of Urquhart, and that his emoluments as such in all amounted to £111, 4s. per annum; (2) That on the said Act coming into operation it was agreed between the School Board of the parish and the pursuer, in June 1873, that his salary for the year then current should be as previously, £111, 4s., and that he discharged the duties of his said office at that rate of salary from the said date till 2d August 1877, when it was raised to £130 per annum during the pleasure of the board; (3) That on 11th February 1880 the board reduced his salary to £111, 4s., the sum paid to him before the passing of the said Act, and intimated the reduction to him, and that it would take effect on 14th May thereafter, from which date till 14th May 1883 his salary was paid to him at the said reduced rate: Find in law that the defenders were under no obligation to pay to the pursuer for the three years ending at 14th May 1883 any salary exceeding the amount of his emoluments at the passing of the said Act, and are not resting-owing to him any portion of the sum sued for: Therefore dismiss the appeal, affirm the judgment of the Sheriff appealed against, find the defenders entitled to expenses," &c.

Counsel for Pursuer—D.-F. Mackintosh, Q.C. —Guthrie. Agents—John Clerk Brodie & Sons, W.S.

Counsel for Defenders—Comrie Thomson— —Begg. Agents—Morton, Neilson, & Smart, W.S.

Thursday, March 18.

FIRST DIVISION.

[Sheriff-Substitute of Forfarshire.

KIRKLAND *v.* MORE (KIRKLAND'S TRUSTEE).

Bankruptcy—Vesting of Estate in Trustee—Spes successionis—*Bankruptcy (Scotland) Act* 1856 (19 *and* 20 *Vict. cap.* 79), *secs.* 4, 81, 102.

Held (1) that a *spes successionis* belonging to a bankrupt, not being attachable by diligence, does not vest in the trustee in his sequestration under sec. 102 of the statute; but (2) that a *spes successionis*, if valuable, and capable of legal alienation, falls under the definition of "estate" in sec. 4 of the statute, and must be included by the bankrupt in his state of affairs under sec. 81, and made available by assignation to the trustee.

Observed that the proper course for the trustee where such an assignation is refused is not to object to a petition for discharge, but to report that the bankrupt has not made a full surrender of his estate.

Bankruptcy—Spes successionis—*Obligation to Assign—Discharge—Bankruptcy (Scotland) Act* 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 81.

Where a bankrupt petitioned to be found entitled to his discharge, and the trustee objected on the ground that he refused to convey to him a *spes successionis* in certain events to a liferent of estate, but it appeared that in the deed conferring this eventual right there was a clause that a party conveying his right thereunder should thereby forfeit the same and give place to the next in succession, and the deed conveying it should be void—*held* that in respect of this clause of forfeiture the *spes successionis* in question was of no value to the creditors, and the bankrupt could not be called on to convey it as a condition of his discharge.

The estates of John Kirkland & Son, wood merchants, Dundee, and of John Kirkland and David Robertson Souter Kirkland, the individual partners of the firm, were sequestrated on 27th August 1883, and Francis More, Chartered Accountant, Edinburgh, was appointed trustee. A dividend of 6s. 3¼d. per £ was paid on the estates of John Kirkland & Son, and a dividend of 3d. per £ on the estates of D. R. S. Kirkland as an individual.

This was a petition for discharge presented on 14th October 1885 in the Sheriff Court at Dundee by D. R. S. Kirkland. As the petition was presented more than two years after the date when sequestration was awarded, no consents of creditors were required under the statute (sec. 146).

The necessary report from the trustee had been obtained on 27th August 1884, and was in these terms—"The trustee has to report, in terms of the 146th section of the Bankruptcy (Scotland) Act 1856, that the aforesaid David Robertson Souter Kirkland has complied with all the provisions of the statute; that he believes that the bankrupt has made a fair discovery and surrender of his estate; that he has attended the diets of examination, and has not, so far as known to the trustee, been guilty of any collusion, but that his bankruptcy has arisen from losses in business, and not from culpable or undue conduct."

The trustee however lodged a note of objections to the bankrupt's petition for discharge, in which he made the following statement—"Under a deed of settlement granted by the late George Robertson Chaplin of Colliston, dated 29th September 1864, and recorded 13th May 1869, he conveyed to the bankrupt's mother in liferent, for her liferent use allenarly, and after her death to the bankrupt's brother Robertson, for his liferent use allenarly, and to the heirs of his body in fee, whom failing to the bankrupt in liferent, for his liferent use allenarly, the lands and estate of Harwood. Mr Chaplin died on 8th May 1869. The bankrupt's mother is alive and in the enjoyment of the liferent of that estate conferred on her by Mr Chaplin's deed of settlement. The bankrupt's brother Robertson is alive, and he is unmarried. The bankrupt has been called on by the trustee to convey to him for behoof of the creditors the *spes successionis* conferred on him by Mr Chaplin's deed of settlement, but the bankrupt has refused to grant any such deed. The trustee believes that if he were in possession of a conveyance to that *spes successionis* he could realise a very considerable sum for it."

The trustee therefore objected to the discharge until the bankrupt should have conveyed to him for behoof of his creditors his *spes successionis* to the liferent of the estate of Harwood.

The deed of settlement conferring this *spes successionis* upon the bankrupt contained this clause—"All parties who shall at my death or at any time thereafter have any beneficial interest, contingent or otherwise, under this settle-

ment, are hereby prohibited from selling, mortgaging, or otherwise disposing of such interest, excepting always sales or mortgages by parties who are absolute fiars of any of the said estates, and it is hereby stipulated and provided that such sales or mortgages if made shall be void, and all deeds or instruments purporting to be a sale or mortgage of such interest, or of any part thereof, shall be null and void, and all parties signing such deeds or instruments shall thereby forfeit and lose all right and benefit under this settlement, and shall give place to the next in succession, who shall be entitled to come in the right and place of the party signing such deeds or instruments."

The Sheriff-Substitute on 18th November 1885 remitted to the Accountant in Bankruptcy "that he may have an opportunity of reporting whether the bankrupt has fraudulently concealed any part of his estate or effects, or whether he has wilfully failed to comply with any of the provisions of the Bankruptcy (Scotland) Act 1856."

The Accountant in Bankruptcy reported that the trustee's report so far as regarded the two points specified in the Sheriff's interlocutor was correct, and that there was nothing unfavourable to the bankrupt to report on these two heads.

The Sheriff-Substitute (CAMPBELL SMITH) found the bankrupt entitled to his discharge, but before granting the same appointed him to appear and make the statutory declaration.

"*Note.*—Under the deed of settlement of the late Gorge Robertson Chaplin, her granduncle, the bankrupt's mother is liferented in the estate of Harwood, and that estate is destined to her children in the following order — (1st) her youngest son in liferent and the heirs of his body in fee, whom failing (2d) to her second son, who is the bankrupt, in liferent and the heirs of his body in fee, whom failing (3d) to her third son in liferent and the heirs of his body in fee, whom failing (4th) to her daughters successively in the order of age and according to an analogous destination. The bankrupt's mother is still alive and in possession, and her youngest son, the first of the substitutes, is also alive. The trustee in the sequestration objects to the bankrupt obtaining his discharge unless upon the condition that he shall assign his *spes successionis* in the estate of Harwood for the benefit of his creditors. The Sheriff-Substitute does not feel justified in attaching any such condition to the bankrupt obtaining his discharge. The Bankruptcy Statutes have already carried the bankrupt's whole estate, heritable and moveable, to the trustee, and it has been distributed amongst his creditors. If the Legislature intended that a bankrupt should be stripped of any or every *spes successionis* it ought to have said so, and not having said so it cannot be presumed that it entertained any such intention. But there is another reason why the bankrupt should not be called upon to assign, and that is, that under the deed giving him the *spes successionis* the power to assign it is cut off, all deeds to that end being declared null and void, and the penalty of forfeiture of all right imposed on the maker of any such deed. The result of that irritant and penal clause would be to annul the assignation, and to forfeit the bankrupt's possible right in the estate of Harwood. The only certain result of his granting an assignation would be to operate a forfeiture against himself and his children. That forfeiture might prove to be for the advantage of his next brother, and failing this brother, of the sisters in their order, but to compel a bankrupt to forfeit a right in order to benefit somebody else is to adopt a procedure which might be worked so as to realise a trifle for creditors, but is of such a novel character as not to warrant its invention or application in almost any conceivable circumstances, and certainly not in the circumstances of the present petitioner."

The bankrupt thereafter made a declaration in terms of the statute.

The trustee appealed to the Court of Session, and argued—It was conceded on the authority of *Trappes* v. *Meredith*, November 3, 1871, 10 Macph. 38, that this right did not fall within the sequestration without assignation by the bankrupt. But that was just the reason why the bankrupt should not get a discharge without assigning his interest — *M'Donald* v. *M'Grigor*, March 10, 1874, 1 R. 817; *Learmonth* v. *Paterson*, January 21, 1858, 20 D. 418; *Napier* v. *Paterson*, December 3, 1850, 13 D. 222; *Blaikie* v. *Peddie*, November 25, 1871, 10 Macph. 140. The clauses in the settlement did not prevent assignation. The testator could not impose these prohibitions except by a trust or an entail— *White's Trustees* v. *Whyte*, June 1, 1877, 4 R. 786. The Court should either refuse the discharge *hoc statu* or impose the condition of assigning this interest.

The bankrupt argued—The trustee was forced to take up the position that this interest was not aimed at by section 102, and so did not fall under the sequestration, as otherwise his present application was incompetent. The observations in Bell's Comm. ii., 367, 7th ed. (409, 5th ed.) applied to the statute 54 Geo. III. c. 137, sec. 56, under which the position of a bankrupt was less favourable, and therefore applied *a fortiori* to a case under the Act of 1856. The words of section 81 were controlled by the general vesting clause. This *spes successionis* could clearly not be adjudged —*Beaton* v. *M'Donald*, June 7, 1821, F.C., and 1 S. 53—nor poinded nor arrested; Stair iii., 2, 47. Granted that the application was within the discretion of the Court, it was not a case for interfering with the judgment of the Sheriff—*Buchanan* v. *Wallace*, February 3, 1882, 9 R. 631; *Neill* v. *Neill's Trustees*, December 20, 1873, 1 R. 320.

At advising—

LORD PRESIDENT—In this case sequestration was awarded on 27th August 1883, and the bankrupt's petition for discharge was presented on 14th October 1885. That being more than two years from the beginning of the sequestration no consent of creditors was required, but the bankrupt required to get a report from the trustee, and he has obtained that report, which is quite favourable. It is certified in the report that the bankrupt has complied with the provisions of the statute; that according to the belief of the trustee he has made a fair discovery and surrender of his estate; that he has attended the diets of examination, and has not been guilty of any collusion, "but that his bankruptcy has arisen from losses in business, and not from culpable or undue conduct." When the case was before the Sheriff-Substitute he thought it right to obtain a report from the Accountant in Bank-

ruptcy as to whether the bankrupt had fraudulently concealed any part of his estate, or had wilfully failed to comply with any of the provisions of the Bankruptcy Act, and a remit was made for that purpose. The Accountant in Bankruptcy has reported that the trustee's report, so far as regards these two points, "is correct, and there is nothing unfavourable to the bankrupt to report on these two heads."

In these circumstances, the bankrupt's application being apparently made after due compliance with all the necessary conditions, the trustee comes forward with a note of objections, and these objections are to the effect that the bankrupt has an expectant right to a certain succession, which the trustee explains thus:—"Under a deed of settlement granted by the late George Robertson Chaplin of Colliston, dated 29th September 1864, and recorded 13th May 1869, he conveyed to the bankrupt's mother in liferent, for her liferent use allenarly, and after her death to the bankrupt's brother Robertson, for his liferent use allenarly, and to the heirs of his body in fee, whom failing to the bankrupt in liferent, for his liferent use allenarly, the lands and estate of Harwood." This brother of the bankrupt is unmarried, and apparently about twenty-five years of age; and the bankrupt's mother is alive and in possession of the liferent of the estate. The trustee then goes on to say—"The bankrupt has been called on by the trustee to convey to him for behoof of the creditors the *spes successionis* conferred on him by Mr Chaplin's deed of settlement, but the bankrupt has refused to grant any such deed. The trustee believes that if he were in possession of a conveyance to that *spes successionis* he could realise a very considerable sum for it." And accordingly the trustee proposed to the Sheriff-Substitute that the bankrupt's discharge should not be granted except upon condition of his making an assignation of this *spes successionis* for the benefit of his creditors.

The Sheriff-Substitute has rejected that proposal, and he found that the bankrupt was entitled to his discharge; the bankrupt was appointed to appear and make the statutory declaration, which he did, but the discharge has not yet been granted.

The trustee has appealed against the judgment of the Sheriff-Substitute, and it was argued for him that this *spes successionis* or prospective right to the liferent of the estate of Harwood falls within the operation of the 102d section of the Bankruptcy Act. That raises a question of considerable importance. The 102d section has been frequently construed, but not so far as I am aware with reference to a question such as now arises. This section is in some respects substantially the same as the corresponding clauses in the previous Bankruptcy Acts, though not altogether. But it is first of importance to observe with regard to the Act generally the terms of the interpretation clause, sec. 4, which declares that the terms "property" and "estate" shall, "when not expressly restricted, include every kind of property, heritable and moveable, wherever situated, and all rights, powers, and interests therein capable of legal alienation, or of being affected by diligence or attached for debt." This definition of the words "property" and "estate" is of course, like every definition in any Act of Parliament, to hold good only when the meaning of the words is not otherwise restricted—that is to say, those words are to have that meaning when the clause in which they occur does not impose upon them a different signification.

I think it right next to refer to the terms of section 29, because that section declares what the effect of a sequestration is to be. It provides that "when a petition is presented for sequestration the Lord Ordinary or the Sheriff shall forthwith . . . issue a deliverance by which he shall award sequestration of the estate which shall then belong or shall thereafter belong to the debtor before the date of the discharge, and declare the estate to belong to the creditors for the purposes of this Act." These words I think are of great importance as affecting the general construction of the Act. What are "the purposes of this Act?" There is of course a great deal which is mere machinery, and that of course cannot be said to contain the purposes of the Act. The purposes are ascertained in sections 121 and 155. Section 121 provides for the realisation of the bankrupt's estate and its division among the creditors in order to extinguish their claims, or if insufficient for that to satisfy these claims so far as it will go. Section 155 provides that the surplus that may remain after paying debts, interest, and the cost of distribution, shall be conveyed to the bankrupt. These, then, are the purposes referred to in section 29. The object or purpose of the Act (section 121) does not necessarily require anything more than that the estate which vests in the trustee shall be made a complete security in his person in order to pay the creditors so far as it will go. The one idea which runs through the system contained in the statute is that the estate which is to be realised and divided so as to pay the debts shall be put into the trustee's hands as a security for that purpose. This idea runs through many of the cases which have been decided in regard to this matter, but I do not know if I have ever seen it better put than in the case of *Mackenzie* v. *Smith*, 23 D. 1201, by Lord Jerviswoode, who says—"The statutory conveyance to a trustee under the law of bankruptcy is *ex facie* absolute, but after all it is a conveyance for the limited purpose of paying the bankrupt's own debts. It thus in reality only operates as a removing from him for a special purpose the control of what is still radically his own." And in expressing that opinion Lord Jerviswoode followed the opinion of Lord Fullerton in the earlier case of *Gavin* v. *Greig*, 5 D. 1191. Now, keeping this in view, what has section 102 done? It seems to be assumed that the estate is transferred to the trustee just as if there had been a disposition and conveyance of everything vested in the bankrupt and infeftment in favour of the trustee. But that is not all that is done by section 102. That section provides that "the act and warrant of confirmation in favour of the trustee shall *ipso facto* transfer to and vest in him or in any succeeding trustee for behoof of the creditors, absolutely and irredeemably, as at the date of the sequestration, with all right, title, and interest, the whole property of the debtor to the effect following." Then the section provides, first, with regard to the moveable estate wherever situated, that it shall only vest "so far as attachable for debt to the same effect as if actual delivery or possession had been ob-

tained or intimation made at that date," subject always to preferable securities. Nothing can be more clear than that nothing is transferred by that part of the section except moveable estate which is attachable for debt. And though these words are not repeated when we come to that part of the section which deals with heritable estate, the same result is operated, because it is seen that the heritable estate is to be vested in the trustee to the same effect as if every species of diligence suitable to attach heritable property had been used. The words are these—"The whole heritable estate belonging to the bankrupt in Scotland, to the same effect as if a decree of adjudication in implement of sale, as well as a decree of adjudication for payment and in security for debt, subject to no legal reversion, had been pronounced in favour of the trustee, and recorded at the date of sequestration, and as if a poinding of the ground had then been executed, subject always to such preferable securities as existed at the date of the sequestration, and are not null and reducible, and the creditors' right to poind the ground as hereinafter provided; and the right of the trustee shall not be challengeable on the ground of any prior inhibition (saving the effect which such inhibition may be entitled to in the ranking of creditors): Provided always that such transfer and vesting of the heritable estate shall have no effect upon the rights of the superior, nor upon any question of succession between the heir and the executor of any creditor claiming on the sequestrated estate, nor upon the rights of the ancestor (except that the Act and warrant of confirmation shall operate in their favour as complete diligence)." The object of this last provision is to place the creditors of the ancestor in quite as favourable a position as the creditors of the bankrupt, and all that is said in order to put them in that position is that the trustee's act and warrant shall operate as complete diligence in their favour, still more emphatically showing that nothing but what can be carried by diligence is given to the trustee. There is just one form of diligence that it is necessary to notice, viz., adjudication in implement, because that might be represented as not so much a form of diligence as a mode of completing a title to property in which the party has a personal right. On that point I am disposed to concur with Professor Bell in what he says on this subject in treating of adjudication in implement (Com. 7th ed. i. 784, 5th ed. i. 750)—"It seems to be consistent with that equity which first introduced the remedy of adjudication in implement that two or more persons having equal pretensions to demand a complete transference should be conjoined in one complex adjudication, and the subject either sold or divided for their benefit. Truly, they are nothing more than creditors, for while no real right or *jus in re* has been constituted, the *jus ad rem* that each enjoys resolving into a mere action makes them proper personal creditors. 2. As there is in bankruptcy no true distinction among creditors who hitherto hold nothing but a mere personal obligation, whether that obligation be to pay money or to convey land, or to perform any other specific act—a creditor for a money debt being just as well entitled to have direct execution against the debtor's land as one who holds an obligation from the debtor to convey his land to him—so a creditor obtaining an adjudication in implement will not have preference over a creditor for debt who with a decree of adjudication in payment has previously completed his security by sasine. Neither ought the adjudger in implement to prevail over the other money creditors who come within year and day of a prior adjudication for debt completed by infeftment (though subsequently to his adjudication in implement and sasine). The subject is already attached preferably for the benefit of all who come within the year, and the adjudger in implement may still adjudge as a common creditor for damages." The true view therefore, I think, of adjudication in implement is that it is one of the diligences suitable to attach heritable estate in order to satisfy a creditor who has a personal obligation; therefore I arrive at the conclusion that under sec. 102 the right of the trustee to the heritable estate is to be measured by the diligences which are specified in the second subsection, just as his right to the moveable estate is limited in the first subsection by the words "so far as attachable for debt." So that if the right which the bankrupt here has is not one which can be attached for debt if no diligence could be used in regard to it, it must follow that it is not vested in the trustee by force of the 102d section. How does that stand? The estate is enjoyed in liferent by the bankrupt's mother, and she will in all probability be succeeded by the bankrupt's brother. He has a liferent right allenarly, but at his death the estate goes to the heirs of his body in fee. So it is only on the failure of his mother and of his brother without issue that the bankrupt can take. Is that remote and contingent right attachable for debt? It must be considered a heritable right, because it is a right to heritable estate. If it were moveable, it certainly could not be attached for debt either by arrestment or poinding. Taking it to be a heritable right, can it be adjudged? There is an authority which directly negatives the possibility of that—the case of *Beaton* v. *M'Donald*.

The report of that case in 1 Sh. (new ed.) p. 53, is very meagre, but that in the Faculty Collection, June 7, 1821, is much fuller, the most valuable part being that which gives the precise terms of Lord Alloway's judgment, which was adhered to. The right there was the contingent right of an eldest son to succeed to the estate of his father, who was alive but a lunatic, and whose factor *loco tutoris* appeared for him, and it was proposed to adjudicate the right under the Statute 1672, c. 19. The Lord Ordinary pronounced an interlocutor dismissing the action as incompetent "in respect that although Alexander M'Donald is the eldest son of his father, there is no right vested in him as heir-apparent, and which right does not open till after his father's death; in respect that this proceeding is altogether new, in so far as the Lord Ordinary knows, in the law of Scotland, in which there has been no previous attempt to adjudge a *spes successionis*, and which, if competent, might lead to the most inexpedient and oppressive measures, since the right of any person who had the possibility of succession to any estate might be adjudged, and even the right to this succession to the estate secured by a decree of expiry of the legal, and in respect that a general adjudication under the Sequestration Act, although carrying every right which was in the person of the

bankrupt, has never been held to carry any right of succession which may afterwards open to him." The case was elaborately argued, and the interlocutor of the Lord Ordinary was unanimously adhered to. That case, therefore, seems to me a weighty authority to the effect that such a *spes successionis* as this is not adjudgeable, and therefore cannot fall under the general adjudication in favour of the trustee in a sequestration.

This matter was brought under the notice of the Court in another case which stands in a very peculiar position, because the judgment took the form of answers given to questions put by the Court of Chancery, and the Court had no occasion or opportunity for stating the grounds of their judgment, but merely gave categorical answers to the questions which were asked. That was the case of *Trappes* v. *Meredith*, November 3, 1871, 10 Macph. 38, which has been quoted in argument in the present case. In that case the bankrupt had been discharged, and the first question put to the Court of Session was whether a certain annuity given to the bankrupt by clause 1 of the will assuming it to be by the English law capable of legal alienation at and from the death of the testatrix, would but for clauses 2 and 3 have fallen under the sequestration? The answer which the Court gave to that question was this—"By the law of Scotland a right or estate in expectancy or *spes successionis* may be sold and assigned so as to give the purchaser a good title in a question with the seller to the right, estate, or succession when it comes to be vested in the seller. But such right or estate in expectancy or *spes successionis* is not attachable by the diligence of creditors of the person in expectancy or entitled to succeed, and would not be carried to the trustee in his sequestration if he should be discharged before such right, estate, or expectancy vested in him." That, I apprehend, follows the same view which I have been endeavouring to explain. Therefore I hold it to be settled that a right of this kind not being attachable by diligence does not fall under the operation of section 102 or vest in the trustee.

But there is a second point in the case which creates a difficulty of an entirely different kind. The 81st section of the Bankruptcy Act provides that "the bankrupt shall make up and at the meeting appointed for the election of a trustee deliver to the clerk of such meeting a state of his affairs specifiying his whole property wherever situated, the property in expectancy or to which he may have an eventual right. . . and the bankrupt shall at all times give every information and assistance necessary to enable the trustee to execute his duty; and if the bankrupt fail to do so or to grant any deed which may be requisite for the recovery or disposal of his estate, the trustee may apply to the Sheriff to compel him to give such information and assistance, and to grant such deeds under the penalty of imprisonment," &c. The question here comes to be whether as this expectancy or *spes successionis* is capable of legal alienation, the bankrupt may not be called on at any time to grant an assignation to the trustee, and whether it is not a fair condition to adject to the obtaining his discharge that he should execute such an assignation. That must always be a question of circumstances, and a matter which is within the discretion of the Court. I think that if a person was in the immediate expectation of succeeding to an entailed estate, and the heir preceding him were on his death-bed, it would be a very strong thing to say that the creditors were to receive no benefit. If the bankrupt in such circumstances were called on to grant an assignation, the Court would probably insist upon his doing so. On the other hand, there are some rights so visionary and remote that the Court would not be disposed to make the assignation of such as these a condition of the bankrupt's obtaining his discharge. So that it must always be a question whether the right is under the circumstances such a right as the creditors are fairly entitled to have the benefit of.

In the present case I think the matter is very clear. If the trustee did get an assignation I do not see that it would be of any use to him, because on a construction of the deed of settlement it appears that the granting of such an assignation would infer a forfeiture of the right transferred. It appears to me, therefore, that the right given to the bankrupt is given under the condition that he shall not anticipate it by assigning his prospective right, and that if he does so the instrument by which he assigns it shall be void.

Perhaps it was hardly within the power of the testator to make that declaration, but it certainly was in his power to say, and he does say, that if anyone entitled to succeed under the settlement executes such an instrument then he shall not succeed, but the person next in order of succession shall take. The testator has given the bankrupt a right of liferent under that condition, and if the condition is not observed the right goes to some-one else. If, therefore, the right supposing it were assigned would be worth nothing to the creditors, it is vain to talk of forcing the bankrupt to assign it.

Lord Shand—I agree with your Lordship in thinking that the right which the trustee proposes to vindicate is not one of the class which will be vested in the trustee in the sequestration by virtue of section 102 or vesting clause of the Bankruptcy Statute, but upon the other point I am of opinion that if it had not been for the peculiarity to which your Lordship had last alluded, viz., that any conveyance of this subject to the trustee would be nugatory, the trustee would have been right, and would have been entitled to demand and to get that conveyance.

Section 4 of this statute, as your Lordship has pointed out carefully, provides that the word estate, when it is not controlled or limited by other words which shall affect its meaning, shall include all rights, powers, and interests capable of legal alienation, and again in section 81 of the statute we have the provision that the bankrupt shall make up a state of his affairs, and shall therein disclose to his creditors all the property which he has in expectancy, or to which he may have an eventual right, and the clause goes on to provide that the bankrupt shall be bound to grant a conveyance of his estate to his trustee if required, and accordingly although it may be quite true that the vesting clause of the statute —operating only as completed diligence of every kind in favour of the trustee, both in regard to heritable and moveable property—would not carry out the object which the trustee has in

view, it appears to me that the bankrupt is bound under section 81 of the statute to convey to the trustee, if required, any right of property which he has in expectancy or to which he may have an eventual right, and which in the words of section 4 is "capable of legal alienation," and which may be of value or may become valuable to the creditors.

I think that view is confirmed by reference to sections 146 and 147 of the statute, which contain provisions with reference to the very matter of the bankrupt obtaining his discharge, with which we are here dealing, for it is provided by section 46 that the bankrupt shall, as a condition of obtaining his discharge, get from the trustee a "report with regard to the conduct of the bankrupt, and as to how far the bankrupt has complied with the provisions of this Act, and in particular whether the bankrupt has made a full and fair discovery and surrender of his estate." And as the word "estate" in section 4 includes rights and powers which are capable of legal alienation, it must therefore be shown to the satisfaction of the Court that the bankrupt has made a fair discovery and surrender of property in expectancy, or to which he may have an eventual right. The same thing is to be inferred from section 147 of the statute, which goes on further to provide that the bankrupt must make a declaration before the Lord Ordinary or the Sheriff that he has made a full and fair surrender of his estate, and the estate there, as in section 146, is the same as in section 4, to which I have referred.

My opinion therefore in regard to the statute is that although rights of property in expectancy are property to which the bankrupt may have an eventual right, which is nevertheless capable of legal alienation, are not carried by the vesting clause of the statute, the trustee and creditors have power to compel the bankrupt as a condition of his discharge to grant an assignation of these rights where they are of value. And accordingly if it had been shown in this case that this right was really of value, I should have held that the trustee was right in his opposition to the discharge of the bankrupt. But I agree with your Lordship in thinking that the case here is entirely different, and that if this bankrupt is to grant the conveyance which is here asked, the effect of his granting it would be that he would forfeit the right to the thing himself. He would confer no right on the trustee. He would contravene the terms in which the right was given to himself, and so forfeit it. And so looking at the matter, I am of opinion that the bankrupt cannot be called upon to convey this right, and therefore I agree with your Lordships that we should affirm the interlocutor of the Sheriff.

With reference to the argument founded on the case of *White's Trustees* v. *Whyte*, 4 R. 786, I wish to point out that the case here is not the same as it would have been if the bankrupt had been in possession of the interest to which he is entitled under the settlement. Then if there had been a challenge of the deed by which he wanted to transfer that interest, I think the objection would not have been good, because there is no trust. But the bankrupt is not in possession.

Lord Adam—The only ground upon which the trustee opposes the discharge of the bankrupt is, that the bankrupt refuses to assign to him for behoof of the creditor a *spes successionis* which he has under the settlement of Mr Chaplin, the late proprietor of Harwood, to succeed to that property in liferent after the death of his mother, in the event of his surviving her, and in the event of his younger brother dying before him without issue. If these events occur, then he will succeed to that liferent right. It is because he refuses to assign that eventual and contingent right that the trustee opposes his discharge. The Sheriff-Substitute has found that this condition should not be attached to the discharge, and he proceeds upon two grounds, one of which I think is good, but the other of which I think is bad. He says—"The Bankruptcy Statutes have already carried the bankrupt's whole estate, heritable and moveable, to the trustee, and it has been distributed among his creditors." Now, I do not think that this is so in fact. I think the Sheriff-Substitute takes an erroneous view upon that point. I concur in the construction of the vesting clause, section 102, which your Lordship has given, and the result of which is that nothing moveable is carried to the trustee which is not capable of being attached by the diligence which is appropriate to moveables, while those heritable rights only—and this is the case of a right in heritage—are carried which are capable of being affected by the diligence applicable to heritable estate. If a right is in one of those positions, then it vests *eo ipso* in the trustee, and if so—if the right here had already vested—then the present question need not have been argued, since the right is already in the trustee and he needs no assignation. But the question is, the right being one of a kind which is not vested in the trustee, what has vested in him under section 102? Is it the whole estate of the bankrupt? I think it is not. The Sheriff-Substitute goes on to say—"If the Legislature intended that a bankrupt should be stripped of any or every *spes successionis*, it ought to have said so, and not having said so it cannot be presumed to have entertained any such intention." Now, I think the Sheriff-Substitute is wrong in that view. I think that the Legislature has said so—that it has said that a bankrupt's *spes successionis* is to be made available for the benefit of his creditors. It is the intention of the Legislature that all valuable rights shall be made available to the trustee, some by the vesting clause, and some by assignation by the bankrupt. I think that the right here in question is one of the latter kind, and that the interpretation clause, section 4, which defines "estate" makes that distinct. The section I refer to defines "estate" thus, that it "shall, when not expressly restricted, include every kind of property, heritable and moveable, wherever situated, and all rights, powers, and interests therein capable of legal alienation, or of being affected by diligence or attached for debt," and the question is, whether this right is "not capable of legal alienation?" No one says it is not, apart from the special clause of forfeiture which has been adverted to by your Lordship. Again, section 81, which provides that the bankrupt shall make up a state of his affairs, directs that that state shall be one specifying "property in expectancy or to which he may have an eventual right," and section 95, which gives the bankrupt

an opportunity of correcting his state of affairs before the close of his examination, provides that the oath to be taken by him as to the correctness thereof shall bear that the state of affairs contains "a full and true account to the best of my knowledge and belief . . . of all claims which I am entitled to make against any person or persons whatsoever, and of all estate in expectancy or means of whatever kind to which I have an eventual right by contract of marriage, trust-deed, settlement, deed of entail, or otherwise." It was the clear duty, then, of the bankrupt—and I do not doubt that he performed it—to set out in his state of affairs the eventual right now in question. I think that the statute could not possibly have used words more applicable to it than those which I have read, for this is nothing else than an "eventual right." For what purpose, then, is such a right to be set forth in the state of affairs? If we go to section 81, we find that if the bankrupt fails to give the trustee every information and assistance to grant any deed which may be necessary for the recovery or disposal of his estate, the trustee may apply to the Sheriff to compel him to do so. These words must apply to any estate of the nature of an eventual right, and if we go on to section 82 we find that it is the duty of the trustee "to manage, realise, and recover the estate belonging to the bankrupt, wherever situated, and convert the same into money, according to the directions given by the creditors." What estate? It must be that referred to in the immediately preceding section, which contemplates that it may be necessary that the bankrupt shall be called on to grant deeds necessary for the recovery or disposal of his estate. If the vesting clause of the statute—the 102d—makes the right available to the trustee, no more will be necessary, but if not, then it is the duty of the trustee to recover the subject by calling on the bankrupt to execute any necessary assignation.

That is my view of the meaning of the statute, and I therefore differ from the Sheriff-Substitute. I think, indeed, that it would have been monstrous if it had been otherwise, for, as has been pointed out, if the trustee could only recover what the vesting clause declares to vest in him, then a next heir-of-entail, if he were the bankrupt, could go into the market and dispose of a valuable *spes successionis* for, it might be, £1000, without the trustee having the power to make the right available to the creditors.

Being, then, of opinion that an eventual right of the nature of that in dispute can be made available to the trustee, and that he can require an assignation of it, I think that in future cases it will be the more logical course for a trustee not to enforce such assignation by opposing the discharge when applied for unless the bankrupt will execute the required assignation, but rather to report, in the case of such refusal, that the bankrupt has not made a fair and full surrender of his estate. That course, however, would not have been applicable to the special circumstances of this case. In the present case the eventual right in dispute is in a peculiar position, and that makes an assignation of it useless to the trustee, for it is a gift to the bankrupt under a condition. That condition is, that he is prohibited from disposing of his interest under Mr Chaplin's deed, and that it is thereby declared that his right is to be forfeited in the event of his executing any such conveyance as the trustee demands. The trustee would therefore derive no benefit for the creditors from the assignation he is seeking to obtain as a condition of the discharge. I therefore concur with the Sheriff-Substitute in thinking upon this ground that the trustee cannot insist upon the assignation he demands.

Lord Mure was absent.

D.-F. Mackintosh moved that in order to avoid delay the process should be remitted to the Sheriff-Substitute with power to decern for the expenses as taxed in the Court of Session.

The Court pronounced an interlocutor by which their Lordships refused the appeal and authorised the proceedings in the Sheriff Court case to be transmitted forthwith to the Sheriff-Clerk along with a certified copy of this interlocutor, in order that the Sheriff might proceed in virtue thereof with the application for discharge.

Counsel for the Trustee (Appellant)—Gloag—Guthrie. Agents—Davidson & Syme, W.S.

Counsel for Kirkland (Respondent)—D.-F. Mackintosh, Q.C.—Graham Murray. Agent—J. Smith Clark, S.S.C.

Friday, March 19.

OUTER HOUSE.

[Lord Trayner.

DALGLEISH *v.* MITCHELL.

Process—Abandonment—Withdrawal of Minute of Abandonment.

The pursuer after the record in an action had been closed and a discussion had taken place in the Procedure Roll, gave in a minute of abandonment, and an interlocutor was pronounced allowing the pursuer to abandon on payment of expenses to the defender and remitting the account to the Auditor for taxation. Thereafter the pursuer craved leave to withdraw the minute of abandonment. The defender opposed this motion. The Lord Ordinary *allowed* the pursuer to withdraw the minute of abandonment on payment to the defender of the expenses connected with the proposed abandonment.

Counsel for Pursuer—C. N. Johnston. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Defender—M'Kechnie. Agents—Curror, Cowper, & Curror, S.S.C.