heirs and assignees Now, the word assignee does not affect the question, which is, whether the heirs of Barbara were conditionally instituted in the event of her predecease. Upon that point I cannot find any indication that the testator's intention was that the ordinary rule should not apply, and I am therefore of opinion that it must receive effect.

Lord Mure and Lord Shand concurred.

The Court pronounced this interlocutor:—

"Find and declare that under the destination to Barbara Halliburton, and her heirs and assignees, in the trust-disposition and settlement of the late John Halliburton, her sisters, parties of the third part, do, in consequence of Barbara Halliburton predeceasing the testator, take the benefit of the bequest of residue as conditional institutes, and decern."

Counsel for First and Second Parties—Martin. Agents—Bruce & Kerr, W.S.

Counsel for Third Parties—Darling. Agents—W. N. Fraser, S.S.C.

Saturday, June 28.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

SOMERVELL AND OTHERS *v.* SOMERVELL.

Succession—Entail—Bond of Provision—Equitable Compensation.

An heir of entail in possession who had made provisions for his children under his marriage-contract, and had granted provisions to his younger children by bond under the Aberdeen Act, directed his trustees by the fifth purpose of his trust-disposition and settlement to hold and apply £6000 for each of his children other than the heir, which provision was to be inclusive of the sums to which they were entitled under the marriage-contract and bond of provision. He bequeathed the residue of his estate to the heir of entail. By a codicil he revoked the fifth purpose of his settlement, and in place thereof he directed his trustees to hold, apply, and pay to his younger children certain legacies, including legacies of £5000 each to three of his younger sons, "which shall include and comprehend, and be subject to abatement and deduction, or shall consist, as the case may be," of the sums to which they should be entitled under the marriage-contract and bond of provision. By a second codicil he revoked the destination of residue in the settlement, divided the residue among the three younger sons to whom he had given legacies of £5000, and confirmed the settlement and preceding codicil except in so far as thereby altered. These three younger sons claimed from their elder brother, who succeeded as heir of entail, unconditional payment of the sum in the bond of provision. *Held*, that on a sound construction of the settlement and codicils, the provisions thereby made for these younger sons were intended to be in satisfaction of their claims under the bond of provision, and therefore that they could not exact from the heir of entail payment of the sum contained in the bond without making compensation to him out of the general estate.

Mr Graham Somervell, heir of entail in possession of the estates of Sorn and others in Ayrshire, Hamilton's Farm, Lanarkshire, and Dalgain and others, in Ayrshire, died on 11th November 1881, survived by his widow, his eldest son James Somervell, and five younger children, Mrs Middleton, William Somervell Somervell, Graham C. Somervell, Henry David Somervell, and Louis Somervell. All these children had reached majority. By his marriage-contract, executed before he succeeded to the estates, he had bound himself to pay £3000 to the children of the marriage if more than three, with an additional sum of £3000 in the event of his succeeding to the entailed estates, and power was reserved to him of apportioning the whole £6000 among his children.

In 1857 Mr Somervell having succeeded to the entailed estates, executed a trust-disposition and settlement. This settlement, which was dated 19th February 1857, and proceeded on the narrative of the marriage-contract, and that he had now succeeded to the entailed estates and had resolved to allocate the provisions contained in the contract in favour of the children, allocated £100 to the child who should succeed to the entailed estates, and the remainder to the testator's other children, equally between them. The settlement also, on the narrative, *inter alia*, that the testator had executed or was about to execute a bond of provision in favour of his children by virtue of the Aberdeen Act (5 Geo. IV. c. 87), "which provisions made by the said bond are intended by me to be over and above the provisions in favour of the children of the marriage between me and my said spouse made by the said contract of marriage," conveyed to trustees his whole estate, heritable (except the entailed lands) and moveable, for payment of debts, conveyance of furniture in Sorn Castle to the heir of entail, provisions for the widow, etc.; and *fifth*—"In the fifth place, the said trustees and their foresaids shall hold, apply, and pay the sum of £6000 to and for behoof of each of the children born, or that may hereafter be born, to me, exclusive of any child who shall succeed to me in the foresaid entailed lands and estates, bearing interest at the rate of five per cent per annum from and after the first term of Whitsunday or Martinmas occurring after my decease, till payment: But declaring, as it is hereby expressly provided and declared, that the said sum of £6000 and interest shall include and comprehend, and be subject to abatement and deduction of the sum or sums to which my children shall respectively be entitled in his or her own right (not by way of accretion or succession) under the contract of marriage and bond of provision before recited, or either of them, it being my will and intention that each of my said children, exclusive as aforesaid, shall receive in his or her own right the said sum of £6000 and interest thereon from the date foresaid without prejudice to his or her receiving more under and in virtue of the contract of marriage and bond of provision before narrated, or

by way of accretion or succession to any other or others of my younger children who may decease without issue." There was also a direction that the residue of the estate was to be paid to the heir of entail entitled to succeed. Of the same date with the settlement the testator executed a bond under the Aberdeen Act (5 Geo. IV. c. 87) in favour of his children.

By bond of provision, superseding that of 1857, and dated 24th February 1871, on the narrative of the Aberdeen Act, Mr Somervell bound himself and the heirs of entail succeeding him in the entailed estates of Sorn and Hamilton's Farm, to make payment to his children then born, and to the child or children who might thereafter be born to him, who should be alive at his decease, other than the child who should succeed to those estates, and to the representatives of those children who should predecease him, claiming right in virtue of special settlement by marriage-contract, of the sum of £7200 sterling, calculated on three years' free yearly rent of the entailed estates, and payable at the first term of Whitsunday or Martinmas which should be twelve months after his decease. By the bond he also in like manner provided £3600 at the like term out of the entailed estate of Dalgain, in all £10,800 out of the entailed estates. The bond reserved to him power of dividing the provisions by any writing under his hand.

On the same date as this bond, 24th February 1871, Mr Somervell executed a (*first*) codicil to his settlement. In this codicil he narrated the bond of the same date, and his intention to exercise the powers of division contained in it, and also to revoke the allocation in the settlement of the provision of £6000 in favour of the children, contained in the marriage-contract, and make a new allocation; he therefore (1) allocated to his son William £300, to his daughter £2500, and to each of his younger sons £2700, payable out of the sums contained in the bond of provision; and (2) revoked the allocation of the £6000 in the marriage-contract, and allocated to the heir (James) £100, to William £100, to his daughter £100, and to each of the three younger sons £1900. The fourth purpose revoked the above-quoted fifth purpose of the trust settlement, in the following terms:—"In the fourth place, I hereby revoke and recall the fifth head or purpose of trust of the said trust-disposition and deed of settlement, and whole provisions, declarations, and others therein contained, and in lieu and place thereof I direct and appoint my said trustees and executors to hold, apply, and pay the legacies following to and for behoof of my four younger sons, viz., to and for behoof of the said William Somervell Somervell the sum of £1700, and to and for behoof of each of my three younger sons the sum of £5000, but which provisions of £5000 shall include and comprehend and be subject to abatement and deduction, or shall consist, as the case may be, of the sum or sums to which my said three younger sons shall respectively be entitled under the contract of marriage and bond of provision before recited, or either of them, in their own right, or by way of accretion or succession, so far as such sum or sums shall not exceed the said sum of £5000, it being my will and intention that each of my three younger sons shall receive in all a provision of £5000, but without prejudice, in the event of the decease of any of them without representatives having right as aforesaid, to the survivors or survivor of them receiving more, by way of accretion or succession, out of the shares of such deceasers, of the sums payable under the foresaid bond of provision, and which legacies, payable to or for behoof of the said William Somervell Somervell and my three younger sons, including the portions thereof payable from the foresaid marriage-contract provision of £6000, even in the event of my said spouse surviving me, shall bear interest at the rate of 5 per cent per annum from and after my decease till payment." The codicil further contained these clauses—"And with regard to the said sum of £5000 hereinbefore provided to each of my three younger sons, I provide that the same shall be payable to and become vested interests in them respectively at the first term of Whitsunday and Martinmas occurring after my decease, and after they shall respectively attain to majority, and 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, 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 . . . . And I further declare that the provisions contained in the foregoing trust-disposition and settlement and this codicil shall be in full satisfaction of the whole claims of my children under my said contract of marriage and the said bond of provision, and in full satisfaction also and inclusive of any obligations I may undertake in favour of them or their issue in the marriage-contracts of my children, or of any of them; and I confirm the foregoing trust-disposition and settlement so far as not thereby altered."

By his *second* codicil, dated 5th November 1881, he revoked the last purpose of his trust-deed (by which the residue was given to the heir) and in lieu theref directed his trustees to make an equal division of his residue among his three younger children, Graham, Henry, and Louis, being the three sons to whom provisions of £5000 were given by the first codicil—"And except so far as hereby altered, I approve of and confirm my foregoing trust-disposition and deed of settlement, and the preceding codicil thereto, in all respects, and declare that the said trust-disposition and deed of settlement, with the immediately preceding codicil and this codicil, contain the expression of my will."

Mr Somervell was succeeded in the entailed estates by his eldest son James Somervell. In 1882 Louis Somervell died, leaving a settlement under which Graham C. Somervell and J. H. Stirling were trustees and executors, and Graham C. Somervell and Henry David Somervell were residuary legatees. Louis Somervell had before his death received £5000 from his father's trustees.

James Somervell, the heir of entail, after his succession to the entailed estate denied that he was liable under the bond of provision to the three younger sons, Graham, Henry David, and Louis, if they took their provisions under the settlement. Graham C. Somervell maintained that the younger sons were entitled to payment of the sums due to them under the bond, and also to the testamentary provisions in their favour; and after serving on James Somervell a requisition

under the Aberdeen Act, sec. 9, calling upon him to make payment of the £10,800 contained in the bond of provision, he as an individual, and also he together with his co-trustee, as the trustees and executors of Louis Somervell, raised this action against him to have it declared that the bond of provision effectually bound the defender as heir of entail to pay to the younger children the sum of £10,800, or such other sum as should be the amount of three years' free rent, and for payment to Graham C. Somervell of £2,700, and to him and his co-trustee as trustees of Louis Somervell, £2700 as the proportion thereof falling to each of Graham and Louis respectively.

The defender pleaded—"(1) Upon a sound construction of the testamentary writings of the deceased Mr Somervell, his three youngest sons are not entitled to their testamentary provisions, and also to their shares of the sum contained in the bond of provision."

The Lord Ordinary (M'Laren) pronounced this interlocutor:—"Finds that under the combined effect of the testamentary settlement and codicils of the late Graham Somervell, Esq., the legacies and shares of residue therein bequeathed to the pursuers are given in satisfaction of their claims as creditors in the bond of provision libelled, and that the pursuers are not entitled to payment of their shares of the said bond of provision except on condition of making compensation to the heirs of entail, the debtors in said bond, out of the general estate of the said deceased Graham Somervell: Appoints the pursuers to give in a minute stating whether they elect to insist in this action conditionally on making compensation to the heirs of entail, or whether, having regard to the preceding findings, they elect to accept their testamentary provisions in satisfaction of the present claims: And grants leave to reclaim."

"*Opinion.*—The pursuers of this action of declarator are a younger son and the representatives of a younger son of the late Graham Somervell, Esquire of Sorn, and they claim to be entitled to unconditional payment of the sum contained in a bond of provision granted by the late proprietor under the authority of the Aberdeen Act. The defender pleads that the provision made by the bond is satisfied by the provisions of Mr Graham Somervell's settlements, and that the pursuers are not entitled to payment under the bond if they also maintain their rights under the settlement and codicils. The question is, whether the terms of the settlement and codicils are such as to put the pursuers to their election?

"Under the settlement of Mr Graham Somervell, which is in the usual form of a deed of trust with directions, the trustees were directed in the fifth place to hold and apply the sum of £6000 for the benefit of each of the testator's children other than the heir, and it was provided in effect that these several provisions of £6000 should be inclusive of the sums to which the testator's children were entitled under his contract of marriage and under the bond of provision which he had just executed. By this deed the heir of entail was constituted the testator's residuary legatee. The deed is dated 19th February 1857.

"By his first codicil, which is dated 24th February 1871, the testator revokes the fifth purpose of his settlement (to which reference has been made), and in lieu thereof he directs his trustees 'to hold, apply, and pay' the legacies following to his four younger sons—viz., to William S. Somervell, £1700, and to each of his three younger sons the sum of £5000. But which provisions of £5000, he proceeds, 'shall include and comprehend and be subject to abatement and deduction, or shall consist, as the case may be,' of the sum or sums to which such younger sons should be entitled under their father's contract of marriage and a bond of provision (a new bond which supersedes the one above referred to). The chief difference between the original and the substituted clause, so far as the interests of the pursuers are concerned, is that under the substituted clause their provisions are reduced from £6000 to £5000 each. There is not much difference in the language used with reference to the respective bonds of provision, and it is not necessary to refer further to the revoked clause.

"Before making reference to the second codicil (which alters the destination of the residue), let me consider the effect of the first codicil upon the pursuers' rights as creditors in the bond of provison granted under the Aberdeen Act. I have already quoted the words by which this effect is declared. They seem to offer an alternative to the younger child either to accept the testamentary provision in full satisfaction of his claim as a creditor in the bond, or to take under the testamentary provision the difference between his claim as a creditor and the sum of £5000. The words 'as the case may be' are distributive words; they certainly imply that the operative words are not all of them applicable to the circumstances which might exist when the claim is to be satisfied. It is the testator's clear intention that £5000 should be the limit of each younger son's claim under the codicil and bond of provision taken together, and that intention is repeated in the concluding words of the bequest. There could be no strong reason for giving the younger children an option as to the mode of payment; and according to the grammatical construction of the clause, the option appears to be given to the trustees. I think this was not only formally but really the testator's meaning—that the trustees were to make the payment in whatever way should best carry out his purpose that each child should receive £5000 and no more. If, therefore, any of the younger children should use his rights as a creditor on the entailed estate, it would become the duty of the trustees under this clause to deduct the amount so recovered from the testamentary provision, and to apply the money so retained to the purposes of equitable compensation.

"By the second codicil, which is dated 5th November 1881, a very important alteration is made in Mr Somervell's testamentary scheme. In it he revokes the last purpose of his will (by which the residue was given to the heir), and directs his trustees to make an equal division of this residue among his three younger sons—Graham, Henry, and Louis,—being the three sons to whom provisions of £5000 were given by the clause in the first codicil which has been considered. The pursuers contend that these special provisions are merged in the gift of the residue, and that they are thus entitled to claim payment of the bond of provision from the heir without taking any notice of the direction in the first codicil, under which provision is in effect

made for payment of this bond out of the general estate.

"Now, if a legacy is given unconditionally to a person who is afterwards constituted residuary legatee, I agree that the legacy will merge—not, however, in virtue of any rule of law, but from the nature of the case—because the residue is all that can be got out of the estate. But it is a very different proposition to affirm that when a legacy is given under a condition, the subsequent gift of the residue to the same person will discharge the condition. The gift of the residue does not disable the legatee from fulfilling the condition, and I do not understand how the legatee can take the estate consistently with the will except by holding it to the extent of the special bequest subject to the fulfilment of the condition. In the present case Mr Somervell's second codicil does not contain a revocation of his first codicil. On the contrary, it contains a clause confirming his trust-disposition and settlement 'and the preceding codicil thereto,' except in so far as thereby altered. Under the first codicil I conceive that the trustees are charged with the application of a fund of £15,000 in such a manner that the three younger sons shall only receive full payment on condition of accepting it in satisfaction of their interest in the bond of provision. If they claim as creditors under the bond, they are only to receive a differential payment. What, then, will become of the sum that was intended to come in place of the heritable debt? To hold that it falls into residue would not be giving effect to the testator's intention. In such a case the principle of equitable compensation comes in aid of the testator's intention, and under that principle I conceive that it will be the duty of the trustees to apply out of the pursuers' provisions a sum equal to what may be recovered under the bond in compensating the heir of entail for whose benefit the condition annexed to the bequest was intended.

"This being my opinion, I shall, before disposing of the conclusions of the action, appoint the pursuers to state whether they elect to proceed under the bond of provision under the condition of compensating the heir, or to abandon the action. I do not think I can at this stage grant decree of absolvitor—because the bonds of provision are undischarged, and the pursuers are entitled to make them effectual on condition of surrendering an equivalent sum to satisfy the condition of the first codicil."

The defenders reclaimed—The contentions on both sides appear very fully in the Lord Ordinary's note, and in the opinions of the Judges of the Second Division.

At advising—

Lord Justice-Clerk—The Lord Ordinary has bestowed very great pains upon this case, and has explained the position under which the question arises for determination very clearly.

The action arises out of the succession of the late Mr Somervell of Sorn, and the various settlements and codicils which he executed. By his marriage-contract he made certain provisions for his younger children, and when he succeeded to the estates of Sorn and Dalgain he executed a bond of provision in favour of his three younger sons, under the Aberdeen Act, to the amount of £10,000 odds, or whatever the sum might be, calculated on three years' free yearly rent or value of certain entailed estates. He subsequently executed a trust-disposition and settlement, and two codicils; and it is upon the construction, or rather the effect of these two last deeds substantially, that any difficulty in the case arises. There is no objection to the bond under the Aberdeen Act. It is regular in itself, and there is no question in regard to the liability of the heir of entail. But the question arises upon the settlement and codicils, which we must examine to see what the question really is. Now, the original trust-disposition and settlement made this provision for his younger children—"The trustees and their foresaids shall hold, apply, and pay the sum of £6000 to and for behoof of each of the children born, or that may hereafter be born to me, exclusive of any child who shall succeed to me in the foresaid entailed lands and estates, bearing interest at the rate of five per centum per annum from and after the first term of Whitsunday or Martinmas occurring after my decease, till payment." But to that provision there was adjected this declaration—"Declaring, as it is hereby expressly provided and declared, that the said sum of £6000 and interest shall include and comprehend and be subject to abatement and deduction of the sum or sums to which my children shall be respectively entitled in his or her own right (not by way of accretion or succession) under the contract of marriage and bond of provision before recited, or either of them, it being my will and intention that each of my said children, exclusive as aforesaid, shall receive in his or her own right the said sum of £6000 and interest thereon from the date foresaid, without prejudice to his or her receiving more under and in virtue of the contract of marriage and bond of provision before narrated or by way of accretion or succession to any other or others of my younger children who may decease without issue." The first codicil which was executed altered that provision to a certain extent, and also altered and gave further expression to the condition apparently attached to this legacy of £6000. In the first place, it reduced the provision from £6000 to £5000, and then it contained this declaration—"Which provisions of £5000 shall include and comprehend and be subject to abatement and deduction, or shall consist, as the case may be, of the sum or sums to which my said three younger sons shall respectively be entitled, under the contract of marriage and bond of provision before recited, or either of them, in their own right, or by way of accretion or succession, so far as such sum or sums shall not exceed the said sum of £5000, it being my will and intention that each of my three younger sons shall receive in all a provision of £5000, but without prejudice, in the event of the decease of any of them without representatives having right as aforesaid, to the survivors or survivor of them receiving more by way of accretion or succession out of the shares of such deceasers, of the sums payable under the foresaid bond of provision, and which legacies payable to or for behoof of the said William Somervell Somervell and my three younger sons, including the portions thereof payable from the foresaid marriage-contract provision of £6000, even in the event of my said

spouse surviving me, shall bear interest at the rate of 5 per centum per annum from and after my decease till payment."

Now, if that had remained as it stood it would have given rise to some difficult questions, because the residue of the estate by the original settlement and this first codicil was to go to the heir after paying off the younger children and their legacies, and fulfilling other purposes. I should also say, before going further, that in this first codicil there is a further provision to this effect—"And I further declare that the provisions contained in the foregoing trust-disposition and settlement and this codicil shall be in full satisfaction of the whole claims of my children under my said contract of marriage and the said bond of provision, and in full satisfaction also and inclusive of any obligations I may undertake in favour of them or their issue in the marriage-contracts of my children, or of any of them."

Now, the Lord Ordinary has held—and I entirely agree with him—that the terms of the clause that I have read in this first codicil restrict the provision of £5000, and that it amounts to a declaration that what they are to draw from the succession of the testator is not to exceed that sum. And the result of that would be that they would have been entitled to draw from the estate, in one shape or other, either under the bond or under the legacies, the sum of £5000 in all, and no more; and there might have been a question about the proportions which each part of the estates, the moveable and the entailed estate, were to bear of that burden.

But those questions do not arise in that position of affairs, because Mr Somervell executed a second codicil by which he recalled the bequest of residue to the heir; he revoked, cancelled, and annulled the last purpose of the settlement, and gave his residue to the three younger sons, "and except so far as hereby altered, I approve of and confirm my foregoing trust-disposition and deed of settlement and the preceding codicil thereto in all respects, and declare that the said trust-disposition and deed of settlement with the immediately preceding codicil, and this codicil, contains the expression of my will." The Lord Ordinary has found that that is not a clause revoking the declaration in the first codicil, that the sum paid to the younger children is not to exceed £5000, but, on the contrary, is a direct re-declaration of it. I think the Lord Ordinary is right. The codicil subsists to that effect, although the last purpose in regard to residue is altered. If that be so—if the provision is not to exceed £5000—I think the Lord Ordinary has dealt quite properly with the question in saying that these legatees or claimants under the bond of provision must elect whether they will take their provisions under the bond, and give up so much residue, or whether (which seems the reasonable course for them to take) they shall take the £5000 out of residue, and leave the bond of provision out of account. I should have thought that, as the case stands, the simple solution would have been to prevent the bond from being any longer a burden on the entailed estate, especially as the residue is more than enough to pay £5000 to each of the younger sons. I see no objection to the course the Lord Ordinary has followed in that matter.

Lord Young—I am entirely of the same opinion, and on the same grounds. The only doubt I have is about the form of judgment. How much would they get out of residue? [Mr Pearson—£4300 is all that they will get.] Then the action would, in my opinion, and I understand quite in accordance with your Lordships' views, be good against the heir under the bond only to the extent of the deficiency. For I quite agree that whatever they take under the will from the general estate is in discharge of the bond, and that under the bond the heir is only liable to make up any deficiency.

Lord Craighill—I also think that the judgment of the Lord Ordinary is right. The question is, as was admitted by counsel upon both sides in the course of the discussion, what is the true interpretation of the fourth purpose of the first codicil? Does it confer a legacy of £5000 on each of the three specified legatees, subject to the condition that this shall be in full satisfaction of what might be claimed under the bond of provision under the Aberdeen Act and the marriage-contract referred to on record, or only a legacy of the difference between that sum and the sum of these other provisions? On consideration of the arguments for the parties, and of the language of the trust deed and codicils, I cannot doubt that the former is the true import of the bequest. That peculiar words occur in the clause of bequest, which at first sight seem to be a difficulty in the way of this construction, may be admitted, for there are words there to which it is not easy to give a satisfactory meaning whichever of the readings shall be adopted. This much, however, appears to me to be plain, that when all the words of the clause are taken together, and when these are read in connection with the other parts of the codicil, the conclusion at which the Lord Ordinary has arrived is abundantly justified. Take, for example, the opening words of the truster's direction—"I direct and appoint my said trustees and executors to hold, apply, and pay the legacies following." The fund for the bequest is thus shown to be in the hands of the trustees, and so it will be if the £5000 is to be taken out of the trust-estate, but it will not be so if the legatees must go first to the debtor in the bond of provision, and to those in administration of the marriage-contract fund, for in the latter case, if there be any, a portion at the most is all that can be held, applied, and paid by the testamentary trustees. Then, in the second place, the thing bequeathed is not an indefinite sum—not a balance remaining over after provisions outside the trust have been exhausted—but is set forth in so many words as a sum of £5000. To overcome the effect of a bequest so unambiguously expressed would require the expression of an opposite intention clear beyond all controversy, which is nowhere found in the truster's settlement. Nor is this all, for you have a provision fixing the term at which the said sum of £5000—not a part of it, but the whole—is to vest, that being a term different from the term at which the sum due under the bond of provision was made payable. This is consistent only with the notion of a bequest, the vesting of which could be settled by the truster, and such a power, inasmuch as there is a destination over in favour of children, failing the legatees themselves, could not be exercised

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