Saturday, December 10.

FIRST DIVISION.

[Sheriff Court at Glasgow.

BRADSHAW *v.* KIRKWOOD & SONS.

Bankruptcy — Discharge — Composition — "Reasonable" Offer—Omission to take into Account Valuable Expectancy — Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *secs.* 138 *and* 139.

Held that an offer of composition made by a bankrupt, which omitted to take into consideration a valuable interest which would accrue to the bankrupt in the event of his surviving his mother, a lady of eighty years of age—although such interest was meantime only a *spes successionis*—was not a "reasonable" offer in the sense of sec. 138 of the Bankruptcy (Scotland) Act 1856.

Succession—Vesting—Conditional Institution of Issue.

Where a testator directed his trustees to pay and apply the whole annual income of the residue of his estate to and for behoof of his widow in liferent, for her liferent alimentary use allenarly, and upon her decease to divide and pay the whole residue equally among and to his whole children, declaring that if any of the said children should die before receiving payment of their shares and leave lawful issue, the share or shares which would have fallen to such deceaser or deceasers should be divided equally among and paid to such issue *per stirpes—opinions* (*per* Lord Adam and Lord M'Laren) that the children of the testator did not have a vested interest until the death of the liferentrix.

The Bankruptcy Scotland Act 1856 (19 and 20 Vict. c. 79), section 138, which deals with an offer of composition made at the meeting for election of trustee, enacts—"If at the meeting held after the examination of the bankrupt a majority in number and nine-tenths in value of the creditors there assembled shall accept such offer and security a bond of caution for payment of the composition executed by the bankrupt, . . . and the proposed cautioner, shall be forthwith lodged in the hands of the trustee; and the trustee shall thereupon subscribe and transmit a report of the resolution of the meeting, with the said bond, to the Bill Chamber Clerk or Sheriff-Clerk in order that the approval of the Lord Ordinary or Sheriff (whichever may be selected by the trustee) may be obtained thereto; and if the Lord Ordinary or the Sheriff, after hearings any objections by creditors, shall find that the offer, with the security, has been duly made, and is reasonable, and has been assented to by a majority in number and nine-tenths in value of all the creditors assembled at the said meeting, he shall pronounce a deliverance approving thereof; provided that he shall hear any objection by opposing creditors, and if he shall refuse to sustain the offer or reject the vote of any creditor he shall specify the grounds of refusal or rejection."

Section 139—"In like manner, at the meeting held after the examination of the bankrupt, or at any subsequent meeting called for the purpose by the trustee with the consent of the commissioners, the bankrupt . . . may offer a composition to the creditors on the whole debts with security for payment of the same; and if a majority in number and four-fifths in value of the creditors present shall resolve that the offer and security shall be entertained for consideration, the trustee shall call another meeting, . . . and shall seven days at least before such other meeting send by post letters addressed to each of the creditors who have claimed on the estate or are mentioned in the bankrupt's state of affairs, which letters shall contain a notice of such resolution, and of the hour, day, and place and purpose of the meeting, and specify the offer and security proposed, and give an abstract of the state of affairs and the valuation of the estate so far as can be done, to enable the creditors to judge of such offer; and if at the meeting so called a majority in number and four-fifths in value of the creditors present shall accept the said offer and security a bond of caution shall be lodged and a report made and a deliverance pronounced all in the same manner and to the same effect as is hereinbefore provided."

Henry Bradshaw, stockbroker, Glasgow, a bankrupt, at a meeting of his creditors, on 20th July 1904, held after his examination, made an offer of a composition of five shillings per pound on his whole debts, payable within one month after his discharge, and the meeting resolved to entertain the offer for consideration. In the circular calling another meeting of creditors on 24th August 1904, in accordance with the provisions of section 139 of the Bankruptcy Act, the trustee in the sequestration, James R. Hodge, C.A., Glasgow, set forth a state of affairs showing liabilities of £678, 14s. 7d. and assets £20, 18s. 6d., to which was added the following note—"The bankrupt's father died about three years ago, leaving heritable and moveable estate valued at £11,259, 10s., but subject to liferent of his widow, and on her death to be divided equally among her children, of whom there are six, but I am advised that this does not vest in the children unless they survive their mother, and therefore I am unable to place any value on the share provided for the bankrupt under his father's will."

Philip Bradshaw, the bankrupt's father, by his trust-disposition and settlement, dated 9th February 1891, and recorded 26th July 1901, had conveyed his estate to trustees for certain purposes, *inter alia*:—"In the second place, I direct my trustees . . . to pay and apply the whole annual income and produce of the residue of my means and estate to and for behoof of my said wife in liferent for her liferent alimentary use allenarly during all the days and years of her life. . . . And lastly, on the decease

of the longest liver of me and my said wife I direct the said trustees to divide and pay the whole residue of my said means and estate equally among and to my whole children (except my son James Bradshaw, who shall not participate in any part of my estate), and the lawful children of my said son James, *per stirpes* and not *per capita*. . . . Declaring that if any of my said children shall die before receiving payment of their shares above provided to them and leave lawful issue, the share or shares which would have fallen to such deceaser or deceasers shall be divided equally among and paid to such issue *per stirpes*." . . .

At the meeting of the creditors on the 24th August 1904 it was by the necessary majority in number and four-fifths majority in value agreed to accept the offer of composition and the security offered.

The trustee thereafter reported to the Sheriff of Lanarkshire at Glasgow in accordance with section 138 of the Act.

James Kirkwood & Sons, stockbrokers in Glasgow, creditors on the estate for £143, 8s. 8d., lodged a note of objections to the composition. In this note they maintained *inter alia*—"(6) The offer is not reasonable in respect that the bankrupt has an interest in his father's estate, which if realised would be more than sufficient to pay the creditors 20s. per £."

On 24th October 1904 the Sheriff-Substitute (BALFOUR) issued this interlocutor—"Having heard the agents for the bankrupt and for the opposing creditors James Kirkwood & Sons, and considered the objections lodged by the said opposing creditors, for the reasons contained in the annexed note, Finds that the offer of composition made by the bankrupt is not reasonable: Therefore refuses his discharge, and decerns."

Note.—"The offer in question was made at a meeting of the creditors called by the trustee, who reported that the bankrupt's father died three years ago leaving estate valued at £11,259, 10s., but subject to the liferent of his widow, and on her death to be divided equally among his children of whom there were six, but the trustee adds, 'I am advised that this does not vest in the children unless they survive their mother, and therefore I am unable to place any value on the share provided for the bankrupt under his father's will.'

"The facts of the case are that the bankrupt is one of a family of six, and his mother is living, but she is eighty years of age and in infirm health. The bankrupt's claim on the father's estate amounts to over £2000, and the claims in thes equestration amount to £670. The offer of 5s. per £ amounts to about £170. These facts were admitted by the bankrupt's agent, and the question comes to be whether the bankrupt's share in his father's estate has already vested in him or does not vest till his mother's death.

"By his father's will he conveyed his estates to trustees, and directed them to pay the income of the residue to his wife in liferent, and on the decease of the longest liver of him and his wife he directed his trustees to divide and pay the whole residue of his estate equally among his whole children excepting one son, and he declared that if any of his children should die before receiving payment of their shares, leaving lawful issue, the shares, which would have fallen to such deceasers should be divided among such issue *per stirpes*. The trustee states that he has been advised that the bankrupt's share does not vest in him unless he survives his mother, but he does not say who has given him this advice, and I am of opinion that according to the authorities the bankrupt's share has already vested in him. The recent leading cases on the subject are *Ross's Trustees* v. *Ross*, 12 R. 378, 22 S.L.R. 232; *Hay's Trustees* v. *Hay*, 17 R. 961, 27 S.L.R. 771; and *Ross's Trustees* v. *Ross*, 25 R. 65, 35 S.L.R. 101, to which I refer, but I refer more particularly to Lord M'Laren's judgment in the case of *Hay's Trustees* v. *Hay*, where he gives a careful resumé of the principles which regulate vesting under a will like the present. Lord M'Laren refers to the four elements of intention which regulate vesting, and after referring to the fourth element, which is in the nature of the destination itself, and which has been the principal subject of discussion in this case, he says that the true criterion is that where legatees of the second order are either mentioned by name or by some description independent of the first, then they may be taken to be *personæ delectæ*, and their contingent interest is sufficient to suspend the vesting of the estate. But if the legatees of the second order are described as the children or issue or heirs of the institute (there being no ulterior destination) these are to be considered in this question as persons instituted in consequence of their being the natural successors of the institute, and therefore undertaking a right which is subordinated to his, and it is not intended to interfere with the fullest benefits previously given to liferenters or other persons. That judgment, which was confirmed by the other Judges in the First Division, appears to me to dispose of the question arising in this case, and I am therefore of opinion that the share has vested in the bankrupt. If this be so, the offer of 5s. per £ is quite unreasonable, because the creditors would, on the footing of the share having vested, get 20s. per £ on their debts. The asset is one which, notwithstanding of the widow's survivance, could readily be disposed of for a substantial sum."

The bankrupt appealed, and argued—The composition offered was "reasonable"—(1) The bankrupt's interest in his father's estate was not a vested interest. There was in the trust-disposition merely a direction to pay on the death of the liferentrix, and that was coupled with a destination-over to the issue of predeceasing children. Directions in these terms did not confer a vested interest. The Sheriff-Substitute had omitted to observe the recent authorities, following on *dicta* in *Bowman* v. *Bowman*, July 25, 1899, 1 F. (H.L.) 69, 36 S.L.R. 959, and the cases cited by him were no longer authoritative on this question—*Dawson* v. *Smart*, July 20, 1903, 5 F. (H.L.) 24, *sub nom. Gavin's Trustees* v. *Johnston's Trustees*, 40 S.L.R

879; *Parlane's Trustees* v. *Parlane*, May 17, 1902, 4 F. 805, 39 S.L.R. 632; *Crichton* v. *Macdonald*, March 17, 1904, 6 F. 616, 41 S.L.R. 421. (2) The bankrupt's interest in his father's estate not being a vested right, but merely a *spes successionis*, did not fall within the sequestration, and he could not be compelled to assign it—*Reid* v. *Morison*, May 10, 1893, 20 R. 510, 30 S.L.R. 477. The mere fact that the bankrupt had an expectancy or chance of becoming proprietor of a share in the residue of his father's estate did not make the offer of composition "unreasonable." The Court should therefore sustain the appeal.

Counsel for the respondents, the objecting creditors, were not called upon.

LORD ADAM — The interlocutor of the Sheriff-Substitute which is submitted to review is in these terms — [*His Lordship read the interlocutor*]. The Sheriff finds that the offer was not reasonable, and that is the whole question before us. The circumstances of the case are these. The bankrupt made an offer of composition of five shillings in the pound, which was approved of at the necessary statutory meetings by the requisite majority in number and value of the creditors. By the 139th section of the Bankruptcy Act it is provided that when an offer of compensation has been made, if "a majority in number and four-fifths in value of the creditors present shall accept the said offer and security, a bond of caution shall be lodged, and a report made and a deliverance pronounced, all in the same manner and to the same effect as hereinbefore provided." The latter words refer to the 138th section, where it is provided that "the trustee shall thereupon subscribe and transmit a report of the resolution of the meeting with the said bond to the Bill Chamber Clerk or Sheriff Clerk in order that the approval of the Lord Ordinary or Sheriff (whichever may be selected by the trustee) may be obtained thereto; and if the Lord Ordinary or the Sheriff, after hearing any objections by creditors, shall find that the offer, with the security, has been duly made, and is reasonable, and has been assented to by a majority in number and nine-tenths in value of all the creditors assembled at the said meeting, he shall pronounce a deliverance approving thereof; provided that he shall hear any objections by opposing creditors, and if he shall refuse to sustain the offer or reject the vote of any creditor he shall specify the grounds of refusal or rejection." Now, this offer was assented to by the requisite majority of the creditors, but it was also objected to by one creditor on the ground that it was not reasonable, in respect that the bankrupt had an interest in his father's estate which if realised would be more than sufficient to pay the creditors twenty shillings in the pound. It was on this ground that the Sheriff founded his decree refusing the discharge, and the question submitted to us is—Was this a reasonable offer?

The facts as to the bankrupt's interest in his father's estate are stated by the trustee in his report to the creditors as follows—[*His Lordship read the trustee's note*]. That was the advice given by the trustee to the creditors, but the ground on which the Sheriff proceeded is stated in his note to be —"I am therefore of opinion that the share has vested in the bankrupt. If this be so, the offer of five shillings per £ is quite unreasonable, because the creditors would, on the footing of the share having vested, get twenty shillings per £ on their debts. The asset is one which, notwithstanding of the widow's survivance, could readily be disposed of for a substantial sum."

I should not be disposed to agree with the Sheriff-Substitute in his views as to vesting, for I do not think this testament gave a vested interest. The testator provides a liferent to his wife, and disposes of the residue on her death in these terms—[*His Lordship read the clauses disposing of residue*]. Now, it is to be observed that no right is given to any of the children except by the instruction to the trustees to pay to them on the death of the widow a certain proportion of the residue, and on these clauses alone it seems to me unnecessary to consider *Bowman* and the cases following it. But if we are to consider the case of *Bowman*, then I think it is also clear that there is here a destination-over. I am of opinion that here there was no vesting, but merely a *spes successionis*, and not a vested interest. But however that may be, it makes no difference to the question of the reasonableness of this offer, for although this right was not vested in the bankrupt, and so not carried to the trustee by the vesting clause in his favour, yet here there was an expectancy of £2000 depending on the life of an old lady of eighty, and that was clearly a valuable asset and would sell for a large sum—for much more than the £170 offered for a composition, and indeed I have little doubt that the bankrupt could sell this right at any time for enough to pay off the creditors in full. Now, I think that in view of that valuable asset in the possession of the bankrupt the offer of a composition of five shillings in the pound was not a reasonable offer, and on that ground I think the interlocutor of the Sheriff should be affirmed.

LORD M'LAREN — Bankruptcy appeals which often do not relate to sums of large amount may be important in point of principle, because they may regulate procedure for all future cases. It is therefore necessary to keep the points which have been argued to us clearly distinguished. In the case of *Reid* v. *Morison*, 20 R. 510, 30 S.L.R. 477, which was a case of what may be called a compulsory winding-up, it was held by this Division along with three Consulted Judges of the Second Division that a trustee was not entitled to refuse his consent to a discharge because the bankrupt had not given up an interest which had not vested in him. But there are means even in such a case by which a bankrupt may be induced to make an interest which has not vested available to his creditors to some extent. The conditions are quite different when the estate is being wound up by the acceptance of a composition offer. In the

present case an offer has been made which does not take into account an interest which will accrue to the bankrupt on the death of his mother, and the question is whether that is a reasonable offer of composition. The Sheriff has held that the offer is not reasonable, because in his opinion the bankrupt's interest has vested and falls under the sequestration. I am not of opinion that the interest in question has vested, but anything said on this subject will not have any influence in the question of vesting should it hereafter arise for decision. Assuming, however, that the interest has not vested, the fact remains that the bankrupt is possessed of an asset of considerable value, and the trustee is entitled to go through all the forms permitted by the Bankruptcy Act and take his chance that before the estate is wound up this asset may fall into the sequestration. A prudent trustee would say that there was no advantage in accepting an offer of five shillings in the pound with the chance of a good estate falling in, and would, so far as he had power, elect to keep up the sequestration. That is a good reason why, if the bankrupt desires to settle by composition, he should make a reasonable contribution of the funds which will fall to him on the death of his mother. I therefore agree with your Lordship.

LORD KINNEAR—I agree with your Lordships. I assume that all the proceedings have been regular, but I observe that that is merely an assumption, because Mr Morison tells us that, assuming the judgment of the Sheriff-Substitute is wrong, he still has objections of a formidable nature. I agree, however, that the decision of the Sheriff-Substitute is right, though I am not able to assent to the grounds in law upon which it is based. It is at least very doubtful whether the interest in question has vested, but without deciding that question, which is not before us, I agree with your Lordships that the bankrupt has a *spes successionis* which is certainly capable of being valued. The only condition upon which the bankrupt's right depends is his survivance of an aged and infirm lady, and that is an interest which is taken into account and valued by insurance companies every day. The question therefore is, whether it is reasonable that the creditors should be compelled to accept a small composition without taking into account an interest which is capable of being turned into money, and I agree that it is not. The case of *Reid* v. *Morison*, 20 R. 510, 30 S.L.R. 477, decided that a bankrupt could not be compelled to assign a *spes successionis*, because it was not attachable by diligence nor carried by the vesting clause of the Bankruptcy Act. But it is a very different matter to say that it is not reasonable to take such an interest into account when the bankrupt claims to put an end to the sequestration by offering to his creditors a small composition for a full discharge. I am of opinion that this is not an offer which the majority of the creditors can compel the minority to accept.

The LORD PRESIDENT was absent.

The Court affirmed the interlocutor of the Sheriff-Substitute.

Counsel for the Appellant—Orr—Irvine. Agent—W. J. Lewis, S.S.C.

Counsel for the Respondents—Morison. Agents—J. Mullo Weir, S.S.C.

Saturday, December 10.

SECOND DIVISION.

[Lord Low, Ordinary.

M'PHIE *v.* MAGISTRATES OF GREENOCK.

Reparation—Public Authorities Protection Act 1893 (56 *and* 57 *Vict. c.* 61), *sec.* 1 (*a*) *—Action of Damages against Public Authority for Breach of Contract to Let Town Hall.*

Held that the protection given to public authorities by the Public Authorities Protection Act 1893 did not extend to an action of damages brought by a private individual against the magistrates and town council of a burgh for breach of an alleged contract to let the town hall to him.

The Public Authorities Protection Act 1893 (56 and 57 Vict. c. 61), sec. 1, enacts — "Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect:—(*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of."

On 8th April 1804 an action was raised by William Cross M'Phie, public entertainment manager, 375 Eglinton Street, Glasgow, against the Provost, Magistrates, and Town Council of Greenock, in which the pursuer sought to recover damages for alleged breach of contract on the part of the defenders.

The circumstances were as follows:—By a contract, entered into by letters dated 24th and 29th July 1903, the defenders agreed to let the Town Hall of Greenock to the pursuer for the 7th, 8th, and 9th of September, for the purpose of giving public entertainments therein. On the 7th of September, however, the day fixed for the first entertainment, the defenders refused to allow the pursuer the use of the hall unless he agreed to omit a wrestling competition from the performance. The pursuer refused to do so, and accordingly the defenders would not allow him to use the hall, with the result that he was unable to give the proposed entertainments.