question they had to decide. Now, having determined that Nicol M'Nicol was not fit to have the uncontrolled command of his share, they were bound to put it under restrictions, one of these being that he was only to have an alimentary liferent of the share. If the succession to the fee had not depended on the execution of the trust purposes, probably there would have been no great harm in the trustees acting as they did, but apparently in the event of either of his sons being unable to look after the management of his share, the testator wished the money to be divided among the next-of-kin of himself and his wife. That being so, it seems impossible to maintain that the trustees could by any act of their own defeat the expectation of the wife's next-of-kin under this proviso of the will. But this is what they have done, not with the intention of injuring any person, but from thoughtlessness and from not considering carefully the extent of their powers under the will. In such a case I think that the maxim *quod fieri debet infectum valet* applies, and that the estate must be divided as if the trustees had limited Nicol M'Nicol to an alimentary liferent, as they were bound and required to do by the terms of the deed under which they acted.

LORD KINNEAR—If I could have held that the trustees had an absolute discretion, as the Lord Ordinary has done, I should have come to the same conclusion as he did, but I agree with your Lordships that they had no absolute discretion, and that they were required, in the exercise of the duty imposed upon them by the testator, to consider and determine whether it was prudent or expedient to give both or either of his sons the uncontrolled command of their expected interest in his succession. The words in which this direction is expressed are, I think, not immaterial, because the deed describes the interest of the sons in the succession not as given to them, but as "their understood or expected interest." The judgment of the trustees on the question they had to determine is absolute and conclusive, and when they had determined it in favour of either of the testator's sons, there is no question what they had to do. If they determined that either son was not in a position to be entrusted with the uncontrolled command of his expected interest, a very wide discretion was given them as to the method of restricting or limiting that interest. They might limit him to an alimentary liferent of the whole or of a part of his share, or they might advance him a part for the purpose of setting him up in business, but they had no wider discretion than this. They have no discretion to resolve that the son was not in a condition to be entrusted with the uncontrolled command of his share, and then to proceed to give him his share, because the only condition on which they were entitled to make over to him a whole or a part of his share was when they had resolved that it would be prudent that he should have his share uncontrolled and without limitation.

That being my construction of the deed, I agree that what the trustees have done is to resolve that Nicol M'Nicol should not have the uncontrolled disposal of his share, and then to put him formally and legally, if not practically, in the same position as if he had the full control over and the uncontrolled disposal of it. I agree therefore that the Lord Ordinary's interlocutor must be recalled.

The Court recalled the Lord Ordinary's interlocutor, found that Nicol M'Nicol had right only to an alimentary liferent of one moiety of the residue of his father's estate, and that the capital of the estate conveyed to Nicol M'Nicol by his father's trustees belonged, one-half to the next-of-kin of Donald M'Nicol, and one-half to the next-of-kin of the spouse of Donald M'Nicol; and remitted to the Lord Ordinary to proceed.

Counsel for the Claimants Grace M'Nicol or Mitchell and Others—Guthrie—T. B. Morison. Agents—Robert D. Ker, W.S., and Peter Morison, S.S.C.

Counsel for the Claimants Margaret Clark or M'Nicol and Others—H. Johnston—Ure. Agents—J. & J. Galletly, S.S.C.

Saturday, February 18.

FIRST DIVISION.

DRYBROUGH & COMPANY *v.* MACDONALD.

Bankruptcy—Sequestration—Acquisition of Property by Undischarged Bankrupt after Discharge of the Trustee—Acquiescence of Creditors—Appointment of New Trustee—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 103.

The estates of a bankrupt were sequestrated in 1874, and yielded less than a shilling in the £. The trustee was discharged in 1877. In 1893 a creditor petitioned for the election of a new trustee, alleging that it had recently come to his knowledge that the bankrupt was possessed of property of considerable value. The bankrupt answered that any property he possessed had been acquired by his own industry since 1878, and that the petitioner, as he had been aware that the bankrupt was carrying on business and had done nothing to enforce his rights, was barred from insisting in the petition. The Court, without pronouncing any opinion as to the respective rights of the creditors and the bankrupt to the property which the latter had acquired, *granted* the petition.

This was a petition at the instance of Messrs Drybrough & Company, brewers in Edinburgh, for the election of a new trustee on the sequestrated estates of Messrs J. & A. Macdonald, bottlers in

Melrose, and of James Macdonald and Alexander Macdonald, the individual partners of said firm.

The petitioners stated that the estates of the firm of J. & A. Macdonald and of the individual partners thereof had been sequestrated in December 1874; that thereafter a trustee had been elected, and the sequestrated estates, so far as known and available at the time, had been realised and divided among the creditors of the bankrupts, the dividend paid being elevenpence in the £; that the trustee in the sequestration had been discharged in 1877, but that the bankrupts had not been discharged or reinvested in the sequestrated estates; and that it had lately come to the knowledge of the petitioners that Alexander Macdonald was proprietor of heritable property in Hawick, with a rental of £120 per annum, and was also possessed of personal estate of large amount.

Answers were lodged by Alexander Macdonald, in which he stated, *inter alia*, that in 1877 "he started business as a grocer in Hawick, and continued as such till 1882. From 1882 until Whitsunday of last year, he carried on a wine and spirit business in Hawick. He has recently retired from business and gone to live in Liverpool. The income from his savings is not more than sufficient for the support of himself and his family. Any property which Alexander Macdonald now possesses has been acquired by his own industry since the year 1878. The petitioners also allowed James Macdonald to carry on the bottling business of J. & A. Macdonald for many years after the sequestration, and never asked him to account for the profits of that business. The petitioners knew that the said Alexander Macdonald was carrying on business in Hawick, but during the last nineteen years they have shown no disposition to avail themselves of their rights, and have allowed Alexander Macdonald to keep possession of his estate and deal with it as he pleased, and they are now barred by lapse of time and the implied discharge which they gave Alexander Macdonald, from insisting in the present petition."

Argued for the petitioners—The bankrupt never having been discharged and being possessed of considerable property, the petitioning creditor was entitled to have the sequestration revived by the appointment of a new trustee. The contention of the respondent that the petitioners had abandoned their claim against him did not fall to be considered under the present petition, but was a matter for the consideration of whoever might be appointed trustee—*Heritable Securities Investment Company, Limited* v. *Whyte*, November 21, 1888, 16 R. 100.

Argued for the respondent—It would be an extreme hardship for the respondent if the sequestration were revived after the long lapse of time which had occurred. The 103rd section of the Bankruptcy Act was open to construction, and cause might be shown why the claims of creditors should not receive effect. It might be shown that they had abandoned their claims—*Whyte* v. *Northern Heritable Securities Investment Company*, June 16, 1891, 18 R. (H. of L.) 37, *per* Lord Watson, 39. Creditors would be held to have abandoned their claims if they had acquiesced in the bankrupt's trading for his own behoof—*Taylor* v. *Charteris*, November 1, 1879, 7 R. 128, *per* Lord President, 131; *Abel* v. *Watt*, November 21, 1883, 11 R. 149; *Christie* v. *Louden*, December 19, 1835, 14 S. 191. In the present case the petitioners had allowed the respondent to carry on business for his own behoof for 15 years, and they were therefore barred from laying claim to the estate he had so acquired. The case of *Abel* v. *Watt*, *supra*, was an authority for taking the objection at this stage. In England the decisions seemed to proceed on the theory that the bankrupt was not to be made the mere slave of his creditors. Creditors were accordingly held to have no claim upon the personal earnings of a bankrupt after sequestration, but the profits of any business carried on by a bankrupt with the assistance of employees were deemed open to their claims.

At advising—

LORD PRESIDENT—I think we should remit to a Lord Ordinary to call a meeting of creditors to elect a trustee. I do not think we are called upon to pronounce judgment or express any opinion as to the respective rights of the debtor and creditors. There is, I think, enough in the admitted facts of the case to lead to the view that the body of the creditors should be represented by a trustee in this sequestration, under which the bankrupt has not been discharged.

LORDS ADAM, M'LAREN, and KINNEAR concurred.

The Court remitted to the Lord Ordinary on the Bills to appoint a meeting of creditors to be held for the election of a trustee in the sequestration.

Counsel for the Petitioners—Jameson—Cullen. Agents—Horne & Lyell, W.S.

Counsel for the Respondent—Dundas—W. Thomson. Agents—Shiell & Smith, S.S.C.