to the trust estate and convey the same to a judicial factor or new trustees who may be appointed by the Court. In either case a certain amount of expense would have to be incurred which some of the parties desire to avoid. The point is a new one and has not been made the subject of express decision in Scotland. Lord M'Laren in his book on Wills and Succession indicates what appears at first sight to be an opinion adverse to the view that the heir of a surviving trustee is entitled to administer the trust. He says (section 1686)—"The heir of a last surviving trustee might indeed make up titles to the trust estate and convey it to a factor or to beneficiaries; but it has been considered that a trustee by succession could not in general execute the discretionary powers of the trust; and it is certain that he is liable to be superseded in the administration of the trust by the appointment of a judicial factor." This opinion, except perhaps the latter part, is not supported by authority and is opposed to the views of other writers on conveyancing. Much necessarily depends on the terms of the particular trust deed, and here these seem to be in favour of the view that the nearest heir-male of the nominated trustee was intended by the truster to act as trustee for all purposes. Indeed there seems no good reason for holding that he can make up titles to the trust estate and convey to a factor and yet be debarred from administering the trust if none of the beneficiaries apply for a factor. In the case of *White* v. *Anderson*, 12 S.L.T. 493, Lord Pearson had occasion to consider a similar question, but he decided it upon the terms of the trust conveyance, which differed from those which we have here. He expresses no opinion on the point raised in this case, while admitting that the recent conveyancing treatises affirm that a clause framed as the clause in Mr Wood's trust conveyance would have the effect of carrying not merely the bare trust title but also the office of trustee to the heir of the last trustee. That this was presumably the intention of the testator in the present case may further be gathered from the fact that the heir-male of John Hastie, who was constituted trustee on his failure, was to be resident in Great Britain and *sui juris* at the time of John Hastie's death. I am accordingly of opinion that we should answer the third question in the affirmative and the fourth in the negative. [*His Lordship then dealt with other questions on which the case is not reported.*]

LORD DUNDAS was sitting in the Extra Division.

The Court answered the third question of law in the affirmative and the fourth in the negative.

Counsel for the First, Fourth, and Fifth Parties—Mercer. Agents—J. & A. Hastie, Solicitors.

Counsel for the Second and Third Parties—Wilton. Agent—Robert Stewart, Solicitor.

Friday, December 22.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

COATS *v.* BANNOCHIE'S TRUSTEES.

Husband and Wife—Capacity of Married Woman to Contract—Mandate by Married Woman to her Father's Trustees to Retain her Share of his Estate—Assignation by Married Woman of Spes successionis.

A daughter executed and delivered to her father a holograph writing whereby she undertook that in the event of her husband being indebted to him at the time of his death "the amount of said indebtedness shall . . . form a debt due by me, and a deduction from my share of your means and estate."

Held that the writing was a mandate by the daughter to her father's trustees to retain her share of his estate in liquidation of her husband's indebtedness to him, and that she could validly convey her right in her father's estate though merely a *spes successionis*.

Mrs Mary Bannochie or Coats, wife of Thomas Archibald Coats, brought an action against George Mitchell and others, the trustees of her father James Bannochie, to have it found and declared that as one of his children she was entitled to legitim out of his estate, for payment of the amount thereof, and for reduction of a holograph writing granted by her to her father.

The defenders averred—"(Stat. 1) On 10th June 1902 the pursuer executed and delivered to the truster a holograph writing in the following terms:—'I, Mary Bannochie or Coats, wife of and residing with Thomas Archibald Coats, S.S.C., Aberdeen, do hereby undertake and agree that in the event of my said husband being indebted to you, James Bannochie above designed, to any extent at the time of your death, whether by way of obligation to any bank or bill or otherwise on any document held by you, the amount of said indebtedness shall, unless and until liquidated by the said Thomas Archibald Coats, form a debt due by me, and a deduction from my share of your means and estate.

'Adopted as holograph.

'MARY COATS.'

Said writing was executed by the pursuer with the consent of her husband, who appended thereto the following docquet:—'I approve and confirm the above.

'THOMAS A. COATS.'

(Stat. 2) At the date of the truster's death the said Thomas Archibald Coats was due the truster, *inter alia*, the sum of £1194, 18s. 5d., conform to I O U dated 17th May 1904 herewith produced, together with £253, 16s. 6d. of interest thereon, conform to statement also herewith produced. Said sum has not been paid by the said Thomas Archibald Coats, who became bankrupt on or about 16th December 1907, and is irrecoverable out of his estate. In terms

of said writing of 10th June 1902 said sums are deductible from the pursuer's share of the truster's estate. They greatly exceed her share of legitim."

In answer thereto the pursuer averred—(Ans. 1) Admitted that the said writing was executed by the pursuer and the said docquet by her husband. They are referred to for their terms, beyond which no admission is made. Explained and averred that at the time of signing said writing the pursuer was a married woman, and was accordingly incapable of granting such an obligation as the said writing purports to grant; that she was in ignorance of her legal rights in her father's estate; that she had no independent legal advice, and that she received no consideration in exchange for signing said document. Further, the pursuer understood from her father that her share of his means and estate would be largely in excess of all sums advanced by him to her husband."

The pursuer pleaded—"(2) The pursuer having been a married woman at the time she executed the said pretended undertaking or agreement, she is not bound thereby, and the same should be set aside as null and void and of no force or effect as excluding the pursuer's claim to legitim. (3) The said pretended undertaking or agreement having been granted by the pursuer in ignorance of her legal rights in her father's estate is not binding on her, and ought to be set aside. (4) The said pretended undertaking or agreement having been granted without any consideration therefor, and for an indefinite amount, is null and void, and ought to be set aside."

The defenders pleaded—"(2) The defenders being entitled to set off against the pursuer's legitim the debts due by her husband to the truster at his death, and said debts being in excess of the pursuer's share of legitim, the defenders are entitled to absolvitor." (3) The pursuer's averments in support of the reductive conclusion of the summons are irrelevant."

On 25th February the Lord Ordinary (ORMIDALE) repelled the second plea-in-law for the pursuer.

Opinion.—"Mr James Bannochie died on 29th June 1909. This is an action at the instance of one of his children—Mrs Coats—against his trustees and executors for payment of legitim.

"The defenders plead that they are entitled to set off against the pursuer's legitim the debts due by her husband to her father at the time of his death, and that as these debts are in excess of the pursuer's share of legitim they are entitled to absolvitor.

"The right to set off these debts depends on the nature and effect of a holograph writing, admittedly executed by the pursuer, dated 10th June 1902.

"It is quoted in the defenders' statement 1.

"The pursuer maintains that it is a cautionary obligation and nothing else. It is not disputed that if this is so it is not binding on the pursuer, she being a married woman.

"In my judgment the writing is not a cautionary obligation, except perhaps in the sense that the bond and assignation in security by Mrs Halkett was a cautionary obligation in the case of the *Reliance Mutual Life Assurance Society* v. *Halkett's Factor*, 1891, 18 R. 615, for I think that here, as there, the wife did agree to interpose her personal credit for the purpose of assisting her husband. But she did not do so by becoming cautioner for him. The writing, if not strictly speaking an assignation, is of the nature of an assignation. No doubt the right to claim legitim did not vest in the pursuer until her survivance of her father, and so regarded is a mere *spes successionis*. But it seems to me to be none the less susceptible of being dealt with prior to the parent's death. It may certainly be satisfied, in whole or in part, by advances made to a child by a parent during his lifetime, and as certainly it cannot be gratuitously defeated by the parent. In any view of the right, the pursuer's legitim was at her own absolute disposal. It was her separate estate, and she was, it seems to me, entitled to deal with it in any way the pleased—*Biggart v. City of Glasgow Bank*, 1879, 6 R. 470; *Burnet* v. *British Linen Bank*, 1888, 25 S.L.R. 356.

"What she did do here, if not to assign it in security, was to give her father a mandate to treat it as a fund of credit for her husband, and to authorise him to debit it with the amount of any advances made by him to her husband. The essence of a cautionary obligation is that the cautioner becomes personally bound along with the principal debtor. Here it may be noted that at the date of the holograph writing there was no principal debtor, for there was no principal debt. The wife's transaction with her father constituted an independent and substantive agreement. Moreover, she came under no personal obligation at all—none at anyrate which the defenders are under any necessity by action or diligence of enforcing against her.

"If the writing had concluded with the words 'shall form a debt due by me,' there might have been room for the plea that there was a personal obligation of a cautionary nature. But I read these words as entirely separable from, or at most as merely introductory, to what follows. They are not the words on which the defenders found. They ignore them, as I think they are entitled to do, and rest their claim on the words 'shall form a deduction from my means and estate.'

"What the wife did, therefore, was to bind, not herself, but her estate, and that has always been regarded as a vital distinction—*Watson* v. *Henderson*, July 9, 1802, Hume, 208; *Harvey & Fawell* v. *Chessels*, February 21, 1791, Bell's Oct. Cas. 255. This appropriation of her future estate might have been unavailing if there had been anyone in the person of a creditor to challenge it or to interfere with its operation—*Bedwells & Yates* v. *Tod*, December 2, 1819, F.C.; *Graham & Company* v. *Raeburn*

& Verel, 1895, 23 R. 84. But there is no one claiming such a right.

"I shall therefore repel the second plea-in-law for the pursuer."

On 9th March 1911 the Lord Ordinary pronounced this further interlocutor—"The Lord Ordinary repels the third and fourth pleas-in-law for the pursuer, and in respect it is admitted at the Bar that at the date of the death of the truster the debts due by the pursuer's husband to the truster were in excess of the sum of £700 sued for, assoilzies the defenders from the conclusions of the summons, and decerns."

The pursuer reclaimed, and argued—The writing of 10th June 1902 constituted a cautionary obligation — Bell's Prin. 245. Such an obligation could not be effectually granted by a married woman—*Biggart* v. *City of Glasgow Bank*, January 15, 1879, 6 R. 470 (Lord President at 481). She could convey her separate estate, and undertake personal obligations with regard thereto. *Quoad ultra* her personal obligation was null. That was the general rule and it had been applied in several cases—*Jackson* v. *Macdiarmid*, March 1, 1892, 19 R. 528, 29 S.L.R. 438; *Laing* v. *Provincial Homes Investment Company, Limited*, 1909 S.C. 812, 46 S.L.R. 616; *M'Lean* v. *Angus Brothers*, February 2, 1887, 14 R. 448, 24 S.L.R. 317. The Married Women's Property (Scotland) Act 1881 (40 and 41 Vict. cap. 29) did not alter the rule of the common law. The pursuer had plainly undertaken a personal obligation, and in security thereof had assigned her *spes successionis* in her father's estate. The words "shall form a debt due by me and a deduction from my share," &c., were ancillary to the personal obligation. By those words she had designated the fund out of which she would make payment to satisfy her obligation. (2) Even if the writing could be read as constituting an assignation, it was neither in form nor substance an assignation of anything belonging to her. She had nothing to convey. All she had was a mere expectancy, for a *spes successionis* was not property or estate—*Reid* v. *Morrison*, March 10, 1893, 20 R. 510 (Lord Rutherfurd Clark at 514), 30 S.L.R. 477. An assignation of a *spes successionis* was just a personal obligation by the granter thereof that if and when property vested in him it should be handed over to the assignee. Such an obligation a married woman could not grant. (3) In any event the pursuer was entitled to a proof of her averments as to error and want of consideration.

Argued for defenders—(1) The writing in question was not merely a personal obligation by the pursuer, but also an assignation by her of her share of her father's estate. No express words were necessary to constitute an assignation if the intention to assign was clear—*Carter* v. *M'Intosh, &c.*, March 20, 1862, 24 D. 925. It was well established that a married woman could grant security affecting her estate—Ersk. i, 6, 27; *Ellis* v. *Keith*, 1665, M. 5987; *Marshall* v. *Ferguson*, 1665, M. 5990; *Somervell* v. *Paton*, 1665, M. 5990; *Clerk* v. *Sharp*, 1717, M. 5996; *Reliance Mutual Life Assurance Society* v. *Halkett's Factor*, March 4, 1891, 18 R. 615, 28 S.L.R. 589. (2) It was immaterial that the subject assigned was a *spes successionis*. A *spes successionis* could be assigned—*Trappes* v. *Meredith*, November 3, 1871, 10 Macph. 38. It was quite common in postnuptial marriage contracts to have assignations of expectancies. If a married woman could assign her property in security of her husband's debts, it was absurd to suggest that she could not so assign a *spes successionis*. The defenders had not to do anything to perfect their right. The funds were in their hands, and their right became effectual when the property vested in the pursuer—*Reid* v. *Morrison* (*sup. cit.*), 20 R. 514. (3) The pursuer had set forth no grounds for inquiry. There were no relevant averments of ignorance nor error induced by misrepresentation. It was immaterial that she received no consideration — *Clerk* v. *Sharp* (*cit. sup.*); *Reliance Mutual Life Assurance Society* v. *Halkett's Factor* (*cit. sup.*).

At advising—

LORD SALVESEN—In this case we had an interesting argument as to the law applicable to the obligations of a married woman, but in the end it became clear that parties were not so much at variance with regard to the law as with regard to its application to the document of 10th June 1902, on which the whole defence is founded. Speaking generally, and without attempting a complete statement of the law, it may be taken that a personal obligation granted by a married woman, even with her husband's consent, is not binding upon her unless it is *in rem versum* of her or relates to her separate estate. On the other hand, a married woman may validly convey or assign her separate estate to pay her husband's debts, and may grant securities over her separate estate to a creditor of her husband for the same purpose, although a personal obligation undertaken by her for behoof of her husband—such as a cautionary obligation—is not enforceable against her even to the extent of her separate estate.

Assuming this to be a correct statement of the law, it remains to be considered how it applies to the writing in question. If that writing is to be read, as the pursuer's counsel argued, as a personal obligation undertaken by the wife along with an implied assignation of her *spes successionis* in her father's estate in security of her own personal obligation, I should be disposed to sustain her second plea-in-law. I cannot, however, so read it. I think that it does import a personal obligation upon her, and to that extent it would not be enforceable against any separate estate other than her share of her father's succession. But I think it is something more. Reading out the words which may be held to constitute the personal obligation, the document is, in substance, an undertaking by the pursuer

that the amount of her husband's indebtedness as at the time of her father's death should form a deduction from her share of his means. Whether that is regarded as an assignation or not, it is, at all events, a mandate to his trustees to retain her share in liquidation of this indebtedness. It requires no personal action against her to make this mandate effective, because the trustees are already in possession of the funds, and it appears to me to be very much in the same position as a pledge by a lady of her jewels to a creditor of her husband, or a conveyance of her separate estate to such a creditor. Transactions of this kind were held to be unchallengeable by the wife more than two centuries ago, when the law with regard to a married woman's personal obligations was rigidly applied—*Ellis* v. *Keith*, M. 5987; *Marshall*, M. 5990. I cannot differentiate this case from these or from the later case of *The Reliance Mutual Life Assurance Society*, 18 R. 615.

Another argument addressed to us on behalf of the pursuer was that the subject assigned being a *spes successionis*, which is not property, could not be validly conveyed by a married woman; that in fact it conveyed nothing, inasmuch as the granter had nothing to convey, and in the words of Lord Rutherfurd Clark in *Reid* v. *Morrison*, 20 R. 510, "it becomes effectual by accretion alone. Till then it is nothing but a mere agreement to convey the subject of the expectancy when it shall vest." It was maintained upon these words that the document founded on was, at most, a mere obligation to convey the pursuer's share of her father's estate, and as such was of the nature of a personal obligation.

I do not think any such conclusion is to be drawn from the words which I have read. I am not sure that the word "accretion" used by that very eminent Judge was a happy one; but all that it imports is that the conveyance cannot take effect until the subject vests. At any rate I see no warrant for the distinction that is sought to be drawn between an assignation of property in security of a husband's debt and an assignation of a chance that the assignor may become the proprietor of the subject assigned. It being perfectly clear that a *spes successionis* is assignable, I see no reason for inferring that a married woman is under a greater disability of dealing with her hopes of succession than with the succession itself when it has vested in her. I think therefore we must repel the second plea-in-law for the pursuer.

The third and fourth pleas are based on very meagre averments. The pursuer says that at the time of granting the document of 10th June she was in ignorance of her legal rights in her father's estate, that she had no independent legal advice, and that she received no consideration in exchange for signing the document. Further, she understood from her father that her share of his means and estate would be largely in excess of all sums advanced by him to her husband. In my opinion these averments are irrelevant to support a reduction of the document. There is no statement of what her ignorance consisted in. She does not say that but for this ignorance she would not have signed the document in question. nor is there any statement that she was induced to sign under error induced by misrepresentation; for even if the pursuer's father told her that her share of his means would be in excess of the sums that he had already advanced, that statement may have been perfectly accurate when it was made. I therefore agree with the Lord Ordinary in repelling the third and fourth pleas in law for the pursuer, and also in his conclusion that the defenders fall to be assoilzied.

The LORD JUSTICE-CLERK and LORD GUTHRIE concurred.

LORD DUNDAS was sitting in the Extra Division.

The Court adhered.

Counsel for Pursuer (Reclaimer) — M'Lennan, K.C.—Dykes. Agent—Wm. B. Rainnie, S.S.C.

Counsel for Defenders (Respondents)—Chree—Carmont. Agents—Lindsay, Cook, & Dickson, Solicitors.

Saturday, December 23.

FIRST DIVISION.

[Sheriff Court at Hawick.

ROBSON, ECKFORD, & COMPANY, LIMITED *v.* BLAKEY.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Accident Arising out of the Employment—Heat Apoplexy.*

A plumber, who was in a state of impaired vitality at the time, was engaged on an excessively hot day in July in laying and jointing pipes in a trench cut in a road. His work obliged him to stoop to a considerable extent, and while so engaged he was struck down by heat apoplexy, from the effects of which he subsequently died. *Held* that his death was not due to an accident arising out of his employment in the sense of section 1 (1) of the Workmen's Compensation Act 1906.

Mrs Mary Blakey, Hawick, having claimed compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) from Robson, Eckford, & Company, Limited, contractors, Hawick, in respect of the death of her husband, the matter was referred to the arbitration of the Sheriff-Substitute at Hawick (BAILLIE), who found the pursuer entitled to compensation, and at the request of the defenders stated a Case for appeal.

The *facts* were as follows:—"1. The deceased Joseph Blakey, a plumber in the employment of the defenders, was engaged