up the loan or balance thereof if they think proper, and that as fully and freely as if this letter had not been granted." I cannot read that back-letter as meaning anything than this, that if the events (or any of them) contemplated should occur, then the back-letter and the privilege thereby conferred of postponed payment of the money due under the bond should fly off, and that the respondents should be entitled to insist on payment at once of everything due under the bond. The reason given by your Lordships for reading the back-letter unfavourably to the respondents' claim is, that by the language used it is "the loan or balance thereof" only which the respondents are entitled to call up, and in the outset of the back-letter reference is made to "the loan of five hundred pounds sterling." But the same language is used in the back-letter to designate the £500 and the £131, 5s. together, for it is provided that the co-obligants are to get five years "to pay off the amount of said loan, and that by quarterly instalments," as specified; and the specified instalments are not of £500 but of £631, 5s. The clause therefore in the conclusion of the back-letter authorising the respondents to call up "the loan or balance thereof" may just as well be read as referring to the £631, 5s. as to the £500, so far as the mere language of the back-letter is concerned. But in my opinion it is not doubtful that what was intended and understood by the parties was that on the occurrence of any of the events provided for, the respondents should then be entitled to enforce their bond just as if the back-letter had never been granted.

LORD YOUNG was absent.

The Court sustained the appeal.

Counsel for Pursuers and Respondents—H. Johnston—A. S. D. Thomson. Agent—A. B. C. Wood, W.S.

Counsel for Defender and Appellant—Dickson—Watt. Agents—J. & A. Hastie, Solicitors.

Tuesday, February 23.

FIRST DIVISION.

[Sheriff of Lanarkshire.

STEELE AND OTHERS *v.* STRATHIE.

Bankruptcy — Sequestration — Meeting of Creditors Called by Commissioner "with Notice to the Trustee"—Notice not Timeous—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 98.

The Bankruptcy (Scotland) Act 1856, by section 98, provides that "any commissioner, with notice to the trustee, may at any time call a meeting of the creditors." A commissioner called a meeting by a notice in the *Gazette*, which is published in the evening. Upon the afternoon of the day of publication he sent notice to the trustee by a registered letter, which was not delivered until the following morning.

Held that the requirement of the statute had not been complied with, as the notice to the trustee had not been timeously given.

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79) provides by section 98 that "any commissioner, with notice to the trustee, may at any time call a meeting of the creditors." . . .

Edward Cruickshank, one of the commissioners in the sequestration of R. S. Lang, manufacturer, Glasgow, inserted a notice, dated October 26th 1891, in the *Edinburgh Gazette*, published on the evening of October 27th, calling a general meeting of creditors to be held on November 4th 1891, "to, if so resolved, remove the trustee, David Strathie, C.A., Glasgow, from office."

Upon the afternoon of October 27th he sent a registered letter addressed to the trustee at his office giving notice of having called said meeting. When the postman went his rounds it was after office hours, and the letter was not delivered to Mr Strathie until the next morning.

The meeting of creditors was held upon November 4th, and a resolution for the removal of the trustee was carried.

The trustee appealed to the Sheriff to have the resolution recalled, and upon 9th December 1891 the Sheriff-Substitute (ERSKINE MURRAY), for reasons assigned in his note, recalled the resolution complained of.

"*Note.*—The Bankruptcy Act 1856 provides that a majority of creditors present at any meeting duly called for the purpose may remove a trustee. Section 98 provides that 'any commissioner, with notice to the trustee, may at any time call a meeting of the creditors.' In the present case one of the commissioners sent to the *Gazette* a notice, dated 26th October, to be published in the *Gazette* of 27th October, calling a meeting for 4th November. The *Gazette* was published on the 27th between 6 and 7 p.m. On the afternoon of the 27th the same commissioner sent by registered letter a notice to the trustee, addressed to his place of business. It was not delivered till 10 a.m. on the 28th, as, being registered, it could not be delivered after business hours on the 27th, the trustee's office being then shut.

"In these circumstances the Sheriff-Substitute must hold that notice to the trustee was not given till the 28th. But as the advertisement in the *Gazette* was published on the evening of the 27th, it must also be held that the intimation to the trustee did not precede, nor was even simultaneous with, but was subsequent to the date of the calling of the meeting, even if that date be taken to be the date of the publication of the *Gazette*. Still more so would this be the case were the date of the calling of the meeting to be held to be the date annexed to the notice in the *Gazette*, being that of the day previous, the 26th October.

"In these circumstances the Sheriff-

Substitute cannot hold that the provision of the 98th section, that a commissioner, with notice to the trustee, may at any time call a meeting of creditors, has been complied with. That provision seems necessarily to imply that the notice must be, if not precedent to, at the very least simultaneous with the calling of the meeting. Indeed, the former of the two interpretations seems the most reasonable. But certainly it cannot be said that a commissioner is within his statutory power if he calls a meeting not only without having given previous notice, but without even giving simultaneous notice to the trustee. He is clearly not at the time when he calls the meeting calling it with notice to the trustee.

"The above views are strongly confirmed by the judgment of the Second Division on 11th March 1884, adhering to a judgment of Lord Kinnear in the case of *M'Fadyean (Todd's Trustee)* v. *Campbell*, 21 S.L.R. 479. In that case two of the Judges held that the notice to the trustee must precede the calling of the meeting, while the Lord Justice-Clerk and the Lord Ordinary considered that simultaneous notice might do."

Robert Steele, manufacturer, Leeds, and others, creditors in the sequestration, appealed to the First Division of the Court of Session against the deliverance of the Sheriff-Substitute, and argued—The letter containing the notice was duly posted, and would have been delivered to the trustee the same evening as the notice appeared in the *Gazette* had he been at his office. That would have been sufficient—see Lord Kinnear's opinion in the case of *M'Fadyean*, referred to by the Sheriff-Substitute. If the trustee absented himself from his office, he must just suffer any inconvenience thereby occasioned. The commissioner was not bound to know the hours he kept, and arrange the delivery of letters accordingly. He had taken an unnecessary precaution to ensure that he received the notice by registering the letter.

Argued for the respondent—The precaution taken necessarily occasioned delay of delivery until the next day. Posting was not enough. Notice to the trustee must be received by him at latest simultaneously with the appearance of the *Gazette*, and probably, looking to the opinions of the Lord Young and of Lord Craighill in *M'Fadyean's* case, before the *Gazette* notice appeared. The trustee was not expected to be in his office after ordinary business hours.

At advising—

LORD PRESIDENT—The 98th section of the Bankruptcy Act of 1856 enables a commissioner to call a meeting of the creditors, but that power is qualified by the words, "with notice to the trustee." I take it as quite clear that these words qualify the call, making it a good call if "with notice," and a bad one if without notice.

Mr Watt told us that the calling of the meeting was done by a *Gazette* notice, and the question before us is, whether that *Gazette* notice took place with or without notice to the trustee? The *Gazette* containing the notice was published on the evening of the 27th of October, and the trustee did not *de facto* receive notice until the 28th. *Prima facie*, therefore, the *Gazette* notice was bad. The trustee received notice posterior to the appearance of the notice in the *Gazette*, and that could not have the effect of rehabilitating the *Gazette* notice. But then it was argued that means had been taken to give the trustee notice upon the evening of the 27th. At best that was only giving him notice at the same time as the notice appeared in the *Gazette*. Now, what were the means taken to apprise the trustee of what was going to appear in the *Gazette*? A registered letter was despatched upon the afternoon of the 27th, to be placed in the hands of Mr Strathie himself, and if he was not found, delivery would necessarily be delayed until the following day. Steps were taken therefore to ensure that the delivery should be personal, but in such a way as to render postponement of delivery possible. *De facto*, then, the trustee did not receive notice until the 28th, and that will not suffice to validate the *Gazette* notice.

Mr Watt argued that we should decide the matter upon what is before us. Well, the Sheriff-Substitute sets out in a distinct narrative that the letter "could not be delivered after business hours on the 27th, the trustee's office being shut." I take it that when the postman came to the office it was after business hours, when the trustee might reasonably be expected to be away. No offer was made to displace that fact by evidence, and indeed I doubt if any evidence would suffice to make up for the commissioner not giving notice before the appearance of the notice in the *Gazette*.

I am of opinion that we should dismiss the appeal.

LORD ADAM—The question here depends upon the construction of the 98th section of the Bankruptcy Act, which provides that "any commissioner, with notice to the trustee, may at any time call a meeting of the creditors." In this case the appellant, who is a commissioner on a sequestrated estate, called such a meeting, and gave notice to the trustee, but the question is, whether that notice was given in time? As matter of fact the *Gazette* notice appeared upon the evening of the 27th of October, and it is admitted that in point of fact notice to the trustee did not reach him until the next morning. Therefore, if there is nothing to make this case exceptional, it is clear that the notice to the trustee was given after the publication of the *Gazette*—that is, after the calling of the meeting—and accordingly bad. The question of whether the calling of the meeting simultaneously with giving notice to the trustee is effectual was raised in the case referred to. But a trustee's receiving notice at the very moment of the publication of the *Gazette*

is so unlikely to occur that I think the consideration of such a possibility would be unprofitable discussion. In any case, notice to the trustee must not be after publication of the *Gazette*. It will be time enough to consider the question of simultaneity when it occurs. Here the notice was given after the *Gazette* notice appeared, and that, I think, is sufficient for the decision of this case.

But then it was said that although the actual delivery of the letter containing the notice was not until the 28th, that was owing to the trustee's own actings, and it was said that if the trustee had happened to be at his office when the registered letter was brought the notice would probably have been in time. The facts however were different. The effect of registering the letter was to make it necessary that it should be delivered to him personally, and as he had left his office that was postponed. There was nothing here unusual in the actings of the trustee. Had the letter been brought at ten o'clock in the forenoon, and the office had then been found shut, it might have made a difference. There was no such case here, and I agree with your Lordship in thinking that the appeal should be dismissed.

LORD KINNEAR—I agree with Lord Adam that the Act cannot mean notice is to be given to the trustee simultaneously with notice to the world, and that was never seriously suggested in the argument or in the previous case. The only thing there suggested was that notice might have been sufficient if given at the same time as the publication of the *Gazette*, and that if it so happened that might be enough. I thought at the time that there was a great deal to be said in support of the stricter view expressed by Lord Young and Lord Craighill, to the effect that that would not be enough, but that notice to the trustee must precede the notice calling the meeting. It is not necessary to consider that question here, and it is enough to say that the notice to the trustee must not be later than that calling the meeting. The fact here is that the meeting was called by a notice in the *Gazette* upon the 27th, and the notice was not given to the trustee until the 28th, therefore the notice to the trustee was later than that calling the meeting. It was said that the failure to give timeous notice was owing to the absence of the trustee from his place of business. I think we cannot give effect to that view implying that it is the duty of a man of business to be at his office at all hours. Where the duty of giving notice is sufficiently discharged by sending a letter through the post, it may be enough if the letter is addressed to the office of the person receiving the notice, without the necessity of proving that the addressee was at home, or did not receive it through failure to open his letters. But here the precaution was taken of sending a registered letter, to be delivered only to the addressee personally, with the inevitable consequence that if it was after business hours delivery would be postponed until next morning. I concur in thinking the appeal should be dismissed.

LORD M'LAREN was absent.

The Court dismissed the appeal.

Counsel for Appellant—Watt. Agents—Clark & Macdonald, S.S.C.

Counsel for Respondent — Salvesen — Crabb Watt. Agents — Simpson & Marwick, W.S.

Saturday, February 27.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

VALENTINE (ONCKEN'S JUDICIAL FACTOR) *v.* MACDOUGALL (REIMERS' CURATOR).

Parent and Child—Aliment of Bastard.

Held that a bastard incapable of supporting himself was entitled to aliment out of the estate of his deceased father, and that a sum must be set aside for payment of this aliment before division of the estate in terms of the father's settlement.

Paul Gerhard Oncken, merchant in Leith, died in June 1888 leaving a trust-disposition and settlement by which he conveyed his whole estate to trustees, whom he directed (1) to pay his debts; (2) to pay legacies of £250 to his brother and his eldest son; (3) to convey his business to his eldest son, subject to a condition that he should bind himself to pay a sum of £50 a-year to each of the testator's three younger children; and (4) to divide the residue of his estate among his said younger children on their attaining the age of 25.

The testator was survived by his brother and the four children mentioned in the settlement.

On July 15, 1890, William John Valentine, C.A., was appointed judicial factor on the trust-estate. After the estate had been realised and the legacies paid, there remained in the hands of the judicial factor a balance of £1296.

On 18th November 1891 the judicial factor, with the concurrence of two of the testator's younger children, and of William Walker, who had been appointed *curator bonis* to the third younger child, presented a petition to the Court for special powers and for discharge.

The petitioner stated — "The judicial factor is ready to divide the estate, but a difficulty stands in the way of a division being made by the existence of an imbecile illegitimate son of the testator, named Alexander Gerhard Reimers, who is twenty years old, and is at present boarded at Bonnyrigg, Midlothian, at a cost to the estate of £30 per annum. There can be no doubt that the testator recognised the paternity and maintained the child, and