upon the sums due under the bond of provision, under the Aberdeen Act and the marriage-contract. Further, there is a power to advance, and there is also a power to postpone payment, and there is also a declaration that the provisions contained in the foregoing trust-disposition and settlement shall be in full satisfaction of all other claims. These things all point to the conclusion—and, indeed, are inconsistent with any other conclusion than that—at which the Lord Ordinary has arrived.

The pursuers' counsel suggested that as the pursuers had by the last codicil been made residuary legatees in place of their oldest brother, the heir of entail, the interpretation they contend for should be put upon the fourth head of the first codicil, that the residue may be increased for their benefit. This seems to me to be an unwarrantable contention. The second codicil confirms the first in everything which was not altered, and as a consequence the fourth purpose must be read as it would have been had there been no later codicil, or as if it had been repeated word for word in that codicil. The change, therefore, in the bequest of residue from one legatee to another cannot change the subject of the bequest. The residue bequeathed was left unchanged, and once we see what it would have been under the first codicil, we see what it is under the second. In both it is the part of the estate which may remain after all the prior provisions, including the £5000 legacies, have been satisfied. This is shown by that part of the codicil which provides that "in the event of the decease of any of my said three younger sons without leaving issue before the said period of payment, then the share of such deceaser or deceasers" of the £5000 before provided to each of these sons, "so far as not previously paid or applied for his behoof, in virtue of the powers hereinafter written, shall fall into and become part of the residue of my estate." This residue is only that which was left after the legacies in question had been taken out of the estate; and this of itself appears to me to be conclusive of the controversy.

For these reasons I think that the interlocutor of the Lord Ordinary should be affirmed.

Lord Rutherfurd Clark concurred.

The Court adhered, and remitted to the Lord Ordinary for further procedure.

Counsel for Pursuers (Reclaimers)—J. P. B. Robertson — Pearson. Agents — Campbell & Somervell, W.S.

Counsel for Defender (Respondent)—Mackintosh—Low. Agent—Donald Mackenzie, W.S.

Saturday, June 21.

FIRST DIVISION.

[Sheriff of Forfarshire.

WYLIE AND ANOTHER *v.* KYD.

Bankruptcy — Sequestration — Appointment of Trustee— Vote of Creditor— Competency of Proof —Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79).

In a competition for the office of trustee on a sequestrated estate, objections were lodged to the votes of creditors who voted for one candidate, on the ground that on emitting their affidavits they had not been put on oath by the Justices of Peace before whom the affidavits were said to have been taken, and the Sheriff allowed a proof of this averment. *Held* that a proof at large into the regularity of proceedings *ex facie* regular and formal could not be allowed at that stage of the sequestration.

The estates of John Ogilvy, farmer, were on 12th April 1884 sequestrated by the Sheriff-Substitute of Forfarshire. The interlocutor granting sequestration appointed in usual form a meeting of creditors to elect a trustee, and meantime a judicial factor was appointed for the preservation of the estate. At the meeting to elect a trustee there was an apparent majority in favour of James Wylie, whom failing George Robertson. George Kyd, another competitor for the office of trustee, lodged objections in the Sheriff Court at Forfar to the votes of a large number of the creditors who had supported the election of Wylie. He objected to the vote, *inter alios*, of Harry Walker, Dundee, "in respect that although the said affidavit and claim bears that the said Harry Walker was solemnly sworn, it is believed and averred that he was not put on oath by the Justice of Peace before whom it is said the oath was taken." A precisely similar objection was taken by him to the votes of all the other creditors voting for Wylie, being a large number of persons residing in various parts of the country. The result of the objection, if sustained, would be that Kyd and not Wylie would be entitled to the office.

On 5th May 1884 the Sheriff-Substitute (Brown Douglas) allowed Kyd "a proof of his objections that the several deponents in the affidavits produced were not put on oath by the Justices of Peace before whom the said affidavits bear to have been respectively sworn, and to the competitor Wylie a conjunct probation."

"*Note.*—The oath which is produced by a creditor in a sequestration must be such, that if it contains statements which are wilfully false, the deponent may be convicted of perjury, and this can only be the case where an oath in some form has been actually administered by the Justice before whom the affidavit is taken. Considering further the very strong expression of opinion by the Lord President in the case of *Hall* v. *Colquhoun*, June 22, 1870, 8 Macph. 891, concurred in by the rest of the Court, I think that if the allegations of the competitor Kyd for the trusteeship in this sequestration are correct, and if no oaths of any kind were really administered to the claimants, the affidavits he objects to are bad, and a proof is therefore allowed."

Wylie appealed to the Court of Session under

section 170 of the Bankruptcy Act of 1856, and argued that a proof was in the circumstances, and looking to the nature of the objections, incompetent, and was in direct opposition to the spirit of the Act. The Court was asked on an offer of parole proof to go behind certain *ex facie* regular and formal documents and cut them down. The creditors' rights were in danger of being prejudiced while the claimants were competing for the office of trustee. If the evil complained of really existed, the remedy was to bring the matter under the notice of the Lord Advocate.

Authorities—*Tennent* v. *Crawford*, January 12, 1878, 5 R. 433; *Reid* v. *Drummond*, November 15, 1879, 7 R. 255; *More* v. *Slate*, July 12, 1849, 11 D. 1345.

Argued for respondent—If the objections taken by Kyd were well founded, and he believed that they were, then not one of the votes in favour of Wylie was good. When objections of so serious a character were brought forward, the Sheriff had no other course open to him than to allow a proof. The opinion of the Lord President in *Hall* v. *Colquhoun* (*infra*) was good authority for the procedure which had been adopted. The same procedure had recently been adopted in a case in the Sheriff Court of Lanarkshire, so that it was a mistake to suppose that proof on such a matter was unknown in practice.

Authorities—*Rhind* v. *Mitchell*, December 5, 1846, 9 D. 231; *Mann* v. *Dickson*, July 1, 1857, 19 D. 942; *Hall* v. *Colquhoun*, June 22, 1870, 8 Macph. 891.

At advising—

Lord Mure—The objections which we are here asked to deal with by a proof at large, have been taken at that stage in the sequestration proceedings when a competition has arisen for the office of trustee, being a stage at which the policy of the statute, as I read it, is to enforce expedition, and to prevent anything like delay; and yet the main objection which has been lodged by one of the competitors for the trusteeship relates to every vote—and they are twenty in all—which has been tendered in support of his opponent. The substance of that objection is, that he "believes and avers" that the different creditors were not put on oath by the Justices of the Peace before whom the oaths are said to have been respectively emitted. Now, this objection raises an issue of fact as to what took place before various Justices in six different parts of the country—in Dundee, in Forfar, in Coupar-Angus, in Kirriemuir, in Glasgow, and in Edinburgh—and what is asked for in support of it is a proof that in all these different localities, and on twenty different occasions, the oaths bearing to have been emitted were not properly taken, or that no oaths were taken at all. It appears to me that it is already matter of decision that at this stage in a sequestration, and in a competition between two parties for the office of trustee an objection of this kind cannot be allowed to go to proof. I do not rest my judgment solely on the case of *Reid* v. *Drummond*, but also and mainly on the earlier case of *Rhind*, Dec. 5, 1846, 9 D. 231, to which we were referred, and the rubric of which bears that "it is competent to grant a diligence for the recovery of documents which afford instant proof in regard to the validity or invalidity of votes in the election of a trustee on a sequestrated estate; but it is incompetent at that stage of the sequestration to grant a diligence to recover writs as for a proof at large"—that is, in other words, that a proof *prout de jure* was incompetent at that stage of the proceedings. That case was very deliberately decided by Judges of great eminence, and although Lord Jeffrey in his original opinion expressed himself to the effect that no diligence should be granted, even for recovery of specified documents, at that stage of the proceedings, his Lordship, after more mature consideration, and after hearing the opinions of his brethren, seems to have come to the conclusion expressed in the rubric, which I think correctly embodies the opinion of the Court upon the question, and I am not aware that since then there has been any decision to a contrary effect.

I am therefore for applying the rule there laid down to the present case. The point raised was not altogether new at the time of the case of *Rhind*, for I observe that reference was there made to 2 Bell's Com., p. 347 (5th edition), where the law on the subject is laid down thus—"When any objection fatal to the debt claimed can be instantly verified, the Court is bound to give effect to it, and to reject the vote of the claimant." But he adds—"The effect of the decisions cited below is that the scrutiny into debts, considered as qualifications to vote, is not to be made the subject of parole proof. The admission, on the one hand, of such written evidence in refutation as may instantly be produced, and, on the other, the security of an oath guarded by all the pains of perjury, seem to have appeared to the Legislature sufficient precautions against danger in matters of this sort, while a protracted inquiry suspensive of functions most important to the common interest is carefully to be avoided. The line of distinction is happily drawn in a case which came twice before the Court. At first the objection was stated to the claim as a qualification to vote in the election of interim factor, and afterwards the same objection was repeated to the debt as a title to draw a dividend. The Court supported the claim on the first occasion, and admitted it to further proof on the second."

Any objection, therefore, which necessarily involves a proof at large cannot be entertained at that stage of the proceedings where a trustee falls to be appointed, but may be dealt with at a later period in the sequestration, viz., when a dividend has to be made. I am therefore for recalling the Sheriff-Substitute's interlocutor.

Lord Shand—It is obvious, from the nature of the proceedings in a sequestration, that it is of the utmost consequence to the creditors that there should be the least possible delay in the appointment of a trustee, and it is out of the question to suggest that in order to determine who shall fill the office the Court should enter into such an inquiry as was here suggested. Under the former statute the proceedings at the early stage of the sequestration were of a summary nature, while under the existing statute it is enacted that the judgment of the Sheriff declaring "the person or persons elected to be trustees in succession shall be given with the least possible delay, and such judgment shall be final, and in no case subject to review in any Court in any manner whatever." Now, I think

the effect of that enactment, as of the corresponding clause in the earlier statute which has been the subject of decision, is just this, that no objections can be entertained at this stage of a sequestration except such as are capable of instant verification. I include in the exceptional cases those in which it may be necessary to grant delay in order by diligence to obtain certain specified papers, but I exclude the case where it is sought to obtain a general diligence for the recovery of papers.

With regard to the present case, if it be the fact that a loose practice with regard to the taking of affidavits in bankruptcy such as is here averred really exists, of course it is very strongly to be condemned, and it was a condemnation of something of the kind that led to the observations of the Lord President in *Hall* v. *Colquhoun;* but those *dicta* do not touch the question whether a sequestration is to be stopped for the purpose of allowing inquiries to be made as to whether affidavits *ex facie* regular were or were not taken with all proper solemnity. That is not a matter capable of instant verification, but would involve a proof which would certainly take days, possibly weeks, to complete. I think such a proceeding would be entirely contrary to practice, decision, and to the whole spirit of the statute regulating the matter. Here it is said that all the affidavits were objectionable, and there are a great many of them; but I should have held precisely the same opinion if the objection had been taken to one affidavit only.

Whether a proof under an appeal, of which the object was an inquiry into the personal disqualification of the proposed trustee, would be competent is a different question. Very possibly the only way to settle the question might be to have a proof, but that question is not raised here, and I therefore give no opinion upon it.

I will only add, that the Sheriff-Substitute in this case appears to have been misled by the view he took of the case of *Hall* v. *Colquhoun.* There the Lord President condemned very strongly a loose and improper proceeding which the proof in the case showed to have taken place, and the course which was followed was to remit the matter to the Lord Advocate for inquiry; but that case seems to me to have nothing to do with a question such as we have here—whether a proof at large should be allowed as to the validity of the affidavits in a sequestration on which the votes were given with reference to the question of the appointment of a trustee.

Lord Adam—We all know that if it were to become the custom for protracted litigation to take place between parties desiring the office of trustee, it would be an unfortunate business for anyone except those actually carrying on the proceedings. It was having this evil in view that made the Legislature provide that the Sheriff's judgment declaring a certain person elected to the office of trustee was to be final, and in no way subject to review, and the object of this enactment was clearly to prevent litigation for trusteeships being carried on at the expense of creditors.

The case of *Rhind* shows, I think, that a proof at large in the present case is not to be thought of, and that even a diligence at large would not be allowed. Here the affidavits are all *ex facie* regular and formal, and yet it is proposed by means of a proof at large to show that they were not actually sworn. I cannot see upon what grounds such a proof should be allowed by way of meeting the present objection, and not also be allowed against any other form of objection which might be taken to those affidavits. I do not think it makes any matter whether the objections be taken to one or to twenty affidavits. I think a proof at this stage of the proceedings incompetent, and I agree in the opinion expressed by your Lordships.

The Lord President and Lord Deas were absent.

The Court sustained the appeal and recalled the interlocutor of the Sheriff-Substitute, and remitted to the Sheriff to proceed as accords.

Counsel for Appellant—Strachan—M'Kechnie. Agent—P. S. Malloch, S.S.C.

Counsel for Respondent — Darling — Watt. Agent—David Milne, S.S.C.

Tuesday, July 1.

FIRST DIVISION.

[Sheriff of Dumbartonshire.

WATERSON *v.* MURRAY & COMPANY.

Reparation—Master and Servant—Relevancy—Want of Specification.

An action for damages at the instance of the widow of a person alleged to have been killed while in the service of the defenders, by falling from a gangway provided by them, and which the pursuer alleged was insufficient or defective—*held* not relevant, because it was not specifically averred in what respect the gangway was insufficient or defective.

This was an action at the instance of Christina M'Kinlay or Waterson, widow of the late James Waterson, boiler coverer, against Henry Murray & Company, owners or builders of the steamship "Sergipe," to recover damages for the death of her husband.

The pursuer averred that on 18th April her husband, who was in the employment of William Duff, was sent by him to assist in work at the boilers of the defenders' ship "Sergipe," which he (Duff) had been employed to cover; that the "Sergipe" was lying at the dock outside the "Tennasserim," which it was necessary to cross and thence go by a gangway to the "Sergipe;" that it was the custom where, as in this case, the vessel is not out of the hands of the builders (which she alleged the defenders to be) for them to supply a gangway for the use of all who are working at the ship. "(Cond. 4.) The 'Tennasserim' was a much higher vessel than the 'Sergipe,' and the said gangway, which was lashed at one end to the 'Tennasserim,' at the other end rested upon a block of wood placed on the gunwale of the 'Sergipe;' and the gangway was unsteady, as the block of wood shook at any movement of the vessels. The gangway consisted of two planks about 12 feet long, joined together by small