reside in the house during her life, if she should so long continue his widow and unmarried, but not otherwise; and it was also declared that she was entitled to the annuity of £54, 12s. during her life if she should continue the testator's widow and unmarried, but not otherwise; and it was ordered that the house should be sold, subject to the right of the widow to reside therein, as thereinbefore declared, with liberty for any of the parties to bid at such sale, or to make proposals to purchase the said house by private contract.

Mr. Rolt and Mr. Lewis, in support of the motion.

Upon the whole will, the intention is clear to give the widow the increased annuity of £54, 10s. in satisfaction of the annuity of £20 and the right to reside in the house. The testator could not have intended that the house should be sold, subject to a right in the widow to reside in it during her life. Such a sale would be a very improvident one, if it were practicable. The scope of the will shews that the whole interest in the property, including the house, furniture and effects, was intended to be sold on the youngest son's attaining twenty-one.

[371] Mr. Walker and Mr. Goodeve, for the widow.

The direction that the widow should reside during her widowhood is positive and unqualified, and cannot be controlled by anything less clear. But in fact there is nothing in the will irreconcilable with this gift, and the only argument against it is one founded on mere conjecture. The sale may well be made, subject to the widow's right of residence, which perhaps may not interfere with the business being carried on upon the premises. Without entering into that question, it is sufficient that the two directions are not irreconcilable, the rule being, that all the clauses of a will must be reconciled, if possible.

They referred to *Williams* v. *Evans* (1 Ell. & Bl. 727), *Thornhill* v. *Hall* (2 Cl. & Fin. 22), *Davies* v. *Davies* (Daniel, 84), *Bacon* v. *Clerk* (1 P. Wms. 478).

Mr. W. M. James, for the Plaintiffs.

THE LORD JUSTICE KNIGHT BRUCE. This will is inartificially drawn, and has many superfluous words. But from it I collect the testator's intention to have been, that as soon as the youngest son should attain twenty-one, the property should be sold, disencumbered from any interest in the widow, whether married or unmarried. I have less difficulty than I should otherwise feel in differing from the Vice-Chancellor, because the question does not appear to have been so fully argued before him as it has before us.

THE LORD JUSTICE TURNER. It is the duty of the Court to find out from the whole will what was the testator's intention. That intention **[372]** appears to me to have been, that the right of the widow to reside in the house should be determinable on the period of sale arriving.

The order was varied by declaring that the widow was not entitled to reside in the house after the sale, and directing the sale to be made of the fee-simple in possession. Costs of all parties to be costs in the cause.

[372] Between WILLIAM PENNELL, one of the Official Assignees in Bankruptcies prosecuted in Her Majesty's Court of Bankrutcy on behalf of Himself and all Assignees of Bankrupts and Insolvents and Other Persons as having been Partners with Bankrupts interested in the Monies or Funds sought to be recovered in this Suit, or any part thereof, *Plaintiff*; and HENRY DEFFELL and HARRIET SUSANNAH DEFFELL, *Defendants*. Before the Lords Justices. *June* 23, *July* 16, 1853.

[S. C. 22 L. T. (O. S.) 126; 1 W. R. 499; 23 L. J. Ch. 115; 18 Jur. 273. Considered, *Brown* v. *Adams*, 1869, L. R. 4 Ch. 764. See *In re European Bank*, 1870, L. R. 5 Ch. 362; *Great Eastern Railway Company* v. *Turner*, 1872, L. R. 8 Ch. 153; *Ex parte Cooper*, 1874, 31 L. T. 420; *Lord Provost, &c., of Edinburgh* v. *Lord Advocate*, 1879, 4 App. Cas. 835. Considered, *In re West of England and South Wales District Bank*, 1879, 11 Ch. D. 772. See *In re Hallett's Estate*, 1879-80, 13 Ch. D. 696; *Allcard* v. *Skinner*, 1887, 36 Ch. D. 164; *Lyell* v. *Kennedy*, 1889, 14 App. Cas. 459.]

When a trustee pays trust-money into a bank to his credit to a simple account with himself, not distinguished in any other manner, the debt thus constituted

from the bank to him is one which belongs as specifically to the trust as the money would have done had it specifically been placed by the trustee in a particular repository, and so remained; and the case would not be varied by the circumstance of the bank holding also for the trustee, or owing also to him money, in every sense his own. But cheques drawn by the trustee in a general manner upon the bank, would for every purpose be ascribed and affect the account in the mode explained and laid down in *Clayton's case*, 1 Mer. 572.

This was an appeal from the decision of the Master of the Rolls upon exceptions and further directions. The suit was supplemental to one for the administration **[373]** of the estate of George Green, deceased, late one of the official assignees of the Court of Bankruptcy, who died on the 22d of October 1849, intestate. The Defendants were his administratrix and her husband.

Mr. Green had been appointed official assignee shortly after the establishment of the Court of Bankruptcy; and on the decease of Mr. Follett (another official assignee), which took place on the 9th June 1849, Mr. Green was appointed to be the official assignee in all the bankruptcies in which Mr. Follett was at the time of his death the official assignee.

Mr. Green continued to be such official assignee until the time of his death, when the Plaintiff was appointed to be an official assignee in bankruptcies prosecuted in the Court of Bankruptcy, in the place of Mr. Green; and in particular the Plaintiff was appointed to be the official assignee, and to act as such, in all the bankruptcies in which Mr. Green was at the time of his death the official assignee.

Mr. Green was originally attached to the Court of Mr. Commissioner Merivale, who died in the year 1844, and was succeeded by Mr. Commissioner Goulburn. From that time Mr. Green, during his life, and afterwards the Plaintiff, as the successor of Mr. Green, were successively attached to the Court of Mr. Commissioner Goulburn.

On his first appointment to be such official assignee, Mr. Green opened in his own name a banking account with the Bank of England, into which account he paid all the monies he received, whether monies received by him as such official assignee or his own private monies; and he continued such account until the promulgation of **[374]** the order in bankruptcy of the 12th of November 1842.(1)

Immediately after this order was promulgated, Mr. Green set apart his banking account at the Bank of England as the banker's account to be kept by him as official assignee in obedience to the 15th section of the order; but as the Bank of England will not open a banking account with an individual as a trustee, or in any character qualifying his absolute title, Mr. Green was permitted by the Commissioners to keep his account at the Bank without such account being headed "as official assignee."

[375] By the decree dated the 7th of December 1850, it was referred to the Master to inquire and state whether any or what balances or balance were or was, at the decease of Mr. Green, due from him to any and which of the bankrupt's estates of which he was at his decease the official assignee, and what was at his decease the aggregate amount of all such balances, if any, and whether any and what balances or balance, if any, were or was at the decease of Mr. Green due to him from any and which of the bankrupt's estates of which he was at his decease the official assignee, and what was at his decease the aggregate amount of all such balances, if any; and the Master was to inquire and state whether any and what balances or balance were or was at the time of the decease of Mr. Green due from him. Similar inquiries were directed with respect to partnerships, the assets of which were received by him, where any of the members of such partnerships were or was bankrupts or a bankrupt; and also as to insolvents' estates of which he had been official assignee under the then existing law. An inquiry was also directed as to what balances were standing to the credit of Mr. Green in his banking accounts with the Bank of England and with the London Joint Stock Banking Company respectively, and from what or whose funds or monies the same balances arose respectively, and under what circumstances the same were so standing to his credit with the said banks; but the several inquiries thereinbefore directed were to be without prejudice to the rights of any of the parties and to any question in the cause.

The Master, by his report, dated the 10th of January 1853, found to the effect

of the foregoing statement, and set forth the accounts of Mr. Green with the Bank of England and the London Joint Stock Banking Company, the former upon the 30th of September 1849 (the date **[376]** of making up his last quarterly account), and the latter from the 31st of December 1848, to the day of his death, in each case.

The former account was as follows:—

Dr. THE BANK OF ENGLAND, *in Account with* MR. GEO. GREEN. *Cr.*

1849.		£	*s.*	*d.*
	To balance agreed	648	3	3
Oct. 3.	Sundries	199	15	0
„	Ditto	20	8	5
4.	Ditto	180	19	0
5.	Post Office	2	12	0
„	Sundries	512	16	3
8.	Cash	7	0	0
9.	Sundries	97	15	2
12.	Same	329	8	4
		1998	17	5
17.	Sundries	37	6	0
18.	Ditto	126	7	0
		2162	10	5
22.	Sundries	130	0	0
„	London and County	44	15	2
23.	Challis	121	7	0
		£2458	12	7

1849.		£	*s.*	*d.*
Oct. 3.	Hartley	8	0	0
4.	Atkinson	6	5	0
„	G. Assurance Co.	8	5	0
„	Cantrice	57	10	0
„	Carter	25	0	0
„	Campbell	15	14	2
„	Self	10	0	0
5.	Cutten, Broker	21	13	4
„	Upton	18	18	0
„	Inglis	28	4	6
		199	10	0
8.	Hastings	25	0	0
„	Paterson	6	15	2
9.	Campbell	10	0	0
10.	Reeves	8	3	8
11.	Gill	50	12	9
„	Adamson	4	4	10
		304	6	5
15.	Office	31	5	0
18.	Returned draft	121	7	0
		456	18	5
20.	Miss Fox	13	2	6
		470	0	11
	Balance	1988	11	8
		£2458	12	7

With respect to this account, the Master found that the whole of the monies respectively paid into and drawn out after the 30th of September 1849, were monies respectively received by him in his official capacity, with the following exceptions only, viz., that £72, 16s. 3d., part of the above-mentioned sum of £512, 16s. 3d. paid in on the 5th of October, was received by him on his private account; and several sums of £6, 5s., £8, 5s., **[377]** £57, 10s., £25, £10, £18, 18s., £25, £6, 15s. 2d., £31, 5s., and £13, 2s. 6d., making in the whole £202, 0s. 8d., were drawn out and applied by Mr. Green on his private account, so that during the period aforesaid Mr. Green drew out and applied on his private account £129, 4s. 5d. more than he had paid in from his private resources. The Master also found that the sum of £72, 16s. 3d. so paid in by Mr. Green from his private resources was drawn out by him and applied on his private account in manner aforesaid, and that the whole balance or sum of £1988, 11s. 8d., standing to his credit with the Bank of England at his death, arose from and formed part of the several bankrupts' estates specified in a schedule to the Master's report.

The other account was as follows:—

Dr. THE LONDON JOINT STOCK BANK, *in Account with* GEO. GREEN, ESQ. *Cr.*

1849.		£	s.	d.	1849.		£	s.	d.
	Balance . .	642	15	7	Jan. 11.	G. G. . .	89	11	3
Mar.	5. Cash . .	210	0	0	Feb.	2. Ditto . .	40	0	0
June	28. Ditto . .	169	3	10		16. Self . .	100	0	0
	30. Ditto . .	79	8	0	Mar.	27. Fowler . .	10	0	0
					Apr.	12. Jones . .	20	0	0
						23. Fowler . .	10	0	0
					May	3. Jones . .	250	0	0
					June	15. G. G. . .	100	0	0
						18. G. G. . .	20	0	0
							639	11	3
						Balance .	461	16	2
		£1101	7	5			£1101	7	5
	Balance . .	461	16	2	Sept.	13. G. G. . .	150	0	0
July	2. Interest . .	2	1	10		28. Abrahall . .	6	13	4
	31. Cash . .	20	0	0					
	„ Ditto . .	219	0	6					
Sept.	6. Ditto . .	1627	15	8					
							156	13	4
						Balance .	2174	0	10
		£2330	14	2			£2330	14	2

[378] With respect to this account, the Master found that the following items, viz., £642, 15s. 7d., £210, £2, 1s. 10d. and £20 arose from Mr. Green's private monies: that the item £169, 3s. 10d. was composed of sums which, at various times prior to that date, Mr. Green had received on account of a Mr. Denvon's estate, and paid into his account at the Bank of England, but had afterwards drawn out a cheque and paid it to his account with the London Joint Stock Banking Company.

With respect to the item £79, 8s. similar circumstances were stated. The item £219, 0s. 6d. was found by the Master to be composed of £50 received by Mr. Green on account of Denvon's estate, and £169, 0s. 6d. received on account of another estate, all paid in the first instance into the account at the Bank of England, but drawn out by a cheque for £219, 0s. 6d., and paid to his account with the London Joint Stock Banking Company. The item £1627, 15s. 8d. was composed of balances received by Mr. Green from the executors of Mr. Follett and from various bankrupts' estates, similarly paid in the first instance into Mr. Green's account at the Bank of England and subsequently transferred to his account with the London Joint Stock Banking Company. The Master therefore found, that the balance or sum of £2174, 0s. 10d. standing to the credit of Mr. Green on his account with the London Joint Stock Banking Company arose to the extent of £2088, 14s. 8d., part thereof, from monies received by Mr. Green, from and at the date of his death, due to the estates which the report specified; and that the sum of £85, 6s. 2d., residue of the sum of £2174, 0s. 10d., arose from and formed part of the private monies of Mr. Green.

To this report the Defendant took eleven exceptions, which were allowed by the Master of the Rolls, who, **[379]** on further directions, decided that the balances of both accounts formed part of the general estate of the testator. Against this decision the Plaintiff now appealed.

Mr. Roupell and Mr. Hardy appeared in support of the appeal.

Mr. Roundell Palmer and Mr. Rogers, for the Respondents.

The following cases were cited:—*Burdett* v. *Willett* (2 Vern. 638), *Lane* v. *Dighton*

(Amb. 409), *Ryall* v. *Ryall* (1 Atk. 59), *Ex parte Chion* (3 P. Wms. 187, n.), *Lord Chedworth* v. *Edwards* (8 Ves. 46), *Lench* v. *Lench* (10 Ves. 511), *Lupton* v. *White* (15 Ves. 432), *Taylor* v. *Plumer* (3 Mau. & S. 562), *Clayton's case* (1 Mer. 572), *Liebman* v. *Harcourt* (2 Mer. 513), *Massey* v. *Banner* (1 J. & W. 241), *Gardner* v. *Rowe* (2 Sim. & St. 346), *Small* v. *Attwood* (3 Y. & C. 105), *Grigg* v. *Cocks* (4 Sim. 438), *Sims* v. *Bond* (5 B. & Ad. 389), *Ex parte Gribble* (3 D. & C. 339), *Foley* v. *Hill* (1 Ph. 399; 2 H. of L. Ca. 28), *Manningford* v. *Toleman* (1 Coll. 670), *Pinkett* v. *Wright* (2 Hare, 120; S. C. on Appeal, nom. *Murray* v. *Pinkett*, 12 Cl. & Fin. 764), *Trench* v. *Harrison* (17 Sim. 111).

July 16. THE LORD JUSTICE KNIGHT BRUCE. As in this case (subject to the possible effect on our minds of a reply if one shall be addressed to us) we have arrived at a conclusion which practically, so far as the particular cause before us is concerned, approaches nearly **[380]** that of the Master's report, we have thought it right now to state our present opinions; and in the event of the Plaintiff's leading counsel desiring, after hearing these, to reply, he shall be attentively listened to, if not on this day on some other that may suit him better. Nor need we assure him of our readiness to own if he shall effect a change in our views. The matter stands thus:—

The late Mr. George Green, as an official assignee in bankruptcy, or in that character and otherwise, was a trustee for various persons and purposes. The trusts thus reposed in him were many, and the persons interested respectively in them numerous.

In the course of their performance he received from time to time on account of them respectively various sums of money, for which, not having discharged himself of them in his lifetime, he was accountable at his death.

He employed two banking establishments as his bankers, one the Bank of England, the other the London Joint Stock Banking Company. With each severally he had but one account, and in each instance the account was kept with him as a private man merely, without any official designation, without any title of a trust, without anything to mark that he was not alone interested in the amount for the time being due to him upon it. On the account with the Bank of England there was a balance in Mr. Green's favour at his death of £1988, 11s. 8d. On the account with the London Joint Stock Bank there was a balance then in his favour of £2174, 0s. 10d. He died on the 22d of October 1849.

Soon afterwards it was alleged against his executors, but disputed by them, that of these two sums the whole **[381]** of the former and the greater part of the latter belonged specifically to the trusts that I have mentioned, exclusively of his general creditors. Hence arose this suit, instituted in a form not under the circumstances incorrect, on behalf of the several persons interested in those trusts. The points raised being, whether the whole or any and what part of the balance at the Bank of England, and the greater or some and what part of the balance at the London Joint Stock Bank do in truth belong specifically to the trusts, it being certain that Mr. Green was, at his death, accountable to the trusts in the aggregate for an amount equal to the amount claimed, or for more.

The Master upon a reference to him has found certain facts. It is admitted, on each side, that some at least of the facts so found are accurately found and true; and the only question is, what are the just inferences from the undisputed facts—what are their legal or what their equitable consequences? In order to answering this question, it will be convenient, in the first place, to suppose certain cases, and come to a conclusion upon them. Thus, let me suppose that the several sums for which, as I have said, Mr. Green was accountable at the time of his death, had been (that is to say, that the very coins and the very notes received by him on account of the trusts respectively had been) placed by him together in a particular repository—such as a chest—mixed confusedly together as among themselves; but in a state of clear and distinct separation from everything else, and had so remained at his death. It is, I apprehend, certain, that after his death the coins and notes thus circumstanced would not have formed part of his general assets, would not have been permitted so to be used; but would have been specifically applicable to the purposes of the trusts on account of which he had received **[382]** them. Suppose the case that I have just suggested to be varied only by the fact, that in the same chest with these coins and

notes Mr. Green had placed money of his own (in every sense his own), of a known amount—had never taken it out again—but had so mixed and blended it with the rest of the contents of the chest, that the particular coins or notes of which this money of his own consisted could not be pointed out—could not be identified. What difference would that make? None, as I apprehend, except (if it is an exception) that his executors would possibly be entitled to receive from the contents of the repository an amount equal to the ascertained amount of the money in every sense his own, so mixed by himself with the other money. But not in either case, as I conceive, would the blending together of the trust-monies, however confusedly, be of any moment as between the various *cestuis que trustent* on the one hand, and the executors as representing the general creditors on the other.

Let it be imagined that in the second case supposed, Mr. Green, after mixing the known amount of money of his own with the trust-monies, had taken from the repository a sum for his own private purposes, and it could not be ascertained whether in fact the specific coins and notes, forming it, included or consisted of those or any of those which were, in every sense, his own specifically, what would be the consequence? I apprehend that, in equity at least, if not at law also, what he so took would be solely or primarily ascribed to those contents of the repository which were in every sense his own. He would, in the absence of evidence that he intended a wrong, be deemed to have intended and done what was right; and if the act could not in that way be wholly justified, it would be deemed to have been just to the utmost amount possible. If these propositions, which I believe to be **[383]** founded in principle, and supported by authorities cited during the argument as well as by others, are true, can the Plaintiff be wholly wrong in his actual contention? I apprehend not.

In the first place, we are not embarrassed with any statutory question of order and disposition or reputed ownership. Such considerations are out of the case. In the next place, there is here no dispute with either of the two banking establishments—each is indifferent to the contest; nor is there any dispute among those whose interests are represented by the Plaintiff. The controversy is merely between them (agreeing and acting together) on one side, and the executors as representing the general creditors of Mr. Green on the other; nor do the executors deny that if the Plaintiff is wholly wrong in his specific claim, those whose interests he represents are general creditors of Mr. Green for an amount equal to the balance at the Bank of England, and a further amount equal to as much as the Plaintiff claims of the balance at the other bank. When a trustee pays trust-money into a bank to his credit, the account being a simple account with himself, not marked or distinguished in any other manner, the debt thus constituted from the bank to him is one which, as long as it remains due, belongs specifically to the trust as much and as effectually as the money so paid would have done, had it specifically been placed by the trustee in a particular repository and so remained: that is to say, if the specific debt shall be claimed on behalf of the *cestuis que trustent*, it must be deemed specifically theirs, as between the trustee and his executors and the general creditors after his death on one hand and the trust on the other. Whether the *cestuis que trustent* are bound to take to the debt—whether the deposit was a breach of trust, is a different question.

[384] This state of things would not, I apprehend, be varied by the circumstance of the bank holding also for the trustee, or owing also to him, money in every sense his own. It may be, however, and as I think is true, that cheques drawn by the trustee in a general manner upon the bank, would for every purpose be ascribed and affect the account in the mode explained and laid down by Sir W. Grant, in *Clayton's case*. The principles there stated would, I conceive, be applicable, notwithstanding the different nature and character of the sums forming together the balance due from the bank to the trustee, whatever the purposes and objects of the cheques. Supposing, however, the bank to apprise the customer, or the customer to apprise the bank, contemporaneously or with due dispatch of an intention to ascribe and apply a cheque, in a manner out of the ordinary course, that, possibly, might make a difference or raise a question; but a difference not here material, for not here existing, nor a question here arising. For the actual circumstances of the present case are thus:—With regard to the balance at the Bank of England, the account with that establishment may, for every present purpose, be considered as commencing, on one side, with the sum of £648, 3s. 3d. credited to Mr. Green on the 30th of September 1849, which

was clearly trust-money; and, on the other, with the £8 debited to him on the 3d of October following. That and the sums afterwards debited to him in the account appear to amount together to £470, 0s. 11d., and must, I am apprehensive, be considered as general and not expressly appropriated drafts, and, upon the principle of *Clayton's case*, be set against and accordingly reduce the £648, 3s. 3d. as the earliest item of credit. The consequence is, I think, that a sum of £72, 6s. 3d. mentioned in the report, being the only part of the items of credit which, not specifically belonging to some trust, was in every sense Mr. Green's own, must be deducted in **[385]** favour of the Defendants from the balance of £1988, 11s. 8d. so as to leave of that only £1916, 5s. 5d. applicable specifically to the demands of those or some of those whom the Plaintiff represents on the record.

With respect to the balance at the bank of the London Joint Stock Banking Company, the account with that company may, for every purpose at present material, be considered as commencing on one side with the item of £642, 15s. 7d., standing to Mr. Green's credit at the end of the year 1848; and, on the other, with the £89, 11s. 3d. debited to him on the 11th of January 1849. That, and the other items of debit against him, appear to be general drafts, and to amount together to £796, 4s. 7d., from which sum being deducted the £642, 15s. 7d., the earliest item of credit, there remains an amount of £153, 9s. 0d. to be applied in reducing the £210 forming the second item of credit, by which means that item becomes diminished to £56, 11s. 0d., and that sum of £56, 11s. 0d., the Plaintiff is not, and the Defendants are specifically, entitled to. So likewise the £2, 1s. 10d., and the £20 belong to the Defendants and not to the Plaintiff. But to the residue, namely, to £2095, 8s. 0d. of the balance of £2174, 0s. 10d., the Plaintiff is, I apprehend, entitled specifically against the Defendants, upon the unquestioned facts found by the report.

The Master's conclusions, therefore, are practically, I conceive, to be but slightly departed from;—and I have said to what extent. As to the exceptions, I had rather neither allow nor overrule any of them, but make upon them and the further directions, the declaration and order proper to be made.

It has been urged, that to assent to Sir G. Rose's conclusions in any degree, whether practically or theoretically, **[386]** will be to contravene some expressions of opinion attributed, and probably with correctness attributed, to Lord Eldon in the case of *Massey* v. *Banner* (1 J. & W. 241). I am not, however, satisfied that those expressions ought to be understood and applied, as the counsel for the Defendants here have contended. Certainly, I may assert my belief of this, that had the present cause been before that most eminent Judge, in the circumstances in which it is before us, he would have decided it, as I have stated that in my opinion it ought to be decided. Had I thought otherwise, I should, to say the least, have hesitated much and long before concluding to any extent in the Plaintiff's favour—well knowing how very little is the chance that a man has of being right who, on a point of law or equity, differs from Lord Eldon.

THE LORD JUSTICE TURNER. George Green the testator, whose estate is in the course of administration in this suit, was official assignee under several bankruptcies, and was also assignee or trustee under several insolvencies and of several partnership estates, in cases in which one or more, but not all the partners had become bankrupt. He died on the 22d of October 1849. William Pennell, the Plaintiff in this suit, has succeeded him in all or most of his offices of assignee and trustee, and he claims to be entitled to certain balances which at the time of Green's death were standing to his credit in account with his bankers, upon the ground that such balances belonged to estates of which Green was and the Plaintiff now is assignee or trustee. No objection was made to the title of the Plaintiff to maintain this claim, and after the decision of Lord Cot-**[387]**-tenham in *Green* v. *Weston* (3 Myl. & Cr. 385), I think that such an objection, if made, could not have been supported.

The testator George Green had two banking accounts; one with the Bank of England, the other with the London Joint Stock Bank. To each of these accounts he was in the habit of paying in monies belonging to the estates which he represented, and also monies which belonged to himself individually; and upon each of these accounts he was in the habit of drawing, both on account of the estates which he represented, and on his own private and individual account. Upon each of these accounts there was a balance in his favour at the time of his death. In one respect

there seems to have been a distinction between the two accounts. The account with the London Joint Stock Bank appears to have contained no receipts or payments on account of estates of which Green was official assignee under bankruptcies: and the account with the Bank of England appears to have consisted mainly of receipts and payments on account of those estates; but I do not think it necessary to pursue this distinction. It is sufficient for the present purpose to observe, that each of the accounts embraced monies paid in and drawn out by Green, partly on account of the estates which he represented, and partly on his own private and individual account.

The balance due to Green at the time of his death on his account with the Bank of England amounted to £1988, 11s. 8d., and the balance due to him at the time of his death on his account with the London Joint Stock Bank amounted to £2174, 0s. 10d.; and these balances form the subject of the present contention. Inquiries **[388]** having been directed by the decree upon the subject of these balances, the Master by his report found that the whole of the £1988, 11s. 8d., the balance on the Bank of England account, and £2088, 14s. 8d., part of the £2174, 0s. 10d., the balance on the London Joint Stock account, belonged to the estates represented by Green as assignee or trustee; but this report having been excepted to, the Master of the Rolls, upon hearing the exceptions, decided that the whole of the £1988, 11s. 8d., the balance of the Bank of England account, and the whole of the £2174, 0s. 10d., the balance of the London Joint Stock Bank account, belonged to and formed part of the general estate of Green. The conclusion at which the Master of the Rolls has arrived rests upon the ground, that the monies belonging to the estates represented by Green cannot be followed into the banking accounts; and the first question which we have to consider upon this appeal is, whether that conclusion is well founded.

It is, I apprehend, an undoubted principle of this Court, that as between *cestui que trust* and trustee, and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust; and from this principle I do not understand the Master of the Rolls to have in any degree dissented. Several cases illustrating the principle were cited in the argument, but perhaps it cannot be better illustrated than by referring to a case of familiar, almost daily occurrence, the case of trust-monies employed in trade. An executor of a deceased partner continues his capital in the trade with the concurrence of the surviving partners, **[389]** and carries on the trade with them. The very capital itself may consist only of the balance which at the death of the partner was due to him on the result of the partnership account. That capital may have no existence but in the stock-in-trade and debts of the partnership. The stock-in-trade and debts may undergo a continual course of change and fluctuation, and yet this Court follows the trust capital throughout all its ramifications, and gives to the beneficiaries of the deceased partner's estate the fruits derived from that capital, so continually altered and changed. We have here, I think, the most perfect instance of the extent to which the doctrine of following trust property has been carried by the Court, an instance, too, which exemplifies the difficulties with which the Court has felt bound to grapple for the purpose of carrying out that doctrine, for nothing can be more difficult, nothing more inconvenient than to follow out such a case to its results.

But of course in those cases as in other cases the property which is the subject of the trust must in some manner be ascertained; and it is upon this point of the supposed impossibility of ascertaining what portion of the balances at the bankers' belonged to the trust, and what portion to the separate estate of Green, the judgment of the Master of the Rolls in this case has proceeded. These balances, it is said, are derived from two sources, the trust estate and the private estate. How is it to be ascertained what portion of them is derived from one source, and what portion from the other? Is it, I would ask, more difficult to ascertain this than to ascertain what part of the profits of a partnership are to be attributed to the capital of a deceased partner, with the superadded difficulty, perhaps, of portions of that capital having been from time to time drawn out? It may be said, that in the case to which I have referred, the Court has a substratum on which to proceed—the ascertained **[390]**

amount of the deceased partner's share; but is there not equally a substratum in the case before us, in the amount of the trust-monies paid into the banking-house? Again, it may be said, that in the case to which I have referred there are rules and principles by which this Court is guided, in determining what belongs to the estates of deceased partners—rules and principles which are not even yet, perhaps, clearly *settled and defined; but before we part with this question upon that ground,* we must inquire whether there are not also rules and principles by which this Court may be guided in determining what, in such a case as the present, belongs to the trust estate.

In order to test the question, whether it be true that it cannot be ascertained what portion of the balances at the bankers' belonged to the trust estate, let us simplify the case. Suppose a trustee pays into a bank monies belonging to his trust to an account not marked or distinguished as a trust account, and pays in no other monies, could it for one moment be denied, that the monies standing to the account of the debt due from the bankers arising from the monies so paid in would belong to the trust and not to the private estate of the trustee? Then suppose the trustee subsequently pays in monies of his own, not belonging to the trust, to the same account. Would the character of the monies which he had before paid in—of the debt which had before accrued—be altered? Again, suppose the trustee, instead of subsequently paying monies into the bank, draws out part of the trust-monies which he has before paid in, would the remainder of those monies and of the debt contracted in respect of them lose their trust character? Then, can the circumstance of the account consisting of a continued series of monies paid in and drawn out alter the principle? It may indeed increase the difficulty of ascertain-**[391]**-ing what belongs to the trust, but *I can see no possible ground on which it can affect the principle.*

We must see, however, whether the law does not furnish the means of meeting even the difficulty arising from such a continued series of monies paid in and drawn out. I think that it does. I take it to be now well settled, that monies drawn out on a banking account are to be applied to the earlier items on the opposite of the account. By every payment which he makes, the banker discharges so much of the debt which he first contracted. If that debt arose from trust-monies paid in by the customer, so much of those trust-monies is paid off, and, unless otherwise invested, on account of the trust, falls into the customer's general estate and is lost to the trust, because it cannot be distinguished from the general estate of which it has become part. If, on the other hand, the earliest debt due from the banker arose from the customer's own monies paid in by him, that debt is *pro tanto* discharged, and the trust-monies subsequently paid in remain unaffected. The same principle runs through the whole account; each sum drawn out goes to discharge the earliest debt due from the banker which is remaining unpaid; and thus, when it is ascertained what monies have been paid in belonging to the trust, it becomes clear to what portion of the balance which remains the trust estate is entitled.

These are the principles which in my opinion—concurring fully in that of my learned brother—are to be applied to such a case as the present. They are plain and *simple, and furnish, as it seems to me, a ready solution to all the difficulties which* can present themselves. They are the principles which govern all other accounts, and I can see no reason why they should not be held applicable to the accounts before us.

[392] I cannot, therefore, concur in the conclusion at which the Master of the Rolls has arrived, that these balances belong wholly to the estate of Green. With deference to the Master of the Rolls I do not think that the case of *Massey* v. *Banner* (1 Jac. & W. 241), on which he has mainly relied, supports the conclusion at which he has arrived. That case, as I understand it, establishes no more than this, that a trustee who pays in monies to his own account at his bankers' is liable to his *cestuis que trustent* for the monies which he has so paid in, as he well may be. He has no right to mix the trust-monies with his own, or to subject his *cestuis que trustent* to the difficulty of separating them. It is one thing however to say that the trustee is liable for monies so paid in, and another that the *cestius que trust* are not entitled to the benefit of separating the trust-monies, if it be in their power to do so. The case indeed contains some observations, which, as I read them, are in direct opposition to the conclusion of the Master of the Rolls. Thus Lord Eldon says (page 249), "See

what the consequence is: If he had paid the sums in question to the account of his sister's estate, and the bankers had then become bankrupts, undoubtedly the trustees would have been entitled to prove the sum against them. Even now that it is standing in his name, the trustees might be entitled to prove it, by his confession, that it belonged to his sister's estate, and then they would be in the same situation." If this right of proof would exist upon the admission of the trustee, it can hardly, I think, be said that it could not be established by evidence against him in a case where there is no bankruptcy, and therefore no question of order and disposition.

The case of *Foley* v. *Hill* (1 Ph. 399; 2 H. of L. Ca. 28) was also relied upon on **[393]** the part of the Respondents, but that case again is perfectly distinct from the present. The question there was between the banker and the customer, not as in the present case between the customer and his *cestuis que trustent*. The case establishes merely that the relation of trustee and *cestui que trust* does not exist between bankers and their customers, and does not at all affect the question on which the present case depends, viz., what are the rights of the *cestuis que trustent* of the customer against the customer, their trustee?

These are the grounds upon which I find myself unable to concur in the opinion of the Master of the Rolls. I differ also from the opinion of the Master, and it will be right also to state the grounds on which I differ from his opinion.

The Master's opinion appears by his report to be founded upon this principle—that the sums drawn out by Green on his private account ought to be attributed to the sums paid in by him on that account, without reference to the order in which the sums were paid in or drawn out, and the case of *Pinkett* v. *Wright* (2 Hare, 120) was cited in support of that principle; but the case of *Pinkett* v. *Wright*, in which I fully concur, is I think materially distinguishable from the present. *Pinkett* v. *Wright* was the simple case of a person having shares in his own right and also as a trustee, and selling some of the shares, and the Court held that the shares which were sold must be taken to be those to which the party was entitled in his own right. There was no course of dealing, no bankruptcy account to be considered in the case of *Pinkett* v. *Wright*. Now Green opened and kept these banking accounts upon the usual footing, and **[394]** the Plaintiff, taking the benefit of the accounts, cannot, as I think, be entitled to alter their character. Adopting them for the purpose of establishing his demand against Green's estate he must, I think, adopt them with all their incidents, one of which is that the monies drawn out are to be applied to the monies first paid in. Upon any other footing this consequence would follow, that a debt which had been extinguished at law by the course of payment would be revived in equity by an alteration in that course. Indeed it would follow that in all cases where trust-monies were paid by a trustee into a bank to his own private account, they must be held to have remained there so long as the trustee may have had monies of his own in the bank to answer his drafts, whatever may have been the dealings upon the account and however long it may have continued. To apply the principle of *Pinkett* v. *Wright* to such a case as the present was, in my opinion, an unwarrantable extension of that principle, and certainly it would be attended with the greatest inconvenience.

I may remark, further, that the conclusion at which we have arrived in this case seems to me to be in conformity with the view of Lord Eldon to be collected from the case of *Lord Chedworth* v. *Edwards* (8 Ves. 46). In that case Lord Eldon, in the first instance, granted the injunction as to the monies in the bank, but afterwards, upon more mature deliberation, he refused that part of the injunction, and the ground on which he refused it was that the last payment, meaning as appears clearly by the context the last payment into the bank, had been made two years ago, thus indicating that had the last payment into the bank been recent, so that it could have been inferred that the monies remained there, he would have maintained **[395]** that part of the injunction also. After this indication of his opinion I feel no doubt that Lord Eldon would in the case before us have gone at least as far as we have gone. My only doubt is, whether he would not have gone much further. I am therefore also of opinion that this order must be reversed, and that the true result of the case is that which my learned brother has expressed.

(1) The following are the material sections of the order:—

13. That no official assignee shall keep under his control upon any one estate

more than £100, or, in the aggregate of monies of bankrupts' estate, more than £1000, and any excess beyond such sum shall be paid by him forthwith into the Bank of England.

14. That the official assignee, at the time of paying any monies into the Bank of England, shall state in writing, delivered therewith to the cashier of the Bank, in the form specified in the schedule hereunto annexed (No. 4), the date and amount of the payment, the name of the official assignee making it, the name and description of the bankrupt or bankrupts to whose estate the money belongs, and that it is to be placed to the credit of the accountant in bankruptcy; and the official assignee shall take a receipt for the same from the cashier of the Bank, and on the same day carry or transmit it to the office of the accountant in bankruptcy, who will give a proper voucher for such receipt, and that the money is placed to the credit of the estate of the said bankrupt or bankrupts in the books kept in the office of the accountant in bankruptcy; such voucher to be produced when called for by the Court.

15. That all monies without exception received by the official assignee, and not paid by him forthwith into the Bank of England to the credit of the accountant in bankruptcy, shall be paid by the official assignee, as soon as they shall amount to £100, into the hands of a banker, with whom such official assignee shall keep an account as such official assignee, such account to be entitled as official assignee, and in which account no monies shall be entered except such as are received by the official assignee in his official capacity.

[395] TUCKER *v.* HERNAMAN. Before the Lord Justices. *July* 18, 1853.

[S. C. 22 L. J. Ch. 791; 17 Jur. 723; 1 Sm. & G. 394. See *Engelbach* v. *Nixon*, 1875, L. R. 10 C. P. 653; *Ex parte Ford*, 1876, 1 Ch. D. 525; *Meggy* v. *Imperial Discount Company*, 1878, 3 Q. B. D. 720; *Tailby* v. *Official Receiver*, 1888, 13 App. Cas. 540.]

An uncertificated bankrupt carried on business for several years after his bankruptcy with the knowledge of his assignees and of others who were his creditors at the time of the bankruptcy. He died possessed of considerable property. On a claim filed by one of his executors against the other and the official assignee under the bankruptcy: Held, that the creditors subsequent to the bankruptcy were entitled to priority over the former creditors, and that the estate ought to be administered in Chancery.

The official assignee, who appealed against a decree to that effect, was ordered to pay personally the costs of the appeal.

This was an appeal from the decision of Vice-Chancellor Stuart, reported in the 1st Volume of Messrs. Smale & Giffard's Reports, page 394, where the facts are fully stated. The following is a short summary of them:—

A solicitor named Elswood became bankrupt in 1815, at Chard, in Somersetshire, and never obtained his certificate. In 1817 he went to Bungay, in Suffolk, and practised as a solicitor there till 1852, with the knowledge of some of his creditors, including his assignees. He died in 1852, leaving considerable property, and having made a will. An official assignee, who had recently been appointed under the bankruptcy, claimed the right of distributing the bankrupt's estate among the creditors, whereupon one of the executors, who differed from the other as to the course to be taken, filed a claim against the latter and the official assignee to have the **[396]** assets administered in Chancery, and the Vice-Chancellor, by the order under appeal, declared that the subsequent creditors were entitled to be paid in the first place out of the bankrupt's estate, and directed accounts to be taken of the real and personal estate of the testator.

The official assignee appealed.

Mr. Bacon and Mr. Schomberg, for the Plaintiff.

The case is completely governed by the authority of Lord Hardwicke in *Troughton* v. *Gitley* (Amb. 630). The form of the decree made there shews that the point was