ing in any court, or before any person or body of persons having by law power to cite parties or witnesses, any summons or warrant of citation of a person, whether as a party or witness, or warrant of service or judicial intimation, may be executed in Scotland by any officer of the court from which such summons, warrant, or judicial intimation was issued . . . by sending to the known residence or place of business of the person upon whom such summons, warrant, or judicial intimation is to be served, or to his last known address if it continues to be his legal domicile or proper place of citation . . . a registered letter by post containing the copy of the summons or petition or other document required by law in the particular case to be served, with the proper citation or notice subjoined thereto, or containing such other citation or notice as may be required in the circumstances, and such posting shall constitute a legal and valid citation, unless the person cited shall prove that such letter was not left or tendered at his known residence or place of business, or at his last known address if it continues to be his legal domicile or proper place of citation." "Section 4. The following provisions shall apply to service by registered letter . . . (5) If delivery of the letter be not made because the address cannot be found, or because the house or place of business at the address is shut up . . . or because the address is not within a postal delivery district, and the letter is not called for within twenty-four hours after its receipt at the post-office of the place to which it is addressed, or for any other reason, the letter shall be immediately returned through the post-office to the clerk of court with the reason for the failure to deliver marked thereon, and the clerk shall make intimation to the party at whose instance the summons, warrant, or intimation was issued or obtained, and shall, where the order for service was made by a judge or magistrate, present the letter to a judge or magistrate of the court from which the summons, warrant, or intimation was issued, and he may, if he shall think fit, order service of new, either according to the present law or practice, or in the manner hereinbefore provided, and if need be substitute a new diet of appearance."

Counsel for the pursuer objected—The provisions of the Act of Parliament were unworkable in this particular case. This was an action for interdict, and therefore required the utmost diligence and despatch. There was no postal delivery within the district where the summons had to be served. It was scarcely imaginable, then, that the crofters would come to the Post-Office to fetch their summonses. In these circumstances the only other alternative had to be adopted, and a Sheriff's officer was sent from Inverness, this being rendered necessary as all the Sheriff's officers in Skye had resigned their commissions. The pursuer, then, was entitled to the full expenses of service charged.

Counsel for the defenders replied—There was nothing in the argument that there was no postal delivery within the district. This was applicable in very many parts of Scotland. It could not be assumed that not one of forty crofters would call at the Post-Office for letters. The Act made provision where letters containing summonses were not called for in sub-section 5 of section 4. In respect, then, that the pursuer had resorted to the more expensive method of service, and one not sanctioned by the Citation Amendment Act, the Auditor was right in only allowing the expense of the method sanctioned by the Act.

At advising—

The Lord Justice-Clerk delivered the opinion of the Court (Lord Justice-Clerk, Lord Craighill, and Lord Rutherfurd Clark):—In this case the question has arisen whether the successful party is to be allowed the expense of serving the summons and interdict by means of an ordinary Sheriff's officer going from Inverness and serving the writs personally on the parties concerned, or whether he is only entitled to the expense which would have been incurred by using the provision of the recent statute by sending the summons through the medium of the Post-Office.

It is admitted that the Post-Office does not deliver letters in the particular district in question, and it is almost certain that the summons would not have been delivered if it had been sent through the Post-Office. The letter might possibly have been delivered if called for, but the probability is it would not in this particular district have been a sufficient mode of transmission of an important writ. It is true that the Act of Parliament authorises such writs to be served through the Post-Office, and that there is a provision in a clause of the statute by which, if they do not reach their destination, application may be made to the judge or magistrate before whom the case is called to authorise another mode of service. That is a perfectly proper provision, and manifestly applicable to the cases which it is contemplated to meet. But such application does not exclude such a case as the present, where manifestly the mode of transmission is not a certain or secure one, and where, as I have said, in all probability the summons would never have reached the parties. I think, then, we must sustain the objection.

Lord Young was absent.

The Court sustained the pursuer's objection.

Counsel for Pursuer — Rutherfurd Clark. Agents—Skene, Edwards, & Bilton, W.S.

Counsel for Defenders—Rhind. Agent—Wm. Officer, S.S.C.

Saturday, January 8.

FIRST DIVISION.

[Sheriff of Inverness.

MONCUR *v.* MACDONALD AND OTHERS.

Bankruptcy—Sequestration—Trustee—Review of Interlocutory Judgment of Sheriff before Appointment—Bankruptcy Act 1856 (19 *and* 20 *Vict. c.* 79), *secs.* 69 *and* 170.

In a competition for the office of trustee in a sequestration the Sheriff allowed a proof of certain personal objections taken against one of the claimants. *Held* (1) that appeal against the deliverance was competent, (2) that the allowing such proof was in the discretion of

the Sheriff, and that he had, in the circumstances, exercised it rightly.

Murdo Macdonald, Inverness, having been sequestrated a competition took place for the office of trustee.

The minute of the meeting of creditors held to elect a trustee on 29th November 1886 showed that John Macdonald, a creditor for £114, 3s. 4d., voted for Mr John Grant, accountant, Inverness, while Mr Howard Smith, a creditor for £125, 19s. 4d., and Mr Urquhart, a creditor for £12, 12s., and Mr Howard Smith, as mandatory for three other creditors to the amount of £24, 5s. 4d., £7, 12s., and £57, 2s. 5d., voted for "William Moncur, writer, Edinburgh," whom failing "John Anderson, commission agent, Edinburgh," whom failing a gentleman who subsequently withdrew from the competition. Thus Moncur had votes of creditors in all amounting to £219, 11s. 11d. Cautioners were proposed for each of the candidates.

Moncur objected to the vote in favour of Grant, *inter alia*, (1) that the oath was vitiated *in essentialibus;* (2) that the creditor was conjunct and confident with the bankrupt, and the vouchers were insufficient; but these objections need not here be further detailed.

On the other hand, John Macdonald, the creditor who voted for Grant, Grant himself, and the bankrupt, objected to Moncur as follows—"(1) William Moncur, first named as trustee, is entirely unsuitable. It is averred that he is an old man, who was at one time a clerk, and is now lodging in a close in the Canongate in Edinburgh, and is without means or occupation. The person proposed as his cautioner is a clerk to Mr David Howard Smith, who is acting as agent in the sequestration; he is without means, and utterly insufficient as cautioner for a trustee in a sequestration. (2) They objected that Anderson (the trustee proposed, failing Moncur) was also unsuitable; that there was no 'John Anderson, commission agent, Edinburgh,'" so far as the Directory showed or the objectors could find. . . . "(4) The objectors allege that the parties proposing Messrs Moncur and Anderson are purposely endeavouring to appoint a man of straw to the post of trustee in order that actions and claims against him which might arise out of his administration, or the proceedings taken by him or in his name, may be frustrated by the absence of means in the case both of himself and the person put forward as cautioner. It is also averred that Mr Charles John Monro, who recently resigned office, resigned in order to escape liability for claims of a similar character."

The Sheriff-Substitute (Blair) on 7th December 1886 pronounced this interlocutor—"Finds the objections of John Macdonald [the creditor], Murdo Macdonald [the bankrupt], and John Grant, relevant, allows them a proof of their averments, and the opposing creditors a conjunct probation." He fixed a diet for the proof.

Moncur appealed to the Court of Session under section 170 of the Bankruptcy Act 1856, craving the Court to recal the deliverance of the Sheriff, and to remit to him with instructions to declare him (appellant) duly elected trustee in the sequestration, and to find him entitled to expenses.

He argued—The question as to his fitness for office and the sufficiency of his cautioner was one for the creditors—Bell's Comm. ii. (5th ed.) 371. He was not said to be bankrupt, but only to be poor. The averments were too vague to be sent to proof, especially on the demand of the one creditor who formed the minority, and who was the bankrupt's brother, and of the bankrupt and a competitor for the trusteeship. He referred to the Bankruptcy Act 1856, secs. 68, 69, 71, and 170. The appeal was competent—*Wylie* v. *Kyd* (first report), May 21, 1884, 11 R. 820; *Tennent* v. *Crawford*, January 12, 1878, 5 R. 433.

Argued for the respondents—(1) The appeal was incompetent—*Gall* v. *Macrae*, June 9, 1880, 7 R. 888. (2) The case was one for inquiry, and the Sheriff was right in seeking to ascertain the facts with regard to the objection that an unsuitable person was being put forward for an illegitimate object. It was averred, and was plainly relevant, that the proposed trustee was in a very bad position, and the cautioner quite unsuitable. The matter was one for the Sheriff's discretion, and his judgment should be affirmed — *A B, Petitioner*, February 19, 1833, 11 S. 412; *Bell* v. *Carstairs*, December 17, 1842, 5 D. 318; *Wylie* v. *Kyd* (second report), May 21, 1884, 11 R. 968.

At advising—

Lord President — The respondents in the course of their argument gave up the point as to the competency of the present appeal, and in so doing I think they acted rightly, as it would have been impossible for us in the light of the authorities on this matter to have given any effect to the objection.

As to the merits of the present application, the Sheriff-Substitute by his interlocutor has allowed inquiry in the shape of proof of certain averments which have been made against the eligibility of one of the candidates for the office of trustee on this sequestrated estate. The statute leaves all such matters to the discretion of the Court below, for it provides by section 69 that the Sheriff may either "forthwith decide" on the objections "or make avizandum," when, as in the present case, the averments made against the candidate are of some weight.

It is to be kept in mind that the proof which has been allowed is a mere incidental inquiry which the Sheriff-Substitute has allowed in the exercise of his discretion, If, in order to satisfy himself as to the suitability of this candidate for the office of trustee, the Sheriff-Substitute wishes some further information, I do not think we should interfere in the matter. I am therefore for refusing the appeal.

Lord Mure concurred.

Lord Shand—The objections which have been stated by the respondents are all personal to the party claiming the office of trustee and to his cautioner, and in this respect the present case differs from some of those which were cited when the objections had reference rather to votes. The Sheriff has found the objections stated for John Macdonald, Murdo Macdonald, and John Grant relevant, and has allowed them a proof of their averments, and I agree with your Lordship that we should not interfere with what he has done.

Upon the question of the competency of this appeal, no doubt in his final deliverance as to who is to be trustee the decision of the Sheriff is to be final, yet it has been held that interlocutory

judgments pronounced in the course of the proceedings are sometimes appealable, though I for my part am for limiting such appeals as much as possible. If the Sheriff should transgress some well-known rule, then we should be bound to interfere as we did in the case of *Wylie* v. *Kyd*. In the present case, however, nothing has been stated which in my opinion would warrant our interference with the discretion of the Sheriff.

Lord Adam concurred.

The Court refused the appeal.

Counsel for Appellant—D.-F. Mackintosh, Q.C. —Rhind. Agent—D. Howard Smith, Solicitor.

Counsel for Respondents—Pearson Guthrie. Agents—J. C. Brodie & Sons, W.S.

HOUSE OF LORDS.

Friday, December 10, 1886.

(Before Lord Chancellor Halsbury, Lord Blackburn, and Lord Watson.)

NATIONAL BANK OF SCOTLAND *v.* UNION BANK OF SCOTLAND.

(*Ante*, vol. xxiii. p. 242, December 18, 1885, and 13 R. 380).

Right in Security—Absolute Disposition with Back-Letter—Assignation by Debtor of Right to Reconveyance, intimated to Creditor — Retention.

A, in security of advances by the National Bank, disponed to that bank, by disposition *ex facie* absolute, duly recorded, certain heritable property belonging to her. By separate back-letter, never recorded, it was agreed that the National Bank should hold the disposition "in security and till payment of all sums now due, or which may hereafter become due," by A's firm and by A, and that on payment of all such sums the subjects should be reconveyed to A. Thereafter A, in security of advances by the Union Bank, assigned to the Union Bank her whole right in the heritable property under the right of reversion which arose out of the transaction with the National Bank. This assignation was intimated to the National Bank. After the intimation the National Bank continued as before to make advances to A, who eventually executed a trust for creditors, being largely indebted to both banks. The subjects were not sufficient to pay both. *Held (reversing* judgment of majority of whole Judges of Court of Session) that as the transaction was one of security only, the preference of the National Bank did not extend to its whole advances before and after the intimation of the assignation and down to the granting of the trust-deed, but was limited to the amount due to it at the date of the intimation of the assignation.

This case is reported *ante*, vol. xxiii. p. 242, December 18, 1885, and 13 R. 380.

The Union Bank appealed to the House of Lords.

At delivering judgment—

Lord Chancellor—My Lords, two propositions appear to be established beyond dispute in the discussions of the learned Judges on this question. One, that the National Bank held an absolute disposition of the lands in question dated 12th February 1879, and recorded some days later. Another, that the terms of a back-letter, the meaning and construction of which I will refer to presently, qualified the absolute disposition, and restricted the title to one in security.

The interesting historical retrospect of the Lord President of the mode in which this form of transaction came to be adopted by Scotch conveyancers in order to avoid the common law and the Statute of 1696 is, I think, very relevant to the question of what is the substantial nature of the transaction in question. It certainly bears a very close analogy to the English mortgage of land, which conveys in the most absolute form the estate to the mortgagee, but which nevertheless is only held as a security for money advanced.

In the language of the back-letter the National Bank were to "hold the said disposition in security, and until full and final payment of all sums of money now due or" (and these are the cardinal words) "which may hereafter become due." These words, it is contended, are enough in construing the personal contract to establish that by the contractual relations between the parties the National Bank were entitled to prevent Mrs M'Arthur borrowing, elsewhere than from themselves, anything upon the security of the lands in question.

The first observation that strikes one is, that no such express contract appears on the face of the instrument. It might be that Mrs M'Arthur would continue to borrow to the full extent of the security, and if she did so borrow from the National Bank, there is no doubt that the security would (as the language I have quoted obviously intended that it should) form a security for such further advances. But does it follow because the back-letter makes provision for what in that event would be a natural and proper course of dealing, that thereby Mrs M'Arthur entered into a contract not to deal with the reversionary interest with anyone else?

It is certain that no obligation is imposed on the National Bank to advance any more money than they have already advanced, and the result would appear to be, that by Mrs M'Arthur's entering into a contract to allow her property to be security for all sums already due, and for all sums which upon terms to be afterwards settled between them the bank might advance to her, she thereby undertook that she would remain with that bank as a customer (to use the language of one of the learned Judges) until the value of her security was exhausted.

It appears to me that this is the real ground of difference upon which the learned Judges have been divided. It is not denied—indeed it is insisted—that upon payment of all sums due Mrs M'Arthur would be entitled to demand re-conveyance, and it cannot therefore be denied that if instead of fresh advances obtained from the National Bank Mrs M'Arthur had proceeded to some other bank,