equally true that the feu-rights of the complainers and respondents, as well as of all the other proprietors in Belhaven Terrace, flow from the same source, that each and all of them contain obligations and conditions of the same character, and that in particular they contain the obligation or condition more immediately in question, to the effect that the feuars must use their houses "as private dwelling-houses only." And what is of great importance, the whole obligations and conditions referred to are in the feu-rights of each and all of them, including the complainers and respondents, "declared real liens, burdens, and servitudes upon the lots of ground hereby feued, not only in favour of the first party" (the granter of the feus) "and his foresaids, but also of the whole feuars and disponees upon the first parties' lands, and their successors."

Having regard to the terms in which the feu-rights of the feuars in Belhaven Terrace are expressed, as now referred to, I can have no doubt that the question of the complainers' title to insist in the present application for interdict against the respondents must be sustained, in the same way and for the same reasons as the title of a party similarly situated was sustained in the recent case of *M'Gibbon* v. *Rankin senr. and Others*, January 19, 1871, 9 Macph. 423, a case not only analagous, but, so far as the matter of titles is concerned, in all respects identical with the present. The Judges in that case, while unanimous in sustaining the pursuer's title, appear to have differed as to whether it rested on *jus quæsitum tertio* or implied contract. So far, however, as the parties litigants are interested, it is of little or no consequence which of the principles is the true one. For my own part, I am inclined to hold that both of them are applicable—that while the principle of implied contract arises from the mutuality of right and obligation which is created amongst all the feuars in Belhaven Terrace by the terms of their feu-rights, a *jus quæsitum tertio* is also conferred by their titles on each of them. In accordance with the decision in the case of *M'Gibbon*, judgment was shortly afterwards pronounced in the case of *Alexander and Others* v. *Stobo and Miller*, March 3, 1871, 9 Macph. 599.

As to the complainers' interest as well as title to insist in the present application, I can have no doubt. It is impossible, I think, to say that such a school, attended by so many young persons as the respondents admit they are likely to have as residents and day-boarders, may not in many ways be disagreeable and annoying to the residenters in the neighbouring and especially in the adjoining houses. The complainers, all of whom have houses in Belhaven Terrace, and two of whom are owners of the houses adjoining the respondents, have therefore a clear and undoubted interest to prevent if they can the respondents from occupying their house as they propose and threaten to do, in respect of the noise and bustle and annoyance otherwise which such occupation would unavoidably give rise to.

Nor do I think there can be any doubt that the respondents' threatened occupation of their house would be a contravention of their as well as the complainers' feu-rights, that their houses can only be used as private dwellings. This very point, in circumstances almost identical, was recently, and since the Lord Ordinary's judgment, so determined in the Court of Appeal in England, Chancery Division—*German* v. *Chapman*—where, as appears from the notice of the case in the Weekly Notes, No. 49, Dec. 8, 1877, p. 243, it was held, without requiring proof, reversing a judgment of Vice-Chancellor Bacon, that the use of a house as a school for girls was a breach of a contract such as there is here, and therefore injunction was granted.

In these circumstances, I am of opinion that the Lord Ordinary's interlocutor reclaimed against ought to be recalled, and interdict granted against the respondents using their house No. 23 Belhaven Terrace as proposed by them.

Lord Gifford and the Lord Justice-Clerk concurred.

The Court recalled the interlocutor reclaimed against, and granted the interdict craved.

Counsel for Complainers—(Reclaimers) Balfour—Robertson. Agent—C. S. Taylor, S.S.C.
Counsel for Respondents—Asher—Lorimer. Agents—Finlay & Wilson, S.S.C.

Saturday, January 12.

FIRST DIVISION.

[Sheriff-Substitute of Lanarkshire.

TENNENT *v.* CRAWFORD.

Process—Appeal—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *secs.* 71 *and* 170—*Review of Sheriff's Interlocutor preliminary to Appointment of Trustee.*

Held that the exclusion of review under the 71st section of the Bankruptcy (Scotland) Act 1856 applies only to interlocutors confirming the election of a trustee, and not to those which deal with questions preliminary to the election, *e.g.*, the validity of the creditors' votes.

Observed per Lord Shand, that he would not have concurred in so holding had the point not been prejudged by the case of *Wiseman* v. *Skene*, March 5, 1870, 8 Macph. 661.

Bill—Promissory-Note—Bond—Bank Interest.

A document granted for a certain sum, to be paid back at a certain date with bank interest, is not a promissory-note, extraneous evidence being necessary to determine the exact sum due, and it may therefore if unstamped be admitted in evidence on payment of the duty and penalty under the Act 33 and 34 Vict. c. 97.

Bankrupt—Diligence—Election of Trustee, Vouching of Claims for.

A diligence may be granted for the recovery of specified documents in the hands of specified persons, in order that parties claiming to vote in the election of a trustee in bankruptcy may instruct their claims.

This was a competition for the office of trustee on the sequestrated estate of William M'Culloch jun., farmer, between Mr Tennent, accountant, Glasgow, and Mr Crawford, accountant, Ayr. Mr Tennent objected to the claims of certain creditors who supported Mr Crawford for the office, amongst others to the claims of

Mr Murray, the bankrupt's father-in-law, and Mrs M'Culloch, his mother. The claim of the former was founded on an acknowledgment by the bankrupt in this form:—

"Dear Sir,—I acknowledge to have received from you the sum of four hundred pounds stg., which I am to pay back, with bank int., at Martinmas 1878.—Yours faithfully,

"William M'Culloch jr."

The objection was that the document was not stamped. The objection to Mrs M'Culloch's claim was that her designation did not correspond with that of the creditor in the document upon which she claimed.

The Sheriff-Substitute (Birnie) allowed these parties to meet the objections taken in the one case by stamping within eight days the document of debt on which the claim was founded, and, in the other, by amending the claim so as to make the claimant's designation correspond with that of the creditor in the document on which the claim was made. He further allowed the two claimants a diligence "to produce within said eight days books or documents in support of their respective vouchers."

Tennent appealed to the Court of Session.

When the case was in the Single Bills, it was objected that the appeal was, under section 71 of the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79), incompetent, on the ground that if the judgment of the Sheriff in appointing the trustee was final, it followed that all steps to that end must also be beyond the review of the Court. Section 71 provided—"The judgment of the Sheriff declaring the person or persons elected to be trustee or trustees in succession shall be given with the least possible delay; and such judgment shall be final, and in no case subject to review in any Court or in any manner whatever."

It was answered that by section 170 of the Act, and at common law, unless review was expressly excluded, it was not incompetent, and the only judgment which was declared to be final by the statute was that appointing the trustee. The point, besides, was settled in the cases of *Latta* v. *Dall*, November 28, 1865, 4 Macph. 100; *Wiseman* v. *Skene*, March 5, 1870, 8 Macph. 661; and *Miller* v. *Duncan*, March 18, 1858, 20 D. 803.

At advising—

Lord President—The interlocutor which it is desired to bring under review by this appeal was pronounced by one of the Sheriff-Substitutes of Lanarkshire in the course of a competition for the office of trustee on a sequestrated estate, the two competitors being the appellant and a Mr Crawford. The Sheriff has determined that a party claiming to be a creditor is entitled to have a document stamped in order to give effect to his vote; he has allowed another claimant to amend her claim; and he was further allowed both parties to produce books or documents in support of their vouchers; and these are the points sought to be brought under review. An objection has been taken to the competency of the appeal under the 71st section of the Bankruptcy Act of 1856, but this point appears to me to have been already settled in two cases, viz., *Latta* v. *Dall*, November 28, 1865, 4 Macph. 100, and *Wiseman* v. *Skene*, March 5, 1870, 8 Macph. 661, the only distinction being that in the former case the objection was not taken but the competency assumed; in the latter the objection was taken, deliberately considered, and unanimously repelled.

It is therefore unnecessary to go further; but I am bound to say that the construction put on the Act by these decisions is, in my opinion, the only sound and possible construction of it. The judgment that is declared by the 71st section to be final is the judgment declaring a certain person to be trustee; and on referring to the 170th section we find it provided that interlocutors not declared final shall be appealed in a certain form. Every interlocutor of an inferior Judge not declared to be final is subject to appeal, and the only interlocutor here declared to be final is the interlocutor declaring a certain person to be trustee.

Lord Deas concurred.

Lord Mure concurred, and referred to the case of *Mann* v. *Dickson*, July 1, 1857, 19 D. 942, where a question arose as to whether a person had so conducted himself as to unfit him for the office of trustee. The Court disposed of that question although it related to the election of a trustee, and refused to confirm his appointment.

Lord Shand—I feel myself constrained to concur with your Lordships, but solely on the ground that *Wiseman's* case decided this very point, and that we could not refuse this appeal except by going back on that decision. But I think it right to say that I entertain a totally different opinion from your Lordships. It is provided by the statute that the appointment of a trustee shall be summary, and not subject to any review whatever. That being so, to take up a question as to the validity of votes is taking up a matter with which the Legislature intended that this Court should have nothing to do. Unfortunately, however, the question has been decided the other way, and therefore I concur.

The objection to the competency was therefore repelled.

Argued, on the merits, for the appellant—The document here founded on by Murray was a promissory-note. It could not therefore be stamped, and could not be looked at. It was clearly against the policy of the statute that time should be allowed to claimants to recover documents to instruct their claims. Creditors must come prepared with proper vouchers—*Aitken* v. *Stocks*, February 14, 1846, 8 D. 509; *Scott* v. *Scott*, June 23, 1847, 9 D. 1347.

The competitor Crawford argued—The document was not a promissory-note. [Lord President—You may refer to the well-known case of *Pirie's Representatives* v. *Smith's Executrix* for the opinion of the Court on similar documents, reported on February 28, 1833, 11 S. 473. Lord Mure—Or to the case of *Martin*, reported at 728 of the same volume, on June 25, 1833.] The case of *Morgan* v. *Morgan*, January 20, 1866, 4 Macph. 321, followed upon the cases referred to by the Court, and supported the contention. If this document was not a promissory-note, then it could certainly have been looked at by the Sheriff on payment of the duty and penalty. The Sheriff

was right to grant such a diligence as he had granted, the document not being in itself sufficient. Such a diligence was granted in the case of *Menzies* v. *Duff*, June 5, 1851, 13 D. 1044; Bell's Comm. ii. 314 of M'Laren's Ed., 5th ed. 347. Besides, the diligence here might be a very limited one. He was prepared to give in a specification of the documents required, and of the persons in whose hands they were.

At advising—

LORD PRESIDENT—There are three points determined by the Sheriff here. The first is in regard to the want of a stamp on a document founded on by the claimant Murray. The second is in regard to the allowance by the Sheriff to Mrs M'Culloch of an amendment of her claim by the addition of some words to her designation. The third is in regard to the diligence granted for the recovery of additional documents and books to support the claims of both of these parties.

As regards the first point, the document in question is expressed in these terms—[*reads as above*]. If that is a promissory-note, the Sheriff is wrong, for the document should at once have been rejected: but I am of opinion that it is a document in the nature of a bond, not of a promissory-note, for it is impossible to ascertain from the document itself what the precise sum payable is, as no one can tell what the bank interest will amount to. That fact is conclusive upon the nature of the document under *Morgan's* case, which is in harmony with the leading cases of *Pirie's Trustees* and *Martin*. But the Sheriff did not take the right way of admitting it; he should have proceeded under the 16th section of the Stamp Act of 33 and 34 Vic. c. 97, and upon payment of the duty and the penalty he should then have admitted it without a stamp. We should therefore, I think, recall that finding and allowance, and remit to the Sheriff to admit the document after the duty has been duly paid.

With regard to the diligence allowed, I cannot approve of the terms in which it is granted, for it is a roving diligence, under which the party might have gone all over the world to recover documents. Now, all that this party required, and all he was entitled to get, was a diligence to recover certain specific documents which he can say are in the hands of certain third parties and will instruct his claim. The counsel for Mr Crawford, who supports this claim, says that he can specify the documents that will do so, and I think he should be allowed such a limited diligence.

LORD DEAS concurred, observing—upon the question as to the granting of a diligence—The statute contemplates very summary procedure, and it is the duty of the Sheriff to keep the diligence within reasonable bounds, and not allow this privilege to be abused. If any thing of that kind were brought under our notice, we should not of course allow the statute to be so transgressed, but I entirely concur in the allowance of diligence proposed.

LORD MURE concurred.

LORD SHAND concurred on the question of the stamping of the documents. On the other question he said—With reference to the other point, the universal rule I understand to be that where parties come to vote at an election of a trustee they shall have their affidavits in proper form, and shall produce the documents to instruct their claims which are in their possession or under their control; if any party does not do so he must lose his vote. Here the writings asked for are beyond the parties' control, and are, as it appears, sufficient to make out their claims plainly. I think that the Sheriff should allow a diligence to recover any special documents on the one side as well as on the other.

The Court substantially adhered to the interlocutor of the Sheriff, but allowed expenses to neither party.

Counsel for Tennent (Appellant)—Trayner—C. S. Dickson. Agent—Thomas Carmichael, S.S.C.

Counsel for Crawford (Respondent)—J. P. B. Robertson. Agents—Bruce & Kerr, W.S.

Tuesday, January 15.

SECOND DIVISION.

[Sheriff of Forfarshire.

SIMPSON *v.* THE CALEDONIAN RAILWAY COMPANY.

Railway—Obligation on Railway Company to maintain Fences along a Disused Line.

A portion of a line of railway was relinquished and disused in terms of a Special Act of Parliament. The railway company left the fences in good condition when they ceased using the line, but after that they were suffered to get into disrepair. In an action of damages against the railway company on account of injury caused to stock through the insufficient state of the fences—*held* that the railway company was liable, in respect (1) that their obligation in the original Act under which the railway was constructed was to put up and maintain in all time coming a sufficient fence, which obligation was part of the price paid for the ground, and (2) that the relinquishment of use in no respect liberated the company from any obligations which they had undertaken to those with whom they had originally contracted.

Charles Simpson, the pursuer in this case, was tenant of the farm of Hatton, near Newtyle. Part of the line of the Dundee and Newtyle Railway, now owned by the defenders the Caledonian Railway Company, ran through the pursuer's farm. By Act of Parliament (27 and 28 Vict. cap. 214, the defenders had obtained authority to disuse as a public railway a portion of the line, including the part passing through pursuer's farm. The terms of the 18th section of the Act were as follows:—"On the completion and opening for public traffic of the railway, and of the joint station at Newtyle hereinafter provided for, so much of the Dundee and Newtyle Railway as lies between Pitnappie Junction and the foot of the Hatton incline at Newtyle Station shall be relinquished and disused as a public railway; and the *solum* thereof, subject to all claims affecting the same at the instance of other parties than the