and if the jury said that, he did not think it could be said that that was contrary to the evidence before them. But then, on the other hand, if that letter was not granted through force and fear, it appeared to be an obligation to pay money out of a certain deposit, and for the first time in Dr Stewart's evidence it appeared that that deposit was a deposit not of his own money, but of the money of Lopez. He suggested at the trial, and it was the only answer given, that he was trustee for Lopez, and had no right to use Lopez's money for Madame Lynch's debt. But it would be for consideration whether, if he undertook to use Lopez's money for Madame Lynch's debt, he was not bound to do so unless interpelled by Lopez, and whether it was in his mouth to say that he had no authority, —or rather whether the granting of the bill did not imply that he had. In addition to that, it would be observed that this money was put into his hand without any written obligation, as he stated; and therefore it might be assumed that he rightly judged of his own power when he granted the letter of the 9th November 1868. There seemed to be a great deal of force, also, in the fact that George Stewart was not examined: but whether that would warrant the Court in granting a new trial, he did not feel called upon to say. Therefore, while on the one hand he did not think the verdict could be set aside as being contrary to evidence, he was clearly of opinion now, as he was at the time, that the issues did not raise the question as it ultimately came out in evidence. He thought, therefore, that on the one hand the defender, M. Gelot, must add to his record a statement in regard to the deposit and state, if he was so advised. that that deposit was money which had been intrusted to Dr Stewart's hands in the way described; and then, founding on that, he must, if so advised, take an issue on the letter of the 9th November as a specific agreement. On the other hand, if Dr Stewart said that letter was obtained through force and fear, he must add that to his summons of reduction, and to his issue, and then the Court would consider, when these alterations were made on the record, in what shape the case was to be put. His impression was that there should be two separate issues on the letter of 9th November—that was to say, one putting it as an obligation on the part of Dr Stewart to pay out of the deposit; and the other, if Dr Stewart insisted in his allegation that he granted it through force and fear, entitling him to prove that fact. It did not seem to him that the issue on onerosity should go further at present, because it had been settled by the special verdict, which he would suggest that the parties would turn into an admission upon the record. With regard to the terms on which this was to be allowed, he thought that in the meantime the Court need not decide. It would be an important matter to consider whether it could be done without an allowance of expenses; but when the Court saw the alterations made on the record they would be ready to dispose of that question. With regard to their power to do what was proposed, he was very glad that under a recent statute they had power to do justice, and that the supposed sanctity of an issue, which sometimes had been considered more sacred than getting at the truth of the case, had at all events to that extent been abrogated. He had no doubt that the justice of the case would be consulted by the course which the Court proposed to adopt.

The Court therefore set aside the verdict of the jury on the first issue, and made the rule absolute for a new trial of that issue along with any other issues which might be proposed and adjusted after the record was amended. This was done on condition that the defender should pay the expense of the last trial, so far as not available for the new trial, and except in so far as the expense was caused by the trial of the second issue.

Agent for Gelot—William Mason, S.S.C.

Agents for Stewart—Fyfe, Miller & Fyfe, S.S.C.

Friday, March 5.

FIRST DIVISION.

WISEMAN *v.* SKENE.

Bankruptcy Act, 19 *and* 20 *Vict.*, *c.* 79, §§ 70–74—*Sequestration — Trustee — Vote — Claim—Open Account.* At a meeting of creditors under the Bankrupt Act 1856, one of the competitors for the office of trustee had an apparent majority in his favour, and the caution offered was declared satisfactory by the meeting. The supporters of the other competitor, who had not offered caution and had withdrawn from his candidature, appealed to the Sheriff. The decision of the Sheriff, who, on a scrutiny, disallowed a vote founded on an open account containing items "for services, oil paintings," &c., presented by the brother of bankrupt; and found that there had been a real majority at the meeting in favour of the candidate who had since withdrawn, and accordingly appointed a new meeting for the election of a trustee—*sustained.*

In obedience to a deliverance of the Sheriff of Edinburgh, dated 11th January 1870, whereby he sequestrated the whole estates and effects of John Cumming, photographer, Edinburgh, the creditors assembled on 21st January to elect a trustee and commissioners. On a division, creditors with claims to the amount of £605, 11s. 5d., voted for Mr Dall, C.A., while creditors with alleged claims amounting to £1221, 9s. 1d., voted for Mr Wiseman, accountant, leaving an apparent majority in his favour of £615, 17s. 7d. Those creditors who had voted for Mr Dall protested against the validity of the votes given for Mr Wiseman. The meeting fixed £100 as the amount of caution to be found by the trustee, and declared themselves satisfied with the person proposed as cautioner for Mr Wiseman. They then proceeded to elect commissioners in terms of the statute. Mr Dall having declined to act, the dissentients appealed to the Sheriff (HALLARD), who on 9th February pronounced an interlocutor, finding "that the said John Wiseman was not supported by a majority of valid votes, and therefore declines to confirm him as trustee foresaid; and in respect that the said John Wiseman's competitor for the said office, Thomas Dall, is not a party to the present proceedings, and cannot therefore be appointed trustee foresaid, appoints the creditors of the said John Cumming to meet of new for the purpose of electing a trustee, and trustees in succession, and commissioners, in terms of the statute."

He appended the following Note:—"This case presents the unusual feature of a candidate for the office of trustee with an apparent majority of creditors on the one side; and on the other side the apparent minority who opposed his election, but whose own candidate declines to litigate the ques-

tion. The Sheriff-Substitute's first impression was that, there being *now* no competition in the proper sense of the word, the candidate of the apparent majority must prevail, subject to the powers of removal conferred upon creditors by the 74th section of the statute. But, on further consideration, the true course seems to be to take up this competition as usual, with the result of confirming the candidate of the apparent majority, if the votes recorded in his favour could successfully stand examination, and of ordering a new election in the opposite event of a victory won by the apparent minority litigating without a candidate. At the meeting for the election of trustee the apparent majority of the creditors supported John Wiseman; the apparent minority voted for Thomas Dall. Each side declared its own candidate duly elected, with the customary protest against the validity of the votes tendered for the opponent. A cautioner was proposed by John Wiseman. No cautioner was proposed for Thomas Dall. In these circumstances the Sheriff-Substitute has sustained the title of William F. Skene and others, creditors supporting Thomas Dall, to contest the validity of the votes recorded in favour of John Wiseman. The first objection stated by these creditors was to the vote of Gilbert Cumming, a brother of the bankrupt. This vote is upon a claim for £817, 7s. At the division the apparent majority was £1221, 9s. 1d. for Wiseman as against £605, 11s. 5d. for Dall. Consequently, if deduction be made for this vote as invalid, the majority would be the other way. The claim annexed to the affidavit is stated in the usual form of a tradesman's account. But in substance it represents a series of disconnected transactions, some of which are of considerable amount. One of the items, the largest, presents a manifest incongruity with the rest. It consists of a sum of £382 as wages due to the claimant by the bankrupt for 'services.' Of this claim, even if well founded, a large portion is extinguished by prescription. But it seems quite clear that this is not a statement of debt entitled to the privileges of an ordinary tradesman's account. It was justly contended at the discussion that a claimant cannot escape the statutory obligation of producing vouchers merely by putting his claim in that shape. No voucher whatever has been produced. This objection is abundantly strengthened by two considerations. One is, that the claimant is conjunct and confident with the bankrupt. The other is, that the bankrupt in 1868 executed a trust-deed for behoof of creditors whose names and claims are therein set forth in detail. The name of Gilbert Cumming and his claim of £817 do not appear in that list. On these grounds this vote was disallowed by the Sheriff-substitute. The majority being thus turned the other way, objections were stated to the votes for the nominee of William F. Skene and others. . . . . As to Wilson, Burn & Gloag's claim for a professional account for £112, 13s. 9d., the objection is that this account has not been taxed. On this point the statute is silent; and no authority is produced for taxation as a preliminary to voting. The Sheriff-Substitute therefore does not feel justified in sustaining this objection. It is unnecessary to pursue any further this investigation of the votes. Even if Wiseman's remaining objections were all good, there is now an effectual majority against him. But as his opponent, Dall, is not in a position to be confirmed, a new election has been ordered."

Wiseman appealed.

BRAND, for him, argued—that the Sheriff should have given effect to the balance of Cumming's claim after deduction of the sum claimed for services; that it was no objection to the claim that it was made by the bankrupt's brother; *Blyth*, 4 S. 154; and that the creditors had no title to appear before the Sheriff without having a competing trustee who had complied with the terms of the statute. Their remedy being the removal of Wiseman under section 74 of the statute.

GLOAG, in answer, argued—that the creditors dissenting had a right to appear before the Sheriff; Lord Wood's opinion in *Bailey*, 8 D. 18; *Macfarlane*, 29th January 1848, 10 D. 551; Cumming's claim was not of the nature of a tradesman's account; *Kinnear* v. *Lowe*, 14th November 1849, 12 D. 6.

At advising—

The LORD PRESIDENT said that there could be no question of the competency of this appeal. If the Sheriff had judicially declared some one to be elected as trustee, that judgment was final under section 71 of the statute. But the finalty under the statute was confined to such judgments. The next question was as to the title of the supporters of Mr Dall to appear before the Sheriff and object to the election of Mr Wiseman as trustee, although Mr Dall was no longer a competitor. He agreed entirely with the *dictum* of Lord Wood in the case of *Bailey*, and thought that "the parties" in section 78, who are to appear before the Sheriff and enter into the scrutiny, were not the professional men proposed as trustees, but their supporters.

The turning point in the case was the claim of Gilbert Cumming, the brother of the bankrupt, because if it were disallowed there was no doubt that Mr Dall had a real majority. It was certain that open accounts were sufficient vouchers of debt to sustain a claim and give a vote at this stage, but they must be of such a nature as in the general case were the only vouchers which could be had; such as a tradesman's account for furnishings. It would be most unjust and inconsistent with the statute that tradesmen should be denied a right to vote for the election of a trustee who had nothing to show except their unpaid accounts. But this doctrine must not be extended to things which did not in the general case run into "open accounts." In his opinion this was not an "open account" in the sense of the statute, it was merely an assemblage of items constituting a claim against the bankrupt. Nor was the suspicious nature of the claim to be left out of view. There had been a private trust in 1868, and the claim was not included in italthough the claimant was the brother of the bankrupt.

In the circumstances, he thought the Sheriff had taken the right course in appointing a meeting to elect a trustee of new.

LORDS DEAS and ARDMILLAN concurred.

LORD KINLOCH— I am of opinion that the Sheriff has rightly disposed of this case. The main question regards the effect due to the affidavit and claim made by Mr Gilbert Cumming in the sequestration of his brother. I would not throw the slightest doubt on the admissibility of open accounts, properly certified, to entitle the party in right of them to vote in the election of trustee. But alleged open accounts are, from their nature,

not unlikely in supposable cases to be made the ground work of fraudulent claims.

It is easy to frame an *ex facie* open account which is entirely fraudulent. The Court have therefore rightly proceeded upon the principle, that what is called an open account must be a thing the good faith of which shall be fairly presumable. I think the account produced by Gilbert Cumming in the present case is a most suspicious document. The first item that strikes the eye is a sum of £382 odds, said to be due by his brother for services. Mr Brand very judiciously did not contend that this sum could be included in the claim; but that withdrawal does not alter the impression produced on my mind by this item of the account.

Another item is £94 for an oil painting, subject unnamed. One is left to surmise whether this is the work of an old master, or the modest value which Mr Cumming places upon his own production. So also of other items. On the whole, I am of opinion that this document is not such an open account as can give a vote in the election of trustee. It may entitle to draw a dividend when fully proved, but only then.

Agent for Pursuer—J. M. Stacey, S.S.C.
Agent for Defender—W. R. Garson, S.S.C.

Tuesday, March 8.

M'GILCHRIST'S TRS. *v.* MURRAY AND OTHERS.

Heritable and Moveable—Heir and Executor—Direction to Sell. A truster after making certain special provisions directed the trustees under his trust-deed and settlement to "realise and convert into cash my whole estates and effects of every description, heritable and moveable," and divide and apportion "the whole residue and remainder of my said means and estate" "equally among my said sons, and pay or convey to each of my said sons his share thereof." The residue consisted partly of a villa, a dwelling house, a foundry, and a bond and assignation in security for £900. In a question between the heir and executrices of one of his sons, *held* that the share of the deceased son in these subjects was moveable *destinatione.*

This was an action of multiplepoinding, brought by the trustees of the late James M'Gilchrist, Coatbridge, who died in December 1865, leaving a trust-disposition and settlement, containing the following among other provisions:—

"In the sixth place, as it is my wish that my sons, or such of them as may desire to do so, shall carry on my present business of a founder and engineer, I hereby direct and instruct my said trustees, in the event of all my said sons having obtained majority at my decease, so soon as may be convenient thereafter, to assign, dispone, and convey to my said sons, or to the survivors or survivor of them who may be in life at my decease, equally among them, the heritable subjects in Coatbridge acquired by me by feu-contract entered into between Robert Baird, iron and coal master in Glasgow, factor and commissioner for William Baird, iron and coal master, Gartsherrie, dated the 9th and 15th days of April 1845, and upon which I have erected the Atlas Foundry; with the said foundry itself, and whole other erections, all as the same presently belong or shall belong to me at the time of my decease; but in the event of any one or more of my said sons not wishing to carry on said business, then the said trustees shall have the said portion of my estate appointed to be conveyed as before written, valued and appraised by skilled parties, two or more, of whose competency they shall be the sole judges; and the sons or son electing to carry on said business shall be entitled to require a conveyance to the whole of said portion of my estate, on paying or securing to each of the said son or sons not desiring the business the value of his share of said whole subjects; and in the event of none of my said sons electing to carry on said business, and acquire right to said portion of my estate on the foresaid terms, then the same shall revert to and form part of the residue of my general means and estate, and be realised and divided therewith as aftermentioned.

"In the seventh place, in the event of my dying before the youngest of my sons attains majority, and if any of my sons, who may then be major, desiring to continue the foresaid business, I hereby authorise and empower my said trustees to grant to such son or sons a lease of the said Atlas Foundry, and whole pertinents thereof, including the fixed machinery therein, with steam engines and appurtenances, and that for a period not exceeding the time to run till the first term of Whitsunday after the majority of my youngest son alive at the commencement of said lease, with a break in said lease in the event of the death of my youngest son, so that it will in any case terminate on the first term of Whitsunday after the majority of the youngest of my surviving sons, and that at such rent as my said trustees may consider reasonable.

"In the ninth place, in the event of my dying before the majority of my youngest son as aforesaid, and none of my said sons or son who may be major at my decease agreeing to carry on my said business on the aforesaid terms, then my said trustees are hereby authorised and empowered to sell and convert into cash my whole stock in trade of every description, and to let the said Atlas Foundry, with pertinents, and fixed machinery, and steam-engine and appurtenances, and that at such rent as they can get therefor, but they shall not give any lease which shall extend beyond the first term of Whitsunday after the majority of my youngest son.

"In the tenth place, my said trustees shall, as soon as possible after my decease, collect all debts due to me, and realise and convert into cash my whole estate and effects of every description, heritable and moveable, other than those portions thereof specially before provided for, but including my said household furniture and plenishing, and my said property at Sunnyside, in the event of my said spouse predeceasing me; and also including my said heritable subjects on which the Atlas Foundry is erected, with the whole pertinents, machinery and others thereon, and whole stock in trade, in the event of all of my sons being major at my decease, and none of them having continued my said business, as before provided for, and acquired that portion of my estate on the terms before mentioned; and after payment of all my said debts, heritable and otherwise, and the expenses of realisation, and of the trust generally, they shall divide and apportion the whole residue and remainder of my said means and estate, heritable and moveable, equally among my said sons, and pay or convey to each of my said sons his share thereof.

"In the eleventh place, in the event of my said heritable property at Sunnyside not falling under