trust-settlements, and that is just what gives this case importance. I cannot but think that this question must have arisen before although no decision has ever been given upon it.

The argument of the reclaimers rests on a fallacy as to the construction of the deed. They say that every contingent bequest is to the legatee, whom failing, to the residuary legatee, who is conditional institute. That is not a sound construction. The estate is given to the residuary legatee, but he is burdened with certain contingent bequests. If the contingency does not occur the residuary legatee has possession of the whole estate. If that is so, there is an end of the question. For the residuary estate is one, and not made up of different parts. It must therefore vest at one time, and that time is at the death of the testator.

If this bequest had been of so much money, without reference to a particular fund, the question might never have been raised. I do not, however, think that the fact that the bequest here is of a particular fund makes any difference.

Lord Deas concurred.

Lord Ardmillan—I am of the same opinion. The principle is that the residuary legatee is not a substitute, but *ab initio* the beneficiary, subject to the qualification that the amount may be affected by contingencies.

Lord Jerviswoode concurred.

Counsel for the Pursuer—Watson and Mackintosh.

Counsel for the Defender—Fraser and Balfour.

Wednesday, June 3.

FIRST DIVISION.

[Lord Gifford, Ordinary.

JAMES M'ALISTER *v.* SWINBURNE & CO. AND OTHERS.

Bankrupt—Private Trust—Discharge—Sequestration.

A bankrupt granted a trust-deed in favour of his creditors, who appointed a trustee. A personal discharge was promised to the bankrupt in the event of his implementing certain conditions, but on his refusal to do so the deed of discharge, which had been duly executed but not delivered, was cancelled by the deletion of the signatures. Thereafter the bankrupt obtained sequestration, and raised an action concluding for delivery of the deed of discharge on his implementing the conditions, or alternatively for declarator that it had been delivered, and that by it the creditors acceding to the private trust were excluded from ranking on the sequestrated estate. *Held* that it was not necessary to go into any of the questions relating to its discharge or its cancellation, the whole previous proceedings having been swept away by the sequestration.

In the year 1862 the pursuer of this action, James M'Alister, whose affairs had become embarrassed, granted a trust-deed for behoof of his creditors, the trustee being Mr James M'Clelland junior, accountant in Glasgow, who had power to grant a discharge in certain circumstances. A deed of discharge was prepared and duly executed, and the pursuer was promised that it should be delivered to him on his fulfilling certain conditions. These conditions he failed to implement, and the trustee, who died before the date of this action, or some one by his direction, deleted the signatures to the deed with a view to its cancellation. Two years after the private trust was constituted the pursuer applied for sequestration, which was granted, and a trustee was appointed in common form. Subsequently to this the pursuer raised this action, in which, *inter alia*, he concluded for declarator that the discharge had been duly executed and delivered to him, or alternatively that on his fulfilling the conditions contained in it he was entitled to obtain delivery of it, and that the creditors who acceded to the trust-deed were barred from claiming under the sequestration. The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 27th January* 1874.—The Lord Ordinary having heard parties' procurators, and having considered the closed record, proof adduced, and whole process—Finds that the pursuer has failed to instruct that the deed of discharge, No. 167 of process, was ever delivered to him: Finds that the pursuer has failed to instruct that the defenders or any one else are now bound to deliver said deed of discharge to the pursuer, or that the said deed of discharge has been improperly cancelled: Finds that the pursuer has failed to instruct that the defenders are now under any obligation to discharge the pursuer, or to assign their debts to him: Therefore assoilzies the defenders from the whole conclusions of the libel, and decerns: Finds, under the remit by the First Division contained in the interlocutor of 7th November 1873, that the pursuer is entitled to the expense of the reclaiming note lodged by him on 10th July 1873, and of the discussion thereon: *Quoad ultra*, finds the defenders entitled to the whole other expenses incurred by them in the cause, and remits the account of said expenses to the auditor of Court to tax the same, and to report.

"*Note.*—The voluminous documentary and oral proof which has been adduced in this case raises several questions of some interest, and probably of considerable importance to the pursuer, but the Lord Ordinary cannot say that he has ultimately found much difficulty in disposing of these questions upon the evidence.

"The whole questions in dispute may ultimately be resolved into three, viz.—(1) Was the deed of discharge, No. 167 of process (now bearing to be cancelled), delivered uncancelled to the pursuer as the pursuer's proper writ and deed? (2) Are the defenders or any of them now bound to deliver the said deed or any other deed of discharge to the pursuer? (3) Are the defenders or any of them now bound to discharge the pursuer at all, and on what terms and on what conditions?

"The Lord Ordinary answers all these questions in the negative.

"In order to prevent misconception, it is necessary to keep in mind that the pursuer is at this moment a divested and undischarged bankrupt, under a mercantile sequestration which still subsists. The discharge which he seeks in the present action is not a discharge in the existing sequestration, for that must be sought in a different form altogether, but a discharge in a pre-

viously existing private trust, which was superseded by the sequestration so long ago as 11th October 1866, when the mercantile sequestration was awarded. The mercantile sequestration superseded the private trust, and the trustee in the sequestration took over everything which had not been realised and divided under the private trust, and the real object of the present action is to exclude the defenders from ranking or taking part as creditors in the subsisting sequestration of the pursuer's estates.

"On 1st July 1873 the Lord Ordinary found that the pursuer as a divested bankrupt was bound to find caution as a condition of proceeding with the present action. This, however, was altered by the Inner House, and the pursuer was allowed to proceed with the action without finding caution.

"In considering the question of caution, however, the Lord Ordinary had occasion to advert to the merits of the case so far as he could do so on the documents founded on, and he respectfully refers to the note annexed to the interlocutor of 1st July 1873.

"A full proof, however, has now been taken, and the case falls to be disposed of on its merits as a concluded cause. The Lord Ordinary will advert as shortly as possible to the three leading questions upon which the whole case seems to turn.

"*First.* The Lord Ordinary is of opinion that the pursuer has failed to establish that the deed of discharge, No. 167 of process, was ever delivered to the pursuer as the pursuer's writ and evident. On the contrary, he thinks that it is clearly shown that that deed was never delivered to the pursuer, the pursuer having failed to comply with the conditions upon which alone delivery was offered.

"It seems plain enough, and is not disputed, that the voluntary trustee and the committee of the pursuer's creditors were at one time willing, on certain conditions, to grant the pursuer a personal discharge, that is, a discharge of the pursuer's person, or of his personal obligations, leaving all the creditors to rank upon the estate embraced in the voluntary trust, which, notwithstanding the discharge, was still to subsist. It was with this view that the deed No 167 of process was prepared and signed.

"But that deed was never delivered to the pursuer. Even upon the pursuer's own evidence, the Lord Ordinary thinks it plain that no delivery took place. Mr Mackenzie, who was acting for Mr M'Clelland, the trustee, did not deliver it absolutely and finally; but even upon the pursuer's own showing, insisted upon retaining it until Mr M'Clelland came in, and until some arrangement was made about a receipt. Mr Mackenzie did retain the deed, and the pursuer retained his money, and as the pursuer could not make any arrangement with Mr M'Clelland, the result was that he never paid the money, never complied with the conditions about the receipt or bill, and never got the deed.

"But though this seems plain, even upon the pursuer's own evidence, the matter is put beyond all doubt when the other evidence is looked to. Mr Mackenzie, by whom the deed is said to have been delivered, and who was the only party present at the alleged delivery, proves most clearly and distinctly that the deed was never delivered; and the Lord Ordinary must say that he attaches much more weight to Mr Mackenzie's evidence than to that of the pursuer, who is the interested party, and whose views cannot but be warped not only by his interest, but by the proceedings of the last nine years. The pursuer's unsupported evidence would never *per se* prove delivery, the deed being found in the hands of the granters, and the pursuer being flatly contradicted by Mr Mackenzie, Mr M'Clelland's cashier, on whose perfect credibility no imputation can be made.

"But when the real and written evidence is looked to, the matter becomes, if possible, still more clear. The letters which passed at the time show that rightly or wrongly the pursuer was required, as a condition of getting his discharge, to give up the receipt for Gray & M'Lardy's bill, and to grant a letter renouncing all claim on that bill. This the pursuer refused to do, and whether he was right or wrong in his refusal it stopped delivery of the deed of discharge. Then the pursuer's successive agents employed by him at the time, and acting for him, all admitted that the discharge had never been delivered; but, on the contrary, insisted that the pursuer was right in refusing to comply with the conditions which led to delivery being refused. The pursuer's formal notarial protest bears the same thing, and the pursuer's petition to the Sheriff for delivery, which is signed by the pursuer himself, and by the statements in which the pursuer must be bound, expressly bears that delivery of the discharge had been refused on pretence of certain conditions which the trustee was not entitled to make. Accordingly, the petitioner prayed, not for possession of the deed as already a delivered deed, but that the trustee, upon certain conditions, should be ordained to deliver it. This petition was refused by default, and this judgment *in foro* still subsists.

"It is needless to go over in detail the correspondence and proceedings. Everything shows that the deed of discharge was never delivered. The whole litigations and the whole disputes proceeded upon this footing, and it is only recently, and after the pursuer had met with an adverse vote in the subsisting mercantile sequestration, that he seems for the first time to have bethought himself of pleading that the deed was actually delivered, and this is abundantly proved not to have been the fact.

"Nothing turns upon the cancellation of the deed. It is proved by Mr Keyden, the agent in the trust, that it was cancelled by the granters, or by their authority, as an undelivered deed, the conditions on which it had been tendered not having been implemented. If the pursuer could have shown that the deed had been finally delivered to him, and that the cancellation was unwarrantable, the Lord Ordinary would have been disposed, even without any formal proving of the tenor, and upon special findings of the circumstances, to have set up the deed as still an uncancelled deed. He is inclined to think that this might be done as in an incidental proving of the tenor. But no such case, and no approach to such a case, has been made.

Second. The next question is, Are the defenders, or any of them, now bound to deliver the said discharge, or to re-execute a discharge in similar terms? The Lord Ordinary thinks they are not.

"There is, no doubt, in the voluntary trust-deed a power given to the trustee and committee to discharge the pursuer, but, waiving all questions as to action, and all questions as to how far individual creditors could ever be bound to grant

separate discharges, it is plain that the power to discharge was a power entirely in the discretion of the trustee and committee of creditors. They could not be compelled to grant a discharge. They might grant it or not as they pleased, but no right is vested in the pursuer to demand a discharge.

"Now, did the trustee and committee ever bind themselves finally to grant a discharge, either absolutely or conditionally? The Lord Ordinary thinks they did not. There is no obligation in the minutes, and none in the letters. The nearest approach to such an obligation is contained in the minute of the trustee and commissioners under the private trust, dated 23d June 1864. The minute bears:—'The meeting also instructed the trustee to call on Mr M'Alister to pay up the balance of the price of his stock-in-trade and furniture, as specified in the minute of 26th August 1862, and in the event of his doing so, to grant him a discharge of his person from the debts of the acceding creditors.'

"But, besides this instruction being strictly conditional, and that the pursuer has never complied with or fulfilled the condition, it is enough to say that the discharge here proposed to be granted is a mere personal discharge, reserving the whole debts as against the estate. The pursuer in the course of this debate, and all through the litigation, refuses to take any such discharge. What he wants is such a discharge as will extinguish absolutely the defenders' debts, so as to prevent them from ranking in his sequestration. His person is not threatened. He holds, it is believed, a personal protection, and the present defenders have all along expressed their willingness to forego any claim against his person. But this would not answer the end which the pursuer has in view.

"Besides, this obligation, even if binding at the time, is no longer so. The condition was not timeously implemented. The voluntary trust has come to an end, being superseded by the sequestration. Circumstances are no longer the same, and a conditional obligation, even if valid on 23d June 1864, cannot be enforced in 1874, against different parties than those by whom alone it was undertaken. But,

"*Third.* There still remains the pursuer's contention, that on implementing certain conditions, and in particular on paying up the balance of the price of his stock and furniture, the pursuer is still entitled to get, not from the trustee and committee, for there is no conclusion against them, but from the defenders, as individual creditors in the voluntary trust, a discharge extinguishing their respective individual debts.

"There are many answers to this demand, any one of which the Lord Ordinary thinks sufficient. For example:—

"No undertaking has been established against the defenders as individuals to grant any such discharge. The individual creditors can only be bound by the actings of the voluntary trustee and committee, and if no action would lie against the trustee and committee, none could lie against the individual creditors.

"The obligation being confessedly conditional, and the condition not having been timeously purified, the obligation is now at an end. It is absurd to maintain that an agreement which implied instant payment of the balance of the price, which balance was never paid, can be enforced after nine years' interval, and after a total change of circumstances.

"Even yet the pursuer has failed to prove that he has implemented, or has offered to implement, the condition. In the State, printed at page 12 of the record, it is alleged by the pursuer that he has overpaid the price of his stock and debts (all of which admittedly he got the full possession of) by the sum of £61, 19s. 3d.

"Now, without going into the somewhat complicated details of this accounting, it is enough to say that the pursuer has failed to instruct the following items of alleged discharge, viz.:—

	Value of stock claimed by Lamb & Sons, - -	£38	5	
1862,				
Aug. 8.	Of Joshua Brown's acceptance, unrecovered, -	5	19	8
	Tower & Arrol's bill, - -	38	1	6
Nov. 17.	Belongs to heritage, - -	6	18	9
Dec. 5.	Gray & M'Lardy's draft, which is part of the general estate left in the trustee, - - - - -	52	1	8
1863,				
Oct. 20.	Tower & Arrol, - - - -	8	18	0
		£150	5	4
	Balance of price of pursuer's stock still unpaid, - -	£88	6	1

To whom is this to be paid now, assuming the conditional agreement to be proved and still binding? Certainly not to the individual defenders; as plainly not to the voluntary trustee, who is displaced by the sequestration. If to anybody, it must be to the trustee in the existing sequestration. And yet the pursuer maintains that, on making this payment, or paying whatever sum may be still due, he is entitled to extinguish the defenders' debts, so as to prevent them from ranking in the sequestration, or participating in any of the funds. In truth, in no possible view is the pursuer entitled, except by full payment, to extinguish the defenders' debts. This was never intended. The defenders were still to rank upon and participate in the voluntary trust; and, as the sequestration took over the whole trust-estate, and in particular the large very valuable heritable estates under all its burdens, the defenders must be entitled to rank and vote in the sequestration just as they would have been entitled, even if the discharge had been delivered, to rank and vote in the voluntary trust

"Without going into more detail, the Lord Ordinary thinks the pursuer has entirely failed to make out any of the alternative branches of his case."

The pursuer reclaimed.

At advising—

LORD PRESIDENT—My Lords, I must regret that so extensive and so expensive a litigation should have taken place to no purpose, but I really do not see my way to giving any redress to the pursuer such as he seeks. To my mind there is the greatest difficulty in giving decree in terms of the summons; but I do not rest my judgment upon that; I should be most unwilling to decide such a case as this upon so purely technical a ground. A private trust was created in 1862 by a trust-deed by the pursuer, and by deed of accession by the creditors, and that trust has come to an end. It did subsist for a few years but its purpose was never carried out, that is to say, the estate was not realised and divided,

Before that object was attained the trust was utterly extinguished and destroyed for any purpose whatever, and that extinction and destruction was caused by the debtor's own act in applying for sequestration, the effect of which was to divest the trustee under the private trust and transfer the whole estate to the trustee appointed under the sequestration. Now the real question is, whether the pursuer is entitled now, in 1874, to obtain a discharge such as that which was prepared and executed in 1864? An answer to that question is to be found in the statements which I have already made, that the trust is at an end, extinguished and destroyed. Nothing can be done under it, either in the way of dividing the property or discharging the pursuer; everything must be done under the sequestration, and there can be no division or anything else except in the process of sequestration. It is possible that the discharge, if delivered, might have been good and available if delivered in 1864, but it never was delivered. There were certain conditions, on compliance with which by the pursuer his creditors promised to deliver the discharge, but those conditions were not complied with. We cannot go into the question whether they were reasonable or not; but whether they were it was only on compliance with them that the delivery of the discharge was promised. I do not think the pursuer can take any benefit from the cancellation of that document; on the contrary, if we were to give any effect to it at all, it would operate rather strongly against the creditors; but I do not think it has any effect. I take the case on the footing that the deed is not cancelled and is still in the hands of the trustee uncancelled and undelivered, and I hold it to be now impossible to deliver it *cum effectu*. I am of opinion that the Lord Ordinary is right, and that the defenders ought to be assoilzied.

Lord Deas—I think, with your Lordship, that this litigation is greatly to be lamented, and that no effect can be given to the cancellation of the deed, which was an irregular and indefensible act on the part of the trustee. But that does not go very deep into the merits of this case; and I should feel great difficulty in holding that the summons does not contain conclusions which, if the pursuer had been right on the merits, might not have been given effect to. They are much endangered, however, by those other portions of the summons, which are extravagant and inconsistent. I think, for instance, that it is a good enough conclusion that the pursuer was personally discharged in the only way in which such a deed ever does discharge a debtor, and that is personally, and therefore it might have been found that he was so discharged. It might also be said that he could maintain and show that he ought to have got delivery of the discharge at the time it was executed, and so ought to get it now. If there was enough in the writings which passed between the parties in June 1864 to give ground for such a contention, the promise might have been made on the footing of immediate payment; but still, on the other hand, it might be that he was entitled to get the deed as soon as he had made payment of the £700, so if he could show that he had done so, he might have argued that he ought to get the deed. Nor was his case on the merits desperate. However in October 1866 he makes an application for sequestration and obtains it. Now if this had been a case where the creditors had applied for sequestration the case might have been different, but it was himself, and he surely must have done it on the footing that he was not discharged. Supposing that he had got delivery of the deed of discharge in 1864, he would have had no ground for applying for sequestration. The strong thing which I cannot get over is, that there was a dispute between the parties as to whether or not he had implemented the condition, the creditors denying that he had done so, and he maintaining that he had. He asserted that he was discharged by that deed, but when he applied for sequestration he must have done so on the footing that he was not discharged. His application was an admission on his part—a judicial admission—that they were right and he was wrong, and to my mind it is conclusive.

Lord Ardmillan—I think there is very little room for doubt that the discharge was never delivered. There seems to have been a condition attached to it, but I do not go into the question whether it was implemented or not; but however that may have been, the discharge was only to be given on that condition. I am satisfied that the cancellation of the deed was illegal and irregular, but even though we hold the deed to be in existence uncancelled and undelivered, the question is whether or not it can be put in force now. I am of opinion that when the pursuer applied for sequestration he must be held to have meant to transfer his whole estate to the statutory trustees, and that thereby the private trust fell. It is out of the question now to set up this discharge so as to exclude the creditors under the private trust. I agree with the Lord Ordinary in the result he has come to, though I cannot altogether concur in all his remarks.

Lord Jerviswoode concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for the pursuer against Lord Gifford's interlocutor, dated 27th January 1874, Recal the said interlocutor; find that the pursuer has failed to prove that the deed of discharge, No 167 of process, was ever delivered to him: Find that by force of the sequestration of the pursuer's estates awarded on 11th October 1866, on the application of the pursuer himself, the trust constituted by the deed granted by the pursuer on 11th August 1862 and relative deed of accession has been superceded, and that neither the trustee under the said trust nor the defenders, as acceding creditors, can now be called upon to grant or deliver any deed of discharge to the pursuer: Therefore assoilzie the defenders and decern: Find the defenders entitled to expenses, but modify them to one-half of the taxed amount thereof: Allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Pursuer—J. Campbell Smith and M'Kechnie. Agents—Drummond & Mackenzie, S.S.C.

Counsel for Defenders—Dean of Faculty (Clark) and J. M. Duncan. Agent—David Dove, S.S.C.