couched in terms so precise that it is utterly impossible to mistake it.

Therefore I think that this demand of the liquidator is a most inequitable one, because the real meaning of it, as I have said, is to compel this party who has paid instalments under the Act of Parliament to pay them over again.

It is said that the company is in liquidation, and I must plainly say, that listening to the argument as I have done, I am at a loss to know what that means. It is not in liquidation of its debts, for there are none of those. It is not in liquidation of anything arising out of the investing part of its business, because the investing members do not owe anything to each other, and they do not owe anything to the outer world. There can be no liquidation with the borrowing members, for this simple reason, that if they are not only borrowing but investing members they will simply lose that money *pro rata* along with the rest of them. The way in which the borrowing or investing members suffer, which is the only pretext for liquidation, is that they do not get so much for their money as they expected. There is no other. And if the borrower here had been an investing member, or held to be such, there would be so much the less profit, in proportion to the amount he had invested. Therefore, with Lord Young, I am utterly at a loss to comprehend on what ground liquidation is proceeding. It seems to me that liquidation is not the term to be applied to the winding-up of the affairs of the company, if the company is to be put a stop to. I do not suppose they are to stop, and I think this is a mere device to raise this question, which has for its aim the compelling a man to pay his debt twice over.

I therefore think we had better affirm the judgment of the Sheriff-Substitute. He no doubt finds that in the present condition the respondent is not entitled to withdraw, but I apprehend that only means that he is not entitled to withdraw independently of having his bond cancelled. Cancellation of the bond would, I daresay, be quite enough to obviate any objection of that sort.

The Lords found in terms of the first and second heads of the petition.

Counsel for Appellants—Guthrie Smith—R. Johnstone—J. A. Reid. Agent—J. Smith Clark, S.S.C.

Counsel for Respondent—H. J. Moncreiff—Strachan. Agent—R. H. Miller, L.A.

Friday, July 8.

SECOND DIVISION.

ANGUS *v.* ANGUS.

Executor—Count and Reckoning with Beneficiary.

This was an action by James Angus, Aberdeen, against his brother William Angus, executor of his father the deceased James Angus. The summons concluded for £150 as the amount due to him as one of the next-of-kin of his father. The defence was that at a meeting of the family after the father's funeral, when an interim division of his estate was made by the defender as executor, in which division the sum paid to each next-of-kin was £85, the pursuer had admitted having recently received from his father an advance of £70, and agreed to sign a receipt for his £85 on receiving a payment of £15. The defender produced the executry accounts, which brought out a further balance of £21, which he stated he had all along been ready and willing to pay to the pursuer. At the proof the pursuer took up the position that the signing of the receipt was a mistake, and that he had not read it over before signature. The Lord Ordinary having assoilzied the defender except as regarded the £21, which he was willing to pay, the pursuer reclaimed. In the Inner House he abandoned the contention that the signing of the receipt was a mistake, but maintained that the taking of such a receipt was not a competent way of taking credit for a debt to the estate (assuming it to be such) which the defender could not otherwise have proved but by writ or oath of the pursuer. The defences, he argued, were an admission that the receipt stated what was not true in point of fact.

Their Lordships adhered to the Lord Ordinary's interlocutor, but expressed the opinion that the taking of the receipt in the manner which had been done was irregular and not to be commended. On that ground they refused to the defender the expenses of the proof.

Counsel for Pursuer—J. Campbell Smith—Rhind. Agent—W. Officer, S.S.C.

Counsel for Defender — M'Kechnie — Ure. Agent—Thomas Carmichael, S.S.C.

Friday, July 8.

FIRST DIVISION.

[Lord Fraser, Ordinary.

BARRON *v.* MITCHELL.

Bankruptcy—Estate Acquired after Sequestration and before Discharge—Schoolmaster's Salary—19 and 20 Vict. cap. 79, sec. 103.

Where the teacher of a public school was sequestrated, *held* that the salary accruing to him after the date of his sequestration could not be attached under the provisions of the 103d section of the Bankruptcy Act as estate acquired by the bankrupt after his sequestration.

Bankruptcy—Estate Falling under Sequestration—Schoolmaster's Salary—19 and 20 Vict. cap. 79, sec. 4.

Question, Whether a schoolmaster's salary is estate within the meaning of the 4th section of the Bankruptcy Act?

Opinion (per Lord Fraser, Ordinary) that it is not.

The petitioner in this case was the trustee on the sequestrated estate of John Mitchell, English master in the Elgin Academy. The petition was under the 103d section of the Bankruptcy Act of 1876 (19 and 20 Vict. c. 79), which provides —"If any estate, wherever situated, shall, after

the date of the sequestration and before the bankrupt has obtained his discharge, be acquired by him, or descend or revert or come to him, the same shall *ipso jure* fall under the sequestration, and the full right and interest accruing thereon to the bankrupt shall be held as transferred to and vested in the trustee as at the date of the acquisition thereof or succession for the purposes of this Act; and the trustee shall, on coming to the knowledge of the fact, present a petition setting forth the circumstance to the Lord Ordinary, who shall appoint intimation to be made in the *Gazette*, and require all concerned to appear within a certain time for their interest, and after the expiration of such time, and no cause being shown to the contrary, the Lord Ordinary shall declare all right and interest in such estate which belongs to the bankrupt to be vested in the trustee as at the date of the acquisition thereof or succession thereto, to the same effect as is hereinbefore enacted in regard to the other estates; and the proceeds thereof, when sold, shall be divided in terms of this Act."

The petitioner averred—"Since the date of the said sequestration the bankrupt has acquired right to the portion of the said salary and emoluments which have fallen due since that date, and he will further have right to the said salary and emoluments so long as he holds the said office of teacher in the said school. Under the foresaid section of the said statute, the right to the said salary and emoluments has been transferred to and vested in the petitioner as trustee foresaid for the purposes of the said Act, until the debts due by the bankrupt at the date of the said sequestration are satisfied and paid, and the present application is accordingly presented to your Lordship in order to have his right thereto declared in terms of the foresaid section of the said statute. The petitioner is quite willing to make a reasonable allowance to the bankrupt out of the said salary and emoluments for his maintenance and support."

The petitioner therefore prayed the Court—"To declare all right and interest which belongs and may belong to the bankrupt in the salary and emoluments attaching to the foresaid office held by him to be vested in the petitioner as trustee foresaid as at the date when the same has or may become payable, to the same effect as is provided by the said statute in respect to estates vested in the bankrupt as at the date of the sequestration, and that until the debts due by the bankrupt as at the said date are duly satisfied and paid, or until your Lordship shall make order to the contrary, but subject always to the payment by the petitioner to the bankrupt of said salary and emoluments of such reasonable allowance for his maintenance and support as to your Lordship may seem proper."

The respondent, the bankrupt, averred—"That in January 1866 the respondent was appointed by the Town Council of Elgin, then patrons of Elgin Academy, English master thereof, at a salary of £40 per annum, with a right to collect the fees of his department. At first these fees did not average over £100 per annum, but they gradually improved, till in 1874 they came to £170. Since 1874 they have decreased, and they are now not more than £160 per annum, making the respondent's salary £200—a sum barely sufficient for the maintenance of the respondent and his wife and family in a condition becoming his position as English master of one of the few high-class schools in Scotland.

The respondent's house rent is	. £35	0	0
Income-tax and other taxes	. 10	0	0
Servant's wages . .	. 9	0	0
	£54	0	0

leaving only £146 to feed and clothe himself, wife, and four children, and to feed his servant." He held office *ad vitam aut culpam*.

The respondent pleaded, *inter alia*—"(2) The respondent not having acquired rights to any 'estate,' in the sense of the section quoted in the petition, the same should be dismissed. (3) In any event, the respondent's income not being in excess of a reasonable aliment for himself and family, the prayer of the petition should be refused."

The Lord Ordinary (FRASER) refused the petition, adding this note:—"The petition is presented under the 103d section of the Bankrupt Act 1856, to have it declared that all right and interest which belongs or may belong to the bankrupt in the salary and emoluments accruing to him as one of the teachers of the burgh schools of Elgin, shall be vested in the trustee upon the sequestrated estate at the dates when the same may become payable, to the same effect as is provided in respect to estates vested in the bankrupt as at the date of the sequestration.

"The bankrupt since the sequestration has, in order to obtain a subsistence for himself and family, continued to teach in the Elgin school, and has obtained thereby an income amounting to £200 per annum. The question now is, Whether this is an 'estate' which can be declared vested in the trustee under the 103d section? the words of which are as follows:—[*ut supra*]. It is further declared by this section, that if the bankrupt do not immediately notify to the trustee that such estate has been acquired, or has come to him as aforesaid, he shall forfeit all the benefits of the Act.

"The word 'estate' is defined as follows in the interpretation clause (sec. 4)—'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.'

"It appears to the Lord Ordinary that the fees from the personal labour of a bankrupt are not the kind of estate which is here contemplated. The trustee in the sequestration has no right to direct that the bankrupt, say a professional man—an advocate, a physician, or dentist—shall proceed to labour and earn money to be handed over to him, the trustee, for the payment of creditors; and if he has no such right to order the bankrupt so to labour for the creditors' behoof, it seems logically to follow that if the bankrupt voluntarily does so the trustee cannot demand from him the produce of his brains. In the present case the petitioner, the trustee, is willing, as he states in the petition, to allow the bankrupt to retain as much as will be a subsistence to himself and his family,

and only claims the surplus not required for that purpose. This implies, if it be a sound position, that the trustee has a right to insist upon the bankrupt continuing his profession for the benefit of his creditors — a doctrine for which under the present bankrupt laws there is no authority whatever.

"Cases similar to this must have frequently occurred in Scotland, where professional men, in order to live during the pendency of the sequestration, continue in the exercise of their profession. But there is no instance of any demand having been made, or at all events successfully made, by the trustee, to claim a vesting order in the fees which the bankrupt earns. The question, however, seems to have occurred frequently in England. The result of the decisions there seems to be this, that the trustee has no right to seize the profits of the bankrupt's personal and daily labour. In one of these cases (*ex parte Vine*, 28th Mar. 1878, 8 Chan. Div. 366), Lord Justice James said — 'The general principle always has been, that until a bankrupt has obtained his discharge all his property is divisible among his creditors. But an exception was absolutely necessary in order that the bankrupt might not be an outlaw—a mere slave to his trustee; he could not be prevented from earning his own living.' This was only following up the leading case in the time of Lord Mansfield of *Chippendall* v. *Tomlinson*, 4 Dougl. 318. But this case has been distinguished in England from other cases where the bankrupt continues to carry on his business by means of servants and skilled workmen, and the Courts have held that the returns here must be accounted for to the trustee. Thus, a bankrupt, acting as a furniture-broker, employing men and vans, and an apothecary supplying medicines, were not considered as merely using personal labour in this sense (*Crofton* v. *Poole*, 1 B. and ad. 568; *Elliott* v. *Clayton*, 16 Q.B. 581); and Mr Justice Fry, in a recent case dealing with the estate of a bankrupt architect, held that his trustee was entitled to sue for remuneration due in respect of professional work done in the bankrupt's office since his bankruptcy, for plans there prepared, and for damages for breach of an alleged contract to employ the bankrupt in his professional capacity (*Emden* v. *Carte*, 11th April 1881). This class of cases, however, differs essentially from those where a professional man, such as a teacher, a dentist, an advocate, by his own brains or hands earns fees, and which if taken from him would simply, in the words of Lord Justice James, constitute the bankrupt a slave to his trustee.

"But apart altogether from the light cast upon the subject by these English cases, the Lord Ordinary is opinion that the word 'estate,' in the 103d section of the Scottish Bankrupt Act, never was intended to apply to anything else than some tangible property which has come to the bankrupt by succession, bequest, donation, or other means irrespective of the labour of the bankrupt himself."

The petitioner reclaimed, and argued—The Court as a condition of freeing the bankrupt will oblige him to give up so much of his salary as exceeds what is required for the subsistence of himself and his family. A clergyman's stipend has been held to fall under his sequestration—*A. B.* v. *Sloan*, Bell's Comm. i. 127. There was no distinction in Scotland between a bankrupt's personal earnings and the profits he makes in trade. [Lord Mure—How can a salary which is in a man's possession at the time of his sequestration be arrestable under the 103d section, which refers to future estate?] The salary has become due since — *Moniet* v. *Hamilton*.

Authorities—*A. B.* v. *Sloan*, June 30, 1824, 3 S. 195; *Moniet* v. *Hamilton*, Feb. 2, 1833, 11 S. 348; *Jackson* v. *M'Kechnie*, Nov. 13, 1875, 3 R. 130; Bell's Comm. i. 127.

Replied for respondent—The passage cited from Bell shows that the decisions have not proceeded on any principle; and there is no case in which a schoolmaster's salary has been held to be arrestable. It was not 'estate' within the meaning of the 4th section of the statute. The mere fact that it is capable of alienation is not enough, for a *spes successionis* possessed that character yet it was not attachable by creditors—*Trappes* v. *Meredith*. Personal earnings are in England clearly distinguished from other estate, and the English statute was quite as comprehensive as the Scotch. The petitioner proposed to give the respondent the *beneficium competentiæ*, but under the 103d section he must take the whole estate if he was entitled to take any at all. He had no discretion. In any event the salary was not excessive.

Authorities—*Laidlaw* v. *Wylde*, June 9, 1801, Mor. App. Arrest. No. 4; *Smith* v. *Innes*, May 29, 1855, 17 D. 778; *Trappes* v. *Meredith*, Nov. 3, 1871, 10 Macph. 38; *ex parte Darling*, Feb. 12, 1877, L.R. 4 Chan. Div. 689, and the cases cited by the Lord Ordinary; 1 and 2 Vict. cap. 110, sec. 37; 2 and 3 Vict. cap. 41, secs. 3 and 81.

At advising—

Lord President — The Lord Ordinary has found that the allegations of the petitioner are not relevant to support the application. Therefore he refuses the petition, and in that result I concur, but in doing so I have no intention of repeating or adopting the grounds of his opinion which he gives in his note, and which I do not think are necessary to the decision of the present question. The question is whether the petition is a competent petition under the 103d section of the Bankruptcy Act. That section is—[*reads*]. Now, the petition is laid on that section of the statute, and the prayer of the petition is quite in accordance with the language of the section. The question is, Whether the estate which is the subject of the present dispute is estate, using the word in the wide meaning of the interpretation clause of the statute, which has been acquired by the bankrupt, or has descended, reverted, or come to him after sequestration? Now, what has vested in the bankrupt is his office of schoolmaster, and that was vested in him at the date of sequestration. Therefore, it is not estate which has been acquired by him, or has descended, reverted, or come to him after the sequestration. But what the trustee wishes to have attached is the emoluments of this office; that is a subject which was vested in the bankrupt at the date of sequestration. On this single ground I am for refusing the petition.

Lord Deas—I am clearly of opinion that this claim does not fall within the 103d section of the statute. The words cannot be repeated without seeing that. This single ground disposes of the case, and I am not inclined to go into the point raised by the Lord Ordinary in his note, without necessity. The question is a very serious one, but until it is properly raised on the merits I do no say what my opinion on it is.

Lord Mure—I am of the same opinion. It is a difficult question how far salaries like the present are assignable or attachable, but it is not necessary to determine it here, because this bankrupt was teacher in the school at the date of the sequestration, while the 103d section contemplates new estate only. I am quite clear therefore that the present petition is not within the 103d section.

Lord Shand—I am of the same opinion. The bankrupt was teacher at the date of the sequestration. It is not disputed that he held office *ad vitam aut culpam*, and had the right to draw all future emoluments. Therefore, if the trustee has any claim he has it in virtue of the sequestration and not in virtue of the 103d section. But if he goes further he will be met, in the first place with the difficulty dealt with by the Lord Ordinary, and secondly, there is the consideration whether, looking to the circumstances and position of the bankrupt, £200 a year is an excessive amount for the maintenance of himself and his family.

The Court adhered.

Counsel for Petitioner (Reclaimer)—Strachan. Agent—W. Officer, S.S.C.

Counsel for Respondent—Salvesen. Agents—Boyd, Macdonald & Co., S.S.C.

Saturday, July 9.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

MACPHERSON v. MURRAYS.

Process—Reclaiming—Decree Assoilzieing Defender where Pursuer is Absent and Defender has been Appointed to Lead in a Proof—Ill-health assigned as Ground of Absence.

This was an action of count and reckoning by a lady against her law agents, and related to certain sums of money which she alleged had come into their hands in order to carry on a litigation on her behalf. After a variety of procedure the Lord Ordinary (Rutherfurd Clark) pronounced this interlocutor:—"The Lord Ordinary having heard parties, Allows them a proof of their respective averments, the defenders to lead; grants diligence at the instance of both parties for citing witnesses and havers; and appoints the proof to proceed before the Lord Ordinary upon Thursday, the 16th day of June next, at 10 o'clock forenoon." Thereafter, on the 16th June, the following interlocutor was pronounced:—"The Lord Ordinary, in respect of no appearance made for the pursuer, Finds it unnecessary to proceed with the proof allowed by interlocutor of 13th May last: Therefore discharges the order for proof, assoilzies the defenders from the conclusions of the summons, and decerns." The pursuer reclaimed. Nevay for her produced a medical certificate, and stated that being an old woman, over seventy years of age, bedridden, and in poor circumstances, she had been unable to attend to her interests in the litigation. In any case, the defenders were appointed to lead the proof, and had failed to do so. [The Lord President observed that the defenders, as pursuers of the issue, might either lead proof or not, as they preferred]. The defenders replied—The medical certificates merely bore that the pursuer was an old woman, and, besides, her personal attendance at the proof was not necessary. The Court refused the reclaiming note.

Counsel for Pursuer (Reclaimer) — Nevay. Agent—R. Broatch, Solicitor.

Counsel for Defenders (Respondents)—Lang. Agents—J. & W. C. Murray, W.S.

Saturday, July 9.

SECOND DIVISION.

SPECIAL CASE—DUNCAN'S TRUSTEES v. DUNCAN AND OTHERS.

Settlement—Marriage-Contract.

A husband and wife in their daughter's marriage-contract bound themselves to pay to the marriage-contract trustees one-fifth of the free residue of the estate of each of them remaining after satisfaction of onerous obligations, the said share to be payable on the lapse of six months after the death of the longest liver of them. The husband thereafter died leaving to his widow a liferent of his whole estate. *Held* that the widow was entitled to a liferent of the whole estate, and that the daughter's marriage-contract trustees had no claim to the principal or interest of one-fifth of her father's estate till after the death of the widow.

James Duncan, W.S., Edinburgh, died on 27th September 1874, survived by a widow, two daughters, and one son, James Barker Duncan, W.S. He was also survived by three grandchildren, the family of a daughter Mrs Millar, who predeceased him. Mr Duncan had in 1865 been a party, as had also Mrs Duncan, to the marriage-contract of Mrs Millar. In that marriage-contract Mr and Mrs Duncan with mutual consent bound themselves to convey and make payment to the marriage-contract trustees acting for the time of "one-fifth part or share of the free residue of each of them remaining after satisfaction of onerous obligations, the said share to be payable on the lapse of six months after the death of the longest liver of the said James Duncan and Mrs Christian Duncan." It was then declared that the said share should be liferented by Mrs Millar and by her husband if he survived her, and that the fee should belong to the child