all. So far as appears, the wife had no fortune of her own, and £150 could not by any possibility maintain her until the end of her days; and when once it was spent, which it would be soon, then if there was no other provision for her she must have turned on the estate left by her husband and claimed as matter of law what he has wisely left her as matter of provision under the trust-deed of 1874. Of course, if it turned out that the provision given in favour of the wife was an unreasonable one in itself—that, so to speak, he had robbed others that she might be unreasonably enriched—the law would not confirm the exercise—such an exercise—of the power which the husband possessed. But these provisions which have been given in the end are not more than reasonable provisions, and therefore I think they ought to be sustained.

The difficulty I had for a moment was with regard to the imposition, so to speak, of that portion of the provision which was created in favour of the wife out of the liferent of two-fifths left to the children of the marriage. But everything taken into account, and looking at the powers which the husband unquestionably has over all parts of the succession, I quite agree with your Lordships in thinking that as regards the effect the thing cannot be interfered with as being contrary to the faith of the contract.

The Court therefore found that the second party was entitled to the additional provisions made in her favour by the trust-settlement of 17th July 1874, and the codicils of 28th July 1877 and 12th Dec. 1878, and that the said provisions were entitled to be charged on the trust-estate in the manner and to the effect directed by the trust-settlement and codicils; and that the first parties were entitled to the sole administration and management of the trust-estate; and lastly, that it was unnecessary to answer any of the other questions.

Counsel for First, Second, and Third Parties—R. V. Campbell—Kennedy. Agents—Duncan, Archibald, & Cuningham, W.S.

Counsel for Fourth Parties—Guthrie Smith. Agent—W. B. Glen, S.S.C.

Friday, June 3.

FIRST DIVISION.

[Lord Rutherfurd-Clark, Ordinary.

POWRIE *v.* LOUIS.

Forgery—Adoption—Bill.

Circumstances in which allegations of the adoption of a forged acceptance of a bill *held* not to be proved. *Observations* on the *onus probandi* in such cases.

The complainer in this case was Archibald Powrie, 8 Crofts Lane, Dundee, and the respondent was Albert Louis, bill discounter and money lender, St Vincent Street, Glasgow. On the 31st July 1880 there was presented to the complainer for payment a bill, dated Glasgow the 29th April preceding, for £275, 10s., drawn by John C. Baldie upon, and said to be accepted by, the complainer. This bill was blank endorsed by Baldie and Louis, and was presented by the Clydesdale Bank, Dundee, for payment. The complainer refused to retire the bill, on the ground the acceptance thereto was not his, and that he knew nothing about the bill. Thereafter the bill was protested, and the complainer was charged at the instance of Louis. This was a suspension of that charge.

Louis denied that the acceptance was a forgery, but ultimately his main defence was rested on alleged evidence of adoption by the complainer.

On a proof the following facts appeared:—Louis was slightly acquainted with the complainer, and more intimately with J. C. Baldie, the complainer's nephew. He discounted the bill for Baldie, from whom he also, as he alleged, took a receipt for the amount, the receipt being produced. He took no precautions to satisfy himself that the complainer's acceptance was genuine, although he had previously had experience of doubtful acceptances in bills which he discounted for Baldie. He however alleged that on three separate occasions the complainer, when the bill was mentioned to him, answered "that it was all right," or words to that effect—on 20th, 27th, and 31st May. The substance of the evidence regarding these occasions, particularly the last, appears from the opinions *infra*. It was also contended by the complainer that the alleged receipt by Baldie above mentioned was a forgery. Baldie had absconded.

The Lord Ordinary (Rutherfurd-Clark) suspended the charge, adding the following note—"The first question is, whether the complainer's name is forged? The Lord Ordinary is of opinion that it is forged. The evidence is all one way, and the comparison which is instituted between the complainer's true signature and the signature on the bills removes all doubt.

"But the respondent alleges that the complainer adopted the bill. The case for adoption consists in the alleged admission by the complainer of his liability as acceptor, and in the allegation that in consequence of that admission the respondent advanced £25, 6s. to Baldie, the drawer of the bill in question, in part payment of a bill for £70, of which the respondent was acceptor, but which was not then due.

"The evidence is very contradictory, and the case turns on the credence which is to be given to the witnesses. The Lord Ordinary did not take the proof, and has in consequence lost some means of judgment.

"It is peculiar that the respondent says that in addition to the bill he took a receipt from Baldie, dated 30th April 1880, in which Baldie acknowledges that he received £275, 5s. 10d. for a bill drawn on A. Powrie, Dundee. Such a receipt is unusual. It was not necessary, as the indorsation of the bill gave the respondent a right to recover the contents. But a greater peculiarity is, that so far as can be ascertained by a comparison of the receipt with the admittedly genuine signatures of Baldie, the receipt is a forgery. The signature upon it bears no resemblance to Baldie's genuine signature, and there is much room for the observation that it was manufactured in order to establish that the

respondent had given value for the bill sued for. Baldie has absconded, and his evidence has not been obtained. But he had more aid to enable him to abscond from the respondent than from anyone else.

"With this suspicious matter at the beginning of the respondent's case, it would require, it is thought, very clear evidence to show that the complainer had adopted the bill. But at the best the parole evidence is evenly balanced, and in the opinion of the Lord Ordinary the respondent has not proved that the complainer adopted it. There are three letters produced which it is not easy to explain. It is clear enough that in writing the first of them the complainer was not acknowledging any bill as a consideration for a cheque which the respondent had promised to grant. On the contrary, he speaks of sending a bill to Glasgow to be discounted. The answer of the respondent is ambiguous. He refers to the bill already drawn at three months, but without describing it. In reply the complainer charges him with a want of good faith. To say the least, the complainer gave the respondent an opportunity of stating his case in writing. He failed to avail himself of it when he should have done so, and does not even make reference to the fact that the complainer was under any liability to him, though the complainer was asking a remittance. To the Lord Ordinary this appears to be very suspicious, and suggests such underhand dealing on the part of the respondent as is not consistent with honesty."

The respondent reclaimed.

Authority—*Mackenzie* v. *British Linen Company*, Feb. 11, 1881, L.R. 6 App. Ca. 82.

At advising—

Lord President—This is a question entirely of fact on the evidence. The complainer has suspended a charge on a bill on the ground that his acceptance is forged. It is now conceded that the signature is forged—forged by a person who is now away, a relative of the complainer's. But the respondent maintains that the complainer is still chargeable because he has adopted or accredited the bill. Now, a good deal has been said as to the *onus probandi* on the person founding on the signature in such circumstances, in which I entirely concur. The *onus* is a heavy one, and rightly so; for the effect of sustaining such a plea is to bind a person just as if he had subscribed, while in point of fact he did not subscribe, and to bring him under a *literarum obligatio* by parole evidence. In such circumstances the proof must be very strong, and above all the party proving must himself be entirely free from suspicion. Now, here the respondent is surrounded with suspicion throughout. He had no acquaintance with Powrie till the occasion of discounting a £70 bill, but he was well acquainted with Baldie, the drawer of the bill, the present forger, and it is clear that Louis either knew or strongly suspected that Baldie had forged acceptances before this one. In these circumstances it was the plain interest of Louis, if he wished to act honestly, to make sure, in dealing with bills by Baldie, that the acceptances were genuine. He did not do so. But he says that he got three different acknowledgments from Powrie that the acceptances were his. His statements are loose enough at the best, even if uncontradicted. There is, however, a conflict of evidence, and it is very remarkable that a business man like Louis should take the risk of this bill being all right on the faith of three casual conversations when he had it in his power to put it all right. One remarkable circumstance is said to have occurred at the last meeting. Then Powrie desired to have cash for a £70 bill which he held before it fell due. This was a bill which had been accepted by Louis as the price of furniture. After the interview £25 was paid by a cheque, but Powrie was dissatisfied and asked for further payment. But Louis refused to give cash for the bill, stating as his reason that the other bill for £275 was maturing, and that when it fell due there would be an accounting between him and Powrie. Now, this is rational enough if true. That was Louis' original answer. But when Powrie writes afterwards for further payment, it is remarkable that Louis does not make the same answer. On 16th June Powrie writes:—"Dear Sir,—I am surprised you have not sent me a cheque as promised; be good enough to let me have one this week, or I shall send the bill to Glasgow to be discounted.—Yours, &c." Louis' answer is as follows:—"Dear Sir,—Yours of 16th to hand, but as you are aware the bill is drawn at 3 months, consequently I cannot see that there is any hurry for me sending a cheque at present; however I may do shortly. I have already lost money by the furniture, so that I may as well take the advantage of the time allowed. As to discounting the bill, that I will leave to your own discretion.—Yours truly." A lame enough answer that. He retreats from his promise. His former answer was far more satisfactory and conclusive. That leads me to doubt whether the former answer was ever made at all, and this throws doubt upon the whole interview.

Again, it was thought necessary by Louis to have a separate receipt from Baldie for the money he gave as discount. There is no satisfactory explanation of why this was asked for or given. Further, I do not say that this receipt is a forgery, but it is so unlike signatures which are admittedly Baldie's as to make it the respondent's duty to clear up the matter.

On the whole matter, and without having seen the witnesses, I can find no reliable evidence to affirm Louis' evidence. I am for adhering.

Lord Deas and Lord Mure concurred.

Lord Shand—I have no difficulty in concurring. I am clear that the Lord Ordinary is right. There is one feature which distinguishes this case from all others which we have had. When the usual notice that the bill was falling due was sent to the alleged acceptor, he at once intimated that the signature was not his. In former cases there was failure to give timeous denial, and injury had so resulted to the bank. But here notice was sent on 26th July from Glasgow that the bill fell due on the 31st. Powrie called at once—on the 27th—and when the bill was sent to Dundee for collection the same thing occurred again. The case is thus unique. The only writing we have records the acceptor's instant repudiation, and the evidence of Scott, the bank agent, shows that Powrie was decided enough from the first that the signature was not

his—that he did not take any time to think. What then is left? The respondent's case is founded entirely on what happened during the first month of the bill's currency. There were three meetings, and there never was anything more than casual references to the bill. I am clearly of opinion that when the object is to make a party responsible for what he did not sign, if there is no writing to show it, the evidence must be very distinct, and I am not sure that it would be effectual, however distinct, unless actings followed which showed prejudice. Mere evidence of agreement would not bind one under a lease without proof of actings. Verbal communings will bind only if acted on. In *Mackenzie's* case the House of Lords, especially Lord Blackburn, say that the essence of the case on this head is that actings should follow on conversations to make it effectual. In this his Lordship follows Baron Parke in *Freeman* v. *Cook* (2 Ex. 654). I make these observations merely to guard myself from being understood to say that words alone would have been enough, however clear. Here I think the evidence is far from clear. I entirely agree with your Lordship's view of the evidence. There is an entire failure to prove adoption.

The Court adhered.

Counsel for Reclaimer—Scott—Rhind. Agent—W. Officer, S.S.C.

Counsel for Respondent—D.-F. Kinnear, Q.C. H. Johnston. Agents—Leburn & Henderson, S.S.C.

Saturday, June 4.

FIRST DIVISION.

[Sheriff of Lanarkshire.

MARR & SONS *v.* LINDSAY.

Process—Appeal — Bankruptcy — Where Sheriff Refuses Sequestration—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *secs.* 19, 31, 169, 170.

It is competent to appeal to the Court of Session against a deliverance of the Sheriff refusing a petition for sequestration.

On the 2d April 1881 John S. Marr & Sons, stationers, Glasgow, presented a petition in the Sheriff Court of Lanarkshire for the sequestration of the estates of Robert Lindsay, bookseller, Glasgow. The Sheriff-Substitute (SPENS) pronounced the first deliverance on the same day. On the 30th April, after some discussion, the Sheriff-Substitute dismissed the petition and found the petitioners liable in expenses, modified to the sum of £5. The petitioners appealed. The respondent, when the case appeared in the Single Bills, objected to the competency of the appeal, on the ground that the Bankruptcy Act of 1856 by implication excluded a right of appeal against deliverances of the Sheriff refusing sequestration. The arguments of parties, and the portions of the statute founded on, fully appear from the opinion of the Lord President, who said:—

In this case the appellants, Marr & Sons, on the 2d April presented a petition in the Sheriff Court praying for the sequestration of the estates of Robert Lindsay, the respondent. There was a good deal of discussion in the Sheriff Court, extending over several days, and on the 30th April the Sheriff-Substitute dismissed the petition for sequestration, and found the petitioner liable in expenses, which he modified to £5. The petitioner now appeals, and the respondent objects that the appeal is incompetent and that the Sheriff's decision is final.

Now, that depends on whether it is made final by the operation of the Bankrupt Statute, and it is necessary to attend to several sections of the statute in order to dispose of this point, which is certainly one of considerable importance. The matter of appeals generally is regulated by the 169th and the 170th sections of the Act. The 169th section provides for appeals against resolutions of the creditors, and for appeals against deliverances of the trustee in the sequestration; and the 170th section provides for appeals from the Sheriff to the Court, but it applies only to appeals after the deliverance of the Sheriff awarding sequestration, and consequently does not embrace the appeal in the present case. There is therefore no direct authority in the statute sanctioning this appeal, but on the other hand there are no direct words taking away the right of appeal.

The 31st section provides that the deliverance awarding sequestration shall not be subject to appeal, and the remedy there given is a petition for recall. "The deliverance awarding sequestration shall not be subject to review; but any debtor whose estate has been sequestrated without his consent, or the successors of any deceased debtor whose estate has been sequestrated without their consent, unless on the application of a mandatory authorised by the deceased debtor, or any creditor, whether the sequestration has been awarded by the Lord Ordinary or by the Sheriff, may, within forty days after the date of such deliverance, present a petition to the Lord Ordinary setting forth the grounds for recall, and praying for recall." Now, this section does not apply to the present deliverance, but it applies to a deliverance which might have been made in this case, namely, a deliverance awarding sequestration; and the only section of the statute relating to the case of refusal to sequestrate is the 19th, in which it is provided that where sequestration has been awarded against a debtor by the Sheriffs of two or more counties, the later sequestration or sequestrations shall, on the production of a certificate by the Sheriff-Clerk of the county in which sequestration first in date was awarded, setting forth the date of such sequestration, be remitted to the Sheriff of such county; and where all the sequestrations are of the same date, any one may be brought by appeal at any time before either Division of the Court of Session or Lord Ordinary; and on such appeal, or when a sequestration has been awarded by the Court alone, or by the Court of Session, and also by one or more Sheriff Courts, the Court of Session or Lord Ordinary shall remit the sequestration to such Sheriff Court as in the whole circumstances they or he shall deem expedient; and a notice of such remit shall be inserted in the *Gazette* within