Observed that it is not a ground sufficient to disqualify a magistrate from performing the duties of returning-officer at a burgh election that he has taken an active part in promoting the return of particular candidates.

The petitioners in this case were Peter Keir, provost of the burgh of Musselburgh; J. T. Riddock and William Brown, two of the bailies of the said burgh; and A. D. Macfarlane, the town-clerk.

At the election of councillors which fell to take place on 1st November 1881, Provost Keir and Bailie Riddock were included in the third of the council who had been longest in office, and fell to go out of office by rotation as provided by the statutes regulating the election of burgh councillors (3 and 4 Will. IV., cap. 77, sec. 12). Under the statutes regulating municipal elections, and particularly under the 3 and 4 Will. IV., cap. 76, secs. 8 and 10, Bailie Meikle, the remaining bailie, as next senior magistrate, was appointed to act as returning-officer on the day of election. Bailie Meikle, however, declined to act. On 24th October current he addressed the following letter to the petitioner Macfarlane: — "The Hollies, Musselburgh, Oct. 24th, 1881.—Dear Sir,—Looking at the present aspect of affairs, I think it would be injudicious on my part to act in the capacity of returning-officer at the ensuing election. You will therefore be pleased to intimate to the Council my declinature to so act, so that steps may be taken to provide against the contingency.—Yours truly (Signed) A. MEIKLE."

While 15 and 16 Vict., cap. 32, sec. 5, provided for the case of all magistrates of a burgh going out of office, there was no provision in any of the statutes regulating the election of burgh councils for the case of the senior magistrate remaining in office and refusing to discharge the duties thereby devolving upon him. In these circumstances the petitioners appealed to the *nobile officium* of the Court, and prayed the Court "to authorise and appoint the said William Brown [who was the magistrate next in seniority to Bailie Meikle] to act as returning-officer at the said election of councillors of the burgh of Musselburgh on first November 1881, to superintend the poll, and otherwise conduct and manage the said election in the same way and with the same powers, rights, and functions as if he were senior magistrate; and further, to find that the expenses incurred in presenting this application, and consequent thereto, shall form a good and lawful charge against the funds of the said burgh; or to do further or otherwise in the premises as to your Lordships shall seem proper."

It was stated by counsel that Bailie Meikle declined to act as returning-officer because he was taking an active part in promoting the return of particular candidates.

At advising—

LORD PRESIDENT—We are not favoured with the reasons which prevent Mr Meikle from performing his statutory duties, and that is a little embarrassing, because magistrates of burghs are not entitled to decline to perform the duties that were laid upon them by Act of Parliament. But it has been explained to us that Mr Meikle has been taking a very active part in the election of particular councillors. Now, I am quite clear that this is not a sufficient disqualification, because the statute must have contemplated that the provost and bailies would take an active interest in the return of particular candidates, and do what they could to promote their election, and yet it has laid upon them this duty. Therefore I cannot hold this to be a disqualification. But in the particular circumstances of this case, and looking to the fact that the gentleman whom it is proposed to substitute for Bailie Meikle is the person whom the statute itself chooses for that purpose, I am rather disposed to grant the prayer of this petition.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

The Court granted the prayer of the petition.

Counsel for the Petitioners—Lord Advocate (Balfour, Q.C.)—Dickson. Agent—A. D. Macfarlane, Solicitor.

Tuesday, November 1.

SECOND DIVISION.

[Lord Rutherfurd-Clark, Ordinary.

COLLIE (CHIVAS' TRUSTEE) *v.* COLLIE AND OTHERS.

Succession—Will—Legacy—Ranking of Legacies—Demonstrative Legacy.

A testatrix left a settlement and several codicils. By one of these she bequeathed £1000 to a beneficiary, to be set apart and invested for that beneficiary out of the free residue remaining of her estate after paying legacies contained in writings "prior to the date hereof." *Held* (1) that this did not constitute the £1000 a demonstrative legacy to be paid out of the fund so marked out; (2) that (*rev.* Lord Rutherfurd-Clark) legacies subsequent in date to it, but containing no mention of residue, were not preferable to it, but fell to be ranked *pari passu* with it.

Mrs Christian Abercrombie or Chivas died in Aberdeen in November 1878, leaving a trust-disposition and settlement with eighteen codicils thereto, which latter were dated at various times between July 1872 and April 1877. The trust-disposition and settlement had for its purposes payment of debts and of legacies therein mentioned and to be mentioned by separate writings under her hand, the gift of a liferent to certain beneficiaries, and disposal of residue. Among the codicils was one of date March 16, 1875, whereby the testatrix, on the narrative of the settlement and preceding codicils, and of her desire to make certain bequests "should there be a sufficiency of funds after meeting the whole of the gifts, legacies, and provisions" already bequeathed, directed her executor in that event, "out of the residue of my said estate, to make payment of a legacy of £100 sterling to Miss Jane or Jeanie Adam," and also to invest a sum sufficient to yield certain small annuities to the poor of certain parishes named. Thereafter she left other legacies by codicils, dated in December

1875 and March 1876, and on January 2, 1877, executed another codicil, in which she directed her trustee, "after paying and making provision for the whole legacies, bequests, and annuities" directed in the settlement and previous codicils "executed by me prior to the date hereof, to set apart and invest from the free residue thereafter remaining of my whole means and estate" a sum of £1000 in favour of Miss Rachel M'Leod. On February 27, 1877, and April 23, 1877, she executed two other codicils, by which various persons were favoured, and in particular by the first—that of February 1877 — she left "an additional sum of" £400 to Miss Jeanie Adam. The estate having proved insufficient to meet the whole legacies, and doubts being felt as to the order of preference of the various legacies, a multiplepoinding was raised by the trustee, and claims were lodged by the legatees above described and others. After hearing parties, the Lord Ordinary (Lord Rutherfurd-Clark) pronounced an interlocutor finding the whole legacies contained in the settlement and codicils entitled to be ranked *pari passu*, except the legacies of March 16, 1875, January 2, 1877, and February 23, 1877, above quoted, which legacies he found ought to be postponed to the whole other legacies left by the testatrix. These three legacies he found entitled to be ranked in the following order—First and *pari passu*, those in the codicil of March 16, 1875, together with the legacy of £400 to Miss Adam, and thereafter, after satisfaction of these legacies, the legacy of £1000 to Miss M'Leod contained in the codicil of January 2, 1877.

Miss M'Leod reclaimed, and argued—By "residue" in the codicil of January 2, 1877, under which the claimant was favoured, was only meant the remainder after paying legacies "prior to the date hereof." It was the fund "thereafter remaining" after paying the legacies. It was a question of intention, and the Lord Ordinary was wrong in holding that the testatrix meant general residue, thereby placing Miss M'Leod's legacy in a less favourable situation than those of later date. The word "additional" in the legacy of £400 to Miss Adam had not the effect of making that legacy like her previous legacy of £100 preferable to the reclaimer's legacy of £1000. But further, the reclaimer ought to be ranked not only *pari passu* with, but preferably to, the legacies of later date. Hers was a demonstrative legacy out of a marked-out fund—the remainder after paying legacies prior to its date. That made it preferable to those of February and April 1877, to which the Lord Ordinary had postponed it — 2 White and Tudor's Leading Cases, 244.

Argued for Miss Adam—The legacy of £400 was "in addition to" that of £100 by a codicil prior to the date of, and admittedly preferable to, that of Miss M'Leod. In such a case the added gift is, in the absence of intention to the contrary, to be taken with the conditions of, and in the same order with, that to which it is added. The £400 legacy was therefore preferable to that of Miss M'Leod—Roper on Legacies, 4th edit. 873; and cases of *Leacroft*, 1 Vesey Jun. 279, and *Crowder*, 2 Vesey Jun. 449, there referred to.

At advising—

Lord Justice-Clerk—This case has been well argued. Though many authorities might have been quoted, counsel have with great judgment treated the case as a pure question of intention. The impression I have formed is that in so far as the Lord Ordinary has preferred the legacies under the codicil of February 27, 1877, and April 23, 1877, to the legacy to Miss M'Leod of January 2, 1877, he has not given effect to the meaning of the testatrix.

I think the line was intended to be drawn once for all at January 2, 1877, and I think the testatrix never intended that the subsequent legacies should interfere with the legacy of January 2, 1877. All this mass of codicils is to be read as one settlement. No doubt the words which introduce the codicil of January 2, 1877, would, if all the codicils had been written at the same time, control all that followed. There was no reason for postponing Miss M'Leod to all the other legatees. I think the Lord Ordinary has drawn too fine a distinction in holding that the legacies under the two latest codicils are preferable to that of Miss M'Leod. As to the words "in addition" to the previous legacy to Miss Adam, it is entirely a question of intention, and I think they mean "not in satisfaction." I am for altering the judgment of the Lord Ordinary to the effect of making Miss M'Leod's legacy rank *pari passu* with those of February and April, to which the Lord Ordinary has postponed it.

Lord Young—I concur. It is provided by the codicil of January 2, 1877, under which Miss M'Leod takes, that the legacy thereby given to her is to be paid out of the residue remaining after paying and making provision for the whole of the legacies by the principal will and the codicils executed "prior to the date hereof." That gives a preference to the legacies by the original will and by the codicils prior to January 2, 1877.

But the material question is, whether a preference is also given to the legacies by the subsequent codicils, so that Miss M'Leod, taking under the codicil of January 2, 1877, is to be postponed not merely to the legacies by the prior, but also to those by the subsequent codicils. I think there is nothing to lead us to that result. But for the words postponing her to the prior codicils she would not be postponed at all, but be ranked *pari passu* with all the other legatees. What is there then to postpone her to those claiming under the codicils subsequent to that of January 2, 1877? Nothing at all but this, that the subsequent codicils say nothing of payment after satisfying legatees in the legacies prior to Miss M'Leod's. But these come after that date, January 2—one of them in February and one in April. What does the difference in date between January and April signify; still less can that between January and February. It would be the same question if the codicils had been written on the same day. The only words of postponement are those which postpone Miss M'Leod to the legatees under codicils prior to January 2, 1877. Had there been such words in the subsequent codicils, then, indeed, their dates might have mattered. But there are none. The result therefore is that the testatrix provides that the legacies prior to January 2, 1877, shall be satisfied first, that then out of the residue existing after that Miss M'Leod shall have £1000, and the other legacies paid, but all out of the fund left after such payment to legatees under legacies prior to January 2, 1877. These legacies therefore subsequent to that date

should all be paid *pari passu*. As to Miss M'Leod's claim to a preference as having a demonstrative legacy—that is, a legacy out of a particular fund—I think there is nothing in it. Here the fund to pay all the legacies is just that which remains after the preferable legacies are satisfied. They are all demonstrative legacies, since all that is needed to satisfy the definition of that kind of legacy is that there should be an intention on the part of the testator that a legacy be paid out of a particular fund. I think therefore that there should be no preference among the legacies of January 2, 1877, and subsequent legacies, and am for altering the interlocutor to the effect of making them rank *pari passu*.

Lord Craighill concurred.

The Court altered the interlocutor reclaimed against, and found the legacies of January 2, February 27, and April 23, 1877, payable *pari passu* out of the fund *in medio*, after satisfaction of the legacies prior in date to January 2, 1877.

Counsel for Reclaimer—J. P. B. Robertson—Maconochie. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Claimants Miss Adam and Others—W. Campbell. Agent—R. C. Gray, S.S.C.

Counsel for Real Raiser and Remaining Claimants—J. A. Reid. Agents—R. C. Gray, S.S.C.; W. J. Cook, W.S.; F. J. Martin, W.S.; Paterson, Cameron, & Co., S.S.C.

Tuesday, November 1.

SECOND DIVISION.

[Lord Adam, Ordinary.

REID AND ANOTHER *v.* M'PHEDRANS.

Succession—Will—Substitution under a Condition where Condition does not come into effect—Power of Disponee to Defeat by Will Right of Person conditionally Substituted.

A testator executed a general conveyance of his estate to "his beloved friend A. M.," declaring the conveyance to be under the express condition that should A. M. not by writing under his hand explicitly declare that the property thus taken by him should form part of his own means and estate and descend to his heirs, the children of a brother of the testator who should be alive at A. M.'s death should receive from A. M.'s estate "the full amount of my whole means and estate hereby disponed to him, it being my wish and intention that whatever he may receive in virtue of these presents shall be completely and effectually at my friend's disposal." A. M. having died, leaving a *mortis causa* deed bearing to exercise the power thus conferred, by declaring that the estate thus left to him should belong to his own heirs, a niece of the testator raised an action to have the estate handed over to her, on the ground that the deed of testator was invalid to confer more than a liferent on A. M., in respect that it was an attempt to confer on A. M. the power of making a will for another. She concluded also for reduction, if necessary, of the declaration by A. M. *Held* that the deed of the original testator was merely a substitution under a condition, and that the condition having never come into operation, the pursuer had no right under the will.

Process—Proof—Party declining to Lead Proof in respect of Refusal of Commission to Examine a Necessary Witness.

Circumstances in which *held* (*diss.* Lord Craighill) that a party who had, in consequence of a refusal by the Lord Ordinary to allow a commission to examine an important witness abroad, declined to proceed with other proof, and taken a judgment on the action without such proof, was not thereafter entitled to a fresh allowance of proof.

Andrew Inglis, writer in Greenock, died on 5th October 1849. He was never married. He left a will, dated in 1841, consisting of a general conveyance "to my beloved friend Alexander M'Culloch of Craigbet" of his whole estate, heritable and moveable, "declaring always, as it is hereby expressly provided and declared, that these presents are granted and to be accepted of by my said disponee under this condition and stipulation, that should he not, by writing under his hand, expressly declare that what he may succeed to and receive in virtue of these presents is to form part of his own means and estate, and belong to his own heirs or disponees, then and in that case such of the children of my deceased brother John as may be alive at the time of the decease of the said Alexander M'Culloch, shall receive from his means and estate, or heirs and disponees, the full amount of my whole means and estate hereby disponed to him, it being my wish and intention that whatever he may receive in virtue of these presents shall be completely and effectually at my friend's disposal, and used by him for his own purposes, but that on his death the children of my said deceased brother John shall be entitled to receive from my friend's estate the amount so received, unless my said friend shall, by a writing under his hand, explicitly declare the said children shall have no such claim; and under the condition and stipulation before written, I do hereby nominate and appoint the said Alexander M'Culloch my sole executor and universal intromittor with my moveable means and estate, with power to expede confirmation, and all other titles necessary, reserving always my own liferent, use, and enjoyment, and full power and liberty to sell, use, and dispose, of the whole means and estate hereby disponed, and power also to revoke these presents in whole or in part as I may think proper, dispensing with the delivery hereof." The estate left by Inglis consisted mainly of heritable property in Greenock. M'Culloch was a physician in Greenock who was for many years on intimate terms with Inglis. In 1851 M'Culloch, who was then fifty-five years of age, executed a writing, which after narrating the terms of the will by Inglis, proceeded thus—"And now seeing that it is the will and desire of me the said Alexander M'Culloch that the whole means and estate, heritable and moveable, conveyed to me by the said disposition and settlement, should form part of my own means and estate, and belong to my own heirs or disponees, therefore I do hereby, in exer-