this lot that all the complaining parties here, with the exception of the two previously laid out of sight, hold their feus. The only deed granted by Stobo which we have in full is the feu-contract between him and Taylor, by which Stobo lays him under all the conditions, &c. contained in his own feu-disposition, and provides that these conditions, &c. are to operate as servitudes over the ground disponed in favour of the neighbouring feuars of the land of Hillhead. Now I am strongly of opinion that that lays Taylor and his singular successors under the restrictions, and, among others, under the restriction that they shall not erect buildings over four square storeys in height. That is rather a peculiar restriction, as one man might build his storeys twice as high as those of another, and still not transgress the restriction. But I do not find, in the disposition by Kerr to Stobo, and the feu-contract between Taylor and Stobo, anything which confers a right on Taylor to enforce that or any other restriction on another estate, which is the case we have to deal with here. There is no such thing said, and there ought to be no such thing implied. In the case of *M'Gibbon*, the different feus were held from one proprietor, who got the land under one deed, and the holdings were the same. But how can parties on one estate claim to enforce restrictions upon parties who have their holdings on another estate? I do not see anything in what was urged that the deeds were dated on the same day. The deeds are different, and belong to different progresses of titles. But that is not what we have here. The feu-disposition, I have already mentioned, is dated 8th December 1852, and the other deed, the feu-contract between the same parties under which is disponed the ground on which the house complained of is built, is dated 8th December 1852 and 18th March 1853. Now a mutual deed signed by one of the parties only is no deed till it is signed by the other. In a competition with a creditor, for instance, could Stobo have said, "the deed having been signed four months ago by Kerr, and though I have not signed it, still I am entitled to the property?" This is clearly then not a case of both deeds being signed on the same day.

It is, as I have said, on a part of the estate of 2378 yards disponed by the feu-contract that the house complained of is built, and on which the restrictions are endeavoured to be put by parties who have houses on the other estate of 8125 yards. The proprietor under the feu-disposition may do as he likes, but under the feu-contract he is in a very different position; every steading is to be held of the superior, sub-infeudation is forbidden, and any act in contravention thereof is to be null. Of course, also, the feuars under the contract are in a very different position from those who are under the disposition. The one property may come back to Ker, while the other cannot. The whole progress under the contract may be evacuated, and the land revert to the superior, but it is not so under the disposition. Is there here then any community of title or community of holding? There is no contract between the parties holding in the lot consisting of 8125 yards and those holding in that which consists of 2378 yards; and if there is no contract, I am of opinion that there can be no title to enforce the restrictions. Though the distinction I have pointed out is narrow enough, still I think it sufficient to free the appellant from the conclusions of the petition.

LORD PRESIDENT — I concur entirely in the opinion delivered by Lord Ardmillan.

Agent for the Pursuers—Morton, Whitehead, & Greig, W.S.

Agents for the Defender, Stobo—M. Lawson, S.S.C.

Agent for the Defender, Miller—Wm. Mitchell, S.S.C.

Friday, March 3.

DARGAVEL *v.* GRAY.

Process—Reclaiming Note. Reclaiming note refused in respect of no appearance.

When the case was called,

KERR, for defender and reclaimer, stated that his client had become notour bankrupt, and had absconded, and craved the Court to sist process till a trustee should be appointed on his estate.

R. V. CAMPBELL, for respondent, submitted that the reclaiming note should be refused, as there was no appearance in support of it, the counsel and agent on the other side no longer representing any one.

The Court, in respect of no appearance, refused the reclaiming note.

Agents for Defender—Philip & Laing, S.S.C.

Agent ror Respondents—R. Pasley Stevenson, S.S.C.

Saturday, March 4.

FILSHIE *v.* LANG AND OTHERS.

Sequestration—Meeting of Creditors—Removal of Trustee—Title to Vote—Bankruptcy (Scotland) Act 1856, § 64. At a meeting of creditors on a sequestrated estate, a motion for removal of the trustee was brought forward, and objections to the votes of several creditors were taken. *Held*, with regard to the objection—(1) That the son and heir-at-law of the bankrupt, who was proprietor of heritable property, had a legitimate interest to come forward and offer payment of the debts, and that a creditor refusing such offer of payment of the only debt on which he could make a valid claim, because he considered he had others claims for which he neither had been nor could be ranked, was no longer entitled to vote. (2) That § 64 of the Bankruptcy Act was to be strictly interpreted, and applied only to voting in the election of the trustee, and did not apply to voting as to the removal of the trustee, or as to other business.

This was an appeal to the Lord Ordinary on the Bills, in the sequestration of the deceased George Lang, brought under sect. 169 of the Bankruptcy Act. The matter at issue was the removal of the present trustee in the sequestration, Mr James Wink. At a meeting of creditors held on 15th June 1870, there voted for the removal of the trustee James Filshie, John Cameron, and John Hall. Against the removal there voted Robert Lang and James Wink. Each of these votes was objected to severally by the opposite party. The subject of the present appeal was these different objections.

James Filshie claimed in right of three bills;

and it was objected that though the sequestration of George Lang was awarded on 4th April 1854, he had not claimed upon two of these bills until May 1861, when they had been long prescribed; and that, farther, the sums in them were not truly due to Mr Filshie, they being of the nature of accommodation bills. As to the third, a claim had been made in due time, but an offer of payment with interest in full had been made on 2d June 1870 by Robert Lang, the bankrupt's son and heir-at-law, and by Mr Filshie had been refused on the ground that he was not bound to take payment from a third party. It was contended that in consequence of this refusal Mr Filshie had forfeited his right to vote at a meeting of creditors.

John Cameron claimed to vote as mandatory of Messrs Reddie & Crichton. His mandate was dated 12th April 1870, and signed by Mr Reddie on behalf of the firm. But in 1859 Messrs Reddie & Crichton had entered into a minute of agreement which dissolved the firm, and transferred to Mr Crichton all powers for liquidating the partnership concerns, under an obligation to account to Mr Reddie. It was therefore objected that Cameron's title to vote was null.

Hall's title to vote was not insisted in.

On the other hand, Robert Lang claimed to vote in right of an assignation to a debt of £226 due to a Mr Mackay by the bankrupt. This assignation was subsequent to the sequestration. It was objected that he had not a title to vote, in terms of the 64th section of the Act, in respect that the assignation was subsequent to the sequestration; and separately, on the ground that he was conjunct and confident with the bankrupt, and therefore the debt should be held discharged.

Mr Wink claimed to vote as mandatory of Mr Foulds, who was trustee upon the sequestrated estate of Mr Crichton, the above-mentioned partner of Messrs Reddie & Crichton, who were the creditors of George Lang for the sum of £76. It was objected that his position as trustee on Mr Crichton's own invididual estate did not convey to him the power over the partnership concerns which had been conferred upon Mr Crichton. For Mr Wink, however, it was contended that Mr Crichton had come under individual liabilities to the bank in process of liquidating the firm's affairs, and that Mr Fould's title as now representing the firm in this matter, had been recognised by Mr Reddie in certain formal proceedings, and in a submission to arbitration.

The Lord Ordinary on the Bills (MACKENZIE) sustained the objection against the votes of Filshie, Cameron, and Hall, and repelled those against the votes of Robert Lang and Mr Wink; and, holding that the motion for removal of Mr Wink as trustee had not been carried, dismissed the appeal.

Filshie reclaimed.

The SOLICITOR-GENERAL and TAYLOR INNES for him.

SCOTT and BURNET for the respondents, Wink and Lang.

On hearing counsel on the reclaiming note, their Lordships ordered the reclaimer to state specifically in a minute the grounds and evidence on which he undertook to establish that the debts contained in the two prescribed bills were subsisting debts. The reclaimer accordingly put in a minute narrating certain circumstantial evidence offered to be adduced in proof of the subsistence of the debt.

At advising—

LORD PRESIDENT—The minutes of meeting of creditors, out of which this appeal arises, bear that three votes were given upon each side upon the question whether Mr Wink, the trustee, should be removed or not. Every one of these votes is objected to by the opposite side. The Lord Ordinary has disposed of some of these objections very satisfactorily, but I rather think he should have disposed of them all. To begin with Mr Filshie, one of the creditors voting for the removal of the trustee, claims to vote upon a sum of £780, 8s. 4d., which, I understand, is the aggregate of three bills, one for £247, another for £165, 16s. 9d., and a third for £237, 2s. Now, as regards the two first of these bills, they are prescribed, and therefore Mr Filshie cannot vote in respect of them. And not only are they prescribed, but they stand in a very peculiar position in relation to this sequestration. For though sequestration was awarded in 1854, these two bills were not lodged or made the ground of a claim until 1861. The remaining debt in the bill, for £237, 2s., is not objected to as a subsisting debt, but the objection taken here is, that Mr Robert Lang offered to pay, and that Mr Filshie refused to receive it. Mr Filshie, on the other hand, maintains that he was not bound to receive payment of the sum in this bill from a third party, who was neither the bankrupt nor his trustee. I do not say that a creditor is bound to accept payment from anybody, but it must be observed that Mr Robert Lang stands in a very peculiar position in this sequestration. The bankrupt is possessed of a certain heritable property, and Mr Robert Lang is his son and heir at law. He has expressed a strong desire to save this heritable estate from being disposed of, and, with the view of doing so, and as rapidly as possible freeing it from the claims of his father's creditors, he has offered payment of the sum due under Mr Filshie's bill. Under these circumstances, I hold Mr Filshie bound to receive payment, and I do not think that he had any legitimate interest to refuse doing so, while Mr Lang had a most undoubted and legitimate interest to make the offer. Mr Filshie has then only an apparent interest in this sequestration. If he could have shown by any evidence in a ranking that the other debts were subsisting, then he would have stood in a very different position. But I don't think that Mr Filshie has shown that he can make good these debts, and that being so, Mr Filshie was not entitled to vote on the occasion in question.

With regard to the opposite claim of Mr Lang, the objection is, that he is debarred from voting by the 64th section of the Bankruptcy Act, which provides, "That any person who shall acquire after the date of the sequestration, otherwise than by succession or marriage, a debt due by the bankrupt . . . shall not be entitled to vote in the election of trustee or commissioners, but in all other respects such person may be ranked as a creditor." Now, there is no doubt that Mr Lang did acquire certain debts since the date of the sequestration; but the question is, whether the clause applies to the vote in question. The prohibition in the statute is against such person voting in the election of the trustee or commissioners; but the vote in question was not for the election of a trustee, but for his removal. It was argued before us that it would be very absurd to enact that a person should not be entitled to vote

for the election of a trustee, but should be entitled to vote for his removal. I cannot tell whether the Legislature thought so or not; we are dealing with a statutory enactment, and whatever may have been their mind in this matter, there stands the enactment, and it does not apply to the question of removal of the trustee. Mr Lang's vote was therefore, I think, a good one.

The only other question relates to the competition between Messrs Foulds & Cameron to represent the debt due originally to the firm of Reddie & Crichton. That matter is stated by the Lord Ordinary so very clearly that I do not think it necessary to go into the matter. The partnership between Messrs Reddie & Crichton was dissolved by a minute of agreement in July 1859. It was therein agreed that Mr Crichton should uplift the whole debts due to the said firm, and apply the same, in the first place, in payment of the debts due by the said firm, including all sums drawn from the Bank of Scotland for behoof of the firm under a cash credit opened by Mr Crichton in his own name. After that, Mr Crichton's own estates were sequestrated in 1861, and Mr Foulds was appointed trustee thereon. Mr Foulds continued, in room of Mr Crichton, to liquidate the affairs of the firm of Reddie & Crichton. On the other hand, Mr Cameron claims to vote in virtue of a subsequent mandate directly from Mr Reddie, the other member of the firm. The question is, whether Cameron or Foulds is truly in right of the debt claimed in the present sequestration, and about that I have no doubt. Mr Foulds is the only person with an acting title at all. Therefore, my opinion is that Mr Cameron's vote was bad. There is nothing said in support of Hall's pretended title to vote, and so the consequence is, that there are no good votes at all for the removal of the trustee. I am therefore for adhering to the interlocutor of the Lord Ordinary.

LORDS DEAS and ARDMILLAN concurred.

LORD KINLOCH—I agree with the opinion delivered by your Lordship in the chair on all points except one, and that is respecting the vote of Mr Foulds, as trustee upon Mr Crichton's estate. I am clear that Cameron had no right whatever to vote. Crichton was constituted the sole trustee of the partnership affairs. He was himself thereafter sequestrated, and Foulds was appointed trustee upon his estate. I have great doubt whether his appointment as trustee upon the individual estate of Mr Crichton conveyed to him Crichton's administrative character with reference to the affairs of the firm. But this doubt does not in any way affect my judgment on the practical result.

The Court adhered.

Appeal dismissed.

Agents for the Appellants—Lindsay & Paterson, W.S.

Agent for the Respondent—John Walls, S.S.C.

Saturday, March 4.

SECOND DIVISION.

STEWART *v.* CLARK.

Process—Reclaiming Note—A. S., 10th March 1870.

In an action for breach of an alleged agreement, *held* an interlocutor by a Lord Ordinary, restricting proof of the agreement to the writ or oath of the defender, does not come under section 2 of the A. S., 10th March 1870, and can therefore be competently reclaimed against more than six days thereafter.

Agreement—Lease—Essentialia. A party alleged that some weeks before the execution of a lease, in which he hired premises and steam-driving power, he had made a verbal agreement with the landlord to supply him with steam for heating purposes, but without fixing at what cost, or for how long. *Held*, if the agreement had been separate, it was deficient *in essentialibus*; but that it was a stipulation of the lease, and only proveable by the defender's writ or oath.

The pursuer is a comb manufacturer, and the defender a turner at Silvermills, Stockbridge. In January 1870 negotiations commenced between the parties for a lease to the pursuer of part of the defender's premises. Eventually, on 31st March and 1st April, a lease was signed by the parties, in which the defender let to the pursuer a specified number of workshops for five years from the term of Whitsunday 1870, which was to be the term of entry. The defender also let to the pursuer part of the driving power of his steam engine. On this subject the lease provided as follows:—"And farther, the said Martin Clark hereby lets to the said John Stewart junior a portion, to the extent of eleven horse-power of the steam-power of the engine to be erected by the said Martin Clark upon the said subjects; and, until the said new engine is erected, he binds himself to furnish the said John Stewart junior with power, to the extent of five horse, from the present engine for the use of the works to be carried on by the said John Stewart junior, and obliges himself to supply the said steam power to the said John Stewart junior, and his foresaids, during the currency of this tack, each week-day, for the usual working time of ten hours, except Saturdays, when the same shall be supplied for six ordinary working hours, and except at such times as it may be necessary to repair the said engine, and the said Martin Clark shall supply and put up the main shaft and driving pulley in connection with the said engine, and shall keep the said engine, and shaft, and pulley in good working order during the currency of this lease at his own expense." The lease also provided for the payment to be made for this steam power, and for a graduated rent in proportion to the amount supplied. The lease made no provision in regard to steam for heating the pursuer's machinery. But the pursuer alleged an agreement had been entered into on the subject in the month of February 1870. The contract, he averred, "as to driving power was afterwards embodied in a written lease, but as the amount of steam which might be required for heating was somewhat indefinite, the contract in regard to it was allowed to rest on the parole contract, it being however distinctly agreed that the defender would supply steam for heating purposes to whatever extent it might be necessary for the pursuer's business of comb-making, the nature of which the defender professed to be acquainted with. . . The contract was, in point of fact, either by express words or overt acts, fully within the defender's knowledge, completely defined in all particulars except as to the price to be paid for the said steam for heating, but the pursuer has all along been ready and willing either to take said steam for heating as an equivalent of part of the steam power to which he was entitled under the