Saturday, June 1.

SECOND DIVISION.

[Lord Sands, Ordinary.

CALDWELL *v.* HAMILTON.

(*Ante*, 53 S.L.R. 657.)

Bankruptcy — Sequestration — Salary of Bankrupt—Income in Excess of a Suitable Aliment — Payment of Surplus Income to Trustee in Sequestration — Bankruptcy (Scotland) Act 1913 (3 *and* 4 *Geo. V, cap.* 20), *secs.* 2, 28, 97, 98 (2), *and* 148.

At the date of his sequestration a bankrupt was employed at a fixed salary of £500 per annum, which added to certain other sums accruing to him brought his annual income up to £670. There was no definite contract of service, but the bankrupt had been so employed for some years prior to the sequestration, and he continued to be so employed subsequent to it. One of his creditors presented a petition to have the bankrupt ordained to pay over to the trustee in his sequestration a portion of his earnings accruing after the date of his sequestration, averring that the bankrupt's total income was in excess of what was in the existing circumstances a suitable aliment to him.

The Court *ordained* the bankrupt to pay over to the trustee £150 out of the salary of £500, as and when received, in that proportion.

The Right Honourable James Caldwell, 12 Grosvenor Terrace, Glasgow, a creditor of John Hamilton, 2 Kelvinside Terrace, Glasgow, with the consent and concurrence and in name of Henry Moncreiff Steele, Glasgow, the trustee on the sequestrated estate of the said John Hamilton, *petitioners*, presented a petition in the Bill Chamber whereby they craved the Court—"(*First*) To find and determine that the said John Hamilton is at present in the enjoyment of the following salary or emolument, and a right and interest in and to the following incomes, which fall to be computed in reckoning the amount available for the aliment of the said John Hamilton, viz., (*a*) a fixed salary or emolument at the rate of £500 per annum as an employee of William Beardmore & Company, Limited, Glasgow, as set forth in the petition; (*b*) a right and interest in and to an alimentary provision or income amounting to £100 per annum or thereby under the antenuptial contract between the said John Hamilton and his wife Clara Denny or Hamilton, dated and recorded as aforesaid, as set forth in the petition; and (*c*) a right and interest in and to an income of £100 per annum or thereby from the said John Hamilton's deceased father's estate, as set forth in the petition; amounting said several sums of salary or emolument and incomes to £700 per annum or thereby: (*Second*) To find and determine that the cumulative amount of the foresaid salary or emolument and said incomes available for the aliment of the said John Hamilton is in excess of a suitable aliment to him in view of his existing circumstances: And (*Third*) To fix the amount by which the cumulative amount of the said salary or emolument and the said incomes exceeds a suitable aliment to the said John Hamilton in view of his existing circumstances, and to order and decern the amount of such excess as so fixed to be paid by the said John Hamilton as and when received by him to the said Henry Moncrieff Steele as trustee foresaid, as part of the property of the said John Hamilton falling under the sequestration, until your Lordship shall make order and decerniture to the contrary: Reserving always to your Lordship at any time hereafter on the application of the petitioners, or of the said John Hamilton, to reconsider and to alter such order and decerniture as your Lordship may deem fitting, in the event of any change of circumstances which may make such alteration proper: Further, to find the said James Caldwell, as litigant creditor, entitled to the expenses of this application out of the first and readiest of the funds which may be recovered hereunder; and to find the said John Hamilton, in the event of his opposing the prayer of this petition, or any other party or parties who shall appear to oppose the same, liable in the expenses of his, her, or their opposition: Reserving to the said James Caldwell all claims, whether of priority or otherwise, competent to him as litigant creditor, upon the funds which may be recovered hereunder in respect of the balance outstanding of his claim in the sequestration. . . ."

John Hamilton, *respondent*, lodged answers.

The petitioners averred—"1. That the said James Caldwell is one of the commissioners in the sequestration of the said John Hamilton and a creditor admitted to a ranking, as an ordinary creditor, of £500, being the unsecured balance of a loan arising in respect of depreciation to that extent in the value of the dwelling-house at 22 Athole Gardens, Glasgow, over which since 1893 he has held a bond and disposition in security for £1300, for which the said John Hamilton was and is a personal obligant. 2. The estates of the said John Hamilton were sequestrated on 3rd November 1913 by the Sheriff of Lanarkshire on a petition by the said John Hamilton, with concurrence of John Inglis, LL.D., shipbuilder, Glasgow, as concurring creditor. The deliverance awarding sequestration sequestrated the estates which then belonged, or should thereafter belong, to the said John Hamilton before the date of his discharge, and declared the same to belong to the creditors for the purposes of the Bankruptcy (Scotland) Act. 3. The said Henry Moncrieff Steele was duly appointed and confirmed trustee, conform to act and warrant of confirmation in his favour, and as such trustee his name and title have been given to prosecute this application, the said James Caldwell as a commissioner and a creditor foresaid having given to the said Henry Moncrieff Steele a bond of indemnity freeing and relieving him personally as trustee, and his successors in office, and the said sequestrated estate, of all

damages and expenses, judicial and extrajudicial, which may be occasioned thereby, as set forth in the said bond of indemnity. . . . 6. Out of the sequestrated estates there have been paid to the ordinary creditors two dividends amounting *in cumulo* to five shillings and ninepence one farthing in the pound of their respective debts, leaving a balance of fourteen shillings and twopence three farthings in the pound of their respective debts as still due and resting-owing to the above unsecured ordinary creditors by the said John Hamilton, who is still undischarged of the debts and obligations due by him at the date of his sequestration. 7. The said John Hamilton was for many years prior to the sequestration, has continued since, and still is, in the employment of William Beardmore and Company (Limited), Glasgow, at a fixed salary or emolument. At first and for some years his salary was at the rate of £1000 per annum. In 1908, as stated by the said John Hamilton in an application for his discharge, his salary was reduced to £500 per annum payable quarterly, at which it still stands, irrespective of any bonuses or additions to salary granted, or which may be granted, to him during the war. 8. In addition to his said salary or emolument the said John Hamilton and his wife Clara Denny or Hamilton have a right or interest in and to an alimentary provision or income, amounting to £100 per annum or thereby, under the antenuptial contract between the said John Hamilton and his said wife, dated 10th and 15th June, and recorded in the Books of Council and Session 1st July, all in the year 1868, whereby the said wife's estate, heritable and moveable, then belonging and owing, or which should become owing during the subsistence of the marriage, was assigned and made over to the marriage-contract trustees (of whom the said John Inglis is one), to be applied by them for behoof of the said wife during the subsistence of the marriage in alimentary liferent, and for her behoof in the event of her surviving her said husband also in liferent, and in the event of the said John Hamilton surviving his wife, then for his liferent alimentary use allenarly. The income from the wife's estate has been in wont to be paid to her by the trustees monthly, and to be applied in paying household and other debts due by the said John Hamilton. 9. On the other hand, the said John Hamilton by the said antenuptial contract made certain onerous provisions, consisting of an annuity and other provisions, in favour of his said wife in the event of her surviving him, and in security of the same assigned to the said marriage-contract trustees a policy of insurance for one thousand pounds, with bonuses thereon, upon which policy bonuses to the extent of eleven hundred pounds have already accrued. 10. Further, and in addition to his said salary or emolument and the foresaid income from his wife's estate, the said John Hamilton and his said wife have had since 1894, and still have, an income of £100 per annum or thereby from the said John Hamilton's deceased father's estate, secured by his father's deed of settlement dated 13th April 1883, and codicil thereto dated 26th December 1893, and both recorded in the Books of Council and Session 20th February 1894, whereby the trustees of his deceased father (the said John Inglis being one) are directed to hold and apply the sum of £2000 for behoof of the said John Hamilton and his said wife, and the survivor, in conjunct liferent, and their children equally among them in fee. . . . 13. The petitioners aver that the foresaid salary or emolument at the rate of £500 per annum, which has been received by the said John Hamilton since 1908, and is still being received by him, irrespective of any bonuses or additions to salary which have been granted, or which may be granted, to him during the war, as also the foresaid alimentary income receivable from the wife's estate, and the foresaid income receivable from the estate of the said John Hamilton's deceased father, all fall to be aggregated in determining the cumulative amount which is available for the aliment of the said John Hamilton. That the cumulative amount thereof is greatly in excess of a suitable aliment to the said John Hamilton in view of his existing circumstances, and that the petitioners are entitled to the order and decerniture all as hereinafter craved. 14. The petitioner, the said James Caldwell, humbly suggests that of the foresaid cumulative amount of said salary or emolument, and said incomes, amounting *in cumulo* as before stated to £700 per annum or thereby, a sum of £400 per annum or thereby would be a suitable aliment to the said John Hamilton in view of his existing circumstances."

The respondent in his answer 8 admitted Mrs Hamilton was in receipt of an income of £90 per annum under her antenuptial marriage-contract, and in his answer 10 that an income of £80 per annum was received from the source mentioned in statement 10.

On 1st February 1918 the Lord Ordinary (SANDS) dismissed the petition.

Opinion.—"This is a peculiar and, so far as I am aware in relation to the special circumstances, a novel application. The petitioner relies both upon the common law and the Bankruptcy Act 1913. In regard to the latter, whilst basing his application upon the general provisions of the Act, he points specifically to section 98 (2). That section deals with alimentary provisions. In my view, however, if the small alimentary provisions to which, along with his wife, the bankrupt is entitled under his father's settlement be left out of account, that subsection does not apply to the circumstances of the present case. The object of that subsection, as I understand it, is to enable the trustee to get hold of an alimentary fund so far as excessive, which but for the circumstances of its being alimentary would have vested in him in virtue of his act and warrant. But a man's earnings, whether in the form of wages, salary, or profits, are not an 'alimentary provision.' The bankrupt has at present a salary of £500 per annum from Messrs Beardmore. It may be, as the peti-

tioner concedes, that if the trustee is entitled to attach this salary the bankrupt is entitled to an alimentary provision out of it. But that is quite a different matter from treating the whole salary to begin with as an 'alimentary provision' to be dealt with under section 98 (2). The petition must therefore proceed upon more general grounds than the special provision of section 98 (2).

"Questions similar to that which is raised in the petition are not unfamiliar in connection with applications for discharge. But the considerations in that case are different. There the Court has a discretion as to conditions under which the bankrupt shall obtain the privilege of a discharge. On the other hand, so long as the bankrupt is undischarged, and the question is one of the claim of the trustee to funds as forming part of his estate, the Court has no discretion. It is a question of legal right.

"Under the sequestration the estate of the bankrupt passes to the trustee, including all *quasi* vested rights to salary or emoluments for a period long or short, such as the stipend of a minister or the salary of the holder of the like office, or as I take it a contractual salary for a term of years under a private contract. It is not suggested, however, that the salary which the bankrupt here earns is on that footing. He had no continuing contract or right to salary from Messrs Beardmore. As it appears to me no right to salary from Messrs Beardmore fell under the sequestration, and the present salary is on the same footing as if the bankrupt had entered into the employment of Messrs Beardmore after the sequestration.

"The question whether a trustee in bankruptcy has any claim to the earnings of the bankrupt after sequestration has been a good deal canvassed. There are obviously considerations of public policy both ways. On the one hand it is undesirable that people who are able to earn considerable emoluments should be encouraged to contract debt in the expectation of being able to find relief in sequestration and immediately to resume enjoyment of a substantial income. On the other hand it is undesirable that people who have been unfortunate should be encouraged to idle and to sorn upon their relations, and discouraged from seeking work and working with full efficiency. I am not called upon, however, to weigh up these considerations. I must be guided by the authority of the law if I can find it. It appears to me that there is authority which though not technically binding is of such concurrent weight that it must be followed by a judge of first instance. The authorities are Lord Fraser in *Barron* v. *Mitchell*, 8 R. 933; Lord Kyllachy in *Carrick* v. *Edinburgh and Glasgow Property Investment Company*, 10 S.L.T. 105; and Lord Stormonth Darling in *Mason* v. *Paterson*, 12 S.L.T. 511. The purport of the opinions of these learned judges is thus stated by Lord Stormonth Darling (12 S.L.T. p. 514)—'The opinion of Lord Fraser went on the general principle that where creditors allow a bankrupt to earn money by his personal exertions, which they could not compel him to do, they have no right to seize the fruits of his labour.' I am not quite sure that I appreciate the phrase about 'allowing the bankrupt,' but it does not appear to me to affect the principle. The petitioner conceded that the fees of a professional man could not be touched. If the bankrupt here were a medical consultant earning £2000 a year by fees, it would be incompetent to present an application to have him ordained to pay so much of these fees over to his trustee. I have difficulty, however, in seeing how any logical distinction can be drawn according to the form in which the remuneration is earned. It is curious if a bankrupt solicitor who earns £1000 a year in fees cannot be ordained to pay over part of that to his trustee, whilst his bankrupt clerk who has a salary of £300 a year can be ordained to pay part of that salary to his trustee.

"The petitioner, however, relies upon certain provisions of the Bankruptcy Act as putting a salary in a different position from fees. He points to section 28 of the Bankruptcy Act, under which there falls under the sequestration the estate which 'shall belong to the debtor before the date of the discharge,' and he points to the definition of 'estate' in section 2. 'Estate' shall *when* '*not expressly restricted* include every kind of property, heritable or moveable, wherever situated, and all rights, powers, and interests therein capable of legal or voluntary alienation, or of being affected by diligence or attached for debt.' He lays particular stress upon the 'attached for debt.' I do not, however, quite appreciate this reasoning as marking off the distinction between fees and salary paid by an employer. It is quite true that the salary can be attached for debt, but the fees in a bankrupt's pocket are 'property' and are 'capable of legal or voluntary alienation,' and I have never heard it suggested that a bankrupt can withhold money from his trustee by keeping it in his pocket. It appears to me that both upon general principles of statutory construction and in view of the qualification 'when not expressly restricted' in the definition, regard is to be had rather to the particular enumeration in sections 97 and 98 than to the general words of section 28. The provisions in regard to *acquirenda* in section 98 are—'If any estate wherever situated shall after the date of the sequestration and before the bankrupt has obtained his discharge be acquired by him or descend or revert or come to him, the same shall *ipso jure* fall under the sequestration.' Now literally these words may have the same extent as regards *acquirenda* as the more general words in section 28. But in my view they are more easily reconcilable with the rule that a man's earnings from his labour, whether fees, wages, or salary, do not fall to his trustee. Literally, no doubt, if regard be had to the definition of 'estate,' they are 'estate acquired by him, or what has come to him' after the date of his sequestration. But such a description is not in accordance with the familiar use of language. Nobody who was told that his debtor had acquired some estate would imagine that this might mean that he had earned some salary.

"Assuming, however, that the petitioner is right in the differentiating stress which he lays upon the words 'capable of being affected by diligence,' it may very well be that the trustee is entitled to lay hold of unpaid salary in the hands of Messrs Beardmore if he finds it there. It does not follow, however, that the order here asked is competent. For all the Court knows Messrs Beardmore may pay the salary in advance and attachment may be incompetent. For reasons I have already indicated it appears to me impossible, once the money earned has found its way into the hands of the bankrupt, to differentiate according to the form in which his remuneration has been earned and paid. The debtor may or may not continue to work; he may or may not continue in the employment of Messrs. Beardmore; he may or may not be remunerated in the form of a salary.

"I am accordingly of opinion that if the order here asked is competent, it must be competent to ordain any bankrupt who earns remuneration by his own labour after sequestration to pay over part of that remuneration to his trustee. I can see no valid reason for differentiating according to the manner in which that remuneration happens to be paid to him—salary, wages, or fees.

"As I have already pointed out, the condition which may be attached to a discharge is no analogy. That is payment for a privilege which the bankrupt is free to avail himself of or not. Nor do I think that the salary of public offices is an apposite analogy. The right to such a salary is, as it were, vested in the bankrupt and vests in the trustee by his act and warrant. If the bankrupt chooses to resign the office he may do so and seek other employment, and the trustee's right to the salary then ceases. Here again the bankrupt is free. If he works for the benefit of the trustee for his creditors it is his own choice. But if such an order as that here sought is competent the position is this—that the trustee can say to the bankrupt 'I cannot compel you to work, but if you work for remuneration of any kind you shall work for me, and out of what you earn I shall allow you the aliment necessary to enable you to earn it, and take the rest.' More than one learned judge has pointed out that under these conditions the trustee is virtually in the position of saying to the bankrupt—'You are my slave, the law does not permit me to punish idleness or enforce labour by corporal pains, but if you labour you shall labour for me. If you are industrious and get a rise in your earnings, that is my rise not yours.' As I have already indicated I express no opinion as to whether such a rule would be in accordance with public policy. What I require to determine is whether it is the law, and so far as I have been able to form an opinion from the authorities cited, it is not the law.

"I regard this simply as an application to the Court to ordain a bankrupt by an order which he must obey under pain of imprisonment to pay so much of his voluntary earnings to his trustee in bankruptcy. The question whether such an order falls to be made is not one of discretion in the circumstances of the particular case, but a general question of law. I must dismiss the application as unsupported by authority and contrary to such authority as I have been enabled to consider."

The petitioners reclaimed, and argued—The bankrupt was admittedly under a continuing contract of service, subject to notice by either side, in respect of which he was in receipt of a salary, the surplus of which, over and above what in his existing circumstances was a suitable aliment to him, he was bound to pay over to his trustee in sequestration—Bell's Com., i, 127; *Bogg* v. *Davidson*, 1668, M. 10,380. A bankrupt was not entitled to deprive his creditors of the free balance of his income and the Court had the power to make payment of his salary *salvo beneficio competentiæ* a condition before discharging the bankrupt—*Livingstone* v. *Livingstone*, 1886, 14 R. 43, 24 S.L.R. 30, *per* Lord Shand. *Cp.* also *Learmonth* v. *Paterson*, 1858, 20 D. 418, *per* Lord Mackenzie; *A B* v. *Sloan*, 1824, 3 S. 195 (N.E. 133); *Hale*, 1736, M. 711; *Smith* v. *Earl of Moray*, 13th December 1815, F.C.; *Scott* v. *Macdonald*, 1823, 1 Sh. App. 363; *Laidlaw* v. *Wylde*, 1801, M., App. Arrestment, No. 4; *Moinet* v. *Hamilton*, 1833, 11 S. 348; *Jackson* v. *M'Kechnie*, 1875, 3 R. 130, 13 S.L.R. 65; *Simpson* v. *Jack*, 1888, 16 R. 131, 26 S.L.R. 76; *Hurst* v. *Beveridge*, 1900, 2 F. 702, 37 S.L.R. 501; *Leslie* v. *Cumming & Spence*, 1900, 2 F. 643, 37 S.L.R. 444. All sources of income were attachable by a creditor prior to sequestration, including professional fees or any other form of earnings. A bankrupt was not entitled to more favoured treatment. That would result in this, that by never applying for his discharge and spending his whole income on himself he would never pay his creditors anything. Not only was the estate belonging to the bankrupt at the date of his sequestration transferred to his creditors, but also any estate which he acquired prior to the date of his discharge—Bankruptcy (Scotland) Act 1913 (3 and 4 Geo. V, cap. 20) section 28. By section 2 of that Act the word "estate" was made to include every kind of property and practically everything attachable for debt. Any surplus salary over and above what was necessary for suitable aliment was vested in the trustee in the sequestration under section 97. Section 98 (2), dealing with alimentary provisions, merely incorporated into the Act the effect of decisions of the Courts, which held that that portion of an alimentary provision which was in excess of a reasonable maintenance was to be paid over to the trustee for the creditors. There was no distinction between the law of Scotland and England on the question involved in the present case. And the law of England was clear that salary of the bankrupt in excess of his alimentary requirement could be recovered for his creditors—*Ex parte Benwell*, 1884, 14 Q.B.D. 301; *in re Roberts*, [1900] 1 Q.B. 122, *per* Lindley, M.R.; *Hollinshead* v. *Hazelton*, [1916] 1 A.C. 428; Baldwin on the Law of Bankruptcy, 1915 ed., 321;

Williams' Bankruptcy Practice, 10th ed., 249. The bankrupt should be ordained to pay the sum of £200 per annum to the trustee in the sequestration.

Argued for the respondent—A salary could not be regarded as either *acquirenda* or an alimentary provision, and accordingly did not fall under either sections 98 (1) or 98 (2) of the Act. The present case had nothing to do with salary accruing from a contract existing at the date of the sequestration, for the contract of service here was terminable at any time, though as matter of fact the employment had been continued. The act and warrant was the trustee's title to the bankrupt's whole estate at the date of sequestration, but with regard to *acquirenda* the trustee would have to apply to the Court for an order, when all parties concerned would have an opportunity of preserving their interests—section 98 (1). Section 148 was not applicable to this case. Section 51 of the English Bankruptcy Act 1914 (4 and 5 Geo. V, c. 59), on which the case of *Hollinshead* v. *Hazelton* (*cit.*) was decided, did not apply to Scotland. No order had ever been made on the bankrupt to pay over money to the trustee in his sequestration. At all events there ought to be an inquiry as to what the bankrupt's requirements might be in the nature of aliment. Counsel referred to the following cases:—*Barron* v. *Mitchell*, 1880, 8 R. 933, 18 S.L.R. 668; *Carrick* v. *Edinburgh and Glasgow Property Investment Company*, 1902, 10 S.L.T. 105; *Mason* v. *Paterson*, 1904, 12 S.L.T. 511; *ex parte* Vine, 1878, 8 Ch. D. 364.

At advising—

LORD JUSTICE-CLERK—I have found this case difficult, but I have ultimately come to be of opinion that the petitioner is substantially entitled to what he asks to the extent of £150 per annum.

It was maintained before us by the respondent that there is in Scotland no common law applicable to the problem which we have now to consider, the whole law being as he contended statutory, and to be found in the Bankruptcy (Scotland) Act 1913. It is no doubt true that the modern process of sequestration in bankruptcy is entirely the creature of statute. But on the other hand I think there is a common law in Scotland applicable to bankruptcy and to the rights of debtors and creditors *hinc inde* when the condition of bankruptcy exists, which in my opinion may, and indeed in certain cases must, be applied even in administering the statutory law of sequestration.

Thus in Bell's Commentaries (7th ed.), p. 282, we read—"When in 1783 this statute" (which he refers to as "the first attempt to regulate mercantile bankruptcy," being the Statute 12 Geo. III, c. 72) "came to be renewed, the alarm occasioned by the novelty of the arrangements had given way to a conviction that bankruptcies were much more beneficially administered under the new system, imperfect as it was, than under the common law."

The Scottish mercantile sequestration was not at first of general application, but was confined to merchants and manufacturers, and it did not at first attach estate or effects acquired by the bankrupt after sequestration, the consequence of which was "that a second sequestration was competent" in order to attach and render available to creditors such *acquirenda*—Bell's Comm. (5th ed.), p. 478. In these respects changes were made by later legislation, and one of the questions to be determined in this case is what is the effect of this later legislation, and particularly of the Statute of 1913.

In this case the particular subject with which we are concerned is the salary to be earned by the bankrupt in a position of service which he originally held before the sequestration, which he held at the date of the sequestration, has ever since held, and apparently is likely to continue to hold indefinitely. His tenure of the employment, however, does not depend on any contract confirming him in the service for any fixed period, but is dependent on the mutual consent of both parties (himself and his employers), which has hitherto tacitly continued without a break. The petitioner says that the salary of £500, taken along with other sources of income available to the bankrupt or his wife, and amounting as the petitioner alleges to £200, makes the total income available for the maintenance of the bankrupt and his family £700. That sum, the petitioner alleges, is more than is necessary for such maintenance on a fitting scale, and his demand is that out of the said moneys "as and when received" by the bankrupt he should pay the excess over what is required for such maintenance to the trustee in the sequestration, who is a petitioner along with the creditor petitioner, who is a creditor for over £500.

The first point to determine is whether the opinion of Lord Fraser in *Barron* v. *Mitchell*, 8 R. 933, adopted and approved subsequently by Lord Kyllachy and Lord Stormonth Darling, is well founded according to the law of Scotland as we now find it. In my opinion it is not, and in this respect I differ from the Lord Ordinary (Sands) in the present case, though I think he could hardly have done otherwise in view of these authorities than come to the conclusion at which he has arrived. In *Mitchell's* case the Judges in the Inner House, or at anyrate the Lord President, pointedly refused to adopt the grounds of the Lord Ordinary, and the other Judges proceeded like the Lord President on quite a different ground in adhering to the Lord Ordinary's interlocutor.

As to the Lord Ordinary's (Fraser) view that fees from personal labour of a bankrupt are not "estate" in the sense of the statute, I do not agree that if the trustee cannot "direct" or "order" the bankrupt to labour for the creditors' behoof it "logically follows that if the bankrupt voluntarily does so, the trustee cannot demand from him the produce of his brains." The salary of an office may *quoad excessum* be attached by the trustee, but the holder of the office, in most cases at anyrate, can resign when he pleases. Moreover, under our older law a second sequestration would have attached the said excess, and arrestment might have

affected the whole salary. I refer also to Professor Bell's views, after quoted, to the cases he cites, and in addition to *Moinet* v. *Hamilton*, 11 S. 348, and to *Jackson* v. *M'Kechnie*, 3 R. 130.

As to the English cases founded on by Lord Fraser I have great hesitation in dealing with them at all, but I doubt if his view as to English law on the subject is sound. *Mitchell's* case was decided in 1881, which was of course before the Bankruptcy Act 1883. In this matter I do not think it safe to rely on English precedents, because these depend on statutes differing materially in their terms from that which we have to consider, and I am not expert either in the application of these statutes or in the English common law on the subject, if any such there be. I may say, however, that the result which I have arrived at as to what is the law of Scotland does not to my mind indicate any substantial difference from what would have been reached according to the law of England, apart from what I may call technical rules of process.

What, then, is the legal position of wages or salary earned by this bankrupt after the date of his sequestration according to the law of Scotland?

Bell (Commentaries, 7th ed., i, p. 121) defines an office thus—"An office is a right to exercise a public or private employment, and to take the fees and emoluments which belong to it"; and he proceeds—"In considering offices as responsible for debt, three questions may be raised—1st, Whether the office itself may be attached, or transferred by the operation of legal diligence, or sold for the behoof of creditors? . . . and 3rd, Whether the wages, profits, or salary can be taken by the creditors of him who holds the office?" In Scotland there are offices which may be attached or transferred in the sense and manner aforesaid, but the present bankrupt holds no such office.

As to the 3rd of the above questions Bell says (Commentaries, 5th ed., i, p. 126, 7th ed., p. 122)—"The salary of an office stands on a different footing from the office itself. Although the *delectus personæ* which an office implies may effectually prevent the office itself from being exposed to sale, to be purchased, perhaps, by one who is quite unable to discharge its duties, this principle at least can never stand in the way of creditors proceeding to attach the salary, or the accruing perquisites and profits as they arise and converting them into a fund of payment. But any restraint on the right of attaching the salary of an office proceeds on other principles. (1) A proper salary is in its nature alimentary. In its very constitution and appropriation the fund set apart for it is separated from common purposes, and from its destination it may fairly be regarded as under specific appropriation. And (2) with this appropriation the public policy concurs in requiring that officers should at all times be ready, without interruption, to perform the duties which the public expect from them. A doubt naturally suggests itself whether in deciding on such cases the former of the considerations now stated has always been sufficiently recognised, or the latter enough attended to in its remote and in its immediate consequences. It is quite true that the law will not recognise as a sufficient characteristic of the alimentary nature of a fund that it is necessary for the subsistence of the person favoured. But the particular appropriation to subsistence is the decisive mark of an alimentary fund; and this seems to be necessarily implied in the appointment of a salary to a public office." Later on in the same page he says —"2. In the law of Scotland the salary of a judge, the pay or half-pay of an officer, and the salary of other inalienable public offices, as the funds assigned by the statute for enabling those who hold them to discharge the duties of their place, have been supposed to be not attachable by creditors; but this doctrine has been called in question, and in modern practice is not admitted without limitation." He is there dealing with public offices, but even as to such offices the excess or superfluity beyond what we call the "*beneficium competentiæ*" does not seem to be protected against the diligence of creditors or prevented from falling under a sequestration in bankruptcy. Even *Mitchell* v. *Barron* recognises this law.

But what of the salary or wages of an ordinary employee or servant like the bankrupt? As to these Bell says (Commentaries, 5th ed., p. 131, 7th ed., p. 127)—"The wages or fees of servants constitute a fund properly alimentary, and can be attached only so far as they exceed what is necessary for their subsistence. The salary of a comedian is held to be alimentary on a similar principle. The debtor, indeed, may be imprisoned, and thus forced to bargain with his creditors, but if the creditors should prefer the attachment of his gains, they must leave untouched a reasonable maintenance conformable to his condition."

Dealing generally with the *acquirenda* after sequestration of a bankrupt Bell says (Commentaries, 5th ed., vol. ii, p. 434)—"3. The bankrupt may go into trade or employment of any kind, exposed no doubt . . . to attachment of his acquisitions both by his old creditors and by new ones. Such acquisitions it will in general be for the interest of the creditors to allow him to retain as it will save them an allowance. But when it amounts to a sum beyond his decent and decorous subsistence it is his duty to give it up to his creditors, and they will be entitled either to attach it by their individual diligence or to apply for a supplementary sequestration to have it brought into a course of management and distribution."

I am of opinion that by the law of Scotland the wages or earnings of an employee or servant so far as in excess of the *beneficium competentiæ* are subject to the diligence of his creditors and may be made available for the payment of his debts, and that it is the bankrupt's duty to make them so available.

What, then, is the position under the Scottish Statute of 1913?

In the interpretation clause it is provided —"'Property' and 'estate' shall, when not expressly restricted, include every kind of property, heritable or moveable, wherever

situated, and all rights, powers, and interests therein capable of legal or voluntary alienation or of being affected by diligence or attached for debt."

I emphasise the words "or voluntary alienation," as they did not occur in the previous statute. That interpretation is broad enough to include, according to its terms, the whole wages or salary earned by a bankrupt as and when they are paid.

Section 28 provides that on the presentation of the petition under and in compliance with the necessary conditions the judge "shall forthwith . . . issue a deliverance by which he shall award sequestration of the estates which then belong or shall thereafter belong to the debtor before the date of the discharge, and declare the estates to belong to the creditors for the purposes of this Act."

That is the deliverance which has been pronounced in this sequestration, and the effect of that deliverance is in my opinion to sequestrate any money which thereafter comes to belong to the bankrupt before his discharge, including wages earned by him and actually paid to him before his discharge, so far at least as in excess of the *beneficium competentiæ*, and to declare such excess to belong to his creditors.

By section 70 it is declared that the act and warrant issued to the trustee "shall be evidence of his right and title to the sequestrated estate for the purposes of this Act." Section 97 vests in the trustee the moveable estate of the bankrupt, *inter alia*, as if intimation had been made at the date of the sequestration. By section 98 (1) it is declared —"1. If any estate . . . shall after the date of the sequestration, and before the bankrupt has obtained his discharge, be acquired by him . . . the same shall *ipso jure* fall under the sequestration, and the full right and interest accruing thereon to the bankrupt shall be held as transferred to and vested in the trustee as at the date of the acquisition thereof . . . for the purposes of this Act."

Turning now to the precise terms of the prayer of the petition, the first crave is little more than a crave for a declarator of certain facts to the effect that the bankrupt is in receipt of income from three sources amounting *in cumulo* to £700 per annum and available as aliment, £500 being a salary received by him as an employee of William Beardmore & Company, and subject to certain restrictions £200 over and above the £500. That is, I think, practically admitted. The second crave is that the amount so received annually by the bankrupt "is in excess of a suitable aliment to him."

The third crave is to fix the amount by which the annual income of the bankrupt derived as aforesaid exceeds a suitable aliment, and "to order and decern the amount of such excess as so fixed to be paid by the said John Hamilton" (the bankrupt), "*as and when received by him*," to the trustee in his sequestration "as part of the property of the said John Hamilton falling under the sequestration." In my opinion "the amount of such excess," if we accept as I think we must the case of *Mitchell* v. *Barron* as well decided, formed part of the estate which was sequestrated in terms of section 28. The bankrupt held the position of service which he now holds when he was sequestrated, and the contractual relation between him and his employer has never been terminated and still subsists. The trustee is in my opinion entitled to receive as part of the estate vested in him any excess of said salary or wages as above described. But if that were not so I think said excess must be regarded in that event as "estate" in the sense of section 98 (1) which when the bankrupt receives it will fall within the conditions of said section as being acquired after sequestration and before discharge, and therefore it would in my opinion "*ipso jure* fall under the sequestration," and the bankrupt's full right and interest thereon would be held "as transferred to and vested in the trustee."

But section 98 (1) goes on to describe a certain procedure which is to be followed in order to facilitate the reduction of the estate into the actual possession of the trustee. I was at first inclined to think that the special prayer of the petition might have enabled us, even assuming the wages to be *acquirenda*, to grant the prayer *de plano* although, as was pointed out by the respondent, the intimation provided for by the statute had not been made. The point does not seem to have been taken before the Lord Ordinary, but in any event we have (in case the view might be taken that the salary was *acquirenda*) appointed intimation and required appearance in terms of the statute. That intimation and requirement have been duly made, and no appearance has been made.

The petitioner avers, and it is not disputed, that the bankrupt has a salary of £500 per annum. There remain to be considered the other two sums of £100 each. As to one of these the respondent only admits about £90 which is received by his wife, but which at any rate is available for her maintenance. As to the other £100, the respondent only admits £80 as the annual income. The members of the bankrupt's family are all over twenty-one. In these circumstances I think it would be a moderate sum to require the bankrupt to make over to the trustee £150 so long as there is no material change in his position.

I think we should recal the interlocutor reclaimed against, and remit to the Lord Ordinary to grant the prayer of the petition to the effect of finding that the bankrupt is in receipt of a salary of £500 per annum as an employee of William Beardmore & Company, Glasgow; that the bankrupt or his wife has right, as an alimentary provision, to a further income of at least £90 per annum and to a further income of about £80 per annum; second, to find that the cumulative amount of the said salary and incomes is in excess of a suitable aliment to the bankrupt in his existing circumstances by £150 per annum, and to order and decern the said John Hamilton to pay over £150 per annum out of the amount of the said salary of £500, in the proportion of £150 to £500 out of the amounts of said salary so

received by the bankrupt from time to time, to the said Henry Moncrieff Steele as trustee foresaid, as part of the property of the said John Hamilton falling under the sequestration, until further order and decerniture, under reservation always to the petitioner and to the bankrupt to apply further to the Court if any material change in the circumstances should arise; and to find the petitioner entitled to expenses.

LORD DUNDAS—The principal matter for determination here is whether the trustee is entitled to demand that a portion of the salary which the bankrupt is at present earning shall be paid over by him to the trustee, as and when received, as part of the property falling under the sequestration. This raises a very important and, I think, a novel question.

I shall eliminate in the first place certain elements of the debate which appear to me to be irrelevant. We cannot, I think, derive any aid from English cases, some of which were cited to us, *e.g.*, *Hollinshead* v. *Hazleton*, [1916] 1 A.C. 428; *Benwell*, (1884) 14 Q.B.D. 301—for the English statutes and rules of bankruptcy law appear to differ materially from our own. Next, I discard as having no place in the present argument section 98 (2) of the Act of 1913, because I do not think this salary can be regarded as an "alimentary provision" within the meaning of the section, or indeed as a provision at all. Thirdly, it appears to me that section 148 has no application here and no significance unless by way of contrast. Lastly, I consider that we are not here within the scope of section 98 (1) of the Act. I do not think that the payments of salary as they fall due should be regarded as *acquirenda*. The salary is the fruit, periodically accruing, of a contract of employment which subsisted at the date of sequestration, and the bankrupt's right to receive it passed, in my judgment, to his trustee by force of the sequestration. This view seems to me to derive support from the judgment of the First Division in *Barron* v. *Mitchell*, (1881) 8 R. 933, to which, and to this topic generally, I shall presently revert. But if I am wrong as to section 98 (1) it would not alter in substance the conclusion of my judgment, though the legal theory underlying it and the appropriate procedure would be somewhat different. With a view to such a contingency this Court ordered intimation to be made as provided by section 98 (1). This was done, and no further appearance has been entered.

The strength of the petitioner's case depends, in my judgment, upon sections 28 and 97 of the Act read along with the definition of "property" and "estate" in section 2. Section 28 provides that on a petition for sequestration the Lord Ordinary or Sheriff shall forthwith issue a "deliverance by which he shall award sequestration of the estates which then belong or shall belong to the debtor before the date of the discharge, and declare the estates to belong to the creditors for the purposes of this Act." Section 97 (1) provides that the trustee's act and warrant shall *ipso jure* transfer to and vest in him "as at the date of sequestration, with all right, title, and interest, the whole property of the debtor," including his whole moveable estate "so far as attachable for debt or capable of voluntary alienation by the bankrupt." The definition of "property" and "estate" (section 2) includes, *inter alia*, every kind of moveable property "and all rights, powers, and interests therein capable of legal or voluntary alienation, or of being affected by diligence or attached for debt." The petitioner maintains that by force of these sections a right to the salary, which by agreement with Messrs Beardmore the bankrupt was drawing, vested *ipso jure* in him at the date of the sequestration, with all right and interest thereto so long as it might continue to be paid, down to the date of the discharge. This seems to me to be a reasonable and proper construction of the statutory provisions which we ought to adopt unless there be anything in principle or authority adverse to our so doing, and I do not think any such obstacle exists.

It appears to be settled that where a bankrupt holds at the date of sequestration a salaried office its emoluments fall under the scope of the sequestration, at all events so far as they exceed what is a reasonable *beneficium competentiæ* in the circumstances. This has been decided, *e.g.*, as regards a parish minister—see *Learmonth*, (1858) 20 D. 418, Lord Mackenzie's opinion; *Sloan*, (1824) 3 S. 133 (o. e. 195), 1 Bell Comm. 124; *cf. Hale*, (1736) M. 711; *Smith*, Dec. 13, 1815, F.C.; *Scott*, Jan. 25, 1817, reported in note to *Davidson*, March 11, 1818, F.C., *affd.* (1823) 1 Sh. App. 323; a professor of civil law—*Laidlaw*, (1801) M., Appx. Arrestment, No. 4; and a pursuivant-at-arms—*Moinet*, (1833) 11 S. 348; and the opinions of the First Division in *Barron's* case seem to indicate that a schoolmaster's salary stands in a similar position. I see no good reason why a salary such as this bankrupt has enjoyed, and still enjoys, should in law be regarded as different from those others I have indicated; it may be more precarious, but so long as it continues to be paid I do not see that it is of any different quality. The Lord Ordinary considered, perhaps rightly, that there is authority, or at least a concurrence of judicial opinions, sufficient to bind him as an Outer House Judge to decide as he did, and the opinions he quotes, though not binding upon us, are entitled to great respect.

In *Barron's* case, that of a schoolmaster, the Lord Ordinary (Fraser) expressed the opinion that fees from the personal labour of a bankrupt, *e.g.*, of an advocate, physician, or dentist, are not *acquirenda* within the meaning of the statute. He said that the trustee could not compel a man to earn such fees for the creditors' behoof, and "it seems logically to follow that if the bankrupt voluntarily does so the trustee cannot demand from him the produce of his brains." After pointing out that the trustee's claim was only for the surplus over and above a subsistence allowance to the bankrupt and his family, his Lordship observes that "this implies, if it be a sound position, that the

trustee has a right to insist upon the bankrupt continuing his profession for the benefit of his creditors"—a doctrine for which, as Lord Fraser justly says, there is no authority whatever. With great respect I am unable to agree with his Lordship's reasoning. It is certain that a trustee cannot compel a bankrupt to work, but I see nothing illogical or unseemly in the idea that if the latter does work and earns money the trustee should be entitled to insist that the money shall—at least so far as not necessary for the bankrupt's support—inure to the creditors' benefit. Lord Fraser relies upon certain English decisions, and especially on an observation by James, L.J., in *ex parte Vine*, (1878) 8 Ch. Div. 366, that an exception to the general rules of bankruptcy was "absolutely necessary in order that the bankrupt might not be an outlaw—a mere slave to his trustee; he could not be prevented from earning his own living." I have already said that in my judgment English decisions and English rules are not to be relied on as safe guides for Scots lawyers in the region of bankruptcy, and in support of this view I may refer to the very weighty and pointed observations of Lord President Inglis in *Royal Bank of Scotland*, (1881) 8 R. at p. 815. *Vine's* case seems to afford an illustration in point. It was there held that a sum of damages recovered by the bankrupt in an action for slander raised by him after sequestration did not pass or belong to the trustee; but a decision in the contrary sense was pronounced by our Courts in *Jackson* v. *M'Kechnie*, (1875) 3 R. 130. Lord Fraser's judgment in *Barron's* case was adhered to by the First Division, but while the views set forth in his opinion were not expressly repudiated as unsound, they do not seem to have received any favour in the Inner House, and Lord President Inglis said that he had "no intention of repeating or adopting the grounds of his Lordship's opinion." In 1902 Lord Kyllachy sitting in the Outer House had occasion, incidentally to a dispute as to the sufficiency of a title to heritage, to consider whether the personal earnings of a solicitor, while an undischarged bankrupt, fell under the statutory clause anent *acquirenda*—*Carrick*, 1902, 10 S.L.T. 105. His Lordship held that they did not, "for the reasons stated by Lord Fraser in the case of *Barron* v. *Mitchell*, and which apart from that judgment I have always considered to be sound in principle and according to law." A year or two later Lord Stormonth Darling as Lord Ordinary decided the case of *Mason* v. *Paterson*, 1904, 12 S.L.T. 511, and in doing so had to deal with a precisely similar question arising upon the very deed of arrangement which Lord Kyllachy had had before him. Lord Stormonth Darling simply adopted (p. 514) the views of Lord Kyllachy and Lord Fraser, adding that the latter judge's opinion "went on the general principle that where creditors allow a bankrupt to earn money by his personal exertions, which they could not compel him to do, they have no right to seize the fruits of his labour." This latter decision does not seem to carry the matter any further than the preceding ones. I apprehend that Lord Stormonth Darling used the words "allow a bankrupt to earn money"—which seemed to have puzzled the Lord Ordinary—in the same sense as that in which they occur in such cases as *Abel*, 1883, 11 R. 149, and *Taylor*, 1879, 7 R. 128, which show that if creditors allow a bankrupt, either while undischarged (as in *Abel*) or after his discharge (as in *Taylor*), to keep possession for a length of time of property he has acquired, or to engage in trade and earn money by it, they may be barred by acquiescence from exercising what would otherwise have been their rights under section 103 (now section 98 (1)) of the Bankruptcy Statute. But there is nothing of that sort here; the facts of the case, with which this Court is familiar, having had to deal with a series of appeals rising out of the sequestration, show that the bankrupt has not been "allowed" to keep possession of estate for a length of time or to engage in any new business so as to bar Mr Caldwell's claim if it be otherwise well-founded —*cf. Hamilton* v. *Caldwell*, 1916 S.C. 809, *per* Lord Justice-Clerk, at p. 811 (53 S.L.R. 657 at 658).

The opinions of Lords Fraser, Kyllachy, and Stormonth Darling, to which I have now referred, whether they be well-founded or not—and I own that to my mind they are not satisfactory or convincing—do not quite cover the point here at issue. We are now considering a salary; the three learned judges were considering fees earned by a professional man, *e.g.*, an advocate, solicitor, or physician—for although *Barron's* case referred to a schoolmaster's salary, Lord Fraser's observations, which I have quoted, related to the question of fees. The Lord Ordinary says that "the petitioner conceded that the fees of a professional man could not be touched." Mr Caldwell, who conducted his case before us with much ability, assured us that the Lord Ordinary is under a misapprehension, and that he made no such concession, and he certainly did not make it at our bar. But I gather from the Lord Ordinary's opinion that the supposed concession went materially to influence his decision. He states as a *reductio ad impossibile* that if the order here asked is "competent, it must be competent to ordain any bankrupt who earns remuneration by his own labour after sequestration to pay over part of that remuneration to his trustee. I can see no valid reason for differentiating according to the manner in which that remuneration happens to be paid to him—salary, wages, or fees." For my own part it does not seem to me to be an extraordinary or an impossible view that all earnings by an undischarged bankrupt, whether by way of fees or otherwise, should be liable to attachment by his trustee for behoof of the creditors. After all the scope of the Act covers the bankrupt's whole estate, whether vested in him at the date of sequestration or coming to him later before the date of his discharge. It might be more difficult as matter of process to attach fees than a salary. They would if attachable probably be so as

acquirenda, and not under the vesting sections. So again if the bankrupt should acquire a salaried post after sequestration, it may be that the periodical payments of the salary would fall to be recovered as *acquirenda*. But it is unnecessary to decide these matters; we are here dealing with a salaried post which the bankrupt occupied at the date of sequestration, and the emoluments of which he is still enjoying. I am unable to see why such a salary should be treated as materially different from one which is drawn in virtue of an office such as that of a minister, a schoolmaster, a professor, or the like. In both cases the post or office stands to the salary as the tree to its fruit; in the former case the life of the tree may be more precarious than in the latter, but while the tree lasts its fruits spring from and belong to it and are not mere casual windfalls. In both cases the bankrupt's right, whether well secured or precarious, to the emoluments of his post passes in my judgment to the trustee as at the date of the sequestration. I think therefore that upon a sound construction of the Act the salary here in question should be treated as being vested—at all events as regards the surplus over and above what is reasonably necessary for subsistence—in the trustee for the purposes of the sequestration, and that there is nothing in principle or in authority to deter us from arriving at such a conclusion.

The Lord Ordinary deals in his opinion with considerations of public policy. I do not think that we are concerned with these; our duty is to administer the statute as we find it. But there seems to me to be much good sense in the observation of Lord Deas in *Learmonth's* case, 1858, 20 D. at p. 423, that "it is a bad thing that a parish minister should not have the means of living according to his position, but it would be worse that he should be allowed to contract debts and leave them unpaid." These words might I think be applied, *mutatis mutandis*, to a case like the present.

I am therefore for recalling the Lord Ordinary's interlocutor and remitting to his Lordship to grant decree in the terms indicated by the Lord Justice-Clerk. I should add that as regards the question of pecuniary amount I agree with what the Lord Justice-Clerk has said.

LORD SALVESEN—The estates of Mr John Hamilton, formerly shipbuilder in Govan, were sequestrated on 3rd November 1913. Mr H. M. Steel was appointed trustee on the sequestrated estate, and he has paid a dividend of 5s. 9¼d. to the ordinary creditors. The petitioner was a creditor for £500, and there was only one other large creditor, who is the bankrupt's brother-in-law, and who has virtually been able to control the proceedings in the sequestration.

At the date of the sequestration the bankrupt was in the service of Messrs William Beardmore & Company. His salary at that time was £500 a-year. We were informed that the contract of service was not of any fixed duration, and the Lord Ordinary has dealt with the matter on this footing. Nevertheless the bankrupt has continued in the same employment ever since, and has drawn the same yearly salary. It may be assumed that he could not be dismissed without notice. In addition the bankrupt is admittedly entitled to an annual income of £80 from a sum left by his father, and his wife is entitled to an annual income of £90. Both of these are declared to be alimentary and not attachable for debt. The total income which the bankrupt has thus continued to enjoy from the date of his sequestration amounts to at least £670. Out of this income he has contributed nothing towards the payment of his prior creditors.

In 1915 the bankrupt petitioned for his discharge, which the Sheriff-Substitute before whom the application came granted. On 20th June 1916 this Division recalled the interlocutor of the Sheriff-Substitute granting the discharge, and found that as a condition of the bankrupt being granted his discharge he should undertake to make payment for behoof of his creditors of the sum of £100 per annum out of his salary or emoluments so long as the same amounted to not less than £500 per annum. The bankrupt thereupon withdrew his application for discharge.

The petitioner, who has been duly authorised to use the name of the trustee on conditions with which he has complied, has now presented a petition in which he asks us, *inter alia*, to fix the amount by which the cumulative amount of the bankrupt's salary and the incomes which he and his wife enjoy exceed a suitable aliment for him in view of his existing circumstances, and to order the amount of such excess as and when received by him to be paid to his trustee. The Lord Ordinary has dismissed the petition, and his interlocutor has now been brought under review.

The Lord Ordinary has reached his decision because of authority which, although he admits it is not technically binding, is of such concurrent weight that he thinks it must be followed by a judge of first instance. These authorities are the opinion of Lord Fraser in *Barron* v. *Mitchell*, 8 R. 933, in which Lord Kyllachy and Lord Stormonth Darling in two subsequent cases which were decided in the Outer House expressed their concurrence. In the case of *Mason*, 12 S.L.T. 511, which Lord Stormonth-Darling decided, the fund was claimed not merely by the trustee in the sequestration but by new creditors. There is no such competition here, and accordingly the actual decision has no bearing on the question we have to determine. The same remark applies to the decision in *Barron* v. *Mitchell*. The petition there was laid on the 103rd section of the Bankruptcy Act 1856. Lord President Inglis said—"The question is whether the estate which is the subject of the present dispute is estate, using the words in the wide meaning of the interpretation clause of the statute, which has been acquired by the bankrupt, or has descended, reverted, or come to him after the sequestration. Now what has vested in the bankrupt is his office of schoolmaster, and that was vested in him at the date of sequestration. Therefore it is not

estate which has been acquired by him, or has descended, reverted, or come to him after the sequestration, and what the trustee wishes to have attached are the emoluments of this office—a subject which was vested in the bankrupt at the date of sequestration. On this single ground I am for refusing the petition." The Lord President was careful not to associate himself with the opinion of Lord Fraser, on which the Lord Ordinary here relies, and none of the other Judges expressed any approval of it.

The present petition is not limited to what is generally called the *acquirenda* clause, and it is brought on a new statute—the Bankruptcy (Scotland) Act 1913. It is open to the petitioner to maintain as he did either that his claim is competent under section 28 or under sections 97 and 98 of the new statute, or indeed at common law. I agree, however, with a remark which was made by Mr Sandeman that there is no common law of bankruptcy, although the principles underlying the statute being equitable principles are also recognised by the common law. The broad question which we have now to determine is whether personal earnings of the bankrupt, however large they may be, are protected by the Bankruptcy Act as in a question with the creditors in his sequestration. Dealing with this question, which Lord Fraser said had frequently occurred in England, he expressed the opinion that the result of the decisions there settled that the trustee had no right to seize the profits of the bankrupt's personal and daily labour, and he indicated in unmistakable terms that he would hold the same rule applicable in Scotland.

I cannot say that I am satisfied that Lord Fraser correctly apprehended the law of England as it was at the date when his opinion was delivered. The passage in the opinion of James, L.J., on which he mainly relied is perfectly true in a sense. No bankrupt can be compelled to give his labour for the benefit of his trustee, and it is settled both in England and in Scotland that he is entitled to an alimentary allowance out of any earnings which he may make by his personal labour, for without the means of livelihood the bankrupt would be unable to earn any money. But the question with which we are concerned in this case, namely, whether surplus earnings beyond what is sufficient for the reasonable maintenance of the bankrupt in the position in life which he occupies was not considered in *ex parte Vine*, 8 Ch. Div. The decision in that case is besides diametrically opposed to one which had been previously given in Scotland —*Jackson* v. *M'Kechnie*, 3 R. 130—although that decision does not appear to have been referred to in the argument before the English Court. In the later case of *Emden* v. *Carte*, 17 Ch. Div. 768, Lush, L.J., said—"The Act made all the property acquired after the adjudication pass to the trustee. It has been held that what the bankrupt earns by daily labour to support life does not vest in the trustee. But if he earns a margin that is a profit and goes to the trustee." That, as I understand it, embodies the argument for the reclaimer in a nutshell, and is, in the teeth of Lord Fraser's opinion, based on isolated passages in previous judgments which did not deal with the point here at issue.

But whatever may have been at one time the law of England, it is certain now that under the English Bankruptcy Act of 1914 the Court is directed on the application of the trustee "where the bankrupt is in receipt of a salary or income" (other than one derived from employment under the Crown, in respect of which there is a special provision) "to make such order as it thinks just for the payment of the salary, income, half-pay, pension, or compensation, or any part thereof, to the trustee, to be applied by him in such manner as the Court may direct." This provision which is contained in section 51 (2) has been frequently applied in England and covers the case of salary received in any civil employment. The Legislature apparently did not think that by this enactment it was making a slave of the bankrupt, and seems to answer, so far as England is concerned, the question of public policy which the Lord Ordinary discusses, and with regard to which he says that there are considerations pointing both ways.

It is, however, the case that in the Scottish Bankruptcy Act 1913 there is no provision corresponding to section 51 (2) of the English Act, and the petitioner's claim must be based on the statute. He appeals in the first place to section 28, which provides for the Lord Ordinary or the Sheriff awarding sequestration "of the estates which then belong or shall thereafter belong to the debtor before the date of the discharge," and for declaring these estates to belong to the creditors for the purposes of the Act. "Estate" is defined by section 2 as including "every kind of property, heritable or moveable, wherever situated, and all rights, powers, and interests therein capable of legal or voluntary alienation, or of being affected by diligence or attached for debt." Now I cannot doubt that the salary due to an employee for services rendered falls within this definition. It is attachable for debt and it is also capable of alienation. *Prima facie*, therefore, I see no answer to the reclaimer's view that the salary which the bankrupt has been receiving since the date of his sequestration vested in the trustee subject only to such common law exceptions as may be held to be necessarily implied. Such salary earned since the date of the sequestration did not, of course, belong to the bankrupt at that date, but it had come to belong to him before the date of his discharge—which he has not yet obtained—and therefore, in my judgment, vested in the trustee. It is not therefore necessary, as I think, for the petitioner to appeal to section 98 (1), although I am unable to see how a salary which a man has earned after his sequestration under a contract of employment which might have been terminated at any time on short notice, is not estate which has been acquired by him since the date of his sequestration, and where any question arises as to the right of the bankrupt to retain sufficient for his

maintenance out of such salary it is proper —and indeed necessary—that an application should be made to the Court in order to fix the surplus, or, to use the expression of Lush, L.J., "the margin that is to go to the trustee." The decision in the case of *Barron* v. *Mitchell* does not conflict with this view although it appears to me that the ground of decision was somewhat narrow. There an office which the bankrupt held at the date of sequestration, and which carried certain emoluments, was held not to come within the scope of the *acquirenda* clause. Notwithstanding the great weight which one attaches to any opinion of Lord President Inglis I have some difficulty in accepting the grounds of his judgment. An office such as that of a schoolmaster cannot vest in the trustee for creditors. The duties of the office cannot be discharged by the trustee, but the emoluments to which the bankrupt acquired right in virtue of his office and because of the personal services which he has rendered in its due discharge may very well vest in the trustee for the benefit of prior creditors, so far as not necessary for the bankrupt's maintenance. If the respondent in *Barron's* case had been appointed to the office of schoolmaster after his sequestration, the *ratio decidendi* of the Lord President would not have applied, and I can see no reason why an application should not have been made in such a case under the 103rd section of the 1856 Act. Lord Shand indicated in his opinion that while the trustee had no claim under the 103rd section his claim might be good under the vesting order, but he indicated that the trustee in bankruptcy would have two difficulties to meet, namely, (1) whether earnings from personal service could ever be appropriated by a trustee for creditors, and (2) whether the earnings in that particular case were in excess of a suitable aliment. The latter consideration may explain why there is no record of any attempt by the trustee to press his claim after the adverse judgment of the First Division.

I need not refer in detail to the various decisions in our Courts in which it has been held that bankrupts holding salaried appointments are bound to assign part of their salary for the benefit of their creditors where the Court is of opiniou that the amount is more than adequate for the maintenance of the bankrupt. These decisions are summarised by Lord Shaw of Dunfermline in his opinion in the case of *Hollinshead*, [1916] A.C., at p. 546, where he says —"I am, moreover, in some measure acquainted with a system of jurisprudence in which such an allowance is made to the creditors of persons who, being overtaken by bankruptcy, have continued to hold positions of the highest dignity and responsibility. Clergymen of the Established Church, town-clerks, and professors in the university—all of them, to speak generally, holding office *ad vitam ad culpam* —have been liable to the action of their creditors in ingathering their salaries, the bankrupt being secured by the Court in a *beneficium competentiæ*." I concur in the observation which the learned Judge makes when he says that this result is just in itself and just to all parties.

In principle it appears to me to make no difference that the office from which the salary is derived is held on a life tenure. Such an office may always be terminated at the will of the bankrupt for he may resign it at pleasure, and if he does so and chooses to live in poverty his creditors' just claims will be defeated. The position which the respondent here holds is no doubt more precarious for it may be terminated by his employers, but so long as he holds it, or any other position from which he derives an income in excess of what is reasonably necessary for his own support, there is no hardship in his being compelled to make over the surplus to his creditors while he remains undischarged. The case may be figured where a bankrupt is capable of earning a very large income by his personal exertions and continues to do so after his bankruptcy. If it were to be laid down that such earnings could never be attached by the bankrupt's creditors as at the date of the sequestration, the process would be a convenient mode of getting rid of all past liabilities without interfering in the slightest with the comfort of the bankrupt. The present is not an extreme case, but I daresay there are some of the respondent's creditors who never had an income such as he has continuously enjoyed since the date of the sequestration.

The result of my opinion is that, assuming the decision in *Barron's* case to be binding upon us, the reclaimer is entitled to succeed in virtue of section 28 of the 1913 Act. If, on the other hand, the matter is open, my own opinion is that section 98, being the *acquirenda* clause of the new Act, is the section that applies—this being on the footing that it is not the office which the bankrupt holds at the date of the sequestration which vests in his trustee, but that the salary due from time to time thereafter is estate which the bankrupt has acquired during the sequestration. The procedure would therefore be exactly the same whether the salaried position was held by the bankrupt when he applied for sequestration or had been obtained by him after the award. I concur in Lord Dundas's observations with regard to the anomalies which the Lord Ordinary deduces from Mr Caldwell's alleged concession. I cannot hold that any different principle applies to fees due to a dentist, physician, or lawyer for personal services (with the possible exception of an advocate's fees, which he has no title to sue for unless they have been actually recovered by the solicitor) from emoluments derived by way of salary. The fees of a physician—to take one illustration—may be recovered by him from his patients, and they may be arrested in the patient's hands by a creditor. They appear to me to fall under exactly the same rule as is applicable to stipend or salary, the only difference being that it is less easy to ascertain, in the absence of books kept by the physician, what is the cumulo amount of his income.

As regards the amount, I do not dissent from the sum that your Lordship in the

chair has indicated. In most of the prior cases, including that of *Hollinshead*, a much larger proportion was given to the creditors than we propose to do here, and I am not to be taken as committed to the view that £520 is necessary for the bankrupt's maintenance, or to be precluded, in the event of his earning a less amount in his present or some future position, from holding that he must share that also with his creditors. What weighs with me, however, is that the position which the bankrupt holds being apparently terminable on due notice by either party to the contract of service, it is not expedient that so much of it should be assigned for the benefit of creditors as to discourage the bankrupt from continuing to hold it. If the bankrupt here had made an allowance to his creditors since his sequestration I should have been disposed favourably to consider an application for his discharge on the footing of his continuing the allowance—not until the debts were paid, but for a reasonable period only; although in the case of one unfortunate clergyman the Court seems to have condemned him to pay a large part of his stipend to his creditors for the remainder of his life, and that although his sequestration had been brought about by no personal fault. For these reasons I agree with your Lordship in holding that we must recal the judgment of the Lord Ordinary and pronounce an interlocutor in the terms proposed by your Lordship in the chair.

LORD GUTHRIE—On 13th November 1913, when the estates of John Hamilton were sequestrated, he was in the employment of William Beardmore & Company at a salary of £500. He was dismissible at pleasure, subject to payment of the proportion of his salary applicable to the customary period of notice. The sequestration having been in 1913, the present petition was not brought till January 1918, after the said period of notice and the right to payment in lieu of notice had long expired, and applies only to salary payable to Hamilton after the date of the petition.

In these circumstances the question is whether Hamilton's creditors are entitled through the trustee in the sequestration to payment of such part of the salary of £500—the question would have been the same if it had been £5000—accruing after the date of the petition payable to Hamilton by Beardmore's (and of certain other funds which do not require to be separately dealt with) as is not reasonably necessary for Hamilton's maintenance. Contrary to the Lord Ordinary's opinion, and agreeing with the result arrived at by your Lordships, although I do not proceed on the same grounds, I think the creditors are so entitled.

The question depends on the application of sections 2, 28, 97 (1), and 98 (1) of the Bankruptcy (Scotland) Act 1913 to the admitted facts of this case. The interpretations of the word "estate" in section 2 and section 28 apply both to estate which the statute considers to have had a legal existence at the date of the sequestration and to *acquirenda*. Section 97 (1) is limited in its application to moveable estate in legal existence at the date of the sequestration, and section 98 (1) is limited in its application to *acquirenda*, heritable and moveable. The question under the statute is whether the income in question can be brought within the purview of 97 (1) taken along with the interpretation clause, section 2, or whether, if not, it falls within 98 (1) taken along with the interpretation clause.

It was not disputed that if Hamilton at the date of his sequestration had held a contract for a term of years with Beardmore, which contract was still current, the bankrupt's rights under that contract would have vested in the trustee under sections 28 and 97 (1) of the 1913 Act, taken along with the interpretation of the word "estate" in section 2, the interpretation clause of that statute, even although the previous cases on this branch of the law have not gone beyond the case of a holder of a salaried office *ad vitam aut culpam* or a substantially equivalent tenure. In that case the bankrupt's right to salary applicable to the unexpired portion of the contract period, or to its equivalent in name of damages in the event of his unjustifiable dismissal, would clearly be a legal estate in him attachable for debt and capable of voluntary alienation by him. If the sequestration came to an end before the expiry of the contract period the question would not arise which falls to be decided in the present case. Hamilton at the date of the sequestration was a servant at will, and it is said that in connection with his employment with the Beardmores he had no estate as at that date in the sense of the statute which could vest in the trustee. I am of opinion that he had such estate, but only to the extent of the salary effeiring to the period during which he had a legal right to continued payment of his salary or to compensation in lieu of notice. On the expiry of that period no estate as at the date of sequestration remained, because all the bankrupt's legal right to salary or its equivalent existing at that date had then expired. His right to salary for the period of notice if he ran that period, or to the equivalent if he was summarily dismissed, was as at the date of the sequestration attachable for debt and capable of voluntary alienation. But as at that date he had no right to salary or its equivalent for any subsequent period, and consequently there was nothing applicable to such subsequent period which could be attached for debt or made the subject of a voluntary alienation as at the date of the sequestration. In my opinion nothing can be held to be moveable estate falling under the sequestration as at its date which is not in terms of 97 (1) attachable for debt or capable of voluntary alienation, and it seems to me clear that the salary in question as at the date of the petition was neither in the one position or the other at the date of the sequestration. It is to be observed that in section 2 not only is "property" so qualified, but also "all rights, powers, and interests therein." I am not ignoring the argument that although all legal right in the bankrupt as at the date of the sequestration ceased at

the end of the period of notice to which he was entitled, whatever that period was, still in normal circumstances, with goodwill on both sides, he would probably remain in the situation he held at the date of the sequestration, and therefore might be held to be legally in a similar position to the holder of an office *ad vitam aut culpam*, or an employee under a contract for a term current at the date of the sequestration. The difference seems to be vital, namely, that in the one case there is estate in the sense of something attachable for debt or capable of voluntary alienation, in the other there is no such estate, and the statute expressly lays down that these qualities are essential to anything which is to be treated as estate as at the date of the sequestration.

It does not follow that the creditors have no rights in Hamilton's salary payable by Beardmore & Company during the subsequent period of the sequestration. Section 98 (1) of the statute in my opinion applies to that period. Beardmore's periodic payments of salary to Hamilton subsequent to the date of the present petition, although not in my opinion vested in the trustee at the date of the sequestration, vest in him as *acquirenda* of the bankrupt, because they form moveable estate in the sense of section 98 (1), as interpreted by section 2, acquired by him capable of voluntary alienation and of being attached for debt. I see nothing in the statute to exclude such periodic payments.

I therefore concur in the result arrived at by your Lordships, and I think the sum which it is proposed the bankrupt should pay to his trustee for the benefit of his creditors is a fair one in the circumstances.

The Court pronounced this interlocutor—

"Recal the . . . interlocutor reclaimed against, and remit to the Lord Ordinary on the Bills to grant the prayer of the petition to the effect of finding that the bankrupt is in receipt of a salary of £500 per annum as an employee of William Beardmore & Company, Limited, Glasgow; that the bankrupt or his wife has right as an alimentary provision to a further income of at least £90 per annum, and to a further income of about £80 per annum; and second, to find that the cumulative amount of the said salary and incomes is in excess of a suitable aliment to the bankrupt in his existing circumstances by £150 per annum, and to order and decern the said bankrupt John Hamilton to pay over £150 per annum out of the amount of the said salary of £500 as and when received by him, in the proportion of £150 to £500 out of the amounts of said salary so received by him from time to time, to the trustee Henry Moncrieff Steel, as part of the property of the said John Hamilton falling under the sequestration, until further order and decerniture, under reservation always to the petitioner and to the bankrupt of the right to apply further to the Court in the event of any change of circumstances: Find the petitioner entitled to expenses against the respondent the said John Hamilton. . . ."

Counsel for the Petitioners — Party. Agents—Cowan & Stewart, W.S.

Counsel for the Respondent—Sandeman, K.C. — Gentles. Agent — Robert Miller, S.S.C.

Saturday, June 8.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

GRIEVE AND OTHERS *v.* EDINBURGH AND DISTRICT WATER TRUSTEES.

War—Crown—Ultra vires—Statutory Trust—Royal Proclamation—Request by Military Authorities—Water Supply—Defence of the Realm Regulations (Consolidated), sec. 8, D (Order in Council, 23rd May 1916).

Statutory water trustees were requested by the military authorities to provide a supply of water to certain military camps situated within the former's area of supply, which were required as soon as possible for winter use by troops. The water trustees entered into contracts whereby they were to provide the material required, and also to execute the whole plumbing work necessary for the introduction and distribution of water in the camps. Certain local master plumbers brought an action to have it declared that the water trustees were not entitled to engage in the trade or business of plumbing, and, in particular, that they were not entitled to accept any voluntary employment by, or make any contract with, the owner or occupier of any premises supplied or to be supplied by them with water, under which they undertook to provide any appliances or articles other than such as were required to bring or regulate a supply of water to these premises. The defenders pleaded war necessity and the Defence of the Realm Regulations. *Held* that the water trustees were not justified in undertaking work which was *ultra vires* of their statutory powers, and declarator and interdict as craved *granted*.

Approval, per the Lord Justice-Clerk, of statement in Dicey, On the Constitution, that "Royal proclamations have in no sense the force of law; they serve to call the attention of the public to the law; they cannot of themselves impose upon any man any legal obligation or duty not imposed by common law or by Act of Parliament."

The Defence of the Realm Regulations Consolidated, section 8, D (Order in Council 23rd May 1916, Statutory Rules and Orders 1916, No. 317) enacts—"Any company, authority, or person supplying, or authorised to supply, water, light, heat, or power, shall, if so required by the Admiralty or Army Council or the Minister of Munitions, supply water,