Wednesday, June 29.

FIRST DIVISION.

[Sheriff of Renfrew and Bute, at Paisley.

REID *v.* STRATHIE.

Bankruptcy—Sequestration—Election of Trustee—Objections to Affidavit—Proof.

Held that in a sequestration it is incompetent to allow a proof in support of an objection to the validity of votes in the election of a trustee.

Two candidates for the office of trustee in a sequestration lodged objections to certain votes. The Sheriff-Substitute sustained some of these objections, and repelled others; and with regard to one objection allowed a proof. *Held*, on appeal, that the interlocutor, in so far as it allowed a proof, was incompetent, and that upon the other points the interlocutor was final.

In the sequestration of the estates of James Cunningham & Sons, bleachers, Barrhead, a meeting of creditors was held at Paisley on 10th May 1887. Robert Reid and David Strathie, chartered accountants in Glasgow, were proposed as candidates for the office of trustee. A vote was taken, the result being that creditors to the amount of £931, 10s. 2d. voted for Reid, and creditors to the amount of £927, 13s. 5d. voted for Strathie, leaving a majority in favour of Reid of £3, 16s. 9d.

Thereafter Strathie lodged objections to a vote given under mandate by James Myles, the debt being for £96, 7s. 1d., and to a vote given under mandate by Messrs Gemmill & Company, the debt being for £116, 8s. 9d. Reid lodged objections personal to Strathie, and objections to the vote of Mr Anderson, in respect of a debt of £500, and also to the vote of Ross Robertson Auld, and others, the debt being for £321, 3s. 9d.

On 19th May 1887 the Sheriff-Substitute (Cowan) pronounced this interlocutor—"Sustains the objection stated by David Strathie to the vote given under the mandate by Mr James Myles, the debt being a debt due to Mr Archibald Alexander Spiers of Elderslie, for whom Mr Myles states that he acts as factor, under a factory bearing date as duly set forth in his affidavit, but which mandate is not produced, the Sheriff-Substitute being of opinion, under the authority of *Anderson* (1847), 9 D. 1460, which is not impugned, but rather in his opinion confirmed by *Aitken* (1852), 14 D. 572, and also in accordance with the usual practice, that one who claims to depone for another whose the debt is must produce with his oath the evidence of the appointment under which he acts: Repels the objection stated against the vote given under the mandate by William N. Gemmill & Company, the third name inserted as mandatory being interlined in a different handwriting without being in any way authenticated, and these words being held therefore *pro non scripto* the mandate is intelligible, and was used by one of the parties named in it: Finds, therefore, deducting the above-mentioned vote, to which the objection has been sustained, that there voted for Mr Robert Reid, as trustee, creditors to the value of £835, 7s. 1d. sterling: Further, repels the personal objections stated to Mr David Strathie, the Sheriff-Substitute being of opinion that they are not proper personal objections, but rather objections to the votes of the creditors, whose nominee he is said to be, and being further of opinion, as decided in *Colville* (1850), 13 D. 415, that it is not a good objection to a trustee that he is the nominee of creditors whose votes may preponderate over those of others: Repels the objection stated to the vote of Mr Ross Robertson Auld and others, they having produced a lease granted by them in their capacity of trustees, under which, indeed, their claim arises, the debt being truly due to them *qua* trustees, and the vote in this respect differing from that under the mandate by Mr Myles above referred to, and the case of *Aitken* (1852), 14 D. 572, having ruled a somewhat similar point: Further, as regards the objection stated by Mr Reid to the vote of Mr Thomas Anderson, merchant, Glasgow, before answer allows Mr Robert Reid a proof of his averments, and to Mr David Strathie a conjunct probation."

The effect of this interlocutor was, irrespective of Anderson's vote, regarding which a proof was allowed, to place Reid in a minority.

Reid appealed to the First Division of the Court of Session, and argued that the appeal was competent, and that the appeal brought under review the whole interlocutor. The Sheriff-Substitute had repelled certain of his objections which should have been sustained, and it was on these he desired to be heard. If these objections were sustained, there would be no need of a proof.

It was argued for the respondent that the interlocutor in so far as it allowed proof was incompetent—*Rhind* v. *Mitchell*, December 5, 1846, 9 D. 231; *Tennant* v. *Crawford*, January 12, 1878, 5 R. 433; *Weldon* v. *Ferrier*, November 15, 1879, 7 R. 235; *Galt* v. *Macrae*, June 9, 1880, 7 R. 888; *Wylie, &c.*, v. *Kyd, &c.*, May 21, 1884, 11 R. 820; June 21, 1884, 11 R. 968. That had it not been for this allowance of proof it would have been final; that this irregularity ought to be put right; and that the case should be remitted to the Sheriff to appoint the trustee in accordance with his own findings.

At advising—

Lord President—In this case there was a competition for the office of trustee upon a sequestrated estate, and objections were lodged according to the provisions of the Bankruptcy Act. The Sheriff-Substitute heard parties upon them, and pronounced an interlocutor. That interlocutor is in the usual form disposing of the objections. Among other objections, it disposes of an objection regarding Mr Ross Robertson Auld. So far the interlocutor is in the usual form, and quite in accordance with the statute. But an objection was stated by Mr Reid to the vote of a Mr Anderson; he was not in a position instantly to verify it; and, in these circumstances, the Sheriff-Substitute, instead of repelling the objection as he ought to have done, allowed a proof. Now, it has been decided in several cases that this is incompetent under the statute, and accordingly that part of the interlocutor was beyond the power of the Sheriff Substitute, for it was beyond his jurisdiction under the statute. This interlocutor

having been brought before us by way of appeal, we must quash that part which allows proof, and that must be done *ante omnia*. Had the Sheriff-Substitute not fallen into this mistake the interlocutor would have ended in the usual way with the appointment of the trustee, and I think we must send back the case to the Sheriff-Substitute to complete his interlocutor. When that is done it will be final. In following this course we are not affirming the competency of the appeal. But it is the duty of this Court when any irregularity of this kind is brought before us, where the Sheriff-Substitute has acted beyond the statute and *ultra vires*, to put that right, and send the case back to the Sheriff-Substitute.

LORD MURE concurred.

LORD SHAND—In very recent cases the Court have expressed clear opinions that such proof was incompetent. Where an objection such as this is stated it admits of instant verification by the production of documents, or even by a diligence which might be granted for their recovery. No such course was followed here, and the proof allowed is plainly incompetent.

LORD ADAM was absent on circuit.

The Court pronounced this interlocutor :—

"Recal as incompetent that part of the Sheriff-Substitute's interlocutor, of date 19th May 1887, which allows a proof of the objection to the vote of Mr Thomas Anderson, and grants diligence: Remit to the Sheriff to complete his interlocutor in terms of the 70th section of the Bankruptcy (Scotland) Act 1856: Find the respondent entitled to expenses, modify the same to the sum of Five pounds five shillings, for which sum decern against the appellant for payment to the respondent."

Counsel for Appellant — Guthrie. Agent — Boyd, Jameson, & Kelly, W.S.

Counsel for Respondent—Ure. Agent—George Andrew, S.S.C.

Thursday, June 30.

FIRST DIVISION.

CAMPBELL AND OTHERS (RUSSELL'S TRUSTEES) *v.* RUSSELL OR GARDINER AND OTHERS.

Marriage-Contract—Whether Conveyance included Property Acquired by Wife Subsequent to Dissolution of Marriage.

Held, on the construction of an antenuptial marriage-contract, that money to which the wife succeeded after the dissolution of the marriage, was not carried by a clause in the marriage-contract conveying to her husband, "and his heirs and assignees whomsoever, all and sundry the whole means and effects, heritable and moveable, real and personal, now belonging or indebted and owing to her, . . . and all that she may acquire or succeed to during the subsistence of the said intended marriage, or that shall be belonging, owing, and indebted to her at the time of her death, with the exception of the provisions above made in her favour."

By antenuptial contract of marriage dated 17th March 1857, entered into between William Russell, merchant in Glasgow, and Marion Paterson, daughter of the late John Paterson, merchant in Glasgow, Mr Russell assigned a life policy for £1000 to the trustees therein named for the purposes therein mentioned, viz.—"That the said trustees shall hold the said certificate or policy of assurance for behoof of the said Marion Paterson, in case she shall survive the said William Russell, but in case she shall predecease him, then for behoof of the children, if any, of the said intended marriage; and after the sums of money therein contained shall have become exigible, shall pay over the said sums and the bonuses that may be due thereon to the said Marion Paterson, whom failing to the child or children of the said intended marriage, equally among them, or the survivors of them." Mr Russell became bound duly to pay and report to the trustees the payment of the premiums. He further made over to "the said Marion Paterson, his promised spouse, in case she shall survive him, the whole household furniture, books, plate, and other household plenishing and effects of every description which now belong or shall at the time of his death belong to him, and that as her own absolute property."

The conveyance of Mrs Marion Paterson or Russell was as follows, viz.—"For which causes, and on the other part, the said Marion Paterson hereby assigns, dispones, conveys, and makes over from her, to and in favour of the said William Russell, her promised husband, and his heirs and assignees whomsoever, all and sundry the whole means and effects, heritable and moveable, real and personal, now belonging or indebted and owing to her, . . . and all that she may acquire or succeed to during the subsistence of the said intended marriage, or that shall be belonging, owing, and indebted to her at the time of her death, with the exception of the provisions above made in her favour, and that as fully and effectually as if every particular of the said estate were herein particularly enumerated."

Mr Russell died on 29th August 1884, survived by his wife and by a son and three daughters. He left a trust-disposition and settlement dated 29th August 1879, by which he conveyed his whole estate to trustees for the purposes therein mentioned. Upon the death of Mr Russell Mrs Russell obtained payment and delivery of the provisions in her favour in the said marriage-contract. By an agreement dated 7th and 10th November 1885 Mrs Russell agreed "that all her separate estate belonging to her at the date of her marriage with the said deceased William Russell, or acquired during the subsistence thereof, and estimated, so far as hitherto realised and invested, at the sum of £2000 or thereby, conform to detailed statement of investments submitted by her to the first party, should be held as forming part of the testamentary estate of the said deceased William Russell."

On 28th August 1886 Mrs Russell died intestate, and her daughter Mrs Marion Agnes Russell or Gardiner was duly confirmed her executrix. A question arose as to the construction of the marriage-contract, and a Special Case was presented to the First Division of the Court of Ses-