death the son discharged the legitim. The deed of discharge was not actually delivered, but was recorded in the register of deeds for preservation. It is settled law that the delivery of a deed into neutral custody with the intention of putting the deed out of the granter's power and conferring an irrevocable right on the grantee, is equivalent to the delivery of the deed to the grantee himself. The recording of a deed in a public register satisfies the required conditions, and the only question is, whether in the case before us this was done with the intention of constituting an irrevocable discharge. On the evidence I cannot doubt that such was Mr Paton's intention, and that the deed of discharge was in legal effect a delivered deed.

It has then to be considered whether Mr Paton had the power to discharge his legitim, and thus to prevent this valuable right coming into the possession of his creditors. Now, there is this difference between a fraud on creditors, and fraudulent acts of the ordinary type, that an act may be a fraud on creditors which is perfectly innocent in itself, or even laudable if done by a solvent person, because the fraud consists in the violation of the principle that an insolvent is a virtual trustee for his creditors and is disabled from dealing with his estate so as to defeat or imperil their right to distribution. The Statutes of 1621 and 1696 are only aids to the discovery of and restoration against fraud by means of certain presumptions which these statutes established. But the right of creditors to restitution against fraudulent alienation is independent of statute, and I think that the principle has sufficient strength and consistency to prevail over any device by which an insolvent person seeks to secure a benefit to himself, his relatives, or other favoured persons by putting away funds which but for his interference would be available for the liquidation of his debts.

The act of Mr Paton in discharging his legitim has been defended on the ground that according to the decision in *Reid* v. *Morison* the trustee or syndic could not have sold Mr Paton's expectancy in his father's lifetime. But this statement of the law is incomplete if we do not add to it that the trustee, and the body of creditors whose interests he represents, have a right to the chance of the succession falling in during the currency of the sequestration. The Bankruptcy Act, as interpreted, and I think rightly interpreted, in *Reid* v. *Morison*, does not treat a *spes successionis* as a saleable subject for division amongst creditors, and it may very well be that it was not thought consistent with the temperate character of modern bankruptcy legislation that a valuable patrimonial right should be sacrificed for the purpose of producing a relatively small sum for immediate division. But if this be the motive of the exception it lends no support to the claim of the defender that he is to be entitled to give away his right of succession in order to defeat the expectancy of his creditors contingent on the succession falling in before he has got his discharge. Now, if it be a fraud, as it certainly is, to give a preference in satisfaction of a just debt to the detriment of other creditors, it cannot be an honest thing to give away a valuable expectancy which in the natural course of events would come to creditors; and I conclude as I began by saying that it is the interference on the part of the insolvent with his creditors' right to a distribution of his estate which constitutes the fraud. I am therefore of opinion that the deed of discharge is ineffectual in a question with creditors, and that the interlocutor of 16th March 1895 ought to be affirmed.

LORD KINNEAR—I agree with all that has been said by your Lordships.

The Court adhered to the interlocutor of 16th March 1895.

Counsel for the Pursuer—Balfour, Q.C.—Guthrie—Chree. Agents—John C. Brodie & Sons, W.S.

Counsel for the Defenders—Asher, Q.C.—Salvesen. Agent—J. Smith Clark, S.S.C.

Wednesday, March 17.

FIRST DIVISION.

INCORPORATION OF SKINNERS AND FURRIERS IN EDINBURGH *v.* BAXTER'S REPRESENTATIVES.

Process—Proving the Tenor—Disposition of Sale—Absence of Written Adminicles.

The Court will not grant decree of proving the tenor of a disposition of heritage even if satisfied as to the existence of the disposition and as to the *casus amissionis*, unless, in addition, written adminicles of evidence are produced showing the terms of the essential clauses of the deed.

The Incorporation of Skinners and Furriers in Edinburgh raised, against the heir-at-law and representatives of the late John Baxter, Edinburgh, an action of proving of the tenor of the disposition of a shop at 381 High Street.

The pursuers averred that the shop had been purchased by them from the late John Baxter in 1812; that "the titles of the property have been lost, and the writ, whose tenor is now sought to be proved, is the disposition by John Baxter in favour of the Incorporation. The said titles, including the disposition aforesaid, appear to have been in the possession of the Incorporation or of the official thereof whose duty it was to have them in custody, down to the year 1848, when they ceased to be so in some way, which no member of the Incorporation now living can explain." They averred further that a search had been made in the Register of Sasines, but that they had not found an instrument of sasine in their favour; and that they had also examined the Town Court Books and Sheriff Court Books from 1812 to 1816, but

that it did not appear that the disposition had been registered for preservation.

The adminicles and other evidence by which the pursuers sought to prove the tenor of the alleged disposition consisted, *firstly*, in certain extracts from minutes of meetings of the Incorporation showing that they had authorised the purchase of the subjects, and that the purchase had been concluded, and a policy of insurance on the subjects effected with the Caledonian Insurance Company on 24th November 1812. They further produced an excerpt from a disposition by John Baxter to Thomas Miller of "a wareroom flat immediately above that shop sold by me to the said Thomas Miller, and that other shop sold by me to the Incorporation of Skinners and Furriers in Edinburgh," in which it was also stated that "the whole writings of the said subjects were delivered up by me to John Bathgate, deacon of the skinners, William Ritchie, deacon of the furriers, and Thomas Miller, boxmaster to the Incorporation of Skinners and Furriers of Edinburgh, on behalf of the said Incorporation, conform to inventory referred to in the disposition by me of the shop, etc., in their favour."

With regard to the *casus amissionis*, they produced excerpts from minutes of their meetings ranging from 1837 to 1849. The first of these contained the following paragraph—"As the boxes and chests containing the title-deeds and other papers belonging to the Incorporation, together with the tablet of the Ten Commandments and Bible, had been formerly removed and are now in the possession of the Boxmaster (Deacon Miller), the meeting took down the Coat of Arms and box containing the Incorporation flag, and sent them to the house of Deacon Miller."

On 21st October 1847 the excerpt bears—"The meeting having considered this point, unanimously appoint Mr Adam Smith, clerk to the Incorporation, to be their factor, . . . and they instructed the clerk to receive from Mr Miller the records of the Incorporation—the boxes and papers belonging to them, together with Bible, tablet of the Ten Commandments, and Trades flag."

There followed excerpts describing the death of Mr Adam Smith, the appointment of a clerk *ad interim*, and of a new clerk who was authorised to "take delivery of and grant the necessary discharges for the books, papers, and vouchers" in the hands of Mr Smith's representatives.

Finally the excerpt of 9th February 1849 bore—"The clerk then stated that, agreeably to the instructions contained in last minute, Mr Cox and he had waited upon Mr Mason and obtained possession of the books and papers in his hands, amongst which there was nothing of importance but the cheque and bank books, minute and discharge books, and one bond of annuity by the city of Edinburgh. There were no title-deeds. The box No. 2, containing said books and papers, was afterwards conveyed to the clerk's house in Gardener's Crescent."

The pursuers stated that the description of the property given in the disposition annexed to the summons was taken chiefly from the titles of the adjoining property. They averred further that they had been in undisputed possession of the property since 1812, and that John Baxter having died in 1838 without leaving any descendants, they had been unable to discover his heir.

The pursuers pleaded that "in respect of the facts set forth in the condescendence, the pursuers are entitled to a decree, that the tenor of the disposition described in the conclusions of the summons has been proved."

The Lord Ordinary (KINCAIRNEY) on 26th February 1897 made great avizandum to the First Division. The First Division on 2nd March allowed the pursuers a proof, and granted a commission to Mr Carthew Yorstoun, advocate, to take the proof.

Mr Andrew M'Cullagh, clerk of the Incorporation, deponed—"During all the time I have held office the Incorporation have been undisputed proprietors of the shop at 381 High Street, and have received the rents yearly. I never heard any question raised as to the Incorporation not being proprietors. . . . I never saw the title-deeds of that property. It was my duty to keep the papers of the Incorporation. The titles were understood by all the members to be lost. . . . The Incorporation has sold the shop at 381 High Street, and find that in the absence of the titles they are unable to give the purchaser a complete title, and the present action has therefore been rendered necessary."

Similar evidence was given by other members of the Incorporation, and evidence was given as to the examination of the registers.

No defender appeared.

Argued for pursuers—They had proved sufficient both as to the execution of the disposition and its tenor, and as to the *casus amissionis*. With regard to the former, the Court would dispense with specific proof of the terms of the clauses of style. With regard to the testing-clause, where the deed was old and had been acted on without dispute for a long period—as here for more than eighty years—specific proof of the testing-clause and witnesses was not insisted on—*Blackwood* v. *Hamilton*, 1713, Rob. App. Cas. 211. It depended on circumstances what written adminicles were required. They had here the main facts, and it could not be expected that they would have a draft. Moreover, this was a simple deed of sale throwing no burden on anyone else, and the Court would not require elaborate written adminicles. They had also shown enough as to the *casus amissionis*—*Winchester v. Smith*, March 20, 1863, 1 Macph. 685; *Duke of Roxburgh's Trustees* v. *Young*, 1835, 13 S. 476; Ersk, iv. 1, 54.

LORD ADAM—This is an action for proving the tenor of a disposition, alleged to have been executed so long ago as 1812, of certain subjects in the High Street of

Edinburgh in favour of the Incorporation of Skinners and Furriers. The deed, if it ever had any existence, was discovered to have gone amissing so long ago as the year 1849, and it is a little to be regretted that the pursuers, when they discovered that their title was not to be found, did not, when matters were comparatively fresh and the deed and document alleged to have been lost might have been more easily traced, take steps to have it replaced, as one would naturally have expected them to do. However, they have come to the Court now, and it is obvious that evidence both of the tenor of the deed and of the *casus amissionis* might then have been got which are not now available.

Now, it is the fact that ever since the date of the alleged deed the subjects alleged to have been conveyed thereby have been occupied by the Incorporation, and looking to the nature of the deed I quite agree with the pursuers' counsel that the presumption in favour of its having been duly executed ought to prevail, and also that in such a case we are not bound to require proof of the actual fact of the destruction of the deed if there is sufficient evidence to show that it has been searched for in the proper quarters, and after due search cannot be found. I would consider such a *casus amissionis* if proved sufficient, but the first difficulty is as to whether the deed ever existed. The only evidence of its existence which we have is a statement by the granter in a disposition to an adjoining proprietor, who held his property apparently under the same series of titles, that he granted such a disposition. That is very slight evidence of the existence of the deed. No doubt the pursuers have possessed the subjects alleged to have been disponed ever since the date of the alleged disposition, and we might consider that sufficient evidence that the disposition was in fact granted; but the evidence would go no further than to prove that the deed once was in existence, and would not show its terms. Assuming the existence of the deed to have been proved, we might presume that it was executed with the solemnities necessary to its existence as a valid deed, but proof of its existence would carry us no further than this. It would not tell us what the terms of the deed were, and would bring us a very small way towards proof of the tenor of the deed set forth in the summons. Now, there are no adminicles in this case at all. The deed was not put on record, and, from first to last, the deed in the summons is a construction of the pursuer's imagination. I should not hesitate to agree with Mr Rankine that if we have proof of the essential clauses of a deed, we may supply mere clauses of style, but then we have no proof of the essential parts of this deed, and accordingly I come to the conclusion—though I would be willing to assist the pursuers in the matter—that we cannot grant the decree they crave.

Lord M'Laren—The Corporation who are the pursuers in this action need have no apprehension that they will be disturbed in the occupation of this hall, of which they have been in possession since 1812, because if any competitor chooses to set up an ancient title against them he will be barred by the negative prescription. It does not follow because it is proved that the pursuers have been in possession for this period of years under some title, that the Court has jurisdiction to reconstruct a title,—virtually to grant a title which shall serve as a foundation of prescriptive right. Parties may do this for themselves; the simplest way would be for the Corporation to grant a disposition to trustees giving a title which would become indefeasible in twenty years. Another possible way would be ajudication on a trust-bond. But it appears to me that the method adopted here is insufficient, for, while we might conclude that there had been some title, and might even hold the *casus amissionis* established because the deed was traced to the possession of an office-bearer, after whose death nothing further was heard of it, the case fails because no proof has been offered of the terms of the deed.

I must altogether dissent from the proposition that in all cases it is unnecessary to prove the testing-clause of a deed whose tenor is in question. I may say, with all respect to the case in Robertson's Appeals, that we have no means of knowing from the report whether the reversal was on law or on fact. It may be that slight evidence will be sufficient to set up a testing-clause. If a lawyer who had the custody of a deed should say that he remembers that it was a duly executed deed because he had occasion to examine it for some purpose, but that he cannot remember the names of the instrumentary witnesses, we should most probably consider the evidence sufficient; or if an instrument of sasine set forth that a dispositive deed was presented for the purpose of sasine being given in terms of the warrant, we might take this as evidence that the warrant was duly attested. I am not prepared to say that where the purpose of an action is to set up a deed whose execution is in dispute, we could dispense with the evidence of execution which is furnished by a testing-clause. But I need not elaborate this point, because there is no evidence as to the existence of other essential clauses in the deed supposed,—nothing even to show that it contained dispositive words. There is neither draft, nor copy, nor excerpt to enable us to find in fact that a deed existed expressed in the terms set forth in the summons.

Lord Kinnear—I agree with what has been said. I think that in dismissing this action we are doing nothing to throw any doubt on the right of the Corporation to the property of the subjects which have been so long in their possession; and it is—as your Lordships have indicated—very probable that there may be means available to them for making a good title, though it is not for us to suggest or con-

sider what is the most appropriate method for that purpose. But however that may be, I agree that there is no evidence to justify our granting decree of declarator that the disposition was duly executed and delivered, that it has been lost in such circumstances as to justify a proving of the tenor, and that its terms were those set forth in the summons. The evidence as to the execution and delivery of the disposition is very imperfect, though I think it probable that it was so executed and delivered. But that would not be enough to support a decree of proving the tenor. Even assuming the execution of a deed in some terms suitable for the conveyance of a property, there is no evidence of the particular terms of the deed, and no sufficient ground for a decree in terms of the conclusions of the summons.

The LORD PRESIDENT concurred.

The Court dismissed the action.

Counsel for the Pursuers — Rankine — Irvine. Agents—Auld & Macdonald, W.S.

Thursday, March 18.

FIRST DIVISION.

[Lord Pearson, Ordinary.

M'KINLAY *v.* CAMPBELL.

Accounting — Joint-Adventure — Profits — Construction.

B was the tenant of certain slate quarries for which he agreed to pay either a fixed rent or a royalty of half the free profits he might make on his works, manufacture, or trade under the lease, after deducting interest on capital advanced by him and generally all expenditure which he might be put to in carrying out the fair and reasonable purposes of his lease.

A entered into an agreement with B, by which B bound himself to pay to A "one-half of the tenant's share of profits under the lease," under deduction of a fixed annual salary to B for management.

B kept a store at the quarry, in premises falling within the lease, at which he sold to his workmen at retail prices coal and fodder which he had purchased at wholesale prices. He did the same with dynamite, and also made a charge for sharpening the men's tools, it being a term of their contract of service with him that they were to defray these charges out of their own pockets. The amount due by each workman for these articles was in practice deducted from his wages.

During the currency of the lease B sent A yearly states of the working of the quarry, together with his half-share of the profits of the quarry (but not of the store), and A granted receipts therefor.

In an action raised by A against B for an account of his intromissions with the profits of the store, the proof disclosed that A had been aware that B was carrying on the store and making a profit, and that B had more than once pointedly called A's attention to the fact that the store was purely a private concern of his own, and that A had nothing to do with it.

Held (*aff.* judgment of Lord Pearson) that there was nothing either in the terms of the agreement or in the acting of parties to entitle A to a share in the profits of the store, and that B must consequently be assoilzied.

By lease dated 28th October and 2nd and 9th November 1878, the testamentary trustees of Sir George Beresford let to Donald Campbell, M.D., Ballachulish, for a period of fifteen years from Whitsunday 1878—"All and whole the slate quarries of Ballachulish . . . . with power to the said Donald Campbell at his own charges and expenses to search for, quarry, and dig out slates from the said quarries . . . . and generally to carry on the quarrying and manufacture of slates at the said quarries, and also to use the roads, tramways, inclines, and drum-sheds and machines . . . . and also to use the pier or quay for the purpose of loading and unloading vessels." The rent was fixed at £1000 a-year, or, in the landlord's option, a lordship or royalty of one-half the clear profits which the tenant "may make on his works, manufacture, or trade under the lease, after deducting from the gross proceeds of the sales and other income, interest on the capital which he has advanced for carrying on the works at the rate of five per cent. . . . . and generally all and every expenditure which he may be put to in carrying out the fair and reasonable purposes of this lease, and all losses he may sustain by accidents or bad debts." The tenant bound himself to keep regular books and accounts showing his whole income and expenditure under the lease, "which books and accounts with vouchers shall be at all times open to the inspection of" the landlord, and was further bound to submit monthly, quarterly, and annual statements to the landlord showing the income and receipts from the quarries, the stock of slates on hand, the quantity sold, the prices, &c.

On the 21st and 27th of November 1878 Alexander M'Kinlay, Glasgow, entered into an agreement with the said Donald Campbell, which contained the following stipulations, *inter alia*: — "*Second.* The second party being now in possession of Ballachulish Slate Quarries under a lease from Sir George Beresford's trustees for fifteen years as from Whitsunday 1878, he hereby binds and obliges himself to pay the first party one-half of the tenant's share of profits under the lease, but under deduction of £300 sterling yearly to the second party for management, and that at 1st June in each year, commencing first payment as at 1st June 1879."

After certain provisions by which the first party was to provide one-half of the