the correctness of the dates which these writings bear :—

"Applegarth School-house, 26th March 1864.—My dearest Isabella,—You do not know how much your distant coldness last evening has pained me. You did not look like yourself at all, so shy and independent. I must own that you have some apparent cause for displeasure, but I could not act very well otherwise than I have done. It was my real and honest intention when I made you the promise that you should come to Sandyholm next Whitsunday, but on second thoughts I thought it best to put off a little longer. Our house must be in a great measure refurnished; that will take a good deal, and we must not commence housekeeping without a something to fall back upon. But what signifies a little delay. Do not distrust me, for as sure as there is a God above us, I will faithfully fulfil my promises to you. I have called you my wife, and such you are, my dearest Isabella, and if you insist upon it, I will give you marriage lines to make everything sure, but I beg of you not to allow distrust of my intentions for a moment to enter your mind. Mrs Wilson must now of course remain in the house for another year, but at the end of that time you shall get your rights. I shall call over again privately next Tuesday evening, when I earnestly hope you will receive my visit, and that everything will be again *smooth* between us.—I am, dearest Isabella, your ever loving,

(Signed) "ROBERT M'KIE."

"Annanhill, 4th October 1864.—We, the undersigned, having entered into a contract of marriage by our mutual agreement and consent, as permitted by the law of Scotland, hereby acknowledge and declare ourselves husband and wife. Witness our hands this fourth day of October, eighteen hundred and sixty-four years,

(Signed) "ROBERT M'KIE. ISABELLA W. WHITE."

Parties having been heard upon the complaint and defences, the Sheriff-Substitute at Dumfries, before answer, allowed each of them a proof of their respective allegations, and also a conjunct probation. It was stated that the complainer and his wife had been examined in the course of the proof which was afterwards taken in the cause, and that they had given evidence to the effect that the writings above quoted had passed between them of the dates they bear.

The Sheriff-Substitute, however, on 12th February 1866, after hearing parties on the concluded proof and whole case, found the charge proven, and passed sentence of deprivation upon the complainer.

The complainer thereupon brought the present note of suspension and interdict, which having come to depend before Lord Benholme, Ordinary officiating on the bills, was refused by him. Against his Lordship's judgment the complainer now reclaimed.

M'KIE, for the complainer (with him ALEX. MONCRIEFF), submitted various considerations upon which the note should be passed to try the question. These were that the offence charged was not an offence under the Act; that the libel was defective in specification; and that evidence had been improperly admitted upon the law and discipline of the Church of Scotland in regard to antenuptial fornication.

SOLICITOR-GENERAL and COOK, for the respondents, were not called upon.

The COURT was unanimously of opinion that the Sheriff's judgment was final, unless he had exceeded his jurisdiction. None of the reasons stated for the complainer, except the first, involved an excess of jurisdiction. The Court was not prepared to hold that antenuptial fornication was not immoral conduct in the sense of the Act. It was not alleged that the Sheriff had proceeded upon the evidence as to the views of the Church in this matter. It was not enough to justify interference with his sentence that he had committed error in judgment. That was not exceeding his jurisdiction. The Court therefore adhered to the Lord Ordinary's interlocutor, and found the complainer liable in additional expenses.

Agent for the Complainer—Robert Finlay, S.S.C.
Agent for the Respondents—James Steuart, W.S.

Thursday, May 24.

NOTE—MARY BONAR FOR POOR'S ROLL.

Poor's Roll—The reporters on the *probabilis causa* being equally divided in opinion, the Court admitted the applicant to the roll.

In this application for the benefit of the poor's roll, the reporters on the *probabilis causa litigandi* of applicants were equally divided in opinion, and they reported to the Court to that effect.

DONALD CRAWFORD for the applicant submitted that in these circumstances she was entitled to admission. The action she was about to institute involved a jury question, and the difference of opinion among the reporters proved that there was a *probabilis causa.*

The Court admitted the applicant to the roll.

Friday, May 25.

EDMOND *v.* ROBERTSON.

Bankruptcy—Proof. (1) A trustee on a sequestrated estate may produce the bankrupt's books in evidence after a record is closed in a question betwixt him and a creditor. (2) Circumstances in which a party allowed to lead evidence in replication.

Question—Whether, when a Sheriff sustains an objection taken in the course of a proof, he pronounces a deliverance in the sense of sec. 270 of the Bankruptcy Act.

This was an appeal presented by James Edmond, advocate in Aberdeen, trustee on the sequestrated estates of Grant & Donald, druggists in Aberdeen, against two interlocutors of the Sheriff-Substitute of Aberdeenshire.

Alexander Robertson residing at Kepplestone, near Aberdeen, claimed to be ranked as a creditor on the bankrupt's estate in respect of a bill for £368, drawn by him upon and accepted by them. The trustee rejected the claim, and Robertson appealed to the Sheriff.

The Sheriff-Substitute appointed the parties to lodge minutes in terms of the Act. The fifth statement made by the trustee was in these terms:—

"5. Grant & Donald never received any money or value in consideration of either of the said bills or the said note. Whatever may have been the transaction, the firm had no concern or interest in it. It was one of Grant's alone, and known to the claimant to be his, and dealt with by him as such."

This statement was denied by Robertson.

On 17th November 1865 the Sheriff-Substitute pronounced the following interlocutor :—

"Having heard parties' procurators, allows the respondent a proof of the fifth article of his revised minute, and the appellant a cross proof; grants warrants for letters of diligence at both parties'

instance against witnesses and havers; and assigns the 9th day of December next, at ten o'clock forenoon, for proceeding with the proof within the Court-house of Aberdeen. (Signed) W. WATSON."

The first witness adduced for the trustee was himself. He was examined on 9th December 1865. The following minute of his examination contains the first interlocutor against which the present appeal was presented:—

"Compeared James Edmond, advocate, sworn—I am trustee on the sequestrated estate of Grant & Donald. The firm's books are in my possession as trustee. I was told I had got the whole of the books. Being asked to exhibit the said books, Objected to on the ground that the books are in the respondent's possession, and ought to have been produced, or excerpts therefrom made and produced, before the record was closed. Answered, that the books do not belong to the respondent, but to the whole body of creditors, and were open to the inspection of every creditor and claimant. The Sheriff-Substitute, in respect the books offered to be produced were in the respondent's possession, and ought to have been produced before the record was closed, or excerpts therefrom produced, sustains the objection, but allows the question to be answered on a paper apart to be sealed up.

(Signed) "JAMES EDMOND."

The only witnesses examined by Robertson were himself and John Smith Grant, one of the bankrupts.

The trustee thereafter moved to be allowed to adduce evidence in replication to the evidence of Grant. In obedience to an order by the Sheriff, he stated in a minute that the following were the particulars on which he wished to be allowed a proof in replication:—

"1. The statement that part of the money said to have been got from the appellant went to pay accounts due by the firm for drugs. 2. The statement that part of it was lent to A. & W. Gray. 3. The statements in reference to payments to Higgin & Thom, Joseph Cohen, Grossmith, and others, which it was stated will appear in the cash-book paid at that date. (4) The indefinite statement as to the part of the money being deposited in the bank, with reference to the bank-book. 5. The indefinite statement regarding payments to M'Nellan & Co. 6. The statement that the firm was concerned in the speculation in lard. 7. The statement that the witness did not recognise the claim of Williamson's trustees as valid. 8. The statement that many of the transactions of Grant & Donald were not entered in their cash-book."

The Sheriff-Substitute, on 9th March 1866, pronounced the following interlocutor, which was the second one appealed against:—

"Having resumed consideration of this cause, with the minute for the respondent, No. 18 of process, refuses the respondent's motion to be allowed a proof in replication of the evidence of the witness John Smith Grant: Circumduces the term for proving; and appoints parties prors. to be heard on the proof and whole process.

(Signed) "JOHN COMRIE THOMSON."

"*Note.*—The Sheriff-Substitute allowed the respondent a proof of the fifth article of his minute, and the appellant a cross proof. The respondent led and closed his proof. It appears to the Sheriff-Substitute that he is now seeking merely to supplement that proof by additional evidence, which, if of importance, as he now maintains it to be, he ought to have led before he declared his proof in chief closed. No circumstance embraced within the article originally remitted to proof has been now stated by the respondent, which, in the Sheriff-Substitute's opinion, he might not have met in his first probation. (Initd.) "J. C. T."

The Lord Ordinary officiating on the Bills (Benholme), on 11th April 1866, pronounced the following interlocutor:—

"The Lord Ordinary having considered the note of appeal, together with the process and productions and heard parties' procurators, recalls the interlocutor appealed against, and remits to the Sheriff to allow the books of the bankrupts to be produced and form part of the process: also to open up the packet No. 28 of process: and, further, to allow the appellant to lead evidence in replication of the evidence of the bankrupt Grant, in terms of minute No. 18 of process, and thereafter to proceed to dispose of the original appeal by Robertson against the deliverance of the trustee, and also to dispose of the expenses of this appeal.

(Signed) "H. J. ROBERTSON."

Robertson having reclaimed.

W. M. THOMSON, for the reclaimer (A. B. SHAND with him), argued—(1) The appeal against the interlocutor of 9th December 1865 was incompetent. It was not presented until 17th March 1866; and by section 170 of the Bankruptcy Act, appeals against deliverances of the Sheriff must be lodged within eight days. Balderston, 20th Feb. 1841, 3 D. 597; Scottish Provincial Assurance Co., 27th Jan. 1859, 21 D. 333; Latta *v.* Park & Co., 10th Feb. 1865, 3 Macq. 508. If this was a deliverance in the sense of the Act, the appeal was too late; if it was not, it was not appealable at all. (2) The Sheriff-Substitute was right in refusing to allow the books to be produced; because by section 51 of the Act of Sederunt of 10th July 1839 they should have been produced before the record was closed.

(The LORD PRESIDENT—Were the bankrupt's books not accessible to all the creditors?)

They were in the trustee's possession. (3) The Sheriff-Substitute was also right in refusing to allow the proof in replication. No proof-in-chief had been allowed to the creditor. The matter remitted to probation was one of the statements for the trustee, and the creditor was allowed a conjunct proof. The opinion of the Lord Justice-Clerk in Strang *v.* Steuart, 15th May 1862, 24 D. 955, was referred to.

(The LORD PRESIDENT—What Robertson is allowed is a "cross proof." I never heard of that expression before.)

MACKENZIE, for the trustee (GORDON with him), being asked what he had to say as to the competency of the appeal, replied—This is not a deliverance in the sense of section 170. It is not signed by the Sheriff-Substitute, and is a mere step in the procedure, which may be reviewed when the Sheriff pronounces his ultimate deliverance.

(LORD PRESIDENT—You call it an interlocutor in your appeal.)

Yes; but that is a mistake.

Lord ARDMILLAN—I think this appeal is not too late. I don't think the statute intended that all deliverances in the course of a proof should be appealable. If they were, the proceedings might be protracted indefinitely, by taking an appeal on every occasion. It is said this is either a deliverance or it is not. But if it is not a deliverance, there is no judgment.

Lord CURRIEHILL—The interlocutor allowing a proof in this case is a very peculiar one. There is no proof allowed to Robertson except a "cross proof." I don't know what that means. I never heard the

expression. But I rather think that a conjunct proof was what was meant.

LORD PRESIDENT—I think we must allow those books to be produced, and the proposed inquiry to be gone into.

LORD DEAS—It appears to me that what was remitted to probation was the fifth statement for the trustee, and the answer to it. That is just allowing a proof to both parties. What the creditor has led is just his proof in chief, so that the trustee is now entitled to lead his conjunct proof. In regard to the question of competency, I think this deliverance is not one of those referred to in section 170. Apart from its not being signed by the Sheriff, it is taken by him in his capacity of Commissioner, and he allows the answer to be sealed up for consideration afterwards by him in his capacity of Sheriff. I don't think the objection to producing the books is well founded.

LORD PRESIDENT—The question about the books arose in the examination of the first witness examined. That part of the evidence having been improperly excluded, I think it should be left open to the creditor to lead additional proof to that which he led, on the assumption that the books were not to be admitted. I don't think it is necessary to decide whether this is a deliverance in the sense of section 170.

The COURT therefore adhered, it being understood that the creditor was to be allowed to lead further proof also, if so advised. No expenses were allowed, as there had been a miscarriage in the Court below.

Agents for Trustee—Hill, Reid, & Drummond, W.S.

Agent for Creditor—James Renton, jun., S.S.C.

SECOND DIVISION.

WILSON AND OTHERS *v.* SNEDDONS.

Reparation—Culpa—New Trial—Foreman—Collaborateur.—A new trial granted in respect of the defective state of the evidence upon a point essential to the law of the case, and that the jury had not had distinctly before them the grounds in fact and law upon which they were to make up a verdict.

This was an action of damages at the instance of the widow and children of a deceased workman who had been employed by the defenders, who are coal-masters near Wishaw, the defender John Sneddon being the only partner of the company. The ground of action was that the deceased had met his death through the fault of the defenders. The following issue was adjusted to try the case :—

"It being admitted that the defenders are proprietors or lessees of the pit now known as No. 6 pit on the Cambusnethan estates, near Wishaw,

"Whether on or about the 31st day of March 1865 the deceased Andrew Wilson, the husband of the pursuer Mrs Agnes Russell or Wilson, and the father of the other pursuers, while employed by the defenders on the shaft of said pit, was precipitated to the bottom and killed in consequence of the breaking of the rope used for raising the workmen to the surface, from defect or insufficiency thereof, through the fault of the defenders, to the loss, injury, and damage of the pursuers?"

Damages were laid at £250 for the widow, and £150 for each of the children.

The trial took place on 23d February last before Lord Jerviswoode and a jury. It appeared in evidence that the defender had supplied rope for the operation of shanking the pit; but that, unknown to him, his underground oversman named Gemmell had, with the consent and approval of the deceased and another workman, and as it rather seemed, at their instigation, permitted them to use a rope which did not belong to the defender. This rope, though to all appearance sound, gave way from internal defect, and caused the death of the deceased and of the other workman. There was evidence that Gemmell was a person of skill, and competent for his duties. He had the charge of the underground operations of the pit, with power to hire and dismiss workmen. The rope which he had allowed to be used was a rope which some engineers had employed in fitting up machinery at the pit, and it was proposed to use it again for lifting a heavier weight than it was required to bear when it broke. There was a great deal of evidence as to the state of the rope, and the cause of its breaking. In these circumstances Lord Jerviswoode left the question of fault in the using of the rope to the jury, but at the same time directed them that—"If there was fault on the part of Gemmell, though there was none on the part of the defenders, yet the defenders are responsible for that fault, if it was committed by Gemmell when acting as oversman for the defenders."

The counsel for the defenders excepted to the foregoing charge, and asked the following direction, viz.—That if the jury are satisfied on the evidence that the defenders used reasonable care in the appointment of Gemmell as oversman, and provided for his use a sufficient rope for the operation in question, then the defenders are not in law answerable for the personal fault of Gemmell in using a defective or insufficient rope not belonging to them; and the counsel for the defenders farther asked his Lordship to give the following direction, viz.—That if the jury are satisfied on the evidence that the deceased Andrew Wilson used the rope in question in the knowledge that it did not belong to the defenders, and had not been provided by them, but belonged to the engineers who were fitting up the machinery, without reasonable grounds for believing that the defenders had sanctioned its use, the defenders are not responsible in law for the result.

Lord Jerviswoode refused to give said directions, or either of them; and the counsel for the defenders excepted to the said refusal.

The jury found for the pursuers upon the issue, and assessed the damages at £175 to the widow, and £50 to each of the children.

The defender thereupon moved the Court to grant a new trial, on the ground that the verdict was contrary to evidence, and also presented a bill of exceptions as aforesaid.

SHAND and MACLEAN argued that there was no fault on the part of Gemmell in the use of the rope, and that the occurrence arose from a latent defect. They also argued that the defender was not liable for Gemmell's fault (assuming that there was fault on his part), in respect he was a *collaborateur* with the deceased, and in any case had exceeded his duty in not using the rope provided by the defender.

GUTHRIE SMITH and R. V. CAMPBELL supported the verdict, and maintained that the defender was liable for Gemmell's fault as his foreman, and that the supply of the rope in question was within the sphere of his duties.

The Court unanimously granted a new trial.