Friday, March 10.

FIRST DIVISION.

(With three Consulted Judges of the Second Division.)

[Sheriff Court at Arbroath.

MORISON *v.* REID.

Bankruptcy—"Estate" of Bankrupt—Property in Expectancy—Spes successionis—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *secs.* 4, 29, 81.

Held by a majority of Seven Judges (Lord Adam *diss.*) that a bankrupt was not bound, under penalty of imprisonment and of forfeiture of the benefit of the Bankruptcy Statutes, to grant in favour of the trustee in the sequestration an assignation of a *spes successionis*, consisting of a right, contingent upon his survivance, to succeed to a share of the residue of an estate.

Opinions reserved as to whether the Court has a discretionary power to refuse to grant a bankrupt his discharge except upon condition of his conveying to his trustee an "eventual right" of this kind.

The case of *Kirkland* v. *Kirkland's Trustee*, March 18, 1886, 13 R. 798, considered.

The deceased Andrew Morison, farmer, left a trust-disposition and settlement, dated 2nd May 1857, conveying his whole estate, heritable and moveable, to certain trustees for the purpose of maintaining his widow and family, and after the death of his widow, and after the youngest of his children should have attained majority, for distribution and division of the residue of his trust-estate, if any, equally among his children then alive, and the issue of any of his children that might have predeceased leaving issue, such issue being entitled equally to the share which their deceased parent would have received if alive; and it was specially declared that the provisions to his children or their issue should not vest in them until actual payment to them respectively.

On 12th September 1892 the estates of Robert Morison, auctioneer in Arbroath, one of the children of the said Andrew Morison, were sequestrated, and George Reid, bank agent in Arbroath, was appointed trustee. At that date the bankrupt had a *spes successionis* under his father's settlement, the period for actual payment of the residue not having yet arrived.

Section 81 of the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79) provides—"The bankrupt shall make up . . . a state of his affairs, specifying his whole property, wherever situated, the property in expectancy or to which he may have an eventual right, the names and designations of his creditors and debtors, and the debts due by and to him, and a rental of his heritable property, which state and rental shall be subscribed by the bankrupt, and shall then be delivered to the trustee, and the same shall be engrossed in a sederunt book to be kept by the trustee; and the bankrupt shall at all times give every information and assistance necessary to enable the trustee to execute his duty; and if the bankrupt fail to do so, or to grant any deed which may be requisite for the recovery or disposal of his estate, the trustee may apply to the Sheriff to compel him to give such information and assistance, and to grant such deeds, under the penalty of imprisonment and of forfeiture of the benefit of this Act, and unless cause be shown to the contrary the Sheriff shall issue a warrant of imprisonment accordingly."

In accordance with this section, the trustee prepared and called upon the bankrupt to execute an assignation conveying the *spes successionis* to him to enable him to complete a title thereto, and to dispose of it for the benefit of the creditors. The draft of the proposed assignation and conveyance proceeded on a narrative of the father's settlement, and bore that it was imperative on the bankrupt to assign and convey to his trustee "his whole right, title, and interest, present and future, in and to the estate and succession of his said deceased father Andrew Morison, under his said trust-disposition and settlement or otherwise," and it contained power to uplift and discharge, and if need be to sue for, the bankrupt's share and interest in the said estate and succession.

The bankrupt refused to execute such an assignation, and the trustee then presented a petition in the Sheriff Court of Forfarshire at Arbroath, in which he prayed the Court to ordain the bankrupt to execute a deed in the terms above set forth, "and in the event of the defender refusing or delaying to do so, to grant warrant to officers of Court to apprehend and imprison him within the prison of Dundee, therein to remain so long as he so refuses or delays to grant said deed . . . and also to find and declare that he has forfeited the benefit of the Bankruptcy (Scotland) Act 1856 and Acts explaining and amending the same."

On 30th November 1892 the Sheriff-Substitute (ROBERTSON) pronounced the following interlocutor:—"The Sheriff-Substitute having made avizandum with the petition, after hearing parties' prors., ordains the defender to execute the deed referred to; and in the event of the defender refusing or delaying to do so, grants warrant as craved.

"*Note.*—Robert Morison was sequestrated on the 12th September 1892. The pursuer is the trustee in the sequestration, and he produces the act and warrant under which he acts.

"Morison has a *spes successionis* under the trust-disposition of his father, and on the authority of the case of *Trappes* v. *Meredith*, 10 Macph. 38, this does not pass to the trustee. The *spes successionis* to which Morison is entitled is one which has not vested in him; it depends on his survivance, and is a possibility that may never become a beneficial interest. Morison has refused to sign a deed which would enable the

trustee to dispose of this *spes successionis* for what it is worth, and the present action is raised under the 81st section of the Bankruptcy Act of 1856.

"I think, under this section, the bankrupt is bound to do everything in his power to give money to his creditors. He must convey over to his trustee, not only all his effects, but any right of property he has in expectancy, or to which he may have an eventual right, which may be of value, or may become valuable, to the creditors. Then, if the bankrupt fails to give the trustee every information and assistance, or to sign any deed which may be necessary for the recovery or disposal of his estate, the trustee may come to the Sheriff and compel him to do so, under section 81.

"In the present case I am told that there is money in this *spes successionis*, and that the trustee sees his way to raise money on it, but that the bankrupt refuses to help him. It is, in short, an available asset which the bankrupt refuses to make forthcoming. It is an asset, moreover, that may be lost to the creditors if the bankrupt should die before the *spes successionis* vests in him.

"It appears to me, if some insurance or other company is willing to take the risk of the bankrupt surviving, and will pay down a sum in exchange for the *spes successionis*, that this is an asset which the creditors are entitled to; and consequently, that this is a position where the trustee may ask the Sheriff to compel the bankrupt to grant an assignation. This view is certainly supported by Lord Adam in the case of *Kirkland's Trustee*, 13 R. 809. His Lordship says—'I think, in future cases, it will be the more logical way for a trustee not to enforce such assignation by opposing the discharge when applied for, unless the bankrupt will execute the required assignation, but rather to report in the case of such refusal that the bankrupt has not made a fair and full surrender of his estate.'

"The bankrupt never can get his discharge until he surrenders this *spes successionis*. But this is no satisfaction to the creditors. The bankrupt may be willing to wait years for his discharge, and may die before the *spes successionis* vests in him, and thus an available asset may be lost to the creditors.

"I therefore think the compulsory powers of the 81st section should be exercised, and I have granted the prayer of the petition."

The defender appealed.

On 1st February 1893, after having heard counsel and made avizandum, the Lords "in respect of their being equally divided in opinion," appointed the cause to be heard before them, along with three Judges of the Second Division.

The arguments are fully stated in the opinions of Lord Rutherfurd Clark and Lord Adam. The following authorities were referred to—*Trappes* v. *Meredith*, November 3, 1871, 10 Macph. 38; *Kirkland* v. *Kirkland's Trustee*, March 18, 1886, 13 R. 798; Bankruptcy (Scotland) Act 1856, secs. 4, 29, 81, 102, and 103.

At advising—

LORD RUTHERFURD CLARK—The question is, whether the bankrupt is bound to convey to the trustee a *spes successionis* or expectancy to which he has right under his father's trust-settlement? The deed which the trustee demands is before us. It is expressed in such a manner as to convey to him the succession whensoever it shall vest, and to enable him, if he sees fit, to sell it with all right competent to the bankrupt. Otherwise it would be of no use. For it is clear that the trustee will by force of the sequestration take the succession if it vested before the bankrupt is discharged.

It is a matter of express decision that a "right of expectancy or *spes successionis* is not attachable by the diligence of the creditors of the person in expectancy or entitled to succeed, and would not be carried to the trustee in his sequestration, if he should be discharged before such right, estate, or succession was vested in him." I use the language of the Court in the case of *Trappes*. The pursuer does not dispute the soundness of this decision. Accordingly, he does not rely on the award of sequestration or on the vesting clauses of the Act. He founds entirely on the 81st section as that section is explained by the interpretation clause, and he maintains that the defender is thereby bound to convey to him his *spes successionis*.

Although the decision in the case of *Trappes* has not been and indeed cannot be impeached, I think that it will be of use to notice the principle on which it depends. The 29th section directs the judge to issue a deliverance, by which he shall award sequestration of the estates which then belong or shall thereafter belong to the debtor prior to his discharge. *Acquirenda* are thus expressly brought within the sequestration. But the effect of the award is explained by the 103rd section. It provides that if any estate shall be acquired by the bankrupt, or shall descend or come to him, the same shall, *ipso jure*, fall under the sequestration, and shall be held as transferred to and vested in the trustee as at the date of the acquisition or succession. Reading these clauses together, I think it to be clear that sequestration is intended to carry no more than the property of the bankrupt in the ordinary sense of that word, and that it does not divest him of his expectancies. The award is so framed as to dispense with the necessity of a new sequestration in order to take up *acquirenda*. But its operation as regards expectancies is suspended until they become property in the person of the bankrupt. The 102nd section, or, as it is called, the vesting clause, leads to the same result, inasmuch as it vests nothing in the trustee which cannot be attached by legal diligence. An expectancy or *spes successionis* cannot be so attached.

Why cannot an expectancy be attached for debt? The answer is simple. It is not property. The law provides the means of reaching the property of a debtor of whatever kind it be. It provides none for reaching his expectancies, just because they are

not property. We speak of the right of of succession. But however well protected that right may be, it is not property in anything. It is a right under which one may become a proprietor. It can be nothing more. To take a very ordinary example. Until the succession opens to him, an heir of entail has no property in the estate to which if he live he must necessarily succeed.

In what I have said I have been proceeding entirely on the terms of the award of sequestration and vesting clauses. It is to them that one naturally turns in order to determine the extent of the estate and the powers of the trustee. If our attention is confined to these alone, and if we accept the decision of the Court in the case of *Trappes*, there is, I think, no room for dispute. The pursuer indeed admits in the fullest manner that the expectancy is not carried by the sequestration. But he contends that the 81st section enables him to enlarge the sequestrated estate, inasmuch as it entitles him to require the bankrupt to convey the expectancy to him. It seems to be strange that so great an effect should be produced by what I think I may term an auxiliary clause, and that the trustee should be entitled to claim under it more than he takes by the award of sequestration.

The section with which I have now to deal occurs among a number which prescribe the duties of the trustee and commissioners. It provides that the bankrupt shall make up a state of his affairs, "specifying his whole property, the property in expectancy, or to which he may have an eventual right," &c. It then proceeds—"The bankrupt shall at all times give every information and assistance necessary to enable the trustee to execute his duty, and if the bankrupt fail to do so, or to grant any deed which may be requisite for the recovery or disposal of his estate, the trustee may apply to the sheriff to compel him to give such information and assistance, and to grant such deeds, under the penalty of imprisonment and of forfeiture of the benefit of this Act, and unless cause be shown to the contrary, the sheriff shall issue a warrant of imprisonment accordingly."

The interpretation clause, on which the pursuer mainly relies, is as follows—"The words '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 alienation, or of being affected by diligence or attached for debt."

The purpose of the 81st section is to my mind very apparent. It is intended to aid the trustee in carrying out the sequestration. To that end the bankrupt is required to give him every information and to make up a state of his affairs which shall include both property and expectancies, not because the latter form part of the sequestrated estate, but because they may come to do so when they vest. He is further required to give every assistance to the trustee to enable him to discharge his duty. It does not in terms create any other obligations, and I should be disposed to read it as leaving the obligations of the bankrupt, other than those which it prescribes, to be determined by the other provisions of the Act. It merely states what shall be the consequence if the bankrupt fails to grant a deed requisite for the recovery or disposal of his estate. If I had no other light than what is afforded by the section itself, I should be of opinion that such a deed being intended for the assistance of the trustee, must relate to that estate alone which by the award of sequestration he is entitled to recover. I should not be disposed to hold that the trustee could demand a deed which would enlarge that estate.

It may, however, be that this is the necessary consequence, if the 81st section, when read in the light of the interpretation clause, will admit of no other construction. I understand it to be the contention of the pursuer that the interpretation clause comprehends expectancies, and that the word "estate" as it occurs in the 81st section must be equally comprehensive.

On turning to that clause I find that it interprets the words "property" and "estate." They are to include every species of property, and every right, power, or interest therein capable of legal alienation or attachment for debt. The pursuer contends that these words include expectancies. They can only do so if an expectancy is a right, power, or interest in property. It is not said that everything capable of legal alienation is comprehended. The word "therein" is a necessary limitation. The only possible antecedent is property, and therefore it is only rights, powers, and interests in property that are included in the definition.

I do not think that an expectancy is a right or power or interest in property. There is nothing in the expectant beyond a mere chance. He hopes to succeed to property, and by his succession to make it his own. As I have said we speak of a right of succession, and the right may be more or less protected. But a right of succession is a right to succeed to the property of another. No man can succeed to his own, nor can he have by virtue of a right of succession any right, power, or interest in property until he succeed. An expectant cannot sell the property to which he hopes to succeed, or any interest in it, nor can he exercise any power over it. He can sell no more than a chance—his chance of becoming proprietor. He may grant a conveyance, but it conveys nothing, inasmuch as he has nothing to convey. 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 is said that in this case the bankrupt may have a right in property within the meaning of the interpretation clause, because his father is dead, and because he must take an interest if he survive a certain event. But this is nothing more than an instance of protected succession. The trus-

tees are in the father's place, and are the owners of the trust-estate to the necessary exclusion of the bankrupt. If the bankrupt takes any right of property, he takes it by succession and by succession alone.

Further, it is, in my opinion, a mistake to say that the words "capable of legal alienation" are used for the purpose of enlarging the interpretation so that it shall include everything that can be alienated. On the contrary, they are used as a qualification or limitation on the rights previously described. A man may be a proprietor without power of alienation. An heir of entail is a fiar though he cannot alienate. But whatever may be their purpose they do not even suggest that the clause includes anything which is not in its true nature property.

It is not, however, enough for the pursuer to show that the words of the clause are capable of including expectancies. He must establish that according to their just construction as they occur in this Act they do include expectancies. Like any other part of a statute the interpretation clause is subject to construction. If the words have but one meaning, we must, of course, give them that meaning. But if two meanings are possible, we must endeavour to determine in what sense they are used. Here expectancies are not expressly included. The words may be sufficient to include them. But if we held that they do not, I think that no violence would be done to the language of the statute. We must therefore construe the clause in order to ascertain as best we can its true meaning.

I am satisfied that it is not intended to include expectancies. We must keep in view that "property" and "estate" are the words which are defined. I see no reason for thinking that any interpretation of these words should be so construed as to include what is not property or estate. Such a construction makes the definition inconsistent with the subject which is defined. If, therefore, the clause had been intended to include expectancies, I think that they would have been expressly mentioned. So far as I have been able to discover, expectancies are always expressly mentioned whenever they are dealt with. It is so in the very section under consideration. I can only account for it by supposing that the Legislature was then dealing with what they did not regard as the property of the bankrupt, and therefore with a thing which could not fall under the definition of property as given in the interpretation clause, however wide it be.

Regarding the statute as one which, according to its leading clauses, distributes property only as distinguished from expectancies, I think that we should be acting inconsistently with its general purpose if we held that the interpretation clause comprehended expectancies. I see no purpose which such a construction could serve, other than to enable the trustee to claim what has not been given to him by the award of sequestration. I cannot conceive that expectancies would not have been expressly given if it had been the intention of the Legislature that the trustee should have right to them. If such an intention existed the right of the trustee would never have been made dependent on a conveyance which the bankrupt might refuse to grant, and which the trustee, if the bankrupt had absconded, might never be in a position to obtain. I can suppose cases in which a conveyance might be useful, especially if any question arose in a foreign court. But I cannot imagine that the Legislature, if they had the intention which the pursuer imputes to them, could have allowed the right of the trustee to depend on the conveyancer alone.

The contention of the pursuer leads to strange anomalies in the very clause on which he founds. The word "property" when it first occurs is used as not including expectancies. For the bankrupt is directed to give up a state specifying his whole property and his property in expectancy. It is impossible that the word property can be here read as including expectancies. But according to the interpretation clause property and estate are equivalents, so that on the theory of the pursuer we have in the same section and without any apparent reason equivalent words possessing different meanings. From these considerations I was at one time disposed to think that whatever was the just construction of the interpretation clause, the word estate as it occurs in the 81st section could not be read as including expectancies. But I have come to be satisfied that the true ground of judgment is that the interpretation clause does not include expectancies.

For these reasons alone I should hold that the bankrupt is not bound to grant the conveyance which has been required of him. But I think that I may appeal to a wider principle. It is the general law of the land that creditors have no recourse except against the property of their debtor. They cannot attach his chance of succession or force him to convey it to them. The law arms them with no such power. But what is sequestration? It is nothing more than a diligence by which the estate of a debtor is attached for division among his creditors. It is a diligence not for individual creditors but for the whole body, so as to secure equality of distribution. The trustee is a trustee for creditors, and he is vested in the estate on the footing that he has done the fullest diligence which the law allows a creditor to use. I should be slow to hold that the Legislature intended to give to creditors through the trustee more than they could obtain by the use of their own diligence, or that an Act passed for the benefit of creditors as a body was not framed in accordance with the general law. I see no ground for thinking that any such intention or purpose can be imputed to them. On the contrary, it is to my mind clear that the object of the Act is to divide among the creditors nothing more than the property belonging to the bankrupt prior to his discharge, and that it does not divest him or oblige him to divest himself of what he may succeed to after that date. I can-

not construe an ambiguous clause in such a way as to violate an important principle of the common law, and inconsistently with what I take to be the whole scheme of the statute itself.

I cannot imagine anything more formidable than the claim of the pursuer. His success would mean a new departure in the law of bankruptcy fraught with most momentous consequences. If it be well founded, every bankrupt would be bound to grant to the trustee a conveyance of all rights of succession, whatever they might be and whensoever they might vest. His obligation would not be confined to specific property. If it exist at all, it applies to every chance of succession, whether known or unknown, and the conveyance must be as broad as the obligation. I should require a very express statutory direction before I could be induced to put any bankrupt in that position.

It is said that it is hard and unjust that a creditor should be deprived of the benefit of such expectancies. Such considerations are not very pertinent, but the answer is obvious. It is the general law of the land that a creditor can have recourse on nothing but the property of the debtor, and in refusing to force the bankrupt to convey his expectancies I am following that general law. But it is possible that the creditors may not be without a remedy. They may oppose the discharge of the bankrupt, and the Court may refuse to grant a discharge without inquiring into the expectancies of the bankrupt and considering how far he is bound to communicate the benefit of them to his creditors.

I have thought it necessary to state at length the grounds of my opinion, because of the case of *Kirklands*. The decision itself is of no importance. But I cannot disguise from myself that the opinions of the Judges are entirely against me. They are *obiter* only. I am not the less bound to respect them, which I need hardly say I sincerely do.

The Lord President seems to think that it is for the Court to determine whether the creditors are entitled to require an assignation of an expectancy. I should be disposed to agree with him if he meant no more than that the Court might refuse to discharge if the bankrupt refused to assign. I am not sure if that is his meaning. He seems to recognise the existence of an obligation under the 81st section, and to hold that it is within the discretion of the Court to enforce it or not as they may think just. In that I cannot agree. The bankrupt must, in my opinion, implement any obligation which that section imposes, and the Court has no power to relieve him. I have thought it right to notice this point though not very germane to the matter on hand. For if the opinion of the Lord President were sound, the case of the pursuer would be less formidable. I cannot take shelter under it. We have no discretion. If the obligation exists we must enforce it.

I cannot help thinking that the true question which we have to decide was never present to the mind of any of the Judges.

Speaking with reference to the 81st section, the Lord President says—"The question here comes to be, whether as this expectancy or *spes successionis* is capable of legal alieuation the bankrupt may not be called upon at any time to grant an assignation to the trustee." Lord Shand puts it that the 4th section provides that the word estate "shall include all rights, powers, and interests, capable of legal alienation," and therefore he holds that under the 81st section the bankrupt is "bound to convey any right he has in expectancy or to which he may have an eventual right, and which in the words of section 4 is capable of legal alienation." Lord Adam states it thus—"The question is, whether this right is capable of legal alienation. No one says that it is not."

With all respect for these learned Judges, I say again that the true question was never before their minds. They do not even state it. They appear to me to have held that the interpretation clause covers expectancies because they are capable of legal alienation. They never seem to have observed that it was limited to rights, powers, and interests, in property, and they never considered whether an expectancy was a right, power, or interest in property, either it in itself or within the meaning of the Act. They never considered whether a clause which professes to interpret property and estate should be held in the absence of express words to include what is not property in any ordinary sense of the word. They never inquired whether the construction which they adopted was consistent with the scope and purpose of the Act, or with the general law of the land. The reason is plain. They took it to be clear that expectancies were necessarily included because the test was furnished by the capacity to alienate. I need not say that I differ from them, and as we are here to reconsider the whole question, I have stated my opinion.

For these reasons I am of opinion that the judgment of the Sheriff should be reversed and the defender assoilzied.

LORD JUSTICE-CLERK—I concur with Lord Rutherfurd Clark.

LORD ADAM—The subject-matter of the assignation which the Sheriff has ordained the bankrupt to execute is of this nature—his father by his settlement left his whole estate, heritable and moveable, to trustees for the maintenance of his widow and family, and after the death of his widow, and after his youngest child should have attained majority, for distribution and division of the residue equally among his children then alive, and the issue of any predeceasing child, and it was declared that the provisions to his children or their issue should not vest in them till actual payment.

I understand that the time for actual payment has not arrived, but whether in respect that the widow is still alive, or that the youngest child has not attained

majority, we were not informed, and it is not material. But however that may be, it is clear that the bankrupt has at present no vested right to a share of his father's estate, but an eventual right only, contingent on his surviving the widow and the attainment of majority by the youngest child.

In the case of *Kirkland* v. *Kirkland's Trustees* I expressed at length the grounds on which I was of opinion that a bankrupt was bound to grant in favour of the trustee in his sequestration an assignation of an eventual right of the same kind as this. I adhere to that opinion, and only propose to add some observations called for by the recent discussion.

I agree with the argument for the appellant, that unless the *spes successionis* or eventual right in question falls within the 29th section of the Bankruptcy Act, the judgment under appeal cannot be sustained.

That section provides that the Lord Ordinary or Sheriff shall issue a deliverance by which he shall award sequestration of the estates which then belong or shall thereafter belong to the debtors before the date of the discharge, and declare the estates to belong to the creditors for the purposes of the Act.

It is necessary to go back to the interpretation clause, section 4, of the Act to see what is the meaning to be attached to the general word "estate" here used, and what is included therein.

The word "estate," it is there said, 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 alienation, or of being affected by diligence, or attached for debt." That is to say, as it appears to me, that it is to include every kind of property, and all rights and interests in property. I do not see how it can be said that the expectancy in question is not a right and interest in property. I do not think the meaning is limited to rights and interests in the bankrupt's own property, but includes rights and interests which he may have in any property to whomsoever it may belong, and which are "property" in the sense of the statute. Has the bankrupt no right or interest in the property left by his father? It is a right and interest which his father's trustees, who are the owners of the property, cannot defeat. The bankrupt surely would have a right and interest to prevent any proceeding on their part which would have that effect.

I do not say that the right is a right to property, in one sense of the word, but I do say it is a right and interest in property which is capable of alienation, and would be effectually alienated to the trustee by the assignation which the Sheriff has ordained the bankrupt to execute. It appears to me that that is all which the statute requires to bring the right in question within the sequestration, as being part of the "estates" of the bankrupt sequestrated in terms of the 29th section.

As I understand the argument of the appellant, he gives a much more limited meaning to the word "estates" than the interpretation clause says shall be its meaning. He contends that the Act only sequestrates such property of the bankrupt as is capable of being affected by diligence or attachable for debt; but not property or rights or interests in property which although they may be alienable are not also capable of being affected by diligence and attached for debt. If that be so, the word "estate" in the interpretation clause would have to be read as meaning property and all rights and interests in property capable of legal alienation, and affectable by diligence and attachable for debt. But that is not what the Act says that the word "estate" shall mean. It says the word shall mean property and all rights and interests in property capable of legal alienation or affectable by diligence or attachable for debt. It is not capable of alienation and affectable by diligence, but capable of alienation or affectable by diligence.

It may be that the word "property" or "estate" cannot always be read in the statute as including rights in expectancy. The context may clearly show that it is not so used. The 81st section was referred to as an example of a case where rights in expectancy were not included in the word "property." That section directs the bankrupt to specify in his state of affairs his whole property, the property in expectancy or to which he may have an eventual right, the names of his creditors, and so on. The word "property" is clearly not here used as including expectancies, but it does not follow that it is never so used in the statute. Even in this particular case it might be argued *pari ratione* that it does not include debts due to the bankrupt because he is directed to specify these also in his state of affairs. But I do not suppose it will be contended that these form no part of the sequestrated estates as defined by the interpretation clause.

The Act says that the word "estate" when not expressly restricted shall have the meaning ascribed to it in the interpretation clause. In the 29th section it is not restricted, either expressly or otherwise, and I do not see how we can avoid giving it that meaning where it occurs in that section. Of course if it can be affirmed that the bankrupt has no right or interest, in the sense of the statute, in the property left by his father, the eventual right in question will not fall within the sequestration as part of his sequestrated estates. But I do not see how that can be affirmed. Just as in the parallel case of a substitute heir of entail—he has, it is true, no right to the estate, but can it be said that he has no right or interest in the estate which the law will recognise and protect.

It is said that to hold that "expectancies" form part of the sequestrated estate would mean a new departure in the law of bankruptcy, that it would apply to every chance of succession, known or unknown, and would not be confined to specific property.

That is not my opinion. I think no man can be said to have a right or interest, which the law will recognise, in property which is not his own, and which is at the absolute disposal of another. It can only apply, as in the present case, to rights and interests which have emerged and are in existence at the date of the sequestration, and for the same reason can only apply to specific property.

In my view, therefore, the combined effect of the 29th and 4th sections of the Act is to bring the eventual or contingent right in question within the sequestration as part of the sequestrated estate of the bankrupt.

It does not depend on the 81st section. I agree that that section is an auxiliary section, and would not bring estate within the sequestration if not otherwise within it. It provides facilities to enable the trustee the better to discharge his duties. Among others the bankrupt is to deliver a state of his affairs, and he is directed as to the particulars it is to contain.

I do not think that the various items of his estate which he is directed to set forth in any way differ from those included under the general words of the 29th section. I think they are set out in detail that the bankrupt may have no doubt as to what he is to include in his state of affairs. Among other items of his property which he is to specify he is to specify "the property in expectancy or to which he may have an eventual right." I think the reasonable conclusion is that he is directed to specify this property because it forms part of the sequestrated estate.

It is also because I think that expectancies form part of the sequestrated estate that I think the trustee is entitled to apply to the Sheriff to compel the bankrupt to grant an assignation of them in his favour. I think a trustee would have no title to demand from the bankrupt an assignation to an expectancy which was not part of the sequestrated estate, and to which the trustee would have no right. But if an expectancy be part of the sequestrated estates it is no hardship that the bankrupt should be compelled to grant any deed necessary to enable the trustee to realise it. The bankrupt cannot be prejudiced by doing so. It is very much a matter of form. I think also that the Sheriff has no discretion in the matter. On being satisfied that the deed sought is necessary to enable the trustee to recover and dispose of the property he must ordain the bankrupt to grant it. In this case it is necessary, because the 102nd section of the statute applies only to the estate of the bankrupt so far as attachable for debt, and the expectancy in question is not attachable for debt, although it is capable of legal alienation.

The fact that the 103rd section provides for the case of *acquirenda* between the date of the sequestration and the bankrupt's discharge does not appear to me to affect the construction of the 4th and 29th sections. No doubt, if an expectancy is not already a part of the sequestrated estate, it would become so under the 103rd section on vesting in the bankrupt. But that is the *de quo queritur*. The 103rd section appears to me to apply to property, or rights in property, acquired by the bankrupt after the date of sequestration, and to which he had no right, eventual or otherwise, at that date.

It is said that sequestration is a diligence for creditors by which the estate of the bankrupt is attached for division among his creditors, and that it cannot be supposed that the Legislature intended to give the creditors more than they could obtain by the use of their own diligence; and that an expectancy such as this could not be attached by a creditor, or the debtor compelled to grant an assignation of it. That is true, but it leaves out of view the fact that but for the sequestration the creditors would only have to wait until the contingency was purified and then attach the property.

But a sequestration is also for the benefit of the bankrupt in respect that he obtains a discharge which frees him from liability for all debts previously incurred, and therefore would debar his creditors from attaching this expectancy if and when it vested. A bankrupt is entitled to his discharge if he has made a fair discovery and surrender of his estate, and otherwise complied with the provisions of the statute. But if an expectancy was no part of the sequestrated estate the bankrupt would obtain his discharge without surrendering it, and thereby deprive his creditors of all benefit from it. I see therefore no inequity or anything inconsistent with the spirit of the statute in holding such rights to be part of the sequestrated estate.

I have always understood that all available assets of the bankrupt were carried to his creditors by the sequestration. That an expectancy may be a very valuable asset there can be no question. Why such an asset should not be made available to the creditors I am unable to see. The appellant apparently feels that it would be unjust and inequitable that it should—for he suggests, not very consistently perhaps with his argument as to the spirit of the statute, that this end may be attained by making it a condition of granting the bankrupt's discharge that he should assign the expectancy to his creditors. I doubt whether it would be a relevant ground of objection to granting a bankrupt his discharge that he refused to grant an assignation of a subject which, *ex hypothesi*, formed no part of the sequestrated estate. I doubt whether it would be a legitimate use of the process of sequestration, to keep it in force for an indefinite time in order to compel the bankrupt to surrender to the trustee an expectancy to which, as I understand the appellant's argument, the trustee has no right.

I am sure it is much less in accordance with the spirit of the statute than that which would result from the respondent's construction of it—in which case the bankrupt's estate, including expectancies, if any, could be speedily realised, the assets divided, and the sequestration brought to an end.

Practically I do not think it matters to the appellant which view of the statute is adopted, as in either case he can never obtain any benefit from his expectancy.

If the expectancy is already part of the sequestrated estate, then his signing the assignation is a mere form to give a title to the trustee.

If it is not part of the sequestrated estate, then I suppose his discharge will be refused till the right vests in him, when it will equally pass to his trustee.

On the whole matter I am of opinion that the appeal should be dismissed.

LORD M'LAREN — I agree with Lord Rutherfurd Clark.

LORD KINNEAR—I have had the opportunity of reading the opinions both of Lord Rutherfurd Clark and of Lord Adam, and I concur entirely in that of Lord Rutherfurd Clark.

I only wish to add that I did not understand his Lordship to express any opinion—I myself have not formed any—as to the conditions on which the appellant will be entitled to demand a discharge.

LORD TRAYNER — I concur with Lord Rutherfurd Clark.

LORD PRESIDENT—After hearing the first debate on this case I thought that the Sheriff's interlocutor should be adhered to. The further consideration and consultation which have since taken place, and in particular a perusal of Lord Rutherfurd Clark's opinion, have led me to adopt the conclusion and the reasoning which his Lordship has stated.

The Court sustained the appeal and assoilzied the defender.

Counsel for the Defender and Appellant—Dickson—M'Clure. Agents—W. & J. Mackenzie, W.S.

Counsel for the Pursuer and Respondent—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Thursday, March 2.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

LORD ADVOCATE *v.* M'COURT AND FINNIGAN.

Donation inter vivos—Delivery—Revenue.

Two brothers, Hugh and Arthur Finnigan, carried on business together as pawnbrokers in Glasgow under the firm name of H. & A. Finnigan. They also lived together, and kept a saleroom for jewellery in their house. In February 1886, a little more than three months before his death, Hugh, who was then confined to bed, and suffering from a disease the nature of which precluded the hope of recovery, granted a receipt in Arthur's favour, in which he acknowledged that he had received £100 from his brother for his interest in the pawnbroking businesses, jewellery, household furniture, and cash in bank. About the same time Hugh endorsed the pawnbroking licences in his brother's favour, and the bank account which had been kept in name of the firm was closed and a new one was opened in Arthur's name. A month later the pawntickets and pledge-books were altered to Arthur's name. Hugh possessed no estate except what was referred to in the receipt, but that estate was of far greater value than £100. After Hugh's death Arthur declined to give up an inventory of his estate, on the ground that Hugh had conveyed his whole estate to him before his death, and he stated a like defence to an action brought by a sister for a share of Hugh's estate, though he subsequently compromised this action by agreeing to pay this sister, with whom he was going to live, £2 a-week during her life, and £1000 in the event of his predeceasing her. Arthur also mentioned to more than one person that Hugh had sold him his interest in the business. After Arthur's death the Crown claimed inventory or account duty and legacy duty on Hugh's estate from Arthur's executors.

The Court, on proof of the facts above stated, *held* that Hugh had made an absolute transfer of his estate to Arthur at the date of the receipt, and therefore that no duty was payable thereon.

Hugh Finnigan died on 28th May 1886, and his brother Arthur Finnigan on 6th April 1890. During Hugh's lifetime the brothers had for some years carried on a pawnbroking business in Caledonia Road and in Lyon Street, Glasgow, under the firm name of H. & A. Finnigan. They had also kept a saleroom for jewellery at 218 Argyle Street, Glasgow, where they lived. After Arthur's death, his sisters Mrs M'Court and Mary Finnigan were appointed his executors-dative *qua* next-of-kin, and his whole estate, amounting to £4723, was divided equally between them.

On 15th August 1892 the present action was raised by the Lord Advocate, on behalf of the Board of Inland Revenue, against Mrs M'Court and Mary Finnigan, with the object of having them ordained to exhibit a true inventory of the personal estate of Hugh Finnigan, duly stamped with inventory duty, or otherwise a true account, duly stamped, of the moveable property belonging to the said Hugh Finnigan, "taken from him as a donation *mortis causa* by the deceased Arthur Finnigan, and further, to pay legacy duty on said estate."

The pursuer averred—"(Cond. 2) On the death of the said Hugh Finnigan, the said Arthur Finnigan took possession of his whole estate and effects, including his share of the partnership property and the jewellery and furniture. The said Arthur Finnigan alleged a right to do this in