arrived at the conclusion that fraud has not been proved. I can see no proof of fraud. The words of the agreement are not obscure or difficult to understand, and Mr M'Lachlan was quite able to understand them, and he had the assistance of Mr Boyd a professional agent, who was also, however, agent for Mr Watson, a position which I concur in thinking was in this case free from blame. Mr Boyd states that he was satisfied that Mr M'Lachlan "fully understood the agreement," and was "quite satisfied with it," and I see no reason to doubt that this was the case. Four years elapsed between the date of the agreement in May 1868 and the death of Mr M'Lachlan in July 1872. During these years Mr M'Lachlan, while granting bills periodically for the sums stipulated, yet made no objection to the agreement, and made no charge of fraud, misrepresentation, or deception. The hotel keeping did not prove a bad speculation, Mrs M'Lachlan seems to have been a clever, diligent and successful landlady, and no proposal to surrender the lease or give up the business has been made. That some benefit, some aid, some seasonable and convenient assistance and support, was given to Mr M'Lachlan by the interposition and the credit of Mr Watson, I can scarcely doubt. It may well be true, and I am disposed to think it is true, that the price paid for this support was extremely high. But not on that ground can we reduce this written agreement, clearly expressed, perfectly understood, and deliberately subscribed. Mr Watson obtained advances for Mr M'Lachlan, by his credit. He did not, I think, act merely as the friend of M'Lachlan. He made a speculation which proved successful, and he did so by means of an agreement which was quite distinct, and which he fulfilled. But if the hotel had proved a failure Mr Watson might have been a loser to a serious amount. That risk he undertook, and he bargained that for that risk he should be paid as a bonus the sum of £300 each half year for ten years. He has actually been paid by bills in terms of the agreement, and without objection, for four years. It is indeed possible that Mr M'Lachlan might have obtained in other quarters, and on more favourable terms, the funds which he required. It is not quite clear that he could. But if he was not deceived or defrauded by Mr Watson, and if, knowing the meaning of this agreement, he signed it, and acted on it, then the mere fact that he might have made a better arrangement cannot sustain this action.

I have carefully read all the proof, and shall not again refer to it in detail. I do not think there is any serious conflict of evidence. I have some sympathy with the pursuer. I think this has been a hard bargain. I think the consideration was inadequate. But I cannot find proof of fraud, deception, or misrepresentation; and I am unable to reach any other conclusion than that which your Lordship has expressed.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming-note for Mrs Elizabeth Simpson or M'Lachlan against Lord Mackenzie's interlocutor of 17th December 1873, Adhere to the said interlocutor, and refuse the reclaiming-note, except as to the finding of no expenses; recal that part of the interlocutor, and find the defender entitled to his expenses in the cause; allow an account thereof to be lodged, and remit the same to the Auditor to tax and report."

Counsel for Pursuer — Watson and Asher. Agents—Gibson-Craig, Dalziel & Brodies, W.S.

Counsel for Defender—Dean of Faculty (Clark), Q.C., and Balfour. Agents—J. W. & J. Mackenzie W.S.

Friday, May 29.

FIRST DIVISION.

[Lord Mure, Ordinary.

COOK AND OTHERS (STORIE'S TRUSTEES) *v.* GRAY AND OTHERS.

Succession—Legacy—Residue—Vesting.

Held that contingent legacies were only burdens on the residuary estate, which vested in the residuary legatee at the testator's death, although it was not until several years after that event that the amount was ascertained by the contingencies upon which the legacies depended being purified.

The following narrative is taken from the Note of the Lord Ordinary:—

"The questions on which the competing parties are here at issue have been raised in the following circumstances;—(1) By the trust-deed and settlement of the late Mr Andrew Storie, and relative deed of directions executed by him on the 6th of August 1861, he, by the fourth head of those directions, appointed his trustees to pay to Elizabeth Gray or Dymock, wife of Robert Dymock, Procurator-Fiscal of the City of Edinburgh, 'the yearly interest or produce of the sum of £6000 of my capital stock of the Bank of Scotland; and, in the event of her predeceasing her husband, to pay the said yearly produce to him during his life, and on the death of the survivor of them' Mr Storie directed the capital of this stock to be paid or transferred to their child or children who may be then alive 'in such shares, if more than one, as the parents or the survivor of them shall appoint, and failing such appointment, among the children equally.'

"By this deed of directions various other gifts and legacies were made by Mr Storie in favour of his relatives, including his niece, Mrs Penelope Ogle or Swan, and Mr Alexander Hill Gray, minister of Trinity Gask; and by the tenth head of the directions he appointed the residue of his estate 'to be divided into four equal parts, two whereof are to be paid to the said Mrs Penelope Ogle or Swan, under the restrictions aforesaid, one-fourth to the said Alexander Hill Gray, and the other fourth to the said Elizabeth Gray or Dymock, and their respective heirs.'

"(2.) On the death of Mr Storie, which took place in May 1862, he was survived by all his residuary legatees, and his trustees having entered upon the possession and management of the trust-estate, paid the various legacies bequeathed by Mr Storie, and otherwise administered the estate in terms of his directions, and paid the residue in so far as it had then been ascertained and was available, to the residuary legatees.

"(3.) Mr Storie was also survived by two sons of Mr and Mrs Dymock, viz., Robert Lockhart

Dymock junior, and John Gray Dymock, the former of whom predeceased his mother, having died in June 1863, and the latter of whom survived his mother, but predeceased his father, the survivor of the liferenters, who died in April 1872, leaving a trust-disposition whereby he conveyed to the claimants, his trustees, his whole heritable and moveable estate. Mrs Dymock, who was one of the residuary legatees, died in April 1867, leaving a settlement by which she made over her whole property to her husband in liferent, and to her sons, equally between them, in fee, and upon the death of Mr John Gray Dymock, in 1869, his father, Mr Robert Dymock, succeeded, under a settlement executed by Mr John Gray Dymock in 1862, to the fee of the whole of his son's heritable and moveable estate. It thus appears that on the death of Mr Robert Dymock in 1872 all right and interest in the residue of the estate of the late Mr Storie which belonged to Mrs Elizabeth Gray or Dymock had been transferred to Mr Robert Dymock, and now belongs to his trustees.

"(4.) Mr Alexander Hill Gray, who was also one of the residuary legatees, died in May 1866, survived by his widow, the claimant, Mrs Ann Crombie or Gray, and by John Crombie Gray, the only child of their marriage. John Crombie Gray died intestate in July 1868, and was succeeded by his paternal uncle, the now deceased William Fyfe Gray, who was confirmed executor *qua* next of kin to him on the 13th of May 1869; and in the month of July of that year the trustees and executors of Mr Alexander Hill Gray, on the narrative of the trust-disposition and deed of directions of Mr Storie, and of an arrangement entered into between Mr Fyfe Gray and Mrs Ann Crombie or Gray, the present claimant, made ver to them, *inter alia*, the balance remaining in the hands of the trustees of Mr Storie of the one-fourth share of the residue of his estates, which was directed to be paid to Mr Alexander Hill Gray and his heirs, to the extent of two-thirds thereof to Mr Fyfe Gray, and of the remaining third to Mr Crombie or Gray. On Mr Fyfe Gray's death. which took place in 1871, his personal estate and effects were administered by the claimants, Charles Henderson and Andrew Wilson, under a will executed by him in August 1871, so that in this way Mrs Crombie or Gray and the trustees of Mr Fyfe Gray maintain that they are respectively in right, the former to one-third share, and the latter to two-thirds, of any portion of the residue of the late Mr Storie's estate still in the hands of his trustees which belonged to the late Mr Alexander Hill Gray, the residuary legatee, who died in 1866.

"(5.) On the death of Mr Robert Dymock in 1872 various questions arose relative to the disposal of the capital of the £6000 Bank of Scotland stock which had been liferented by Mr Dymock, which were made the subject of a Special Case before the First Division of the Court. The parties to this case were the claimants, the trustees of the late Mr Robert Dymock, on the first part, Mrs Ogle or Swan and her husband for his interest, on the second part, and the claimants, Mrs Ann Crombie or Gray, and Charles Henderson and Andrew Wilson, the executors of Mr Fyfe Gray, on the third part, and the questions submitted for the consideration of the Court were—(1) Whether the fee of this £6000 vested in Mr Robert Lockhart Dymock jun., and John Gray Dymock, the children of Mrs Elizabeth Gray or Dymock, or either of them, and was payable to the first parties, as in their or his right? and if it had not so vested, (2) Whether it belonged to Mrs Ogle or Swan, as the heir *in mobilibus* of Mr Storie, or formed and fell to be disposed of as part of the residue of Mr Storie's estate, and was payable to the parties to that case as residuary legatees, or in right of residuary legatees of Mr Storie? And by the judgment pronounced on the 13th of February 1873 it was found that the fee of the £6000 had not vested in Robert Dymock jun. and John Gray Dymock, or either of them, but that the bequest had lapsed, and 'that the fund became part of the residue of the testator's estate, and was payable to the whole parties hereto as residuary legatees, and representatives of residuary legatees, of the testator.'

"(6.) The effect of this judgment, therefore, as between the parties to the Special Case, was to find that the £6000 in question fell to be dealt with as part of the residue of Mr Storie's estate, and belonged two-fourths of it to Mrs Swan, who was herself one of the residuary legatees of Mr Storie, another fourth to the claimants, the trustees of Mr Dymock, as in right of Mrs Gray or Dymock, who was another of the residuary legatees, and the remaining fourth to the claimants, Mrs Ann Crombie or Gray, and Charles Henderson and Andrew Wilson, the executors of Mr Fyfe Gray, as representing the Rev. Mr Hill Gray, the other residuary legatee. But although by this decision a share of the fund which had lapsed into residue was held to belong to the representatives of those residuary legatees who had predeceased the period at which it was ascertained that the £6000 in question had lapsed, upon the assumption apparently that it fell to be considered as residue at Mr Storie's death, it does not appear either from the record, or in the report of the decision in the Special Case, that any question was there raised as to the precise time at which the money fell into residue, and it is plain that there was no one made a party to that case who had an interest to maintain that the money became residue at any other period than at the death of Mr Storie. Claims, however, have been made since the date of that decision to a share of the sum in question, upon the footing that it did not become residue till the death of Mr John Gray Dymock, the survivor of Mr Dymock's children, by parties who were not represented in the Special Case, and the present action has accordingly been raised to have those claims disposed of."

The parties on whose behalf these claims were made were Alexander Hill Gray and others, who were the nearest heirs, or the representatives of parties who were the nearest heirs *in mobilibus* of the Rev. Mr Hill Gray and Mrs Gray or Dymock, at the date of the death of Mr John Gray Dymock in 1869.

These claimants pleaded—"(1) Upon a sound construction of the said testamentary writings, the sum constituting the fund *in medio* never vested in Robert Lockhart Dymock and John Gray Dymock, but fell into residue upon the death of the latter. (2) The said Alexander Hill Gray and Mrs Elizabeth Gray or Dymock having predeceased the date at which the said sum fell into residue, the claimants, as the persons who possessed the character of their nearest heirs *in mobilibus* at that date, are entitled as conditional institutes to the portion

of the residue forming the fund *in medio* in the shares claimed by them."

The Lord Ordinary pronounced an interlocutor repelling the claim for Alexander Hill Gray and others, and preferring the parties claiming as representatives of the residuary legatees of the testator.

In a Note the Lord Ordinary, after giving the above narrative, proceeded:—"1*st*, the parties on whose behalf those claims have been made are Mr Alexander Hill Gray and others, who are the nearest heirs, or the representatives of parties who were the nearest heirs *in mobilibus* of the Rev. Mr Hill Gray and Mrs Gray or Dymock at the date of the death of Mr John Gray Dymock in 1869. The ground on which their claims are rested is that as Mrs Dymock and the Rev. Mr Hill Gray, although surviving the testator, both predeceased the date at which the £6000 in question was ascertained to have fallen into residue, they never were in right to any share of that money, and that the portion of the residue therefore which forms the fund *in medio* in this action now belongs to the claimants Mr Hill Gray and others, as conditional institutes; and if, as contended for by these claimants, the deed of directions fell to be construed as if by the fourth head of the directions, the capital of the £6000 had, on the failure of the children of Mrs Dymock, been specially directed to be paid to Mrs Swan, Mr Hill Gray, and Mrs Dymock, and their respective heirs, and the case of the other claimants was rested on a direction so worded, there would, it is thought, have been strong grounds for maintaining that the parties claiming as conditional institutes ought to be preferred.

"2*d*, But these directions do not, in the view which the Lord Ordinary takes of them, admit of being so construed, because the right of the other claimants, as representing the deceased residuary legatees, does not depend upon the fourth, but upon the tenth, head of the directions, by which the residue of Mr Storie's estate is appointed to be divided among his residuary legatees, and vested immediately on the death of Mr Storie in those of the legatees who survived him. And no authority was referred to as showing that under such a conveyance of residue the right of the residuary legatees to any particular portion of the residue was to depend, not upon the date at which, on fair construction of the bequest, the residue vested as a whole, but upon the dates at which each portion became available for distribution. It has, on the contrary, been decided, with reference to the share of the residue of an estate appointed to be made over to certain parties *nominatim* 'and their heirs,' but which, being subject to a liferent, was not payable till the death of the liferenter, that the share of a residuary legatee who predeceased the liferenter vested notwithstanding in him, and was carried by his will—*Cochran*, 29th Nov. 1854, D. 17, p. 103.

"3*d*, If, therefore, in the present case the bequest under the fourth head of the directions had been limited to one of liferent in the £6000 to Mrs Dymock and her husband, without any direction to make over the capital to their children, the fee of that capital, under the authority of the case of *Cochran*, would, it is conceived, have belonged to the residuary legatees, and been subject to their disposal. So that, in this view, the main question which is now raised for decision is, Whether, because of the contingent interest in the capital of the £6000 which was created in favour of Mrs Dymock's children, but which lapsed into residue through their predecease of their parents, no right to this portion of the residue vested in the residuary legatees who predeceased Mrs Dymock's children, but the same now belongs to their heirs?

"4*th*, This question is, in the opinion of the Lord Ordinary, attended with considerable nicety; and he is not aware of any direct authority upon the point. But after carefully examining the decisions in both branches of the case of *Lord* v. *Colvin* (December 7, 1860, 23 D., p. 111, and 15th July 1865, 3. M., p. 1083), referred to at the debate, he has come to the conclusion that the grounds in law upon which the Court disposed of those cases afford materials for the disposal of the present case. The ground on which the Court there proceeded, as more fully explained by Lord Ivory in the first, and by Lord Curriehill in the second, branch of that case, appears to have been this, that where the residue of an estate is made the subject of contingent bequests, the right of the heirs *ab intestato* of the testator is not thereby absolutely displaced and superseded, but is merely suspended until it is seen whether the conditions on which the bequest of it had been made are purified, and that upon the failure of the bequests the right of the heirs-at-law is held to have come into operation as at the death of the testator. Because, to use the words of Lord Ivory, 'the conditional bequest was a contingent burden upon the succession which had opened *a morte testatoris*,' and had vested in those who were as at that date in the position of heirs-at-law, subject merely to the contingent burdens which attached to it.

"That decision was no doubt pronounced with reference to an estate which had become residue through intestacy, and in that respect differs from the present, where the estate has been made the subject of a general residuary bequest. But if the Lord Ordinary is right in thinking that by the conception of the tenth head of the directions the residue was intended to vest *a morte testatoris* in the residuary legatees, there is then no substantial difference in principle between the cases. In the one the residue vested by the operation of the law of intestate succession, and in the other in respect of the expressed will of the testator. And the Lord Ordinary can in these circumstances see no sufficient reason why in the latter of those cases, as well as in the former, the right to the residue as a whole should not be held to have vested and to belong to the residuary legatees as at the death of the testator, subject in like manner to the burden of contingent bequests, and without reference to the periods at which it might be ascertained that it had been freed from these burdens.

"On these grounds, the Lord Ordinary has repelled the claim for Alexander Hill Gray and others, and preferred the parties claiming as representatives of the residuary legatees of the testator."

The claimants Alexander Hill Gray and others reclaimed.

At advising—

Lord President—This is a question the solution of which depends upon the construction of the deed. Mr Storie's deed has nothing peculiar in it. Some of the provisions are special bequests to certain persons, and some are contingent provisions, such as the one we are now considering. Such a position of matters is of every day occurrence in

trust-settlements, and that is just what gives this case importance. I cannot but think that this question must have arisen before although no decision has ever been given upon it.

The argument of the reclaimers rests on a fallacy as to the construction of the deed. They say that every contingent bequest is to the legatee, whom failing, to the residuary legatee, who is conditional institute. That is not a sound construction. The estate is given to the residuary legatee, but he is burdened with certain contingent bequests. If the contingency does not occur the residuary legatee has possession of the whole estate. If that is so, there is an end of the question. For the residuary estate is one, and not made up of different parts. It must therefore vest at one time, and that time is at the death of the testator.

If this bequest had been of so much money, without reference to a particular fund, the question might never have been raised. I do not, however, think that the fact that the bequest here is of a particular fund makes any difference.

Lord Deas concurred.

Lord Ardmillan—I am of the same opinion. The principle is that the residuary legatee is not a substitute, but *ab initio* the beneficiary, subject to the qualification that the amount may be affected by contingencies.

Lord Jerviswoode concurred.

Counsel for the Pursuer—Watson and Mackintosh.

Counsel for the Defender—Fraser and Balfour.

Wednesday, June 3.

FIRST DIVISION.

[Lord Gifford, Ordinary.

JAMES M'ALISTER *v.* SWINBURNE & CO. AND OTHERS.

Bankrupt—Private Trust—Discharge—Sequestration.

A bankrupt granted a trust-deed in favour of his creditors, who appointed a trustee. A personal discharge was promised to the bankrupt in the event of his implementing certain conditions, but on his refusal to do so the deed of discharge, which had been duly executed but not delivered, was cancelled by the deletion of the signatures. Thereafter the bankrupt obtained sequestration, and raised an action concluding for delivery of the deed of discharge on his implementing the conditions, or alternatively for declarator that it had been delivered, and that by it the creditors acceding to the private trust were excluded from ranking on the sequestrated estate. *Held* that it was not necessary to go into any of the questions relating to its discharge or its cancellation, the whole previous proceedings having been swept away by the sequestration.

In the year 1862 the pursuer of this action, James M'Alister, whose affairs had become embarrassed, granted a trust-deed for behoof of his creditors, the trustee being Mr James M'Clelland junior, accountant in Glasgow, who had power to grant a discharge in certain circumstances. A deed of discharge was prepared and duly executed, and the pursuer was promised that it should be delivered to him on his fulfilling certain conditions. These conditions he failed to implement, and the trustee, who died before the date of this action, or some one by his direction, deleted the signatures to the deed with a view to its cancellation. Two years after the private trust was constituted the pursuer applied for sequestration, which was granted, and a trustee was appointed in common form. Subsequently to this the pursuer raised this action, in which, *inter alia*, he concluded for declarator that the discharge had been duly executed and delivered to him, or alternatively that on his fulfilling the conditions contained in it he was entitled to obtain delivery of it, and that the creditors who acceded to the trust-deed were barred from claiming under the sequestration. The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 27th January* 1874.—The Lord Ordinary having heard parties' procurators, and having considered the closed record, proof adduced, and whole process—Finds that the pursuer has failed to instruct that the deed of discharge, No. 167 of process, was ever delivered to him: Finds that the pursuer has failed to instruct that the defenders or any one else are now bound to deliver said deed of discharge to the pursuer, or that the said deed of discharge has been improperly cancelled: Finds that the pursuer has failed to instruct that the defenders are now under any obligation to discharge the pursuer, or to assign their debts to him: Therefore assoilzies the defenders from the whole conclusions of the libel, and decerns: Finds, under the remit by the First Division contained in the interlocutor of 7th November 1873, that the pursuer is entitled to the expense of the reclaiming note lodged by him on 10th July 1873, and of the discussion thereon: *Quoad ultra*, finds the defenders entitled to the whole other expenses incurred by them in the cause, and remits the account of said expenses to the auditor of Court to tax the same, and to report.

"*Note.*—The voluminous documentary and oral proof which has been adduced in this case raises several questions of some interest, and probably of considerable importance to the pursuer, but the Lord Ordinary cannot say that he has ultimately found much difficulty in disposing of these questions upon the evidence.

"The whole questions in dispute may ultimately be resolved into three, viz.—(1) Was the deed of discharge, No. 167 of process (now bearing to be cancelled), delivered uncancelled to the pursuer as the pursuer's proper writ and deed? (2) Are the defenders or any of them now bound to deliver the said deed or any other deed of discharge to the pursuer? (3) Are the defenders or any of them now bound to discharge the pursuer at all, and on what terms and on what conditions?

"The Lord Ordinary answers all these questions in the negative.

"In order to prevent misconception, it is necessary to keep in mind that the pursuer is at this moment a divested and undischarged bankrupt, under a mercantile sequestration which still subsists. The discharge which he seeks in the present action is not a discharge in the existing sequestration, for that must be sought in a different form altogether, but a discharge in a pre-