as the "annual proceeds" directed to be placed under their charge and management were to be paid to them in perpetuity, the right conferred on them was by implication a right of fee, and that they were entitled now to payment or delivery of that portion of the estate out of which the perpetual payment was to be made. I think this claim cannot be sustained. There are cases no doubt where the payment in perpetuity of a certain sum may imply a right of fee, so as to entitle the beneficiary to payment of the money, or delivery of the subject out of which the perpetual payment is to be made. But this is not one of these cases. The Free Church in question, for example, is not a corporation; it might cease to exist, or might be merged in some other religious community, in which case the truster's bounty could no longer be claimed by them. But, apart from that, there is no appearance of any intention or purpose on the part of the truster to entrust the office-bearers of that church with anything more than the management of that part of the income of his estate which year by year should be handed over to them by his trustees. The right, therefore, of the fourth parties to this case seems to me to be limited to the one-half of the clear annual income derived from the truster's estate, under deduction of £10 annually for the purpose of providing the bursary above mentioned.

The rights thus conferred on the several parties, as I have now stated them, exhaust the provisions of the deed with regard to the disposal of the truster's estate. The deed, therefore, while it disposes of the whole income of the estate, gives no direction and makes no provision for the disposal of the fee. I am of opinion that as regards the fee of his estate the testator died intestate, and that such fee (subject to the burdens imposed by the trust-settlement) falls to the heir-at-law and heir *in mobilibus* according to the rules of intestate succession. The questions annexed to the special case will be answered in accordance with the views I have expressed.

The LORD JUSTICE-CLERK, LORD YOUNG, and LORD RUTHERFURD CLARK concurred.

The Court pronounced the following interlocutor—

"Find in answer to the first question annexed to the case, that the late George Henderson died intestate *quoad* the fee of the whole of his estate, and that the third party as heir-at-law and the second party as next-of-kin are entitled to such fee (subject to the burdens imposed thereon by the trust settlement executed by the said George Henderson, dated 27th December 1888) according to the rules of law regulating intestate succession: In answer to the second question, that the second party's right under the primary provision of said settlement is a right of liferent: In answer to the third question, that the second party is entitled (1) to the liferent of the house at Ivy Bank; (2) to the liferent of the furniture, &c., in said house; and (3) to payment during her lifetime of one-half of the clear revenue or income derived from the remainder of the truster's estate, both heritable and moveable: And in answer to the fourth question, that the fourth parties are entitled to payment of one-half of the clear revenue or income derived from the said remainder of the truster's estate, both heritable and moveable (under deduction of the sum of £10 annually to found the bursary mentioned in said settlement), to be applied in the Home Mission work specified by the truster in said settlement, . . . and decern," &c.

Counsel for First Parties—Clyde. Agents—J. & A. Hastie, Solicitors.

Counsel for Second Party—H. Johnston—W. Campbell. Agent—John Rhind, S.S.C.

Counsel for Third Party—Wilton. Agent—John Rhind, S.S.C.

Counsel for Fourth Parties—Ure—Constable. Agent—W. J. Johnstone, S.S.C.

Thursday, February 4.

FIRST DIVISION.

[Sheriff of Roxburgh, Berwick, & Selkirk.

SMITH *v.* WILSON.

Bankruptcy—Election of Trustee—Appeal — Competency — Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 71.

It was objected to the affidavit and claim upon which a creditor had voted at a meeting for the election of a trustee in a sequestration, that part of it was vouched by a prescribed bill, and that an acknowledgment of indebtedness by the bankrupt endorsed upon the bill, which bore to be dated shortly prior to sequestration, being holograph, did not prove its own date. The Sheriff rejected the creditor's claim to rank and vote for the amount of the prescribed bill, on the ground that the acknowledgment did not bear to be holograph. The result of this decision was to leave the candidate for whom this creditor had voted in a minority, and the Sheriff accordingly declared the opposing candidate to have been duly elected trustee.

Held that the Sheriff had not exceeded his jurisdiction, and that his decision was final under the 71st section of the Bankruptcy Act.

Farquhar v. *Sutherland*, June 6, 1888, 15 R. 759, *distinguished.*

On 16th November 1891 the estates of Robert Neilson, draper, Lauder, were sequestrated by the Lord Ordinary on the Bills, and a meeting was appointed to take place at Lauder on November 27th for the election of a trustee and commissioners.

The minute of meeting of creditors held

on 27th November bore that George Logan Broomfield, a mandatory for certain creditors, proposed John Wilson, C.A., Edinburgh, as trustee, and that Robert Smith, a creditor, was proposed by himself; that there voted for Wilson five creditors, whose claims amounted in value to £525, 13s. 8d.; and that Smith, whose claim amounted to £342, 0s. 5d., voted for himself.

Wilson objected to Smith's claim to be ranked and to vote for the sum of £342, 0s. 5d., in respect, *inter alia*, "The sum of £200 and interest thereon, £41, 0s. 2d., amounting together to the sum of £241, 0s. 2d., and forming item 1 of the statement annexed to said affidavit, is sought to be vouched by a bill which has suffered the sexennial prescription, but which prescription is sought to be elided by a holograph acknowledgment endorsed thereon bearing date 7th November 1891. The said bill having prescribed is not a sufficient voucher, and the said acknowledgment, which bears date shortly prior to sequestration, being holograph, does not prove its own date."

Objections were also lodged by Smith to certain of the votes tendered in support of Wilson.

Section 71 of the Bankruptcy Act 1856 provides—"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."

On 5th January 1892 the Sheriff-Substitute of Berwickshire (DUNDAS), having heard parties' procurators on the notes of objections, for the reasons mentioned in the note subjoined to his interlocutor, declared Wilson to have been duly elected trustee on the sequestrated estates of the said Robert Neilson in terms of the statutes, &c.

"*Note.*—I cannot say that the vouchers objected to on both sides are at all satisfactory, and as matter of fact I have rejected them all. The result of this is to leave Mr Wilson with a majority in number and value, and I have accordingly declared him duly elected. In support of the objections on each side a good many authorities were quoted, which I do not think it necessary to refer to here, though I have carefully examined them all. I am satisfied that Mr Smith's objection to the claims of the bankrupt's sister and sister-in-law on the ground that they are conjunct persons is sound in law, and I am equally satisfied as to Mr Wilson's objection to the prescribed bill. It is said that the bill is set up again by the holograph acknowledgment on the back of it. I can only say that the writing does not bear to be holograph, and I do not think it necessary to express any opinion as to what would be the effect of it if it were so." . . .

Smith having appealed to the First Division of the Court of Session, Wilson objected to the competency of the appeal.

Argued for Smith—(1) The appeal was competent, as the Sheriff had gone beyond his powers in entertaining an objection not stated to him—*Farquharson* v. *Sutherland*, June 16, 1888, 15 R. 759. Objections stated must be specific—*Lockhart* v. *Mitchell*, July 12, 1849, 11 D. 1341. If the Sheriff could proceed on a new ground of objection in regard to a vote already objected to, it was difficult to see why he could not raise an objection to a vote not objected to. (2) The Sheriffs' ground of decision was mistaken in law. The bill was a writing *in re mercatoria*, and the acknowledgment as being merely accessory thereto partook of the same privileges, and therefore did not require to be either holograph or tested—*Thoms* v. *Thoms*, December 20, 1867, 6 Macph. 174. Taking the bill and acknowledgment together there was *prima facie* proof of debt.

Argued for Wilson—(1) The appeal was incompetent under section 71 of the Bankruptcy Act. The result of allowing such appeals would be to tie up the proceedings in sequestrations for long periods, and such delays were just what the Legislature desired to prevent—*Galt* v. *Macrae*, June 9, 1880, 7 R. 888; *Wylie* v. *Kyd*, *&c.*, June, 21, 1884, 11 R. 968. [LORD ADAM—The Sheriff has sustained no objection not stated to him.] *Farquharson's* case was quite different from the present. (2) The Sheriff was right in the decision he had arrived at—*Anderson* v. *Gill*, *&c.*, April 16, 1858, 3 Macq. 180.

At advising—

LORD PRESIDENT — This is an appeal against the judgment of a Sheriff-Substitute declaring the election of a certain person as trustee in a sequestration. The 71st section of the Bankruptcy Act 1856 enacts that "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 is therefore incumbent on the appellant to make out that the Sheriff's judgment discloses an excess of jurisdiction so as to oust it from the privileged position assigned to such judgments by the statute. If we have regard to the note appended to the interlocutor of the Sheriff-Substitute, it appears that the scrutiny upon which the judgment proceeded was an examination of the votes tendered and of the vouchers by which they were supported. In one instance the Sheriff-Substitute has sustained an objection to a claim on the ground that the debt being instructed by a prescribed bill with an alleged holograph acknowledgment on the back, he could not give effect to such a voucher, because the acknowledgment did not bear to be holograph. When this is seen to be the nature of the judgment, I think it comes to be one of the most ordinary adjudications upon the merits of a vote—the very question which the Legislature by the 71st section of the statute has declared shall not be appealable.

But it has been argued that the Sheriff-

Substitute was not entitled to consider any legal point or plea which was not set forth in the written note of objections which was lodged. That, as it appears to me, is just an invitation to us to review the judgment of the Sheriff upon each vote, and the objection on the ground of excess of jurisdiction comes to this, that while the vote in question was objected to on grounds which were stated, the ground to which the Sheriff-Substitute gave effect was not specifically set forth, although it arose *ex facie* of the voucher produced. I think the Sheriff was within his jurisdiction in so proceeding, and that we ought therefore to refuse the appeal as incompetent.

LORD ADAM—I agree. I do not think *Farquharson's* case the same as the present. If the Sheriff had sustained an objection to a vote not objected to, that would have been a different matter, but he has not done so.

LORD KINNEAR—I am entirely of the same opinion. I think the case of *Farquharson*, 15 R. 759, is not in point. In that case the Sheriff refused to exercise the jurisdiction given him by the statute, because he declined, on a ground that had not been pleaded, to examine a number of votes, and the vouchers tendered in their support, and therefore the Court called upon him to perform his statutory functions and examine these votes and vouchers. In the present case the Sheriff seems to me to have done exactly what he was bound to do, for he has considered the objections raised, and has decided upon them. It is suggested that he has gone beyond his jurisdiction, because he has disposed of an objection on a ground not stated to him. The objection is to the amount of a creditor's claim, and is rested on the ground that part of the claim is sought to be vouched by a bill which has suffered the sexennial prescription. It was answered that prescription had been elided by a holograph acknowledgment endorsed on the bill. To that it was replied that the acknowledgment did not set up the bill, because it did not prove its own date, and the Sheriff decided that it did not set up the bill because it did not prove itself to be holograph. Whether that was right or wrong, it was certainly a decision of the question submitted to him for his judgment, viz., whether the bill, together with the acknowledgment, was or was not a good voucher, and it appears to me of no consequence whether in so deciding he proceeded on grounds that were stated in argument or on grounds that occurred to himself.

But then it is said that the ground of the Sheriff's decision is contradicted by an admission made by the objectors. It is unnecessary to consider whether the judgment would have been set aside if it had proceeded on a ground of fact which was contrary to what was stated by one party and admitted by the other, because in this case the supposed admission does not appear to me to be an admission in fact at all. What the objector says is that the acknowledgment "being holograph" does not prove its own date. Now, it is not the fact of its being holograph which prevents the document from proving its own date, but the fact that it is not tested, and the objection seems to me to mean no more than this—that assuming the document to be holograph, it is ineffectual for the reasons stated. Whether the objection is well founded or not it is not for us to consider, because I do not think it doubtful that the Sheriff has decided the question on grounds which were competently before him.

LORD M'LAREN was absent.

The Court dismissed the appeal as incompetent.

Counsel for the Appellant—W. C. Smith—A. S. D. Thomson. Agent—T. Temple Muir, S.S.C.

Counsel for the Respondent — Gunn. Agents—Whigham & Cowan, S.S.C.

Friday, February 5.

FIRST DIVISION.

[Sheriff of Banff.

IRVINE *v.* M'HARDY.

Writ — Assignation — Notarial Docquet — Holograph—Conveyancing Act 1874, *secs.* 39 *and* 41.

An assignation signed for a person unable to write by a justice of the peace and two witnesses *held* invalid in respect that the notarial docquet attached to the deed was not in the handwriting of the justice of the peace.

The Conveyancing (Scotland) Act 1874 (37 and 38 Victoria, cap. 94), sec. 3, enacts—"No deed, instrument, or writing, subscribed by the granter or maker thereof, and bearing to be attested by two witnesses subscribing, and whether relating to land or not, shall be deemed invalid or denied effect according to its legal import because of any informality of execution, but the burden of proving that such deed, instrument, or writing so attested was subscribed by the granter or maker thereof, and by the witnesses by whom such deed, instrument, or writing bears to be attested, shall lie upon the party using or upholding the same, and such proof may be led in any action or proceeding in which such deed, instrument, or writing is founded on, or objected to, or in a special application to the Court of Session, or to the Sheriff within whose jurisdiction the defender in any such application resides to have it declared that such deed, instrument, or writing was subscribed by such granter or maker and witnesses."

Section 41 enacts—"Without prejudice to the present law and practice, any deed, instrument, or writing, whether relating to land or not, may, after having been read over