say that the bequest of a free annuity to the widow is equivalent to saying that it is to be paid free of income-tax. But it is not necessary to determine that question here, for it is clear that the non-deduction of income-tax is illegal in terms of section 103 of the Income-tax Act. It is in the trust-deed stipulated as a condition of the acceptance by the widow of the provisions therein made for her that she should be thereby barred from claiming her legal rights. Now, when the widow accepted the provisions on that condition she concluded an agreement with her deceased husband or his trustees. That being the case, the agreement is void by the 103d section of the Act.

As to the last question, I am not quite sure that I agree with Lord Ardmillan in an opinion which he expressed, that it is clear that there has been here a blunder, the clause is so distinctly expressed. If it is a blunder, it is a very singular one, as it arises not from the adoption of a style inapplicable to the case, but from the mixing up of different styles; and when that happens it is usually designedly done. In short, the annuity is back-handed, and, if that is assumed, the deed reads perfectly well. The annuity is to commence from the date of the truster's death, the first payment to be at the term of Whitsunday or Martinmas immediately after that event; but that payment is only to be for the interval between the death and the term. I cannot see that it is possible to construe that deed in any other way, and I am not prepared to say that that was not the intention of the testator.

LORD DEAS concurred.

LORD ARDMILLAN—On the two first points I agree with your Lordships. On the third point, although I cannot say that your Lordship's view is not the law, I think that it is very hard law. The allowance for the aliment of a human being is presumed to be payable in advance, and that presumption can only be overcome by the plain words of the deed. It would have been so here but for the word "for." I think that is a blunder, the word "for" having been inserted where the word "with" was intended. As the deed stands, however, I cannot dissent from the opinions expressed by your Lordships.

LORD MURE concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the Special Case—1st, Find and declare that the various charges set forth in article 4 of the case fall to be paid by the trustees, parties of the first part, with the exceptions of the domestic water-rate therein mentioned and the money paid for gas consumed in the house, also therein mentioned, which fall to be paid by the party of the second part.

"2d, Find and declare that the party of the second part is not entitled to receive her annuity from the trustees, parties of the first part, free of income-tax.

"3d, Find and declare that the party of the second part was entitled at Whitsunday 1873 to payment of a proportion of her annuity corresponding to the period between her husband's death and the said term, and was not entitled to any other payment on account of the said annuity at the said term of Whitsunday 1873; authorise the trustees to pay the expenses of both parties, as taxed, out of the fund in their hands; and decern."

Counsel for the First Parties—Dean of Faculty (Clark), and Mackintosh. Agents—C. & A. S. Douglas, W.S.

Counsel for the Second Parties—Solicitor-General (Watson) and Balfour. Agent—John Stewart, W.S.

Saturday, January 9.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

STEVEN *v.* NICHOLL AND OTHERS.

Process—Proof—Diligence—Competency.

In an action by the trustee on a sequestrated estate for reduction of a trust-assignation of certain policies of insurance on the life of the bankrupt granted by him in 1868, on the ground that at the date of the deed he was, and knew himself to be, insolvent, and granted the deed fraudulently to defeat the rights of his creditors; the defence was that at the date of the deed the bankrupt was solvent. *Held* that with a view to prove this defence the defender was not entitled to a diligence to recover documents belonging to the creditors, these documents, apart from the examination of the creditors, not being evidence.

This was an action at the instance of William Steven, accountant in Dundee, trustee on the sequestrated estate of Charles Denoon Young, against Alexander Nicholl and Others, for reduction of a trust-assignation, dated in 1868, of three policies of insurance upon the life of the said Charles Denoon Young, two for the sum of £2000 each, and the other for the sum of £1000.

It appeared that Charles Denoon Young was sequestrated in 1856, when the creditors received a dividend of 2s. 6d. in the pound; and again, in 1862, when the creditors received 3s. 6d. in the pound. He was again sequestrated in 1874. It was further averred that Mr Young was insolvent in 1867. The trust-assignation under reduction bore to be granted by certain parties on the narrative that they stood vested in the policies of insurance assigned in trust, and the purpose of the trust was for behoof of Mrs Young (wife of the said Charles Denoon Young) in liferent and the children of the marriage in fee. The pursuer averred that the persons mentioned in the trust-assignation were not aware of their names having been used in such a transaction, or that the trust-assignation had been granted, until 1873, and that at the date of the trust-assignation the policies belonged in property to the said Charles Denoon Young, who at that time was insolvent.

The defenders alleged that Mr Young was solvent when the trust-assignation was granted, and generally denied the averments of the pursuers. They also alleged that the deed was granted in implement of the obligations in Mr and Mrs Young's marriage-contract.

The pursuers pleaded:—"(1) The trust-assig-

nation having been granted while the said Charles Denoon Young was, and knew himself to be, insolvent, fraudulently for the purpose of defeating the rights of his just and lawful creditors, the same ought to be reduced and set aside. (2) The said trust-assignation ought to be reduced in respect that the same was granted contrary to the provisions of the Act 1621, cap. 18, and to the prejudice of prior creditors of the said Charles Denoon Young. (3) The said assignation not having been known, intimated, or delivered to the trustees nominated in it, and not having been delivered to the beneficiaries under it, and no possession having followed upon it, the same is invalid, and cannot be founded on by the defender Nicholl as representing said trust."

The defenders pleaded that, the pursuer's averments being unfounded in fact, they were entitled to absolvitor.

The defenders moved the Lord Ordinary to grant diligence to recover the documents mentioned in the following specification:—"1 The business and cash books of (1) Messrs D. and W. Robertson, iron merchants, Dundee; (2) Messrs Thomas B. Campbell & Sons, metal merchants, Glasgow; (3) Messrs Cowan & Co., paper-makers, Edinburgh; (4) Robert M'Tear, auctioneer, Glasgow; (5) Robertson, Ferguson & Co., metal merchants, Glasgow; and (6) William Smith, commission agent, 73 Renfield Street, Glasgow, from the beginning of the year 1866 to 5th October 1868 (the present time), that excerpts may be taken therefrom of all entries of transactions during said period between the said respective firms, or any of their partners, on the one part, and C. D. Young & Co., engineers, Perth, or Mr C. D. Young, engineer, Perth, on the other part. 2. All original accounts sales, accounts current, invoices, and correspondence connected with advances or loans by the said D. & W. Robertson, Thomas B. Campbell & Sons, and Cowan & Co., or any of the partners of these firms, to the said C. D. Young & Co., or C. D. Young, during the above period, or connected with consignments and securities held by the said D. & W. Robertson, Thomas B. Campbell & Sons, and Cowan & Co., or their partners, for such advances or loans. 3. The letter-books of the said several firms, that copies may be taken therefrom of all letters to the holders or assignees of securities on which the advances before referred to were made. 4. The books of the Commercial Union Assurance Company, London, that excerpts may be taken therefrom of all entries relating to the two policies of insurance Nos. 863, and 868, on the life of the said Charles Denoon Young. 5. The business and cash-books of Mr Melville Jamieson, solicitor, Perth, from the beginning of the year 1866 to 5th October 1868 (the present time), that excerpts may be taken therefrom of all entries of transactions during the said period between him and the said C. D. Young & Co., and C. D. Young. 6. The books of the Commercial Bank of Scotland for their agencies at Perth and Callander, that excerpts may be taken therefrom of accounts in name of the said C. D. Young & Co., C. D. Young, or Mrs C. D. Young, from the beginning of 1865 to the present time."

The Lord Ordinary (CURRIEHILL) pronounced the following interlocutor:—

"17*th December* 1874.—The Lord Ordinary having heard parties' procurators on the defenders' motion for a diligence against havers to recover the writings mentioned in the specification, No. 16 of process—Grants diligence for recovery of those mentioned in article 4 of said specification, and also those in articles 1, 2, 3, and 5, down to the date of the trust-assignation on 5th October 1868, and commission to the commissioners formerly named to examine the havers and receive their exhibits, the same to be reported on or before the 13th January next. *Quoad ultra* refuses said motion, and grants leave to reclaim against this interlocutor."

Both parties reclaimed.

The pursuer argued—The diligence asked should not be granted, as the documents sought to be received would not be evidence. If the Court, however, thought that part of the diligence should be granted, the Lord Ordinary had exercised a wise discretion

Argued for the defenders—The defenders' case was that at the date of granting the trust-assignation Mr Young was solvent. To prove that it was necessary to get access to the books of the creditors to show the position in which at that time Young stood to his creditors. This was the more necessary as the pursuer, as challenger of the deed, had in his favour a presumption, arising from the fact of present bankruptcy, of insolvency *retro* to the date of granting the deed.

At advising—

LORD PRESIDENT—With the exception of article 4 of this specification, I am of opinion that the diligence should be refused, as the documents specified are not the kind of evidence by which the solvency or insolvency of Young may be established. If part of the proof of solvency were to go to this, that certain alleged creditors were not creditors at any of the dates specified, or to the extent alleged, or that, instead of being creditors, they were debtors, the proper evidence would be that of Young himself, on the one hand, and of the creditors on the other. Then, if in the examination of creditors as witnesses it is necessary for them to refer to their books, they can do so, or, if the defenders think it desirable that they should do so before coming to give evidence, they can give them notice to do so, and require them to bring the books with them. But the books in themselves, apart from the examination of the creditors, are not evidence at all, and cannot be made so. They may come to be evidence in the sense of being in the hands of witnesses under examination, and in that sense only.

If this diligence were to be granted, I would give great weight to the argument of the defender, that he is entitled to inquire into the whole matter *retro* from the present date to the date of granting the deed, for the pursuer, who challenges the deed, has, from the fact of present bankruptcy, a presumption in his favour of bankruptcy before, and the onus of rebutting that presumption lies on the defenders. That is an argument of great weight, but to grant this diligence would be to go against firmly established principles in the law of evidence.

LORD DEAS—I am of the same opinion. If all the documents specified were recovered and in the hands of the defenders they would prove nothing, unless the owners of the books were called as witnesses.

LORDS ARDMILLAN and MURE concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for the defenders against Lord Curriehill's interlocutor, dated 17th December 1874, and also having heard counsel on said reclaiming note as a reclaiming note for the pursuer against said interlocutor, Recal the said interlocutor, except in so far as it grants diligence for recovery of the documents in article 4 of the specification No. 16 of process, and grant commission for that purpose; refuse the diligence *quoad ultra;* reserving all questions of expenses; and remit the cause to the Lord Ordinary to proceed as accords."

Counsel for the Pursuers—Balfour. Agent—Alex. Morison, S.S.C.

Counsel for the Defenders—Asher and Robertson. Agents—Thomson, Dickson, & Shaw, W.S.

Thursday, January 14.

FIRST DIVISION.

[Lord Young, Ordinary.

MALCOLM RITCHIE *v.* JAS. H. BALGARNIE.

Bankruptcy—19 *and* 20 *Vict. c.* 79, § 126—*Trustee's Deliverance—Interdict—Conjunct and Confident.*

The trustee on a sequestrated estate pronounced the following deliverance—"The trustee rejects this claim as not being sufficiently vouched, the claimant being the bankrupt's father, and therefore conjunct and confident with him: allows the claimant, however, eight days from this date to lodge any further documents or evidence vouching or corroborating the whole or any part of such claim." *Held* that this was not in terms of section 126 of the Bankruptcy Act, 1856, and that the claimant was entitled to interdict against the trustee paying any dividend until his claim was disposed of.

The question in this case arose out of the bankruptcy of John Ritchie, sole partner of the firm of Ritchie & Son, Leith. Mr Balgarnie was appointed agent on the sequestrated estate, and the complainer, who was the bankrupt's father, lodged a claim for a debt amounting to £406, 10s. 10d. vouched by two bills granted by the son and the bank cheques given to him by his father. On this claim the trustee pronounced the following deliverance:—"The trustee rejects this claim as not being sufficiently vouched, the claimant being the bankrupt's father, and therefore conjunct and confident with him: allows the claimant, however, eight days from this date to lodge any farther documents or evidence vouching or corroborating the whole or any part of such claim." The creditor neither tendered farther evidence nor appealed against the trustee's deliverance within fifteen days, and the trustee proposed to pay to the other creditors a dividend of 9s. 8d. per pound, which, as was alleged, would exhaust the estate.

The complainer accordingly presented a note of suspension and interdict, praying the Court to "interdict, prohibit, and discharge the said respondent from paying over to any of the creditors of the said Ritchie & Company and John Ritchie any dividend out of the sequestrated estate of the said Ritchie & Company and John Ritchie on the 4th June current, or thereafter, until the respondent has had a proper opportunity to establish the claim lodged by him as a creditor on the said estate, and the said claim has been either admitted or rejected in terms of the Bankruptcy (Scotland) Act, 1856."

The Lord Ordinary (YOUNG) pronounced the following interlocutor and opinion:—

"*Edinburgh, 13th November* 1874.—The Lord Ordinary having heard counsel for the parties, and considered the closed record: Repels the reasons of suspension: refuses the note of suspension and interdict, and decerns: finds the complainer liable in expenses, and remits the account when lodged to the Auditor to tax and report."

"*Opinion*—The question is, whether the complainer has stated sufficient grounds for suspending the proceedings of the respondent as trustee in the sequestration of Ritchie & Company, with a view to the first statutory dividend, and interdicting payment thereof. The complaint involves no disputed facts, but rests exclusively on the terms of the trustee's deliverance (quoted in stat. 4) upon the complainer's claim in the sequestration.

"The peculiarity in the deliverance is, that after formally and in terms rejecting the claim, the trustee allows the claimant, however, eight days from this date, April 17, to lodge any further documents or evidence vouching or corroborating the whole or any part of such claim.' The case turns on the effect of this peculiarity. I am unable to see clearly how the trustee, after rejecting the claim and declaring the first statutory dividend on that footing, could thereafter, with statutory regularity, of his own authority have admitted the claimant to the benefit of that dividend, had the claimant availed himself of the opportunity afforded him, to the effect of establishing his claim to the satisfaction of the trustee. At least I see difficulty in the way of such a proceeding, and know of no authority for it. But it was unnecessary to consider that matter, for the claimant was not in a condition to avail himself, and in fact did not avail himself, of the opportunity which the trustee indulgently (and with questionable regularity) afforded to him. He did not lodge 'any further documents or evidence vouching or corroborating the whole or any part of such claim,' within the eight days allowed to him for that purpose, or at any time thereafter. He does not allege now that he has any further documents or evidence; but only that, if allowed the opportunity of appealing, he may by argument satisfy the appellate tribunal that the documents and evidence which were before the trustee when he rejected the claim ought to have induced him to admit it. The purpose of this suspension is, in truth, to obtain for the complainer an opportunity of appealing against the judgment of the trustee after the lapse of the statutory period. But for this purpose I cannot, in the circumstances of the case, sustain it. I say in the circumstances of the case, because I think this Court has jurisdiction, which might be exercised by way of suspension, to afford relief to a claimant in a sequestration who had been misled to his prejudice by the form of the trustee's deliverance on his claim. But a party whose claim is rejected, subject to further documents or evidence within eight days, was put to the immediate consideration of the question whether or not he could lodge further documents or evidence, and if he determine that question in the negative, as the complainer did, I think he