In the present case, if it appears that the boy acted officiously and unnecessarily, the defenders will be assoilzied. But as on the pursuers' averments I see nothing to indicate that he acted as a volunteer, I think the case must go to trial.

On 16th March the Court approved of an issue in common form for the trial of the cause.

Counsel for the Pursuer—G. Watt—A. S. D. Thomson. Agents—Hutton & Jack, Solicitors.

Counsel for the Defenders—Balfour, Q.C.—Salvesen. Agents—Gill & Pringle, W.S.

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*Wednesday, March* 17.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

## OBERS *v.* GIBB AND ANOTHER (J. G. PATON'S TRUSTEES).

*Bankruptcy—Gratuitous Alienation—Spes Successionis.*

The creditors of a bankrupt have the right to reduce any gratuitous alienation by him of a *spes successionis* which is, and is intended to be, to their prejudice.

*Reid* v. *Morison*, March 10, 1893, 20 R. 510, *distinguished.*

*Bankruptcy—Foreign—Effect of Foreign Sequestration of a Scotch Debtor—Title to Sue.*

The Court, in accordance with the principle of international comity, will recognise and give effect to a decree pronounced by the court of a foreign country sequestrating the estates of a debtor who, though trading in that country, has a Scotch domicile of succession.

This principle *applied* (*aff.* judgment of Lord Kyllachy) in a case where the syndic in a French sequestration of a Scotch trader's estate sued for reduction of a gratuitous discharge of his share of legitim granted by the bankrupt during the sequestration.

*Writ—Delivery—Registration.*

Registration in the Books of Council and Session of a discharge of legitim *held* to be equivalent to delivery, this being the intention of the grantee.

On the 29th October 1889 James Middleton Paton, a Scotchman who had for a considerable time previously carried on business as a merchant in Lille, was declared bankrupt by judgment of the Tribunal of Commerce of that town, and shortly afterwards Francis Obers, accountant, Lille, was appointed trustee "syndic definitif" on his estate.

On 25th February 1891 the bankrupt executed in favour of his father John George Paton, merchant, Dundee, a discharge of his claim for legitim in the following terms:—"I, James Middleton Paton, residing at the Wild, Broughty Ferry, second son of John George Paton, merchant, Dundee, whereas various advances of money have from time to time been made to me or for my behoof by my said father for my advancement in business, and otherwise for my benefit, and that it appears to me to be reasonable and proper that I, in respect of such advances, should execute the discharge hereinafter written; therefore I have exonered and discharged, and do hereby exoner, acquit, and *simpliciter* discharge, the said John George Paton, his heirs, executors, and successors, and all others his representatives or the intromitters with his effects, of any bairns' part of gear, legitim, portion-natural and share of executry, which I could claim through the death of my said father in the event of me surviving him, excepting as hereinafter mentioned, and of all execution competent to me for the same, and all that has followed or is competent to follow thereon; but excepting from the operation of this discharge any moneys or effects which may be bequeathed to me by my said father in any testamentary deed executed or to be executed by him. And I oblige myself and my heirs and successors to warrant this discharge at my hands. And I consent to the registration hereof for preservation."

The bankrupt's father, John George Paton died on 9th March 1891, leaving a trust-disposition and settlement, whereby he directed his trustees to divide his estate equally among his children, but provided that the trustees should retain in their hands the bankrupt's portion, and pay the whole revenue thereof to him as an alimentary provision only, not assignable by him nor attachable by his creditors.

On 18th January 1892 the syndic in James Middleton Paton's bankruptcy raised an action in the Court of Session against Easton Gibb and another, John George Paton's testamentary trustees, concluding for (1) reduction of the discharge quoted above; (2) an accounting with regard to John George Paton's estate; and (3) payment to the pursuer of such sum as should be found due to him by the defenders.

The pursuer averred—"(Cond. 5) The said discharge was granted fraudulently by the said James Middleton Paton while he was an undischarged bankrupt, and subsequent to the appointment of the pursuer as trustee on his estate. Moreover, it was conceived and executed by the said James Middleton Paton in the full knowledge and in view of the fact that his father was then on his deathbed, with the fraudulent design of rendering effectual and securing for himself the liferent alimentary provisions in his favour contained in his father's trust-disposition and settlement, and of precluding the pursuer and the said James Middleton Paton's creditors from claiming the legitim to which he would have otherwise been entitled from the said John George Paton's estate. It was further granted in favour of a conjunct and con-

fident person, and without any true, just, and necessary cause, and without a just price really paid. At the date when the said discharge was executed the said James Middleton Paton was due his father a large sum in respect of payments made by him from time to time to the said James Middleton Paton, or on his account, and for which he had granted vouchers acknowledging his indebtedness. The said discharge bears to be in respect of such advances, and it was a condition of its execution that the said John George Paton should discharge his said son of the indebtedness constituted by said payments and vouchers. The said John George Paton did not, however, accede to the said condition or accept of the said discharge, and it was still undelivered to him at the date of his death. At the date of the said discharge and of the raising of the present action the said James Middleton Paton was, and he still continues to be, insolvent. The said discharge was made and granted by the said James Middleton Paton fraudulently, with a view to defeating the rights of and to the hurt and prejudice of his whole lawful creditors both in France and elsewhere abroad and in this country, whose debts were then and still are unpaid, and who are represented by the pursuer as special assignee or trustee in the bankruptcy of the said James Middleton Paton." "(Cond. 6) The defenders the trustees and executors of the said deceased John George Paton have been requested by the pursuer as trustee foresaid to give an account of their intromissions with the estate of the said John George Paton, and to pay the share of legitim or bairns' part of the said estate due to the said James Middleton Paton, but they have refused to do so, and this action has therefore been rendered necessary. The pursuer believes and avers that said share amounts to not less than £6000."

The pursuer further set forth his view of the law of France, and in particular relied upon article 443 of the "Code de Commerce Francais" relating to bankruptcies.

The defenders contradicted the pursuer's statement of the law of France, and answered the pursuer's other averments thus—"(Ans. 5) Admitted that it was granted by the said James Middleton Paton while he was an undischarged bankrupt and subsequent to the appointment of the pursuer. Admitted that at the date of the discharge John George Paton was seventy-seven years of age, and explained that at said date he had made advances of money to and for behoof of James Middleton Paton amounting to upwards of £2000. . . . Admitted that at the date when the discharge was executed by James Middleton Paton he was due his father a large sum in respect of advances made by him from time to time to the said James Middleton Paton, or on his account. *Quoad ultra* denied, and explained that with the view of delivering the said discharge James Middleton Paton instructed his agents to register the same in the Books of Council and Session, and it was so registered on 25th February 1891. The said discharge was thus effectually and completely delivered. The said James Middleton Paton informed his father on or about said 25th February 1891 that the said discharge had been executed and registered as aforesaid. (Ans. 6) Admitted that the trustees refuse to give the pursuer an account of their intromissions with the estate of the said John George Paton. Explained that they refuse to do so because the said James Middleton Paton's claim to legitim was effectually discharged by the discharge of 25th February 1891 above quoted."

The pursuer pleaded, *inter alia*—"(3) *Esto* that the said James Middleton Paton is a domiciled Scotchman, the discharge sought to be reduced having been granted by James Middleton Paton when an undischarged bankrupt, without consent of the pursuer, as trustee on his estate, is null and void, and decree ought to be pronounced in terms of the reductive conclusion of the summons. (4) *Esto*, that the said James Middleton Paton is a domiciled Scotchman, the said discharge being fraudulent at common law, and to the prejudice of the said James Middleton Paton's creditors; *et separatim*, being struck at by the Act 1621, cap. 18, decree of reduction should be pronounced as craved. (5) The provisions in the trust-disposition of the deceased John George Paton being gratuitous, and the claim of the said James Middleton Paton to legitim out of his father's estate not having been excluded or renounced, the pursuer, as trustee foresaid, is entitled to decree in terms of the declaratory conclusion of the summons. (6) The said discharge having been conditional, and the condition on which it was granted not having been acceded to by the said John George Paton, *et separatim*, the said discharge having been undelivered at the date of his death, all the bankrupt's rights to legitim vested in the pursuer as his trustee, and the discharge is acccordingly null and void."

The defenders pleaded, *inter alia*—"(1) No title to sue. (2) The pursuer's averments are irrelevant. (3) The pursuer's averments so far as material being unfounded in fact, the defenders should be assoilzied with expenses. . . . (5) The pursuers' claims being unfounded, (1st) under any provisions of the law of Scotland, or (2nd) under any provisions of said law upon which the pursuers are entitled to found as against these defenders, decree of absolvitor should be pronounced."

A proof having been allowed, it appeared that the discharge was prepared on the bankrupt's instructions by Mr George Heron, solicitor, Dundee, who was not Mr J. G. Paton's agent. Mr Heron deponed—"I said to him (*i.e*, the bankrupt) that as his father was in such a state of health he could not take delivery himself, and that the only probable course for making the deed effectual was to put it on record. He thereupon gave me written authority to put it upon record."

The written authority referred to was in

these terms—"Dundee, *25th February* 1891. Messrs Heron & Co., Solicitors, Dundee. Gentlemen,—I hereby request you, by way of delivering the discharge by me in favour of Mr John George Paton, my father, which I have to-day executed and left in your hands, to get the same registered forthwith in the books of council and session.—Your obedient servant, J. M. PATON."

Mr Heron subsequently wrote as follows:—"20 Castle Street, Dundee, *9th March* 1891. James M. Paton, Esq., The Wild, Broughty Ferry. Dear Sir,—We have now got an official extract of the discharge in favour of your father which you executed on 25th ulto., and which in terms of your letter to us of that day was recorded on the following day in the Books of Council and Session. This extract we, in conformity with what you said to us on 5th inst., hold in the meantime for you and subject to your orders.—Yours faithfully, HERON & CO."

M. Leon Renault, Professor of Law, Paris, in answer to certain interrogatories adjusted by parties and approved of by the Lord Ordinary, expressed the opinion (1) that the pursuer as syndic on the bankrupt's estate was entitled according to French law to raise and prosecute all actions having for their object the setting aside of any deeds executed by the bankrupt fraudulently and to the prejudice of his creditors, affecting any estate that but for his execution of such deeds might have fallen to him during the subsistence of his bankruptcy; (2) that the syndic in prosecuting such actions was the representative of the bankrupt's creditors, and entitled to avail himself of all grounds of law competent to them or any of them in setting aside such deeds; and (3) that the syndic had not only a right, but the exclusive right, to act in the interests of the body of the creditors.

On 16th February 1894 the Lord Ordinary (KYLLACHY) found (1) that the bankrupt was a domiciled Scotchman at the date of the bankruptcy and also of the discharge; (2) that the pursuer had failed to prove that by the law of France the syndic had at the date of the discharge any title to the legitim or expectation of legitim which was the subject of the discharge; and (3) that the question of the bankrupt's inability to execute the discharge fell to be determined according to the law of Scotland and not of France.

On 16th March 1895 the Lord Ordinary granted decree in terms of the reductive and declaratory conclusions of the summons, and appointed the defenders to lodge an account of the bankrupt's share of legitim.

*Opinion.*—"In this case the question which I have now to decide may, I think, be stated thus: An insolvent debtor having a *spes successionis* in the shape of a claim to legitim, which is about to open by his father's expected death, makes what is in effect a gratuitous alienation of that *spes successionis* in favour of relatives. In the course of a few weeks, and while his debts are still unpaid, the claim emerged by his father's death. It then appears that but for the gratuitous alienation a considerable fund would have become open to diligence of the insolvent's creditors. An action is thereupon brought on behalf of the creditors (I shall consider the particular instance presently) to set aside the alienation under the Act of 1621 and at common law. The question is whether it is a good defence to that action that the subject conveyed was at the date of the deed a mere expectancy, and therefore a subject which was not at that date open to the diligence of the insolvent's creditors.

"I may say at the outset that it does not appear to me that any of the cases cited at the discussion touch the question which is thus raised. It has been decided—*Trappes* v. *Meredith*, 10 Macph. 38, that a *spes successionis* does not fall under a Scotch sequestration. And I have already in this case held, after inquiry, that in a French sequestration the rule is the same. It has also been decided—*Reid* v. *Morison*, 20 R. 510—that a sequestrated bankrupt cannot be compelled to convey a *spes successionis* to his trustee to the effect of vesting in that trustee all right to the expected succession whether the same may open to the bankrupt before or after his discharge.

"But the present question has nothing to do with the effect of sequestration. There has been no sequestration in this country, and I have already held that the French sequestration, except as a conveyance of the bankrupt's estate at its date, has no effect *extra territorium*. Moreover, the fund here in question is no longer a mere expectancy. The right to it has now vested, and vested while the debtor is still undischarged. It is therefore a fund which, but for the deed challenged, would have been open to the diligence of the insolvent's creditors. In short, but for the deed challenged it would simply have been part of the *acquisita* of the insolvent during the period of his insolvency. Now, I know of no decision which touches the right of an insolvent debtor to deal *ab ante* with estate which he may acquire during insolvency and before discharge. The cases which have occurred apply, in my opinion, to different facts, and depend on different considerations.

"The question therefore must be determined on the general principles of bankruptcy law, and considered in that light I have not been able to find any answer to the pursuer's demand. The point, it will be observed, is not whether the insolvent may not deal as he pleases with expected successions, in so far as the same may fall in after he is discharged. Nothing done in that way would be to the prejudice of his creditors. Neither is the point this—Whether, being still vested in the administration of his estate, he may not sell an expected succession for a fair price. That also would not (at least presumably) be to the prejudice of his creditors. The question is—Whether he can voluntarily, and without consideration, deprive his creditors of funds which *ex hypothesi* would but for his interference have become theirs.

"Now, that is a proposition which appears to me to be contrary to one of the first principles of our bankruptcy law, and indeed, to the principles of bankruptcy law in all civilised countries. The Act of 1621 is of course here unnecessary. It merely aids the common law by introducing certain presumptions, and these are not here required. It is our common law of bankruptcy which here applies, and in my opinion it must be held to be the fundamental doctrine of that law that all gratuitous deeds made by an insolvent debtor to the prejudice of his creditors are null and void, or (to express it otherwise, and perhaps better) that 'all donations are revocable at the suit of creditors if granted by an insolvent debtor and to their prejudice.' There is no doubt that this was the rule of the civil law (Digest 42., 8, 1, 6, sec. 11), from which, according to Professor Bell, our law has borrowed it. It appears also to be the rule both in France and England. (Bell's Com., ii. 171.) And it is a rule which, it will be observed, is quite general. It is not confined to gifts of what is at the time the property of the debtor, or of what his creditors can at the time attach by diligence. On the contrary, it applies to every gratuitous alienation by an insolvent debtor, of which, when it takes effect, it can be predicated that it is to the prejudice of his creditors. The test is not whether the creditors could have attached the subject, or whether the insolvent could have been compelled *ab ante* to assign it to his creditors. The test is simply, whether there has been an alienation, whether the alienation is gratuitous, and whether it is to the creditors' prejudice.

"I am therefore of opinion that the deed here in question is reducible at the instance—perhaps of any creditor, certainly of any prior creditor—of the insolvent. And it only remains to consider whether the trustee under this French bankruptcy has a title to sue on behalf of the body of creditors. On this point I must say I have had some difficulty. There is no doubt that the trustee on the French bankruptcy is a trustee for the whole body of the bankrupt's creditors. He is vested with the whole estate of the bankrupt, including all acquisitions during the bankruptcy as the same fall in. And his duty is to distribute the estate among the whole creditors, wherever resident, who choose to rank. It is certain also that among the creditors who have ranked are various creditors whose debts were prior to the deed now under challenge. On the other hand, it may perhaps be doubted whether the trustee is in strictness the assignee of the creditors, and vested as such in rights of action competent to the creditors with respect to the bankrupt's estate.

"It does not appear that the French bankruptcy statutes contain any provision corresponding to the provision of section 11 of our Bankruptcy Act of 1856. The question must therefore be determined as if it had arisen with respect to the title of a Scotch trustee prior to the Act of 1856, and if that question were open, it might perhaps be doubted how far the position of such a trustee was in this matter distinguishable from the position of a trustee under a voluntary trust for creditors who, as lately decided—*Fleming's Trustees* v. *M'Hardy*, 19 R. 542—has not a sufficient title to sue such an action as the present. It appears, however, to have been settled, at least in practice, that a trustee under our earlier bankruptcy statutes did have a title to sue such actions — Bell's Com. ii. 172, 174; *Edmond*, 15 D. 703. And that being so, I see no reason why the present pursuer should be in a worse position than such trustee.

"I have come, therefore, to the conclusion that I may sustain the pursuer's title and grant decree of reduction, and an order for accounts, as concluded for in the summons."

An account having been lodged, after sundry procedure the Lord Ordinary on 3rd December 1896 pronounced an interlocutor disposing of the defender's account and the pursuer's objection thereto dealing with expenses and granting leave to reclaim. The questions involved in the accounting, however, need not be entered upon at this stage of the case.

The defenders reclaimed, and, upon the interlocutor of 16th March 1895, argued—The Lord Ordinary was wrong. I. The syndic had no title to sue. J. M. Paton being a domiciled Scotchman, the French bankruptcy only affected his property in France, and the syndic's title would not be recognised here. In the absence of any decision on the point in Scotland, the case of *Artola Hermanos*, 1890, 24 Q.B.D. 640, was an authority, and it was a decision expressly negativing the contention that a foreign bankruptcy passed the moveables of the bankrupt *extra territorium*. In *Stein's* case (*Royal Bank of Scotland* v. *Cuthbert*, January 20, 1813, F.C.) it was quite true that two out of the five partners sequestrated were domiciled in Scotland, but it was the firm that was the leading debtor. In any event a distinction must be drawn between the relative position and effect of English and Scotch bankruptcies and that of English or Scotch and Continental bankruptcies, and the distinction was very pointedly taken by Lord Justice-Clerk Inglis in *Young* v. *Buckel*, May 17, 1864, 2 Macph. 1077, at p. 1080. Story's Conflict of Laws, sec. 403, and Guthrie's Savigny, p. 228, also referred to. II. But even assuming that the Scotch Courts would recognise the title of the syndic in the French bankruptcy to the whole of the bankrupt's estate—assuming in other words that the syndic here had been a Scotch trustee in bankruptcy—he would not have been entitled to reduce the deed in question, for it dealt merely with a *spes successionis*, and that was not property which sequestration could affect. This was conclusively established by a series of decisions. *Trappes* v. *Meredith*, November 3, 1871, 10 Macph. 38, decided that a bankrupt's *spes successionis* is not carried to the trustee in the sequestration. *Kirkland* v. *Kirkland's Trustee*, March 18, 1886, 13 R. 798, confirmed

that decision, while *Reid* v. *Morison*, March 10, 1893, 20 R. 510, went a step further and settled not only that a *spes successionis* did not fall under a sequestration but that the bankrupt could not be called upon under section 81 of the Bankruptcy Act 1856 to assign it to his trustee. The grounds of this decision were very fully explained by Lord Rutherfurd Clark, particularly at page 515, and their substance was that individual creditors having no recourse except against the property of their debtor, the whole body of the creditors, for whose common benefit sequestration was designed, could have no higher right. The right to legitim was a purely personal right, and the creditors of a bankrupt could not compel him to exercise his option between his legal provision and a testamentary or marriage-contract provision—*Stevenson* v. *Hamilton*, December 7, 1838, 1 D. 181; *Lowson* v. *Young*, July 15, 1854, 16 D. 1098; *Aikman (Smith's Trustee)*, 1890, 30 S.L.R. 804. When the legitim vested no doubt it went *ipso facto* to the assignee of the person entitled to it, but only if that person had not discharged his right, which he was perfectly entitled to do—*Macdougal* v. *Wilson*, February 20, 1858, 20 D. 658. III. (1) The discharge of legitim granted by the bankrupt was not gratuitous, and was therefore not struck at by the Act 1621, cap. 18. The cause of granting it was the existence of a debt due by the son to the father, and such a cause was sufficient—Bell's Comm. ii. 177. But, even if there were no sufficient cause, it was not the father who benefited by it, but his other children, for the legitim fund remained the same. (2) The deed was a complete and effectual discharge, not merely an offer to discharge, and therefore acceptance was unnecessary. As regards delivery, there had been registration which was equivalent to delivery—*Tennent* v. *Tennent's Trustees*, July 2, 1869, 7 Macph. 936.

Argued for the pursuer—The Lord Ordinary was right. (I) The case of *Artola Hermanos, ut sup.*, if applicable at all, was in direct conflict with the law of Scotland as laid down in a long series of cases—*Strother* v. *Read*, 1803, M. App. *voce* "Forum competens," No. 4; *Maitland* v. *Hoffman*, 1807, M. App. "Bankrupt," No. 26; *Stein's* case, *ut sup.*; *Selkrig* v. *Davies*, 1814, 2 Dow, 230; *Young* v. *Buckel, ut sup.*; *Goetze* v. *Aders*, Nov. 27, 1874, 2 R. 150; and *Phosphate Sewage Company* v. *Lawson & Sons' Trustee*, July 20, 1878, 5 R. 1125, all concurred in establishing that the law of Scotland accepted the proposition of international law that a good foreign vesting order in bankruptcy carried Scotch moveables. This rule was not limited by the domicile of the bankrupt debtor, and indeed the whole question was one not of domicile so much as of the application of foreign judgments. The English Courts had given effect to the same principle in *Geddes* v. *Mowat*, 1 Glyn and J. 414, and *M'Culloch*, 14 Ch. D. 716. *Blithman*, L.R., 2 Eq. 23, also referred to. (II) It was not sought to dispute the authority of *Trappes, ut sup.*, or *Reid* v. *Morison, ut sup.* These cases only decided that a *spes successionis* did not vest in a trustee in bankruptcy. They did not in any way affect the principle that if the succession actually opened during the continuance of the bankruptcy the bankrupt's share of legitim instantly vested in the trustee. That rule was perfectly consistent with the trustee having no power to exercise the bankrupt's right of election—See *Millar* v. *Birrell*, November 8, 1876, 4 R. 87. It was true that there were no express provisions in the French bankruptcy statutes conferring on a syndic the power conferred by sec. 11 of the Bankruptcy Act 1856 on the trustee. That such a power was recognised by the French Courts as existing in the syndic was plain from the proof, but even if it was not, and *White* v. *Briggs*, June 8, 1843, 5 D. 1148, *per* Lord Fullerton at p. 1158, and *Corbet* v. *Waddell*, November 13, 1879, 7 R. 200, seemed to show that the law of Scotland must setttle the question—he was in no worse position than a Scotch trustee before 1856, and it was settled by authority that he had a title to sue such actions as the present—*Edmond* v. *Grant*, June 1, 1853, 15 D. 703, Bell's Comm. ii. 172-174. *Brown & Company* v. *M'Callum*, December 19, 1890, 18 R. 311, *per* Lord Kinnear at p. 317, and *Bolden* v. *Ferguson*, March 6, 1863, 1 Macph. 522, also referred to. The position of a trustee under a voluntary trust-deed for behoof of creditors was different—*Fleming's Trustees* v. *M'Hardy*, March 2, 1892, 19 R. 542. (3) This was the sort of deed struck at by the Acts of 1621 and 1696, as well as by the general principles of bankruptcy law. It was essentially a fraudulent transaction to the prejudice of creditors. But apart from that it was invalid. It was of the nature of an uncompleted contract—an offer to discharge a claim for legitim in return for a discharge of debt due to the father. As such it required acceptance, and it had never been accepted—see *Webster* v. *Rettie*, June 4, 1859, 21 D. 915. At all events, and even assuming that it was an effectual discharge, delivery was necessary, and recording was not necessarily tantamount to delivery—*Burnet* v. *Morrow*, March 26, 1864, 2 Macph. 929; *Tennent* v. *Tennent's Trustees, ut sup.*, referred to.

At advising—

Lord President — On 25th February 1891 James Middleton Paton executed in favour of his father the deed of discharge which is the subject of these actions. His father died a fortnight later. On 29th October 1889 James Middleton Paton had been declared bankrupt by the Tribunal of Commerce of Lille, where he carried on business; his bankruptcy subsisted at the date of the deed, and still subsists.

Two sets of questions were argued under this reclaiming-note—*First*, the respondent maintained that the deed, whether delivered or not, did not take effect, because while in name a discharge, it was in substance an offer of a discharge on conditions which

were not accepted. *Second*, It was maintained by the reclaimers that assuming the deed to be an operative discharge, and to have been delivered, it is not open to reduction—(1) from the right discharged being one in which no creditors have any interest; and (2) because the French syndic has no title to sue a reduction even assuming that a Scotch trustee in sequestration might have done so. I shall consider these questions in the order stated.

1. The deed itself purports to be a discharge by James Middleton Paton in favour of his father of any bairns' part of gear, legitim, portion-natural, and share of executry, which he could claim through the death of his father, in the event of his surviving his father, excepting any moneys or effects which might be bequeathed to him by his father in any testamentary deed. It proceeds on the narrative that various advances of money had from time to time been made to him or for his behoof by his father, for his advancement in business and otherwise for his benefit, "and that it appears to me to be reasonable and proper that I, in respect of such advances, should execute the discharge hereinafter written." Then follow the operative words —"Therefore I have exonerated, discharged, and hereby exoner and discharge," and so on.

The argument of the respondent turns solely on the terms of the narrative. He says that the narrative makes the discharge conditional on the father discharging his claim for the advances, and that this was never done. I am entirely unable to assent to this view. The deed purports to be an absolute discharge; and the reasons given for its execution were accomplished facts. There is on the face of the deed nothing contractual about it. Now, when the legal effect of the discharge is considered, is there any encouragement to the search for such an element? When a child discharges his father of legitim, the result is the same as if the child had predeceased his father; the legitim fund is neither increased nor diminished, but there is one participant the less. Accordingly, the benefit really goes to the brothers and sisters, although the deed is executed in favour of the father. Accordingly a bankrupt, if it were legitimate to disregard creditors, might as a family matter very well say, I have already got half my share of legitim; no more will come to me, for, if I do not discharge my father, it will all go to my creditors; therefore I may as well let my brothers and sisters have it instead of my creditors. My father may claim in my sequestration for the advances if he likes—that will mean merely so much the less for the French creditors.

This and nothing else is what James Middleton Paton truly did.

II. The next question, whether the deed was delivered, is susceptible of an easy answer. The deed was given in for registration, and it was recorded in the Books of Council and Session, and the evidence places beyond doubt with what purpose this was done. Mr Heron, the solicitor who prepared the deed, was not the father's agent, and to his knowledge the father himself was not in a state of health to admit of his taking delivery personally. "I said to him," *i.e.*, James Middleton Paton, "that as his father was in such a state of health he could not take delivery himself, and that the only probable course for making the deed effectual was to put it on record. He thereupon gave me written authority to put it upon record." And the letter accordingly runs thus—"I hereby request you, by way of delivering the discharge by me in favour of Mr John George Paton, my father, which I have to-day executed and left in your hands, to get the same registered forthwith in the Books of Council and Session."

If, as is settled, delivery may be effected by recording in the Books of Council and Session, it is difficult to see how it did not take place in this case.

III. Assuming, then, the deed to have been delivered as a present discharge, the next question may be put in this way—would it be open to reduction at the instance of a trustee representing creditors in a valid sequestration?

Now the argument in the negative sense is certainly formidable, and is rested on the case of *Reid* v. *Morison*, and the class of cases of which it is the most recent. A claim of legitim during the life of the father is a *spes successionis; a spes successionis* is not carried to creditors by sequestration, and the argument is that therefore they have no interest in it and cannot challenge anything done by the bankrupt which affects it.

After full consideration I have come to be of opinion that this argument is unsound and that creditors have right to challenge a gratuitous alienation by the bankrupt of a *spes successionis*. The question so far as appears is new. While, in my opinion, the principles which apply to alienation of assets forming part of the estate transferred to the creditors apply equally to alienations of a *spes successionis*, yet I am unable to claim any of the authorities cited by the Lord Ordinary as intentionally applying to both classes of rights the general language used. I think the question is to be decided on principle.

Again, one of the arguments advanced in support of the interlocutor is plainly fallacious. We were told that by the death of the bankrupt's father there vested in the bankrupt a right to his share of legitim, and that this action of reduction is merely a step to ingathering what has thus come to be vested in the creditors. This is not an argument but a mere statement of the conclusion aimed at. The true question is what were the rights of the creditors at the date of the discharge when nothing had vested in the bankrupt, and he had only a *spes successionis*.

Now, the solution of this question depends on whether it is a logical consequence of a *spes successionis* not being attachable by diligence, and not being included in the sequestration, that the bankrupt has unlimited power of disposing of it, just as if

he were solvent. The one thing does not necessarily follow from the other. It may quite well be that the creditors have no active rights in the *spes successionis*, and must allow events to bring the succession their way or not to bring it their way. It is another and a very different thing to say that by overt act the bankrupt may of design interfere to intercept and divert a succession from ever by possibility coming to meet his debts. The transfer of his estate by sequestration from himself to his trustee does not in principle absolve the bankrupt from that equitable duty to his creditors which the law has more frequent occasion to recognise in the initial stage of insolvency. And while the law will not compel a bankrupt to assign a *spes successionis* to his creditors, it may well, if this be in accordance with the spirit of the other restrictions on bankrupts, forbid them to do any act in relation to a *spes successionis* which is and is intended to be to the prejudice of creditors. Now the facts of the present case are very gross, and while they must not bias the determination of what is a general question, yet they illustrate what are the realities of the question. A bankrupt, partly out of spite to his creditors and partly to benefit himself and his family, gratuitously discharges a a right of legitim worth several thousand pounds, when the father is on his deathbed. No one can doubt that the creditors are prejudiced; and no one can deny that the act is fraudulent—that word being one of morals. I am prepared to hold that given an act of a bankrupt having those qualities and effects, it does not matter whether it operates on what is at the time, or only what may possibly come to be, a part of the bankrupt's estate.

IV. The remaining question in the case is whether the syndic who sues the reduction so represents the creditors (whom I now assume to be prejudiced) as to have a good instance. The evidence as to French law places it beyond doubt that according to that law the syndic has not merely the rights of the bankrupt but that he represents creditors in the fullest sense.

This being so, the only objection suggested to his title is that this Court ought not to recognise the sequestration by decree of a French Court of the estates of one who, although trading in France, is for purposes of succession a domiciled Scotchman. The refusal to recognise a sequestration in bankruptcy which is valid by the law of the country in which it has been granted can only be justified on the ground that it is contrary to the principles of Scotch law when dealing with international rights to recognise the sequestration of a foreigner. But the fact is that our own law takes no account of the domicile of succession when asked to sequestrate the estates of a trader, but on the contrary habitually and deliberately sequestrates the estates of foreigners who carry on business in this country. It seems difficult to the degree of impossibility for this Court to decline on principle to recognise, if done abroad, what it is itself bound to do and does daily at home. I may add that in the cases cited by the reclaimers the word domicile does not seem to have been used with reference to succession at all, and accordingly furnish no support to the reclaimers' argument.

I am for adhering to the Lord Ordinary's interlocutor.

Lord Adam—I entirely concur.

Lord M'Laren—I am of the same opinion, and only desire to add a few words expressing my general view on the chief points in the case.

The first question in the order of the arguments relates to the effect which the Courts of Scotland are entitled and bound to accord to a foreign bankruptcy, and the claim instituted by its administrator.

In considering this question it is well to bear in mind that under the statutory law of bankruptcy which we administer a foreigner who carries on business in Scotland, and who is unable to pay his debts, is liable to have his estates put under sequestration, and further, that the subject of sequestration is the estate of the bankrupt wherever situated. In the case supposed it would be the duty of a Scottish trustee for creditors to take proceedings in the native country of the bankrupt for the recovery, with a view to distribution, of any bequest or right of succession that might accrue to the bankrupt during the currency of the sequestration. In this state of our municipal law I think we cannot be wrong in recognising the same right in the French syndic which we should claim for the Scottish trustee in the parallel case.

The principle of international comity has been liberally admitted by our Courts in bankruptcy cases, and I apprehend that in sustaining the title of the French syndic we are maintaining the principle on which this Court has acted in past times. It is of course inevitable that there should be differences of opinion or expression on such a question amongst the writers who profess to treat this subject from a purely philosophic point of view, but these differences are perhaps more apparent than real; and when it is said that the Court of the domicile is the proper Court of Bankruptcy, I think this must be understood to mean a trading domicile. In principle I cannot doubt that every trader who is unable to pay his debts is liable to have his estate seized and divided amongst his creditors by judicial authority in the country where he carries on his business, because every State has the right of enforcing the performance of the obligations of those who enjoy the protection of its laws. When this is done there is an obvious convenience in giving a wide extension to the powers of the trustee or administrator in bankruptcy, so that the bankrupt may not be harassed by the conflicting claims of separate administrations.

The claim of the syndic is to receive and administer the legitim to which Mr Paton was prospectively entitled in his father's lifetime and which he contends became vested in the bankrupt on the death of his father. This claim is disputed on the ground that a few days before the father's

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

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

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

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

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

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

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

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*Wednesday, March* 17.

## FIRST DIVISION.

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

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

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

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

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