infeftment, to be granted to such buyer if his own superiority shall be good and valid, provided always, that the monies paid as the price of such superiority or superiorities, being part of a tailzied estate, shall be laid out and settled to the same uses, and with the same limitations and restrictions, as such superiority was settled before the sale thereof as aforesaid."

My Lords, under the provisions of that Act of Parliament, from time to time, between the date of