I think the fallacy of the learned Sheriff-Substitute's method is very easily demonstrated by taking an example. Let me suppose that two workmen have been injured by the same accident, that they have both been injured in the same manner, and that they each afterwards take up a public-house business. The one starts his public-house in the town A and the other starts his public-house in the town B; and the public-house in A, owing to the habits of the inhabitants, is a better business than the business in B. The result would be, if you treated the matter as the Sheriff-Substitute has done, that you would find that the profits made by the one man were very different from the profits made by the other man. Is it not almost absurd to suppose that that represents the wage-earning capacity? There is of course an element of luck in every business, which has nothing to do with the wage-earning capacity.

In the circumstances which we find in this case I think the inquiry the Sheriff-Substitute had to make was in one sense a simple one, although to be decided roughly, as these things must be. If he had discovered how much work this man did in his public-house—that is to say, what he really worked at—then I think that what he would have to apply his mind to would be, What would the services which this man actually rendered have been considered worth if, instead of serving himself, he had been serving somebody else? That is to say, What would he have got in the market if he had gone there for work in that business? It is not for us to know what he would have earned; and I think that the case must go back to the Sheriff in order that he may apply his mind to that inquiry.

LORD KINNEAR and LORD JOHNSTON concurred.

LORD M'LAREN was absent.

The Court recalled the determination of the arbiter and remitted to him to proceed as accorded.

Counsel for the Appellant—Munro—Mair. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Respondents—Cooper, K.C.—Strain. Agents—W. & J. Burness, W.S.

Tuesday, October 26.

FIRST DIVISION.

[Sheriff Court at Glasgow.

M'CULLOCH (JACK'S TRUSTEE) *v.* JACK'S TRUSTEES.

Bankruptcy — Cessio — Warrant for Examination of Persons who can Give Information "Relative to" the Bankrupt's Estate—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *secs.* 90 *and* 91—*Bankruptcy and Cessio (Scotland) Act* 1881 (44 *and* 45 *Vict. cap.* 22), *sec.* 10.

The Bankruptcy (Scotland) Act 1856 enacts—Section 90—"The Sheriff may at any time, on the application of the trustee, order an examination of the bankrupt's wife and family, clerks, servants, factors, law agents, and others, who can give information relative to his estate, on oath, and issue his warrant requiring such persons to appear. . . ." Section 91—"The bankrupt and such other persons shall answer all lawful questions relating to the affairs of the bankrupt; and the Sheriff may order such persons to produce for inspection any books of account, papers, deeds, writings or other documents in their custody relative to the bankrupt's affairs. . . ."

A bankrupt disclosed that under the trust-disposition and settlement of an uncle he had or might have right to a legacy of £500. (There was doubt as to whether the right had vested absolutely or subject to defeasance, or whether there was a mere *spes successionis.*) The trustee in bankruptcy presented a petition to the Sheriff for warrant to cite the uncle's testamentary trustees to appear for public examination. It appeared from the correspondence between the parties that the trustee in bankruptcy desired to know how the trust funds were invested, whether the uncle's widow had claimed her legal rights (the probable effect of this under the will would have been to make the bankrupt's legacy at once payable), and the amount of debts on the estate.

The Court (*reversing* Sheriff-Substitute Glegg and Sheriff Millar), *dismissed* the petition, *holding* that the examination of the testamentary trustees, not upon the question of whether the bankrupt had disclosed his whole estate or not, but upon collateral matters which might affect the pecuniary value of the bankrupt's estate, was incompetent.

By the Lord President—"The whole scope of those sections" (*i.e.* 90 and 91) is to trace property which the bankrupt may otherwise have concealed. Once that is traced and identified, there, it seems to me, is an end of the matter. If the property is then recoverable the trustee can sue. If it is not, he must wait."

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), sections 90 and 91, is quoted in the rubric. The Bankruptcy and Cessio (Scotland) Act 1881 (44 and 45 Vict. cap. 22), section 10, authorises the Sheriff in proceedings under the Cessio Acts to exercise the powers and grant the warrants and commissions which in sequestrations he is empowered to exercise under the 90th and 91st sections of the Bankruptcy (Scotland) Act 1856.

George M'Culloch, trustee in the cessio of the estate of William Jacks, Arnold Avenue, Bishopbriggs, presented a petition in the Sheriff Court at Glasgow, in which he craved the Court to fix a date for the public examination of Mrs Ferguson Steven or Jacks and others, the testamentary trustees of William Jacks, and to grant warrant requiring them then to appear in terms of section 10 of the Bankruptcy and Cessio (Scotland) Act 1856.

The trustees of William Jacks in answer to the petition lodged a minute in which they stated, *interalia*—"The minuters make the following explanations:—(1) Under the before-mentioned trust-disposition and settlement of the said deceased William Jacks, a legacy of £500 will become payable to his nephew, the bankrupt William Jacks (a son of his late brother, Richard Jacks), provided he, the bankrupt, survive the testator's widow, who still lives. The legacy is directed by the testator to be payable 'upon the death of my (his) said wife, or should she surrender her liferent over any part thereof to admit of payment, then for payment of such part upon such surrender: . . . Declaring that in the event of any of my (his) said nephews and nieces, children of my brother Richard . . . dying before the date of vesting, leaving issue then surviving, such issue shall be entitled to the legacy which their parent would have taken on survivance.' The testator's widow has not seen fit to surrender her liferent to admit of said legacy of £500 or any part thereof being paid to the bankrupt before her death. So the legacy has not vested in the bankrupt; it may never vest in him; it may be carried by the destination-over. He has a mere *spes successionis*, which forms no part of the bankrupt's 'estate' under the Bankruptcy Acts; and has not been transferred to the petitioner as trustee in his cessio. (*Reid* v. *Morison* (1893), 20 R. 510, 30 S.L.R. 477; *Bradshaw* v. *Kirkwood* (1904), 7 F. 249, 42 S.L.R. 187.) And as already stated, whoever succeeds to said legacy will succeed at the date of the widow's death, being the date of payment.

"(2) The object of the petition is not to get information 'relative to the bankrupt's estate' (the minuters know of none), but to compel them (as trustees of the late Mr William Jacks) to supply the petitioner with the following information regarding the estate under their charge, viz.—'(1) How the trust funds are invested. (2) Whether Mrs Jacks has claimed her legal rights, or is taking the provisions contained in the settlement; and (3) the amount of debts on the estate.' This information, according to letter of 28th April 1909, addressed by Mr John Martin, the petitioner's law agent, to Mr Charles France, the minuters' law agent, 'is required for the purpose of enabling the trustee to sell his claim in respect of the legacy bequeathed to the bankrupt.' And Mr Martin adds—'Of course, if you will give me this information out of Court, I shall be pleased to dispense with your and the other trustees' attendance.' The minuters being advised that the petitioner has no right or title to make this demand or to enforce it as he is attempting to do, also that they are not entitled to give the information asked regarding the valuable estate under their charge for the purpose mentioned or any purpose, they decline to do so."

On 5th May 1909 the Sheriff-Substitute (GLEGG) sustained the competency of the petition and granted leave to reclaim.

Note.—[*After discussing the nature of the bankrupt's interest in his uncle's estate the Sheriff-Substitute came to the conclusion that the legacy had vested and was not a mere spes successionis, and proceeded*]—"It follows, therefore, that neither *Morison* v. *Reid*, 20 R. 510, nor *Bradshaw* v. *Kirkwood*, 7 F. 249, assist the testamentary trustees' case. These cases decide that a *spes successionis* does not fall to a trustee in bankruptcy; and a trustee in a cessio is at least in no better position, but in both it was clear that vesting had not taken place.

"It is unnecessary to notice in detail the nature of the proposed examination, as the competency or propriety of particular questions will arise at the proof. But it may be noticed that the trustee stated that he required to ascertain the probable value of the legacy before exposing it for sale. This appears to be a relevant inquiry, and technically to justify the application.

"As it was intimated that the trustees wished to appeal, and as probably a decision either way on the competency will render further Court proceedings unnecessary, there is no need to fix a diet of proof."

The respondents appealed to the Sheriff (MILLAR), who on 22nd July 1909 adhered to the interlocutor of 5th May and remitted to the Sheriff-Substitute to proceed as accorded.

Note.—". . . . . It may be that it [*i.e.*, the bankrupt's right or interest in the legacy] would be construed as vesting subject to defeasance. Another question was raised as to whether the fact, if it be true, that the widow has renounced her testamentary provisions might not have the effect of hastening the period of division in the event of it being held by the Court that there was a vested and indefeasible right in the bankrupt; but in my view this process is not one suitable for the determination of either of these questions. What has happened is that the bankrupt in giving up his state of affairs has entered in it this legacy which is said to have been left by his uncle. I think the trustee was bound to make inquiry into this on behalf of the creditors. Before taking action he is entitled to know all the facts and circum-

stances which might affect this claim, if he had any. It might affect his final judgment to have information as to whether this estate is sufficient to pay all the legacies, and whether the widow had renounced her right under the will. It may be that the bankrupt would be prepared to assign this right to an intending purchaser, though I agree that he is not bound to do so. As this petition is only to obtain information, I think the trustee in the process of cessio is entitled to have it. The appellants desired leave to appeal to a higher Court. As the question may be of importance, I think the motion should be granted."

The respondents appealed to the Court of Session, and argued—The petition should be dismissed. The petitioner was not entitled to know more than the terms of the bequest. The present process was not a proper one for determining the nature and quality of the bankrupt's right. The purpose of sections 90 and 91 of the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79) was to discover the whole of the bankrupt's estate, not to inquire into collateral matters which might affect the value of the subjects as to which there was disclosure.

Argued for the petitioner—The words of section 90, "information relative to his" [*i.e.* the bankrupt's] "estate," covered the information here desired, for that information affected the value of the legacy. It was for the Sheriff to see that irrelevant questions were not put to the trustees. Reference was made to *Selkirk* v. *Service*, October 22, 1880, 8 R. 29, 18 S.L.R. 9.

LORD PRESIDENT—The petitioner here and the learned Sheriffs have apparently misunderstood the sections of the Bankruptcy Act which are incorporated into the Cessio Act by the recent Act. The incorporated sections with which we have to do are the 90th and 91st, and they allow the Sheriff, on the application of the trustee, to order an examination of the bankrupt's wife and family, clerks, servants, and so on, who can speak to and give information relative to his estate; and then it says that the bankrupt and such other persons shall answer all lawful questions relative to the affairs of the bankrupt. Now the bankrupt in this case—of course he was under cessio, but I take it as upon the incorporated sections—the bankrupt in this case had a right to a legacy under the settlement of a deceased uncle, and he included in his state of affairs the fact that he had a right to this legacy. There was a doubt raised as to whether upon the terms of the settlement the legacy was vested or was not, or whether it was only a *spes successionis*. But the trustee, in order to sell the right, whatever it was, if he could—as to which of course one gives no opinion,—applied to the trustees of the deceased uncle for information as to this legacy. Now a correspondence has been read to us which I cannot say excited my admiration, because I think a little more frankness on the part of the testamentary trustees at the initial stages might probably have saved this trouble. But at the same time, while that is so, I think the demands made by the trustee were obviously excessive. It seems to me that what he was entitled to know was—Was the bankrupt's statement true or not—that is to say, was it a fact that under a settlement left by the uncle there was a bequest of a certain kind left to the bankrupt?—and I think the testamentary trustees' duty was to have sent in either a copy of or an excerpt from the settlement showing that a certain legacy was left. When that had been done, it seems to me they had done everything they could be called upon to do. But the trustee seemingly wanted to know a great deal more, because he has admitted by a letter he sent that he wants to know how the trust funds are invested, whether a certain person claimed legal rights or not, and what is the amount of the debts on the estate. With all these matters I do not think he had anything to do. And I must say the idea of praying in aid sections 90 and 91, and putting persons in the box for public examination, and then examining them—not upon the question as to whether the bankrupt had disclosed his whole estate or not—but upon a question of collateral matters dealing with the estate under their charge, simply upon the ground that these collateral matters may in certain circumstances affect the pecuniary value of what the bankrupt's estate is, is out of the question. The whole scope of those sections is to trace property which the bankrupt may otherwise have concealed. Once that is traced and identified, there, it seems to me, is an end of the matter. If the property is then recoverable, the trustee can sue. If it is not, he must wait. Accordingly I think there has been an entire misapprehension of the position here; that the interlocutors appealed against must be recalled, and that the appeal must be allowed and the petition dismissed.

LORD KINNEAR and LORD JOHNSTON concurred.

LORD M'LAREN was absent.

The Court recalled the interlocutors appealed against, sustained the appeal, and dismissed the petition.

Counsel for the Petitioner (Respondent) Morison, K.C.—Russell. Agent—S. F. Sutherland, S.S.C.

Counsel for the Respondents (Appellants)—Fleming, K.C.—Hon. W. Watson. Agents—Webster, Will, & Company, S.S.C.