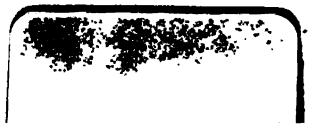

DECISIONS

OF THE

COURT OF SESSION,

FROM 12TH NOVEMBER 1834 TO 11TH JULY 1835;

REPORTS

OF THE

JURY SITTINGS FROM 13TH MARCH TO 29TH JULY 1835,

AND

CASES DECIDED IN THE HIGH COURT OF JUSTICIARY,

FROM 24TH JANUARY TO 22D JUNE 1835.

COLLECTED BY

J. TAWSE, J. CRAIGIE, AD. URQUHART AND G. ROBINSON, ESQUIRES, ADVOCATES.

BY APPOINTMENT OF THE FACULTY OF ADVOCATES.

EDINBURGH:
PRINTED FOR ADAM AND CHARLES BLACK,
NORTH BRIDGE.
1835.

James Walker, Printer,
6. James's Court, Lawnmarket,
Edinburgh.

JUDGES

OF THE

COURT OF SESSION,

DURING THE PERIOD OF THESE REPORTS.

FIRST DIVISION.

Right Honourable CHARLES HOPE, Lord President.
DAVID ROBERTSON WILLIAMSON EWART, Lord Balgray.
ADAM GILLIES, Lord Gillies.
JOSHUA HENRY MACKENZIE, Lord Mackenzie.

Lords Ordinary.

GEORGE CRANSTOUN, Lord Corehouse.
JOHN FULLERTON, Lord Fullerton.

SECOND DIVISION.

Right Honourable DAVID BOYLE, Lord Justice-Clerk.
SIR WILLIAM MILLER, Bart. Lord Glenlee.
ALEXANDER MACONOCHIE, Lord Meadowbank.
JOHN HAY FORBES, Lord Medwyn, who succeeded Lord Cringletie, upon his resignation in November 1834.

Lords Ordinary.

SIR JAMES WELLWOOD MONCREIFF, Bart. Lord Moncreiff.
FRANCIS JEFFREY, Lord Jeffrey; who became an Ordinary of the Second Division on the removal of Lord Medwyn to the Inner House.

Lord Ordinary on the Bills, &c.

HENRY COCKBURN, Lord Cockburn, promoted to the Bench upon the resignation of Lord Cringletie.

JOHN HOPE, Esq. *Dean of Faculty.*
JOHN ARCHIBALD MURRAY, Esq. *Lord Advocate,* succeeded, upon his resignation in November 1834, by
SIR WILLIAM RAE, Bart. who resigned in April 1835, when Mr MURRAY was reappointed.
ANDREW SKENE, Esq. *Solicitor-General,* succeeded Lord Cockburn on his promotion to the Bench. Mr Skene resigned in November 1834, and was succeeded by
DUNCAN M'NEILL, Esq. who resigned in April 1835, and was succeeded by
JOHN CUNINGHAME, Esq. *

* Mr Skene died, deeply regretted by the profession, in April 1835.

INDEX OF NAMES.

* Printed Lauder in report.

DECISIONS

OF THE

COURT OF SESSION.

FIRST DIVISION.

No. I. 12*th November* 1834.

DONALD STEWART, Judicial Factor on the Estate of Harris, *against* ALEXANDER M'RA.

Tack.—(Meliorations).—Landlord and Tenant.—Heritable Creditor.—*A tenant having right to meliorations, at the termination of his lease, is entitled to retain the amount of these from the last year's rent, in so far as expressly authorised by the lease, but not as authorised by separate obligation, against a judicial factor in a ranking and sale demanding payment of the rent.*

Archibald M'Ra, the defender's father, possessed part of the estate of Harris, upon a lease for nineteen years from Whitsunday 1814. Upon his death he was succeeded by his son, the defender, who continued in possession during the remainder of the lease. The lease contained the following clause: 'Further, it is hereby declared, that the said Archibald M'Ra, and his foresaids, shall have 'liberty to build a dwelling-house and stone-dikes upon the lands 'hereby set, and that at the expiry of the present lease, he or they 'shall receive payment for the same, but that only on the express 'condition that the said dwelling-house is built of stone and lime, 'and slated, and that the dikes are sufficient stone-dikes; and it

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'is declared that fanks for sheep are to be paid for as stone-dikes: 'which dwelling-house and dikes are to be valued by persons mu- 'tually chosen by the parties at the expiry of this lease: and it 'is declared, that the claim of the said Archibald M'Ra, and his 'foresaids, for building such dwelling-house and dikes, is on no ac- 'count to exceed the sum of L.300 sterling, and that the said 'Alexander Norman Macleod, and his foresaids, shall be liable to 'that extent only, and for no greater sum, on any account what- 'ever; and also, that it shall be in the power of the said Archibald 'M'Ra, and his foresaids, to build houses necessary for the accom- 'modation of the shepherds; which houses, if they are built of stone 'and clay, and left in good repair at the expiry of this lease, are to 'be valued in manner foresaid, and to be paid for by the said Alex- 'ander Norman Macleod, and his foresaids, over and above the 'expense of the buildings before mentioned.'

In 1822 the following farther agreement was entered into between the pursuer, as factor for the proprietor of Harris, and the defender: '*Rodil, 20th July* 1822.—DEAR SIR, In consequence of 'your application to me respecting breaking the falls of the river 'Bunavinsidh, so as to allow salmon up that rivulet, Mr Robertson 'of Edinburgh, the accountant for the estate of Harris, and I, agree 'that you will begin said improvements forthwith; and as we con- 'sider it beneficial for Harris's interest to get this done, it is agreed 'on that you will be allowed L.12 sterling, as meliorations for said 'improvement, at the expiry of your lease, provided the salmon will 'surmount the fall up the stream; and in the event of your failing 'to execute the improvement complete, you will be allowed L.6 'sterling, on giving it a fair trial. I, however, expect you will be 'able to get the job executed. I am, &c. (Signed) DONALD 'STEWART, factor for Harris. To A. M'RA, Esq. tacksman of 'Hushinish.'

In the course of the lease a dwelling-house, and other buildings and dikes, were erected by the tenant, and the falls on the river were broken so as to allow the salmon to get up.

A process of ranking and sale having been brought of the estate of Harris, the pursuer was appointed judicial factor, and in that character raised the present action against the defender, concluding for payment of the balance of the rent for the last year of the lease. In defence, the defender stated, that he was entitled to retain the rent in payment pro tanto of the meliorations allowed by the lease.

Pleaded for the pursuer—

As the houses and dikes were built during the possession of the

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Stewart v. M'Ra.

Pursuer's Pleas.

estate by Mr Macleod, the proprietor, the claim for meliorations can only be enforced against him and his heirs, and the defender cannot found upon the obligations in the tack, to the effect of entitling him to retain his rent in a question with creditors, or a singular successor. The agreement entered into by the letter of 1822, being founded on a separate obligation from the tack, cannot affect creditors or singular successors; and, at any event, such claim cannot include any buildings or meliorations not expressly authorised by the tack.

Answered for the defender

Defender's Pleas.

The meliorations in question being capable of being instantly liquidated, and falling due at the same time with the rents claimed, these rents may be retained by the tenant in security or satisfaction of his claims, in virtue of his lease, or other obligations granted by the landlord.

The pursuer is liable in payment, both of the meliorations on the farm let to the defender, stipulated in the original lease, and also of the sum stipulated to be paid by the separate obligation of 1822, both being obligations connected with, and having reference to the estate itself; and the pursuer, as representing the creditors of Mr Macleod, having derived the benefit of these operations, the obligation is equally effectual against Mr Macleod, and against all parties deriving right from him; Arbuthnot *v.* Colquhoun, 5th Feb. 1772, *M.* 10,424; Morrison *v.* Patullo, 3d Feb. 1787, *M.* 10,425; Bell *v.* Lamont, 14th June 1814; Stotts *v.* Earl of Selkirk, 20th Feb. 1817; Gordon *v.* Gordon, 8th Feb. 1820.

The Lord Ordinary pronounced the following interlocutor:

'The Lord Ordinary having heard parties' procurators, and considered the closed record and process, finds, That the defender is entitled to retention of the amount of the meliorations authorised by the clause of his lease: Finds, That neither the claim for the manager's house and store-house, nor for breaking the falls of the river Bunavinsidh, fall under that description; but, in respect that, independently of those two articles, the meliorations, as ascertained by the valuators, exceed the sum of rent now pursued for, sustains the defences, and assoilzies the defender from the conclusions of the libel: Finds no expenses due to either party, and decerns.'

Note.—'The question here is, whether a tenant's claim for meliorations, exigible under his lease at the expiration of his possession, is good against a judicial factor in a ranking and sale; or, as

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'the averments on the part of the pursuer substantially imply, against 'heritable creditors who have entered into possession in virtue of 'their securities. The question, in so far as the Lord Ordinary 'knows, has never been expressly decided; but it is now fixed that 'a claim of the same kind is good against a singular successor, and 'the Lord Ordinary does not see any good grounds for applying a 'different principle to the case of a judicial factor or heritable cre-'ditor entering into possession, and holding that possession at the 'expiration of the lease.'

Judgment.

The pursuer *reclaimed*, and the *Court* adhered, but, at the request of parties, remitted the claim as to the manager's house and store-house to the Ordinary.

Opinion of Court.

Lord Balgray.—This is a question of some importance, but I think the interlocutor right. There are three classes of persons who may be interested in a question like the present,—purchasers, heritable creditors, and heirs of entail. In regard to purchasers, the articles of sale generally stipulate an exemption of the current leases from the warrandice. It is of course the purchaser's duty, as well as his interest, to satisfy himself as to the stipulations of existing leases, which may materially affect the price to be paid. Although heritable creditors do not stand in precisely the same situation, yet the principles applicable to them are the same. A person lending money is presumed to have satisfied himself of the sufficiency of the security, and must be held to have examined the leases, and their conditions. In this respect he is in the same situation as a purchaser, with this difference, that he leaves the proprietor in full possession, and with a power to grant leases and exercise every other rational act of ownership. The proprietor is bound to act for the interest of the heritable creditor as well as for his own, and he is bound to do so fairly. If he grants a collusive lease, for the purpose of injuring the heritable creditor, then the heritable creditor may be entitled to reduce it; but if the proprietor grants a lease with the ordinary, prudent and necessary clauses, they will be effectual against the heritable creditor in the same way they would be binding on the proprietor. There is nothing unusual in the stipulation for meliorations in this lease: they were for the advantage of the property, and therefore I can see no ground why the tenant's claim for these should not be as good against an heritable creditor as against the proprietor.

Lord President.—An heritable creditor is entitled to call for inspection of all the leases, and he must be presumed to have done so before he lent his money. The proprietor is left in possession of

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the estate, and is entitled to exercise every prudent and rational power as proprietor, and every such act of administration of his will be equally binding upon an heritable creditor.

Lord Mackenzie concurred.

Opinion of Court.

Lord Gillies.—There is a strong analogy between an heritable creditor and a purchaser. Both must look to the value of the estate. A purchaser just pays so much less price if he sees that, by the current leases, he will have meliorations to pay for; and an heritable creditor just deducts that from the value of his security, or lends so much less upon the property, the claim for meliorations so far diminishing the rental. The proprietor being in possession, must have power to act for the heritable creditors; and so long as he does so bona fide, and in the ordinary exercise of ownership, his acts must be binding on an heritable creditor: the interest of both parties is the same. The case would be different if it could be shewn that the proprietor was acting in mala fide; but there is nothing of that kind here.

Lord Fullerton, Ordinary. Act. *Dean of Fac. (Hope,) Ad. Anderson. Dickson & Stewart*, W. S. Agents. Alt. *Jameson, Moir. Inglis & Donald*, W. S. Agents. *B.* Clerk.

T.

FIRST DIVISION.

No. II. 12*th November* 1834.

DONALD STEWART
against
MRS ANN CAMPBELL.

THIS was a case similar in its circumstances to the preceding one. The defender was also a tenant on the estate of Harris. The lease was granted to the defender's author in 1770, for forty-two years, and of course did not terminate till 1812; but in 1805 a new lease was entered into for thirty years from and after 1804, which stipulated, that at the expiry of the lease the tenant should be entitled to 'such reasonable sum, by way of meliorations, as may have 'been already laid out under the former lease, or that may be laid 'out by them, during the currency hereof, in building or repairing

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'proper dwelling-houses or office-houses on the said lands and 'others,' &c.

The house and offices were erected during the former lease, and in 1813 they were completely repaired. The tenant had also built a mill, and in 1818 the proprietor wrote to her: 'I this day re-'ceived your missive letter regarding the mill you built at Oab, 'and hereby signify my full approbation of the sufficient manner in 'which it is built. I accordingly hereby, by this my missive letter, 'bind and oblige myself, my heirs, executors or assignees what-'somever, to pay back to you the expense of building said mill, say 'L.230, at the expiration of your tack of the lands you hold from 'me, provided you uphold and deliver over to me the said mill in 'the same good order it now stands.'

The tenant, as in the former case, pleaded retention of the rent to meet these meliorations, and the Lord Ordinary found, 'that 'the defender is entitled to the amount of the meliorations specified in the clause of the lease 1805: Finds, That the claim for the 'value of the mill erected by the tenant does not fall under that 'description.'

Judgment. And to this interlocutor the *Court* adhered.

Lord Fullerton, Ordinary. Act. *Dean of Fac. (Hope,) Ad. Anderson.* *Dickson & Stewart*, W. S. Agents. Alt. *Rutherfurd, Moir.* *J. Arnott*, W. S. Agent. *B.* Clerk.

T.

SECOND DIVISION.

No. III. 12*th November* 1834.

THE UNIVERSITY OF GLASGOW *against* THE FACULTY OF PHYSICIANS AND SURGEONS OF GLASGOW.

COLLEGE.—*Persons holding degrees or diplomas in surgery from the College of Glasgow are not entitled to practise surgery within the bounds over which the privileges of the Faculty of Physicians in Glasgow extend, without undergoing an examination and receiving a licence from the Faculty.*

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University of Glasgow v. Physicians and Surgeons of Glasgow.

THE Faculty of Physicians and Surgeons of Glasgow was constituted by charter of King James the Sixth, in 1599, with certain powers and privileges, for the purpose of regulating the practice of surgery in the burghs of Glasgow, Renfrew and Dumbarton, and sheriffdoms of Clydesdale, Renfrew, Lanark, Kyle, Carrick, Ayr, and Cunningham. In virtue of this grant, which was at different times ratified in Parliament, and recognised by decisions of the Court as conferring on the grantees the privileges of a corporation, the Faculty exercised the right of examining, licensing and exacting certain customary fees from all persons desirous of practising surgery within the bounds above specified. They were also empowered by their charter to interdict and prevent any person from practising medicine within the said bounds, 'without ane testimo-'nial of ane famous universitie quhair medicine is taught, or at the 'leave of oure and oure dearest spouse chief medicinaris.'

Acting under the authority of this charter, the said Faculty of Physicians and Surgeons raised an action, in 1814, to interdict Dr James Steele and others, who had obtained degrees as doctors of medicine from the University of Glasgow, from practising surgery within their bounds, without passing an examination with them. And in this action they obtained decree on the 26th February 1819, finding, 'that in virtue of the diplomas and other testimonials pro-'duced by the defenders, James Steele, &c. these parties are autho-'rised, without challenge, to practise medicine within the district 'specified in the royal grant founded on by the pursuers;' but 'that no person can, within the said district, practise surgery, or 'carry on the business of an apothecary or druggist, without such 'an examination as is there prescribed.'

The University of Glasgow, at the time when the royal grant was first made to the Faculty of Physicians and Surgeons, and for more than two centuries afterwards, was not in the practice of granting any degrees or testimonials in surgery, as distinguished from medicine; but in the year 1810, during the dependence of the action with Dr Steele and the other medical graduates, the University commenced to hold examinations, and to grant degrees of masters in surgery; and several persons holding these degrees entered on the practice of surgery, within the bounds specified in the royal grant to the Faculty of Physicians and Surgeons, without entering with or undergoing an examination by that body.

The Faculty thereupon raised an action of suspension and interdict against Mr John Macmillan and others, who had obtained these degrees of master in surgery from the University, to prohibit them from exercising that profession within those limits; and the University of Glasgow, on the other hand, raised an action of de-

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clarator against the Faculty, to have it found and declared, that their degrees or testimonials of skill in surgery authorised the holders thereof to practise in that department of the medical art, in the same way as a degree of M. D. authorised the holder to practise in medicine properly so called.

The actions were conjoined, and the Lord Ordinary took them to report on cases, in which

Pursuers' Pleas.

The pursuers (the University of Glasgow) *pleaded*—1st, That the royal grant of 1599 being posterior to the foundation of the University, could not be so interpreted as to infringe on the rights inherent in the college as an university to grant degrees, which, being testimonials, from a duly qualified body, of proficiency in the several acts and sciences in which they are held, conferred upon the holders at common law the right of practising these professions in every part of the country; and, 2dly, That, at all events, as the grant made an exception in favour of persons who held degrees or testimonials from a famous university, authorising them to practise medicine, a degree in surgery, being a branch of the medical art, must equally qualify the holders of that degree to practise the particular department of the art in which they have obtained a testimonial of skill.

Defenders' Pleas.

The defenders (the Faculty of Physicians and Surgeons) *answered*—1st, That the power of the Crown to grant an exclusive privilege to license practitioners in any art or science within certain bounds could not be questioned, as the grant in favour of the defenders had been ratified in Parliament, and recognised by decisions of the Supreme Court; and, 2dly, That the distinction between medicine and surgery was specially preserved through the whole royal grant in favour of the defenders, the first clause having prohibited any person from practising surgery, or compounding and selling drugs, without undergoing an examination and receiving a licence from the Faculty, whereas the fourth clause, which relates exclusively to medicine, requires the Faculty to prohibit any person from practising medicine without either a testimonial from a university, or a licence from the King's physicians; but does not give the Faculty itself any authority to grant a licence in this department, thereby keeping the two branches of medicine and surgery quite distinct.

The Judges of the Second Division, before which the action depended, required the opinion of the other Judges in writing, on the following question: 'Whether persons holding diplomas, de-'grees, licences, or testimonials from the University of Glasgow,

'empowering them to practise the art of surgery, and its different 'branches, are entitled and authorised so to do within the bounds 'over which the defenders claim the privilege to grant licences, as 'pleaded by them; and are so entitled to practise, without under- 'going any examination by the Faculty of Physicians and Surgeons 'in Glasgow, and without payment of any sums of money in name 'of freedom fines, or otherwise.'

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The following opinions were given in:

Opinions of Consulted Judges.

Opinions of the Lord President, Lords Balgray, Gillies, Mackenzie, Medwyn, Corehouse and Fullerton.—James the Sixth, by his charter or letter of gift, dated the 29th November 1599, in favour of Mr Peter Low, chief surgeon to his Majesty and the Prince, and Mr Robert Hamilton, professor of medicine, and their successors, indwellers of the city of Glasgow, conferred upon them certain powers and privileges for the purpose of regulating the practice of surgery and medicine in the burghs of Glasgow, Renfrew and Dumbarton, and in the sheriffdoms of Clydesdale, Renfrew, Lanark, Kyle, Carrick, Ayr and Cunningham, and also for the inspection of drugs sold in Glasgow. It sets forth, as the inductive cause of the grant, that ignorant, unskilled and unlearned persons, under the colour of being surgeons, had abused the people, destroyed an infinite number of the King's subjects, and escaped without punishment. To remedy this evil, by the first clause, Low and Hamilton, and their successors, are empowered, under the name of visitors, to call before them all persons professing or using the art of surgery within the bounds specified, to examine them upon their literature, knowledge and practice, if found worthy, to admit, allow, and approve them, to give them a testimonial according to their art and knowledge, to receive their oaths, and to authorise them to practise accordingly. The visitors are further empowered to discharge or prohibit persons to practise farther than they are found qualified. If those who are cited are contumacious, they are to be fined by an order, on which letters of horning and poinding are to pass, and if necessary, of caption, till caution is found to appear for trial. By the second clause, the visitors are directed to inspect the bodies of those who are hurt or killed; and, by the third, to make statutes as to the practice of the art, with the advice of their brethren. By the fourth clause, it is provided that no person shall exercise medicine within the bounds specified in the grant, without the testimonial of a famous university where medicine is taught, or a licence from the King and Queen's physicians; and the visitors are empowered to interdict transgressors under certain penalties. The fifth and sixth clauses relate to the inspection of drugs in Glasgow;

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the seventh provides for gratuitous assistance to the poor; and the eighth confers certain exemptions from public burdens.

It will be remarked, that throughout the whole of this charter, surgery and medicine are carefully distinguished. Thus, the visitors have power to examine and license those who practise surgery; but they have no power to examine and license those who practise medicine. As a board of police, they may interdict unqualified persons to practise medicine, but the qualification for practice is not a licence from the grantees, but a licence from the King and Queen's chief physicians, or the testimonial of a university where medicine is taught. The charter does not expressly erect the grantees into a corporation, but as they and their successors were to form a perpetual board, and were empowered, with the advice of their brethren, to make statutes to regulate the practice of surgery, they held themselves to be a corporation, exacted fees from entrants, like other crafts, and admitted the barbers into their association. It is unnecessary to inquire whether the charter warranted these proceedings, because they were acquiesced in; and at an early period the visitors and their brethren were held in courts of law as a corporation or faculty by virtue of their charter; 17th Dec. 1701, Surgeons and Apothecaries of Glasgow. Afterwards a seal of cause was granted by the magistrates to the surgeons and barbers, narrating the charter of James VI, and conferring the usual political privileges within burgh. The seal of cause is to the surgeons and barbers allenarlie, who are thus distinguished from practitioners of medicine, or physicians.

The charter of James VI. was ratified in Parliament in 1672, by an act in favour 'of the present surgeons, apothecaries, and barbers 'within the burgh of Glasgow, and their successors allenarly;' and in that statute medicine and surgery are again contradistinguished.

It appears, indeed, that the corporation or faculty, as early as 1635, put forward a pretension, not only to interdict those who practised medicine without a university degree, or a licence from the King and Queen's physicians, but to examine and to grant licences themselves, a pretension certainly unauthorised by the charter; and to give a colour for it there is a misrecital of the charter in the statute 1672. Whether in consequence of usage or otherwise they have now acquired that right, it is unnecessary at present to inquire. In reference to this question, it is enough that the distinction between surgery and medicine is clearly recognised in all the grants to the corporation or faculty, whether by the Crown, by Parliament, or by the city of Glasgow; and though the privileges of the faculty may have been extended by usage, there has been no usage on the other side to restrict them.

Keeping this distinction in view, it appears, from a perusal of the

charter, that the grantees are empowered to examine every person within their bounds professing or using the art of surgery, and to give or withhold a licence to practise that art, or any department of it, according as he shall be found qualified. To that privilege there is no exception whatever. It is otherwise with regard to medicine. Whether the Faculty have or have not acquired by usage a right to examine in medicine, which was not conferred by the charter, a testimonial or diploma from a university where it is taught constitutes a good title to practise, and to exempt the possessor from the necessity of obtaining a licence from the Faculty. But in surgery, neither a licence from the King's and Queen's physicians, nor the diploma of a university, nor any other ground of exemption, is admitted. This being the import of the charter, it follows, that if the Crown had power to grant it, the individuals, parties in this cause, who have obtained diplomas as Masters of Surgery, may, notwithstanding, be interdicted by the Faculty, unless they submit to trial.

To escape from this conclusion, the University of Glasgow, who are the pursuers of the declarator in these conjoined actions, have put a different construction on the charter 1599. They maintain, that surgery is a department of medicine, and comprehended under that term; and hence they infer, that as a testimonial or diploma from a university is declared in the charter to be a title to practise medicine, it must be held as a title to practise surgery also. We are of opinion that that plea is unfounded. Medicine and surgery are essentially different; science and observation alone will qualify an individual to practise medicine, but to the successful practice of surgery, manual dexterity is also and chiefly requisite. It is proved by the documents in process, that they were separate professions in the reign of James VI, as they are at the present day, or rather, they were kept still more distinct at that time, surgery being looked on more as a mechanical art, and connected with the craft of the barbers. If King James had intended that a medical diploma was to exempt the possessor from an examination in surgery, he would have introduced it as an exception to the first clause of the charter, which relates to surgery alone, and not to the fourth clause, which relates solely to medicine. In like manner, if the University's diploma had been a title to practise surgery, it would have been noticed as such in the seal of cause to the surgeons, and in the parliamentary ratification of the charter. But it is unnecessary to dwell on this point, because, in the recent case of Steele and Others, (26th Feb. 1819,) the Court, after full argument, decided, that a diploma in medicine does not authorise the possessor to practise surgery within the limits of the Faculty's grant.

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In support of the same view, the pursuers of the declarator have argued, that the Faculty have no power under the charter to interdict the practice of surgery by unlicensed persons, except by virtue of the fourth clause, or, as they term it, the prohibitory clause; and then only on the assumption, that surgery is there comprehended under the term medicine. But this is plainly a mistake; for the first clause confers express power to admit and authorise those who are qualified to practise surgery, to discharge or interdict those who are not qualified, and to compel all surgeons to appear for examination by means of fines and imprisonment. The first clause, therefore, is no less prohibitory than the fourth; but the fourth, which applies to medicine, admits of an exception, while the first, which applies to surgery, does not.

The chief ground on which the pursuers of the declarator rely is, that the Crown has no power to erect a corporation of surgeons, with privileges which the charter would confer, if taken in the sense in which it is construed by the defenders; because such privileges would be inconsistent with the rights of the universities established before the date of the charter; and, in particular, would derogate from the effect of their diplomas in medicine, which are said to give authority not only to teach, but to practise.

With regard to the power of the Crown to erect a corporation of surgeons, with exclusive privileges, the usage of Scotland, as well as of England, and it is believed of every other feudal country in Europe, is decisive. The London Corporation or College of Surgeons, with exclusive privileges, and particularly with the privilege to examine and authorise practitioners of surgery within their bounds, was erected in the reign of Henry VIII, and sanctioned by various acts of Parliament in that reign. Similar powers were also conferred, in the same reign, on a College of Physicians. In Edinburgh the Corporation of Surgeons was erected by a seal of cause in 1515, which was afterwards ratified by a charter from the Crown in the reign of James V, and the corporation was established as one of the deaconries by the decreet-arbitral of James VI. The exclusive privileges of those corporations have been sanctioned by various decisions in both countries, both as to monopoly of practice and the power of granting licences. With regard to the privileges of the universities, it must be remembered, that they were, of old, ecclesiastical corporations, and that their testimonial or diploma confers no civil or municipal right, except in so far as is allowed by statute or usage. In the words of the Court of King's Bench, in the case of West, 'testimonials from the uni-'versity, upon taking the doctor's degree, have the nature of a re-'commendation; they may give a man a fair reputation, but con-

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Opinions of Consulted Judges.

'fer no right.' On that ground, the Court of King's Bench, both in that case and in the case of Lovett, (1. Lord Raymond, 472, 16 *Mod.* 354,) referred to in the pleadings, determined that a man who had taken his degree of doctor of physic at Oxford could not practise in London, or within seven miles of it, without a licence from the College of Physicians, which was incorporated by the 14th and 15th Henry VIII, c. 5. Those cases are the more decisive, because the statute erecting that college had, in express terms, reserved the privileges of the universities. And we think they may with propriety be referred to as authoritative in this case, as there is no reason to hold that the law of Scotland differs from that of England with regard to the privileges of universities, at least as to the effect of degrees.

When this Court, therefore, in the case of Steele, just mentioned, found that persons who had graduated at the university in physic, were entitled to practise physic in Glasgow without a licence from the defenders, we apprehend the judgment proceeded, not on the ground that the diploma per se conferred that privilege, to the exclusion of all corporate rights, but, on the contrary, that it proceeded on the ground that the charter of the defenders contained an exception to that effect,—an exception, as already observed, confined to medicine, and not extending to surgery.

The pursuers have said, that, at the date of the charter of James VI. in 1599, surgery was not taught in any of the Scotch universities, at least degrees in surgery were not conferred; and they state this to be the reason why a university's testimonial in surgery is not recognised in the charter as an exemption from the Faculty's right to examine and license. Farther, they say that no degrees in surgery were granted from that time till after the action against Steele and others occurred; and that this accounts for the judgment of the Court in that action, by which it was found, that a degree in medicine is no licence to practise surgery. It is unnecessary to remark the inconsistency between this argument and the position they previously maintain, that a degree in medicine comprehends a degree in surgery also, as a department of medicine. But if we are correct in the view now taken, even if surgery had been taught at the date of the charter, and degrees in surgery granted, they would have conferred no exemption, unless an express exception to that effect had been inserted in the charter; since university degrees cannot control the privileges of a corporation, unless it is so provided in the charter of erection, or unless a law to that effect has been subsequently introduced by statute or usage. Nor did the judgment in Steele's case rest on that ground; for it was observed on the Bench, that there might be good reasons why sur-

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geons should be examined by the Faculty in Glasgow, though they held university degrees.

We are of opinion, therefore,—

1. That the Faculty of Physicians and Surgeons in Glasgow are a legal corporation.

2. That the Faculty, by virtue of the charter 1599, ratified by Parliament in 1672, have power to debar, from the practice of surgery, persons who have not submitted to examination before them, or who have not obtained their licence to practise.

3. That the degree of doctor of physic from a university where medicine is taught does not entitle the graduate to practise surgery within the bounds specified in the charter, unless he obtains a licence from the Faculty.

4. In like manner that a testimonial of skill in surgery from a university where surgery is taught, or the degree of master in surgery, recently introduced in the University of Glasgow, does not entitle the possessor to practise surgery within these bounds, unless he submits to examination by the Faculty, and is licensed by them.

To these observations it may be proper to add, That we entertain no doubt that there is a University at Glasgow, with as ample power to confer degrees as any other university in the kingdom. It has been recognised in grants from the Crown, by royal visitations, in public statutes, and in decisions of this Court, in a great number of instances. The mistake of the defenders on this point seems to have arisen from their confounding the University of Glasgow with the College of Glasgow; but those bodies are distinct, as was found by the decision of this Court, in the case of Muirhead against the College of Glasgow, 16th May 1809.

We think it unnecessary to inquire whether the University of Glasgow has power to grant degrees, or testimonials of skill in surgery. Admitting that the University possesses that power, and supposing it had been exercised from the date of the erection in 1450, we are of opinion, on the grounds above stated, that such degrees or testimonials would be of no avail in a question with the Faculty. If they had been in use at the date of the charter, it is possible that James VI. might have admitted an exception in their favour, with regard to the practice of surgery, as he has done in favour of medical degrees with regard to the practice of medicine; and as they are now granted, they may perhaps induce the Legislature to restrict the privileges of the defenders. But as the law stands at present, we are of opinion they cannot control the express and unambiguous terms of the charter 1599, ratified in Parliament, and uniformly acted upon.

We have not taken into view the plea of prescription urged by

the defenders. Their case would certainly have been much more doubtful, if they had been compelled to resort exclusively to that plea. Although they had, from time immemorial, exercised the power of debarring from the practice of surgery those who had not submitted to examination, even including graduates in medicine, yet agreeably to the maxim, tantum præscriptum quantum possessum, that usage would not have conferred a right to exclude those who had the University's diploma of skill in surgery recently introduced, assuming that the University has power to grant it, which the pursuers maintain on very plausible grounds. But the defenders, standing on their charter, are entitled to plead that their privilege strikes at every person not expressly excepted, and the charter contains no exception applicable to the practice of surgery.

Note by Lord Medwyn.—I entirely agree in this opinion. When this cause was pleaded before me in the Outer-House, I early formed this opinion, and would have so decided; but I thought, as the case had been very anxiously and elaborately pleaded, and as a great variety of documents had been founded on, that it would be presented for review in a more convenient form, by having written pleadings on both sides. Afterwards, when the University appeared to support the effect claimed for their degrees in surgery, I thought it more becoming the respect due to that learned body, to obtain at once the decision of the Court, although my own views of the case were not in anywise altered by their appearance or pleading. I therefore made avisandum with the cause, and, according to my usual practice in such cases, without presuming to offer any opinion of my own.

Lord Moncreiff.—I am inclined to think that the University of Glasgow are entitled to obtain decree of declarator, in the terms, or according to the substance, of the conclusions of their action.

I entertain no doubt that the defenders are a corporation, entitled to exercise exclusive privileges, according to the terms and true meaning of the original charter in their favour in 1599. But I am of opinion that, except in so far as they acquired such right by that charter, and by the subsequent ratification of it in Parliament, they cannot maintain any prescriptive title in the particular matter in question, to the prejudice of whatever rights and privileges may be vested in the University of Glasgow.

I can entertain no doubt, that the pursuers constitute an university in the amplest sense of that term; with the fullest powers of conferring degrees in all the departments of art and science in which it is competent for any other university to grant degrees.

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Considering this to be clear, I am farther of opinion, that the University of Glasgow have power to grant degrees in every department of the science of medicine; and that the degrees which they have power to grant, do, according to the law of Scotland, constitute a valid licence generally to practise the art, according to the terms of the diploma granted. I do not doubt, that there may be special exclusive privileges constituted in favour of other bodies, which will be sufficient to prevent the exercise of such rights in particular places or circumstances: I speak at present of the effect of the degrees generally.

It farther appears to me to admit of no reasonable question, that the art of surgery is a branch of the general science of medicine, which it is perfectly competent for any royal university to teach, and in which, upon due examination, they may grant degrees, which will be equally effectual as licences for practice generally, as any other medical degree which it is in their power to grant. Nor do I think that it at all militates against either the competency or the effect of such degrees in surgery, that, until lately, and since the establishment of a regular teacher of that art within the University of Glasgow, they had not been in the use of granting similar degrees; seeing that the power appears to me to be inherent in their general character as a university, and such as could not be lost by the lapse of any length of time during which it might not be exercised.

Having this opinion on the general points agitated in these papers, I think, that the question between the parties depends on the construction of the charter 1599, on which the title of the defenders rests. If that had been a simple and absolute grant of exclusive privileges, in a branch of science not then regularly taught in the University, it must have been effectual, at least when ratified in Parliament, to subject all persons whatever to the force of its provisions. But it is qualified, and in all its structure extremely peculiar. Although, therefore, I feel the force of the arguments employed by the defenders, and the weight of the views entertained by other Judges, I still have considerable doubt, whether it ought to be so construed, as either in intention or in effect to operate to the prejudice of the University.

It has already been determined in the case of Steele, in 1819, 1st, That the privileges of the defenders as a faculty or corporation do not affect the holders of degrees of medicinæ doctores, in the practice of medicine or physic, in the limited sense of the term as ordinarily understood; and, 2d, That the holders of such degrees are not, by virtue thereof, entitled to practise surgery within the bounds of the charter, without submitting to examination by the

defenders. The question which remains is, Whether, on a sound construction of the charter, when the University of Glasgow, having a regular school of surgery established, do grant degrees in that special branch of the healing art, the persons holding them must still be subject to examination by the defenders before they can practise within the limited bounds.

The commission constituted by the charter consisted of the King's surgeon and Mr Robert Hamilton, professor of medicine, and their successors. And it does appear a little singular, that, if surgery was regarded as so perfectly distinct from medicine, as not to be comprehended within the latter term in any sense, a professor of medicine should be one of the two commissioners appointed to examine persons in their knowledge of the art of surgery, and grant licences to practise it. He at least must have been held competent to the examination, and by implication himself competent in the practice of the art. The object of the charter was to prevent 'unskilled and unlearned' persons, who, 'under the colour of chi-'rurgeons, abuses the people,' &c. &c. from carrying on their practices. To attain this object, ample power is given to call before the commissioners 'all persons professing or using the said art of 'chirurgeon,' to examine them on their knowledge, &c. to grant licences according to their fitness, and, in case of contumacy, to impose fines. There seems to be no doubt that, in this part of the charter, it relates specially to surgery, as contradistinguished from the other branches of the science of medicine. But I am not satisfied that this affords a complete solution of the question.

The fourth article of the charter prohibits all persons within the bounds 'to exercise medicine, without ane testimonial of ane fa-'mous university where medicine is taught, or at the leave of our 'and our dearest spouse chief medicinaris;' and authorises the commissioners to challenge, pursue, and inhibit, such persons from the practice of medicine, under the pain of L.40, &c. It is clear enough, that here no power is given to the visitors to examine persons in medicine as different from surgery, the right of practising it being made to depend solely on a testimonial by a famous university, or the leave of the King's physicians. And so far there is a marked distinction between that case, and the case of the practice of surgery. But still this express acknowledgment in the body of the charter, of the rights and privileges of the universities, appears to me to be of very great importance in the question, Whether it was intended in this charter to create any collision between the rights and powers conferred on the commissioners, either in regard to surgery or in regard to medicine, and the vested rights and privileges of the royal universities?

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It is clear that the rights and privileges of the universities were not overlooked. And if it be granted, as I think it must be, that, if at that time surgery had been specially taught in the university, the university might then have granted degrees in surgery, the question appears to me to be, whether the right to grant such degrees, with their ordinary legal effects, shall be held to have been taken away, or in this case excluded by implication; or, in other words, whether it required an express clause reserving them to save them from the operation of the first article of the charter.

The view of the general scope of the charter which I should be inclined to take is this: That the art of surgery, though of great importance to the public, was considered as an inferior branch of the science of medicine; that to prevent the abuses referred to in regard to surgery, and also to prevent unauthorised persons from practising medicine generally, it was expedient to institute the commission; with this effect, that no one could practise medicine generally without a testimonial from a university where medicine was taught, or the leave of the King's physician; and no one could practise the inferior art of surgery without a licence from these commissioners, as things then stood: But that, as the superior powers of the universities were here expressly recognised in regard to medicine, it was implied that, as soon as they chose to exercise their privileges, by teaching, examining, and granting degrees in surgery, such degrees would form a title to practise at least co-ordinate with the licence of the commissioners, if not essentially superior to it.

The difficulty, therefore, which I have, is to see, how, while the privileges of the university generally with regard to medicine as then taught are expressly recognised in the charter, and their power to grant degrees in surgery cannot in my opinion be doubted, it can be held, on a sound construction of this charter, that it was intended to have the effect, or can legally produce such effect, of excluding or impairing the efficacy of such degrees in surgery, when legally granted.

I must, however, distrust my own judgment, seeing that the same difficulties have not been felt by the other consulted Judges.

When the cause returned to the Second Division, the Judges there concurred unanimously in the opinion of the majority of the consulted Judges.

Opinion of Court.

The *Lord Justice-Clerk*.—On considering this case deliberately, and looking back to the decision of this Court, pronounced in the case of Steele in 1819, my opinion concurs entirely with that of

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the majority of the consulted Judges. I am satisfied that the royal grant in 1599 conveyed to the defenders a certain corporate right; and am also satisfied that the University of Glasgow has established its right to all the privileges and immunities of a university. But the question now at issue is, Whether their degree of master in surgery can confer any right on the holders of it to practise that branch of the art within the bounds over which the privileges of the defenders extend; and on this point I am now convinced that the pursuers have failed in making out their case. There is a marked distinction taken in the royal grant of 1599, between the branches of medicine and surgery; and although a degree or testimonial of a famous university is declared to be sufficient to enable a person to practise the former, there is no such provision as to the latter; and, on the other hand, the defenders (who have no right to license practitioners of medicine) are empowered to examine and admit practitioners of surgery within the limits mentioned in their charter, without any exception or provision in favour of the holders of university degrees.

Lords Glenlee and *Meadowbank* concurred.

The *Court* accordingly sustained the defences in the declarator, and suspended the letters, and granted the interdict in the suspension at the instance of the Faculty of Physicians. Judgment.

Lord Ordinary, *Medwyn.* Act. *Dean of Fac. (Hope,)* and *Monteith.* Alt. *Lord Advocate, (Murray,) S. More* and *Penney. W. A. G. & R. Ellis,* and *Hopkirk & Imlach,* Agents. *F.* Clerk.

U.

FIRST DIVISION.

No. IV. 14*th November* 1834.

JAMES DONALDSON
against
MATHEW MONCRIEFF PATTISON AND FREDERICK PATTISON.

JURISDICTION.—PUBLIC NUISANCE.—*A petition and complaint being presented to the Dean of Guild, setting forth, that the parties complained against (the occupiers of a cotton store in a public street,) were in the constant practice of loading and unloading their carts close to the said cotton store, and raising heavy bales of goods, by*

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means of cranes and pullies, into the upper flats of the said cotton store, and again lowering them into the carts in the same way, whereby the footway on the said street was not only interrupted, and the property of the complainers deteriorated, but the lives of passengers endangered, and praying accordingly for an interdict, which was granted—held, in an advocation, that the application to the Dean of Guild was incompetent.

THE respondents presented a petition to the Dean of Guild of Glasgow, (24th Jan. 1832,) setting forth, 'That the petitioners are joint 'proprietors of certain buildings situated between Mitchell Street 'and Buchanan Street, Glasgow, and fronting Mitchell Street, oc- 'cupied as a public market, tavern, &c.: That immediately adjoin- 'ing the property of the petitioners to the north, in Mitchell Street, 'there is a large building, occupied as a cotton store, belonging to 'James Donaldson, cotton broker in Glasgow: That the wall of the 'said building fronting Mitchell Street is built on the extreme 'western boundary of the said James Donaldson's property, and 'immediately adjoins the public street: That the said James Do- 'naldson, or James Donaldson and Company, the tenants or occu- 'piers of the said cotton store, are in the constant practice of load- 'ing and unloading their carts on the public street, and of taking 'their carts close in to the front wall of the said cotton store, and 'raising heavy bales of cotton and other goods, by means of cranes 'and pullies, or other tackling, into the upper flats of the said cot- 'ton store, and again lowering them into the carts in the same way: 'That in consequence of this the access to the property of the pe- 'titioners, along the pavement or footway, on the east side of 'Mitchell Street, is not only interrupted, but the lives of the pas- 'sengers endangered, all to the great injury of the petitioners, 'whose property, as a public market and tavern, is thus much de- 'teriorated: For which reasons the present application becomes 'necessary.—May it therefore please your Lordship, and Brethren 'in Council, to appoint copies of this petition to be served on 'the said James Donaldson, and James Donaldson and Company, 'and ordain them to appear and answer in court, first court-day; 'thereafter interdict, prohibit, and discharge them, and all others 'for them, from interrupting the passage along the pavement, or 'footway, of Mitchell Street aforesaid, by their carts; and from 'raising their cotton bales, and other goods, from their carts, into 'the upper flats of the said building, and again lowering them down, 'as aforesaid; and find the said James Donaldson, and James Do- 'naldson and Company, liable in expenses; or to do otherwise in

'the premises as to your Lordship, and Brethren in Council, shall 'seem proper.'

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The advocator, Donaldson, besides defences on the merits, objected, 1st, That the present question, being one of police, was not cognisable by the Dean of Guild; and, 2d, That the practice complained of was universal throughout commercial towns, and perfectly legal. Upon advising a proof the Dean of Guild found, 'That the defender has not established the existence of any gene-'ral practice or usage in the city of Glasgow and suburbs, such as 'to justify the construction and use of machinery in the loading and 'unloading of carts at his store, and the mode of loading or unload-'ing these carts upon the public street complained of by the pur-'suers: Find, That Mitchell Street is now one of the public streets 'in this town; and find the defender is not entitled, for the accommo-'dation of persons resorting to his store, to occupy the said street, 'and foot pavement thereof, opposite to his property, by the suc-'cessive position thereon, for at least several hours daily, of carts 'receiving or delivering goods at his said store, to the obstruction 'of the passage along the said street, and of the access thereby to 'the premises of the pursuers, and other adjacent proprietors and 'possessors; nor to suspend, by tackling over the said street, heavy 'bales, or packages of goods, in the process of loading or unloading 'the said carts, to the danger of the persons and lives of the lieges: 'Therefore grant interdict as craved in the original petition: Find 'the pursuers entitled to expenses, and remit to the Auditor to tax 'the same.'

In an advocation, Donaldson complained of this judgment, both on the merits and on the point of jurisdiction *, and maintained, that the original petition to the Dean of Guild Court was incompetent, in respect that the subject-matter of the petition did not fall under the jurisdiction of the Dean of Guild.

It was answered, that the subjects being locally situated within the territory of the Dean of Guild, and the application relating to encroachments on a public street, and to an alleged interference with the rights of conterminous proprietors, the Dean of Guild had full jurisdiction to entertain the petition, and to pronounce the judgment complained of.

'The Lord Ordinary finds that the advocator is the proprietor 'and occupier of a cotton store in Mitchell Street in Glasgow, ad-'joining to the property of the respondents: Finds it proved and 'admitted, that the goods are raised to, and lowered from the said

* The judgment of the Court, however, was confined to the point of jurisdiction.

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'store, by pullies or other machinery suspending them, while so 'raised or lowered, in front of the building, and over the footway 'of the said street: Finds it proved, that these operations occasion 'the obstruction of the footway during several hours of the day, 'and are also attended with danger: Finds it not proved that there 'is any general or common practice in Glasgow of using such ma-'chinery in the public streets: Finds it not proved that there is 'any peculiarity in the situation or circumstances of Mitchell Street, 'which distinguishes it from the other public streets of the city: 'Finds, That in these circumstances the operations of the advoca-'tor afford a legal ground of complaint to the respondents, the ad-'joining proprietors, and do, from their nature, as proved, fall 'within the cognisance of the Dean of Guild: Therefore repels the 'reasons of advocation; remits the case simpliciter to the Dean of 'Guild, and decerns: Finds the respondents entitled to expenses,' &c.

Donaldson *reclaimed*, and after hearing counsel on the question of competency, the cause was delayed for consideration.

Opinion of Court.

When the case came again to be advised, *Lord Mackenzie* said, that he was glad that time had been taken to consider the point, as in all questions of jurisdiction it was proper that the grounds upon which the Court proceeded should be fully understood, for the guidance of parties in bringing their actions. His Lordship at the first had some difficulty on the point, but he was soon satisfied, from the terms of the application to the Dean of Guild, that the objection to his jurisdiction was well founded. That jurisdiction is peculiar, and exclusive of other inferior magistrates, in cases which fall under it. It relates to questions of neighbourhood, *i. e.* between neighbouring heritors, depending upon, or necessarily connected with the policy or rule of building within burgh. In the case of the Magistrates of Stirling, it is so described. It also embraces questions relating to neighbourhood between buildings and the public street. The Dean of Guild may, at the instance of any neighbour, or without any instance, enforce the rights of the public in this respect. He may entertain any complaint against a building, as being necessarily or naturally injurious to the neighbourhood, or to the public street. Such being the nature of the jurisdiction of the Dean of Guild, I think it very likely that in this case there was room for a complaint to that Magistrate. In fact it is evident, that a storehouse had been so constructed that, if not necessarily, at least naturally, the use of it led to a nuisance on the public street. A complaint therefore might, I believe, have been made to the Dean of Guild against this building, praying to have it

taken down, or modified, or at least its use regulated, so as to prevent the mischief. But the salient point of such complaint must have been the statement of the fault in the building. That was indispensible to give jurisdiction to the Dean of Guild in the application, as it was to exclude the other Magistrates and Sheriff from entertaining it. But in this case, unfortunately, that is entirely omitted in the petition. There is no complaint against any building, nor any statement of any quality in such building, to ground a complaint. Nothing is said but that the respondent's storehouse borders on the street, which is perfectly legal. The only thing complained of is: 'That the said James Donaldson, or James Donaldson 'and Company, the tenants or occupiers of the said cotton store, 'are in the constant practice of loading and unloading their carts on 'the public street, and of taking their carts close into the front 'wall of the said cotton store, and raising heavy bales of cotton and 'other goods, by means of cranes and pullies, or other tackling, 'into the upper flats of the said cotton store, and again lowering 'them into the carts in the same way: That in consequence of this 'the access to the property of the petitioners, along the pavement 'or footway on the east side of Mitchell Street, is not only inter-'rupted, but the lives of the passengers endangered, all to the great 'injury of the petitioners, whose property as a public market and 'tavern is thus much deteriorated; for which causes the present 'application becomes necessary.' Now that might be done in reference to any building that had windows; and it is a sort of wrong which surely the Sheriff or Magistrates are not incompetent to remedy. Then the prayer is, 'to interdict, prohibit and discharge 'them, and all others for them, from interrupting the passage along 'the pavement or footway of Mitchell Street aforesaid, by their 'carts; and from raising their cotton bales and other goods from 'their carts into the upper flats of the said building, and again 'lowering them down, as aforesaid.' This prayer surely the Sheriff or Magistrates might grant. I therefore think, that though the case seems to have admitted it, the complaint is not so made as to bring it under the peculiar jurisdiction of the Dean of Guild. It has been argued that a case may be brought before the Dean of Guild by a statement merely that a building (not said to be itself illegal) is used illegally, and a prayer to have that use prohibited. But upon fully considering the case, and the authorities referred to, it appears to me that they do not support this view, and that such a statement in a petition would not be sufficient to exclude the ordinary courts, and admit the Dean of Guild. The case of Fleming against Ure, 24th Feb. 1750, *M.* 15,159, relating to the teaching of fencing in an upper flat, seems in point; but the question of jurisdiction was

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not raised in that case, so that it cannot be considered as an authority on the point. None of the other cases referred to by the respondents apply. For instance, in the case of Vary *v.* Thom, 2d July 1805, (*M. App.* No. 4. *v. Public Police,*) the thing complained of was the formation of a smith's working shop in such a flat, which is more than a mere use, and may be regarded as a modification of the house. So also, with regard to the formation of a carpenter's shop and timber yard, which were the things complained of in the case of the Proprietors of Carrubber's Close, 26th Feb. 1762, *M.* 13,175. In like manner, the putting up of a water barge and a sign on a house were the subjects of complaint in the cases of Buchanan, 15th Nov. *M.* 11,378, and Thomson *v.* Crombie, 21st Nov. 1776, *App. v. Public Police.* But be that as it may, the petition in this case does not set forth even an illegal use of a building, or pray interdict against such use, but merely states a certain practice on a public street, and prays to have that prohibited. I do not therefore think that such an application was incompetent before the Sheriff or ordinary Magistrates, or that it is now competent before the Dean of Guild.

The *other Judges* concurred.

Lord Gillies said, that there was no doubt that in certain cases of nuisance the Dean of Guild had jurisdiction; but this did not arise from the circumstance of the thing complained of being a nuisance, but from the nuisance arising from a building, as, for instance, a projecting wall.

The *Lord President* observed, that upon the principle contended for by the respondents, if the Dean of Guild had jurisdiction in the present case, it would be equally competent to apply for his interference in all ordinary questions of police, as, for instance, to interdict parties from stopping up the public streets by carriages or carts.

Judgment.

Their Lordships therefore recalled the interlocutor of the Lord Ordinary, advocated the cause, dismissed the action as incompetent, but found no expenses due.

Lord Fullerton, Ordinary. For the Advocator, *Dean of Fac. (Hope,) H. J. Robertson.* *Pearson, Wilkie & Robertson*, Agents. Alt. *Rutherfurd, Monteith. W. A. G. & R. Ellis*, W. S. Agents. *R.* Clerk.

C.

FIRST DIVISION.

No. V. 15*th November* 1834.

LACHLAN M'NEIL, Suspender,
against
WILLIAM and JOHN BLAIR, Chargers.

Process.—Removing.—Title to pursue.—*An heritable creditor having obtained decree of removing against his debtor, who was proprietor and in possession of the subjects over which the security extended, on the simple allegation that a year's interest on the bond was due—bill of suspension passed without caution.*

In September 1825, the suspender borrowed L.900 from the late Reverend Walter Blair, in security of which he granted a bond and disposition in security over certain house property which he had in Paisley. By the bond the principal sum was made payable at Martinmas 1830, but by a letter subsequently granted the term of payment was postponed for other five years. Part of the subjects over which the heritable security extended was possessed by the suspender himself.

In the beginning of the year 1834, and before (under the letter of agreement) the principal sum in the bond was payable, the chargers, as representatives of the original creditor in the bond, brought a process of removing against the suspender before the Magistrates of Paisley, upon the allegation that no part of the principal sum in the bond had been paid; 'and there is also due to the pursuers, at 'Martinmas last, 1833, the sum of L.20 and upwards, being arrears 'of interest on the said principal sum.' 'That the defender is tenant 'and possessor of part of said premises: That L.8 sterling is a fair 'rent for the premises which he so occupies: That although the 'pursuers have frequently required the said defender to pay the 'rent for the current year 1833 till Whitsunday 1834 of said pre-'mises occupied by him, and also remove and flit therefrom at the 'term of Whitsunday next, yet he refuses either to pay said rent, 'or to remove from said premises;' therefore concluding, that he should be decerned and ordained 'to flit and remove himself, his 'family, servants, subtenants, &c. forth and from the said premises, 'and to leave the same void and redd, to the end that the pursuers, 'and others in their names, may enter thereto, and peaceably pos-

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'sess and enjoy the same during the not redemption of said sub-'jects.'

In defence against this action, it was objected, that it was not competent for a mere creditor in an heritable bond, who had nothing more than a security over the subjects for payment of a debt, and had taken no steps by adjudication, or otherwise, to make that security available, to prosecute a removing against the debtor, proprietor, and in possession of these subjects.

The Magistrates ordained the defender to find caution for violent profits; and thereafter, no caution having been found, they decerned in the removing.

A charge having been given upon this extracted decree, the defender suspended and *pleaded*—

Defender's Pleas.

I. It was not competent for an inferior judge to entertain a removing from an heritable subject, except under the statute 1555, c. 39, or the Act of Sederunt 1756; Horn v. Maclean, 19th Jan. 1830; and in that case it is necessary that the Act of Sederunt be expressly libelled on; *Bell on Leases*, p. 462; Innes v. Clerk, 22d Dec. 1780, *Mor.* 13,871. In the case of conventional engagements to remove without warning, these may be enforced without libelling on the Act of Sederunt; but there was no such agreement here; there was no lease, and the defender was not in any respect a tenant of the premises, but the proprietor of the subject.

II. The inferior court was not warranted in pronouncing an order for caution for violent profits in this case. In an ordinary question of removing between landlord and tenant, under the Act of Parliament, or Act of Sederunt, the inferior judge is entitled to call for caution for violent profits: but this is the first instance of a mere bondholder, upon an allegation that a year's interest was due, prosecuting a removing against the proprietor of the subject, who was not allowed to be heard on the merits. Such a proceeding is not competent. A party cannot be bound to find caution when the question is, whether the action is competent, or of such a nature as to warrant the demand for caution or not.

III. The whole proceeding is incompetent. The pursuers are mere creditors in an heritable bond, and are not entitled to turn the proprietor out of possession, by a summary process of removing, upon a mere allegation, that a term's interest had become due. The principal sum is not due. The suspender remains to all intents and purposes proprietor of the subjects, as effectually as if no burden affected them. He has the power of letting the subjects, or otherwise disposing of them. The creditor in the bond is not without his remedy; he may bring his process of maills and duties, and

attach the rent, if the subjects were let; or a poinding of the ground, and attach the whole effects thereon. These are the only remedies in such a case; *Ersk.* iv. 1, 49; *Bell*, ii. 15. In either case, the proprietor must be called for his interest; but there is no authority by which a creditor is entitled at once to proceed by a removing from the subjects in an inferior court. But farther, there is no rent fixed here. L. 8 is said to be a fair rent, but no such rent is stipulated; and a party cannot be laid under caution for violent profits, when there is no fixed rent, where such party is not tenant, but proprietor of the subjects, and where the party pursuing is merely an heritable creditor in a bond and disposition in security. In such a case, neither the Act of Parliament nor Act of Sederunt can apply; Douglas *v.* Edington, 28th Feb. 1628, *M.* 13,892.

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M'Neil *v.* Blairs.

Defender's Pleas.

Answered—The right of the respondents is not a mere heritable bond properly speaking, but a bond and disposition in security, by which the debtor 'sells, alienates and dispones' the subjects, 'with 'all right and title thereto,' and assigns the creditor 'into the 'rents, maills and duties' thereof, and all action competent thereon. By this deed the complainer is as much bound to cede the possession of the subjects during the not redemption, as if the deed were an absolute and irredeemable conveyance of the property. The only difference between a creditor and a purchaser is, that the former is accountable for what he draws from the property.

Respondents' Pleas.

Whether the principal sum was due or not, the respondents were entitled to receive the arrears of interest, by taking possession of the property and drawing the rents, and it was for that purpose that the action before the inferior court was raised. The rents of the other parts of the subjects, not possessed by the suspender, were not sufficient to meet the interest, and therefore the respondents were obliged to have recourse to the portion possessed by the suspender himself.

The objection, that the Act of Sederunt is not founded on, is answered by the plea of the suspender himself, that he is not a tenant, and therefore the Act of Sederunt, which had no application to the suspender's case, could not be founded upon. But farther, the subject in question consists of an urban tenement, to which the provisions of the Act of Sederunt 1756, or the solemnities of the statute, do not apply.

Actions of removing at the instance of an heritable creditor, against the debtor in possession, are quite common in the inferior courts. The proposition, that the creditor in a bond and disposition in security, is not entitled to enter into possession of the subject

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of the security, is contrary both to the practice of the country and to legal authority. Mr Ross says, (vol. i. p. 378,) it entitles the creditor to a total intromission with the debtor's property, in the same manner as an apprising or adjudication, and was intended to entitle the creditor to a total possession of the debtor's estate, as a convenient method of obtaining repayment both of his principal and interest. In the analogous case of adjudgers, the right of the adjudger to prosecute a removing has been uniformly sustained by the Court; Faldownside *v.* Bennerside, 14th Dec. 1621, *Mor.* 13,787; Galloway *v.* Bogmiln, 20th Feb. 1629, *M.* 13,791; Balmagie *v.* Maxwell, 7th Dec. 1633, *M.* 13,800. Even an improper wadsetter may remove tenants; Halyburton *v.* Cuninghame, 16th Jan. 1677, *M.* 13,801; by which case it was also found, that the party resisting the removing was bound to find caution.

The case of Edington, referred to by the suspender, is an authority against him, for there the right of an heritable creditor to prosecute a removing against the debtor in possession was held good; and in regard to the question of caution, (for which purpose it is referred to by the suspender,) the ground of suspension in that case was, that caution was unnecessary, because the party had removed, and did not object to the creditor entering into possession.

In the present case no benefit could be got from an action of maills and duties, nor from a poinding of the ground; the former was not available, as they were no tenants; and there being nothing on the property, a poinding of the ground would have been useless. The respondents therefore had no other way of securing themselves, and recovering payment of the arrears of interest, than by prosecuting a removing and getting possession of the subject.

The Lord Ordinary pronounced the following interlocutor: 'Having considered the bill, with answers and productions, and 'heard counsel for the parties, passes the bill without caution.'

Judgment.

The respondents reclaimed, but the *Court* unanimously adhered.

Lord Fullerton, Ordinary. For the Suspender, *Jameson*, *A. M'Neil.* *Alex. Nairne*, Agent. For Respondents, *Dean of Fac. (Hope,)* *W. Bell.* *Maclean & Giffen*, W. S. Agents. *B.* Clerk.

T.

SECOND DIVISION.

No. VI. 18*th November* 1834.

MACDOUGALL
against
STEVENSON.

COMPETITION.—DILIGENCE.—EXECUTOR.—*A creditor of a deceased person, who had acquiesced for some years in the management of his executor, (who had also served heir beneficio inventarii,) found not entitled, at the end of that time, to obtain a preference over the other creditors, by arresting the funds which the executor had realised for the purpose of distribution among the creditors.*

JOHN PADON died intestate in 1825, and his son, Thomas Padon, who was then a minor, was served heir, with the consent of his curators, cum beneficio inventarii; he also confirmed executor qua nearest of kin; and the inventories given up by him under his service and confirmation comprehended the whole estate, both real and personal, of the deceased. It soon appeared that there would be, in all probability, a deficiency of funds for payment of the debts due by the deceased; and several meetings of his father's creditors were held by Thomas Padon and his curators, with regard to the management and distribution of his estate. One of these was held on 1st August 1827, and another in March 1829, called by circular notices sent to all the creditors, and amongst others to Miss Macdougall and Miss Grindlay, the claimants in the present action. Those ladies did not attend these meetings; but neither did they intimate any dissent from the resolutions of the creditors taken for realising and distributing the trust-estate. The chief part of John Padon's estate was afterwards realised by the sale of his interest in the lease and stock of the distillery of Borrowstounness, to Mr Vannan, for the sum of about L.1200. One-half of this was paid immediately, and deposited in the British Linen Company, and the other moiety remained for some months in the hands of Mr Vannan, the purchaser. Miss Macdougall at length raised a summons of constitution against Thomas Padon, as representing his father, for the sum of L. 90; and upon the dependence of this action she raised letters of arrestment, in the hands of Mr Vannan, and of the British Linen Company, on the 2d and 6th November 1829, and obtained decree on the 4th February 1830. Miss

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Grindlay raised a similar action, and laid on arrestments of the same dates. Thomas Padon and his curators finding that separate steps were thus taken, raised the present process of multiplepoinding and exoneration on the 16th December 1829; and Mr Stevenson was appointed the common agent.

In the multiplepoinding Miss Macdougall and Miss Grindlay claimed preferences over the funds attached by their arrestment, in virtue of their decrees and arrestments.

The common agent objected, 1st, That the claimants were barred, personali exceptione, from obtaining any preference, or from availing themselves of any priority in the execution of their diligences, in consequence of the proceedings which had taken place, with the concurrence of all the creditors, for the distribution of John Padon's estate; and, 2d, That the funds attached by the arrestments being part of the estate of John Padon, to which Thomas Padon had completed his title as executor, for behoof of his father's creditors, remained in his hands as trustee, and were not liable to be attached by the separate diligence of any creditor attempting to obtain a preference over the others.

The Lord Ordinary pronounced the following interlocutor and note: 'The Lord Ordinary having heard parties' procurators, and 'thereafter considered the closed records and whole process, repels 'the claims of Mrs Margaret Macdougall, Miss Janet Grindlay, 'and Miss Hodge, to preferences over the other creditors, and de-'cerns: Finds the claim of Mr William Thomson to a preference 'not insisted in, and therefore repels the same: Finds all these 'claimants respectively liable to the common agent in the expenses 'of process caused by their several claims of preference having 'been made; of which allows an account to be given in, and when 'lodged, remits to the Auditor to tax the same, and report: Sus-'tains the claim of James Tod, writer to the signet, and others, 'the representatives of the late James Tod of Deanston, for a pre-'ference, in proportion to their debt, equally with the other re-'maining debts of James and Andrew Tod and Company on the 'fund in medio, to the extent stated by them; but under this qua-'lification, that, from the said fund, so liable to preference, must be 'deducted any expenses incurred by Mr Padon and his estate, and 'the respondent, in rendering effectual this claim of compensation, 'out of which the said fund has arisen, of which allows an account 'to be put into process.'

'*Note.*—There seems to be a ground of distinction between the 'effect of diligence done against a person by any one of his own cre-'ditors, and diligence done against a trustee acting for creditors by

'any one of those creditors. In the first case, what is not secured by 'the diligence of the creditor may be consumed by the debtor; and it 'seems not wholly unequitable, therefore, to allow any creditor, even 'in case of a deficiency, to keep the whole of what he, by his dili- 'gence, has secured from waste, at least to the extent of full payment 'of his debt. And accordingly this, though under great modifications 'and exceptions, is still allowed in our law. But, in the case of a trus- 'tee, it is not to be presumed that he will consume the funds which 'do not belong to himself; and therefore, it would be going a great 'deal too far to allow any one creditor, merely by doing diligence, 'to secure to himself full payment, by taking what the trustee was 'in the reasonably presumed course of ultimately dividing fairly 'among the whole creditors. Diligence by particular creditors 'may indeed be allowed, to the effect of securing or receiving their 'share, or of securing the fund for the general behoof, in case of 'any danger of embezzlement or undue delay. But that is quite 'different from allowing it to constitute a preference, to the preju- 'dice of the other creditors. Accordingly, there seems little rea- 'son to doubt that, in ordinary cases of a valid trust for behoof of 'creditors, no one creditor can, by diligence against the trustee, 'create a preference over the other creditors, so as to draw more 'than his fair share of the trust-estate, and then it seems that an 'executor or heir cum beneficio inventarii, when there is a known 'or expected deficiency of funds to pay the defunct's debts, is just 'a trustee for behoof, in the first instance, of all the creditors of 'the defunct. It may be otherwise when there is no known or ex- 'pected deficiency. An executor, or heir cum beneficio, may fairly 'pay primo venienti, without waiting for creditors whom he does 'not know of, or for creditors whose interests he does not see to 'be in any danger. But where the executor or heir cum bene- 'ficio does know of the defunct's creditors, and knows that there 'must be, or will probably be, a deficiency of funds, his duty seems 'just to be that of a trustee for the general behoof of creditors. Ac- 'cordingly, it seems fixed by decisions in the case of Russell, that 'it is not his duty to pay in full primo venienti, when there is a 'deficiency, even after the six months, and the creditor claiming 'payment has obtained a decree for his full debt; for if it had 'been held his duty so to pay, the decree must have been held to 'give a preference, as it would have subjected the executor per- 'sonally, who must then have been entitled to pay under it, and, 'of course, would have paid; and if it be not the duty of the exe- 'cutor to pay in full primo venienti, after the six months, although 'decree be obtained, in other words, though the decree is held 'valid only to give right to a fair share, how can diligence by ar-

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'restment, or any diligence on that decree, be held to convert the 'right into right to full payment? If horning pass on the decree, 'it seems indisputable that the executor might suspend beyond the 'extent of a fair share, and raise a multiplepoinding, calling all the 'creditors to receive their shares. Why should arrestment have a 'more extended effect in favour of a creditor? Why should that 'diligence stretch beyond the substantial intended effect of the de- 'cree on which it proceeded? The Lord Ordinary is not satisfied 'on this head; and not being clearly satisfied, he cannot sustain 'the preference claimed in this case. It is a very strong case; 'for here the executor and heir cum beneficio had been in a long 'course of dealing with the creditors of the defunct, as acting for 'their interest; and the present claimants, if not expressly, yet 'tacitly, allowed themselves to be considered as going along with 'the rest; and then, after the fund is notoriously deficient, and 'ready for division, the claimants attempt, by arrestment, to seize 'upon a disproportionate share of it. Nothing can be more plain- 'ly inequitable; and the grounds of law, to support it, must have 'been made very clear indeed, before they can be maintained. 'For this reason, the Lord Ordinary finds expenses due to the 'common agent. It is an attempt very unfavourable, and ought 'to be made at their own risk, in regard to expenses.'

Pursuers' Pleas.

Misses Macdougall and Grindlay *reclaimed*, and the Court ordered cases, in which they *pleaded*—That by the old law, previous to 1662, priority of execution, in competitions among creditors of a deceased person, secured a preference; see Ellis *v.* Dalmahoy, 21st March 1628, (*Brown, Sup.* i. 256); and every executor was safe in making payment primo venienti, unless he were interpelled, by citation or action duly intented, at the instance of another creditor, where there was an obvious deficiency of fund; see Lyle, 2d Dec. 1628, *M.* 3867; White, 16th Dec. 1629, *M.* 3868; and Telfer *v.* Wilson, 16th July 1629, *M.* 3868. The Act of Sederunt, Feb. 1662, in so far modified the old law, as to bring, in pari passu, all creditors citing or pursuing an executor within six months after the death of the ancestor; but in all other respects the old law is left as it was; and, after the expiry of six months, every creditor is entitled, as formerly, to secure a preference over the funds of his deceased debtor, by doing diligence against his estate in the hands of his executor; *Stair*, iii. 8, 69; and *Ersk.* iii. 9, 46. The case of Russell *v.* Simes, in 1791, *Bell's Cases*, 217, made no change on the general law in this respect; and it has been recognised in subsequent decisions; Gardiner *v.* Pearsons, 28th Nov. 1810; Atkinson, Muir and Company *v.* Learmonth, 14th Jan. 1808; Sceales

and Son *v.* Russell, 15th Nov. 1821; and Swayne *v.* The Fife Banking Company, 8th June 1822; and Dunlop *v.* Weir, 29th Jan. 1823. 18 Nov. 1834. Macdougall v. Stevenson.

As to the personal exception urged against the claimant in the present case, it is a sufficient answer, that they neither attended any meeting, nor gave any sanction, by mandate or otherwise, to the course of proceedings said to have been adopted by the executor, with the concurrence of the whole body of creditors. Pursuer's Pleas.

The common agent *answered*—That an heir entered cum beneficio inventarii, and an executor is merely a trustee for those beneficially interested in the succession or executry of the deceased; that is, first for his creditors, and then, if there be any residue, for his nearest of kin. An arrestment in the hands of a trustee is plainly incompetent to secure any preference on the trust-funds over any other creditor. And it was decided in the case of Russell *v.* Symes, in 1791, *Bell's Cases*, 217, that so long as executry funds are in medio, every creditor who puts in his claim has a right to a pari passu preference, along with creditors who have obtained decree even within the six months. The point now contested was not decided in any of the more recent decisions quoted by the claimants. Defender's Pleas.

In the present case, also, the claimant had acquiesced in the general management of her estate by the executor, for the behoof of the creditors, for four years, before they attempted to take any separate steps; and the sales by which the funds now arrested were realised, were made under the express authority of a resolution of the creditors in March 1829. The fund was therefore created by the creditors, and belonged to them, having been placed in the hands of the arrestees solely for their behoof, and for the purpose of distribution.

The *Court* refused the note, and adhered to the interlocutor of the Lord Ordinary; but the Judges who concurred in this judgment proceeded entirely on the special circumstances of this case, and on the long acquiescence of the claimants in the general management of the executor, under the superintendence of the creditors, and not on the general ground taken up in the note of the Lord Ordinary, and pleaded by the common agent. Judgment.

Lord Glenlee.—I think this a case of very considerable difficulty, and am not sure that the two claimants in the fund are exactly in the same situation. No doubt an executor is a trustee, and must account for the fund realised under his confirmation, to the parties who have an interest in it. But I am not satisfied that the fund itself is merely a trust-fund, and so placed beyond the diligence of parties who constitute their debts against the executor, and then Opinion of Court.

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proceed to attach it. Previous to the Act of Sederunt in 1662, all creditors proceeded to attach the estate of their deceased debtor in any way they could, and were preferred according to the priority of their diligences. The effect of that act was to put an end to any party acquiring any preference, to the exclusion of competitors, either by decree obtained, or by completed diligence done within the six months; but after that period the competition is left, generally speaking, to the operation of common law. All that was decided in the case of Russell *v.* Symes was, that so long as the fund was extant in the hand of the executor, every creditor making his claim is entitled to share in it. But in that case nothing was decided as to the effect of diligence done against the executor, for there was there no question of diligence at all. When diligence comes to be used, then I understand this fund to be open for the attachment of creditors. Accordingly, in the case of Dunlop *v.* Weir, referred to in the pleadings, the question debated was, whether the arrestment there used was a competent diligence. But this question could only have been raised on the assumption, that the diligence would have given a preference, if it had been competently used; and accordingly it was taken for granted, that it would have been available, if no objection had lain against it. I therefore cannot go the length of the Lord Ordinary's note, in holding that the executry is to be considered as a trust-fund, tied up from the diligence of creditors. But I think that in this case, the arrestment of Miss Macdougall on the dependence, being only an inchoate diligence, not followed by a decree of forthcoming, before the fund was brought into Court in the multiplepoinding, can give her no preference; and there is also a great deal in the personal objection to both claimants, arising from their previous acquiescence in the management of the estate by the executor, with the concurrence of the other creditors.

The *Lord Justice-Clerk.*—If I am compelled to decide this case upon the grounds taken by the Lord Ordinary in his note, I should have great difficulty in arriving at the same conclusion as his Lordship, for I think there are some propositions, especially in the former part of it, which are contradicted by the recent decisions of this Court. But I think there is enough to decide this case in the conduct of the parties themselves, without placing it on the general ground taken up by his Lordship. The long acquiescence in the management of the executor, and in the proceedings of those meetings of the creditors, to which it is admitted that the present claimants were invited, although they failed to attend, without ever having intimated their dissent from the course of proceedings then recommended, affords, I think, sufficient ground to decide this case

against the claimants, on the footing of personal exception alluded to in the conclusion of the note, without adopting all the general law touched upon in the previous part of it.

Lord Meadowbank concurred with the Lord Justice-Clerk.

Lord Medwyn thought that the ground of personal exception was not sufficiently made out against the two claimants; and in the general law concurred with Lord Glenlee and the Lord Justice-Clerk.

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Opinion of Court.

Lord Ordinary, *Mackenzie*. Act. *Jameson* and *Dunbar*. Alt. *Sol.-Gen. (Shene,)* and *Currie*. *John Rymer*, and *Alex. Stevenson*, Agents. *F.* Clerk.

U.

SECOND DIVISION.

No. VII. 18*th November* 1834.

FORSYTH
against
JOHN HARE AND COMPANY.

JURISDICTION.—PROCESS.—*A copartnery carrying on business under a social firm, which the partners subscribe, and under which they grant obligations, may be competently brought into Court as defenders, by a summons directed against the company under its social firm, without calling the individual partners, and by an arrestment jurisdictionis fundandæ causa, used against the company in the same terms.*

FORSYTH having a claim of damages for breach of contract against John Hare and Company, manufacturers at Bristol, used arrestment jurisdictionis fundandæ causa against them, under the style of their social firm, as John Hare and Company, in the hands of Robertson and Tullet, cabinet-makers in Aberdeen, and thereupon raised their action of damages against them under the same firm. Neither the letters of arrestment, nor the summons in the action, were directed against any of the individual partners of the company, but only against the copartnery, under its social firm.

The defenders at first allowed decree in absence to pass against them; but afterwards, being reponed on a reclaiming note given in in name of John Hare and Company, they lodged defences, in

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which, besides their plea on the merits, they stated the following objections to the competency of the action: I. The defenders are not subject to the jurisdiction of this Court, and no jurisdiction has been created by the pretended arrestment used by the pursuer for that purpose. II. The action is incompetent, in respect it only calls and concludes against 'John Hare and Company,' and does not call or conclude against the individual partners of the company.

The Lord Ordinary took the case to report, verbally, on these two preliminary defences, and the Court, in order that the point might be authoritatively determined, ordered minutes of debate for the consideration of all the Judges.

Pursuer's Pleas.

The pursuer *pleaded*—That there was an obvious distinction between companies carrying on business under a social firm, such as the present, by which they subscribe their obligations, and those which have only a descriptive firm, such as the Culcreuch Cotton Company, or York-Buildings Company, whose obligations are subscribed by a partner or manager on behalf of the company. The proper debtor of the pursuer, in the present case, is the copartnery of John Hare and Company. He contracted with them under their company firm, and he does not know, and has no means of discovering, the names of the individual partners who compose it. The practice of copartneries pursuing and defending by their social firms, without mentioning the individual partners, is quite general; and it appears from the register of protested bills, that even such protests are almost always extended, either at the instance of or against companies, by the firm only.

Defenders' Pleas.

The defenders *answered*—That it was now settled by many decisions, that a copartnery, carrying on business under a descriptive name, could neither sue nor be sued in the name of the firm; see Culcreuch Cotton Company, 27th Nov. 1822. And in all the subsequent cases which have occurred in which this question has been raised, such as the Commercial Bank against Pollock's Trustees in the House of Lords, 3 *Wilson and Shaw's Appeal Cases*, 365, the Sea Insurance Company of Scotland, 27th Feb. 1827, and others, the competency of the action in the name of the company has only been sustained, in respect that it was joined along with the instance of individual partners or managers. The point now at issue was decided in the case of Mills *v.* James Finlay and Company, 16th Nov. 1830, in which the Court dismissed a petition and complaint as incompetent, because it was directed against a company like Hare and Company, carrying on business under a proper mercantile firm, without calling the individual partners.

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Opinions of Consulted Judges.

The following opinions were given in by the consulted Judges:

Lord Fullerton, Lords President, Balgray, Gillies, Corehouse and *Moncreiff.*—This is an action brought by the pursuer against 'John Hare and Company, floor-cloth manufacturers, and oil and 'colourmen in Bristol.' The object of it is, to constitute a claim of damages against the defenders; and it proceeds upon an arrestment jurisdictionis fundandæ causa, used in the hands of persons who are 'said to be debtors, or have the keeping or custody of effects be-'longing to the said defenders.'

Against this action defences are given in in the name of 'Messrs 'John Hare and Company, floor-cloth manufacturers in Bristol.' The defences contain no notice of the names of the individual partners who compose the company; and it is not denied that 'the 'debts and effects arrested are the property of the defenders, situa-'ted locally within this country.'

In these circumstances, two preliminary pleas are maintained by the defenders; 1*st*, That no 'jurisdiction has been created by the 'pretended arrestment used by the pursuers for that purpose;' and, 2*dly*, That 'the action is incompetent, in respect it only calls 'and concludes against 'John Hare and Company,' and does not 'call or conclude against the individual partners of the company.'

In so far as the first objection rests upon the particular nature of the present action, as being raised for the establishment of a claim of damages, and as not being founded on any liquid ground of debt, we are of opinion that there is no ground for the distinction taken by the defenders. However ineffectual an arrestment jurisdictionis fundandæ causa may be, in regard to an action of declarator of marriage, as in the case of Scruton against Gray, there is no authority for questioning, in an action containing conclusions merely pecuniary, the rule laid down by Mr Erskine, (i. 2, 19,) that such arrestments 'found a jurisdiction in our Supreme Court of Session, 'to judge in a personal action against the foreigner, proceeding 'upon an edictal citation, for constituting the debt due by him to 'the arrester, in order to pronounce a decree of furthcoming against 'those in whose hands arrestment was used.'

When the objection to the jurisdiction is rested upon the particular form of the arrestment used on the present occasion, it involves the very question, which is raised in the second preliminary defence, and which we understand to be the only one occasioning any difficulty, viz. Whether either the action or diligence can be sustained, inasmuch as both are directed merely against 'John 'Hare and Company,' without calling the individual partners of the company.

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The Lord Ordinary took the case to report, verbally, on these two preliminary defences, and the Court, in order that the point might be authoritatively determined, ordered minutes of debate for the consideration of all the Judges.

Pursuer's Pleas.

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Against this action defences are given in in the name of 'Messrs 'John Hare and Company, floor-cloth manufacturers in Bristol.' The defences contain no notice of the names of the individual partners who compose the company; and it is not denied that 'the 'debts and effects arrested are the property of the defenders, situa-'ted locally within this country.'

In these circumstances, two preliminary pleas are maintained by the defenders; 1*st*, That no 'jurisdiction has been created by the 'pretended arrestment used by the pursuers for that purpose;' and, 2*dly*, That 'the action is incompetent, in respect it only calls 'and concludes against 'John Hare and Company,' and does not 'call or conclude against the individual partners of the company.'

In so far as the first objection rests upon the particular nature of the present action, as being raised for the establishment of a claim of damages, and as not being founded on any liquid ground of debt, we are of opinion that there is no ground for the distinction taken by the defenders. However ineffectual an arrestment jurisdictionis fundandæ causa may be, in regard to an action of declarator of marriage, as in the case of Scruton against Gray, there is no authority for questioning, in an action containing conclusions merely pecuniary, the rule laid down by Mr Erskine, (i. 2, 19,) that such arrestments 'found a jurisdiction in our Supreme Court of Session, 'to judge in a personal action against the foreigner, proceeding 'upon an edictal citation, for constituting the debt due by him to 'the arrester, in order to pronounce a decree of furthcoming against 'those in whose hands arrestment was used.'

When the objection to the jurisdiction is rested upon the particular form of the arrestment used on the present occasion, it involves the very question, which is raised in the second preliminary defence, and which we understand to be the only one occasioning any difficulty, viz. Whether either the action or diligence can be sustained, inasmuch as both are directed merely against 'John 'Hare and Company,' without calling the individual partners of the company.

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Upon this point, too, we are of opinion that the plea of the defenders is ill-founded. As a mercantile company is understood in the law of Scotland to be a separate person, capable of maintaining the relations of debtor and creditor, distinct from those held by the individual partners, and as the firm or company name forms the designation of that separate person, and of the whole individuals in their social character, under which name obligations are effectually contracted by and to the company, there does not appear to us to be any legal inconsistency or incongruity in allowing action or diligence either at the instance of, or directed against a partnership by its firm. And the competency of such procedure has not only been very generally assumed in practice, but has been sustained by the Court. In one of the many actions at the instance of Messrs Douglas, Heron and Company, viz. that against Mr Gordon of Culvenan, in 1792, the question was distinctly raised. The action was brought in the name of 'Messrs Douglas, Heron and Company, 'late bankers in Ayr, and by George Home of Branxton, their 'factor and manager, conform to factory and commission granted 'by a quorum of the committee named for winding up the affairs 'of the said company.' The title was objected to, and among other pleas, the defenders maintained the incompetency of suing in the name of the firm, and without setting forth the names of the individual partners. In the pleadings in that case, the most positive allegations of the practice were made on the part of the pursuers, the practice was admitted by the defender; and ultimately the objection was disregarded both by the Court of Session, 14th July 1792, and the House of Lords, 24th Dec. 1795.

It is true, that in that case the summons proceeded in the name of one individual, George Home of Branxton, and that that circumstance was founded upon as a specialty by the pursuers, in addition to their argument on the general point. But when it is considered that the leading instance was that of the company, under the name of the firm, and Mr Home appeared only as their 'factor and ma-'nager, according to a factory and commission,' it is difficult to see how the instance of the mandatary could be sustained, if that of the party had been considered bad. Indeed, any doubt upon that point may be held to be removed by the case of Scott against Napier, 23d Feb. 1827, one of those referred to in the present pleadings, in which the Court refused to sustain action against Mr Napier, as the manager 'of the Galloway Banking Company,' until all the partners were called. Upon comparing the judgment in this last case with that pronounced by the Court and the House of Lords in that of Douglas, Heron and Company against Gordon, we consider ourselves warranted in the conclusion, that the distinction re-

peatedly made by the Court, as in the case of the Culcreuch Cotton Company, (Nov. 27. 1822,) and other cases of the same kind, is well founded; and that, although action cannot be maintained at the instance of a 'mere descriptive name or denomination,' it may be maintained by a 'mercantile company suing under its proper 'firm by which it grants obligations.'

But we must add, that while the question as to the competency of an action in such form, at the instance of a company, is little more than one of mere form, as they always have the means of specifying the names of the partners, the objection, if good on the part of defenders, as it is urged in the present case, would involve the most serious consequences, not easily reconcileable with the generally recognised forms of procedure in many branches of our practice.

Thus, in order to make good a claim for an illiquid company debt against the individual partners, it is held indispensable that the debt should, in the first instance, be constituted against the company. According to the form of summons in such a case, even as referred to in the pleadings for the defenders, 'the said C. D. and 'Co., as a company, and the said C. and D, the individual partners 'thereof,' are called upon to make payment: the will of the summons being, 'that on sight hereof ye pass, and in our name and 'authority, lawfully summon, warn and charge the said C. D. and 'Company, as a company, at their usual place of business, and the 'said C. and D, the individual partners thereof, personally, or at 'their respective dwelling-places,' &c. Here the individual partners called are to be cited in the common way, while C. D. and Company, as a company, are to be cited at 'their usual place of 'business.' Indeed this form of citation is expressly recognised by statute, it being provided by 54 Geo. III. c. 137, § 20, in regard to the sequestration of partnerships, that 'it shall be sufficient to 'cite the partnership, by leaving a copy at the house or shop where 'their business is or was carried on, or where any of their acting 'partners reside.' Now it surely cannot be held, that the conclusion against, and the citation of the company under the firm or company name is an empty form. On the contrary, it rather appears to us, agreeably to the principle mentioned above, that so far from the conclusion against the company being dependent on that directed against individual partners, the conclusion against the individual partners is dependent, for its validity and effect, on that directed against the company by its firm. Accordingly, in the case of a decree obtained under a summons framed in the above-mentioned form, and executed at the ordinary place of business of the company, we should think that the debt must be held as constituted against the company, and that in the event of the subsequent dis-

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covery of a partner, whose share in the concern had not been known at the time, it would be equally contrary to principle, and injurious in practice, to allow such partner to plead, that the decree of constitution against the company was invalid, because his name, as an individual, had not been included in the original summons.

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But again, it has been already noticed, that in cases of sequestration, the statute expressly recognises the existence of the partnership, as distinct from the individuals composing it, and points out the form in which that body, in its social character, shall be cited. Indeed, in many cases this is unavoidable, as a partnership may be insolvent and sequestrated, while one or more of the partners remain solvent. The whole rules and authorities applicable to such cases seem to proceed on the assumption that the sequestration of the company is to be directed against the firm, (*Bell's Com. passim*); and if it should be held that such a procedure is not effectual, without directing it against the whole individual partners, we rather suspect it would be necessary to devise a new set of forms, very different from those which have been generally followed, and hitherto considered as unobjectionable.

Lastly, It is only necessary to mention the practice in regard to bills and promissory-notes, which appears to us necessarily to imply the competency of procedure, either at the instance of, or directed against a company by its firm. In such cases the registered protest has, by statute, the force of a decree. But it is evident that the terms of the bill or note afford necessarily the measure of the constructive decree obtained by the registration. In every case, then, of a bill protested, either at the instance of or against a company, effect is given to a decree at the instance of or against a firm, without mention of the individual partners. Such we understand to be the invariable practice; and indeed the principle involved in it has received effect, to its full extent, by the decision of the Court in the case of Thomson against Liddle and Company, 2d July 1812, in which it was held 'competent to charge the in-'dividual partners of a company upon letters of horning directed 'against the company firm.'

Neither does it appear to us to be of any importance, that in that case the letters of horning were directed against 'the said John 'Liddle and Company, and the individual partners of that company.' For, in the first place, if a company has not under its firm a persona standi, the objection surely cannot be remedied by the vague and unmeaning addition of 'the individual partners of that com-'pany.' 2dly, As the bill charged on was drawn by 'John Liddle 'and Company,' the letters of horning, in adding the words alluded to, were utterly unwarranted by the bill forming the groundwork

of the diligence; unless on the supposition, that the firm does, by necessary legal implication, include the individual members of the company in their social character. And, 3dly and lastly, The supposed specialty does not apply to one part of the procedure which was recognised by that decision; for although the letters of horning were directed against John Liddle and Company, and 'the individual partners of the company,' the charge was given not only to Andrew Liddle, but to 'Andrew Liddle and Company,' without any mention of the individual partners of this last company; so that, in that very case, a charge against 'Andrew Liddle and Company,' without even the general mention of the individual partners, was sustained.

On these grounds, we are of opinion, that the preliminary pleas of the defenders are ill-founded. It is not denied, that the only designation under which the defenders dealt with the pursuer was that of 'John Hare and Company.' It is not denied, that the effects arrested belonged to 'John Hare and Company,' and no notice is given of the individual partners, nor requisition made to call them; and, in these circumstances, we think that the mere formal objection now maintained by the defenders could not be listened to, without bringing into question the practice, judicial as well as mercantile, hitherto followed in some of the most important and comprehensive classes of transactions.

Lord President, Lords Balgray, Gillies, Corehouse and Moncreiff.—Further, in the case of defenders, it may often be impossible for the pursuer, in limine, to discover who are the individual partners of the company against which the action is raised; whereas, a company pursuing has it always in its power to specify the names of the partners—so that the ratio is stronger for suing a company only by its firm.

Lord Mackenzie.—I concur in the above opinion, with this observation, that I do not wish to give any opinion whether the decision in the case of the Culcreuch Cotton Company, and other cases of the same kind, was well founded in principle or not. I think it enough to observe, that the only ground on which these decisions can be supported, viz. that the name of the company was not that in which they granted obligations or conveyances of right, has no existence in the present case.

Lord Medwyn.—This is a very important question, and deserves the most minute and anxious discussion.

In the commercial states of Europe, the history of commerce shews, that while the traffic with the more distant quarters of the

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globe was carried on by regulated and joint-stock companies, associations, consisting of two or more individuals, were formed for carrying on home trade and manufactures under a company firm. Scotland, following this example, adopted a similar plan, having both public and private associations of this kind in the 17th century. The first were encouraged by various Acts of Parliament; see 1661, c. 40; 1681, c. 12; 1693, c. 32; 1695, c. 8. As to the latter, Erskine (iii. 3, 20,) says, 'According to our present practice, the partners in private companies generally assume to themselves a firm or name proper to their own company, by which they may be distinguished in their transactions; and in all deeds subscribed by this name of distinction every partner is, by the nature of the copartnery, understood to be entrusted with a power from the company of binding them.'

A copartnery for trade using a social firm, under which contracts are made with the public, is a separate person (*Bell's Principles*, 357.) from any, or the whole individuals of which it consists; and is capable of maintaining the relation of debtor and creditor separate and distinct from the obligations of the partners as individuals; *Bell on Bankruptcy*, ii. 619. It is a quasi corporation, possessing many, but not all the privileges which law confers upon a duly constituted corporation. A mercantile company can hold moveable property; it has even been adjudged that it can hold a lease of an heritable subject; Dennistoun, Macnayr and Company, 16th Feb. 1808. A company binds itself by subscribing a personal bond or bill by its firm, and, in like manner, a bond or bill granted in its favour is an available document of debt. 'If a partner acquires a right in name of the company, the property is vested directly in the company;' *Ersk.* iii. 3, 20. One company may become a member or individual partner of another company; *Bell*, ii. 627; of which instances will be found in Dewar *v.* Miller, 14th June 1766, and in Thomson *v.* Liddle and Company, 2d July 1812.

It arises from thus viewing the company as a separate person from the individual partners, that it is incompetent to arrest a company debt for a debt of one of the copartners; that the company funds are, in the first instance, liable for company debts; Corrie and Son *v.* Calder's Creditors, 23d Jan. 1741; that a company creditor, after ranking on the company funds, may then rank on the individual estates of the partners; Creditors of Carlyle and Company *v.* Dunlop's Trustees, 8th August 1776; and that the share of the company's funds due to a partner may be arrested in the hands of the company; *Ersk.* iii. 3, 24.

In Fraser, Reid and Sons against Lancaster and Jamieson, 14th

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Jan. 1795, although a very critical objection to an arrestment was stated and sustained, it never occurred to the parties that an arrestment, used in the hands of a company as an individual and under the social firm, was inept. The execution of arrestment, as appears from the report of the case, bore, 'of which letters I left 'a just copy of arrestment for each of the said Michael Muirhead 'and Company, James Coats, Mitchell and Anderson, within each 'of their respective accounting-houses in Glasgow, with each of 'their respective clerks, to be given to each of their respective 'masters, because, after inquiry made by me for them there, I could 'not apprehend them personally.'

By indorsing a bill granted to a company with the company firm the property is transferred; the property of a moveable bond or other moveables will also be transferred by assignation subscribed by the company; Robb *v.* Forrest, 28th May 1830; and the only effectual discharge of the one or the other is in like manner by this company firm. When a company is creditor of a bankrupt, and coneurs in his discharge, the discharge is subscribed by the firm; *Bell*, ii. 472.

Finally, A company may be rendered bankrupt under the Act 1696; Fairholmes, 18th Dec. 1770; and may be sequestrated under the Bankrupt Act, § 20; which farther provides, that 'it 'shall be sufficient to cite the partnership, by leaving a copy at 'the house or shop where their business is or was carried on, or 'where any of their acting partners reside.'

The only limitation on the rights of a private company seem to be, that they cannot hold heritable property, as they cannot maintain the character of superior or vassal; and that a penal action cannot be directed against them; Miles *v.* James Finlay and Company, 16th Nov. 1830; neither can they be pursuers of such; Aitken *v.* Rennie, 10th Dec. 1810.

Among the many improvements introduced into the law of Scotland during the Presidency of Lord Stair, the act 1681, c. 21, was passed, which authorised summary diligence upon foreign bills of exchange, duly protested against the acceptors and indorsers; and this privilege was extended to inland bills by 1696, c. 36. The form of protest of a bill is and was, according to mercantile usage, by commencing with a copy of the bill, stating the non-payment, and protesting against the acceptor by name, and the drawer and indorsers generally. Hence, whenever a company held any of these characters, this was a direct authority for raising diligence against a company, and at the instance of a company. Foreign bills would often be drawn and indorsed by a social firm; and although, among ourselves, there might then be comparatively few private mercan-

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tile partnerships using a social firm, they were not altogether unknown; (see Monteith, 9th Jan. 1672.) Practice has fully sanctioned this interpretation of the above statutes. By 12. Geo. III. c. 72, the privilege was extended against drawers of bills; and as by this time the practice of charging companies on such documents was quite notorious, since no restriction is imposed as to this, it may be said to have been sanctioned by implication.

The protest being registered is the warrant for letters of horning, and if the protest is against a company, for which alone the bill signed by the company gives warrant, so the letters of horning can only issue in name of a company or against a company. The form in the Juridical Styles, ii. 541, ed. 1790, is thus: 'That on 'sight hereof ye pass, and in our name and authority, command 'and charge the said B. and Company, personally, or at their re- 'spective dwelling-places, conjunctly and severally, to make pay- 'ment, &c. Wherein, if they fail, the said space being elapsed, 'that immediately thereafter ye denounce them our rebels, put 'them to the horn, &c. Attour, that ye lawfully fence, arrest, &c., 'all and sundry the said B. and Company's whole readiest move- 'able goods, gear,' &c.: And this note is added, 'This horning 'ought to be executed against each individual known to be a part- 'ner of the company, personally, or at his dwelling-place, in com- 'mon form. It may also be executed by delivering a copy of the 'charge to any one of the partners for himself, and on account of 'the company, which we conceive to be a sufficient warrant for 'poinding or other procedure against the company funds. But if 'personal diligence be wanted, the former mode is preferable, as 'caption can only be obtained against such of the partners as are 'specially and individually charged.'

This shews the practice more than forty years ago. What is stated on this subject in the latest edition is to the same import.

The form given in the Appendix to Thomsom on Bills differs from the above only in this, that after the company firm, there is added, 'as well as the individual partners thereof.' But though the name of no individual is ever mentioned, the horning against the company is a sufficient warrant to charge any one or the whole partners, each partner being liable for the debts of the company in solidum. This has been repeatedly sanctioned; Anderson *v.* Bolton and Barker, 26th Jan. 1810; Thomson *v.* Liddle and Company, 2d July 1812. If any mistake has occurred in charging a person who is not a partner, he is entitled to have the charge suspended without caution.

When a charge is given to a company for payment of a bill on which they are obligants, if they have any defence to state against

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the claim, a bill of suspension is presented in their name, as being the party charged to pay. When passed, it is discussed in their name, and the letters are found orderly proceeded against the company, the person indebted and charged to pay, or they are suspended. If a company has thus a persona standi to obtain a suspension, can there be any reason why a company should not also pursue an ordinary action socio nomine?

When the proceedings against a company commence by an ordinary action, it has been held that the company must be called; and it is not competent to pursue one or more of the individual partners without calling the company; *Kilk.* 518; Reid and M'Call *v.* Douglas, 11th June 1814; and the law is so laid down in the interlocutor in M'Tavish *v.* Lady Saltoun, 3d Feb. 1821, that in an action for a company debt, 'it is necessary so call the company itself, and 'it will not be competent to insist against an individual partner, 'without calling the company.'

If, then, a company may and must be defenders in a claim against them; if diligence may issue in their name, at their instance, or against them; if they may suspend socio nomine, it would be a singular anomaly if they could not also, when they can hold property, and sustain the relation of a creditor, raise action except in the name of their individual partners. Accordingly, it does not appear that any such doubt had ever occurred till recently, when we have become more acquainted with the doctrines of the English law, which 'on this point is peculiar.' We cannot turn up a page in our reports without finding innumerable instances of companies both pursuing and defending socio nomine; (*Bell's Princ.* 357); and so far as I can see, without a doubt of the correctness of such a procedure, either in our Courts or in the House of Lords. Thus, in Kames' Decisions, there is Baynton and Shaw *v.* Swinton, 14th Nov. 1714. In Elchies' Decisions, we have Ainslie *v.* Arbuthnot and Company, 5th June 1739; John Coutts and Company *v.* Ramsay and Stewart, 10th Jan. 1749; Robertson *v.* Melvill and Liddell, 31st Jan. 1749, &c. In Falconer's Decisions, we find Wardrop *v.* Fairholm and Arbuthnot, 19th Dec. 1744; and the interlocutor 'prefers Fairholm and Arbuthnot primo loco, and Arbuthnot and 'Company secundo loco.' In Kilkerran, we find Forbes *v.* Main and Company, 25th Feb. 1752; Christie and Company *v.* Fairholms, 7th Dec. 1748, &c.

In Livingston *v.* Gordon, 17th Jan. 1755, a question occurred, whether Gutzmer and Sommerville acted as a company; and among the grounds for inferring that they did, it is argued, '3*dly*, It 'appears from evidence produced, that they both sued and were 'sued as a company.'

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Neither was the appearance of a company as pursuer or defender under their company firm admitted without question in our own Courts only. When any such causes have been carried to the House of Lords by appeal, no objection seems in former times to have been raised on that ground; see Ainslie *v.* Arbuthnot and Company, 7th Feb. 1743; Cheap *v.* Aiton and Company, 11th Dec. 1772, the interlocutor in which bears, 'Ordered, That 'the aforesaid interlocutor, &c. be reversed, reserving to the 'respondents, the said Aiton and Company,' &c.; Elliot *v.* Wilson and Company, 25th June 1776; Alston *v.* Campbell and Company, 3d March 1779; Douglas, Heron and Company *v.* Gray, 14th Jan. 1779, &c.

In Douglas, Heron and Company *v.* Gordon, 16th June 1792, the point may be said to have been in terminis decided. The summons is raised at the instance of 'Messrs Douglas, Heron and 'Company, late bankers in Ayr, and George Home of Branxholm, 'their factor and manager,' concluding that Sir Alexander Gordon should be decerned 'to make payment to the said Messrs Douglas, 'Heron and Company, and to the said George Home, their factor 'and manager,' &c. The defence is, 'that the pursuers had pro-'duced no title;' and in support of this it is argued, that a firm of a private company or partnership, if it could in any shape maintain an action, could never maintain one like the present, after its dissolution, to the effect of compelling an individual partner to pay such sums as they chose to a gentleman described as their manager.

The Lord Ordinary (Dreghorn,) 24th Dec. 1791, repelled the defender's objections to the title of the pursuers to insist in the action.

A reclaiming petition was presented, which, among other things, prayed the Court 'to sustain the objections to the title sued on, 'and dismiss the action simpliciter; or to find, 1*st*, That the firm 'of Douglas, Heron and Company cannot be regarded as pursuers 'in the present libel, as not being a nomen juris. 2*d*, That as Mr 'Home appears solely as factor for, and deriving his right from this 'firm, the addition of his name does not obviate the objection.'

The Court refused the petition.

The case was appealed on this point of title chiefly. The judgment of the House of Lords, 24th Dec. 1795, was: 'It is or-'dered that the action do proceed in the Court below, between 'the appellant and respondent; and it is further ordered, that an 'account be taken of all the dealings,' &c.

These instances may suffice as to the practice of the Courts formerly, and that it was without objection; and it may be only further noticed as to this matter, that in a practical work, published in

1804, is this statement: 'When a mercantile company is pursuer, there can be no other change in the form of the summons 'than what arises from designing the company by the firm, as "our lovites A. and Co.' In the other parts of the summons they 'are called pursuers. When the action is raised against a company, you will, in describing the debt, state that 'B. and Co. are "justly indebted,' &c.; and the will ought to be expressed in these 'terms—'Our will is therefore, that ye summon, warn and charge "the said B. and Co.,' at their shop or warehouse, &c. It is not 'necessary to cite the pursuers of the company individually; a company may sue and be sued, and the decree of an action against 'the company will bind the partners of that company;' *Bell's Forms of Deeds*, vi. 18 *.

The change which has been introduced into the last edition of the Juridical Styles was subsequent to, and occasioned by the doubts expressed at one time in the House of Lords, but which afterwards were admitted to have been ill founded; *Wilson and Shaw's Appeal Cases*, iii. 365.

When a mercantile company has been established, and has acquired credit with the public, it has been the policy of such to continue the use of the well-known firm, although all the partners who originally constituted the company, and gave sanction to the firm, have left the company by death or retirement. This practice was common among the continental states, and was recognised in the commercial law of Europe, till it was recently modified by the Code Napoleon, and it is eminently so with us. In many well-known companies it is so. The minute for Forsyth mentions several; but it has never been made a subject of inquiry, whether the partners whose names are in the firm still subsist, nor has action ever been refused to a company on this ground. If a mercantile company be

* As corroborative of this statement as to the practice, I subjoin the answer I received from a very intelligent agent, who passed writer to the signet in 1786, and who has been much employed by mercantile companies: 'It has been my practice, 'from the starting to the present date, to raise all summonses and diligence at the instance of mercantile companies, foreign and domestic, by the company firm, without 'naming the partners; and I never in any instance saw that course objected to. I 'allude, of course, to personal actions for sums of money. When it was found necessary 'to proceed to real diligence, such as adjudication, I considered it necessary 'to sue in name of the individuals composing the company, because such proceedings 'led to a feudal investiture, which cannot exist in any company not incorporated. 'In the case of Sir W. F. and Co., they, on those occasions, usually assigned the debt 'to me.

'The same course is followed in practice when the defender is a mercantile company, or when a mercantile company is to be subjected to ultimate personal diligence; and this last affords the most satisfactory instance of the practice, for the 'letters of horning show, on the face of them, nothing but the company firm.'

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not held as duly called, by merely calling Mr Napier, as manager of the bank. But, on the other hand, action is competent against such a company, if the company is called as well as certain of the individual partners; Gavin *v.* Sea Insurance Company, 17th Feb. 1827; Pollock *v.* Commercial Bank, in House of Lords, 28th July 1828. In consequence of this last judgment, action was even sustained at the instance of the cashier of a banking company, which had ceased to carry on business, except to wind up their concerns; Cheyne and Mackersy *v.* Little, 2d Dec. 1828.

Such a conclusion is not inconsistent with the decisions in the Mason Lodge of Lanark *v.* Hamilton, 11th June 1730; Crawford *v.* Mitchell, 13th June 1761; Lawson *v.* Gordon, 7th July 1810, or Wilson *v.* Kippen, 7th June 1823; because these were not mercantile companies pursuing on mercantile contracts, supported by mercantile usage, and the general law of Europe founded on it, but private associations nowise connected with commerce; two of them being mason lodges seeking to enforce bye-laws; another, an association assuming the privileges of a corporation within burgh; and the last the managers of a subscription coffeeroom.

When this question was first stirred, in the year 1828, I set myself to examine it carefully for my own satisfaction; and besides looking into the authorities in our own law, I examined the works of foreign jurists, and even obtained opinions from lawyers of Germany, Italy, Holland and France. I found, as I expected, that the law relative to mercantile societies in the continental states was the same as that which was recognised among ourselves; that although a corporation (universitas) had alone the privilege of suing and being sued in its corporate character, and that an ordinary private society (societas) had not, yet that mercantile usage had sanctioned the use of mercantile firms; that they had acquired this privilege of a corporation, and that they sue and are sued as persons by their firm, which had grown up from, and was sanctioned rather by the practice of the courts than by any express enactments. Further, it does not appear that any distinction is made between a mercantile company assuming its name from the individuals of which it is composed, or from the nature or locality of the trade which it carries on, except under the recent enactments of the Code Napoleon, in those countries, such as France and Italy, and the Rhenish Provinces of Germany, which are still subject to that Code.

The Code de Commerce is chiefly a compilation from the Ordonnance of 1673, drawn up by Savary, the author of the Parfait Négociant, as the exposition of the customary commercial law of France, and from those of 1681 and 1687; and in defining the three kinds of mercantile company recognised in the French law, (*Code de Com-*

merce, 1, 8, 1,) La Société en nom collectif, La Société en commandite, and La Société anonyme, the chief alteration seems to be, besides re-enacting the necessity of registration, which had fallen into disuse, (*Pothier de la Société, par Hutteau*, p. 39,) in more specifically applying the latter to such companies as derive their name from the object and place of their trade than was done under the old law; (see *Pothier*, p. 59). The first is the ordinary company trading by an individual firm. The second is a constitution of partnership unknown in Great Britain. The Société Anonyme, by the new code, requires the sanction of the government, and the publication of its contract, which must contain a clause by which a manager or director is appointed, in whose name actions are to proceed; but when thus constituted, that species of mercantile company thus sue and are sued; while the other two sue and are sued by their trading firm, as is enacted by the Code de Procedure Civile, Art. 63, and one of the best commentators on it says, 'La 'seconde particularité est, que pour assigner valablement une So- 'ciété de commerce, il suffit de la designer dans l'exploit par la de- 'nomination qu'elle prend elle-même dans le public, sans qu'il soit 'necessaire d'y specifier le nom individuel d'aucun de ses membres;' *Merlin, Repertoire de Jurisprudence*, tom. xii. p. 709. Great latitude, however, is allowed in this matter, influenced, perhaps, by the ancient state of the law, for a coach company was held to be duly cited by the general designation, 'Entrepreneurs des Messa- 'geries générales, demeurant à Paris, Rue,' &c. without mentioning the name of the manager, or of any of the individuals composing it; *Sivey, Jurispr. de la Cour de Cassat.* t. ix. p. 40. But by the mercantile law of other countries, which do not now, nor never did acknowledge the authority of the French Code, this distinction seems to be unknown, and either form of mercantile society has the privilege of a corporation, to the effect of suing and being sued by its mercantile firm.

The law of England seems to be the only law which has not allowed usage to confer this privilege upon a mercantile company. This perhaps arises from the strict technicality of the English law, which declares that a plaintiff must sue by his Christian name and surname, (see *Comyn's Digest, v. Abatement*,) and from the original process, which could only bring an individual into court as defendant by arrest, but, at least, it is attended with some anomalous consequences, which should not encourage its adoption into other systems of law; for, it is undoubted that, although a mercantile company cannot appear as plaintiff or defendant, the individuals can sue or be sued on bills of exchange or other mercantile documents, drawn on, accepted by, or indorsed to the firm of the company. In

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short, they may draw a bill, or take a bond in their favour, as a company, and may recover under it, but not in the name to which the instrument directs payment to be made.

Opinions of Consulted Judges.

Thus, in 'J. Moller and T. Moller v. Lambert,' (Nov. 1810, 2 *Camp.* 548,) the defendant bound himself by a bond of bottomry to the 'Widow Moller and Son.' It was proved that the Widow Moller had been dead some years before the execution of the bond, and that the plaintiffs, her sons, have since continued to carry on trade under the old firm. It was objected, 'that, however a bill of 'exchange or promissory-note might be given to a mercantile firm, 'in such a solemn instrument as a bond, the names of the obligees 'must be specifically mentioned.' But, on the other hand, it was maintained, 'that, in this respect, there was no difference between 'bonds and simple contract obligations.'

'Sir James Mansfield, C. J., thought it was enough if the plain-'tiffs were proved to be the persons meant by the Widow Moller 'and Son.'

They had a verdict accordingly.

As a necessary, but very inconvenient, consequence of obliging mercantile companies to sue and be sued in the names of the individual, it is held, upon the principle that no man can contract with himself, nor, of course, can require to sue himself, that if a promissory-note be indorsed from one firm to another firm, and one of the partners is a member of both firms, the indorsees cannot maintain an action upon the note against the indorsers; *Montague*, vol. i. p. 76, referring to Mainwaring v. Newman, in 1800; 2 *Bos. and Pull.* 120.

I am humbly of opinion, that the result of the decisions is, that a descriptive company (not having the protection of 7th Geo. IV,) may sue or be sued in their own name, with the names of the directors, or manager or cashier subjoined. But however this may be, I have no difficulty in holding, that an ordinary mercantile firm, such as that under which the defenders trade and deal with the public, can be properly brought into Court by a summons against them, socio nomine.

When the cause returned to the Second Division with these opinions,

Opinion of Court.

The Lord Justice-Clerk said—I concurred with your Lordships in opinion, that it was proper to send this case to be considered by our brethren, in order to have a point of this importance settled by a solemn judgment. We have now an unanimous opinion of the Consulted Judges in favour of sustaining this summons, and in that opinion I entirely concur, after having studied this case with all the

pains that I could bestow on it. I shall only add, that in delivering this judgment, I by no means think that I am at all touching on the authority of the case of the Culcreuch Cotton Company, in which I was of opinion, and still remain so, that it is incompetent for a company carrying on business under a mere descriptive firm, which is never subscribed or used in obligations, to sue or be sued merely in the name of the firm. This case is entirely different. 18 Nov. 1834. Forsyth v. Hare & Co. Opinion of Court.

The other Judges concurred.

The *Court* accordingly repelled the preliminary defences, and remitted to the Lord Ordinary to proceed accordingly. Judgment.

Lord Ordinary, *Mackenzie.* Act. *Moir.* Alt. *Whigham.* *Gordon & Barron*, and *T. Bruce jun.* Agents. *F.* Clerk.

U.

FIRST DIVISION.

No. VIII. 20*th November* 1834.

ALEXANDER PETRIE
against
THE RIGHT HONOURABLE THE EARL OF AIRLIE.

PUBLIC POLICE.—OFFER OF REWARD.—IMPLIED CONDITION.—PUBLIC OFFICER.—*The Lord-Lieutenant of a county having offered a reward 'to any person who would give such information as 'might lead to the detection of the author and printer' of a placard, to be paid by the clerk of the lieutenancy 'on conviction,'—found liable for the amount of the reward, in a personal action against him by a party who had given the information required, although no conviction followed, the public prosecutor having declined to prosecute, and no steps having been taken by the Lord-Lieutenant to obtain a conviction at his own instance.*

On 16th May 1831, a meeting of the Noblemen, Freeholders, Justices of Peace, and Commissioners of Supply, was held at Forfar, being called by the convener of the county, upon a requisition, 'for the purpose of considering the plan of reform lately submit-'ted to the House of Commons, and determining on the propriety 'of addressing both Houses of Parliament in regard to the same.' At that meeting, two sets of resolutions were proposed, one approving and the other disapproving of the measure. The former was carried by a large majority.

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Soon after this meeting a placard was printed, and posted up in several places of the county, entitled 'Reform,' and bearing to be a list of the names of those composing the majority and minority of the above meeting. The majority were described in the placard, as 'Majority in favour of the King, his government, and his people,' and the Minority were described, as 'Minority against the King, 'his government, the people, and the bill.' Among the names in the latter list was the defender's, the Earl of Airlie. The result was summed up thus: 'For the King, 59; against the King, 24; 'majority for the King, 35.' The placard did not bear the name of the printer nor the date.

When the publishing of this placard came to the knowledge of Lord Airlie, he, as Lord-Lieutenant of the county, caused the following advertisement to be published:

'ONE HUNDRED GUINEAS REWARD. A most false and scandalous 'placard, headed Reform, having appeared in several of the burghs 'of Forfarshire, without any printer's name or date being attached 'to it, in which it is stated, that the Lord-Lieutenant, and thirteen 'Deputy-Lieutenants of the county, voted at a county meeting, 'held at Forfar on the 16th ult., against the King, his govern-'ment, and his people; and this placard having come to the know-'ledge of the Lord-Lieutenant only this day, on his return from 'Edinburgh to Cortachy Castle, a reward of one hundred guineas 'is hereby offered to any person who will give such information as 'may lead to the detection of the author and printer. The reward 'will be paid on conviction by the clerk of the lieutenancy. By 'order of the Right Honourable the Earl of Airlie, Lord-Lieu-'tenant. (Signed) THO. CARNABY, C. G. M. Forfarshire. *Cor-'tachy Castle, 14th June* 1831.'

The defender intimated what he had done to the Lord Advocate, and added, 'I think it right to state, that I look to you, as Lord 'Advocate of Scotland, for the support of his Majesty's Govern-'ment, in aiding in the detection of the authors of this calumny.' Intimation to the same effect was given to the Solicitor-General, and to the Sheriff of the county.

In consequence of this offer of reward, the pursuer, on the evening of the same day in which it was published at Arbroath, gave information to Mr Nicol, sub-division lieutenancy clerk there, that James Lindsay and David Petrie (the informant's brother) were the authors, printers and publishers of the placard, and emitted a declaration to that effect. This information the defender immediately communicated to the Lord Advocate by letter, in which he stated, 'I shall now leave the matter in your Lordship's hands, 'and expect that your Lordship will give the necessary instructions 'to have the parties concerned brought to justice.'

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The Lord Advocate declined to prosecute, stating, that although he considered the placard to be unwarrantable and offensive, 'that 'its publication does not in my opinion amount to a crime, and 'that therefore I see no ground on which I could, with propriety, 'indict those who have been concerned in it;' considering that the placard would, 'instead of an indictable offence, turn out to be a 'mere piece of factious impertinence.' In consequence of the public prosecutor declining to interfere, the defender took no farther steps in the matter.

The pursuer then applied for payment of the reward, which was refused, on the ground that it was only to be paid on conviction, but no conviction had followed. The pursuer raised the present action before the Sheriff of Forfarshire, concluding against the Earl of Airlie for L.105, being the amount of the reward offered, with legal interest from the date of citation, and expenses.

In defence against this action it was *pleaded*—

Defender's Pleas.

1. The reward having been offered in the event of a conviction, plainly meaning, a conviction on a proceeding to be instituted by the law-officers of the Crown, and no such proceeding having been instituted or conviction obtained, the pursuer has no claim for the reward.

2. The offer being for the sake of the public service, and the defender not having bound himself to prosecute individually, the reward offered on his part, publicly as Lord-Lieutenant, can afford no ground for instituting an action against him directly, or for demanding the reward from him as an individual.

Pursuer's Pleas.

Answered—1. The information for which the reward was offered was such as might lead to the detection of the author and printer of the placard. The statement, that the reward would be paid on conviction, was not intended to introduce any condition into the offer, but merely to indicate a criterion by which the accuracy of the information, and its power of leading to detection, might be tested, and to suspend the payment until these points should be ascertained. So far from making the conviction of a crime a condition of the payment of the reward, it does not mention any particular sort of crime that had been committed. But the defender having declined to test the information which was given by any judicial proceedings, the criterion indicated in the offer is superseded, and the pursuer having done all that was incumbent upon him, is entitled to the reward.

2. Even if it were held that conviction is a condition of the offer, the defender cannot avail himself of that, in respect he, and not the

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informer, was the party engaging to procure a conviction, and there is no particular sort of conviction specified in the offer. No attempt has been made by the defender to obtain a conviction. Having obtained all the information for which the reward was offered, the defender is bound to pay, or to sue for a conviction, which it is in his power to obtain.

The Sheriff sustained the defences, assoilzied the defender, but found no expenses due. The following note was added: 'The 'Sheriff-substitute is of opinion, that the merits of the case depend 'on the construction which falls to be put on the two placards, and 'that it is unnecessary to send parties to proof. He thinks it evi- 'dent, from the 'offer of reward' placard, that it was issued under 'the impression that there was culpable matter in the 'reform' pla- 'card, which might be the subject of accusation and conviction of 'the author and printer in a court of law, and accordingly the re- 'ward is declared payable 'on conviction.' When the case was 'laid before the Lord Advocate and Solicitor-General, they were 'both of opinion that there were not grounds in the 'reform' pla- 'card for a conviction. As no conviction, therefore, can be obtain- 'ed, the reward can never become payable. As the pursuer has 'been led into some trouble and expense by the offer of reward, 'expenses have not been awarded to the defender.'

The pursuer advocated, and the Lord Ordinary pronounced the following interlocutor and note: 'The Lord Ordinary having con- 'sidered the closed record, minutes of debate, productions, and 'whole process, advocates the cause, alters the interlocutor of the 'Sheriff, and decerns in terms of the libel: Finds the advocator 'entitled to expenses both in this and the inferior court, and re- 'mits the account thereof when lodged to the Auditor, to be taxed, 'and to report.'

Note.—'In the notice issued by the respondent, it is stated that 'a false and scandalous placard had been put up without the print- 'er's name or date being attached to it, and a reward of one hun- 'dred guineas is offered to any person who will give such informa- 'tion as may lead to the detection of the author or printer. So far 'the offer is unconditional; but it is added, that the reward will be 'paid on conviction. The advocator says that he gave the informa- 'tion required; his declaration was taken in writing by the clerk 'of the lieutenancy employed by the respondent for that purpose, 'and it is not disputed that it led to the detection of the author and 'printer of the placard.

'The advocator claims the reward, but he is met with the de- 'fence that conviction has not taken place. He pleads, in answer, 'that the defence is barred personali exceptione, because the re-

'spondent has declined to prosecute; and having implemented his 20 Nov. 1834.
'part of the agreement, the respondent is not entitled to withhold
'performance of the counterpart. This plea, at least to a certain Petrie v. Earl of Airlie.
'extent, is well founded; for if the respondent had chosen to prose-
'cute, he might unquestionably have convicted the printer, under
'the statute 39. Geo. III. c. 79, § 27. With regard to the author,
'the point is not quite so clear. The Lord Advocate refused his
'instance, being of opinion that the offence was not indictable; but
'he reminded the respondent, that the prosecution might proceed in
'his own name with the concurrence, which is never refused. It
'is not certain, therefore, whether a conviction might not still be ob-
'tained. But assuming that it could not, if the respondent offered
'a reward for detecting the author, under a mistaken idea that the
'offence was indictable when it was not so, it is he, and not the in-
'former, who is responsible for that mistake. If the time specified
'for payment of the reward, namely, the date of the conviction, is
'held to involve a condition, that condition cannot import more
'than that the information given should be sufficient to satisfy the
'Court or Jury, as in a question of proof, to which alone it refers,
'and not as in a question of relevancy, with which it has no connec-
'tion. The respondent having obtained from the advocator all that
'he stipulated for, he is not entitled to evade payment of the price
'which he offered for it, because it does not answer the purpose
'which he had in view. If he meant to construe the offer in the
'sense which he now does, he should have put the advocator on his
'guard, and not have allowed the disclosure to be made, which he
'knew, or ought to have known, would never lead to a conviction.
'He had no right to extract information which would enable him to
'bring an action of damages for defamation, or at least to expose
'the parties implicated, and injure their character in public estima-
'tion, while he knew, or ought to have known, that the reward
'which he held out to the informer, and on the faith of which the
'information was communicated, never could become exigible. The
'case of the advocator is in many respects extremely unfavourable;
'but it is thought that the present defence is inconsistent with
'equity, and, if sustained, would introduce a dangerous precedent.'

The defender reclaimed; but the *Court*, on the grounds stated in the Lord Ordinary's note, unanimously adhered. Judgment.

Lord Corehouse, Ordinary. For Advocator, *Jameson, Munro.* *James Burness*, S.S.C. Agent. For Respondent, *Dean of Fac. (Hope,) P. Robertson.* *John Yule*, W. S. Agent. *R.* Clerk.

T.

SECOND DIVISION.

No. IX. 21*st November* 1834.

TORRANCE
against
LEAF, COLES, SON AND COMPANY.

REPARATION.—(PRIVILEGED DISCUSSION.)—PROOF.—*In an action of damages brought by a bankrupt against one of his creditors for alleged defamation against his character, in matters relating to his bankruptcy, circulated amongst the other creditors, with a view to procure their concurrence in investigating his conduct and opposing his discharge,—found that the pursuer was bound to take an issue to prove malice, as well as injury and calumny.*

TORRANCE was a trader in Glasgow, and became bankrupt in 1831, being indebted to the defenders along with various other creditors. Sequestration was awarded against him on the 6th December 1831. On the 28th January 1832, the sequestration was recalled, on a petition at the instance of James Morrison and Company, merchants in London, and some of his other creditors. During the discussion on the petition for recall of the sequestration awarded in December 1831, a second petition for sequestration was presented at the instance of another creditor, but this was not immediately insisted in; and, in the mean while, various meetings of Mr Torrance's creditors were held, for the purpose of attempting to arrange his affairs by an extrajudicial trust and voluntary composition. Leaf, Coles, Son and Company were solicited to become parties to this composition, which they declined to do, but, on the contrary, wrote to the creditors, who so applied to them, a letter, commenting severely on the conduct of Torrance with regard to his bankruptcy, and holding him out as a fit person to be made an example of being refused his discharge. They also circulated copies of this letter to others of the creditors, all in the course of taking steps relative to his depending sequestration and discharge.

Torrance raised an action of damages against them, and against James Turnbull, their agent, who had circulated these letters, for defamation, and the jury clerks gave the pursuer four articulate issues, narrating the alleged words and circulation of the letters, and concluding with the usual terms in actions for ordinary slander where there is no privilege: 'Whether the whole, or any part of the

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'above words, are false and calumnious, and to the injury and damage of the pursuer?' On the other side, they gave to the defenders a counter issue, 'Whether in writing, or causing to be written, or in transmitting, or causing to be transmitted, either or both of the said letters, the defenders, or any of them, acted in discharge of a duty, or exercise of a privilege as a creditor or creditors of the said pursuer?' And also two issues in justification.

The defenders, on the other hand, insisted before the Lord Ordinary, that the burden of proving malice should be laid, in the first instance, on the pursuer, as in the ordinary case of an action for slander, where the defenders have an undoubted privilege.

The Lord Ordinary took the case to report, with the following interlocutor and note: 'The Lord Ordinary having considered the issues proposed for trying this cause, and heard parties' procurators thereon, and having consulted with Lord Mackenzie, to whom they were first presented, appoints the said proposed issues, together with the summons and defences, to be put into the boxes of the Lords of the Second Division of the Court, in order that the issues may be satisfactorily adjusted.'

Note.—'The Lord Ordinary thinks this a question of importance. The case is, that according to the most probable view of the cause, as it appears from the summons, the defenders being creditors under a depending process of sequestration, resisted a proposal of composition on the ground of what they held to be fraudulent practice in the bankrupts in the contraction of the debts, and the disposal of the goods furnished to them; and that they endeavoured to obtain the concurrence of other creditors in the opposition, by laying before them extrajudicially their views of such fraudulent practices. The question is, whether this is a relevant ground of an action or issue of damages without a statement of malice as well as falsehood? Or, at least, whether some form of issue is not necessary, which shall throw on the pursuer the onus of shewing that what was done was not done in the ordinary exercise of the rights of a creditor in the discharge of a duty, or the exercise of a privilege? The issues, as they stand, give to the pursuer a right to a verdict on simply proving that the things said were untrue, (which would be inferred unless the justification in the record were supported by evidence,) and injurious or calumnious in their own nature; and they give merely a converse issue to the defender, to prove that the words were written in discharge of a duty, or exercise of a privilege. The defenders say that the onus should lie the other way, and the Lord Ordinary thinks the question very important; for he thinks that it

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'would be a grievous state of things if, whenever an injured creditor, when required to concur in a composition contract, (which is this case,) refuses to do so under an impression of fraud, which he may not ultimately be able to establish, and under that impression endeavours by representations to obtain the concurrence of other creditors in his opposition, he must, without allegation of malice, or even of violation of duty, or departure from bona fide privilege, be made liable in an action of damages. The Lord Ordinary is strongly inclined to think, that if malice shall not be required, (which may perhaps be inconvenient in interpretation in this country,) some such form of issues as that adopted in the case of Coulter (Grant *v.* Coltart, Feb. 1. 1834) should in this case be resorted to. He cannot conceive a principle of greater hardship than to say, that because a man has opposed a composition on grounds which ultimately are found not to be proved, and has bona fide stated his views to other creditors for the legitimate purpose of obtaining their opinion, he must not only suffer by paying the expenses of the discussion, but be exposed to an action of damages at the instance of his bankrupt debtor. It requires very grave consideration, in his opinion; and he is inclined to believe, from any information he has, that in England, without a positive allegation of malice in the issue, or something equivalent, it could not be sent to a jury.

'The issues are clearly wrong as drawn in the first and second issues, because there is evidently no relevancy without combining them. A man cannot be liable in damages for the instructions he gives privately to his own mandatary or agent, and therefore the first issue, by itself, could never be allowed. The Lord Ordinary understands it to be admitted that this must be corrected.'

Pursuer's Pleas.

The pursuer *pleaded*—That the cases in which a pursuer was bound to lead a special proof of malice, and consequently to take an issue on that head, were those in which it appeared necessarily, from the whole res gesta, as stated in the record, that the defender was, at the time of uttering or publishing the slander, acting under an admitted privilege, and while, consequently, the only question that could arise in an action of damages was, whether or not the defender, in these circumstances, was in bona fide exercising his privilege, or whether he was merely making use of it as a cover for the purpose of conveying his malicious attack on the character of the pursuer. But in the present case, not only is the privilege denied, but there is no averment made by the pursuer on the record, that the defenders uttered and circulated the slander under any circumstances that could afford them the pretence of a privilege.

The defender *answered*—That in all such cases, when the Court was of opinion that a privilege was enjoyed by the defender in an action for slander, the pursuer was bound both to libel malice and to take an issue to prove it. 21 Nov. 1834. Torrance v. Leaf, Coles, Son & Co.

The *Court* was unanimously of opinion that the pursuer was bound in this case to take an issue to prove malice. Judgment.

Lord Medwyn.—This is an important case, though the principles on which it is to be decided are not new in our law. The law as applicable to all such cases is well laid down in the opinion of a learned Judge, (Lord Pitmilly,) in the case of Hamilton *v.* Hope, where he says, (*Fac. Coll.* 345,) 'Of other cases the distinction is, 'that in common slander (as distinguished from privileged cases) 'the law presumes malice from the use of the words; and the pur-'suer having proved injury and falsehood, is not put to prove ma-'licious intention, but the law infers it. In other cases which are 'called privileged, there is no room for this presumption, and there-'fore the pursuer must prove malice in the use of the words.' I entirely concur in the remark of the counsel for the pursuer, that in framing the issues, what appears in the face of the pursuers' allegations, (always presuming that they are relevant to support the conclusions of the action,) must be the criterion of what he is called upon to prove, and that if any thing else be requisite for the defence, the defender must take an issue to establish it. This would have been applicable in the present action, for instance, if the pursuer had denied or not admitted that the defenders were his creditors: it would have been necessary, in that case, for the defenders to have taken an issue to prove that fact; but it being distinctly admitted, both in the summons and condescendence, that they were creditors, then the question of their privilege as such is a pure point of law for the Court to determine in framing the issues. The only question, therefore, for the Court now to decide is, whether the defenders, being creditors, were warranted in making such comments on the conduct of the pursuer, in the circumstances stated in the summons, provided they did so in bona fide, and in the fair exercise of their privilege as creditors, and not merely out of malice and ill-will to the pursuer. In this point of view, it is important to consider, that an offer of composition had been made to the defenders at the time when the first letter on which the action is founded was written. Now, were the defenders, in considering the propriety of accepting their composition, not entitled to express to the other creditors their opinion of the conduct of the pursuer, in reference to his bankruptcy, provided only they did so in good faith, and not out of malice? The pursuer seems to have been of this opinion him- Opinion of Court.

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self in framing his summons and condescendence, in which the ground of his action is all along stated as founded on malice, although he now wishes to leave it out of his issues.

Lord Glenlee concurred.

Opinion of Court.

Lord Meadowbank.—I am entirely of the same opinion. If this matter had come to be considered on a question of the relevancy of the summons, there can be no doubt we should have required the pursuer to allege malice. I think, in the circumstances in which these defenders were placed, as stated in the condescendence, a composition being offered to them, they were clearly entitled to enlighten the other creditors as to the conduct of their common debtor, in order to induce them to assist in joint measures.

The *Lord Justice-Clerk.*—I thought this a case well deserving consideration; but the doubts I had in approving of the issues, as they were originally proposed, are now confirmed. Malice is stated distinctly, both in the summons and condescendence, and the whole action is rested on that basis. I do not think that the pursuer is now entitled to step out of that, and to take his issue as in the ordinary case for defamation, where there is no privilege. The only difficulty is as to the co-defender, Turnbull; but there is no allegation in the summons that he did any thing except as mandatary and agent for the other defenders.

Judgment.

The *Court* found, that in this case the pursuer could take no issue, without asserting malice, as well as injury and falsehood.

Lord Ordinary, *Moncreiff.* Act. *M'Neill, Dean of Fac. (Hope.)* Alt. *Rutherfurd* and *Sol.-Gen. (Cockburn.)* *John Cullen*, and *Campbell & Macdowal*, W. S. Agents.

U.

FIRST DIVISION.

No. X. 22*d November* 1834.

POOR FORBES
against
WILSON, STOW AND CO.

PROCESS.—POOR'S ROLL.—*Offer of settlement held sufficient to warrant a remit de novo to the lawyers and agents for the poor, who had reported a probabilis causa litigandi.*

FORBES having raised two actions against Wilson, Stow and Com-

pany, one a reduction, the other for damages, but depending on the reduction, applied for the benefit of the poor's roll, and obtained a report in his favour. Before, however, an interlocutor was pronounced, admitting Forbes to the poor's roll, the defenders offered to pay him the sum of L.30, in full of all claims under these actions, and applied, by a note to the Court, for a remit de novo of Forbes's application, that the lawyers and agents for the poor might consider, whether, in these circumstances, and with this offer of settlement, the pursuer had now a probabilis causa litigandi. The Court considered this highly expedient, and pronounced a new remit accordingly.

Act. Ivory. *Gibson-Craigs, Wardlaw & Dalziel*, Agents. *D.* Clerk.

T.

(No printed papers.)

FIRST DIVISION.

No. XI. 22*d November* 1834.

JAMES JOHN FRASER, W. S.
against
JAMES STEWART, S. S. C.

PROCESS.—EXPENSES.—ACT OF SEDERUNT, 6TH FEB. 1806.—*A decree for an account of expenses having passed in absence, without the account of expenses having been previously audited, in terms of the above Act of Sederunt, and the party having afterwards granted his bill for the amount, and paid a sum to account,—found, that he was not entitled to suspend a charge upon that bill, for the purpose of opening up the decree, and getting the account of expenses taxed.*

ALEXANDER HARDIE, shipowner in Greenock, was sequestrated on 27th May 1830. Messrs Kerr and Inglis, writers in Greenock, were agents in the sequestration at that place. The complainer was agent in the sequestration in Edinburgh. In August 1831, the bankrupt offered a composition, which was accepted of by the creditors, and approved of by the Court. The complainer was one of the cautioners for the payment of the composition, and for the payment of the expenses of the sequestration. The account due to Kerr and Inglis, for business done, and disbursements made in

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the management of the sequestration at Greenock, amounted to L.66. This account these gentlemen indorsed over to the charger, Mr Stewart, their ordinary agent and correspondent in Edinburgh, in payment of a debt due by them, and for the purpose of recovering payment from the complainer. The charger intimated this to the complainer in May 1833, and requested a settlement. After some personal interviews, the charger again, in October following, wrote to the complainer, inclosing a copy of the account, and requesting payment. In the beginning of the year 1834, the charger raised an action against Hardie, the bankrupt, George Fraser, one of the cautioners for the composition and expenses, and the complainer, as attestor of Fraser, and also as cautioner for the composition and the expenses of the sequestration. The summons concluded against these parties, conjunctly and severally, for payment of the above account, with interest and expenses. The summons and productions were borrowed up by the complainer; but being returned without defences, decree passed in absence. The decree was extracted, and charges given to the primary obligants, Hardie and Fraser.

On the expiry of these charges, the charger intimated to the complainer, that he was now ready to complete the discussion of the principals, by denouncing and recording the hornings and executions; at the same time sending a state of the debt, requesting payment, without farther expense being incurred. The charger at last gave the complainer a charge of horning on the extracted decree, upon which the complainer granted his bill for the amount, (L.89, 18s.) on 21st May 1834, payable one month after date. This bill not being retired when due, a charge of horning was given, and on the last day of the charge, the complainer paid L.50 to account, requesting indulgence for three weeks to pay the balance. After the expiry of the three weeks, the complainer presented a bill of suspension, which, upon being advised with answers, was refused, with expenses.

The complainer then presented this second bill of suspension, in which he *pleaded*—

Complainer's Pleas.

1. The decree upon which the first charge was given was pronounced for payment of the account of expenses, without these expenses having been taxed, which was irregular, and contrary to the terms of the Act of Sederunt, 6th Feb. 1806, which provides, 'That whenever an agent or his representatives shall choose to 'raise a summons for payment of an account, the Lord Ordinary, 'before whom the process may come, shall remit the account to the 'Auditor of Court, and no decree shall be pronounced, either in 'absence or after hearing parties, without a report having been

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Complainer's Pleas.

'made by the Auditor.' There is no distinction made between expenses incurred in the Court of Session, and such as are incurred by agents in the country. But even if there had been such a distinction, it would not apply to the present case, for although the account is due to country agents, it was in a process of sequestration before the Court of Session.

As the decree was pronounced in absence, and the charge upon it being under suspension, it is competent to have it opened up; *Erskine* iv. 3. 6; Craigie *v.* Scobie, 12th Nov. 1831.

2. The granting of the bill under suspension is no sufficient recognisal of the account to exclude taxation. This has been decided in Megget *v.* Douglas, 2d March 1826; Nelson *v.* Morison, 13th June 1834. The suspender, therefore, is entitled still to have these accounts taxed, and is not precluded from insisting in this, from having granted his bill for the amount, or from having made a payment to account. Mr Hardie, the bankrupt, who is bound to relieve him, might afterwards object to do so, on the ground that payment had been made without the accounts having been taxed; and the charger was bound to have got the accounts taxed before he took decree in absence. The decree pronounced without such taxation is null and void, and therefore falls to be suspended.

Charger's Pleas.

Answered—1. The charge under suspension is not a charge upon the decree in absence, but a charge upon the bill which had been granted by the suspender in implement of that decree. The validity of the decree cannot therefore be tried in the present suspension, that decree having received full execution, and all procedure upon it put an end to by payment. It is not therefore competent, in the present suspension, to impugn that decree.

2. But even if the validity of that decree could be tried in this suspension, and that it had been incumbent on the charger to have got his accounts taxed before taking decree, the objection cannot be stated now, the complainer being barred by the settlement under which the bill charged on was granted. Although a client is, in every case, entitled to insist on his agent's account of business being taxed, yet where payment has actually been made, the client is not entitled to open up the settlement and insist for taxation: he is held to have waived his right, and to have barred himself from insisting on his privilege, unless he could allege gross and palpable overcharges and inaccuracies. This point has been settled by repeated decisions; Macdonel *v.* Mackenzie and Mann, 6th Feb. 1823; Macmichie *v.* Phillips, 7th July 1826; Elder *v.* Smith, 27th May 1829; Macdonel *v.* Mackenzie, 22d June 1829; Clyne *v.* Swanson, 26th Jan. 1830; Macara *v.* Gilfillan, 4th June 1831.

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Charger's Pleas.

The only exception to the rule so completely established is, where the settlement was not considered a final settlement, or where there are specific allegations of fraudulent or improper dealings. Thus, in the case of Megget v. Douglas, 2d March 1826, founded on by the suspender, Megget, in the course of the business, received sundry partial payments to account from his client, and on one occasion a bill, likewise to account; but there was no final settlement of accounts, and the client was found not to be barred from insisting on taxation by the partial payments which he had made while the business was carrying on; and the same principle was recognised in the other case referred to by the suspender; Nelson v. Morison, 13th June 1834. In the present case, however, a final settlement has taken place, decree for the amount of the account has passed, and that decree was not challenged either by suspension or reduction: it was acquiesced in, and a bill for the amount granted, upon which bill alone the present charge is given. There is no room, therefore, for the application of the principle decided in the cases referred to by the suspender.

Judgment.

The Lord Ordinary refused the bill; and on a reclaiming note from the suspender, the *Court* unanimously adhered.

Lord Corehouse, Ordinary. Act. *Dean of Fac. (Hope,) Maidment.* *Party*, Agent. Alt. *Sol.-Gen. (Skene,) Wm. Bell.* *Party*, Agent. *B.* Clerk.

T.

FIRST DIVISION.

No. XII. *25th November* 1834.

WILLIAM M'GAVIN
against
JOHN ROBERTSON.

BANKRUPT STATUTE, 54. GEO. III. c. 137, § 15.—*Diligence by horning and caption, followed by an execution of search, having passed against an insolvent party, and about seven months thereafter a second search having been executed against him,—held that the limitation of four months, after the first execution of search, whereby the party was rendered legally bankrupt, applied only to the equalisation of diligences between competing creditors within that period, and that a petition for sequestration, if within four months of a subsequent*

search, (the other requisites of the statute being complied with,) was competent.

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M'Gavin *v.* Robertson.

THE respondent, Robertson, was a manufacturer near Dundee, and having become insolvent, the petitioner, M'Gavin, who was a creditor by a bill to the amount required by the statute, proceeded to execute diligence against him by horning and caption, (1st Nov. 1833,) and an execution of search was returned against him, (1st Jan. 1834) *.

A second search, under the petitioner's caption, was made for the respondent, and an execution returned 18th July following. This search was followed by a petition for sequestration, (9th Aug.) to which it was

Objected—That the application was incompetent, in respect that it had not been presented within the period of four months from the date of his legal bankruptcy, viz. 1st Jan. 1834, the respondent having been rendered bankrupt by the execution of search returned of that date. By the 15th section of the bankrupt statute it is provided, 'That if any person, being a merchant or trader in Scot-'land,' &c. 'shall be under legal diligence by horning and caption 'against him for debt, and shall either, in virtue thereof, be impri-'soned, or retire to a sanctuary, or fly or abscond for his personal 'safety from such diligence,' &c. 'it shall be lawful for any credi-'tor of the said person, whose debt shall amount to the sum of 'L.100,' &c. 'at any time within four calendar months of the last 'step of the said diligence, to apply by summary petition to the 'Court of Session for sequestration of the said debtor's estate, heri-'table and moveable, real and personal,' &c. Unless, therefore, a petition for sequestration be presented within four months from the legal bankruptcy, as completed by the first imprisonment, or its equivalents, absconding, &c. the application is incompetent, and an attempt, such as the present, to sequestrate the respondent, by executing a second search, seven or eight months after bankruptcy, is illegal.

Defender's Pleas.

This construction is supported by the analogy of the rules applicable to persons not engaged in trade. In ordinary bankruptcy the rule is, that beyond sixty days before bankruptcy, and four months afterwards, arrestments and poindings are preferable accord-

* The respondent had, previous to this, been imprisoned on letters of caption at the instance of another creditor, and a previous execution of search had also been returned against him upon the diligence of a third creditor, but these facts were not material to the present question.

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ing to their dates, that the bankruptcy continues in this state so long as the debtor remains insolvent, or unable to pay his debts, and that the renewal of the diligence does not produce a second bankruptcy, to the effect of a fresh equalisation of diligence; Strang v. M'Laren's Creditors, 12th May 1821; M'Math v. M'Kellar, 1st March 1791, *Bell's Com.* ii. 222. But if there can be no second bankruptcy in the general case, as little is there any authority for maintaining the doctrine of a second bankruptcy in the case of mercantile men, where there is no restoration to solvency; and it is only by constituting a second bankruptcy, that a renewed search, or other reiterated act of diligence, can render a petition for sequestration competent, which would otherwise be too late. There is no difference as to the time allowed in mercantile and other bankruptcies for equalising diligences, nor should there be any. The correspondence of the period of four months for sequestrating after bankruptcy, and of the period of four months for arresting or poinding in the ordinary case, must have been intentional; and the period runs from the same date in both cases, viz. from the period at which the party is rendered legally bankrupt.

Defender's Pleas.

Pursuer's Pleas.

It was *answered*—1. The construction contended for by the respondent is not warranted by the terms of the 15th section of the bankrupt statute, by which alone the present question falls to be determined, but is deduced from those clauses of the statute which provide for the equalisation of arrestments and poindings used against a bankrupt debtor within four months after the date of the bankruptcy. In the ordinary case, after the lapse of the first four months, every creditor is entitled to be preferred on his own diligence, according to the date of its priority; and from this the respondent contends, that, in the case of persons engaged in trade, sequestration after the four months is incompetent, because the effect would be to introduce a new term for the equalisation of diligences. But to sanction this conclusion an express proviso would have been necessary. The statute, however, does not even render future poindings and arrestment incompetent, but is confined to regulating their preferences; and it is only by its express enactments, in regard to that special matter, that the Court have decided in questions of competitions between such diligences. It is, however, altogether fallacious to infer, that because no arrestment or poinding, after the lapse of four months from legal bankruptcy, is entitled to claim a pari passu preference, but must each be separately preferred in suo ordine, therefore there can be no competent sequestration subsequent to the same period. But,

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2. There is no provision whatever in the 15th section of the statute about legal bankruptcy, in reference to the competency of a sequestration. The statute has not declared that this was to be the terminus from which the four months were to be counted, in the same manner as was provided with regard to the pari passu preference of arrestments and poindings. On the contrary, the term legal bankruptcy, as well as the circumstances that go to constitute it, had been left out, and an entirely separate and distinct set of requisites had been introduced in its stead, as constituting that position of the debtor which entitled his creditors to apply for sequestration. These were, 1. That the debtor shall be under legal diligence by horning and caption; 2. That he shall either have been imprisoned by virtue of such diligence, or have absconded, &c. (as ascertained by the execution of search); and, 3d, That the sequestration shall have been applied for within four months of the last step of the said diligence. All these concur in the present instance; and this being the case, it was of no consequence whether the debtor had been previously rendered bankrupt or not, or whether previous diligence may have been used against him or not.

But the reason upon which the respondent's objection is founded, viz. that sequestration, if granted after the lapse of four months from the date of legal bankruptcy, would disturb matters in regard to the independent right of preference belonging to each arrestment and poinding by itself, as fixed by the statute, is removed by the 18th section of the act, which provides for sequestration with the debtor's consent, and by which, without any reference to legal diligence, or to the lapse of time, the application is made competent at any time, on the joint application of the bankrupt and a creditor.

In the present case, therefore, if the respondent had done his duty, sequestration would undoubtedly have been awarded, although, when so awarded, it would have been attended with all the consequences which have been pointed out, in order to prove the incompetency of the present application.

Opinion of Court.

The Lord Ordinary ordered cases, and at the advising *Lord Balgray* observed—That it would be an extraordinary interpretation of the statute to hold that it would be competent for the debtor to apply for sequestration without limitation in point of time, while creditors could only do so within four months from the legal bankruptcy, there being no express provision in the statute on this point. If, indeed, there were any record in which executions of search could be entered, the objection would be entitled to greater weight, as all the creditors would thus have an opportunity of knowing if the debtor had been thereby rendered bankrupt; but this not

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being the case, it would open a wide door for fraud between the bankrupt and creditors who were inclined to assist him, to hold that a sequestration could be rendered incompetent by such a proceeding, which might be altogether unknown to the other creditors.

The *Lord President* concurred, though the case was attended with some difficulty. But if a different interpretation were placed upon the statute, it would be in the power of any creditor, with the collusion of the debtor, to render sequestration at the instance of the other creditors incompetent, by using diligence against him, followed by an execution of which third parties might know nothing, and then, after the period of four months, to object, that by the lapse of this period sequestration was thereafter rendered incompetent.

Lord Gillies entertained great doubts on the subject. If, indeed, the Court were to decide on views of expediency, he would entirely concur in the opinions which had been delivered. But their procedure was regulated by a statute, in which, as it appeared to him, there was no ambiguity. The statute pointed out certain cases in which sequestration was competent, without the concurrence of the bankrupt; and if the present case did not fall under the description of these, his Lordship did not think that sequestration could be awarded; the enumeration of particular cases being equivalent to an exclusion of those which were not provided for. After reading the 15th section of the statute, his Lordship observed, that under the provision that the application should be presented within four months 'of the last step of the said diligence,' it appeared to him that the diligence alluded to must have been that by which the party had been rendered bankrupt under the statute; whereas, in the present case, the application had not been presented until the lapse of seven months from the date of the first search, whereby bankruptcy had been incurred, though within four months from the date of the second search; but this, his Lordship thought, was not the meaning of the statute.

Lord Mackenzie concurred in the opinions delivered by the Lord President and Lord Balgray. There was no provision in the 15th section of the statute, (by which clause the present question was to be regulated,) as to the character of legal bankruptcy, the requisites for which were different from those which were declared to be necessary for rendering a sequestration competent. It appeared to his Lordship, that it was of no consequence that a party had been previously rendered bankrupt, provided that, at the date of the application for sequestration, the statutory requisites remained, which, in the present instance, appeared to be the case, (there being no question as to the other requisites,) and the petition for sequestration

being presented within four months from the date of the last step of diligence which had been used against the bankrupt.

The *Court*, therefore, granted sequestration.

25 Nov. 1834. M'Gavin v. Robertson.

Lord Corehouse, Ordinary. Act. *Dean of Fac. (Hope.)* *W. Miller*, Agent. Judgment.
Alt. *Rutherfurd, Ivory.* *Geo. M'Callum*, W. S. Agent. *D.* Clerk.

C.

FIRST DIVISION.

No. XIII. *26th November* 1834.

ALEXANDER AND JANET HUME
against
JAMES STEWART.

LEGACY.—LIFERENT AND FEE.—*A legacy having been left to parents in liferent, and to their children nominatim in fee,—found that the liferenters were not entitled to discharge this legacy, upon the allegation that they had received sums to an equal amount from the testator during his lifetime, and that such discharge was no defence to the executor against a claim by the fiars for the amount of the legacy.*

On 1st February 1812, Alexander Stewart executed a general disposition and settlement, conveying his whole funds and estate, heritable and moveable, to the defender, his nephew, whom he also appointed his executor. This disposition was granted under the burden of certain legacies and provisions, and, inter alia, of the sum of L.2450, to be liferented by his wife, and the fee to go in the manner and in the proportions specified in the deed. It farther directed the sum of L.800, part of the above sum of L.2450, 'to be 'laid out on bond, or other good security, payable to Janet Idington, 'wife of Walter Hume, merchant in Kelso, in liferent, and to 'Alexander and Janet Hume, (the pursuers,) son and daughter of 'the said Walter Hume, equally between them, in fee.' It was farther provided, that the several legacies and provisions should be paid, or laid out as directed, at the first term of Whitsunday or Martinmas which should happen after the death of the testator, in case he should survive his wife. The testator died in 1817, (his wife having predeceased him,) when the pursuer took possession of his property and funds, as disponee and executor under the above deed.

26 Nov. 1834.
Humes v. Stewart.

Janet Idington, the mother of the pursuers, and who was entitled to the liferent of the above provision of L.800, and Walter Hume, her husband, had received from the testator, Alexander Stewart, during his lifetime, various sums, at different periods, to the amount of L.800; and after Mr Stewart's death, they granted a discharge to the defender, narrating the provision in the trust-deed, and that, during the lifetime of the testator and his wife, they had received at different times L.600; and after the death of his wife, 'but during 'the lifetime of the said Alexander Stewart, we received from him 'the farther sum of L.200, in full of the said legacy. We there-'fore for ourselves, and as taking burden upon us for our said chil-'dren, exoner, acquit and discharge the said Alexander Stewart's 'representatives and executors of the said legacy of L.800, interest 'thereof, and whatever has followed, or is competent to follow there-'on; and I, the said Walter Hume, bind and oblige myself, with all 'convenient speed, to secure my said wife and children to the extent 'of the said legacy, and in terms of the said settlement, by infefting 'them in my heritable subjects in Kelso.'

The pursuers, the fiars in the above provision, raised the present action against the defender, concluding to have it found and declared, that any transaction or arrangement which might have been entered into between the said Janet Idington, the mother of the pursuers, or their father, or both or either of them, and the defender, are ineffectual against the pursuers; and that the defender should be ordained immediately to lend out the above sum of L.800, payable to the pursuers, equally between them, or in such manner as to secure the fee of the 'said sum of L.800 to the pursuers, in terms of 'the said deed of settlement.'

In defence against this action, the payments made to the pursuers' parents by the testator during his life, and the discharge subsequently granted by them, were founded on; and it was further stated, that the available funds of the testator were no more than sufficient to discharge the other provisions in the settlement. In these circumstances the defender *pleaded*—

Defender's Pleas.

1. The payment of the legacy by Mr Stewart during his lifetime was an intentional revocation of the conditions relative thereto, imposed ex facie of the deed of settlement upon the defender, in so far as that payment was incompatible or inconsistent with these conditions.

2. The testator having left no separate funds to meet the legacy, the presumption of law is, that the payments made by him during his life were truly made in advance, or in lieu of it, and the discharge was good and effectual as such to the defender, and was the only

discharge he could take, or was entitled to require; at all events, the discharge must be effectual, until reduced in a competent action. 26 Nov. 1834. Humes v. Stewart.

Answered—The transaction between the defender and the pursuers' parents is ineffectual against the pursuers, having been made contrary to the deed of settlement, and the pursuers not having been parties thereto. Pursuers' Pleas.

The Lord Ordinary repelled the defences, decerned in terms of the libel, and found expenses due. His Lordship added the following note:

'It is not stated by the defender, that the sum was lent out by 'him as executor, in terms of his uncle's settlement, and after-'wards uplifted by Walter Hume, the pursuers' father, as admi-'nistrator for his children. The defence is, that the testator, during 'his lifetime, made an advance to Walter Hume and his wife, and 'that they, since the testator's death, have acknowledged that this 'advance was made in extinction of the legacy, and discharged 'the defender accordingly. But the liferentrix and her husband 'had no power to grant a discharge of a legacy due to their children, 'the fiars, nor is their declaration evidence that an advance to them 'by the testator was meant to operate as a revocation of the legacy 'to their children. The father cannot be allowed to appropriate 'to himself, by means of his own declaration, a sum bequeathed to 'his children; and no other evidence is offered that the testator meant 'to hold the advance to him as a revocation of the legacy. It is said 'that the tetator did not leave funds sufficient to pay this legacy; 'but it is admitted that the defender was heir as well as executor, 'and it is not averred that he entered cum beneficio inventarii.'

The defender reclaimed, but the *Court* unanimously adhered. Judgment.

Lord Corehouse, Ordinary. Act. *Rutherfurd, G. Bell.* *Geo. Rutherford*, W. S. Agent. Alt. *D. M'Neill, Charles Baillie.* *Alex. Douglas*, W. S. Agent. *D.* Clerk.

T.

FIRST DIVISION.

No. XIV. *26th November* 1834.

JAMES SCOTT
against
WILLIAM SCOTT.

WRIT.—BILL OF EXCHANGE.—STAMP ACT.—*A holograph note, acknowledging receipt of a sum of money, 'which I shall pay when 'called for,' held to be the same as a promissory-note, and effect refused to it in respect it was not stamped.*

THE pursuer brought an action before the Sheriff of Forfar, against the defender, his father, for payment of a variety of different sums, and, inter alia, for payment of L.435, alleged to have been advanced by the pursuer in loan to the defender, and for which the defender had granted the following letter of acknowledgment on unstamped paper:

'*Hiltown of Dundee*, 5 *Mo.* 27. 1822.

'Received thine this day, with four hundred and thirty-five 'pounds sterling, which I shall pay when called for.'

'L.435 sterling.' (Signed) 'WILLIAM SCOTT.'

'*To Jas. Scott, Grocer,*
'*Hiltown, Dundee.*'

In defence against this article, the defender, besides denying that he was due the sum sued for, pleaded that the document founded on could not be received in evidence, being truly a promissory-note, but not being stamped, it is of no effect.

The Sheriff sustained this defence, 'in respect that the writing, 'which is styled in the summons a letter of obligation, is not stamped, while, whether received as a promissory-note or as a bond, it 'can receive no faith in judgment without being so; and also in respect that the claim denied by the defender, as it is, to be well 'founded, is unsupported by any other evidence.' And on advising a reclaiming petition, with answers, the Sheriff, 'on the authority 'of Alexander *v.* Alexander, 26th Feb. 1830, and Mackintosh *v.* 'Stewart, 13th May 1830, finds, that the instrument, forming the 'ground of the first claim libelled, is a promissory-note, and therefore 'unavailable, as not having been written on paper duly stamped.'

The pursuer advocated, and in reference to the above claim in the libel, *pleaded*— 26 Nov. 1834. Scott v. Scott.

Pursuer's Pleas.

1. A memorandum or acknowledgment of the deposition of money in the hands of the writer, or that he is owing a sum of money to another person, is not subject to the stamp laws applicable to bills or promissory-notes, bonds or receipts, and is admissible as evidence that such money is owing; 1 *Espinasse*, 426; 1 *Campbell*, 429; Childers *v.* Barlonis; 1 *Dowling and Ryland's Nisi Prius Cases*, p. 8; *Chitty on Stamp Laws*, § 3, p. 7, edit. 1829, and p. 211.

2. The writing referred to in the summons, with reference to the advocator's first claim, is a mere memorandum or acknowledgment; and such acknowledgment that he got the money, whether considered per se, or in connection with this writing, is equivalent to legal evidence of the existence of the debt.

3. The writing is at all events viewable as evidence to refute the respondent's averment, that the money which he acknowledges to have received was his own money, and not the advocator's; Henderson *v.* Steele, 22d Jan. 1829.

Defender's Pleas.

Answered—1. The document upon which this claim is founded, containing a promise to pay that sum on demand, is a promissory-note, and not being stamped as such, is null and void, and the want of the legal stamp cannot now be supplied; Alexander *v.* Alexander, 26th Feb. 1830; Mackintosh *v.* Stewart, 13th May 1830; *Chitty on Bills*, 334; *Bailey*, 4; *Thomson on Bills*, 6 and 7; 31 Geo. III. c. 25, § 19; 55 Geo. III. c. 184, § 8.

2. As the summons libels exclusively on the note, it is not competent, under that summons, to give effect to any other ground of action; and there being no evidence whatever in support of the debt claimed, except the note produced, that claim falls to be repelled.

The Lord Ordinary found, 'that the writing termed in the summons an obligatory letter, being an unqualified promise to pay a certain sum on demand, is to be held a promissory-note, and not being stamped in terms of law, cannot be received as evidence of a debt; and that there is no other sufficient evidence that the advocator's first claim against the respondent is well founded.'

To this interlocutor the *Court* unanimously adhered. Judgment.

Lord Corehouse, Ordinary. For Advocator, *Dean of Fac. (Hope,) Cuninghame.*
Greig & Morton, W. S. Agents. Alt. *Keay, Christison.* *William Miller*, S. S. C. Agent. *S.* Clerk.

T.

SECOND DIVISION.

No. XV. *28th November* 1834.

SIR ALEXANDER HOPE
against
GOVAN, COMMON AGENT IN THE LOCALITY OF CUPAR-FIFE.

TEINDS.—*Heritors possessing their teinds by tacit relocation under expired tacks, are entitled to be postponed in a locality to such as have produced neither tacks nor any heritable rights to their lands.*

SIR ALEXANDER HOPE is proprietor of 102 acres of Cupar Muir, situated in the parish of Cupar-Fife. Those lands had been originally acquired by his ancestor from the burgh of Cupar, and whilst they belonged to the burgh, no teinds had ever been paid for them. The proprietor, however, had no title but a feu-charter, dated in 1751, and regular progresses following thereupon, without any conveyance of the teinds. In making up the interim scheme of locality applicable to augmentations granted in 1806 and 1830, the common agent postponed certain heritors who produced tacks of their teinds which had expired in 1811 and 1822, and had continued to possess them since these dates, by tacit relocation, without any interruption of their possession by inhibition or otherwise, whom he placed in class No. 6, to Sir Alexander Hope, and the other heritors who produced no right to their teinds, whom he placed in class No. 5.

Pursuer's Pleas.

Sir Alexander objected, and *pleaded*—That heritors who possessed their teinds merely by tacit relocation, after the expiry of their tacks, had no heritable rights to their teinds, and were consequently in no better situation than heritors who had produced no titles to their teinds; amongst whom, consequently, they ought to be classed pari passu: and in support of this proposition he relied on a judgment of the Lord Ordinary Dreghorn, in the locality of Kirkliston, on an objection for Wishart of Foxhall, pronounced on the 11th March 1789, some weeks after the date of the judgment of the Court in the same locality, on the 17th Dec. 1788, reported in the Dictionary, p. 15,326, in which the Lord Ordinary repelled objections made by Mr Wishart apparently on the ground that he had possessed merely by tacit relocation for upwards of a century, and had obtained no renewal of his tack, the other heritor, Mr Gibson Wright, the ob-

jector in the reported case, having obtained a renewal of his tack during the dependence of the locality.

28 Nov. 1834.

Hope v. Govan.

Defender's Pleas.

The common agent *answered*—That the decision in the case of the locality of Kirkliston, 17th Dec. 1788, was decisive of the present question, and had been confirmed by the subsequent judgment in the locality of St Cyrus, 25th May 1827, *(Shaw, Teind Cases)*; that the only person interested in objecting to the possession of the heritors in class No. 6, under tacit relocation, was the titular, who might raise inhibition to interrupt their possession, and so take their whole teinds himself; but that the other heritors, who had no title of possession whatever to their teinds, and consequently were primarily liable in the locality, could have no interest and no right to object.

The Lord Ordinary pronounced the following interlocutor: 'The 'Lord Ordinary having resumed consideration of these objections, 'with the answers thereto for the common agent, and whole pro- 'cess, repels the objections, and approves of the scheme of locality, 'as made up; finds the objector liable in expenses; allows an ac- 'count thereof to be given in; and remits the same, when lodged, 'to the Auditor to be taxed.'

Note.—'It seems plain that the objector has produced nothing 'which can be regarded as an heritable right to his teinds.

'Upon the other point, the second decision, in the case of Kirk- 'liston, (that with Wishart, in March 1789,) occasions some diffi- 'culty; but the Lord Ordinary does not think that the authority of 'that judgment, pronounced after very little discussion, and never 'submitted to the Inner-House, can outweigh that of the solemn de- 'cision of 19th December 1788, or admit of being reconciled with 'it, by the supposition, that the last-mentioned decision proceeded 'upon the ground of the tack having been renewed pendente lite, and 'the right of the tacksman having been sustained entirely on that 'renewal. The case is reported, and seems to have been argued 'throughout upon the effect of tacit relocation alone, which this hy- 'pothesis would exclude from consideration; and the judgment ex- 'pressly bears, that 'as Mr G. Wright possessed his teinds by tacit "relocation, when the process of augmentation was raised, he must "be considered as a tacksman of the teinds at the time, and that his "case cannot be assimilated to that of an heritor, having no right to "his teinds when a process is raised, and merely obtaining a tack of "them after the augmentation was granted.' This judgment was 'twice adhered to by the Court, the second reclaiming petition be- 'ing refused without answers; and it is reported at the distance of 'several years thereafter, without the least apparent suspicion, on

28 Nov. 1834. Hope v. Govan.

'the part of the learned reporters, that its authority had been de-
'stroyed by a subsequent judgment of the Lord Ordinary in the
'same process, in March 1789.

'The reported judgment seems also to be in accordance with the
'principles of the law of tacit relocation, which have been always
'recognised as equally applicable to cases of teinds as of other sub-
'jects, and effect seems to have been deliberately given to these
'principles in the very recent case of St Cyrus, 25th May 1827.

'Both the tacks objected to were current for years after the first
'augmentation in 1808.'

Judgment. Sir Alexander Hope *reclaimed*, but the *Court* unanimously adhered.

Lord Ordinary, *Jeffrey*. Act. *Dean of Fac. (Hope.)* Alt. *Keay* and *S. Keir*. *Jas. Hope*, and *John Govan*, Agents. *Teind* Clerk.

U.

SECOND DIVISION.

No. XVI. 29*th November* 1834.

ANDERSON
against
MUIR.

POOR.—PUBLIC OFFICER.—SUMMARY APPLICATION.—*A petition and complaint against a session-clerk, for not receiving a petition addressed to the kirk-session and heritors, dismissed as frivolous and incompetent, in respect that the clerk acted under the orders of the kirk-session, and that the application ought to have been made to the minister; and also, that no complaint had been made to the kirk-session.*

ANDERSON had a supposed claim against the heritors and kirk-session of Dysart, for the aliment of a pauper child which had been nursed by his wife. He accordingly made an application to the kirk-session, on the 27th November 1832, and at the same time wrote to the first minister of the parish on the subject. The kirk-session, on considering this application, refused to grant the same, but gave no written deliverance upon it. Anderson afterwards, on the 28th January 1833, lodged another petition with Muir, the session-clerk,

addressed to the heritors and kirk-session. Muir laid this petition before the session, who informed him, that he had no right to receive a petition addressed to the heritors and kirk-session, he not being the clerk of the heritors, and having no powers to convene that body. The petition was accordingly given back to Anderson. He however presented a third petition, of date 20th September 1833, still addressed to the same body, which Muir refused to receive; and Anderson thereupon presented a petition and complaint against him to the Court of Session, praying the Court to find, 'that it 'was the duty of the said William Muir, as session-clerk of the 'parish of Dysart, to receive the petition presented to him by the 'petitioner, and to lay it before the kirk-session and heritors of the 'parish of Dysart, in regular meeting assembled, and to ordain and 'appoint the said William Muir immediately to receive the said 'petition, and to lay it before the next meeting of the kirk-session 'and heritors, in order that the petitioner may obtain a deliverance 'thereon,' &c. This petition being followed by answers, the Lord Ordinary took the same to report by the following interlocutor and note: 'The Lord Ordinary having considered the petition and com-'plaint, with the revised answers, and this minute and the answers, 'and heard parties' procurators, and thereafter considered the case 'at avisandum, makes avisandum with the cause to the Court, and 'appoints printed copies of the several papers above mentioned to 'be put into the boxes of the Lords of the Second Division of the 'Court, in order to be reported.'

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Note.—'This seems to the Lord Ordinary to be a very ground-'less, if not an incompetent, complaint. It is now admitted in the 'minute, that the complainer had made his claim to the kirk-'session, that they had it regularly before them at a meeting, and 'that he was personally called into their presence on the subject. 'If they did not duly consider it,—or hear him on the grounds of 'it,—or if they unduly refused to make a written deliverance, that 'surely was no fault of the session-clerk, and the complaint should 'have been against the kirk-session. He states that, in fact, the 'complainer was fully heard, and allowed more than once to say all 'that he had to say; and that it is not the practice of kirk-sessions 'to make written deliverances on such applications,—which is cer-'tainly true. But assuming all this to stand otherwise, no respon-'sibility could lie with the clerk. Then it appears that the com-'plainer and his agents were in direct communication with the mi-'nister, Mr Murray, on the subject, and were distinctly told that, 'if the petition for the complainer to the kirk-session, which had 'been given back to him, were 'returned to him,' it would be 'laid before the members of the session for their consideration.

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'This was on the 5th September. Instead of following this plain 'course, the complainer, on the 26th September, sends to the re- 'spondent, the clerk of the kirk-session, a petition, not addressed 'to that body, but to the heritors and kirk-session, to which joint 'body he never was clerk, and which he had no power to call to- 'gether. The respondent says, that he refused to receive it, be- 'cause he had been instructed so to do by the minister and kirk- 'session, in consequence of another similar petition which had been 'previously laid before them. But supposing that it were other- 'wise, why did not the complainer himself apply to the minister, 'if he thought such a petition competent, or that the respondent 'had done wrong in refusing to receive it? And now, when the 'complainer, instead of applying to the respondent's superiors, 'comes to the Court of Session with this complaint, the question 'is, whether the respondent is liable to any complaint for not re- 'ceiving a petition addressed to a body for whom he was under no 'obligation to act, and whom it did not belong to him to constitute 'or convene in the parish? The Lord Ordinary thinks that he 'clearly is not; and he must own that he finds it difficult to ac- 'count for a complaint being presented in such circumstances.'

When the case first came before the Court on the petition and complaint, with the answers, the Judges were much divided in opinion on the competency of the complaint. It was afterwards argued in minutes of debate, on advising which,

Opinion of Court.

The *Lord Justice-Clerk* said—When I look at the terms of the letter written by the complainer to the respondent on the 28th January 1833, and which requests that he will, 'as session-clerk, 'call a meeting of the heritors and kirk-session of the parish of 'Dysart, on ten days' notice from this date,' the first question that seems to me is, whether the session-clerk had any right or authority to do what is here required of him? Now, I am clear that he had no such right. The session-clerk has no authority to call meetings of the heritors and kirk-session. It is the province of the minister to do so, as is provided in the proclamation and statute 1692. Looking therefore upon this as the original application and basis of every thing which followed, the only question that remains is, whether a summary petition and complaint of this nature, directed not against the minister, who alone could call the heritors together, but against the session-clerk, can be sustained? I think it cannot, and am therefore for dismissing this complaint.

Lord Glenlee was of the same opinion.

Lord Meadowbank.—I remain of the opinion which I formed on

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the first consideration of this petition and complaint, and think that it must be sustained. I do not enter into the merits of the claim made by the petitioner upon the heritors and kirk-session, with which we have nothing to do at present. The only question before us is as to the competency of this petition and complaint. In the first place it is clear, that the only party to whom the petitioner could make his application, was to a meeting of the heritors and kirk-session. If he had gone to the Sheriff, or any other judge, his claim, being a demand on the poor's money of the parish, would have been dismissed as incompetent. Secondly, it is clear, that the whole funds collected for the relief of the poor, whether by voluntary contribution or by assessment, are under the management of the joint body of heritors and kirk-session acting together. The kirk-session, as such, have nothing to do with them. It may be very true that the heritors frequently do not attend such meetings; but if they are summoned thereto, they are held to be present; and the minister and members of the kirk-session, in that case, act in the capacity of a meeting of heritors and kirk-session jointly. But unless the heritors are summoned, the kirk-session alone have no right to interfere with, or to distribute, the funds collected for the support of the poor; and no meeting for that purpose can be legally convened, unless it be intimated to the heritors, in order that they may attend if they see fit. An advocation of a judgment of the kirk-session alone would not be competent: it must be from the heritors and kirk-session jointly. The next question to consider is, what is the proper character occupied by the respondent, Muir? He designs himself as session-clerk; but the kirk-session has no funds legally under its control, out of which its clerk can be paid. His salary is paid out of the poor's money, which is under the management of the heritors and kirk-session jointly, and it is therefore paid by that joint body, and he must hold his office from them. He is therefore the clerk of the joint meeting, and has acted as such at every meeting at which they have distributed the poor's money, or taken claims of relief under consideration. He cannot be heard to say, that he is clerk of the session alone, and that he has nothing to do with the heritors. The minister, I may observe, is de jure moderator of the kirk-session, but he does not necessarily or usually preside at meetings of the heritors and kirk-session. We must now therefore consider, what it is that is complained of in this petition and complaint. It appears that the petitioner, after various proceedings, is advised to lodge his application with the session-clerk, in order that it might be laid before a meeting; but the session-clerk refuses to receive it, because it appears to him that the kirk-session will refuse to entertain it. This is an intolerable pro-

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position. The clerk had nothing to do with the terms or the merits of the application. It was his business to receive it, and to lay it before the next meeting of heritors and kirk-session that should be legally convened. The complainer had no remedy but to come to this Court by petition and complaint, in the way he has done. An application to the Sheriff would have been incompetent. I think, therefore, that the respondent did not do his duty; and on adverting to the prayer of the petition, it appears to me to be the only correct one that could have been framed.

It is said, both by the respondent and by the Lord Ordinary in his note, that it is not the practice of kirk-sessions to make written deliverances on such applications. I do not know what may be the practice of this kirk-session, but I can only say, that if they do not do so on a written application, they are wanting in their duty.

Lord Medwyn.—I entirely agree in the opinion, that we have nothing at present to do with the merits of the application made by the petitioner to the kirk-session, and that the only question now before us is, whether the respondent failed in his duty as session-clerk. The facts of the case are admitted to be, that the complainer originally presented a petition to the kirk-session, which was laid before that body and considered by them, although they gave no deliverance thereon. He then gave in a second application, in January 1833, addressed to the heritors and kirk-session, which the respondent received; but the kirk-session again refused it without any deliverance, and directed the respondent not to receive it in these terms. He is afterwards informed, that if he will lodge a petition to the minister and kirk-session, it will be laid before the session for their consideration; but instead of this, he gives the respondent another petition, addressed to the heritors and kirk-session, which the respondent, not being the clerk of the heritors, declined to receive. It is of importance to ascertain the proper capacity in which the respondent acted. He is designed simply session-clerk, and I have no idea that it follows that the session-clerk is eo ipso clerk of the meetings of heritors and kirk-session, merely because his salary may be paid out of the poor's funds. I am not aware that the heritors and kirk-session, acting jointly, and not being a permanent body or court, like the kirk-session, have any official clerk; but I rather suppose, that each meeting chooses its clerk pro hac vice, and although the session-clerk may be generally taken, this does not constitute him permanent clerk to the body. It is therefore clear, that the respondent had no power to comply with the demand made in the letter of 28th January 1833, that he should call a meeting of the heritors and kirk-session, for he had no

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right to do so. He was not their clerk; and even if he had been so, he was most certainly not the convener of that body. Then comes the letter of 5th September 1833, addressed by Mr Tosh, on behalf of the minister of the parish, to the complainer's agents, and saying, that if he will lodge his application with the session-clerk, it will be laid before the members of the session for their consideration. Now, if the complainer was not satisfied with this, but wished to bring his application before the heritors also, his course was clearly to have applied to the minister, who alone has power, by statute, to convene meetings of the heritors and kirk-session, requiring him to summon such a meeting from the pulpit, for the purpose of taking his application into consideration.

I therefore do not think that it was competent for him to proceed in the way in which he did, and still less to bring this session-clerk at once by petition and complaint before this Court, without applying first to the inferior court of which he was clerk, and asking redress from them for the official malversation of their officer. There is only one authority quoted in support of this manner of proceeding by summary petition and complaint in this Court, against the clerks of inferior courts, viz. that of Angus in 1741, reported by Lord Kilkerran, (*M.* 14,976); and when I look at that report, and find the very significant note of interrogation by Kilkerran in the rubric of the decision, and that no objection was taken there to the competency, I cannot think that that decision affords much sanction to such a proceeding as this.

The *Court*, accordingly, dismissed the petition and complaint. Judgment.

Lord Ordinary, *Moncreiff.* Act. *Maitland.* Alt. *S. More.* *Mackenzie & Macfarlane*, and *Wm. Pollock*, S.S.C. Agents. *T.* Clerk.

U.

FIRST DIVISION.

No. XVII. *2d December* 1834.

EARL OF DUNMORE
against
WALTER DICKSON, W. S. COMMON AGENT IN THE RANKING OF HARRIS.

RANKING AND SALE.—STAT. 54. GEO. III. c. 137, § 6.—*The*

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The *Court*, accordingly, dismissed the petition and complaint. Judgment.

Lord Ordinary, *Moncreiff*. Act. *Maitland*. Alt. *S. More*. *Mackenzie & Macfarlane*, and *Wm. Pollock*, S.S.C. Agents. *T.* Clerk.

U.

FIRST DIVISION.

No. XVII. *2d December* 1834.

EARL OF DUNMORE
against
WALTER DICKSON, W. S. COMMON AGENT IN THE RANKING OF HARRIS.

BANKING AND SALE.—STAT. 54. GEO. III. c. 137, § 6.—*The*

2 Dec. 1834.

Earl of Dunmore v. Dickson.

Court cannot authorise consignation of the price of subjects purchased in a ranking and sale in any other bank than one of those expressly mentioned in the above statute.

THE estate of Harris having been exposed to judicial sale, the Earl of Dunmore became the purchaser, at the price of about L.60,000, and lodged a bond of caution for the price, and for implement of the obligations incumbent on him by the articles of roup, and a decree of sale was afterwards pronounced in his favour. The ranking not having been sufficiently far advanced to admit of payment being received, and some defects having been discovered in the title-deeds, Lord Dunmore, who had made arrangements for payment of the price, and was anxious to get his cautioners relieved, and the bond of caution delivered up, consigned in the Commercial Bank of Scotland the full price, with interest; and he presented a petition to the Court, narrating the purchase, and the consignation in the Commercial Bank, where he was in the custom of transacting business; and farther, stating, that if the Court thought proper to name any other bank, and, in particular, either the Bank of Scotland, the Royal Bank, or the British Linen Company, mentioned in the act 54. Geo. III. c. 137, § 6, for ordinary consignations in judicial sales, where no difficulties as to the purchaser's title occur, and where he has no right of afterwards objecting to the uplifting and application of the price so consigned, he had no objections to the money being transferred to such other bank. The petition prayed the Court 'to approve of the consignation, and to exoner 'and discharge the petitioner and his cautioners of the said prices, 'and grant warrant to, and authorise or ordain the Clerks of Court 'to deliver up the bond of caution,' &c.

Answers were given in to this petition for Walter Dickson, writer to the signet, common agent in the ranking, referring to the 54. Geo. III. c. 137, the 6th section of which provides, 'that in 'every case of a sale under the authority of the Court of Session, it 'shall be lawful to the purchaser, at every term of Whitsunday or 'Martinmas subsequent to the term of payment of the price, to 'lodge the price, with the interest due upon it, in the Royal Bank 'or Bank of Scotland, or the Bank of the British Linen Company, 'at such interest as could be procured for it; by doing which, and 'by giving notice thereof to the agent who carried on the sale, he 'shall be discharged of said price.' The offer to consign in the Commercial Bank was not in terms of the Act of Parliament, not being one of the banks therein mentioned. There was therefore no consignation, in terms of the statute, to entitle the petitioner to be discharged of the price. If the petitioner availed himself of the pri-

vilege of the statute, he was bound to follow out the conditions on which that privilege was granted; but the Court could not approve of a consignation not made in terms of the statute. 2 Dec. 1834. Earl of Dunmore v. Dickson.

The *Court* were unanimously of opinion, that they had no power to sanction consignation in any other bank than one of those expressly mentioned in the statute, and therefore they refused the petition. Judgment.

For Petitioner, *Sol.-Gen. (Shene,) Tait.* *Tait & Young*, W. S. Agents. For Respondent, *Ad. Anderson.* *Walter Dickson*, W. S. Agent. *S.* Clerk.

T.

FIRST DIVISION.

No. XVIII. *4th December* 1834.

MRS E. MILLER AND HUSBAND *against* FARQUHARSON.

WRIT.—BILL OF EXCHANGE.—*A document, whereby the debtors acknowledged the receipt of a certain sum of money, and obliged themselves to pay interest at the rate of* 5 *per cent. per annum, and to* 'repay *the principal at any time on getting six months' notice,' held not to be a promissory-note, but an ordinary obligation of debt, on which action was competent, although unstamped.*

THE pursuers, as representatives of the late Margaret Miller, in whose favour the following obligation had been granted, on her advancing to the parties, (as alleged by the pursuers,) the sum of L. 80 sterling, brought an action against the defender, Mr Farquharson, one of the parties who had signed the obligation, (the others having died or become insolvent,) for payment of the contents. 'Paisley, '4th *November* 1813. We hereby acknowledge to have received 'from Margaret Miller L. 80 sterling, for which we pay her in-'terest, at the rate of 5 per cent. per annum; and we oblige our-'selves to repay the principal at any time, on getting six months' 'notice. (Signed) D. & J. THOMPSON, ROBT FARQUHARSON, 'WM. ANGUS.'

In defence it was inter alia *pleaded*—That the obligation founded

4 Dec. 1834.

Miller and Husband *v.* Farquharson.

Defender's Pleas.

on, being a simple promise to pay a certain sum, so many months after demand, although not conceived in terms precisely similar to those usually employed in a promissory-note, was truly of the nature of such a doquet, and not having been stamped, it was not actionable, and could not bear faith in judgment; Alexander *v.* Alexander, 26th Feb. 1830; Mackintosh *v.* Stewart, 13th May 1830; Price's Representatives *v.* Smith's Executors, 28th Feb. 1833.

Pursuers' Pleas.

It was *answered*—That the doquet in question was entirely different from those which had been held to be bills or promissory-notes in the cases referred to. When compared with the forms of moveable or personal bonds in Dallas and in the Juridical Styles, the doquet founded on is as similar to the forms there prescribed, as it was possible to expect in an obligation written by a party unacquainted with legal technicalities. It acknowledges, in the usual terms, the receipt of the money lent, and then, in order to shew the intention of the parties, that the loan was not to be of a temporary nature, (as in cases where bills or promissory-notes are granted,) but to lie for some time in the hands of the borrower, the parties bind themselves to pay interest to the lender, 'at the rate 'of 5 per cent. per annum,' thereby clearly shewing that this was the purpose of the loan. In this particular the doquet in question is similar to one of the obligations (that for L. 400) which, in the case of Alexander *v.* Alexander, referred to by the defender, was held by the Court not to be in re mercatoria, but an improbative bond.

Again, the obligation 'to repay the principal sum at any time, 'on getting six months' notice,' so far from being similar or analogous to the terms usually employed in promissory-notes or bills of exchange, is essentially different therefrom. In these the obligation is to pay the amount on a particular day, or so many days after date, or so many days after sight; but a condition to pay so many months after notice was never before inserted in documents strictly in re mercatoria, and is substantially the same as the condition of premonition generally inserted in bonds for borrowed money, whereby it is agreed, that failing the sum advanced being repaid within a specified time (generally three months instead of six, as here provided) after the demand, or notice of payment being required, is duly intimated, the party in right of the debt shall be entitled to follow up legal measures for enforcing payment.

The Lord Ordinary assoilzied the defender from the whole conclusions of the libel, and decerned.

4 Dec. 1834.

Miller and Husband v. Farquharson.

Note.—'The document in question is a simple and unconditional promise to pay a certain sum at a given period, that is, six 'months after notice of demand. The words are perhaps not 'strictly synonymous with those usually employed in a promissory-'note, but substantially their purport is the same. The obligation 'is materially different from one of those in Pirie's case founded 'upon by the pursuer, where the party acknowledged receipt of the 'sum, and promised not to pay but to account for it, a condition 'inconsistent with the nature of a promissory-note. If the present 'document were to be held merely as an agreement, an easy way 'would be afforded for evading the stamp-laws, with regard to notes 'and bills.'

Opinion of Court.

The pursuer *reclaimed;* and at the advising the *Court* were unanimously of opinion, that the obligation in question was not of the nature of a promissory-note, and was conceived in different terms from those in the cases referred to by the defender. Although not in the usual and technical phraseology, (which was not to be expected in the case of persons unacquainted with legal forms,) the terms appeared to be substantially the same as those made use of in ordinary bonds for borrowed money. The *Lord President* observed—That in such questions, no decision in any one case could form a certain precedent for another, each case necessarily depending upon its own circumstances, and the particular terms made use of.

Judgment.

The *Court* therefore altered the interlocutor of the Lord Ordinary, found that the doquet founded on was not of the nature of a promissory-note, and remitted to the Lord Ordinary to proceed according.

Lord Corehouse, Ordinary. Act. *Sol.-Gen. (Shene,) Neaves. John Richardson*, W. S. Agent. Alt. *A. M'Neill. Alex. Nairne*, Agent. *D.* Clerk.

C.

FIRST DIVISION.

No. XIX. *5th December* 1834.

CAMPBELL MACINTOSH
against
WILLIAM MACPHERSON.

JURISDICTION.—STAT. 9. GEO. IV. c. 58, § 26.—*The Court of*

5 Dec. 1834.
Macintosh v. Macpherson.

Session have no power to review any judgment pronounced by Justices of Peace, Magistrates, Quarter-Session, or Sheriff, in any proceeding under the above statute.

The statute 9. Geo. IV. c. 58, regulates the granting of certificates by Justices of the Peace and Magistrates, authorising persons to keep common inns, alehouses and victualling houses in Scotland, where ale, beer, spirits, wine and other exciseable liquors, may be sold by retail. After pointing out the manner in which application for licences, either to the Magistrates or the Justices, it provides, (§ 14,) that if any Justice of the Peace, or proprietor, or occupier of any house, in respect whereof any such certificate shall be applied for, shall be dissatisfied with any proceeding of any Justice or Magistrate, either in granting or in refusing a licence, he may appeal to the next Quarter-Sessions of the Peace for the county. Sect. 16. of the act provides, That if any clerk of the peace or town-clerk respectively shall knowingly and wilfully issue or deliver any such certificate as aforesaid, contrary to the deliverance in such book or register, or to any person not duly authorised to receive the same by the Justices or Magistrates assembled at such general or district meeting, or if any such clerk shall knowingly and wilfully insert any untrue date in any such certificate, or shall refuse to deliver such certificate to any person duly authorised as aforesaid to receive the same, every such clerk shall, for every such offence, forfeit the sum of L. 20, to be recovered by any person who will prosecute for the same before the Sheriff of the county, during the period of one year for which such certificate appears to have been granted, or ought to have been granted, or within six months after the expiry of the said period.

Sect. 26. declares, That no process of review, by any superior court, of the judgments pronounced under this act by such Justices of the Peace, Quarter-Sessions, or Sheriffs, shall be competent, either by advocation, suspension, reduction, or otherwise.

Macpherson, who had for several years been a licensed innkeeper in Inverness, having changed his residence to a different part of the town from where he formerly resided, applied to the Magistrates of Inverness, in terms of the above statute, for a renewal of his licence applicable to his new residence. The Magistrates refused the application. Macpherson entered an appeal to the next Quarter-Sessions of Peace for the county of Inverness, who sustained the appeal, 'recal the decision complained of; find 'the appellant entitled to the renewal of his certificate claimed by 'him, and they direct the town-clerk to issue such certificate to 'him in the usual form, in terms of law.'

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Macpherson then produced an extract of this judgment to the advocator, town-clerk of Inverness, and required of him a certificate in terms thereof. This being refused, he presented a petition to the Sheriff, narrating the proceedings, and concluding that the defender should be decerned and ordained to issue the necessary certificate, that the pursuer might obtain a renewal of his licence, and to decern against him for the penalty of L. 20, in terms of the 16th section of the statute, for having refused to grant the certificate as required by the act.

In answer to this petition the defender stated, that he had transmitted to the Excise a list of the persons to whom the Magistrates had granted certificates, which was all the statute required him to do; that he was not responsible for the Magistrates having refused a certificate to the pursuer; and that, as within burghs the Magistrates were the proper judges to whom certificates were to be granted, the Quarter-Sessions had no power to review their judgment refusing a certificate. And even if the Quarter-Sessions had the right of review, they could do no more than sustain the appeal and remit to the Magistrates, who alone had power to grant the certificate. They had no power to direct the defender, as clerk of the Magistrates, to issue the certificates, and therefore the defender has not incurred the penalty in the statute; but as the action concluded not only for the penalty, but for the delivery of the certificate, which was not sanctioned by the clause in the statute libelled on, the action was not competent under the statute.

The Sheriff repelled the objection to the competency of the action, and found, 'that the defender, in his official capacity, is 'bound, by the final judgment of the Quarter-Sessions, to issue in 'the petitioner's favour the certificate thereby directed to be granted 'to him, in the same manner that he would have been bound to do 'if he had been so authorised by the Magistrates of Inverness; and 'therefore ordains the defender forthwith to issue and deliver the 'said certificate to the pursuer in the usual form and manner, and 'for the purpose mentioned in the petition, and decerns accordingly: 'Finds, That the defender, by knowingly and wilfully refusing to 'grant the said certificate, when required by the petitioner, has in-'curred the statutory penalty of L.20 sterling, and decerns against 'him, at the complainer's instance, for payment thereof: Finds the 'defender liable in expenses,' &c.

Macintosh then presented a bill of advocation, which passed in common form; but upon a reclaiming note from the respondent, the Court remitted to the Lord Ordinary to refuse the bill as incompetent, in respect of the 20th section of the above statute, which declares, that no process of review by any superior court shall

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Lord Balgray, Ordinary. For Advocator, *Dean of Fac. (Hope,) Ivory. Wm. Mackenzie*, W. S. Agent. Alt. *Sol.-Gen. (Skene.) George Cumming*, W. S. Agent. *D.* Clerk.

T.

SECOND DIVISION.

No. XX. *5th December* 1834.

MURRAY
against
DONALDSON AND OTHERS.

PUBLIC OFFICER.—STAT. 43 GEO. III. c. 54.—*The church courts have power to enforce their sentences against parochial schoolmasters, by applying for warrant of ejectment to the judge ordinary of the bounds, independent of the statute* 43 *Geo. III.; and a presbytery was found entitled to depose a schoolmaster summarily, as it appeared from their records that he had refused to subscribe the formula of the church, being regularly called upon to do so at their meeting.*

THE pursuer, Murray, became auxiliary parochial schoolmaster at Tail, in the parish of Canobie, in 1811, and was examined as such by a committee of the presbytery, whose report was approved of on the 5th November of that year. On the 5th March 1833, Mr Donaldson, the minister of the parish of Canobie, presented a petition and complaint to the presbytery of Langholm against Mr Murray, bearing that he was not only totally unfit for teaching the school, but, inter alia, that he had not signed the formula, nor taken the usual oaths to Government, and that he was not, as required by law, a member of the established church of Scotland.

The petition was served upon Mr Murray, who attended, in consequence, a meeting of the presbytery at Langholm, on the 19th March 1833, when the following proceedings took place, as recorded in the minutes of presbytery:

'*At Langholm*, 19*th March* 1833. The which day the presby-
'tery of Langholm being met and constituted, sederunt, Mr W. B.
'Shaw, moderator, Messrs Donaldson, R. Shaw and Barton, clerk
'*p. t.* After the minutes of last sederunt had been read, the clerk

'reported, that, according to the appointment of the presbytery, 'he had issued warrant of citation to John Dalgleish, presbytery 'officer, to be served on William Murray, teacher of the auxiliary 'school at Tail, in the parish of Canobie, to attend the present 'meeting, and that the officer had returned an execution, of date 'the 6th instant, bearing, that he had delivered to the said William 'Murray, personally, a full double of an order by the said presby- 'tery, on the complaint and petition of the Reverend James Do- 'naldson, minister of said parish, ordaining him to appear here to- 'day, to answer to the said complaint, conform to execution pro- 'duced; and the said William Murray having been called in, and 'having compeared, and heard the complaint against him read over, 'declares, that he did appear before the presbytery of Langholm, 'and was examined by them twenty-two years ago, but that he was 'not required to sign the formula, or take the oaths to Government, 'and that he was then, as he still is, a member of the Secession 'church. Being farther interrogated, whether he be willing to 'take the oaths to Government, declares, he is ready to do so, but 'positively refuses to subscribe the formula of the established church. 'The above declaration having been read over to him, he admits 'that it is correct; but on being requested to affix his signature to 'it, refuses to do so. Whereupon the said William Murray was 'removed, and the presbytery having considered the complaint 'against him, and his declaration, find that there are good and suf- 'ficient grounds, in conformity with the laws and practice of the 'church, to deprive him of the office of schoolmaster at Tail, and 'depose him from said situation: And they farther did, and hereby 'do declare the situation of schoolmaster at Tail vacant from this 'date. The said William Murray being again called in, and the 'above sentence of the said presbytery being read over to him, he 'protested, and appealed to the synod of Dumfries, and took in- 'struments in the clerk's hands. The meeting was closed with 'prayer.'

Mr Donaldson thereafter presented a petition to the Sheriff of Dumfriesshire, proceeding upon the sentence of the presbytery, and obtained from him a summary warrant of ejectment, on the 21st June 1833, in terms of the statute 43 Geo. III. c. 54.

Murray then raised the present action of reduction and damages against Mr Donaldson, and the other members of the presbytery of Langholm, to reduce the sentence of the presbytery, and warrant of the Sheriff following thereon, on the grounds, 1st, That it was only competent for the presbytery to try and depose him, in terms of the 21st section of the statute 43 Geo. III. c. 54; and, 2d, That

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the proceedings of the presbytery and of Mr Donaldson were irregular, and in violation of the provisions of that act, in respect that no libel had been served on the pursuer, and that the presbytery had neglected to take any competent proof of the alleged offence or ground of complaint.

The defenders maintained, that as the records of presbytery (of which no reduction-improbation was raised,) shewed that the pursuer had refused to subscribe the formula and standards of the established church, as required by the acts 1690, c. 17, and 1706, c. 6, the presbytery was entitled to proceed summarily to depose him, in terms of the statute 43 Geo. III. c. 54.

The Lord Ordinary sustained the defences by the following interlocutor and note: 'The Lord Ordinary having resumed consideration of the record and whole process, sustains the defences, assoilzies the defenders from the whole conclusions of the action, and decerns.'

Note.—'The Lord Ordinary thinks there are difficulties in this case; and has such an impression of its importance as a precedent, that he was inclined to report it to the Court, upon cases, without a judgment. Both parties, however, are in a situation which made him anxious to avoid any unnecessary expense and delay; and as the facts are fully stated in the record, and the points of law arise chiefly on a reference to a few earlier cases of an analogous nature, he has thought it better to give a decision on the merits, with such explanation of his views as may be necessary.

'The pursuer objected to the jurisdiction of the presbytery generally, on the ground that he was not a proper parochial schoolmaster, but a teacher supported by the voluntary contributions of individuals. The Lord Ordinary, however, had no difficulty in repelling this plea, on the grounds stated on the record; and the pursuer, indeed, appeared to have but little confidence in it, when he agreed to take the Lord Ordinary's judgment on the evidence in process, rather than engage in any further proof of his allegations. On that evidence the Lord Ordinary had no hesitation in repelling this objection.

'On the merits, the pursuer admitted that there was a sufficient complaint and citation. His objections were chiefly, that the act 1803 had superseded the original powers of the church courts, in all things touching the deposition of schoolmasters, and that the proceedings in this case were not conformable to that act, 1*st*, Because the charge against him was not one of those for which the presbytery was entitled to give a final sentence of deprivation under the statute; 2*d*, Because he had not been served with a

'libel; and, 3*d*, Because his alleged confession was not subscribed 5 Dec. 1834.
'by him on the record.

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'It is only on the two last grounds that the Lord Ordinary thinks 'there is any difficulty. He apprehends it to be clear, that no part 'of the original powers of the church courts over schoolmasters is 'taken away by the act 1803, except where the exercise of such 'powers is inconsistent with its special provisions; and its general 'tendency is undoubtedly rather to increase than to abridge the 'powers of the presbytery, 1*st*, By making its judgments final; 'and, 2*dly*, By extending its jurisdiction to cases to which its com- 'petency had been previously questioned.

'He thinks it equally clear, that its final jurisdiction, even for 'purposes of deprivation, cannot possibly be limited to the three 'special cases mentioned in section 21. of the act 1803, viz. ne- 'glect of official duty, immorality generally, and cruel or improper 'treatment of the scholars. Those the Lord Ordinary conceives are 'specified in the statute, merely because, not being offences (or dis- 'qualifications) of a proper ecclesiastical nature, it had been dispu- 'ted whether they fell at common law under the cognisance of an 'ecclesiastical tribunal. But it never could be doubted that a re- 'gular parish schoolmaster was bound to be in communion with the 'established church, and that the presbytery of the bounds had 'power to enforce this qualification; while the doctrine of the pur- 'suer seemed to lead to this absurdity, either that such a school- 'master might continue in office, (since the Act 1803,) though he 'openly celebrated mass in his schoolroom every Sunday, or that 'the sentence of the presbytery depriving him, on proof of such an 'offence, was still liable to appeal to the Synod and General As- 'sembly, though this is not the remedy to which the pursuer has 'thought fit to resort. On these grounds the Lord Ordinary has 'no doubt that the judgment of the presbytery is unassailable.

'The case is different as to the want of a libel, and also as to the 'confession or admission of the party not being authenticated by 'his subscription on the record. Effect was given apparently to 'both these objections in the case of Ross; and the attempt of the 'defenders to distinguish this from Ross's case as to the last parti- 'cular, on the ground that the record here bears, that the pursuer 'was required to subscribe his declaration, and refused, while no 'such requisition appears in Ross's case, seems to the Lord Ordi- 'nary to detract but little from the weight of the precedent, as such 'refusal might even be construed into a virtual retractation of the 'verbal confession previously made.

'But the view upon which he got over both objections is this: 'He has no doubt (as already stated) that all parish schoolmasters

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'must be in communion with the established church, and are, consequently, at all times liable to have their adherence to that church tested, by having the formula appointed by the Act of Assembly 1694, and recognised in the act 1803, as well as many earlier acts, presented to them for signature. Now, the record in this case bears, that the pursuer positively refused to sign that formula; and the Lord Ordinary holds, that the sentence of deposition must be considered as proceeding on that refusal. He conceives, too, that this was a valid ground of deposition, and that, if it was the ground, there was no occasion either for a libel, or any signature to a supposed confession.

'1*st*, There was no occasion for a libel, for the charge was not of any anterior or extrinsic act, but of non-compliance with a lawful requisition made by the presbytery in its own presence,—the wilful withholding, or obstruction as it were, of an actus legitimus, which it was at all times entitled to require, and which, in its own nature, admitted neither of previous charge or subsequent probation.

'2*d*, In the same way, and for the same reasons, there was no occasion for the party subscribing his declaration. According to the Lord Ordinary's view of the matter, the sentence did not proceed, or at least did not depend for its validity on his admission, that he was a member of the Secession church, but on the fact of his having refused coram judice to exhibit the only test which the law admits of his adherence to the church of the establishment, viz. by signing the formula when required by the presbytery, to whose superintendence he was undeniably subject, and who, by an Act of Assembly, so late as 1800, are not only empowered, but required to exact such signatures from all schoolmasters within their bounds.

'In the case of Ross, the fact charged was an antecedent and extraneous fact, relating to the fraudulent exhibition of false certificates of attendance at the University, and might therefore justly be held to form the fit subject of a regular libel; and, if established by confession, to make it necessary that the confession should be authenticated on the record, by the signature of the party accused. But the refusal to subscribe the formula was an occurrence, or res gesta intra mœnia of the presbytery itself, and of which the only legitimate and conclusive evidence was the record, in which the whole proceedings of the meeting were authentically entered. The truth of this record could only be impeached by a reduction-improbation, which is not the form of the present action; and the summons, in point of fact, does not allege that, in this particular, the record was at variance with the truth.

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'The Lord Ordinary thinks, therefore, that both these objections are excluded, and that though more precision might have been desirable in the whole course of the procedure, there is truly no ground for holding, either that the presbytery have transgressed the forms required by the statute, or so exceeded the jurisdiction it confers, as to subject their judgment in any respect to a review, from which it is otherwise, and for the best reasons, exempted.'

Judgment.

The pursuer *reclaimed*, but the *Court* unanimously adhered.

Opinion of Court.

The *Lord Justice-Clerk*.—On all the preliminary points raised on the construction of the statute 43. Geo. III, I do not entertain the slightest doubt of the soundness of all the principles laid down in the note of the Lord Ordinary. I am clear that the defender, Mr Donaldson, had a right to bring the matter contained in his petition and complaint before the presbytery; and it is apparent on the face of the proceedings before them, that the pursuer at that time refused to subscribe the formula. Nay more, he still does so, for there is no offer made on his part in the record, or even now at the bar, to qualify, by subscribing the formula, and declaring himself a member of the established church. Therefore, there can be no doubt that he is utterly unqualified to hold the situation of a parochial schoolmaster in any parish in Scotland. I am also of opinion, that the statute of Geo. III. is confirmatory of the common law, and in no way derogates from the jurisdiction of the presbytery over schoolmasters under the former acts of Parliament and of the church. I think, therefore, that the proceedings of the presbytery were right. They might have been reviewed by the church courts, if the pursuer had thought fit to bring them before those tribunals. The only question that remains, therefore, is, whether the subsequent proceedings of the defenders, in applying for a summary warrant of ejection from the Sheriff, under the statute of Geo. III, were regular. Now, it certainly appears that the application to the Sheriff was made in terms of the statute of 43. Geo. III; at least reference is made to that statute in its prayer, although the previous proceedings had been at common law, or under the older statutes; but the question here is, whether the presbytery were not entitled to make this application at common law, in order to get the warrant of the judge-ordinary to enforce the sentence of the presbytery, the pursuer not having taken the proper steps to get that sentence reviewed by the church courts? I think, that, on this footing, the application to the presbytery was competent, and that it is not vitiated by the unnecessary reference to the statute 43. Geo. III. in the prayer of the petition.

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Opinion of Court.

Lord Glenlee entirely concurred.

Lord Meadowbank.—We can do nothing but sustain the defences against this action, as it is impossible for us to decern in terms of the conclusions of the summons, which require us to find and declare, that the pursuer is entitled to resume possession of the schoolhouse, and the performance of the duties of schoolmaster at Tail, and to draw the salary and emoluments of the office. Now, how can we do that in the face of this record of the presbytery, which shews that the pursuer refused to subscribe the formula, and of the admission on the record, and now at the bar, that he still refuses to do so, and that he does not belong to the established but to the secession church? It is therefore quite out of the question to sustain the conclusions of this action. The pursuer cannot be entitled to the character of a parish schoolmaster, so long as he declines to subscribe the formula, and to comply with all the tests imposed legally by the church courts. In the second place, I agree with your Lordship, that the statute of Geo. III. does not derogate from the powers of presbyteries under the old law to depose schoolmasters on such a ground as this, and to get their decrees enforced by applying to the judge ordinary of the bounds.

Lord Medwyn.—If I thought this action well founded on the merits, and that the decree of the presbytery, and warrant of the Sheriff proceeding upon it, were irregular and informal, I should have no difficulty, from the terms of the conclusions of the summons. We could not, indeed, decern de plano in terms of the declaratory conclusion, finding that the pursuer was entitled to the office of schoolmaster; but if the decree of the presbytery, deposing him therefrom, were irregular, we might remit to them either to proceed by a libel against him, or to tender him the formula in due form, and to ascertain, by competent evidence, whether he refuses to take it. My difficulty in the case was this: As this does not fall within any of the three cases mentioned in the act of Geo. III, whether the church courts have power at common law, independent of this statute, to depose a schoolmaster, and to enforce their sentence, by applying to the judge ordinary for a warrant of ejectment. Upon looking into the appeal case in the question with the schoolmaster of Bothwell, I am satisfied that they have this power; that that act did not introduce it, but only, in the three specified cases, made the judgment of the presbytery final, not reviewable by any court, civil or ecclesiastical; and in like manner, the warrant of ejectment authorised by the statute, was not introduced by that act as a new mode of enforcing such decrees, but only with the new quality of being final, and not subject to review. Now, as the ejectment in this case was not issued to enforce sentence in any

of the three cases specified in the statute of Geo. III, I think that it might be reviewed in the civil court, if it had been disconform to its warrant, or unduly followed out, just as the sentence itself might have been reviewed by the higher church courts, if he had chosen to appeal to the synod. But being satisfied that the church courts may depose a schoolmaster, and enforce their sentence against him by applying for the warrant of the judge ordinary, independent of the statute of Geo. III, I have no farther difficulty in the case, as I see nothing irregular in the proceedings, and my opinion does not differ materially from that of your Lordship and Lord Glenlee.

Opinion of Court.

Lord Ordinary, Jeffrey. Act. *Sol.-Gen. (Shene,)* and *Dick.* Alt. *Dean of Fac. (Hope,)* and *Whigham. Jas. Peddie* and *D. Whigham*, Agents.

U.

SECOND DIVISION.

No. XXI. *6th December* 1834.

THE FRIENDLY HIGHLAND SOCIETY OF CAITHNESS, AND ALEXANDER SINCLAIR, THEIR MANAGER, *against* MILLER.

SOCIETY.—MUTUAL CONTRACT.—*A friendly society being constituted on the principle of giving a fixed annuity to the widows of members contributing for a certain number of years, with power to increase the rates of contribution, in case of need, payable by the members, is not entitled, by an after regulation and change of their laws, to diminish the annuities of widows, whose claims are already vested, by the predecease of their husbands, under the former rate.*

THE Friendly Highland Society of Caithness was instituted in 1821, and by the original articles of its constitution it was provided, that the widow of every member should receive an annuity of L.10, payable quarterly, to continue during her widowhood, in consideration of a certain sum of entry money, and a quarterly contribution of five shillings from each ordinary member, which was required to be paid for seven years before any benefit could be drawn from the funds. It was also provided, that in case the funds should prove insufficient, at the end of seven years, to meet the demands due by

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the society, the deficiency should be made up by additional contributions, to be laid upon the members. These rules and regulations were duly confirmed by the Justices, in terms of the stat. 33. Geo. III. c. 54. The charger, Mrs Miller's husband, became a member of the society on the 27th March 1821; and in 1826, the society, by a resolution to which he was a party, agreed to extend the period during which the quarterly contributions were to be made, before any demand could come upon the funds of the society, from seven to ten years. The charger's husband died in 1826, and the quarterly payments having been paid by him, and by the charger, after his death, up to December 1830, she then became entitled to rank on the funds of the society for her annuity, as the widow of a deceased member.

In 1830, the society appointed a committee to reconsider their rules, and the rates of allowance fixed for widows and other persons entitled to claim the benefits of the society by the original rules; and in 1831, upon the report of this committee, they came to an unanimous resolution to reduce the annuities of the widows from L.10 to L.4, and at the same time abrogated the clause by which members were liable to have additional contributions imposed upon them, for the purpose of making up deficiencies. The society, at the same time, availed themselves of the then recent statute of 10. Geo. IV. c. 56, to get these new rules sanctioned by the Justices of Peace for the county of Caithness.

In the meantime Mrs Miller brought her claim against the society, and, on the 6th December 1831, obtained a decree from the Sheriff, finding her entitled to her annuity of L.10, payable quarterly, from and after the 29th March 1831, being the date at which the term of ten years, from the period of her husband's admission as a member of the society, came to an end. Mrs Miller having afterwards charged the treasurer of the society upon this decree, he presented a bill of suspension, which the Lord Ordinary (Jeffrey) refused, with the following note of his opinion: 'If the Lord Ordinary had any doubt on the case, or even thought there was any 'serious chance of the suspender persisting in litigation, he would 'have passed the bill, (caution being found,) as the speediest and 'safest way of establishing the right of the respondent; but not 'having the slightest doubt on the merits, he does not think himself entitled to stay the lawful diligence of the respondent.'

The suspender afterwards presented a second bill of suspension to another Lord Ordinary, which was also refused by the following interlocutor and note: 'The Lord Ordinary officiating on the Bills 'having considered this bill, with the answers, and the former bill

'and answers, and the productions, refuses the bill, finds expenses 6 Dec. 1834.
'due, and remits the account, when lodged, to the Auditor to be
'taxed.'

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Note.—'Caution was required, and no doubt found, under the 'first bill, so that the offer of caution in this second bill makes no 'difference on the state of the case. But though the argument for 'the complainer is certainly very able, the present Lord Ordinary 'so entirely concurs with the former (Lord Jeffrey,) that he does 'not think that he would be justified in involving this charger in a 'protracted litigation for her annuities, by passing the bill. The 'short state of the point is, that there appears to be nothing in the 'statutes, and certainly there is no principle at common law, to 'warrant the conclusion, that the power given to the societies to 'make new rules, and to alter the rates of contribution or payments, 'was intended to enable them to take away or diminish the pre-'viously vested interests of persons not members of the society, but 'creditors, whose interests had already emerged by the death of the 'contributors. It may be true that the representatives, or widows 'of contributors, may be affected by the new rules; but the ques-'tion is, Can this apply to the case of a widow whose husband died 'before the new rules were even framed, that is, who died under 'the old system, and by his death gave a vested right according to 'it? This is very satisfactorily argued in the answers. And, in 'addition to the conclusive differences in the situation, which are 'there pointed out, it may be observed, that when the existing mem-'bers deliberate on the expediency of particular alterations, each 'of them, being still alive, has his own chance of advantage or re-'lief, as well as his risk of loss to his family, by the change. But 'the widow of a man, already dead, could have nothing but the 'certainty of loss, while, in regard to her, all the benefit is to the 'existing members, who, without her intervention, make the rule 'against her.

'The rule about arbitration must evidently go with the principle 'applicable to the other point.'

Suspenders' Pleas.

The suspenders reclaimed, and *pleaded*—That by the terms of the statute 33. Geo. III. c. 54, as afterwards explained and enlarged by the consolidating act of 10. Geo. IV. c. 56, all friendly societies which availed themselves of the provisions of these statutes were entitled, from time to time, to alter and amend their rules, and that such new regulations, when approved of by the requisite majority of the society, and confirmed by the Justices, in terms of the statute, are declared, (stat. 10. Geo. IV. § 8) 'shall be binding on 'the several members and officers of such society, and the several

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'contributors thereto, and their representatives.' Now the charger is, in terms of the statute, the representative of a deceased contributor, and it is only in that character that she can make any claim against the society. Her proper debtor is the society, and not the individual members thereof; and her only claim is against the social funds, which are likewise liable to all other claims which may emerge in consequence of the death or illness of other members; but the claim now made, if sustained to the full extent, will have the effect of carrying off an undue proportion of the common fund, to the exclusion of other claims which are equally well founded.

In the second place, the charger was bound to submit her claim to arbitration, in terms of the statute 10. Geo. IV, the society having, by their new regulations, adopted the alternative permitted by the statute, of having all demands made upon it settled in that way.

Charger's Pleas.

The charger *answered*—That this was a simple contract of mutual assurance, and that the claim of the charger, as a creditor of the society, was vested, by the predecease of her husband, before the new rules and regulations were adopted. The statute 10. Geo. IV, being posterior to the emergence of her claim, could not affect it; but even though it did, the clause founded on by the suspender has no application to the present case, as it relates only to existing members or contributors, and their representatives; whereas the charger, a widow of a previously deceased member, does not claim at all in the character of a member of the society, or as the representative of any member, but as a creditor on the funds. Accordingly, the statute contemplates all widows of deceased members in that light, as creditors whose claims cannot be affected by any after regulations or change in the rules of the society, nor by its dissolution; for whilst it provides, (sect. 26,) that all the existing members, whether paying contributions, or receiving allowances, (as in the case of sickness or old age,) shall have a voice in all changes of the rules or resolutions to dissolve the society, it makes no mention of widows of deceased members, or other persons having claims on the society funds, plainly for the reason that the Legislature considered them as creditors whose rights were already vested, and could in no way be affected by any subsequent resolutions of the society.

Judgment.

The *Court* (Lord Medwyn dissenting) adhered, and refused the note.

Opinion of Court.

The *Lord Justice-Clerk*.—On looking at both the statutes, 33. Geo. III. and 10. Geo. IV, it is evident that the Legislature was anxious to encourage the formation of these friendly societies, and

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to secure their interests; but there is nothing in either of the acts that can lead me to have any doubt of the propriety of this interlocutor. It appears that this Friendly Highland Society of Caithness was formed in 1821, with a view of availing itself of the benefits of the statute 33. Geo. III.; and there can be no doubt, as it appears from their rules, providing for an increase to the rates of quarterly contributions to be paid by the members, that at the time of its formation the risk of forming an erroneous calculation of the value of lives, or the accumulation of capital, was anticipated. I do not think that we have any evidence that their calculations were erroneous, or that the society could not have continued to afford all the benefits originally contemplated, if it had flourished, by a continued accession of new members; but that is of no consequence. It appears, I say, from their rules, that they cautiously guarded against the risk of insolvency, by providing, that in case of heavier claims than were expected coming upon them, the deficiency should be made up by levying additional contributions on the members. They availed themselves of this right in 1826, by a resolution, to which the husband of the charger was a party, deferring the period at which contributors should be entitled to draw benefit from the funds, from seven years till ten. Now, looking to the facts out of which this question arises, it appears that the husband of this charger contributed to the funds of the society, upon the footing of this resolution, in 1826, down to his death in that year; and that the remaining contributions, up to the full period of ten years from 1821, have been paid by the charger, his widow. She had then, I conceive, a vested interest in the funds of the society, under the terms upon which these contributions were paid, and the society is bound to fulfil its bargain. She was not a member of the society after the death of her husband, but a person entitled to make a claim upon it, in right of former contributions actually paid. Then comes the question, whether the statute 10. Geo. IV. has made any change upon rights such as this, actually vested. This enactment, in the first place, repeals and consolidates all the former acts respecting these friendly societies; but then the first section expressly provides, 'that such repeal shall not invalidate or affect any thing which has 'been done before the passing of this act, in pursuance of any of 'the said acts.' The new rates, therefore, adopted under the stat. 10. Geo. IV. could only apply to interests of a prospective nature, and could not affect any rights of parties acquired previously, and already vested before the statute was passed. The only other question is that regarding the jurisdiction of the Sheriff; and this just depends upon the other one on the merits. If the charger had a vested interest and claim, as a creditor, against the society, was she

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not entitled to apply to the judge ordinary in order to enforce it? The previous question therefore recurs, whether any remodelling of the society, under the provisions of the 10. Geo. IV, could affect the rights of parties, previously acquired; and as I am clear that it could not, so I must think that the charger is not bound by the new obligation in the articles of the society, binding the members to submit their claims to arbitration.

Lord Meadowbank.—I am decidedly of the same opinion. The case depends entirely on the statute 33. Geo. III, as the statute 10. Geo. IV. reserves entire every thing that had been previously done in pursuance of any former acts; and it is impossible that the Legislature could contemplate the manifest injustice of affecting any rights vested before the society had placed itself under the operation of the new statute. This was just a contract of mutual insurance; and on looking at the rules of the society, under which the husband of this charger became a contributor, I cannot believe that the contributors entered into it on any other footing than on the faith of the responsibility and solvency of each and every member, for the benefits stipulated to be conferred. Just look at the terms of their own resolutions, by which it is provided, that in order to keep the capital safe, any deficiency or shortcoming in the funds, which it was anticipated might be necessary to meet their obligations, shall be made up by additional contributions to be levied upon the members.

Lord Medwyn.—I cannot but feel considerable diffidence of the opinion that I have formed on this case, seeing that it is opposed to so much weight of authority on the other side. I may perhaps be influenced unconsciously by my impression of the prejudicial consequences which such a judgment as this will have on the prosperity of all such societies, (in whose welfare I have at one period of my life taken some interest); but I can only say, that I have carefully endeavoured to divest myself of any such bias, as well as of the prejudice I may feel against the claim of this charger, arising from the manifest injustice, (as it appears to me,) which will be the result of her claim being successful; and that she will thereby be enabled to draw an undue proportion of the funds of the society, founded on the principle of mutual and equal benefit, to the injury of all other widows who are equally entitled to share in them. If indeed I could look upon the claim of this woman, as the Lord Ordinary has done, as that of a creditor, with a vested right, against the society as a copartnership, and against the individual members thereof, I should have no hesitation in concurring in the interlocutor which he has pronounced. But I cannot look upon it at all in this light, or that the charger has any such right. Her claim is vested

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no doubt; but it appears to me to be only a vested right to a fair share of the society funds, in proportion to her claim, and to those of other annuitants and claimants. I cannot look upon it as any jus crediti against the individual partners. I do not at all look upon this as an ordinary contract of insurance, which, like all other contracts, must be fulfilled by the company undertaking it; but as an agreement, by which the fund contributed was alone responsible to the members of the society, and their representatives, for their annuities or other allowances, with a power vested in the society of altering the rates of such allowances, so as to bring them within the means of the society to supply. The charger has no absolute and indefeasible right to any certain sum, (if she had, of course my difficulty would disappear,) but only to a fair share of the funds. The terms of the contract appear to me to be such, that, in a certain event, and under such sanction as the Legislature might provide, to secure that equal justice might be done to all, the rates of annuity might either suffer diminution, or be augmented, according to the state of the funds. It has been said, that the statute 10. Geo. IV. has no retrospect. I think it has, to this extent, that it regulates the future rights, both of members, and the representatives of members, of all such societies as should avail themselves of its protection. The saving clause was properly introduced, to protect all previous payments made under the old law, but nothing more. It would have been against the professed object of the act, to have secured, in future, higher payments to one than to another; and if such had been intended, very precise words must have been, and might easily have been used. The original regulations of this society, in 1821, reserved a power to alter the rules, by a majority of three-fourths of the members; and the act 1793, by which they were sanctioned, gave this power independent of any such; and it is admitted, that at least one alteration was made, by which the right of drawing any benefit from the funds of the society was postponed from seven to ten years. But suppose that the husband had opposed this resolution, and he had been outvoted by the requisite majority, is it not clear that he, and all claiming through him, would have been bound by it, because such was the resolution of the society? I think the true ground on which the widow of a contributor is bound, by the new regulations of the society, is in the words of the statute 10. Geo. IV, which was intended not merely for the regulation of future societies, but also for the protection of those already existing. It declares, (sect. 8,) that such new rules and regulations as the society shall make, from time to time, shall be binding both on the members and officers of such societies, and the several contributors thereto, and 'their

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'representatives.' Now, this term, 'representatives,' appears to me to apply expressly to widows and other persons having claims against the society, in the right of former contributors. It has been argued, that such widows cannot be bound by the new rules of the society, because they are not allowed by the statute to have any voice in enacting them. But this argument does not weigh much with me, seeing that even in the more important matter of dissolving the society they would have no voice, although it appears clear that the society might dissolve itself at any time, and leave nothing to this charger, except a claim, along with the other annuitants, upon the funds belonging to the society at the time of its dissolution. In short, I think the charger is a creditor of the society, but only conditionally, to a share of a mutual fund, so long only as it is sufficient for the benefits promised. I am also now of opinion, that the charger is bound by the arbitration clause, as the decree is only till it be forfeited or withdrawn: it has been duly withdrawn; and the charger must apply to the society for relief. Like all future applicants, she must be subject to this statutory mode of settling disputes. But it is unnecessary to go into that point. If the Court had been of my opinion, I should have proposed, as the cheapest way of settling the question, to have remitted to the judge ordinary, to investigate whether the decree had been properly withdrawn, (for this, I admit, must be subject to the review of the ordinary courts of justice,) or whether the funds of the society were sufficient to allow an annuity of L. 10 to widows, as well as providing for the other purposes of the society; and if it be ascertained that they are insufficient, then to find that the charger must become a claimant on the fund for a rateable annuity, along with the other persons having right to benefit by it, and that she must be subject to the clause respecting arbitration.

Lord Glenlee.—I am of the same opinion as your Lordship. I think this charger had a vested right to her annuity before the new regulations, or the statute 10. Geo. IV. came into operation; and I do not think that there is any thing in that statute to justify the idea that the Legislature meant to interfere with rights acquired previously. I do not say that cases may not occur of necessity, compelling the Legislature to annul the existing contracts of parties by its authority; but such an exercise of power as that is altogether ultra communes regulas juris, and is certainly not to be inferred by implication in interpreting an act of Parliament. We have here the case of a contributor making payments to the society, under regulations which gave his widow a claim to a certain annuity of L. 10; and no change made in these regulations, or on the amount of the annuity, until after his death, and the claim of his widow had

actually emerged, and become a proper claim of debt against the society. 6 Dec. 1834.

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U.

The *Court*, on the same day, decided a similar action, on a bill of advocation of a judgment of the Sheriff of Caithness, between the same society and their treasurer, as advocators, and Helen Macmillan, respondent.

FIRST DIVISION.

No. XXII. *9th December* 1834.

Mrs E. THOMSON
against
Mrs E. MILLER or JONES, and Husband.

Passive Title.—Vitious Intromission.—*A widow having, after the death of her husband, continued in possession of the furniture and machinery, and carried on business in the same house where her husband resided, for the support of her family, and having given up an inventory to the Commissaries, and paid the amount thereof in preferable debts,—found not to have incurred a passive title by vitious intromission, to subject her generally in the debts of her husband.*

David Thomson, manufacturer in Paisley, husband of the suspender, died in December 1821, leaving debts to a large amount, and little or no property. The suspender, who was left with a family of six children, remained in the house occupied by her husband, retaining possession of the furniture, which none of the creditors attempted to attach, and endeavoured, by her own industry, to support her family. In April 1823, she gave up an inventory, upon oath before the Commissary, of her husband's personal estate, amounting to L.96 : 11 : 11, and soon after she paid preferable debts, deathbed and funeral expenses, rent, taxes, &c. amounting to L.96 : 2 : 7, leaving a balance of her husband's estate of only 9s. 4d. There was a small dwelling-house belonging to the deceased in Paisley, but the suspender did not take possession of it, nor had any intro-

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mission regarding it. It continued to be possessed by a relative of the deceased. Besides the above sum of preferable debts paid by the suspender, she afterwards paid some other family debts due by her husband, to the amount of L.54: 12: 1.

Among the debts due by the deceased was one of above L.100 to Margaret Miller, who, in 1822, applied to the suspender for payment. The suspender wrote in answer: 'I have a perfect recollection of the promise I made you, and as soon as it is in my power I mean to make it good; but until my affairs are properly arranged I cannot say when; but you may rely on my honest and sincere intention to fulfil it as soon as in my power. Your claim has been to me the cause of great uneasiness, and my heavy loss was so sudden and unlooked for, that things were thrown into great confusion. My trial has been a heavy one.' Again, in February 1825, the suspender's brother-in-law wrote to Mary Miller as follows: 'I again write you, at Mrs Thomson's request, to crave a little more of that indulgence which you have so long and kindly shewn her.

'It is now, I believe, past the time that you were promised some money, and Mrs Thomson had made arrangements accordingly; but about a month ago, by the failure of a London house, some of the manufacturers here, with which she was a little interested, had to stop payment, and in consequence some bills had to be retired by her, which fell due about ten days ago. The manufacturers, however, pay a decent composition, and every thing is again going on well; but these circumstances have taken all her ready funds: in a few weeks, however, I should suppose something may be sent you. Mrs Thomson is very sorry indeed that you should be solicited to stop a little longer, but trusts you will do so, which will greatly oblige her.'

On the death of Margaret Miller, the respondent, Mrs Jones, as her next of kin and representative, with consent of her husband, raised action against the suspender for payment of the above debt, and obtained decree in absence. Ultimate diligence having been done upon that decree, the present suspension was brought, in which the suspender *pleaded*—

Suspender's Pleas.

That the suspender was not liable in personal diligence for this debt, which was not a debt of her own, but of her late husband, to whom she had not incurred any passive title, and is not liable in the payment of his debts, by vitious intromission or otherwise. She had not uplifted any debt due to her husband, nor in any respect intromitted with his funds and effects. Although she, with her family, continued in possession of the furniture, in which she was not

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interrupted by any of her husband's creditors, who took no steps to attach the same, this would not infer a passive title, to make her generally liable for her husband's debts; and having given up an inventory of the amount of her husband's funds, her liability must be restricted to the amount of that inventory, which has been more than exhausted by preferable debts; Scott *v.* Livingston, 5th Dec. 1623, *Durie*, *M.* 9824; Bell *v.* Elliot, March 1686, *Harcarse*, *M.* 9860; Stark *v.* Jolly, 22d Jan. 1713, *M.* 9830; Gemmel *v.* Barclay, 9th July 1724, *Edgar*, *M.* 9830; Black *v.* Wallace and King, 26th Jan. 1739, *M.* 9831; Reoch *v.* Cowan, 26th Feb. 1668, *Stair*, *M.* 9828; Wilson *v.* Smith, 19th June 1772, *M.* 9833; Gardner *v.* Pearson, 28th Nov. 1810, *F. C.*; Gardner *v.* Stevenson, 26th Feb. 1830, *S. & D.*; *Bell's Principles*, 498.

Suspender's Pleas.

Respondents' Pleas.

Answered—The suspender having intromitted with the effects of her husband, having retained possession of the furniture, and the machinery with which he carried on his trade as a manufacturer, and paid accounts due by her husband, has incurred a passive title, by vitious intromission, to make her liable for her husband's debts; Ritchie *v.* Bower, 7th March 1795, *M.* 9838; Forbes *v.* Forbes, 12th June 1823; Cunningham and Bell *v.* Mackirdy, 8th Feb. 1827. The suspender is farther liable, as having adopted the respondent's debt, and undertaken to pay it, by the letter written by her, or by her authority, on the faith of which, indulgence was granted, and the respondents and their author were induced to abstain from taking other measures for enforcing payment.

The Lord Ordinary repelled the reasons of suspension, and added the following note: 'It is admitted by the suspender, that on 'the death of her husband, (1st December 1821,) she took possession, not only of his whole household furniture, but also of the 'machinery which he had used as a manufacturer. It was not until the 2d of April 1823, that she gave up an inventory of the 'articles so taken possession of; and it is admitted, that no farther 'steps were ever taken for completing a title. It is also admitted 'by the suspender, that she not only took possession of her husband's moveable effects, but that she used the machinery, forming 'part of those effects, in the prosecution of the manufacture formerly carried on by him; and accordingly it appears, from her 'letter of 20th September 1822, and from that of 21st February '1825, which she admitted at the bar to have been written by her 'authority, that without any reference to the amount or situation of 'the effects of her deceased husband, she assigned the state of her 'own affairs as a reason for delaying the payment of the debt due

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'to the charger. In these circumstances, it appears to the Lord Ordinary, first, that the suspender has incurred the passive title of vitious intromission, by the possession, and application to her own use, of the moveable effects of her husband, without a title; and, secondly, that her liability is confirmed, in regard to the debt in question, by her own letters, obviously warranting the creditor to rely upon her own personal responsibility.'

Judgment. The suspender *reclaimed;* and the *Court* unanimously altered the interlocutor of the Lord Ordinary, suspended the letters simpliciter, and found expenses due.

Opinion of Court. *Lord Balgray* did not think any thing had been done by the suspender to infer vitious intromission. She did not take possession of the furniture and effects of her husband: she only continued in possession of these, which were never attached by the creditors. She could do nothing else in the circumstances of the case. Was she immediately to leave the house, and the furniture, which the creditors did not attach, or do any thing to interfere with her possession? There was clearly no fraud in this case, and no violent possession or vitious intromission, while she has accounted for every farthing of the inventory which she gave up, by the payment of preferable debts.

Lord Gillies was of the same opinion. The Lord Ordinary had mistaken the extent of the intromission in this case.

The other Judges concurred.

Lord Fullerton, Ordinary. For Suspender, *Dean of Fac. (Hope,) J. J. Reid. William Muir*, S.S.C. Agent. Alt. *Sol.-Gen. (Shene,) J. Anderson. John Richardson*, W. S. Agent. *D.* Clerk.

T.

SECOND DIVISION.

No. XXIII. *9th December* 1834.

SIR JAMES BOSWELL
against
THE DUKE OF PORTLAND AND OTHERS.

KIRK.—*When a parish church is in disrepair, it is competent for meetings of the heritors, convened for the purpose, to assess the heritors generally for the expense of the necessary repairs, without applying*

to the presbytery or any other court for their sanction; and if the proceedings of the heritors who act at those meetings, and by whose votes the expenses are incurred, are done in good faith, and with a fair degree of attention to the interests of all concerned, their acts are binding on the absent or dissentient heritors.

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THE parish church of Mauchline was in a state of great disrepair in the years 1826 and 1827, and in the course of those years various meetings of the heritors were held, for the purpose of considering the propriety of repairing the old or building a new church. At these meetings, the heritors who attended were of opinion, that it was advisable to repair the old church, and took plans and estimates for that purpose. All their proceedings were reported, from time to time, to adjourned meetings of the heritors, specially convened for that purpose; and in consequence of the resolutions passed at these meetings, large sums of money were laid out, from time to time, in enlarging and repairing the old church, which, however, was ultimately found to be insufficient to sustain the repairs, and it became necessary to pull it down and to build a new one.

Sir James Boswell, the third heritor in amount of valued rent in the parish, was a minor, on the eve of majority, at the time when these operations began, and afterwards protested, at different times, against the heritors proceeding with certain repairs upon the part of the church which had been allotted to him in the division. At a meeting on the 14th August 1827, the heritors assessed themselves for the expenses of the repairs then in the course of being expended, at the rate of 2s. sterling *per* pound Scots of their valued rent; and afterwards raised an action before the Sheriff of Ayrshire against Sir James Boswell for his share of this assessment, amounting to L.61 : 17 : 11. The Sheriff gave decree for this sum. Sir James Boswell advocated, and the Lord Ordinary pronounced the following interlocutor: 'Advocates the cause, finds the advocator 'liable for the assessment, in so far as the same is applicable to defraying the expense of repairing the church of Mauchline, as libelled, 'and in so far repels the defences; but in so far as the said assessment is not to be applied to such repairs, but is intended to be applied towards building a new church, or otherwise, finds that the 'defender cannot be found liable for the same in this action, and 'in so far sustains the defences,' &c.

Pursuer's Pleas.

Sir James Boswell *reclaimed* against so much of this interlocutor as found him liable for the assessment necessary for defraying the expense of the repairs on the old church, and *pleaded*—That it was not competent for the other heritors of the parish, or any number

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of them, to assess him for the operations in question, because these operations were carried on without any application to the presbytery, or any decree of that court, or any legal sanction or authority.

Defenders' Pleas.

The other heritors of the parish *answered*—That it was competent for a meeting of the heritors of the parish, convened for the purpose, to assess the heritors generally for the expense of the repairs in question; and that there was no occasion to make application to the presbytery, or to any other court, for their sanction or authority to the repairs.

The Court (one of the Judges, Lord Glenlee, being declined, as an heritor in the parish of Mauchline,) ordered cases for the opinions of the other Judges, and the following printed opinions were given in:

Opinion of Consulted Judges.

Opinion of the Lord President, and of Lords Balgray, Mackenzie, Medwyn, Fullerton, and Moncreiff.—1. We think, that it appears certainly from the record, pleadings, and productions in this case, and is a matter on which it is not necessary to order proof or trial, that the church of Mauchline was, on the 17th of August 1826, in a state of disrepair.

2. We think, that such being the fact, it was the duty of the heritors to repair or rebuild it, in terms of the acts of Parliament 1563, c. 76, and 1572, c. 54, and act of Privy Council 13th September 1563, authorised and ratified by the first of these acts of Parliament, all as interpreted or modified by the practice and custom of Scotland. It has been long settled in practice, that the term 'parishioners', used in these acts, must be interpreted to include not mere inhabitants, whose interest in the parish may cease at any time, but those only having immoveable property in the parish, *i. e.* heritors; and also, that the share of this burden originally allotted to the parson must now be added to that borne by the heritors. In this way, the provision of the act of Privy Council now comes to be read: 'Therefore the said Lords ordain all parish-kirks within this realm, 'which are decayed and fallen down, to be repaired and upbigged, 'and where they are ruinous and faulty, to be mended; and after 'that they be sufficiently mended in windows, thack, and other 'necessaries, to be maintained and upholden upon the expenses of 'the heritors.'

3. We think that the heritors of Mauchline had the power of executing their duty of repairing the kirk of that parish, by means of meetings of their own body, called on the requisition of any one of the parties interested, and at those meetings acting, as usual, by the vote of a majority of the members present in person, or by proxy,

adopting such measures of repair as seemed fit, and imposing assessments for payment of the expense of such repairs, so as to bind all the heritors. It seems to us in general, that the heritors of parishes having the duty of repairing churches imposed upon them, it was the implied meaning of these acts of Parliament and Privy Council, that quoad hoc the heritors should be able to act as a corporation, by holding meetings, which should represent the whole body, and act for and bind them in this manner; for the act of Privy Council, with a view to the speedy execution of this duty, authorises the issuing of letters to messengers, which we presume must have been obtainable at the instance of any person interested, to charge the heritors to elect persons to tax them for the expense of such repairs; and it cannot be supposed that they were to be charged to do what was not understood to be within their competency. The messenger, it will be observed, is not authorised to call any meeting, or declare its powers or mode of acting, but simply to charge the heritors to do their duty in this respect. And the statute 1572, which expressly ratifies the previous provision, and censures the parishioners, *i. e.* the heritors, for not having done their duty in this respect, authorises the interference of the bishops (now presbyteries) only where the parishioners, being required to elect and choose 'persones for 'making of the taxation to the effect foresaid, refuses or delayis, or 'quhair thair is na kirk-maisters or deacons appoynted;' and it will also be observed, that what the bishops are appointed to do, is not to authorise meetings of the heritors, but to appoint persons for making the taxation, or for receiving the same, *i. e.* to do themselves what the heritors should have done. Under these acts—of which, it must be remembered, that the last does not repeal, but ratifies the two first—it seems plain that the heritors might meet and act without waiting to be charged by a messenger, and we think, a fortiori, without any interference of the bishop or presbyter, if they were willing. If, however, they could act at all, it seems impossible to doubt that this must have been by means of meetings called on sufficient notice, upon the requisition of any one interested, and acting by the votes of those present, so as to bind the whole. No other way can well be imagined.

Accordingly, in the case of Lauder, 24th Nov. 1630, reported by Spottiswoode, an heritor was found to be bound to pay an assessment laid on by a meeting of heritors for reparation of the kirk, though he himself had not agreed to it. It is true, that in that case it appears the presbytery had interfered. But still the assessment was imposed, not by the presbytery (or bishop,) as authorised by the statute 1572 to be done, but by an act of a meeting of heritors, which the act gives no authority to the presbytery to call, or to au-

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thorise, if otherwise incompetent. And we believe, that in practice it has been understood, that the heritors might act in this way without any warrant from the presbytery, and that this understanding has been acted upon.

We observe, too, that an heretrix was, in the case of Inverkeithing, 15th Feb. 1642, *Durie*, found liable to pay her proportion of a stent imposed for a kirk-bell, which must have been viewed as a pertinent of the kirk, and that at the instance of the parishioners, and without any mention whatever of the presbytery having interfered.

4. We think that the heritors being thus quoad hoc made into a corporation, every one heritor must equally be bound by their acts, whether he be sane or insane, major or minor, present at the meetings or absent, voting with the majority or with the minority, acquiescing in or protesting against what is done. There is, however, a remedy competent to every heritor, which indeed manifestly implies that every heritor is bound, viz. by an application to this Court, to control and direct the body of the heritors by its authority. This any heritor may use; but if he does not, he cannot exempt himself by any act of recusancy or dissent.

5. But it may be asked, can a meeting, or the majority of a meeting of heritors, do any thing they please, without becoming responsible, in their own persons exclusively, for the burdens imposed by their acts? We should answer, that, provided they do not exceed their powers, they cannot incur such responsibility except by acting fraudulently, or at least with that wilful negligence or wantonness, that culpa lata quæ dolo equiparatur. We think that honest error in judgment, even although pretty palpable, will not subject them in this way. Considering that the heritors who attend fulfil a duty which those who are absent decline, and that those who attend and oppose have the remedy of appeal to this Court, which can fail them only because they do not choose to use it, we think it would be very hard and very inexpedient to hold, that the heritors attending the meeting, or those voting in the majority, were to bear the whole burden of what was competently and honestly done in the general concern, merely because it was not done wisely. At that rate, prudent men would stay away from all such meetings, and reserve to themselves the hope of exemption from a burden, by objecting to what was done by others. We think the above rule is the strictest that can be laid down.

6. We think, then, that the church of Mauchline requiring repairs, it appears from the record that the heritors of that parish were competently and fairly called to meetings, and that those meetings acted competently and fairly in ordering the repairs on the church, to which this question relates. That they acted unfortu-

nately, is clear; and we could not say that they acted judiciously, but we see no reason to say there was any fraud, or culpa lata quæ dolo equiparatur, in their conduct. The heritors present at the meetings were on all occasions acting in a matter wherein their own interest was concerned, exactly in the same way as that of all the heritors absent or dissenting was. There appears no trace of any separate or perverse interest whatever leading to any thing that was done. If, then, any thing was done wrong, we do not well see how it could arise from any other cause than honest error in judgment, for which we do not think they can be subjected in the penalty of personal and exclusive liability.

Opinion of Consulted Judges.

7. In this case, the advocator pleads a nullity of the whole proceedings of the heritors, because they did not obtain precise and complete contracts for the repairs before resolving to adopt, or commencing them, or imposing the stent for the expense of them. We are not aware of any grounds for such nullity. The act of Privy Council not only does not mention, but it does not seem to contemplate any contract at all, previous to raising money. The concluding sentence is, 'that the said parishioners make payment of the sums 'that they shall be taxed to the kirk-masters or deacons of the 'paroch, to be appointed by them for receiving thereof, to the re-'paration of the said kirks, sicklike within twelve days next after 'they are charged thereto, under the pain of rebellion, and failing 'thereof to be put to the horn.' And it seems obvious, that although, in cases of rebuilding, it is always possible to have a previous contract, (though, even in these cases, there is generally some extra matter left in a looser state,) yet, in cases of repair, it is very often impossible. The extent, nature, and expense of the repair necessary, often cannot be known until it be actually made; and when it is attempted to make previous contracts for repairs of old buildings, modifications and changes of plan must sometimes unavoidably happen. We do not think, therefore, there is any good ground for this plea of nullity. The case of Porterfield, in which the Court restrained a presbytery from raising money before they had obtained estimates, and entered into contracts for building a new church, bears no analogy to the present, which relates, not to the acts of the presbytery, but of the heritors; and is not a question of what the Court will direct to be done when applied to beforehand; but whether, after repairs have actually been executed or attempted by the heritors, without any application made to the Court to prevent it, the Court will throw the whole burden of these repairs on certain heritors only, and exempt another heritor, because the former executed or attempted the repairs without rigidly adhering to an estimate and contract, while the other stood by, and

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at most objected, but took no legal measure to have the errors of his brother heritors corrected in time. This last would require nothing less than some strict legal nullity in the proceedings. And we may repeat, that we see no warrant for holding, that even the total want of a contract for repair of a church would constitute such nullity, still less, some looseness in and departure from the contract occurring in the course of executing, or attempting to execute such repair.

8. Another special objection has been stated, that at one of the meetings the body which imposed the assessment was not the heritors but the kirk-session. We think that objection too critical. We think it sufficiently appears that the meeting was in truth a meeting of the heritors, though first called, and then adjourned along with a meeting of kirk-session, which it was convenient to have assembled at the same time. We believe, in practice, this is common. And further, we think that the effect of this objection, even if well founded, would only be to make it necessary to call a new meeting of the heritors to impose the assessment, which would still remain due as before.

On the whole, we are of opinion, that upon consideration of what is set forth in the record, pleadings, and productions, the advocator ought to be subjected to the assessment in question.

There is only one other point on which we have not touched above, because we are not sure that it is involved in the question put to us, which seems to relate rather to the liability of the advocator to the assessment generally, than to the amount of his share of it, viz. Whether the stent ought to be proportioned as has been done, or in the manner appropriate to the parish, considered as partly a town parish, like that of Peterhead? If this plea is persisted in, we rather think that it must lead to an investigation of the facts of the case.

Lord Corehouse.—I concur in the above opinion, in so far as it relates to the construction of the acts of Parliament, and of the Privy Council, concerning the building and repairing of parish churches, and in general to the powers and duties of heritors under those acts. But from the facts of the case, I arrive at a different conclusion as to the merits of the question at issue. I think it is not enough that a meeting of heritors ordering a church to be built or repaired, and levying an assessment for the expense on all the heritors, absent as well as present, and dissenting as well as concurring, should act bona fide, or with honest intentions, and avoid that gross negligence which the law holds akin, if not equivalent to fraud; but that they are further bound to use that degree of or-

dinary diligence which a prudent man does in the management of his own affairs. In the language of the civil law, et culpam latam et culpam levem præstare tenentur, a rule I conceive universally applicable, where a statutory trust is created for the purpose of imposing pecuniary burdens.

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In the present case, it appears that on the 13th December 1827, the presbytery appointed two tradesmen of skill, approved of by the heritors, to inspect the state of the church of Mauchline, which they did, and reported upon oath that they found the foundation of the walls insufficient, and the walls generally in an insufficient state, and the roof very much decayed, and the whole in such a state as to be incapable of being repaired. Six weeks before this, one of them had informed the heritors that the whole roof was perfectly rotten and useless. Considering how simple the structure of a country church in Scotland is, all this might have been discovered with equal ease in September 1826, before a shilling of expense had been incurred, as in October or December 1827, after more than L.500 had been spent in an abortive, because an impracticable attempt.

There is no evidence from the minutes, that a general examination of the church, with reference to the fact, whether it could be safely and effectively repaired, took place, before a plan of repair was adopted and commenced. The west gallery was indeed inspected, and on that inspection a resolution to repair, agreeably to a certain plan, was passed, and a contract actually executed. That plan was soon found to be impracticable, the south wall was declared insufficient, and appointed to be rebuilt, in so far, as it appears, without any inspection of the other walls. It is true that on this occasion three men inspected the roof; but they were all contractors or offerers for the job. Davidson was contractor for the wright and slate work, Tait for the walls, and Lees had been conditionally preferred. It appears that Nimmo, the only person who had no interest in the matter, was called upon to report only as to the insufficiency of the south wall, which the other contractors had an interest to rebuild, and not as to the roof, which they had undertaken to repair, and which he himself pronounced irreparable three months afterwards. To proceed with so hazardous an operation, as a general repair of an old building, on a mere partial and superficial inspection, and that by persons evidently interested, appears to me an act of great imprudence. Before any such attempt, a thorough and minute examination of the whole fabric ought to have been made by disinterested persons; the plans, specifications, and estimates of every part of the work ought to have been deliberately settled; and if a doubt was entertained of the practicability of the repair, the contractors

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ought to have been taken bound, not only to execute, but to uphold it. To omit these precautions was certainly a want of ordinary circumspection; and the heritors were the more to blame, that they were put on their guard by Sir James Boswell's reiterated protests, rested, it is true, at first on an untenable ground, but afterwards directed in general terms against the whole proceeding.

To give effect to this assessment would be, in my opinion, a bad precedent. A meeting of heritors is too often disposed to prefer the alternative of repairing to that of rebuilding, either from short-sighted economy, or from the desire of transferring a burden from their own shoulders to those of their successors; and by patching up an old and ruinous church, the congregation in the meantime is ill accommodated, and themselves, and those whom they are empowered to assess, are in the end saddled with twice the expense which would be required to erect a new one. It is for the benefit of all parties, that the heritors should not be encouraged to wink at the real state of the building placed under their charge.

It seems to be thought hard, that the loss in this case should be laid on the individuals who attended the meeting, while those who staid away are exempted; and if it were done, that a motive would be held out to heritors to exempt themselves on such occasions, and to neglect the duty imposed upon them by law. But truly there is little danger of that result, for if the heritors do not choose to act, the presbytery will not fail to act for them. I am of opinion, therefore, that the advocator is not liable for the assessment in question.

Lords Craigie and Gillies—The pleadings and proceedings in this case, on which the opinions of the Court have been required, involve two questions of general importance; 1*st*, The authority of the heritors or landed proprietors in Scotland, in regard to the rebuilding or repairing of parish churches; and, 2*d*, The proper form of procedure to be followed by those who may exercise such authority.

There is a third question of less consequence, Whether, holding the proceedings of the heritors in this case as unauthorised and informal, the advocator, Sir James Boswell, has nevertheless, by taciturnity and acquiescence, debarred himself from making any objection to them.

The two questions first mentioned must be governed by the act of the Secret or Privy Council in Scotland in 1563, referred to and confirmed by act 1563, c. 56, joined with the subsequent act 1572, c. 54. Of the first of these, an authentic transcript has been obtained, and a copy will be found annexed.

It is not said, in the act of the Secret Council, by whom the let-

ters of horning there mentioned are to be obtained, for compelling the parishioners to choose fit persons, styled kirk-masters and deacons, to make the requisite assessments, two-thirds being laid on the parishioners, and the remaining third being laid upon the parson, that is, the parish minister himself, if in the full right of the benefice, or the individual standing in the general right of the titularity of the teinds. It may be supposed, that any of the parishioners or members of the ecclesiastical establishment in Scotland at the time were entitled to interpose. The assesment, however, is to be completed in twelve days, and within twelve days more, payment is to be made to the kirk-masters or deacons; and it is also to be enforced against the parishioners by a charge of horning—what is to be laid upon the parson or titular, so far as unpaid, being to be recovered by sequestration of his lands and teinds, and to be paid over to the deacons and kirk-masters.

These measures may be considered as rather summary, but they might be thought expedient and just, in order to accelerate the buildings required, and for equalising the burden among the parties liable, the expenses not being made a real lien upon the lands, but to fall upon the proprietors and titulars at the time.

From the enactment in 1752, it appears that the parishioners had been tardy in imposing the necessary assessments, and did not name kirk-masters and deacons. It enacts, 'That quhair the parochiners being required to elect and chuse persones for making of 'the taxation to the effect foresaid, refusis or delayis, or quhair 'there is na kirk-masters or deacons appoynted, that then the archbiscop, biscop, superintendent, or commissioner of the kirkes in 'the time of their visitation, quhilk sall be betwixt and the first 'day of Junii nixt to-cum, sall at their discretion nominate and 'appoynt persones in every parochin, for making and settling of the 'taxation, as alswa for receiving of the samin; and decernis and 'declaris the said nomination and appoyntment to be sufficient, and 'sicklike execution sall passe for compelling of them, as micht 'have been given and granted, be vertew of the said act of Secret 'Council, in case they had bene elected be the parochiners.'

There is no longer any doubt that the presbyteries and other ecclesiastical courts, as established at the Reformation, and now existing, have all the powers given by these statutes, although at first they were exercised jointly with those dignitaries of the episcopal church who then held appointments in Scotland. Indeed, by enactments in the same year, chap. 46 and 48, the same functionaries are authorised to perform all the necessary offices of the church, the superintendents and commissioners there mentioned being mem-

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bers of the presbyterian persuasion having charge of ecclesiastical matters at the time.

It thus appears,—

1. That the heritors or landed proprietors of Scotland (for such must be held to have been the parishioners mentioned in these enactments) had no authority, of themselves and directly, to order what was to be done as to rebuilding or repairing of churches, or as to the subsequent proceedings: their duty was to name kirkmasters and deacons, with the powers assigned to the persons so described. Upon the heritors failing to do so, the members of the Reformed Church, within whose bounds the parish lay, were to appoint persons duly qualified, and to enforce what was required.

2. Although nothing is said as to the question, Whether the church was to be rebuilt or repaired, it seems necessarily to follow, that the persons so appointed were, in the first place, to decide either as to the one or the other. They could not otherwise determine what assessments were to be imposed, and which, it will be remembered, were to be equal to the expenditure in repairing or rebuilding, and no more; nor could they enter into effectual contracts for that purpose, as was well explained and enforced in the late case of Kirkmacolm. On this point, there could be no difference between repairing or rebuilding.

It may be admitted, at the same time, that the heritors might, by a mutual contract, agree to build or repair a church, so as to render it fit for the accommodation of the parish; and after such contract, whether it had received the formal sanction of the presbytery or not, the heritors might apply to the Judge-Ordinary, as in the case of any other contract, for compelling performance. And it might be farther admitted, that if all this was done by a considerable majority of the heritors, and acquiesced in by the rest, and for the general benefit, and without any essential deviation from the forms prescribed by the statute, a complaint afterwards made ought not to be readily listened to.

It has been said, that after the work was performed, (the expense amounting to L.522, of which L.61 has been assessed upon the advocator,) the sanction of the presbytery might be obtained; but, in this respect, the authority of the church courts is purely statutory, and can only be exercised in the form and manner prescribed by the statute. Although the work had been properly ordered and beneficial, as they have proved the contrary, the presbytery could not afterwards give any confirmation to them; and accordingly, the demand has been made in the ordinary course of law, as in the case of a consensual obligation. But it is manifest, and clearly esta-

blished by the judgment in the case already referred to, that the presbytery could only have acted as the respondents ought to have done. If they had followed the course pointed out by law, they would have previously inquired, whether an effectual repair might be made, or if a new church was necessary. They would have then advertised for specifications and estimates, and entered into a regular contract, with proper security for the performance; and upon payment of the sums so ascertained, the heritors would have been free from any farther expense for many years to come. What has been done has been wholly useless, and so much money throwa away; and if the respondents cannot support the proceedings on the footing of an obligation, created, and necessarily to be inferred from the advocator's conduct, they have no case.

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On looking, however, into the proceedings, as stated in the record and writings produced, the judgment of the Sheriff appears to be unauthorised. Before any repairs were begun, as it would seem, a protest was taken against the proceedings; and although the reason there stated was rested upon the taking away of the advocator's gallery, it virtually and necessarily included an objection to the whole. These protests were from time to time renewed. It also appears, that instead of the repair attempted, the walls of the church might have been under-built, whereby the building of a new church would have been rendered unnecessary. No regular contract was made—the one which is referred to as such being without a date; it is not attested by witnesses, nor subscribed by the cautioners, nor by a single heritor; and yet the advocator's name is mentioned among the rest, as entering into the contract. By such a writing, the cautioners could not be bound, nor any of the heritors, unless in consequence of their approbatory acts. Besides the specified repairs as to which an estimate had been given in, it was left to the contractors to do what farther might be thought necessary, the work to be valued by an individual named; and with regard to the advocator, so far from justifying the plea arising from implied consent or approbation, his conduct throughout expressed dissent, and nothing else. In this respect, the decision in the case of Arnott, which has been referred to, is quite adverse to the respondents' argument, it being held, that where an obligation could only be raised on an implied consent, it might be put an end to at any time by dissent.

It is almost unnecessary to add, that from such circumstances as have here occurred, great misunderstandings have arisen between the clergy of Scotland and the heritors, as well as among the heritors themselves; and much unnecessary expense incurred in the repairing and rebuilding of parish churches and manses; and for

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these reasons, as well as others, it is humbly thought the principle of the case of Kirkmacolm should be steadily acted upon and enforced, and therefore that the advocator ought not to be subjected in the assessment in question.

It thus appeared, that whilst a considerable majority of the Judges were of opinion, that the general plea of the pursuers was well founded, and that the heritors were entitled to lay out the necessary repairs, and to assess the whole heritors of the parish for the expense thereof, without applying to the presbytery, three of the consulted Judges thought, that, in the special circumstances of this case, the proceedings of the heritors had been taken in such a way as that the defender could not be bound by them. And the three Judges of the Second Division being of that opinion, the Court was equally divided, and the cause stood over for the opinion of

Lord Cockburn, who concurred with the Lord President and the majority of the consulted Judges, for the reasons therein stated.

Judgment.

The *Court* accordingly adhered to the interlocutor of the Lord Ordinary, and refused the note.

Lord Ordinary, *Mackenzie*. Alt. *Dean of Fac. (Hope,)* and *D. M'Neill*. Alt. *Jameson* and *M. Napier*. *Horne & Rose*, and *J. W. Mackenzie*, Agents. *R.* Clerk.

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Act of the Privy Council, referred to in the foregoing Opinions.

Apud Stiriling, xiij. Septembris, anno lxiii.

The quhilk day, the saidis Lordis of Secreit Counsale, understanding that the paroche-kirkis of this realme, partlie be sleuth and negligence of the parochineris, and partlie be oursycht of the personis, dailie decayis and becummis ruynous, and part of thame ar alreddy fallin doun, the parochinaris nawyis causand the samyn be mendit, nor yit the persone doant that appertenis to him for uphald thairof, quhairthrow the preching of the word of God, ministratioun of the sacramentis, and reding of the commone prayers, ceissis. And the people thairthrow becummis altogidder without knawlege and fear of God. Thairfoir the saidis Lordis ordains all paroche-kirkis within this realme quhilkis ar decayit and fallin doun to be reparit and upbigget. And quhair thai ar ruynous and faltie to be mendit. And efter that thai be sufficientlie mendit in windowis, thak, and uther necessaris, mantenit and uphaldin upoun the expenssis of the parochinaris & persone in manner following. That is to say, the tua part of the expenssis thairof to be maid be the parochinaris and third

part be the persone. And that the samyn may tak effect with expeditioun, ordanis letteris to be direct to officiaris of the Quenis shireffis in that part to pas and charge the parochinaris of the paroche-kirkis within this realme to elect & cheise certane of the maist honest qualifeit men within thair parochynis to taxt every ane of thame efferand to thair substance for furnessing of the twa part of the expensis to be maid in bigging and repairing of the saidis paroche-kirkis. And that the saidis taxtaris to be chosen mak the said taxatioun to the effect foirsaid within xij dayis nixt efter thai be chargit thairto. And efter the said taxatioun be maid, that the saidis parochinaris mak payment of the sowmes that thai sal be taxt to to the kirkmaisteris or deaconis of the parochin to be appointit be thame for ressaving thairof to the reparatioun of the saidis paroche-kirkis sicklike within xij dayis next efter thai be chargit thairto, under the pane of rebellioun, and failzeing thairof to put thame to the horne. And also, that the saidis messingeris pas and sequestrat the frutis, teindis and proffittis of the saidis parochynis, sa fer as may extend to the personis part of the same: To remane in the parochinnaris handis quhill the said persone depone and put in the handis of the said kirkmaister and deaconis his part of the expensis to be maid upoun bigging and repairing of the said kirk, extending to the third part thairof: And the saidis sowmes being put in the said kirk-maister or deaconis handis, that thai incontinent thaireftir cause the saidis kirkis ilk ane within thair awin parochynis be reparit, biggit, and mendit sufficientlie, efferand to the sowmes that sal be consignit and put in thair handis to that effect, under the said pane of rebellioun, and failzeing thairof to put thame to the horn, &c.

FIRST DIVISION.

No. XXIV. 11*th December* 1834.

JOHN WILSON, Petitioner.

Factor loco tutoris.—Process.—*A factor loco tutoris empowered to sell the heritable estate of the pupil on a summary application.*

John Wilson, factor loco tutoris to Joan Jane M'Ewan, an infant, applied by petition for authority to dispose of the lands of Spittal Ballat, in the following circumstances: In March 1829 the pupil's

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father, John M'Ewan, acquired these lands from Mr Campbell, at the price of L.1360 sterling, with entry as at Martinmas 1828. M'Ewan entered into possession, in which he continued till his death, in December 1831, but without obtaining any title to the lands, or paying the price. After his death, Campbell brought an action before the Sheriff of Stirlingshire against the petitioner and the pupil, for implement of the bargain and payment of the price, with interest from Martinmas 1828, in which decree was pronounced in September 1833. The whole amount of the pupil's personal estate did not exceed L.700, a sum greatly below the amount contained in the Sheriff's decree. Even if the difference could have been borrowed on the security of the lands, the interest of a loan would have exhausted more than one-half of the rental, which appeared to be little above L.50, while there was no probability of the pupil being able to pay off the loan, by accumulations or otherwise.

Mr Buchanan, Finnick, having in the meantime offered the original price of L.1360 for the lands, on condition that the Court of Session would sanction the transfer, Mr Wilson, the factor, applied by petition to the Court, stating the above circumstances, and praying for authority either to transfer the lands to Mr Buchanan accordingly, or for leave to borrow, on the security of said lands, a sum necessary to complete the purchase in favour of the pupil.

The petition was intimated, and afterwards remitted to the Junior Lord Ordinary, (Moncreiff,) who (June 1834) reported on the circumstances, but left it with the Court to deal with the application as might seem proper. His Lordship appeared to hesitate as to the competency of the application. The Court also felt the difficulty, and therefore delayed giving judgment. Some of their Lordships having signified that the petitioner might attempt a sale by public roup, this, as was subsequently stated in a minute for the petitioner, was tried at the upset price of L.1360, but no offerers appeared. The minute farther stated, that the only alternative now remaining, was either to allow the subjects to be adjudged for payment of the price and interest, by which means not only the lands would be evicted, but almost the whole of the pupil's remaining patrimony would be exhausted; or to authorise a sale to Mr Buchanan, and thus save a small sum for the benefit of the pupil. The Court pronounced the following interlocutor: 'The Lords having resumed 'consideration of this petition, with the minute and productions 'therein referred to, and having heard the counsel for the petitioner, 'grant authority to the said John Wilson to dispone the said lands 'of Spittal Ballat, with the parts and pertinents thereof, to Mr John 'Buchanan, residing at Finnick, at the price of L.1360, in terms of

'his offer to the said John Wilson, of date 1st October 1833, and 'authorise the said John Wilson, as factor loco tutoris foresaid, to 'assign to the said John Buchanan the unexecuted procuratory of 'resignation, and precept of seisin, contained in the disposition of 'the said lands to the pupil and the said factor loco tutoris, exe- 'cuted by Alexander Campbell of Bedly, the original seller of the 'lands, to the late John M'Ewan, the pupil's father; and farther, 'authorise the said John Wilson to grant any other deed necessary 'for vesting the said lands of Spittal Ballat in the person of the 'said John Buchanan, and decern.'

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Act. Buchanan. *Robert Hamilton*, W. S. Agent. *D.* Clerk.

T.

FIRST DIVISION.

No. XXV. 11*th December* 1834.

JOHN AND WILLIAM MARSHALL *against* JAMES IRVINE AND OTHERS.

BANKRUPT.—SEQUESTRATION.—STAT. 1696, c. 5.—*Sequestration refused, upon the application of a creditor, in respect of no evidence of bankruptcy, in terms of the statute, within four months of the date of the petition for sequestration: Held, that a sentence of fugitation by the High Court of Justiciary was not sufficient evidence of bankruptcy in terms of the statute.*

ON the 25th August 1834, John and William Marshall presented a petition to the Court of Session, stating themselves to be creditors of John Macfarlane, banker, auctioneer, and dealer in potatoes at Burrelton, and praying for warrant of service on him, to shew cause why sequestration should not be awarded against him; and failing his doing so, to sequestrate his whole estate and effects, heritable and moveable, &c.

To this petition answers were lodged for James Irvine and others, trustees of John Macfarlane under a private trust-deed, and also in name of the said John Macfarlane, in which they objected to the application, on the ground that the documents founded on by the petitioners were not sufficient, under the Act of Parliament, to war-

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rant the petitioners to apply for sequestration, which could only be awarded under the precise provisions of the statute.

The act provides, 'That from and after the passing of this act, 'if any person being a merchant or trader in Scotland, in gross or 'by retail, or a banker, broker, or underwriter, or a manufacturer, 'or artificer, and, in general, any person, who, either for himself, or 'as agent or factor for others, seeks his living by buying and sell-'ing, or by the workmanship of goods or commodities, or by any 'of the foregoing occupations, or holds a share in any such under-'taking, shall be under legal diligence by horning and caption 'against him for debt, and shall either, in virtue thereof, be impri-'soned, or retire to a sanctuary, or fly or abscond for his personal 'safety from such diligence, or defend his person by force, or, being 'out of Scotland at the time, or not liable to be imprisoned by rea-'son of privilege or personal protection, shall be under diligence 'by charge of horning, attended with arrestment executed of any 'part of his moveable estate or effects, and not loosed or discharged 'by the debtor within fifteen days thereafter, or with poinding exe-'cuted of any part of his moveables, or decree of adjudication of 'any part of his heritable estate, for payment or security of debt, 'at the instance of any of his creditors, it shall be lawful for any 'creditor of the said person, whose debt shall amount to the sum of 'L.100, &c. at any time within four calendar months of the last 'step of the said diligence, to apply, by summary petition, to the 'Court of Session, for sequestration of the said debtor's estate, he-'ritable and moveable, real and personal.'

Under the terms of the statute, the only two alternative situations in which an application for sequestration at a creditor's instance is sanctioned, is either where the debtor has actually been imprisoned on a caption, or where an execution of search has been returned, or where the debtor, not being liable to caption, has received a charge of horning followed up by an arrestment unloosed within fifteen days, or by poinding and adjudication. In both cases the application for sequestration must be made within four months of the last step of diligence.

None of these alternatives have occurred in the present case. The letters of caption produced are dated 29th March, more than four months previous to the date of the petition; but these letters of caption were never carried into execution, either by apprehending the debtor or by an execution of search. It is not sufficient that merely letters of caption were taken out; but even if it were, application for sequestration was not made even within four months of the caption, so it is not competent under the statute to found upon that step of the diligence.

The petitioners also found upon an arrestment, with the view of bringing this case under the second alternative of the statute. But that arrestment was used merely on the dependence of an action against Macfarlane, which was raised in the Sheriff court on the 18th of February, and the arrestment was used on the 19th. Decree in absence was pronounced, upon which a charge was given; but that charge was suspended, and Macfarlane was reponed against the decree, which put an end to the diligence proceeding on that decree; but, at all events, an arrestment on dependence, which is merely in security, followed by a charge, cannot be held as the evidence of the bankruptcy required by the statute, by which arrestment is allowed as a substitute for caption, only in the case where, at the time the charge is given, the debtor is not in the situation to be the subject of a caption. But neither the arrestment founded on, nor the charge of horning that followed it, were within four months of the application for sequestration.

Replied—Although the caption founded on is dated 29th March, and beyond the four months, yet the four months are to be counted not from the date of the caption, but the date of the last step of the diligence; and the petitioners now produce a sentence of fugitation, by the High Court of Justiciary, against Macfarlane, of date 7th July 1834, and which must be held as equivalent to an execution of search under the caption. It has been decided that a sentence of fugitation against a party as furth of the kingdom, without an execution of search, was sufficient to found an application for sequestration; Cheyne and Mackersy *v.* Walker, 26th Nov. 1828. As therefore an execution of search would have been the last step of diligence, within four months of which application for sequestration would have been competent, so the date of the sentence of fugitation, as coming in place of it, must now be the period from which to compute the running of the four months.

Duplied—A sentence of fugitation by a criminal court can never be held as equivalent to a search upon a civil caption for debt. There is no authority for such a doctrine: all that was decided in the case of Cheyne and Mackersy was, that a sentence of fugitation was sufficient prima facie evidence of a debtor being furth of the kingdom to constitute public bankruptcy; but it did not decide that such sentence was sufficient to supply the want of an execution upon a caption as evidence of bankruptcy. A sentence of fugitation may be sufficient evidence of a party being out of the country, but it is no evidence of insolvency. A person may find it necessary to leave the country to avoid punishment, who nevertheless may have no debts, or more than ample funds to pay all his debts. Even an act of warding is not considered equivalent to a caption

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Judgment.

under the statute, just because that is not what the statute requires; *Bell*, ii. 169.

The *Court*, 'in respect that no evidence has been produced of 'Macfarlane's bankruptcy, in terms of the act 1696, c. 5, within 'four months previous to the date of the petition for sequestration, 'refuse the desire of the petition.'

For Petitioner, *Wilson*. *R. Kennedy*, W. S. Agent. For Respondent, *Penney*. *Jas. Hatton*, W. S. Agent. *B.* Clerk.

T.

SECOND DIVISION.

No. XXVI. 11*th December* 1834.

MRS JANET HUNTER OR JACKSON AND HUSBAND *against* KELLIE.

FIAR, ABSOLUTE AND LIMITED. — CONDITION. — TAILZIE.—*A clause prohibiting alienations, not fenced with irritant and resolutive clauses, found to be inoperative in a question inter hæredes, and with a gratuitous disponee, after the subject affected by it had descended under the original grant to heirs-portioners.*

JAMES KELLIE, merchant in Dunbar, the great-grandfather of the pursuer, executed a disposition and settlement of certain subjects, situated within the burgh of Dunbar, in favour of Janet Higgins or Kellie, his daughter-in-law, in liferent, and of James Kellie, her eldest son, (the disponer's grandson,) his heirs and assignees, in fee, with an obligation upon Janet Higgins to renounce her liferent in any part of the subjects which James Kellie, the fiar, might be obliged to dispose of to raise money for payment of a burthen of 7000 merks, imposed upon him by the testator. The disposition also contained the following clause, viz. that 'the said James Kellie, 'and his foresaids, by their acceptance hereof, bind and oblige them, 'upon no account, or upon any pretext whatever, to sell, dispone, 'wadset, or burden with any debt, the cellars, girnals, or closses, 'commonly called Bunckle's Girnals, so that the same may be evict-'ed from them, or carried out of the family; and if he or his heirs 'should so attempt to do, he or they are hereby declared to have

'forfeited their right to the same, and they are to appertain and 'belong to the next heir of line to me in my lands and heritage.' This prohibition was not fortified by any proper irritant or resolutive clauses, and it was not directed to be engrossed in the future investitures of the subjects. The precept of sasine was in terms of the disposition, directing the bailie to grant 'heritable state and 'sasine to the said Janet Higgins, and the said James Kellie and his 'foresaids, for their respective rights of liferent and fee.'

James Kellie survived both the disponer and the liferentrix, and possessed the subjects for many years without completing any title to them. He was survived by four sisters, Martha, Rachael, Joan, and Janet Kellie, who, in 1808, expeded a general service as heirs-portioners to their deceased brother, and executed the procuratory of resignation in old James Kellie's disposition, thereby completing their titles to the property in question under that deed.

Janet Kellie afterwards died, leaving the pursuer, her only daughter and heir-at-law, who served heir to her in one-fourth equal and undivided part of the said property. Rachael Kellie also died, leaving her property to be divided between her surviving sisters, Martha and Joan. And Joan died in 1833, leaving a general disposition and settlement, conveying, inter alia, her share of the property in question to the defender, Dr James Kellie, a reputed natural son of her deceased brother.

Mrs Jackson, as one of the heirs-portioners, and a member of the family of old James Kellie, the original disponer, then raised the present action of reduction and declarator against Dr Kellie, to reduce and set aside the disposition of Joan Kellie, in so far as it contravened the condition of James Kellie's settlement, under which Joan Kellie's title to the subjects in Dunbar had been completed.

Defender's Pleas.

The defender *pleaded*—That as the disposition of old James Kellie conveyed the property in question to his grandson James Kellie, and his heirs and assignees, the subsequent condition could not be so interpreted as to prevent him, or those in his right, from conveying or disponing it either to onerous or gratuitous assignees. The second and fifth defences, (which only it is necessary to mention,) were in the following terms:

'2*d*, The said conveyance, sought to be set aside in this action, 'is not inconsistent with the foresaid restriction, or with the powers 'of the granter;' and,

'5*th*, The said prohibition is wholly inoperative in itself, as being 'a defective entail, and is wrought off by the splitting of the succes-'sion amongst heirs-portioners, to whose case it is entirely inappli-'cable.'

11 Dec. 1834.

Hunter or Jackson and Husband v. Kellie.

The Lord Ordinary pronounced the following interlocutor: 'The 'Lord Ordinary having resumed consideration of the debate, with 'the whole process, sustains the second and fifth defences set forth 'on the record, and, in respect thereof, repells the reasons of reduc- 'tion, assoilzies the defender from all the conclusions of the action, 'and decerns; finds the pursuer liable in expenses, allows an ac- 'count thereof to be given in, and remits the same, when lodged, 'to the Auditor to be taxed.'

Note.—'This case is not altogether without difficulty. It was ad- 'mitted at the debate, that the defender is illegitimate, and must 'be regarded, therefore, as a stranger to the family of his alleged 'father; and it was also admitted, and appears from the documents 'produced, that the restriction in question was engrossed in the title 'made up by Joan Kellie, the defender's author, as one of the heirs- 'portioners of the granter. Nothing, therefore, can now be founded 'upon any different assumption of those circumstances.

'But still there seems enough in the case of the defender to call 'for a judgment in his favour. The considerations which have 'chiefly weighed with the Lord Ordinary are the following:

'I. The dispositive clause of the deed conveys the different tene- 'ments belonging to the granter (among which the girnals in ques- 'tion are the very first enumerated,) to 'Janet Higgins in liferent, "and to James Kellie, his heirs and assignees, in fee;' and the pro- 'curatory of resignation, and precept of sasine, are, in like manner, 'in favour of 'the said Janet Higgins, and the said James Kellie, "and his foresaids, for their respective rights of liferent and fee;' 'while, if effect is given to the subsequent clause of restriction, in 'the way contended for by the pursuer, James Kellie could have 'no assignees in the subjects first named in the dispositive clause. 'The clause of restriction, therefore, appears, in this sense of it, to 'be at variance with the dispositive clause; and it is a settled rule 'of construction, that, wherever any such discrepancy occurs, it is 'the dispositive clause which must prevail.

'II. The restriction itself appears to be against selling or bur- 'dening with debt only, and not against a gratuitous alteration of 'the order of succession; and moreover, it is quite certain, that, not 'being fenced with proper irritant and resolutive clauses, it would 'be utterly inoperative against a purchaser or creditor; and it would 'certainly be a strong measure, to convert such an incompetent and 'ineffectual attempt to prevent sale or adjudication, into a valid bar 'to gratuitous alienations, not apparently in the contemplation of 'the maker.

'III. Though mere prohibitions have been sometimes held to 'give proper substitutes a right to reduce gratuitous alienations to 'their prejudice, upon the ground of their jus crediti, and on the

'principle of the act 1621, there is plainly no room for applying this 'principle to a case like the present, where there are no proper sub- 'stitutes whatever, or persons of any description vested with a jus 'crediti; the only destination of the fee being, as already said, to 'James Kellie, and his heirs and assignees, generally. In the case 'of Ure *v.* the Earl of Crawford, referred to by the pursuer at the 'debate, (17th Jan. 1756, *M.* 4315,) there was, at all events, a class 'of proper substitutes, though the decision, in other respects, stands 'opposed to later authorities.

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'IV. The principle last mentioned takes a definite and more 'authoritative shape in its application to the present case, from the 'admitted fact, that the succession had devolved to, and been divi- 'ded among four heirs-portioners, before the alleged violation of the 'restriction took place. But according to the clear principle of the 'noted case of Cassills of Culzean, 27th February 1760, recognised 'in a great variety of subsequent decisions, and especially in that 'of Sprot *v.* Sprot, 22d May 1828, all limitations of this kind, 'though much more regularly imposed, in the first instance, than 'here, are held to fly off, and to leave the fee unlimited, whenever 'such a dereliction, or splitting of the property occurs; and that 'upon the plain ground of the main object of imposing them be- 'ing no longer attainable, and of there being no individuals in ex- 'istence specially entitled to the character of substitutes, or capable 'of sustaining a jus crediti in relation to the property.'

The pursuer *reclaimed*, but the Court unanimously adhered, chiefly on the ground that the condition was evacuated by the division of the estate amongst heirs-portioners.

Judgment.

Lord Glenlee.—It is clear that the interlocutor is right in sustaining the fifth defence, that the clause on which the action is founded is totally inoperative under the particular circumstances which have occurred; therefore it is a matter of very little consequence what opinion may be formed of the other defences, otherwise there are some of the remarks in the note of the Lord Ordinary which I might think open to some doubt.

Opinion of Court.

The *Lord Justice-Clerk.*—I agree that this interlocutor ought to be adhered to, without going into all the matter contained in the note of the Lord Ordinary.

Lord Medwyn.—I agree in thinking the interlocutor right; and I am the more convinced of it, that I do not think, on attending to the terms of the prohibition, that it applies to alterations of the order of succession.

Lord Ordinary, *Jeffrey.* Act. *Keay* and *Turnbull.* Alt. *D. M'Neill* and *A. M'Neill.* *R. B. Selby* and *Charles Fisher*, Agents. *T.* Clerk.

U.

FIRST DIVISION.

No. XXVII. 12*th December* 1834.

ROBERT JOLLY AND SON
against
WILLIAM YOUNG.

EXPENSES.—ARBITER.—IMPLIED OBLIGATION.—*One of the parties to a submission having, on delivery of the decree-arbitral, and without intimation to the other party of the amount of the charges, paid to the arbiters the sums demanded, as the fees and charges due to them and to their clerk,—held, in an action by him against the other party, that he was entitled to decree for payment of one-half of the amount, no specific objection being proved or stated to the reasonableness of the charges.*

PRIOR to 1830 a number of law-suits had been instituted between the late Dr Macneil and his daughter, Mrs Jolly, (now represented by her husband and son, the pursuers,) on the one hand, and a person of the name of Henry Brown, and the defender Young, on the other, relative to certain leases of the coal and minerals on the lands of Dr Macneil. By an agreement entered into between these parties in August 1830, it was settled, that a lease of the said coals should be granted to the defenders, on such terms and conditions as should be mutually agreed on; and failing a mutual agreement, on such terms and conditions as should be fixed and ascertained to be equitable and proper, by certain professional arbiters who were named, the same to be accepted or declined by the lessees, within three months after the opinion of the arbiters should be communicated.

Before any meeting of the parties took place for settling the terms of the proposed lease, the pursuer transmitted the above agreement to the referees, for the purpose of their adjusting the terms; and accordingly a draft lease was communicated by them to the parties in October 1830. The defender, however, objected, that, in terms of the agreement, the reference had not devolved on the referees, because it was possible the parties themselves might have agreed; and he accordingly brought an action, concluding to have the pursuer ordained to meet him, in the view of attempting an adjustment; and after some discussion, it was agreed that a meeting of the parties should take place for this purpose.

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A meeting accordingly was held, (13th June 1831,) and as the parties then differed in opinion, it was agreed that each should submit a draft of a lease to the referees, and be heard before them, as to the terms and conditions of the lease, previous to its final adjustment.

Each party accordingly lodged with the referees a draft of the proposed lease, and the referees, (30th March 1832,) after various meetings with the parties, adjusted the draft of a lease, which was communicated to the parties. Considerable discussion, both orally and in writing, followed; the terms of the lease were finally settled by the referees, 28th November 1832, and the defender declared his acceptance thereof by letter, 21st December following.

Thereafter the decree-arbitral was delivered to the pursuer, Mr Jolly, by the clerk to the referees, who, at the same time, gave in an account of the sums alleged to be due to the referees, and to himself as their clerk, amounting to L. 84 : 4 : 11.

Pursuer's Pleas.

The pursuer, without previous intimation to the defender, paid the account claimed; and thereafter, in an action against the defender for payment of one half of the sum thus advanced, *pleaded* —That the account referred to having been justly incurred to the arbiter and clerks in the said submission respectively, and having been paid by the pursuer to these parties, or to persons in their right, and authorised to receive payment of and to discharge the same, the pursuer is entitled to relief, to the extent of one-half of the said accounts, from the defender, the opposite party in the submission, for whose behoof, and on whose employment, jointly with the pursuer, those accounts were incurred.

Defender's Pleas.

In defence it was *pleaded*—That it would be a dangerous doctrine, and contrary to authority, to hold, that one party to a submission was entitled to pay such charges and fees to the arbiters as might be demanded, without intimation to the other, and then to bring an action for payment of the half, without even an extrajudicial demand. The defender, in such a case, was not bound, without notice, and without being satisfied as to the reasonableness of the accounts, to acquiesce in such a proceeding. A condition was sometimes inserted in submissions, by which parties became bound to pay such fees to the arbiters as some third party should think reasonable; and sometimes (though this was not a correct proceeding) the arbiters took the parties bound in the submission to pay the fees due to them before they should be obliged to give out their decrees, and effect had been given to such conditions; but no such clause was contained in the reference in the present case; and if

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the pursuer, therefore, chose to pay the amount charged by the referees, without intimation to the defender, he was only entitled to relief on instructing the reasonableness of the particular charges *.

The Lord Ordinary 'found the pursuer entitled to one half of 'the expenses of the arbitration, subsequent to the 13th day of 'June 1831, as paid to the arbiters and their clerks, with inte-'rest from the date of payment as libelled; and found expenses 'due,' &c.

Judgment. The *Court* unanimously adhered.

Lord Corehouse, Ordinary. Act. *Rutherfurd. And. Clason*, W. S. Agent. Alt. *Dean of Fac. (Hope,) Turnbull. Wotherspoon & Mack*, W. S. Agents. *D.* Clerk.

C.

SECOND DIVISION.

No. XXVIII. 16*th December* 1834.

THE REVEREND ROBERT HUNTER, &c.
against
BOOG.

SUPERIOR AND VASSAL.—FEU.—*A vassal, who has accepted of a feu-charter, and entered into possession of the subject, is not entitled afterwards to refute his feu invito domino.*

ON the 29th April 1825, the pursuer granted a feu-charter to the defender of certain subjects situated at Canonmills, with the following clause of tenendas: 'To be holden, and to hold, all and whole 'the subjects above disponed by the said James Boog, and his fore-'said, of and under me, the said Reverend Robert Hunter, and my 'heirs and successors whomsoever, as immediate lawful superiors 'thereof, in feu-farm, fee and heritage for ever, by all the righteous 'meiths and marches thereof, as the same lie in length and breadth, 'with all and sundry liberties, privileges and pertinents thereto be-'longing, freely and quietly, well and in peace, paying therefor

* It was also objected that the account was overcharged, and that many of the charges were unreasonable; but this objection was departed from, before the Court pronounced judgment.

'yearly, the said James Boog and his foresaids, to me, the said 'Reverend Robert Hunter, and my heirs, successors and assignees, 'immediate lawful superiors of the same, the sum of L.57, 10s. 'yearly, in name of feu-duty, at two terms in the year, Whitsun- 'day and Martinmas, by equal portions.' 16 Dec. 1834. Hunter, &c. v. Boog.

Mr Boog did not take infeftment on this charter, but he entered on possession of the subjects contained in it, and held them for some years, and paid the feu-duties from Whitsunday 1826 to Martinmas 1830 inclusive. Having afterwards fallen into arrear, he intimated his intention to give up and repudiate his feu; whereupon Mr Hunter and his trustee raised the present action of declarator, and for payment of the arrears of feu-duty, concluding, that the defender and his heirs should be bound, in all time coming, to hold the subjects in terms of the feu-charter, and to pay the feu-duties in all future years as they became due.

The defender stated as his first plea in law, in defence against this action, that 'the defender, as vassal in a feu-charter, was en- 'titled to refute the feu etiam invito superiore.' And upon the general question thus raised, the Lord Ordinary took the cause to report on cases; and the Judges of the Second Division, after hearing counsel, ordered minutes, for the purpose of consulting the whole Judges.

Pursuer's Pleas.

The pursuer *pleaded*—That there was no authority in any of our institutional writers for holding that the law of Scotland ever authorised the vassal in a proper feu-farm to refute without the consent of his superior. The doubts on the subject intimated by Sir Thomas Craig and the other authorities relate only to proper beneficia, or to lands held in blench farm. And even with regard to them, it does not appear, from the passage in Craig chiefly relied on by the defender, (lib. iii. dieg. 1. § 9,) that such a doctrine had ever been sanctioned by any decision of a court of law in Scotland. And Sir Thomas Craig concludes the passage with merely giving it as a common opinion among feudal lawyers, on a speculative subject, applicable only to cases where the superior could have no interest to object to the renunciation. None of our later authorities afford any countenance to the doctrine; and the decision in the case of the Marquis of Abercorn *v.* Marnoch's Trustees, 26th June 1817, is directly against it. *Stair*, ii. 11. 6, and 4. 48; *Dirleton*, *voce Feus*; *Mackenzie*, *Obs. on Stat.* 1457, c. 71, and *Ersk.* ii. 4. 5, all assimilate holders in feu-farm to tenants holding under a contract of perpetual lease, and plainly thereby exclude them from any right to renounce their obligation without the consent of the other contracting party.

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Defender's Pleas.

The defender *answered*—That his feu-charter did not lay him under any independent personal obligation to pay the feu-duties, but only binds him to pay them as the condition of retaining the right, and he was entitled to liberate himself from the obligation, by renouncing the feu-right with all its benefits. The right of the vassal to renounce a feu constituted by a proper feudal charter and investiture, is recognised by the *Leges Feudorum*, ii. 38, and by every foreign jurist; *vid. Curtius de Feudis*, iv. 185; *Cujacius de Feudis*, ii. 14; *Hotoman de Feudis*, 38, &c. And the same principle has been incorporated into our law; *Craig*, iii. 1, 2; *Stair*, ii. 11, 6. In the case of the Marquis of Abercorn *v.* Marnoch, 26th June 1817, the judgment was rested on the ground, that there was a personal contract, independent of the feu-right, by which the vassal was bound. The attempt to distinguish a holder in feu-farm from a vassal holding blench, in respect of this privilege, is quite unknown to any of the authorities, as the feu-farm was a common tenure at the time when Craig and all the other authors talk indiscriminately of the right of a vassal to refute his feu; *Stat.* 1457, c. 72; *Leg. Burg.* 100. The ground upon which a vassal incurs an irritancy ob non solutum canonem, and that a superior, who avails himself of this irritancy to pursue a declarator, cannot at the same time claim the arrears of feu-duty, (Macvicar *v.* Cochrane, 14th July 1748, *M.* 15,095,) is altogether inconsistent with the idea, that a feu-charter is to be treated as a common contract, binding in all time coming upon both parties.

The following opinions were given by the consulted Judges:

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The *Lords President, Gillies, Mackenzie, Medwyn, Corehouse, Fullerton, Moncreiff, Jeffrey and Cockburn.*—We are of opinion, that the defender is not entitled, in this case, to refute or renounce his feu, without the consent of the superior; and that the action brought by the latter, for having it declared that the feuar is bound to make payment of the feu-duties in all time coming, and for payment of the feu-duties due or to become due, is competent and well founded, both as to its declaratory and its petitory conclusions.

We think that the plain meaning of all the authorities (with the single exception, perhaps, of Lord Bankton) is, that the right of refutation invito domino, is competent only to such vassals as hold proper beneficia; and that, not merely the principle, but the words of these authorities, distinguish and exclude the case of onerous feu-holdings, for duties equivalent to the value, or beyond it.

The right of refutation is nowhere stated to be naturally or necessarily incidental to the relation of superior and vassal, or to be deducible from any theory or system as to the nature of that rela-

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tion. It cannot, therefore, be represented as being technically, and upon principle, inter essentialia of all feudal holdings, of whatever description. On the contrary, its existence, in the absolute terms now maintained by the defender, is admitted to have been matter of controversy among the feudists; and that, not upon any abstract notion of consistency with feudal principles, (which could scarcely admit of question,) but upon broad and flexible views of general justice and equity; with reference to which there never could have been any difficulty in a case like the present.

If the doctrine of the defender receive no countenance from the authority of institutional writers, it is equally unsupported by the decisions of the courts of law, and it is undoubtedly at variance with the general understanding of the country. It is matter of notoriety, that innumerable feus have been granted, within the last thirty years, which have proved sources of most serious loss and embarrassment to the feuars; but with the exception of the case of Marnoch in 1817, this is the only attempt that has been made to get rid of the burden by the simple device of renunciation. It is impossible that this easy mode of relief should not have been generally resorted to, had it not been the clear understanding of the profession, and the country, that it was not legally competent.

If the defender is not entitled to renounce his feu, of course he must comply with the conditions under which he took it, and must consequently be liable for the feu-duties. He raises some difficulty on the want of any written obligation on his part, and on the difference between the case of a bilateral feu-contract, and a mere feu-charter under the hand of the superior; and it is true, that one learned judge rested his opinion in the case of Marnoch on this distinction. We are not of opinion, however, that it is of any serious importance. When it is once settled, that the conveyance is not gratuitous, but strictly onerous, we think it necessarily follows that the consideration must be legally due, and may be enforced by legal procedure. There is necessarily, in all such cases, a clear binding contract, which may be perfected as completely by a written grant or offer on one side, followed by unequivocal acceptance, and consequent delivery of the subject, and continued possession on the other, as if both parties had bound themselves in writing; and nothing is more common, than instances of sale, location, and other ordinary contracts, being perfected in this manner. The form of proceeding necessary for enforcing the obligation may indeed vary according to the circumstances; but the substance is always the same. If there be mutual writings, with a clause of registration, a charge may be immediately given. If there be mutual writings without such a clause, an ordinary action, libelling on the

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writings, will be required; and if there be writing only on one side, with acceptance and delivery on the other, the writing and the facts must be libelled together; but there can be no more doubt of the relevancy and competency of the allegeance in the latter case than in the former.

Lord Balgray.—I consider this case to be of great importance as a question of law.

The facts of the case are few, simple, and admitted. It humbly appears to me, 1*st*, That where parties have thought fit to carry their transactions into effect, by a certain legal form, acknowledged in the law, and its nature and effects fixed and established by practice and undeviating custom, a court of law has not the power to alter what the parties themselves have agreed to adopt. Intention or equitable considerations have nothing to do with the question.

2*d*, Nothing, as is admitted, appears of the transaction between the parties, but that, of a certain date, a proper and correct feu-charter was granted of certain subjects, by the one party to the other. Whether this was the best mode of carrying the transaction into execution, in all its circumstances, is a different matter, and with which third parties have no concern.

3*d*, It is admitted, that no personal obligation, in point of form, is created between the parties, or is engrafted on the real right executed, which was perfectly competent to be done, both in point of form, and according to established practice. There is no inconsistency; on the contrary, there is great expediency, in uniting personal obligations with the pure feudal grant. But where that is not done, each right, whether personal or real, must stand or fall upon its own merits. Parties have alone the power to frame their own rights, and it is not competent for others to supply the defect.

In the present case, the question is presented in its simplest and purest form; and the questions are—

1. Whether the vassal is personally bound to hold the feu-right etiam se invito? Or, whether the vassal has right to refute it, etiam invito superiore.

2. Supposing the vassal personally bound to hold the right, is he personally bound for the reddendo?

With great deference to the opinion of others, I answer, in point of law,

1. That the vassal is not personally bound to hold the feu se invito, but may refute it, etiam invito superiore.

2. Supposing the vassal personally bound to hold the feu, he is not personally bound for the reddendo.

It would be unnecessary, and indeed improper, to refer to and

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quote the authorities already laid before the Court by the vassal. I certainly rest upon these authorities. In addition to these, I would submit—

Opinions of Consulted Judges.

I. By legal construction of the simple feu-charter. The tenendas and reddendo are real conditions of the feudal grant, and not obligations on the vassal personally. Grammatically, tenendas and reddendo are participles; and, logically, participles thus used imply conditions. The meaning is, 'I grant the feu to the grantee, 'he holding it of me, and paying so and so to me.' The words are not, 'he being hereby bound, and, by acceptation hereof, he here-'by binds and obliges himself,' &c.

II. The simple feu-charter does not contain any counter obligation by the vassal, on which any diligence against his person or his general estate can possibly be raised. The simple feu-charter is not signed by him at all.

III. The law has provided a variety of special processes and legal remedies peculiar to the superior; but all of these are against the subject or the rents of it, or the vassal's moveables on the ground, or those of the tenant on the ground. Not one of these special processes or legal remedies is against the person of the vassal, or against his general estate. Thus: 1. The process of poinding the ground; for taking the vassal's moveables on the ground; or those of his tenant on the ground. 2. The process of maills and duties; for taking the rents of the subject. 3. The process of declarator of non-entry; for taking the subject itself, if the heir of the vassal deceased will not receive investiture of the subject instead, and in terms of the deceased vassal's investiture. 4. The process of declarator of tinsel, ob non solutum canonem; for taking the subject itself, if the vassal will not, or does not perform the reddendo. In this last case, so little does the law infer or imply a personal obligation, that all bygone feu-duties are thereby extinguished and sopited.

To these remedies may be added the declarator of liferent escheat, and the declarators of disclamation and of purpresture, which, although now seldom if ever used, are still competent in law. Now, all these are special processes and special remedies, which the law has given to feudal superiors as such; and in not one of those can the person of the vassal be touched, nor aught of his, unless it be on the ground of the feu, or be the rent of the subject, or the subject itself. The superior may raise, no doubt, an ordinary action against the vassal, concluding against him personally for the reddendo; but this would be merely a tentative process, to try whether there ought to be a decree against the vassal personally or not. This is no special process or remedy peculiar to a feudal superior. Our feudal laws have

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been made mostly by feudal superiors, and most certainly they would have provided a statutory remedy against the vassal personally, if the law was, that he, by his acceptance of the feudal investiture, was bound personally for the feudal reddendo.

IV. The Act 20. Geo. II, appointing horning against the superior on the vassal's procuratory of resignation, to receive the resignatary as vassal, and grant investiture to him, instead of the vassal resigner, implies that the vassal resigner is not personally bound, nor personally liable, either to hold the subject, or for the reddendo. To hold that the vassal resigner is bound to hold the subject, and yet entitled to demand that the superior shall receive another vassal in the place of him, the resigner, would be to hold a manifest absurdity; and to hold that the superior is compellable, by law, to liberate one party personally bound to the superior, and to receive another personal obligant instead of the obligant liberated, would be to hold another manifest absurdity. The resigning vassal may be a much more solvent, and a much more eligible debtor than the substituted vassal; and a substitution of debtor for debtor, invito creditore, is perfectly unknown in the law.

It seems to be conceded that, in the case of a pure feudal beneficium, the plea of the defender is sound and incontrovertible. But it is said that here the nature of the transaction between the parties is to be considered as a mutual personal contract between them, and that the real heritable right here occurring must be held and interpreted as an emphyteusis, from which may arise personal obligations hinc inde, which may be enforced. But I cannot accede to any such proposition or transmutation. The parties—the granter, on the one hand, and the receiver on the other—have adopted a form applicable to the subject-matter between them, known in the law, which is attended and accompanied with certain legal effects, and that form and these consequences no person is entitled to alter or amend. The name adopted, by which the right is altered, is laid hold of, for no reason but to make it the foundation of an argument on an assumed state of the fact.

To maintain, in a pure feudal grant, where no personal obligation has been executed by the parties themselves,—that notwithstanding a personal obligation will be implied, according to the adequacy or inadequacy of the feudal acknowledgment—appears to me to be contrary to all the principles of the law of Scotland. In this way a simple and pure feu-charter would be differently interpreted, and different effects given to it, according to the comparative value of the reddendo; and this must vary in different times; as, what may be an equivalent at first, may, in the progress of time, become a mere elusory duty.

16 Dec. 1834.
Hunter, &c. v. Boog.

If a personal obligation can be enforced against the first vassal, from the mere acceptance of the grant, it must be equally effectual against all singular successors who take the same grant; and if this be the law, all those authorities regarding what is 'real and per-'sonal' may be obliterated from our books.

Opinions of Consulted Judges.

If the feudal character of the right stamped on it by the parties is to be altered by interpretation, then that change in the nature of the right must be adopted, and followed out and applied in all the legal consequences. And, therefore, if this feu-charter is to be held as a mere consensual written agreement or contract, it may be fairly asked, what are the rights of heirs, widows and creditors in such a subject?

Is it possible to maintain, that any successor to the feu-right in question, the vassal being infeft, could possibly take it up without a special service?

Or, is it possible to maintain, that the subjects contained in the feu-charter would not be affected by the right of terce?

Or, lastly, would it be possible to maintain, that any creditor would be preferable on the subjects in question, even although he was not secured by infeftment, and that a mere intimated assignation would be sufficient?

For these reasons, and upon the authorities quoted by the defender, I am humbly of opinion that the defender has a right to be assoilzied upon the surrender of his feu-right.

When the cause returned to the Second Division—

Opinion of Court.

The *Lord Justice-Clerk* said—After all the consideration which I can give to this case, I have arrived at the same opinion as the majority of the consulted Judges. I think that all the authorities which have the appearance of supporting the plea of the defender, relate exclusively to proper beneficia, or feus held in blench farm. There is no decision to throw any doubt on the point; and it is impossible to suppose that such a question would not have occurred ere now, amongst the many unfavourable feus that have been taken of late years, had the plea been considered tenable. I have looked at the opinion of one living authority, viz. the MS. lectures of Mr Baron Hume, and I find that that learned professor lays down a doctrine not altogether consistent with the opinion of Lord Balgray, at least on one point. He says, according to my notes of his lectures, 'A feu-charter is considered as a contract, in which form the obli-'gations between the superior and vassal are frequently drawn; 'a personal action therefore arises for payment of the feu-duty:' and he refers to a decision in support of this doctrine, 'Wallace *v.* 'Fergusson, 29th June 1739, *Kilk.*' I have therefore no doubt that

16 Dec. 1834. a feu-charter must be treated just as a form of executing a feu-contract.

Hunter, &c. v. Boog.

Lords Meadowbank and *Glenlee* were of the same opinion.

Opinion of Court.

Lord Medwyn.—I have already expressed my opinion, in concurrence with that of the majority of the consulted Judges; and I shall only add, that in forming it I was much moved by the uniform practice of the country, and general opinion of all lawyers, as it is impossible not to see that this question would have been raised frequently before now, especially of late years, if any idea had been entertained amongst lawyers or men of business, that it could have been maintained with success. I cannot agree in the opinion expressed by Lord Balgray, that a superior has an action of maills and duties for his feu-duty, nor do I find that remedy given to him by any of our institutional writers.

Judgment. The *Court*, accordingly, repelled the defences founded on the first and second pleas of law, and remitted to the Lord Ordinary to proceed with the action.

Lord Ordinary, *Medwyn.* Act. *Jameson* and *Marshall.* Alt. *Dean of Fac. (Hope,)* and *Penney.* *Adam Paterson* and *Robert Lockhart*, Agents. *R.* Clerk.

U.

FIRST DIVISION.

No. XXIX. 20*th December* 1834.

WILLIAM DUTCH
against
ALEXANDER WEBSTER.

PROCESS.—BILL-CHAMBER.—ACT OF SEDERUNT, 11TH JULY 1828, § 15.—*A bill of suspension, presented without caution, having, on 21st June, been passed upon caution, but no caution having been found, and a certificate to that effect having been taken out on 12th July, and a second bill of suspension having been presented on 1st August,—found, that the second bill of suspension was, in the circumstances of the case, competent.*

WEBSTER having given Dutch a charge for payment of a sum contained in a decree obtained against him in absence, Dutch presented a bill of suspension without caution, upon advising which, with answers, the Lord Ordinary, on 21st June 1834, 'passes the bill,

'on payment by the defender of six guineas of the charger's ex- 20 Dec. 1834.
'penses in obtaining the decree in absence, and upon caution.' Dutch v. Webster.
Caution not being found, nor the expenses paid, the charger, on 12th July, obtained a certificate of caution not having been found; and the Lord Ordinary, 14th July 1834, 'in respect the complainer 'has failed to find caution in the suspension within mentioned, in 'terms of the Act of Sederunt, a certificate to that effect having 'been produced, and it also being stated that the said sum of ex- 'penses has not been paid, find the complainer liable in expenses,' &c. The account of expenses was audited in presence of the suspender's agent, and the amount decerned for on 30th July.

On the 1st of August thereafter, this second bill of suspension was presented without caution, or at least upon juratory caution, which, upon being advised with answers, was passed without caution.

The charger *reclaimed*, and objected to the competency of this second bill, and *pleaded*—

Charger's Pleas.

The 15th section of the Act of Sederunt, 11th July 1828, points out the manner in which interlocutors in the Bill-Chamber can alone be brought under review, as follows: '1*st*, Interlocutors en- 'tered in the Minute-book during the last ten days of either vaca- 'tion, or of the Christmas recess, or in session time, except during 'the last four sederunt-days of each session, or during vacation and 'Christmas recess, excepting the last ten days of each vacation and 'recess, if the same be interlocutors passing any bill, by a reclaim- 'ing note to the Court within fourteen days from the date of the 'interlocutor reclaimed against; and if the same be interlocutors 'refusing a bill, by presenting a bill to the next succeeding Ordi- 'nary on the Bills; and in case such second bill shall also be refused, 'by a reclaiming note to the Court, within fourteen days from 'the date of the interlocutor reclaimed against; provided always, 'that all reclaiming notes in such cases shall be intimated to the 'opposite party, and in time of session be duly marked and boxed 'within the said fourteen days.'

In this case, the bill was passed upon the 21st of June, so that there were seventeen days of the session to run; and therefore, if the suspender wished to bring that interlocutor under review, the only competent mode in which he could do so, under the Act of Sederunt, was by a reclaiming note to the Court, within fourteen days of the interlocutor; but no such reclaiming note being presented, the interlocutor became final as to both parties; and although a reduction might thereafter have been open to the suspender, certainly a new suspension was not. The interlocutor passing

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Charger's Pleas.

the bill on caution is the only interlocutor which enters the Minute-book of the Bill-Chamber. There is no such entry on a certificate of no caution being taken out; and it was found, in the case of Arnot v. Thomson, 25th Nov. 1825, that the reclaiming days in the Bill-Chamber run from the date of the interlocutor, although no certificate of refusal had been issued. Indeed, the suspender acquiesced in the interlocutor being final, and joined issue with the charger as to the amount of expenses, in which he was found liable for failing in compliance with the conditions upon which the bill was passed.

The Act of Sederunt makes no distinction between a bill which is passed upon caution, though otherwise prayed for, and one which is passed without caution; nor does it admit, that a bill offered without caution, but passed upon caution, is to be held or considered as a refused bill. The act applies to every interlocutor passing a bill, without distinguishing whether upon caution or not; and therefore as no reclaiming note was lodged, and that was the only remedy, this second bill of suspension was incompetent.

Respondent's Pleas.

Answered—The first bill of suspension was offered without caution, but the Lord Ordinary passed it upon caution only, which was substantially refusing the bill, by annexing to it a condition with which the complainer could not comply, and was not asked in the bill; and such was truly its effect, for the bill was ultimately refused in respect of no caution, by the certificate of no caution afterwards taken out, and expenses on that account found due. When a bill is offered without caution, and is passed upon caution, it is held equivalent to an interlocutor refusing the bill; Wilson v. Mitchells, 17th Dec. 1825. When a first bill, offered without caution, was passed upon caution, a second bill was found competent.

As the certificate of no caution, which must be held as the true date of the interlocutor refusing the bill, was not taken out till after the Court rose for the summer vacation, the Act of Sederunt, in so far as respects interlocutors in the Bill-Chamber, pronounced during session, does not apply.

Opinion of Court.

When the case was first before the Court, (15th November,) the *Lord President* stated, that he considered the second bill incompetent. The interlocutor was not pronounced within the four last sederunt-days of the Court, but on the 21st June; the only remedy was by a reclaiming note. The interlocutor was one passing the bill, and that is the only interlocutor which enters the Minute-book.

Lord Mackenzie.—I cannot hold, in all cases, that an interlocutor passing a bill on caution, where caution has not been offered, is equi-

valent to refusing a bill. It was not originally so. Formerly it was necessary, when caution was not found, to pronounce afterwards an interlocutor, refusing the bill in respect of no caution. It is only under the last Act of Sederunt that such an interlocutor would be held equivalent to refusing a bill if caution was not found.

Lord Gillies.—Either party might have reclaimed; but neither of them having done so, the interlocutor is final as to both.

It was agreed, however, to consult the whole Judges; and when the case was again put out for advising, (20th December 1834,) the *Lord President* said, that they had a conference with the whole Judges on this case, and they had come to an opinion, that the second bill of suspension was competent, and they would therefore adhere to the interlocutor passing the bill *.

Lord Mackenzie, Ordinary. For Charger, *Cuninghame*. *Greig & Morton*, W. S. Agents. For Suspender, *Rutherfurd*. *Robert Smith*, S. S. C. Agent. *R.* Clerk.

T.

* His Lordship at the same time stated, that the Judges were of opinion, that when a bill was offered, either upon caution or without caution, it should be either simpliciter passed or refused; and that, in future, a bill presented without caution should not be passed upon caution; and their Lordships had directed intimation of this to be given to the Bill-Chamber.

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T.

FIRST DIVISION.

No. XXX. 13*th January* 1835.

CAMPBELL'S TRUSTEES *against* WILLIAM PAUL.

BANKRUPT.—SEQUESTRATION.—POINDING THE GROUND.—HERITABLE CREDITOR.—*A creditor in an heritable bond having executed a summons of poinding the ground, after his debtor had been sequestrated, but before a trustee had been appointed or confirmed; and having also, upon application to the Sheriff, obtained warrant of sequestration of the crop and stocking, which were inventoried before the trustee was confirmed; and the crop and stocking having been sold by the trustee, with consent, and under reservation of the heri-*

* His Lordship at the same time stated, that the Judges were of opinion, that when a bill was offered, either upon caution or without caution, it should be either simpliciter passed or refused; and that, in future, a bill presented without caution should not be passed upon caution; and their Lordships had directed intimation of this to be given to the Bill-Chamber.

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table creditor's right,—found, that the heritable creditor's claim over the price of the crop and stocking was preferable, in so far as the price of the lands themselves did not cover the heritable debt, and this in virtue of the heritable security and executed summons of poinding, but not in virtue of the sequestration awarded by the Sheriff.

THE late Miss Campbell was an heritable creditor on the lands of Chippermore, in virtue of a bond and disposition in security, for L.2300, granted to her by Mr Edward Boyd of Mertonhall, of date 21st March 1820, and upon which infeftment followed in May 1822. The bond contained a special assignation to the rents, maills and duties of the lands.

In December 1825, Miss Campbell intimated to Mr Boyd that she required payment of the bond at Whitsunday following. This not having been complied with at that term, Miss Campbell raised personal diligence, and, on 8th August 1826, executed a poinding of Mr Boyd's moveables, and had advertised a sale; but before the sale was carried into effect, Mr Boyd's estates were sequestrated, under the bankrupt act, on 9th August 1826. On the 28th of August the respondent, Mr Paul, was elected interim factor, and on the 23d September thereafter he was elected trustee, and his election confirmed on the 8th October.

On the 29th of August Miss Campbell raised and executed a poinding of the ground to attach the crop and stocking, the lands, over which the security extended, being in the natural possession of Mr Boyd; and to prevent the interim factor or trustee from taking possession, or carrying off the crop and stocking, she presented a petition to the Sheriff of Wigton, to sequestrate the crop and stocking on the lands, in security and for payment to her pro tanto of the sum of L.2300, contained in the heritable bond, with interest, penalty, and expenses thereon. Upon this petition the Sheriff, on the 29th September, granted warrant of sequestration, and to inventory and take charge, till further orders of court, and at the same time appointed the petition to be served. In virtue of this warrant the crop, stocking and moveables on Chippermore were inventoried and sequestrated on the 30th September. The petition was duly served, and Mr Paul entered appearance and lodged answers. This took place before he was confirmed as trustee.

On the 7th of October an arrangement was entered into, by which Mr Paul was allowed to sell the crop and stocking, but under reservation of any right of preference which Miss Campbell might have in virtue of the diligence she had executed. Mr Paul afterwards sold both the lands and the poinded effects. The price obtained for the lands left a shortcoming of Miss Campbell's bond of

upwards of L.750. She died in January 1831, and the complainers, her trustees, claimed a preference over the price of the crop and stocking for this balance. The trustee rejected this claim to a preference, on the ground, that the heritable security gave no preference over the moveables, or the property over which the security extended, and these moveables were by the sequestration validly transferred to the trustee, for behoof of the creditors at large, from the moment of the first deliverance on the petition for sequestration. 13 Jan. 1835. Campbell's Trustees v. Paul.

Against this judgment of the trustee the complainers presented a petition and complaint, which was followed by answers, and thereafter a record was made up and cases lodged.

Pleaded for the complainers— Complainers' Pleas.

I. A bankrupt estate is not transferred from the bankrupt at the date of the first deliverance on the petition for sequestration. It is not in itself either an adjudication of the heritable, or a transference of the moveable property. The interlocutor of sequestration merely renders the estate litigious, in order that it may be ultimately vested, either by sentence of the Court, or by conveyance from the bankrupt, in a trustee elected by the creditors; but even after the confirmation of the trustee, the deliverance operates as a transference of the estate, only in so far as the personal creditors are concerned, and tantum et tale as it stood in the person of the bankrupt. The construction put upon the 30th section of the statute by the respondent is opposed to the whole of the enactments in the other sections relative to vesting the estate in the trustee, and is also opposed to the decisions of the Court in the case of Bell *v.* Bank of Scotland, 3d Dec. 1831.

It is only after the trustee is confirmed, that the Court, by the 29th section, is required to pass an act, ordering the bankrupt to convey the property to the trustee, or, whether he does so or not, adjudging the property to the trustee by the act of Court. The object of the statute is to prevent the bankrupt from granting, or a creditor from acquiring, a preference which had no previous existence. The sequestration prevents the acquisition of any preferable rights subsequently to the first deliverance, but it does not prevent the exercise of preferable rights previously existing. This distinction was recognised in Cormack *v.* Anderson, 8 July 1829; Buchan *v.* Farquharson, 24 May 1797, *M.* 2905.

II. But even supposing the interlocutor of sequestration were equivalent to a decree of adjudication, as of the date of the first deliverance, such decree of itself cannot compete with a poinding of the ground, which, though posterior, proceeded on a prior heritable security, to which no legal objection can be made. A poinding of

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the ground affects not only the fundus, but also the moveables thereon. By it the passive preference created over the moveables by the sasine on the lands is converted into an active or actual right of property in the moveables themselves, entitling the poinder of the ground to stop the procedure of any legal diligence, unless founded on a prior infeftment to his own, so long as the moveables have not been actually transferred by real delivery, and carried off the ground. Poindings of the ground are excluded from the operation of the bankrupt statute. There is no analogy between ordinary personal poindings and a poinding of the ground. In the former, the constitution of the right arises solely in virtue of the diligence, whereby the execution forms both the foundation of the claim and the criterion of preference. But an heritable creditor's preference is founded on infeftment, so that the poinding of the ground is not the constitution of his right, but merely the means of rendering it effectual, and converting what was previously a mere right to stop the proceedings of another, into an actual and indefeasible right of property in himself; so that if he stops an ordinary poinder or purchaser from carrying the goods off the ground till he himself completes his active right by poinding of the ground, he must be preferred in competition with every other party. These principles have been acknowledged by various authorities and decisions; *Ersk.* ii. 8. 32; *Stair*, ii. 5. 12; Lady Kelhead, *Kames, Rem. Dec.* No. 94; Webster *v.* Donaldson, 13 July 1780, *M.* 2902; Parker *v.* Douglas, Heron and Company, 5th Feb. 1783, *M.* 2868; Whyte *v.* Tullis, 18 June 1817; Samson and others *v.* M'Cubbin, 15th May 1822; Lyle *v.* Greig and others, 27th June 1827; Bell *v.* Bank of Scotland, 3d Dec. 1831.

By these decisions it must be held as settled, that if the heritable creditor has commenced his diligence of poinding of the ground before the goods are removed, his preference is established, although the diligence may not have been completed till after sequestration has been awarded.

III. But Miss Campbell's preference does not rest solely on the executed summons of poinding the ground. In addition to this, she obtained sequestration of the crop and stocking. The whole moveables were inventoried before the trustee's confirmation; and the diligence would have been completed by a sale, had it not been interrupted by the agreement entered into, under reservation of Miss Campbell's rights. The right of an heritable creditor to resort to the diligence of sequestration was acknowledged in the case of Douglas, Heron and Company, (ut ante,) where sequestration was the course pursued by the heritable creditor, which was not even followed by a poinding of the ground.

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Respondent's Pleas.

Pleaded for the trustee (respondent)—When the respondent was confirmed trustee, Miss Campbell had merely raised her action of poinding the ground, after sequestration had been awarded, but had not completed her diligence. The great purpose of the bankrupt act was to secure the estate to the general body of creditors, as at the date of the first deliverance, and prevent the creation of any preferences, by diligence or otherwise, subsequent to the date of the first deliverance. This is most distinctly stated in the 29th section of the statute; and the general object of the act is also explained by Mr Bell, ii. 405, 406. It is there distinctly laid down, that the completion of the trustee's right, as a transference of the whole estate, at the date of the first deliverance, cannot be obstructed by any diligence used, or security held by an individual creditor, if not completed as a real right till after that time.

The statute has always been understood to have this effect. Nothing farther than the confirmation of, and the act of adjudication in favour of the trustee, has ever been considered necessary to vest the moveable estate in him. It is pleaded by the complainers, that the transfer of the moveables in favour of the respondent was excluded by the raising of the action of the poinding of the ground, and by the application to the Sheriff for sequestration; but the proper subject of security of an heritable creditor is the land, or other heritable property covered by the security. All the clauses in the bond are framed in reference to the land or heritable subject alone. Owing to a misapprehension of the general nature of an heritable security, erroneous views seem to have been entertained in regard to the heritable creditor's claim against the moveables which happened to be on the land;—as in the principle supposed to be involved in the case of Tullis *v.* Whyte, quoted by the complainers; but the whole subject underwent an anxious and deliberate discussion in the case of Hay *v.* Marshall, 7th July 1824, the import of which is well brought out by Mr Bell, ii. 58.

Although an heritable creditor has no security over, or proper right in the moveables in virtue of his heritable security, it has been held that there is something in the general nature of his heritable security which confers upon him a power of acquiring, in a summary form, a right in the moveables situated on the lands over which the security extends. This power is recognised in the case above referred to, and in the note of the Lord Ordinary in the case of Bell *v.* Bank of Scotland, 3d Dec. 1831; but until the heritable creditor has completed his right in the moveables, by poinding the ground, that right is liable to be defeated, by other rights or diligences completed; and it was so in this case, by the

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confirmation of the respondent as trustee before the poinding was completed.

The application to the Sheriff was incompetent: it was rested on the assumption, that, in virtue of the bond, a right of hypothec or other preferable right over the moveables existed. But no such right did exist; there was no clause in the bond giving such a right; and the cases referred to by the complainers do not sanction any such right; and the conclusions drawn from them are plainly erroneous, from the cases of Hay *v.* Marshall, and Bell *v.* Bank of Scotland, already referred to; *Bell. Com.* ii. 58.

The Lord Ordinary made avisandum to the Court, and at the same time issued the following note: 'The Lord Ordinary reports 'this case, not only because it involves a general question of im- 'portance in the law of sequestration, but because the arguments 'of the parties bring into apparent conflict the principles of several 'recent decisions, the true grounds and import of which it is de- 'sirable to have settled with as little delay as possible.

'There are many points argued in the cases, which the Lord 'Ordinary thinks attended with no difficulty. He has no doubt, 'that an heritable creditor, infeft upon a deed conceived in the 'terms of that held by the complainer, has a right to attach the 'moveables on the lands covered by the infeftment, by a poinding 'of the ground, or other competent diligence; and that he may 'proceed not only to complete, but to originate such process of at- 'tachment, subsequent to the first deliverance, on a petition for 'sequestrating the estate of the debtor, provided such attachment 'is completed before the confirmation of the trustee.

'On the other hand, he has quite as little doubt that it is neces- 'sary for the heritable creditor to use some process of attachment, 'previous to the confirmation of the trustee, in order to obtain a 'preference over such moveables; and that if this be not done, 'they will be vested in the trustee for the whole creditors, by the 'force of the statute.

'Thus much the Lord Ordinary thinks is settled by the deci- 'sions, (to go no farther back,) in the case of Hay *v.* Marshall, af- 'firmed with costs on appeal, and Bell *v.* the Bank of Scotland, 'since pronounced in this Court. But beyond this, he does not 'conceive that any thing has been finally settled;—though princi- 'ples and reasons have been assigned for these, and other decisions, 'which would lead to larger, and he humbly thinks inconsistent 'conclusions,—and it is with a view to determine the extent and 'authority of these conflicting principles, that this case is now re- 'ported. The complainer contends, that under his infeftment he

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'has a real, though accessory right to the moveables on the lands, 'which requires only to be asserted, or at most extricated, by in- 'stituting a poinding of the ground, obtaining a warrant of seques- 'tration, or some other inchoate diligence; and that his preference 'can only be excluded by the trustee, or personal creditor, obtain- 'ing actual delivery of the goods, and removing them from the 'lands previous to any steps against such diligence; and this doc- 'trine he supports by the cases of Douglas, Heron and Co., Tullis, 'and others, of dates anterior to that of Hay and Marshall, and by 'certain expressions in Lord Mackenzie's note in the subsequent 'case of Bell against the Bank of Scotland; and contends that the 'decision in Hay and Marshall proceeded on the plain ground, that 'the goods had been actually sold, and removed before any claim 'was made for the heritable creditor.

'The trustee, on the other hand, maintains, that the heritable 'creditor has, by his infeftment, no real right to the moveables on 'the lands, but merely a power to attach them by the peculiar 'process of a poinding of the ground; and that till this diligence 'is completed, no preference over them can be held as established; 'and, at all events, they must be vested in the trustee under a 'sequestration, if his appointment is previously confirmed; and this, 'he says, is plainly the ground on which the decision in Hay and 'Marshall proceeded, especially in the House of Lords, by which 'the erroneous principles of some earlier decisions were corrected; 'while in Bell *v.* the Bank of Scotland, although the diligence was 'not actually completed, it was plainly in the power of the heritable 'creditor to have completed it, before the trustee was confirmed,— 'decreet having been obtained in both cases before the date of the 'petition for sequestration, and the articles immediately afterwards 'settled by agreement.

'The Lord Ordinary humbly conceives, that one or other of 'these views should now be distinctly sanctioned by the Court. As 'things stand at present, the weight of authority seems to be with 'the complainer, though, if it is once admitted that an heritable cre- 'ditor is not entitled to all the privileges of a landlord, the views of 'the trustee appear most accordant to principle. The confirmation 'of the trustee seems to the Lord Ordinary to vest the moveables 'in him, vi statuti, as completely as they would have been vested 'in any individual creditor by a completed poinding followed up 'by sale and actual delivery. It is by this peculiar statutory privi- 'lege of the trustee, that this case is distinguished from that of an 'ordinary poinding creditor, referred to by Lord Mackenzie in the 'case of Bell and the Bank of Scotland; and consequently, unless 'the heritable creditor had a complete preference by his infeftment

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'alone, and without the help of any diligence whatever, it is difficult to see how any thing but a previously completed diligence should exclude this right of the trustee. The earlier cases seem no doubt to recognise the sufficiency of the infeftment alone, and equiparate the right of the heritable creditor in all respects to that of an absolute proprietor. But the case of Hay and Marshall evidently discredits that doctrine, and requires the use of some diligence, to give the heritable creditor a place in the competition; and then the difficulty recurs, how, if diligence is necessary, any thing but a completed diligence can avail. The Lord Ordinary is not aware of any principle upon which a preference can be gained, (or excluded,) by inchoate diligence, except that of litigiosity; and this, it seems to him, could scarcely be pleaded against the privileged and statutory rights of a judicial trustee. In any other view, it can operate merely as a notice or intimation of a wish and purpose to obtain a preference, which should rather quicken than exclude the efforts of a lawful competitor.

'If the inchoate poinding of the ground would not bar the vesting of the right in the trustee, the Lord Ordinary thinks that still less effect can be given to the subsequent application to the Sheriff for sequestration. Indeed, there seems much reason to doubt of the competency of such an application, at the instance of a mere heritable creditor, under such a deed as that now in question. Since it is admitted that it could not be followed out to the same effect as in the hands of a landlord, and though its competency is recognised in the earlier cases, this seems to be rested on the assumption, which will scarcely be now maintained, that an heritable creditor has all the rights of an absolute proprietor, and has a real preference over moveables, without the need of any diligence, in consequence of his infeftment alone.

'The Lord Ordinary does not think that the agreement of parties in this case can in any way affect the question of law. It was entered into the very day before the trustee was confirmed, and when it was manifestly impossible for the complainer to have completed any process of attachment before that event. The Lord Ordinary cannot suppose that such an agreement can have any effect because dated on the 7th, which it would not have had if dated on the 9th. In this respect, it seems in no respect parallel to the agreement in the case of Bell and the Bank of Scotland.'

When the cases came to be advised, the following opinions were delivered:

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Lord Balgray observed, that the decision in the present case depended upon the distinction between a personal poinding and a

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poinding of the ground, at the instance of an heritable creditor. The latter was of a very ancient origin, and of a peculiar nature. It was not properly a diligence or adjudication of the goods on the lands, but a declarator of a real right,—a real action, to which the proper parties were the owner of the lands, the tenants, and the possessors, but in which (when brought) all who had an interest in the goods might appear and claim to be preferred according to their legal rights; and if the party so appearing could shew a right preferable to that of the heritable creditor who brought the poinding, he would fall to be preferred. The action might be directed against wadsetters, liferenters, tenants and possessors, and even against an heir-apparent, against whom it would be effectual in the same manner that it would be effectual against the goods and moveables of a general disponee, who had acquired right to the lands.

Such being the nature of the action, the next question was, how far the right of an heritable creditor to insist in it was affected by the operation of the sequestration statutes, and the appointment of a trustee. It was said, that the transference in favour of the trustee was of a declaratory nature, that it drew back to the date of the sequestration, and, of course, that all the personal rights and moveables belonging to the bankrupt must, from that moment, be vested in the trustee; but by the same judgment or act of sequestration, which thus vested the moveable property in the trustee, he became the owner of the land itself, and was thus placed in the same situation, in regard to the heritable creditor, as an heir-apparent, a singular successor, or general disponee. What points out the nature and effect of a poinding of the ground is, that there is a set of moveables affected by it, which a trustee in a sequestration never can reach; for he can touch only the goods and moveables belonging to the bankrupt himself, but not those belonging to any third party; whereas the poinding of the ground extends to the moveable property of every tenant and possessor of the ground. Thus, in every view, therefore, of the principles and operation of this diligence or action, the trustee under a sequestration is in no better situation than an heir-apparent or singular successor, and the right of the heritable creditor, therefore, appears preferable.

Lord Mackenzie.—I am not desirous of resting the decision of this case on the view that the trustee is in the same situation as an ordinary singular successor infeft in the lands, as well as getting a conveyance to the moveables at the date of the confirmation. I fear that view might go too far, and might give a preference to the debitor fundi, independently of the fact that he had commenced his poinding of the ground before the confirmation of the trustee. I am content to look to the right of the trustee in this question as

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resting on his conveyance to the moveables under the statute, considered by itself, without being prejudiced by his acquisition of right to the land. In this view, then, the case comes to be a competition between the trustee on a bankrupt estate, who has been duly confirmed, and holds the right to the moveable part of that estate, consequent on such confirmation by the statute; and an heritable creditor, who has used poinding of the ground, and who commenced the process of poinding the ground before that confirmation, —which has the preferable right to the moveables on the lands over which the right of the heritable creditor extends? There are difficulties in the law. Yet we must find some principle for deciding the case. I shall state what seems the only intelligible principle at all that prevents our practice being a mass of mere confusion and contradiction. Anciently, the moveables on land generally were viewed as accessories to the real property of the land in the landlord, without regard to the rights of free tenants. The view seems to have been, that the moveables consisted either in the fruits of the land or other things surrogated for these, and therefore were properly viewed as accessories thereof, while the right of the tenant by his lease was only personal, giving no real right either to the land or its fruits, so long as connected with the land. Accordingly, it is certain that by the brieve of distress for the personal debt of the landlord, the whole moveables on the land were swept away, without regard to the right of the tenant. Then, by 1449, c. 18, the right by tack was made real against subsequent singular successors; and by 1469, c. 36, it was provided, that 'frae 'henceforth, the puir tenant shall not be distrenzied for the lord's 'debts, further than his term's mail extends to;' 'and gif the cre-'diter taks the term's mail by virtue of the brieve of distress, it 'shall not be lawful to the lord to take it again.' This statute strongly shows the ancient view of our law. And it must be observed, that it afforded a remedy only against personal creditors using the brieve of distress, not against real creditors, as to whom the law remained unchanged. Now, it was while this ancient rule prevailed, that the rights of creditors having feu-duties, annualrents, or other debts payable out of certain lands, by virtue of reddendos or infeftments, arose in our practice. The land was by the reddendo or infeftment made subject to a real right in security of the debt, which was called debitum fundi; and it seems plain, that this was held to extend generally over the moveables on the land, as accessories thereof. Accordingly, the real creditor, if his debt was left unpaid, had the power at any time of turning his general security into special property, by poinding the moveables at his own hand in satisfaction. This was thought too rude, and he got the

authority of a court for poinding these moveables. But still the action and diligence of poinding the ground was an action and diligence for giving effect to a real right. It was founded on a reddendo or infeftment over the land. It was preferable among different pursuers thereof, according to the date of the reddendo or infeftment. It was limited to moveables on lands in the reddendo or infeftment. It was good against all moveables on the lands, without regard to the rights of tenants, even after the statutes 1449 and 1469; and at one time, it would seem, even without regard to the rights of third parties having brought their goods on the lands. It was good against singular successors in the lands, not liable personally for the debitum fundi. All these things demonstrate that it was founded on, and merely executory of a real right over the moveables as accessories of the fundus. How can they be accounted for in any other way? If the debitum fundi gave no real right over the moveables in the fundus, why did poinding of the ground require infeftment in the fundus at all? So, why were poindings of the ground preferable inter se, according to the dates of these infeftments; and why were poindings of the ground directed against moveables on the fundus more than any other moveables? Why were they more powerful as against tenants or singular successors than ordinary poindings? Why did they take place by a proceeding different from common poindings? It seems to me utterly impossible to doubt, that debita fundi did anciently give a real right over the moveables on the fundus, of a nature similar to pledge, or hypothec of the fundus instructus, with its accessories of moveables thereon, executable by poinding of the ground, and that our law did sanction the constitution of such real right. And I am aware of no statute, decision or dictum, abolishing, or stating as abolished, this real right. This right, however, had limitations in its own nature, and limitations of it were strongly called for by equity. And, *first*, the extension of it to the goods of mere strangers brought on the fundus was found to be too strong, and was rejected by the decisions of this Court, although at one time sustained by the Court; vide 11th July 1628, Lady Ednam. Then the extension of it to the moveables of tenants was limited to the value of the rents due by them, and the current rent,—not limited, observe, as poindings under statute 1469. Again, it was a right of security general over the moveables on the land, and becoming special only by poinding the ground. It left the administration of the fundus in the proprietor or his tenants. They therefore might, in fair administration, remove moveables from the fundus, or consume them, or alienate to strangers, after the right of strangers was admitted, and so the goods were taken out of the real right of the debitum fundi. Then it seems to have been found, that portions of the goods might in

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like manner be taken out of the right of a prior creditor fundi by a posterior one, if the prior, when called upon, would not come forward in due time and do diligence by poinding the ground; vide *Stair*. Then it seems also to have been found, that even an ordinary poinder for debt of the landlord or tenant, if the real creditor allowed him, without interruption, to complete his judicial transference of the moveables, so as to make them his own, equally as if he had bought them, took them out of the right of the real creditor. Then it was extended to the creditors of a bankrupt taking the moveables by sequestration, if their right was allowed to be completed, while the real creditor had stood by and used no diligence to enforce his right. This was the case of Hay; the strongest case yet decided against the right of the real creditor. But it has never yet been found, that if a prior real creditor did come forward by poinding the ground, in enforcement and application of his debitum fundi, while the moveables were still on the farm, and still the property of the proprietor of the fundus, the real creditor, after coming forward to poind the ground, could be excluded by subsequent alienation, either voluntary or legal, of the moveables, or, in particular, that he was obliged to run a race of diligence with ordinary poinders or takers of the moveables by mercantile sequestration. On the contrary, it was found unanimously in the Second Division, that poindings of the ground were not affected by the equalising provisions of the bankrupt act like ordinary poindings, implying strongly that they were not liable to the ordinary rules of competition with common poindings. Neither has this ever been stated by authority, statute, or even dictum of any lawyer. Nor can I see any ratio for it now, more than existed anciently. The exclusion of a real creditor by a completed alienation, voluntary or judicial, made without any interpellation, by any procedure on his part, rests on principles reconcileable to the peculiar nature of the real right in the creditor fundi, so far as relates to moveables, *i. e.* as a general right over a moveable estate, liable by its nature to change and to management, and consequently liable to alienation, voluntary and judicial, fairly made and completed, while the right of the real creditor was not exercised so as to interpel it. But the exclusion of this real right by a voluntary alienation, poinding, or sequestration taking place after actual commencement of the process for rendering special and effectual the right of the real creditor, can rest on no principle consistent with the existence of that right at all, but just upon a denial of it altogether. It just comes to this, that the creditor fundi had no right at all over the moveables. Now that, I think, not only without authority, but truly inconsistent with the existence of poinding the ground at all. It makes our law utterly unintelligible and preposterous. It makes every one peculiarity of a poinding of the ground,—its foundation,—its limitation,

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—its extension,—its procedure,—its effects, equally senseless and absurd. I cannot therefore possibly receive this view. I rather adhere to the view which I think was certainly that of all our ancient lawyers, not contradicted in this, as far as I can see, even by modern writers—vide particularly *Notes on Stair*, 196.

Opinion of Court.

Lord Gillies.—I entirely agree with Lord Mackenzie, but I do not understand Lord Balgray's opinion to go to this, that if a trustee were confirmed before any step taken in poinding the ground, the debitor fundi would be preferable to the trustee. That is not the case before us, where the question is, whether, after an action of poinding the ground is raised, the heritable creditor is nevertheless to be excluded. The idea that he is, seems to be rested on an attempt to consider a poinding of the ground as a species of diligence; but it is not truly so: it is the assertion of a real right, which becomes effectual the moment it is asserted, to the exclusion of all personal claims. Goods belonging to a tenant are affected by the poinding, not because the tenant is debtor to the party using it, but because the action completes the real right of the creditor to the goods on the lands; and if this applies to the property of the tenant, multo magis ought it to be effectual against the goods of the proprietor. In the present case, the action of poinding was raised, and the summons executed, long before the trustee was confirmed; so that the demand was made, and the right judicially asserted. The Lord Ordinary in his note observes, that the authorities in this case are on one side, and principle on the other; but it appears to me that they agree.

The *Lord President* also concurred; and the *Court* therefore, 'in respect of the bond and disposition in security, and infeftment 'libelled, and of the action of poinding of the ground raised in 'virtue thereof at the instance of Margaret Campbell, the creditor, 'and executed prior to the confirmation of the respondent as trus-'tee on the sequestrated estate of Edward Boyd, sustain the com-'plaint, and find that the respondent did wrong in repelling the 'petitioners' claim of preference on the proceeds of the sale of the 'crop and stocking on the lands of Chippermore, and remit to the 'trustee to sustain the same accordingly: But find that the petition-'ers have no right of preference on the said effects, in virtue of the 'sequestration thereof obtained before the Sheriff of Wigton, and 'decern: Farther, find the respondent, as trustee on said estate, 'liable in the expense incurred by the petitioners in this Court; 'appoint an account,' &c.

Judgment.

Lords Moncreiff and *Jeffrey*, Ordinaries. Act. *Dean of Fac. (Hope,) Donaldson.*
Campbell & Trail, W. S. Agents. Alt. *Keay* and *Graham Bell.* *Thomas Sprott*, W. S. Agent. *R.* Clerk.

C.

FIRST DIVISION.

No. XXXI. 17*th January* 1835.

ABERNETHY AND HIS ASSIGNEES
against
MAJOR-GENERAL FORBES OR GORDON.

BLANK WRIT.—STAT. 1696, c. 25.—ENTAIL.—*A deed of entail being executed with certain substitutions nominatim, but left blank as to the name of a remoter substitute, which, however, was afterwards inserted by the writer of the deed, at the same time that he filled up the testing clause in terms of a holograph letter of the entailer,—held, in an action at the instance of one of the nominatim substitutes, that the entail was a valid and effectual and subsisting entail.*

THE late Lieutenant-General Benjamin Gordon executed a deed of strict entail of his lands and estate of Balbithan in Aberdeenshire. The deed, when written out, contained a destination in favour of the granter, and, after his decease, to the defender, and the heirs-male of his body, (under burden of certain liferents); whom failing, to the pursuer, and the heirs-male of his body; whom failing, to the pursuer's brother (deceased,) and the heirs-male of his body. This destination was followed by the words 'whom failing,' and then a blank space was left in the deed, followed by a destination hæredibus nominandis, and lastly to heirs whomsoever.

The deed was in this state transmitted to General Gordon; and after lying with him for a considerable time, he signed it, before witnesses, at Balbithan, on the 20th day of July 1803, and returned it to his agent at Aberdeen, accompanied by the following holograph letter: '*Balbithan*, 20*th July* 1803. DEAR SIR, According 'to what was settled betwixt us at last meeting, I send you by the 'bearer my disposition and deed of entail, as made out by you, 'signed by me at Balbithan, this 20th day of July 1803, in presence 'of Alexander Williamson, my servant, and Archibald Macgilla-'vray, in Balcraig, witnesses; which you will please cause your 'clerk, Lewis Nicoll, fill up according to form; and you will please, 'on a piece of paper, send me a sketch of what you mentioned may 'be necessary, in case I should choose to add any small codicil or 'legacies. You will likewise cause fill up the blank in the line of

'succession, with the name and designation of Sir John Gordon, 'captain and lieutenant in the Coldstream Regiment of Guards.' (signed) 'BEN. GORDON.' The writer of the deed accordingly filled up the blank as above, along with the testing clause, and the deed was retransmitted to General Gordon.

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Several years after the death of General Gordon, the defender, then the heir in possession, raised a reduction of the entail, the present pursuer, (the next substitute under the entail,) and Sir John Gordon, (whose name was filled up in the blank,) being then abroad; and on 22d June 1822, the late Lord Kinedder, Ordinary, pronounced a decree in absence, finding, 'that there was a blank in 'the deed of tailzie challenged at the time it was executed; and 'that an important clause was afterwards inserted in the blank 'space; finding also, that the said deed is false in its date, and 'therefore reducing, decerning and declaring in terms of the libel.'

The pursuer, on his return from abroad, raised the present action of reduction of the above decree, contending, 1. That the statute 1696, c. 25, did not at all apply to such a case as the present; but supposing it otherwise applicable, it could not, at all events, apply to annul the destination in favour of the pursuer, a substitute whose name was filled up prior to the space which was left blank; nor, 2. Could it apply, because the deed was not delivered blank, but was filled up prior to delivery, and it was left to common law whether there was an effectual substitution. 3. That if the act applied to the period of subscription as well as delivery, then the deed was effectually filled up, because directions were given for this purpose unico contextu with subscription. The Lord Ordinary pronounced the following interlocutor, (4th July 1834): 'The 'Lord Ordinary having resumed consideration of this process, in 'respect that the blank which is said to have existed in General 'Gordon's entail at the time of its execution was in a part of the 'substitution posterior to that in which the names, both of the de-'fender and the pursuer in the present action, were inserted, and 'that the said deed of entail was otherwise perfect and complete, 'finds, That the existence of such blank did not affect the validity 'of the deed as to these parties, and that the defender was not en-'titled to pursue and obtain the decreet of reduction in absence now 'challenged, or to make up the titles in fee-simple sought to be 'reduced in this action; and therefore reduces and decerns in the 'reductive conclusions, in so far as the interest of the pursuer is 'concerned, or may require: But as no appearance is made for Sir 'John Gordon, whose name is said to be improperly filled up in the 'blank, contrary to the provisions of the act 1696, c. 25, finds it

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'unnecessary to determine whether such filling up, or the holo-'graph letter by which such filling up was authorised, would affect 'or import a valid substitution in favour of the said Sir John Gor-'don, or of any substitute called after him in the order of succes-'sion; and supersedes the consideration of the other conclusions 'of the libel, as to the defender having incurred an irritancy, and 'the pursuer being entitled to enter to possession of the estate, till 'this interlocutor, and the decreet of reduction therein contained, 'shall be final; and supersedes also the question of expenses.'

Note.—'The alleged falsity of the date of the entail, which was 'one of the rationes decidendi in the original decreet of reduction, 'having been judicially abandoned by the defender, the question 'came to turn entirely upon the bearing of the act 1696, c. 25, 'upon a case like the present.

'There was much learned argument before the Lord Ordinary, 'on the question, Whether the act could at all apply to this in-'strument, in respect that the blank was regularly filled up before 'delivery?—and also on the question, Whether the filling up unico 'contextu with writing the testing clause, and in virtue of a holo-'graph mandate by the granter, was not a filling up authorised by 'the statute?—and whether that holograph mandate was not of it-'self a valid substitution in favour of the party named therein?

'There were many points of difficulty in this part of the argu-'ment; and if the Lord Ordinary had thought it necessary that 'they should be determined before justice could be done between 'the present parties, he would probably have adopted the sugges-'tion made by the defender, and reported the question upon cases 'to the Court. For the reason assigned in the interlocutor, how-'ever, he did not think this necessary. In a question with Sir John 'Gordon, it would probably have been indispensable. But, as be-'tween the present parties, there seemed to him to be clear and 'sufficient grounds for decision, apart altogether from those more 'difficult inquiries.

'It was thought, in the first place, to be clear enough, that 'though the act bears generally that the deeds against which it is 'directed 'shall be declared null,' this truly means only, that they 'shall be null as to the persons whose names were improperly inserted 'in the blanks, and that the effect of this nullity on the other parts 'of the deed shall be determined on the ordinary principles of law. 'The whole of the decided cases support this construction, as well 'as the preamble of the statute, and justice, and the reason of the 'thing. The evil intended to be remedied was, the risk of fraud, 'from the prevailing practice of passing bonds blank in the name 'of the payee from hand to hand, as bills of exchange now pass

'with blank indorsations; and the case contemplated by the statute, 'and to which its terms are accommodated, was that of one or a 'number of conjunct payees so filled into the blank, by the annul- 'ment of whose rights the instrument itself of course became null. 'But when the statute came to be practically extended (for which 'there was no doubt sufficient warrant in its words) to deeds of 'entail with a variety of substitutions, and to other complex instru- 'ments, under which diverse interests were provided to diverse per- 'sons, it would plainly have been carrying the remedy far beyond 'the evil, and in fact creating a much worse evil, to have found the 'whole deed null and unavailing to the parties primarily favoured, 'on account of blanks in the nomination of postponed parties, or 'parties for whom separate benefits were intended,—to have annul- 'led the right of the institute, for example, because the name of 'the fiftieth substitute was filled into a blank—or disappointed the 'claim of the assignee of L.100,000, because the name of a legatee 'to whom he was directed to pay L.5 was in a similar condition. 'Accordingly, in the case of Kennedy, (July 13. 1722, *M.* 1681,) 'which seems to have been very carefully considered, and where 'the question was as to the validity of a substitution filled into a 'blank, it is assumed on all hands that the disposition itself, and 'the institution therein contained, was liable to no objection. And 'the Lords accordingly found, in express terms, 'that it must still "be looked on as blank in the substitution.' And this judgment 'having become final, the case ultimately ends by sustaining the 'doquet, by virtue of which the blank had been incompetently 'filled up, as 'of itself importing a substitution in favour of the per- "sons therein named.' And the Lord Ordinary has not been able 'to discover that the soundness of this decision, or the principles 'involved in it, has ever been judicially questioned.

'The defender indeed seemed ultimately to admit, that these 'were the principles on which the present case was to be decided; 'and his main argument was, that though the nullity of a substitu- 'tion might not affect the institute or prior substitutes in a disposi- 'tion in fee-simple, (which was the case of Kennedy,) the principle 'failed in its application to cases of strict entail, where all parties 'were burdened in favour of the whole substitutes; and the right 'of these called first made truly conditional, on the succession being 'secured to those named after. Quomodo constat, it was asked, that 'General Gordon would have devised his estate to the pursuer, if 'he had been aware that the succeeding destination to Sir John 'Gordon was not to be effectual; and how does the nullity arising 'from this blank differ from a vitiation in substantialibus, the effect 'of which extends to every part of the instrument?

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'The Lord Ordinary has not been moved by these arguments.

'The case of vitiation he thinks does not apply, both as affording far stronger presumption of actual fraud than the mere occurrence of a blank, and from the circumstance of its generally making it uncertain what the original tenor and import of the deed truly was; and even in cases of vitiation, the parts of the deed not affected by that in which the vitiation occurs have often been found effectual; Keir *v.* Pardowie, 1597, *M.* 17,062; Johnston, 1688, *M.* 17,063; Kemps, 2d March 1802, *M.* 16,949.

'The principle is scarcely affected by the distinction chiefly relied on by the defender, between deeds of entail and dispositions in fee-simple containing substitutions. In fact, they differ only in the power of those who take first in the latter case, to disappoint the substitution. In both these, there is a benefit provided for the substitutes, and a purpose in the maker of the instrument to confer such benefit. If the whole instrument, therefore, is to be annulled, in either case, because that purpose is defeated, it should be annulled in both cases. If it can be competently asked in this case, quomodo constat that General Gordon would have made an entail at all, if he had not relied on the substitution to Sir John Gordon being effectual, it might as well have been asked, in the Balterson case, in 1722, quomodo constat that Hugh Kennedy would have made a disposition of his estate, if he had not relied on the substitution to John Kennedy being effectual?

'But, in truth, all this ground of pleading is fallacious. There may be blanks (or other nullities) occurring in such parts of a deed as to make the whole null: a blank in the name of the property disponed would be of this nature, though not under the act 1696: a blank in the name of the disponee, where there was no substitution, would be equally fatal, both under the act and at common law; and probably a blank in the name of the institute would be in the same situation. But it is extravagant to maintain, that all blanks which vary the deed from what it would have been, if they had been originally filled up, must have this effect; and it seems safe enough to say, that such blanks shall only annul the clauses or provisions in which they occur, and those to which they directly and specially apply, and that all the other parts of the deed, in which a clear and complete purpose is aptly expressed, shall have effect.

'It would no doubt happen, that in this way the deed which ultimately takes effect will not, in all its parts, be the deed which the maker intended or expected to take effect; and that the question, quomodo constat that he would have made the deed which does take effect, can never be answered with absolute and precise

'certainty. But, on the whole, justice is better done by giving 17 Jan. 1835.
'effect to such parts (being the main and principal parts,) as he
'plainly intended and wished to take effect, than by annulling and Abernethy, &c. v. Forbes or Gordon.
'disappointing the whole of his intention, on account of the un-
'foreseen failure of a subordinate part. The leaning of the law is,
'ut res magis valeat quam perseat; and that utile per inutile non
'vitietur. If the defender's doctrine were to be adopted, how
'should a general disposition, in which heritage is incompetently
'devised along with moveables, (as on deathbed or by deed testa-
'mentary,) be sustained as to the moveables, though annulled as to
'the real estate? In the greater part of such cases, the question of
'quomodo constat might be put with infinitely greater force than
'in the present,—the purpose of the maker not being merely de-
'feated as to some subordinate or postponed interest, but the most
'unjust and absurd, and certainly unintended, distribution of his
'property being thereby effected. The same principle, indeed,
'would defeat the rights of all heirs of entail, not alioqui succes-
'suri, who now get rid of the fetters, and turn themselves into
'proprietors in fee-simple of estates, which they never were in-
'tended to hold on such conditions. If the failure of one substitu-
'tion, by its being written on a blank, is held a ground for redu-
'cing the whole deed, because it is not absolutely certain that the
'granter would have made it without that substitution, what shall
'be said of the failure of all the substitutes, and all the conditions,
'without which it is nearly certain that no such destination would
'ever have been made to the prejudice of the heirs of line? The
'answer in both cases is, that what is effectually done by any deed
'shall stand and take effect, although other things, which were in-
'tended to stand along with it, have been found ineffectual; and
'courts of law, in so deciding, do not make a new deed for a party,
'but merely give effect to as much of his deed as the law can re-
'gard as subsisting.'

Both parties *reclaimed*; the pursuer praying for a variation of the interlocutor of the Lord Ordinary, as to the extent and consequences of the judgment, (and to which the Court acceded,) and the defender praying for an alteration on the merits. The defender *pleaded*—1. That the Lord Ordinary had overlooked one of the chief grounds of objection to the deed, viz. that being a deed of strict entail, it was essential it should contain an absolute disposition to some person nominatim; that here the parties favoured were limited fiars, and that it had been proved the maker of the entail had not made up his mind as to the party who was to occupy the last place in the destination, upon which the whole effect and Defender's Pleas.

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validity of the entail must necessarily hinge; that whatever might be the effect of the deed as a simple destination, it was clearly imperfect as an entail. 2. In regard to the act 1696, c. 25, it had been found to apply to deeds of destination; that in none of the cases cited had the Court given effect to a partial application of the act; for in all the cases, and particularly that of Kennedy v. Arbuthnot, 13th July 1722, *M.* 1681, the party whose name had been inserted in the blank was the very person who exhausted the substitution; and independently of that, the deed had been filled up in that case by a writing probative according to 1681, c. 5, which was not so here.

The Court did not think it necessary to hear counsel for the respondent.

Opinion of Court.

Lord Gillies observed, that the defender, by admitting the application of the act 1696, c. 25, to a disposition of a fee-simple estate, had lost the benefit of the statute. By the general provision of that act, it certainly did not originally extend to the destination even of a fee-simple estate; but assuredly its provisions, if applicable at all, were equally applicable to an entail. His Lordship could see no reason for the one more than the other. In truth, there were few deeds of settlement where the maker could be said to have completed his intentions. In the case, for instance, of a destination hæredibus nominandis, there was a power reserved to add to, or alter a deed after its completion. There had been many cases, as, for instance, the Porterfield and Roxburghe cases, where, although the deed of nomination might labour under some defect or nullity, the validity of the original deed had never been disputed.

Judgment.

The other Judges concurred; and the *Court* therefore, (in reference to the variation in point of form prayed for by the pursuer,) pronounced the following interlocutor: 'The Lords alter the interlocutor reclaimed against, and reduce the decree of reduction libelled, in so far as it reduces the disposition and deed of entail libelled, and also reduce the precept and retour and seisin libelled, under which the defender made up a title to the estate of Balbethan, in fee-simple; of new reduce the charter of resignation libelled, expede in virtue of the procuratory of resignation in the said disposition and deed of entail, and the instrument of seisin expede on the said charter, and declare and decern accordingly; and further find, declare and decern, that the said disposition and deed of entail libelled, bearing date the 20th day of July 1803, made and granted by the deceased Lieutenant-General Benjamin Gordon of Balbethan, is a valid, effectual and subsisting entail of the lands and others therein contained; quoad

'ultra, adhere to the interlocutor reclaimed against, reserving all 'questions of expenses.' 17 Jan. 1835. Abernethy, &c. v. Forbes or Gordon.

Lord Jeffrey, Ordinary. *Anderson.* *D.* Clerk. Act. *Rutherfurd* and *Macdowall.* Alt. *Shene* and *J. & W. Dymock*, and *Cranston & Anderson*, Agents.

C.

SECOND DIVISION.

No. XXXII. *23d January* 1835.

WILLIAM HORNE of Scouthel *against* The MARQUESS of BREADALBANE and the TRUSTEES of Sir John Sinclair of Ulbster, Bart.

Warrandice.—Process. — Prescription, Negative. — *Held*, 1. *That certain clauses in a contract of sale imported an obligation to relieve the purchaser and his successors from all augmentations of minister's stipend beyond a sum specified.* 2. *That another party having subsequently undertaken to relieve the seller of all the obligations contained in that contract, the purchaser or his successor is entitled and bound, in bringing his claim of relief, to call this party also as defender, along with the representative of the original obligee.* 3. *That the negative prescription affects the claim of relief, only as to such augmented stipends as have been paid, without relief being claimed for forty years, but does not otherwise affect the general obligation, which still remains effectual as to any augmentations which may have taken place within the last forty years.*

By contract of sale, dated 21st March and 20th April 1715, John Lord Glenorchy sold to Francis Horne of Stirkoke, his heirs, &c. the lands of Sybster and other lands, together 'with the parsonage 'teinds, and the teind sheaves of the said lands,' with the pertinents. The contract contains a clause of warrandice, the latter part of which is in these terms: 'And to warrant, free, and relieve the said 'Francis Sinclair and his foresaids of and from all augmentations of 'minister's stipend and burdens upon the teinds of the said haill 'lands, whether by augmentations, new erection of parishes, and 'additional stipends, and that as well of all terms and years bygone in 'all time coming, and from all other perils, dangers, incumbrances,

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'and grounds of eviction whatsoever, as well not named as named, 'bygone, present, or to come, which may anywise stop, hinder, or 'impede the said Francis Sinclair or his foresaids in the peaceable 'possession, bruiking, and enjoying of the said haill lands, and 'pertinents thereof above disponed, and teinds of the same, and in-'tromissions with, and recovering of the rents, maills, profits, and 'duties thereof, in all time coming, at all hands, and against all 'deadly, under the special exception of the proportions of stipend-'money and victual above specified, now conditioned and agreed 'upon to be paid by him, the said Francis Sinclair, and his fore-'saids, by this present right, to the ministers serving the cure 'of the said parish kirk, and his successors, at the terms and in the 'manner above mentioned.'

In 1719, the Earl of Breadalbane disponed the lands, &c. belonging to the Earldom of Caithness, and among others the lands of Sybster-Wick and Hauster, to John Sinclair of Ulbster, 'under 'the burden of the bargain and sale made by our said umwhile father, 'or of any portions of the lands particularly and generally above 'disponed, or tacks of any of the said teinds or obligements there-'in contained, upon the said 7th January 1719, which the said 'John Sinclair, by his acceptance hereof, binds and obliges himself, 'his heirs and successors whatsoever, to ratify, approve and imple-'ment in the haill heads, tenor, and contents thereof, in so far as 'we, or our said umwhile father, are bound thereby, and never to 'quarrel or impugn the same, on any account whatsoever, that will 'afford ground of eviction or recourse against us or our foresaids.'

The right to the subjects and warrandice conveyed by the contract of 1715 passed into the person of the pursuer's father, who, in 1797, purchased the lands, and in 1823 disponed the subjects to his son, the present pursuer.

Augmentations of stipend were obtained successively in 1719, 1793, 1807, 1823. The augmented stipend had been paid by the pursuer and his predecessors under interim decrees of locality, no final decree of locality having been pronounced since 1715.

The pursuer and his predecessors have been in the use of paying these augmented stipends, which greatly exceeded the sums stipulated in the contract 1715. But in 1828, he raised an action of relief, founding on the above-quoted clauses, concluding against the Marquess of Breadalbane, as representative of John Lord Glenorchy, the party to the contract of 1715, and alternatively against Sir John Sinclair, as representative of John Sinclair of Ulbster, to whom the lands were disponed in 1719, under the burden of Lord Glenorchy's obligations relative to them.

Among other defences it was pleaded for the Marquess of Bread-

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albane—1. That he did not represent universally John Lord Glenorchy; 2. The pursuer had no title to insist; 3. That the clauses founded on do not import an obligation of relief so extensive as that claimed by the pursuer; 4. That the claim is extinguished by the negative prescription.

It was maintained in defence for Sir John Sinclair, that independently of the pleas stated for the Marquess, the obligation of relief was not validly transferred against him by the terms of the disposition 1719, and that, at all events, he was only subsidiarie liable to relieve the Marquess, and could not competently be made a party to an action of relief at the instance of the pursuer.

Thereafter, 'the Lord Ordinary having heard parties, and considered the closed record and whole process, sustains the title of the pursuer: Finds that the defender, the Marquess of Breadalbane, is bound to relieve the pursuer, and his lands and teinds of Sybster, as libelled, of all payments of stipend beyond the amounts of L.29 : 2 : 8 Scots money, and two bolls victual, and also to relieve the pursuer, and his lands and teinds of Wedderclett and Hauster, as libelled, of all payments of stipend beyond the amounts of L.8 : 6 : 8 Scots money, and two bolls of victual, in all time coming; but this with the exception of those portions of stipend which are payable by the pursuer for his said lands or teinds, under any augmentation of stipend granted forty years before the pursuers insisted on the present claim of relief; and in respect to the pursuer's claim for relief, or repayment of arrears of stipend for years bypast, and in respect to the liability of the defender Sir John Sinclair, appoints the parties to be farther heard.

Both defenders *reclaimed*, and the Court ordered cases.

Pursuer's Pleas.

Pleaded for the pursuer—1. The pursuer is entitled to the full benefit of the obligation of warrandice and relief, and has a title to insist; 2. The defenders called are the proper parties to the action; 3. The warrandice having been granted expressly against all augmentations of minister's stipend and burdens beyond the amount specified in the contract 1715, the conclusions of the action are fully supported by the terms of the obligation; 4. There is no room for maintaining that the right of relief has been cut off by the negative prescription. Trifling augmentations, though submitted to for forty years, have not the effect of extinguishing the obligation in toto. Partial eviction cannot operate an extinction of the entire obligation. There is no room for holding, even as to payments traceable to an augmentation granted forty years before the present action was raised, that prescription can begin to run from the date of the

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Pursuer's Pleas.

augmentation. It can only run from the date of the final decree of locality. It is only then that parties can be aware that a permanent eviction to any extent has taken place. Till then, a party is not bound to claim relief under his clause of warrandice. In the Marquess of Tweedale, 12th Nov. 1833, it was found in effect, that prescription could begin to run against the claims of over-paying heritors for relief only from the date of a final decree of locality. This claim of relief, therefore, cannot be affected by the length of time during which it is alleged that the over-payments have been continued. At all events, eviction cannot be said to take place at the date of the augmentation. From a mere augmentation it is not certain that the teinds will be encroached upon, and not certain that eviction will take place; Trustees of Lord Aberdeen *v.* Dundas, 22d Nov. 1821, 1. *S.* 157. Supposing payments beyond the stipulated amount to have been made, and the right of recovering them to be lost by prescription, the obligation of warrandice would still remain in full force as to all payments which have been made within the forty years, or which may be made in future. The augmented stipend creates an obligation of an annual prestation, and each year's obligation, as it falls due, runs a separate course of prescription. Prestations due upwards of forty years may have prescribed. Those which have fallen due within that period, or may hereafter fall due, remain effectual; *Ersk.* iii. 7. 13; Stewart *v.* Fleming's Heirs, 10th March 1627, *M.* 10,749; Laird of Gairntully, 16th Dec. 1638, *M.* 10,750; Magistrates of Paisley, 30th July 1710; Lockhart *v.* Duke of Gordon, July 1730, *M.* 10,736; *Bankt.* ii. 12. 19; l. 7. § 6. *Cod. de Prescrip.* 30 *vel* 40 *ann.*; Managers of King James VI. Hospital, 16th June 1758, *M.* 10,677; Milne *v.* Skene, Feb. 7. 1774, *M.* 10,715.

Pleas for the Marquess of Breadalbane.

Pleaded for the Marquess of Breadalbane—The construction contended for by the pursuer is contradicted by the import and terms of the deeds. 2. The obligation of relief does not subsist in the person of the pursuer. 3. Any claim of relief from augmentations under the contract 1715 is cut off by the negative prescription. It is admitted, that the first augmentation took place in 1719, and that no claim of relief was ever urged or intimated until the date of the present action. It is of no consequence that the augmentations took place under interim decrees of locality. Payment was exigible and was exacted under these decrees from the possessors of the lands, who were therefore in titulo, if they chose, to claim relief. Their silence for upwards of a century extinguishes the obligation of relief in toto. The negative prescription was introduced for the protection

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of the lieges in every case, where, owing to the negligence of the creditor, his claim had lain dormant for forty years; *Kames, Eluc.* 241. The rule was admitted cautiously at first, but being found beneficial, its operation was extended by subsequent enactments; *Ersk.* iii. 7, 8; *Stat.* 1469, c. 29; 1474, c. 55; 1617, c. 12. It is in strict accordance with the principle of the rule to hold, in the present case, the right of relief lost, by neglect to urge the claim for forty years after the date of the first augmentation. It is inconsistent with principle to hold the prescription applicable to one augmentation, without holding the original obligation of relief totally extinguished by it. The pursuer founds on a supposed analogy between the present case and that of teinds and feu-duties left unclaimed for forty years; but the analogy does not hold. Teinds are a burden on lands by public law; feu-duties under the charter by which a man holds his lands; Earl of Moray, 2d Feb. 1827; *Shaw*, v. 284; *Stair*, ii. 12, 22; Earl of Panmuir, 7th Feb. 1666. The right to tack-duties also does not prescribe, because the obligation to pay rent appears in gremio of the tenant's title; Stewart's Heirs, 10th March 1627, *Dict.* 10,749, and other cases referred to by the pursuer. In the present case, no such objection can be pleaded. The defender is neither opposed by public law, nor by the terms of the deeds by which he holds his lands. In the case of the Earl of Aberdeen, referred to by the pursuer, it turned out that the years of prescription had not run since the date of the distress, and on that account alone the plea of prescription was rejected. The case of Lockhart, founded on by the pursuer, is the only one which supports his views; and the decision in that case has been referred to by lawyers as of very doubtful authority; *Kames, Eluc.* 251; *Bankton*, ii. 18, 19. It is not reconcileable to principle, and is contradicted by many other decisions; Beadsmen of Magdalene Chapel *v.* Drysdale, 30th June 1671, *Dict.* 11,148; Countess of Rothes *v.* Marquis of Douglas, 1st Jan. 1685, *Dict.* 11,255; Tarsappie *v.* Pittendriech, 4th March 1685, *Dict.* 10,770; Stewart *v.* Children of Pitoullie, 6th July 1711, *Dict.* 10,722; (this decision approved of by Kames, and contrasted with that of Lockhart, *Eluc.* p. 250); Miller *v.* Storie, 15th June 1757, *Dict.* 10,738; Graham *v.* Douglas, 7th Feb. 1735, *Dict.* 10,745; Magistrates of Linlithgow *v.* Mitchell, 21st June 1822, *Shaw*, i. 553; Earl of Moray, 2d Feb. 1827, *Shaw*, v. 284.

Pleas for Sir John Sinclair's Trustees.

Pleaded for Sir John Sinclair's Trustees—In addition to the pleas maintained for the Marquess, that the pursuer had no title to insist against Sir John.

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At the advising, (20th Feb. 1834,) *Shene*, for the Marquess, referred to the case of Hamilton *v.* Lady Montgomery, Jan. 1834, in which a clause of relief similar to that which gives rise to the present action occurred.

Opinion of Court.

Lord Justice-Clerk.—I have no doubt that Sir John Sinclair was properly called as a defender in this case, and I require nothing farther to satisfy me of this, than the terms of the clause quoted in Sir John's case, p. 7. This clause was embodied in his title to the Earldom of Caithness, and there can be no doubt it was obligatory upon him. What then ought Mr Horne to have done? If he had called the Marquess only into the field, the objection would at once have been taken, that he was not the proper party, Sir John Sinclair's ancestor having undertaken all the obligations which had formerly been undertaken by Lord Glenorchy. The pursuer was clearly bound to have called both parties, leaving them to settle the question of relief between themselves.

The question before us at present is, whether Mr Horne had a title to insist in this action against the Marquess. I have no doubt that the obligation was regularly undertaken by Lord Glenorchy, and has been transmitted to the pursuer. As to the meaning of the obligation, if I read the case for the Marquess alone, I would have no doubt that no warrandice from augmentations had been granted. He seems to wish to shut our eyes to the more important part of the obligation, and direct our attention solely to what is of no consequence. A sale of lands took place; I don't care for how many merks they were purchased. The defender seems to refer to the price as an indication of the character of the contract; but I do not think we have any thing to do with that. The then Lord Glenorchy, as he is called, was, I have no doubt, as sharp as the present Marquess in looking after his interest. A sale took place for an onerous consideration, and warrandice was granted. Then look to the terms of the clause. Is it possible to imagine a more clear obligation to relieve from all augmentations? The clause itself is absolute, with the exception of certain proportions, which proportions are elsewhere anxiously stated in precise terms, as being of a certain specified amount. I have no hesitation whatever in finding the obligation to relieve from all augmentations is as explicit as there was any necessity for it to be. I have as little doubt that the right of relief has been duly transmitted to the pursuer. There seems to be no ground whatever for disputing this. The pursuer's title is therefore unexceptionable, and the only question that remains is, whether the Lord Ordinary's interlocutor correctly decides the rights of the parties.

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Opinion of Court.

With regard to the general defence of prescription, I think it deserving of very considerable attention. 1st, How far, in an obligation like the present, a party is entitled to plead prescription upon interim decrees of locality. We have often had questions before us in regard to charges upon particular heritors under interim decrees of locality, and we have invariably held that the minister had right to come against the heritor to the full amount of his teinds, not certainly beyond that amount, and that the extent of that heritor's right of relief could not be ascertained until a final decree of locality took place. Until that period, it is not known what amount of stipend will ultimately be imposed upon his lands, and therefore it is impossible to say whether or not he will be ultimately entitled to any relief for the payments he is making. I am therefore of opinion, that in this case there are no termini habiles for the plea of prescription. The case of Channelkirk, referred to by the pursuer, is applicable, and was, I think, decided upon sound principles. Until a final decree is pronounced, it is impossible to say what overpayments, or whether any, have been made, and therefore it is impossible to plead prescription. I therefore think the Lord Ordinary's interlocutor right on principle.

Lord Mackenzie *.—It may be right for me to state the grounds upon which I pronounced the interlocutor now brought under review. I have no doubt that the principle which ruled the case of Channelkirk is perfectly correct, but it does not apply here. Where there is a set of heritors paying under interim decrees of locality, supposing the interim decree lasts for one hundred years, it is utterly impossible to hold that their mutual rights of relief should be affected by prescription. But here the case is totally different. This is an extensive obligation, by which Lord Glenorchy bound himself, as an individual, to relieve Francis Sinclair of all exactions beyond a certain amount, as minister's stipend. An heritor, sensible that he is making overpayments under an interim decree, cannot in any shape enforce his right of relief, until a final decree is pronounced. He cannot bring his action of relief until a final decree establishes to what extent his right of relief exists. Here the case is different. The moment Sinclair was called upon to pay beyond the specified amount, his right of relief could be enforced. He might have called, and it was his duty to have called at once upon Lord Glenorchy to relieve him, in terms of his obligation. Nay, he would have been entitled, had he asked it, to a decree, relieving him

* His Lordship was called in, in the absence of Lords Cringletie and Meadowbank.

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in express terms from the payments due under the interim locality. In the ordinary case he must wait for the final locality. But here there seems to have been no reason for delay. Upon these grounds, therefore, I hold prescription to be a relevant plea; and the question remains, how far it is applicable.

Opinion of Court.

With regard to this, I beg to direct your Lordships' attention to an expression in the statute 1617, which seems to have escaped the notice of the parties. It states that the bond of warrandice shall not prescribe from its date, but 'only from the date of the distress 'which shall prescribe.' The pronoun here refers to the distress, not to the bond. The meaning is, each distress shall prescribe. Therefore I hold, that although the plea of prescription is perfectly relevant, it only applies to those augmentations which took place forty years before the date of the present action. With regard to the interpretation of the clause, and the question of transmission, my opinion is the same as your Lordship's. There seems no ground for questioning one or other.

Lord Glenlee.—I am perfectly satisfied as to the title. The clause itself is most explicit. There can be no doubt as to the transmission. With regard to the lands of Sybster in particular, it is the plainest of all points.

With regard to the question of prescription, I must confess I never was more at a loss in my life. It is a new point, and one of great difficulty; and therefore I would wish the opinion of the other Judges. I would do as the other Division often does, just put the question, how far prescription applies here, without troubling them with the rest of the case. I do not think that the case of Channelkirk, (which I have no doubt was correctly decided,) has any reference to the present. The question here arises with a party who might not have been an heritor;—in point of fact he was not an heritor subsequent to the date of the first augmentation. Sinclair was therefore entitled to say, I have a settled claim of relief against an individual;—the amount of the relief is fixed, and cannot be affected by a final decree of locality, or by any question among the heritors; the amount of my liability is fixed; and therefore, from the moment an augmentation takes effect, however just or unjust, I am entitled to relief. But then the question comes, how far the right is lost by prescription: And, 1st, As to the view that each augmentation runs a separate course, I cannot easily concur with it. The right of relief constituted is of one character, and, I may say, is in a manner an individual subject. And, then, the plain principle of the law seems to be, that after such a lapse of time without claiming relief, the party is no worse if he is not allowed to claim

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it. This is the natural conclusion; but the question is altogether a new one, and one of great difficulty. I am very doubtful as to how it ought to be decided, and I am therefore for consulting the other Judges.

Lord Justice-Clerk.—I did not by any means intend to say that my mind was made up on the question. On the contrary, I said it was one of great difficulty, and deserving great consideration. I therefore agree with your Lordship in thinking that the other Judges ought to be consulted. In the meantime we are agreed that the pursuer's title ought to be sustained; and to that extent we adhere to the interlocutor of the Lord Ordinary.

Opinion of Court.

More, for Sir John, again called the attention of the Court to the effect of sustaining generally the title of the pursuer, while the question, whether Sir John had incurred the obligation, remained undecided.

Lord Justice-Clerk.—The title is sustained to this effect merely, that the pursuer was entitled and bound to call Sir John Sinclair into the field, leaving him and the other defenders to settle the question of relief among themselves. An interlocutor was thereupon pronounced, by which their Lordships adhered 'to the interlocutor 'of the Lord Ordinary submitted to review, in so far as to find that 'the obligation of warrandice in the contract of 1715, libelled upon, 'is effectual to relieve from all future augmentations of stipend, and 'that it has been duly transmitted to the pursuer: Therefore, and 'to this effect, sustain the pursuer's title, and decern; but, before 'further answer, ordain the printed papers in the cause to be laid 'before the Judges of the First Division and Permanent Lords Or-'dinary, for their opinion, whether, and to what extent, the plea of 'the negative prescription is applicable to, and can be maintained 'in defence of the present action.'

The following opinion was returned by the Lords President, Balgray, Gillies, Mackenzie, Corehouse, Fullerton, Moncreiff, and Jeffrey.

Opinion of Consulted Judges.

In 1715, by a contract of sale, Lord Glenorchy sold to Francis Sinclair certain lands, with the teinds; and this contract contains a clause of warrandice, the first part of which is of a more general nature; but the latter part is in these words: *(Here follows the clause.)* The right to the subjects and warrandice conveyed by this contract has passed through various authors into the pursuer, Mr Horne, who now pursues the Marquess of Breadalbane and Sir John Sinclair, as representatives of Lord Glenorchy, for relief, in reference to time both past and future, from certain augmentations of stipend obtained by the minister of the parish of Wick, within which the lands lie.

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Opinion of Consulted Judges.

These appear to have been obtained at different dates, particularly in 1719, 1793, 1807 and 1823. It does not appear that any locality of these augmentations has ever been approved of; but the augmented stipend has been paid under interim localities, and in this way a portion of stipend in each augmentation has been paid out of the lands conveyed to Mr Sinclair by Lord Glenorchy. No action upon the obligation of warrandice and relief of stipend appears ever to have been brought, in consequence of any of these evictions, until the present summons was raised in 1828. In defence against this action various pleas have been stated, but the only one in reference to which the opinion of the First Division and Lords Ordinary is now required, is that of the negative prescription, the question being, 'whether and to what extent the plea of the negative prescription is 'applicable to, and can be maintained in defence of the present ac-'tion.'

It appears to us that the law applicable to this question is to be found in the statute 1617, c. 12, which, after enacting the positive prescription, provides, 'And sicklike his Majesty, with advice fore-'said, statutes and ordains, that all actions competent of the law 'upon heritable bonds, reversions, contracts or others whatsoever, 'either already made, or to be made after the date hereof, shall be 'pursued within the space of fourty years after the date of the 'same, except the saids reversions be incorporate within the body 'of the infeftments used and produced by the possessour of the 'saids lands, for his title of the same, or registrated in the Clerk of 'Register his books; in the which case, seeing all suspicion of false-'hood ceases, most justly the actions upon the saids reversions 'ingrossed and registrated ought to be perpetual; excepting always 'from this present act all actions of warrandice which shall not pre-'scribe from the date of the bond or infeftment whereupon the war-'randice is sought, but only from the date of distresse, which shall 'prescribe, it not being pursued within forty years as said is.'

Under this provision, we think, that when any subject is warranted, as soon as the whole or any part of it is evicted, and consequently an action of warrandice or relief in reference to that total or partial eviction arises, then the negative prescription begins to run against that action from the date of the eviction or distress. The consequence, we think, is, that if the eviction be total, the whole warrandice may be lost in forty years from its date. If the eviction be partial, the warrandice may be lost to that extent, but no further. We do not think that the whole benefit of a clause of warrandice can be lost by negative prescription, because a small part of the subject warranted has been evicted,

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Opinion of Consulted Judges.

and action for that partial eviction has not been raised within forty years. To apply this to the present case: Part of the subject disponed by Lord Glenorchy was certain teinds, exposed, among other risks, to the risk of eviction by the minister for augmentation of his stipend; and against this Lord Glenorchy granted an obligation of warrandice and relief. When, after the date of this obligation, the minister obtained an augmentation, we think that the obligation of warrandice and relief instantly applied, and that an action of warrandice and relief immediately arose. For as soon as the augmentation was granted, it instantly affected the teinds, and the minister had immediate right to charge any teind-holder, as intromitter with the teinds, for the whole amount of his augmented stipend, leaving the heritors to their relief against each other. Each heritor's teinds, too, became properly and ultimately liable for a certain proportion of the augmentation. Though it might take some time before an interim locality was settled, and a very long time before a final locality was settled, yet the teinds of each heritor were not the less on that account truly liable to the burden of the augmented stipend in certain proportions from the date of the augmentation. It seems to us clear, therefore, that as soon as an augmentation was granted, an action arose for relief from the augmentation, in terms of the obligation of warrandice, and consequently the negative prescription began to run against that action, and against the obligation of warrandice and relief pro tanto.

We do not think that Mr Sinclair or his successors were limited to a set of actions brought from year to year, for relief from annual payments of augmented stipend. We think they were fully entitled, immediately on the granting of each augmentation, to have brought an action for relief from that augmentation, out and out, in all time coming; and therefore we think that it is against such an action that the negative prescription came to run. Indeed, the present action contains a conclusion of that very kind for relief from the augmentations in all time coming.

Neither do we think that the running of the prescription could be delayed by an interim locality. That might bar action of relief by the heritors inter se, for extra payments of stipend, but had nothing to do with the relief from the augmentation due to one heritor, not by other heritors, but by his authors, who sold him the teinds with warrandice from augmentations, for which relief action became instantly competent, and might competently conclude for relief from the interim locality itself, as consequent on the augmentation, against which the warrandice was granted.

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Opinion of Consulted Judges.

We are of opinion, therefore, that the negative prescription, against the obligation on which this action is founded, ran from the date of each augmentation, and in reference to that augmentation; and therefore that the negative prescription affords a defence to the extent of the augmentations granted forty years before the pursuer raised the present action of relief, as has been found by the Lord Ordinary.

We have only to add, that we do not think that the whole obligation of warrandice and relief from augmentations could be lost by the negative prescription running after the granting of one or more augmentations, partially affecting the teinds, more than the whole of the warrandice of any subject is lost by one or more evictions of parts only of it, followed by neglect to pursue for relief thereof during forty years. We think that what prescribes under the statute 1617 is the right of action for any distress or loss actually incurred by eviction; and that the prescription cannot extend further than the eviction. The contrary rule would expose the warrandice of great estates to be lost by the most trifling evictions of inconsiderable parts; and we see no authority for extending the statute to so severe an effect.

Opinion of Court.

At the final advising *Lord Medwyn* said—As this opinion was not finally adjusted till after my removal from the Outer-House, I did not sign it, although I concurred, at the consultation, in the conclusion to which the other Judges have come. There is only one part of the opinion as to which I am inclined to differ, viz. in regard to the period at which eviction can be said to have taken place. Now, an interlocutor awarding an augmentation does not necessarily imply an eviction. The minister, on getting his augmentation, does not necessarily shew from which of the heritors he is to make his decree effectual. This is ascertained only in the process of locality, and by decree in that process, which was originally separate from the minister's summons of augmentation, and, though now embraced in it, is still a separate proceeding; and it is only upon distress that the right of relief commences, and it cannot be said that there is distress merely by the augmentation being awarded. There are two cases, Creditors of Sutherland, 4th Jan. 1749, *Kilk.*, and Hill *v.* Yeaman and Hogg, in which the Court found eviction could only take place at the date of the decree being made effectual, and the subject carried off.

Lord Glenlee.—Eviction begins when a locality is given in binding the lands, and when relief is due.

Judgment.

The *Court* refused the reclaiming notes, adhered to the interlo-

cutor of the Lord Ordinary, and remitted to a new Ordinary to hear parties on the other points, reserving questions of expenses. 23 Jan. 1835.

Horne v. Marquess of Breadalbane and Others.

For Mr Horne, *Keay* and *Walker*. *A. Monypenny*, W. S. Agent. For Marquess of Breadalbane, *Skene* and *Outram*. *Davidsons & Syme*, W.S. Agents. For Sir John Sinclair's Trustees, *Dean of Fac. (Hope,)* and *More*. *James Bridges*, W. S. Agent. *F.* Clerk.

R.

SECOND DIVISION.

No. XXXIII. 24*th January* 1835.

Sir C. T. METCALF and Others, Assignees of Palmer & Company, *against* W. S. GLAS, and J. PENTLAND, Trustee for his Creditors.

Annual-rent.—*Annual accumulation of interest allowed on a debt contracted in India, and at the rate chargeable in India, down to the date of the action for payment, against holders of funds in this country, although no yearly accounts had been rendered, nor demand made for several years previous to the raising of the action.*

Dr Glas at Bhaugulpore had extensive transactions with Palmer and Company of Calcutta. He got large advances from them on the security of his factories, and policies of insurance; and he looked forward to a gradual reduction of the balance due, by the produce to be sent to Palmer and Company for sale. In 1820 the balance due to Palmer and Company was 524,044 rupees, or about L.15,000. On rendering their account, they wrote to Dr Glas, in April 1820, in these terms: 'The cheerful manner in which you came into our 'plan of restricted cultivation, and the zeal with which you gave 'effect to our measures, have not been unobserved by us; and we 'are sensible that much sacrifice and exertion were requisite to en- 'able you to realise such a respectable produce as you did last year, 'upon the advances to which you were limited.' They then stated their intention to relieve the account for that year from all charge of interest. 'Farther, to encourage a continuance of those exer- 'tions, which we have witnessed with so much pleasure, and which 'we do not despair of yet effecting your emancipation, we intend

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'that the balance of the account, which we now send you, shall be 'relieved from interest altogether for the future, and that the new 'account shall go on at 8 per cent.'

No interest was charged on the balance during Dr Glas's lifetime. A new account was opened in 1820, on which interest was charged at 8 per cent.; and at 30th April 1822, a considerable balance in Dr Glas's favour on the new account was applied in diminution of the old debt.

Dr Glas died in August 1822. The old balance was gradually diminished by various recoveries from his estate in India. At 27th February 1827 the balance in favour of Palmer and Company was 95,583 rupees. No yearly accounts had been rendered, nor any demand made on Dr Glas's representatives in this country.

In February 1827, Palmer and Company brought an action against Walter Stirling Glas, as representing his father, Dr Glas, for 78,312 rupees, or L. 7835 sterling, with interest from the date of the action, at the rate of 10 per cent., according to the usage of India; and in 1829 raised a supplementary process, founded upon an account brought down to 30th April 1827, corrected in two entries, and in the statement of interest, and concluding for the balance of 95,583, S. R., or L. 9558 : 6 : 4, with interest at the rate of 10 per cent. from the 30th April 1827. The processes were conjoined and remitted to an accountant, to whose report, on the question of interest, the defender and his trustee objected; 1. That from April 1820 interest ceased on the account then due, not only during Dr Glas's life, but after his death, until a demand was made. 2. That when interest was chargeable, it was by contract not higher than 8 per cent. 3. That an annual accumulation of interest is inadmissible after Dr Glas's death, no account having been rendered or demand made. 4. That after the debt became Scotch, by being transferred against a Scotch debtor, no higher interest than 5 per cent. was chargeable.

After hearing parties, the Lord Ordinary found, that the 'pur-'suers were not entitled to have the interest accruing on the true 'debt, as it stood at the date of the execution of the original sum-'mons in this action, accumulated annually into a capital sum pos-'terior to the said date, but are only entitled to simple interest 'from the execution of the summons, till decree, and thereafter till 'payment, at the rate of 5 per cent.'

Note.—'The question of interest, in the different views taken, 'has appeared to the Lord Ordinary to be the only doubtful point.

'1. The most important question is, Whether any interest is 'chargeable on the old account, which, in reality, seems to be the 'whole account, the balance creating the debt at Dr Glas's death

being wholly traceable to that. The plea is, that there was an express contract that no interest should be charged, which, if correct, would not be at all obviated by the prospective bond of 1814. And there certainly was an engagement of a certain sort, which was acted on during Dr Glas's life, to state no interest on that account. But the question is, Whether, attending to the considerations on which that engagement proceeded, it could operate, or be intended to operate, after the debtor's death. For the reasons stated by the accountant, the Lord Ordinary thinks that it could not be so meant, and could not take such effect in law; and he should have thought this clear but for the one fact, that the pursuers themselves, when they raised their original action in 1827, four years after Dr Glas's death, charged no interest on the account. It is difficult to relieve the case of the impression created by this fact, that they acted under the idea that this was the meaning, and understood effect of their contract with Dr Glas; and the Lord Ordinary cannot say that all doubt is removed from his mind on this point. But, on the whole, he is of opinion that, if looking at what was actum et tractatum by the writings and accounts with Dr Glas himself, the stipulation could only be held legally to extend to his lifetime, the pursuers, though, in the hope of payment, they might apply it at first beyond its strict limits, ought not to be precluded from reverting in proper time to their legal rights, more especially in constituting their debt with a view to a mere ranking on a bankrupt estate.

'2. The Lord Ordinary thinks it a doubtful question, whether there should be any annual accumulation after the death of the debtor. But, on the whole, he thinks that this must be admitted as long as the debt continued to be purely an India debt.

'3. But he is of opinion that annual accumulation ought not to be allowed after an action was brought for payment of it in this Court, and against the holders of Scotch funds. If decree of constitution had been immediately obtained, there could have been no subsequent accumulation on that decree simply, however long the debt might have remained unpaid; and though the case has gone into discussion, the Lord Ordinary can see no good reason why there should be annual accumulation in this case, more than in any other action on an open account. But what confirms and determines his opinion on this point is, that the case of Kibble against Graham, and afterwards Graham's trustees, in which the mode of charging interest upon an India debt was very particularly laid down by Lord Chancellor Eldon, no accumulation was allowed after the date of the action. This might be inferred from the terms of the judgment itself, as quoted by Mr Shaw, in the

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'report of the case, Nov. 23. 1827. But the Lord Ordinary, upon 'inquiry, is assured that it was so in fact. The mercantile ac- 'counts were accumulated annually till the date of the action. But 'the libel contained no conclusion for accumulation after its date; 'and the point having been expressly stated in the appellant's case 'to the House of Lords, the special judgment pronounced on 21st 'July 1820 clearly did not sanction such accumulation; and nei- 'ther was it admitted by the subsequent interlocutors of Court.

'4. The Lord Ordinary would have had doubt as to the con- 'tinuance of the charge of 10 per cent. after the action was in 'Court; but he considers that point to have been settled by the 'decision in the case Kibble v. Graham's trustees, Nov. 23. 1827, 'under the previous judgment of the House of Lords, above re- 'ferred to.'

The pursuers acquiesced in that part of the interlocutor which disallowed the accumulation of interest after the raising of the summons, and limiting the interest after that date to 5 per cent.

The defenders *reclaimed;* and the *Court* ordered minutes relative to two points; 1st, The pursuers' claim to any interest on the balance due by Dr Glas, in consequence of the letter of Palmer and Company in 1820, agreeing to abate interest; and, 2dly, The pursuers' claim to accumulate interest annually between the period of Dr Glas's death and the raising of this action.

The following opinions were given at the advising:

Opinion of Court.

Lord Justice-Clerk.—I can discover no grounds for altering the interlocutor. The most authentic information and evidence has been obtained that the account stands fairly in the books of Palmer and Company. Then, as to the question of interest, I must say, looking to the correspondence, that the meaning of Palmer and Company, in their letter to Dr Glas in 1820 was, that being highly satisfied with his exertions to relieve himself from his embarrassments, and as he was contriving to pay large premiums on insurances, they agreed not to charge interest on the account. The balance, relieved of interest, was accordingly carried to his debit. Their object plainly was to stimulate Dr Glas to farther exertions. But on Dr Glas's death the situation of matters was altered. Palmer and Company became creditors on his estate, and were entitled to avail themselves, like other creditors, of their undoubted right to charge interest. As to the rate of interest, and mode of accumulation, the accountant has most properly satisfied himself by inquiry of the accuracy of the account, and its exact conformity to the practice in India.

Lord Medwyn.—I concur on both points. The right of Palmer

and Company to charge interest has been put by your Lordship in the proper light. The letter of 1820 was the result of what was considered a good arrangement, and written expressly with the view of inducing Dr Glas personally to make every exertion to reduce the balance standing against him. On his death, when of course the personal exertions to reduce the debt ceased, they were entitled to betake themselves to the rights of all creditors. With regard to the accumulation of interest, it appears to me that Indian merchants or agents are just like the bankers of this country. It has been argued in the minutes that bankers are entitled to accumulate interest, because they render their accounts annually, and that here the accounts were not so rendered. But the ground on which I consider that bankers are entitled to accumulate interest is this,—they balance their books, and accounts are made up at a particular period every year, and all who deal with them know, or are bound to know this practice. I am not aware of any case in which a banker has been refused an accumulation of interest because an account had not been rendered. Where a debt is not paid, but is running on in the books, the banker is entitled to bring this account to a balance every year, the necessary consequence of which is to accumulate the interest. In Captain Cruickshank's case, which we disposed of lately, no account had been rendered for four years, yet the British Linen Company were allowed to charge interest on the account as it stood balanced in their books.

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Opinion of Court.

Lord Glenlee concurred.

The *Court* refused the note, and remitted to the Lord Ordinary, reserving the question of expenses.

Judgment.

Lord Ordinary, *Moncreiff.* For Pursuers, *Cuninghame.* *J. & C. Nairne*, W. S. Agents. For Defenders, *Penney.* *R. Roy*, W. S. Agent. *F.* Clerk.

R.

SECOND DIVISION.

No. XXXIV. *27th January* 1835.

SAMUEL M'KNIGHT AND JAMES MURE
against
WILLIAM GREEN AND SAMUEL GREEN.

DILIGENCE, LEGAL.—*Held, in regard to an execution of poinding, which contained in gremio a schedule of the poinded goods, and the appraised values, that it is not a nullity fatal to the diligence, that the*

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messenger did not state in his execution that he had left a note of the appraised values with the debtor or custodiers, but merely a copy of intimation of the execution, containing a note of the effects poinded.

In June 1833, W. and S. Green used arrestments of effects belonging to W. A. Clarke, for a debt of L.30 : 5 : 6, and thereupon brought a process of forthcoming before the Steward of Kirkcudbright, to which Samuel M'Knight and James Mure, who were posterior arresters, were cited as parties. In October 1833, M'Knight and Mure poinded the arrested and litigious effects, and obtained a warrant of sale. W. and S. Green applied to the Steward for a recall of the warrant, and for an interdict, on the ground of their previous arrestments, and various nullities in the execution of the diligence. One of the objections to the diligence was, that 'no schedule of poinding, with a note of their values, was delivered to, or 'left for any of the persons in whose custody the same were poinded.' The messenger's execution bears in gremio a list of the effects poinded, including the appraised values, and concludes thus: 'And I made, 'subscribed and left for the said W. A. Clarke with his wife, within 'the house in Castle Douglas occupied by her and his family, and 'I delivered to each of the said Allan Bell and Alexander Johnston, 'both personally apprehended, and left for the said Samuel Mouncy 'with his maid-servant, within his dwelling-house in Castle Douglas, 'to be given to him, because I could not apprehend him personally, 'a just copy of intimation of the execution of the said poinding, 'containing a note of the effects poinded respectively in their possession; which schedule of poinding and copies were duly subscribed,' &c.

The Steward-depute at first found, that such of the objections as did not appear ex facie of the execution could be insisted in only in a reduction; and after a record had been closed upon the objections appearing ex facie of the proceedings, he found (8 May 1834) the execution irregular on two grounds; one of which was, 'that the 'execution does not bear that a note of the appraised values of the 'poinded goods was left with the debtor, or those in whose custody 'the goods were, but merely a note of the goods themselves, and 'therefore continues the interdict.'

An advocation having been brought by M'Knight and Mure, the Lord Ordinary (12 Nov. 1834,) advocated the cause, and recalled the interlocutor of the Steward, and found, 'that it is not a 'nullity fatal to the diligence, that the messenger did not state, in his 'execution, that he had left a note of the appraised values with the 'debtor, or custodiers.' His Lordship stated in a note, that he 'can 'find no case where it has been held that the omission to state, in 'the messenger's execution of poinding, that he left a note of the

'appraised values with the debtor or custodier, is a nullity of the 'poinding. No such nullity is declared by the bankrupt statute; 'and as this is a part of the procedure by the messenger, after he 'has so far completed the poinding, and declared the pointed effects 'to be the property of the poinding creditors, the Lord Ordinary 'is not inclined to hold that the proceedings are null on account of 'this omission. It is true, that for the omission of what may be 'thought even of less importance, it has been sometimes held that 'an inhibition is null. It having been so decided, these precedents 'must be followed; but there is no ground for extending such criti-'cal effects to another species of diligence; and there is this diffe-'rence, that the diligence of inhibition enters the records, and affects 'the landed rights of the country, and it may be held that more than 'ordinary precision is requisite for securing the effects of such dili-'gence.'

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The respondents *reclaimed*, and also brought a reduction of the diligence. The Court ordered minutes chiefly as to the practice. It appeared from the minutes, that no uniform rule is observed by messengers in this part of their executions.

Opinion of Court.

Lord Justice-Clerk.—We allowed minutes as to the alleged practice of messengers, and now I see no grounds for altering the interlocutor. There is no formula in the bankrupt act for messengers' executions, and no two messengers concur in the wording of this part of their executions. The bankrupt act requires, that the pointed goods shall be left in the hands of the debtor, with a schedule of the poinded goods, containing a note of the appraised values; but it does not require that a schedule *and* a note of the appraised values shall be left, nor does it declare that the omission to leave two separate documents creates a nullity in the poinding. If the schedule contain a note of the poinded effects and of the appraised values, it is sufficient. Erskine, whose authority has been observed by the framers of the bankrupt act, says expressly, 'that after the poinding 'is completed, the messenger ought also to deliver to the debtor 'a copy of the warrant and its executions, containing a full note of 'the appraised values;' iii. 6. 24. Now, giving this execution fair play, there is nothing omitted which the statute requires. The execution plainly contains a schedule of the effects poinded, with their appraised values; and also bears substantially, that this was left with the custodiers of the goods.

Lord Glenlee.—I agree. It will still be competent in the reduction to shew that no schedule was left, or that it did not contain a note of the appraised values.

Lord Meadowbank.—I am of the same opinion.

Lord Medwyn.—I adhere to my opinion formerly given. The

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error into which the respondents seem to fall, is in supposing that the statute requires two documents to be left. Now it is sufficient if the schedule which is left contain a note of the appraised values, which the schedule here plainly does. Poinding is not like an inhibition or arrestment, where the written instrument lays a nexus on the property of the debtor. A poinding is a decree enforced by certain forms; and in so far as regards the written instrument left with the debtor or custodier of the goods, its object is different from the execution of an inhibition or arrestment. Erskine says, that 'if no offer be made of payment or consignation, the messenger ought to adjudge the goods to the creditor at the appraised 'values, and deliver them over to him; which adjudication and delivery vests the creditor in the full right of them, and completes 'the diligence;' and that after the poinding is thus completed, he must leave a schedule of the poinded goods and values. The bankrupt act says the same. The copy is not left for the benefit of the debtor, but for that of the creditor, that he may have a claim for double the value of the goods carried off; and if any error is committed, he may perhaps lose this benefit; but it is not so clear that it would altogether vitiate the poinding, these values being always in the executions returned. A defect here is not one of the cases in which the explanatory Act of Sederunt 1805 holds the diligence as only inchoate.

Judgment. The *Court* adhered, and found expenses due.

Lord Ordinary, *Medwyn.* For Advocators, *Graham Bell. John Ronald*, S.S.C. Agent. For Respondents, *Marshall. W. Dalrymple*, S.S.C. Agent. *F.* Clerk.

R.

SECOND DIVISION.

No. XXXV. *27th January* 1835.

F. W. CLARK AND SPOUSE
against
BURNS AND OTHERS, WRIGHT'S REPRESENTATIVES.

PROVISION TO HEIRS AND CHILDREN. — CLAUSE.—PROOF.— *A party having, by an antenuptial contract, discharged her legal claims to legitim and dead's part, in consideration of certain provisions, consisting partly of bonds and sums payable at her marriage, and partly of several specified bonds for money lent out by her father*

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in her name, and to which she was to be entitled at his death, in the event of his dying intestate, and which together were declared to form her patrimony; and it having been also declared, that the sums payable at the marriage, the provisions to be made in her father's settlement, 'or in place thereof, the sums which may be outstanding 'in her name in the above securities at his death, shall be accepted' in full of her legal claims, the good will of her father to make farther provisions excepted; and the father having died intestate, and two of the bonds in the daughter's name having been paid up before his death,—held, in a question with the other representatives, that she was entitled to found on certain letters, and holograph memoranda by the father subsequent to the contract, as collateral evidence in regard to the import of the deed, and of his understanding and intention that she should receive the full amount of the securities therein specified, including the amount of the bonds paid up previous to his death.

James Wright, writer in Stirling, was possessed of considerable property, both heritable and moveable. He was in the practice of lending his money on bonds, payable to himself, jointly with one or other of his children. He had a son, (who predeceased him,) and three daughters.

Diana, the youngest daughter, was married, in 1818, to Dr Stewart of Perth. By antenuptial contract, Mr Wright became bound to give her a portion of L.4000, which was declared to be 'in full 'of her legitim and bairn's part of gear, her father's good will ex-'cepted.' Mr Wright accordingly assigned securities to the amount of L.4000 to Dr and Mrs Stewart, and they granted a discharge of the obligation in the marriage-contract 'for L.4000, 'being the sum payable to us by the said James Wright, in our 'contract of marriage, as the patrimony of his said daughter.'

In May 1825, Francis W. Clark became clerk to Mr Wright, and soon after married Agnes, the eldest daughter. Mr Wright executed a disposition, conveying absolutely to Mrs Clark (exclusive of the jus mariti) certain bonds and securities to the value of L.6125. The deed contained no declaration that these provisions were in full of her legal claims. On 14th November 1825, Mrs Clark, in a letter to her father, acknowledged receipt of the interest due on one of the bonds assigned to her; 'which bond, and instru-'ment of sasine thereon, you lately conveyed to me in part of my 'patrimony.' Mr and Mrs Clark lived with Mr Wright, who, in September 1825, assumed Clark as a partner in business.

In January 1828, Mary, the second daughter, was married to the Rev. John Burns. By an antenuptial contract, to which Mr Wright was a party, Mr Burns conveyed his lands of Garvald to Mrs Burns,

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her heirs and assigns, reserving his own liferent; and Mr Wright became bound to pay to Mrs Burns, on her marriage-day, L.3020, excluding the jus mariti. Mr Wright farther declared, 'that over 'and above the foresaid sum of L.3020 sterling, the said Mary 'Wright shall receive at his death whatsoever farther provisions 'he may think proper to give her under his settlements; and in 'the event of his dying intestate, and without making a settlement 'quoad her, he thereby declares that she shall be entitled to the 'various sums of money standing in her name in the after-mentioned 'bonds and securities; *first*, In the one-half of the sum of L.2250 'sterling, secured over the estate of Leitchtown, and conveyed by 'her father to her; *second*, In the one-half of the sum of L.1200 'sterling, contained in Messrs and Mrs Fletcher of Edinburgh's 'personal bond; *third*, In the half of an heritable debt of L.1100 'sterling, secured over the estate of Balhaldies; and, *fourth*, In the 'sum of L.400 sterling, secured over Silvermills, near Edinburgh, 'making in whole the sum of L.2675 sterling, which, with the sum 'of L.3020 sterling, now advanced, makes her patrimony to be 'L.5695 sterling; which sum of L.3020 sterling, the additional 'provisions to be made for the said Mary Wright in her said fa-'ther's settlements, or in place thereof, as before mentioned, the 'sums of money which may be standing in her name in the above-'mentioned securities at the time of his death, she, the said Mary 'Wright, and her said intended husband, the said Rev. John Burns, 'hereby accept of as in full satisfaction and payment to her, and her 'said intended husband, of all bairn's part of gear, legitim, portion-'natural, executry, and every other thing else that she or he might 'ask or crave of the said James Wright her father, or his represen-'tatives, through his death, or the death of the said Mary Powell, 'his spouse, or in any other manner of way whatever, unless her said 'father shall be inclined, from good will and favour towards his said 'daughter, to make any farther provision in her favour.' It was farther expressly provided and declared, 'that the parties to this con-'tract bind themselves and their foresaids to the following effect, that 'in the event of the said Mary Wright dying without issue being 'procreated of the present intended marriage, or, if procreated, that 'they should die without leaving heirs of their bodies, then, and in 'that case, the fortune of the said Mary Wright, consisting of the 'said sum of L.3020, and what she may succeed to by her said 'father's settlements or otherwise, at his death as aforesaid, shall be 'divided into two parts and equal halves,' Mrs Burns being entitled to dispose of a half, the other half going to Mr Burns and his heirs.

Mr Wright reserved power to uplift the money contained in the

said securities, and to alienate and convey the same to whom he might think fit. Mrs Burns, with consent of her husband, granted a discharge to her father 'of the L.3020, and of all claims following 'thereon, as well as of the said contract of marriage itself, in so 'far as it relates to the said obligation for payment of the said sum 'of L.3020 sterling.'

Of the above securities, standing in the name of Mrs Burns, the Silvermills bond for L.400 was paid up on the death of the borrower in 1829. As that bond had been taken in the joint names of Mrs Burns and her father, he wrote to her on 7th May 1829, informing her that her concurrence to the discharge would be necessary, and adding, 'Rest assured, how soon I find an eligible secu-'rity, the L.400 will be lent out in my name and yours, as in the 'present bond over Silvermills, that is, to you and your heirs after 'my decease;' and he expresses his disappointment that the loan had not been more permanent. Mrs Burns hesitated to sign the discharge, requesting from her father 'an obligation on stamped 'paper, that the said sum shall still be considered as part of my 'patrimony, as mentioned in the contract.' Mr Wright, in reply, wrote to his daughter: 'It was no wish of mine to uplift the L.400, 'on the contrary to remain till my decease; but the borrower ha-'ving died, and intimation made, I had no alternative. You will 'see from your contract of marriage how anxious I was to bind 'myself to fulfil that obligation on me at my decease, and that you 'are bound to cooperate with me in satisfying borrowers when they 'will no longer keep my money; but I presume you had not exa-'mined the contract when you wrote me, because it is on stamped 'paper, and duly recorded, and equally binding on me as on you, 'and therefore I annex you a copy of that part of it which relates to 'this business.' Mrs Burns again wrote to her father, that 'You 'assured me not only when alone, but in the presence of others, 'that it (the contract) was verbatim with Mrs Clark's; and you add-'ed with emphasis repeatedly, that you would never make me worse 'than Mrs Clark, and that we should never regret having trusted 'you.' He again wrote to her: 'You never were more foolish 'than at present. Please return the discharge, signed or unsigned.'

The Leitchtown bond for L.2250 had, previous to their respective marriages, been conveyed to Mrs Clark and Mrs Burns, in equal proportions. Mrs Burns's share formed part of the provisions payable to her on her father's death. The bond was called up in 1830, and the money not reinvested. One-half of the money, however, was deposited in bank upon a receipt in name of Mrs Clark, the other half merged into Mr Wright's personal estate. The se-

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curities outstanding in Mrs Burns's name, at her father's death, were thus diminished to the extent of L.1525.

Mr Wright died intestate, no will having been found. In his repositories were found two holograph jottings or memoranda, one of which, bearing the apparent date 23d Jan. 1828, states the L.3020 payable to Mrs Burns on her marriage-day, and the discharge of that sum, and concludes with a statement of the items and amount of other sums payable, beginning thus:

'Payable to her, at her father's death, by her contract of marriage—

'1. The half of L.2250, which was secured on the estate of 'Leitchtown, - - - - L.1125 0 0

(Then follows two other bonds amounting to) 1150 0 0

'4. The sum that was secured on the lands of Silver-'mills, but which was obliged to be received by 'Mr Wright at the death of the borrower in 1829, 400 0 0

L.2675 0 0

and which is added to L.3020, making L.5695.

On the other holograph memorandum, in which Mr Wright states the items of the provisions of L.6125 in Mrs Clark's favour, there is a marking by him thus:

L.6125
5695

L.530

Matthew, the son, died in January 1831, and Mr Wright, the father, in May 1831. His daughters made up titles as heirs-portioners to his heritable property, which was worth from L.2000 to L.3000. The bonds, standing in the names of the three daughters respectively, became payable to them without dispute. The residue of the personal estate was valued at about L.14,000. In order to determine the respective claims of the daughters several actions were brought. Actions of multiplepoinding were brought in name of Major Dundas, a debtor in one of Mr Wright's bonds, and by Mrs Burns and Mrs Stewart, in name of Mr and Mrs Clark; and an action of count, reckoning and payment was brought by Mrs Clark and husband against her two sisters and their husbands. These actions were conjoined, and a record made up, and cases ordered.

Mrs Clark's Pleas.

Mr and Mrs Clark *pleaded*—1st, That Mrs Stewart had, by her marriage-contract, discharged her claim of legitim, in consideration of the sum of L.4000 paid to her by her father at her marriage.

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2d, That Mrs Clark had not discharged her claim either to legitim or dead's part, to both of which she has still right, over and above the provision of L.6125 already received; and, 3d, That Mrs Burns, by her contract of marriage, discharged all claims of every description against her father's estate, whether for legitim or dead's part, or any thing else; and that Mrs Burns was not entitled to L.1525, being the difference betwixt the amount of securities standing in her name at the marriage and at her father's death.

Mrs Clark's Pleas.

Mr and Mrs Clark accordingly claimed one-half of Mr Wright's personal estate as legitim, and also the half of the executry or dead's part, as divisible equally betwixt Mrs Clark and Mrs Stewart.

Mrs Burns's Pleas.

Mr and Mrs Burns *pleaded*—1. That the provisions in the marriage-contracts by Mr Wright, in favour of his daughters, were intended to be in full satisfaction of their respective patrimonies, and that they were accepted under this condition. 2. That by giving effect to the onerous stipulations in her marriage-contract, Mrs Burns is entitled to rank for L.1525, being the difference betwixt the sums actually received by her, and those stipulated to be paid by that deed.

Mrs Stewart's Pleas.

Dr and Mrs Stewart *pleaded*—1. That all the daughters having received provisions which were intended to be in satisfaction of legitim, the whole free personal property became executry, and divisible equally among the three sisters. 2. Supposing Mrs Clark did not discharge her claim to legitim, she is bound to impute, in extinction of that claim, the sums of money or bonds assigned to her by her father in contemplation of that marriage. 3. Supposing Mrs Burns to have discharged her claim to dead's part, the half thereof will fall to Mrs Stewart, the other half to Mrs Clark.

The Lord Ordinary made avisandum with the cases to the Court, and explained his views of the whole cause in the following

Note.—'Though the Lord Ordinary heard counsel in this case 'at great length, the debate was not concluded when the cases 'were ordered. And, as the papers are all already printed, they 'may be boxed immediately, and a judgment of the Court at once 'obtained.

'In the shape in which the case stands upon the record, there 'can be no doubt, 1. That all insinuations as to the capacity of Mr 'Wright are totally irrelevant. 2. That all insinuations as to any 'of the deeds having been fraudulently obtained or executed are 'equally irrelevant. 3. That all statements directed to the suppo-'sition that there may have been a deed of settlement of Mr Wright 'which has not been discovered, are also irrelevant and out of place;

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'and, 4. That, in regard to all the facts on which the material questions between the parties arise, they appear to be sufficiently agreed upon, or ascertained by the documents in process.

'The Lord Ordinary will only intimate his impression with regard to the general character and leading points of the case.

'He is of opinion that it is a case which must be determined according to established rules of law. It is not for the Court to consider what Mr Wright ought to have done in the distribution of his property;—what it might have been natural for him to do;—whether in the result the distribution is fair and equal or not, or any such question. The single question is, what Mr Wright has done, whether in transacting with his daughters and their husbands, or by any testamentary instrument. There is no testamentary deed or writing produced; and therefore the case altogether depends on the deeds and transactions inter vivos between Mr Wright and the present parties respectively.

'And it does appear to the Lord Ordinary, that, as upon the marriage of each of the parties regular deeds were executed, the questions arising ought to be determined according to the legal import and effect of those deeds. He does not think that any of the parties gain much by the reference to other writings: But if he were to decide the cause, he should think it his duty to regulate his judgment by the deeds regularly executed, except, perhaps, in one minor point, where certain holograph letters may deserve consideration.

'1. It is too clear for argument, that all claim to legitim by Mrs Stewart is effectually discharged. Unless the law is to be rescinded, the contrary cannot be maintained.

'2. The Lord Ordinary thinks it equally clear, that all claim of legitim by Mrs Burns is also effectually discharged. A very anxious attempt is made to maintain, that the express discharge in the deed is qualified by a condition, that either the securities, then standing in the name of Mrs Burns, should be preserved to her, or that an equal sum should be settled to her by the voluntary deed of Mr Wright. The Lord Ordinary is unable so to construe the marriage-contract, which appears to him to be clear and unambiguous, giving the L.3020 absolutely to Mrs Burns, and leaving the other sum of L.2675 dependent on the will of Mr Wright. But if there be any claim to the full amount of that sum, it would still be only a claim to be made available at the death of Mr Wright, and not a condition, which, on the change of the securities, would extinguish the discharge of the legitim.

'3. Neither is the Lord Ordinary able to see any legal ground for holding that Mrs Burns's claim to a share of the dead's part

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'is not also discharged. That a child's claim to dead's part may be 'discharged, is settled by all the authorities. That the terms execu- 'try and dead's part are considered as synonymous in such a deed, is 'also clear from the authorities quoted, and particularly the case of 'Campbells v. Lady Inverliver, July 21. 1738, as reported by C. 'Home and Kilkerran. And the purpose of any such discharge must 'always be to provide for the very case of the father dying intestate. 'If there be ground for claiming the sum of L.1525, which was 'paid up to the holders of the securities, it must be on a different 'ground from any qualification of the express discharge of the exe- 'cutry.

'4. The Lord Ordinary thinks it a question fairly open to argu- 'ment, whether that sum of L.1525 may be justly claimed as sur- 'rogatum, or something like surrogatum, of the sums in the securi- 'ties, which were called up by the creditors, and not paid up vo- 'luntarily by Mr Wright, upon the presumed intention of Mr 'Wright in the marriage-contract, and the admitted circumstances 'under which he so put an end to those securities. But the Lord 'Ordinary must confess, that, if it be held that the executry is dis- 'charged by the marriage-contract, he should find great difficulty in 'seeing a safe and solid legal ground for coming to this conclusion; 'because he thinks that every thing, as to the sums mentioned in 'the marriage-contract beyond the L.3020, depended on the will 'of Mr Wright, and that he has not expressed any such will in 'any legal form. At the same time, Mr Wright's letter of the 7th 'May 1829, at least with regard to the L.400, may be admissible 'in this particular point, and may be deserving of the serious con- 'sideration of the Court.

'5. The Lord Ordinary is of opinion, that, according to the terms 'and legal import of the deed in favour of Mrs Clark at her mar- 'riage, the acceptance of the provisions thereby made in her favour 'cannot be held to import a discharge of the legitim. The rule is 'fixed, that legitim is not discharged by implication; and there are 'no words in this deed which have ever been held to import a dis- 'charge of legitim. And, although there is much argument used 'by both parties on this point, the Lord Ordinary is not able to find 'authority for holding, that without any words of discharge, a dis- 'charge may be inferred from collateral circumstances, while the 'circumstances relied on are also of very doubtful effect.

'6. The Lord Ordinary is of opinion, that if the legitim has 'been discharged both by Mrs Stewart and Mrs Burns, Mrs Clark 'is not bound to collate her special provisions before claiming legi- 'tim; because 'collation is admitted only among those who are en-

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" titled to a legitim;' *Ersk.* iii. 9. 25; and farther, that collation ' does not take place as to the dead's part.

' There are some other points of less importance discussed in the ' cases; but the Lord Ordinary does not think it necessary, in re- ' porting the cause, to express any opinion concerning them. The ' case is certainly a hard one, especially in regard to Mr and Mrs ' Burns; but the Lord Ordinary would be afraid of shaking well- ' established principles and rules of law, in yielding to such feel- ' ings of hardship, or judging of the effect of solemn deeds by loose ' notions of what it may be thought would have been equitable or ' fair. No result could possibly have been more opposite to the ' admitted intention of Mr Hogg of Newliston, than the decision ' by which the one-half of his moveable estate was adjudged to Mrs ' Lashley exclusively as legitim, in respect of the discharges grant- ' ed by his other younger children.'

Pleaded for Mr and Mrs Burns.

Dean of Faculty, for Mr and Mrs Burns.—The Lord Ordinary had stated in his note, that the debate had not been concluded, when cases were ordered. He had not been heard. There was only one point to which he would direct the attention of the Court, viz. the consideration, in respect of which Mrs Burns had granted the discharge of her legal rights by her marriage-contract. He would assume that the construction put upon the contract by Mrs Clark was correct; the question remained, what, in the fair meaning of the agreement, was the consideration intended to be given to Mrs Burns in return for this discharge.

The argument now to be stated in regard to the extent of Mr Wright's obligation, would strike the mind better by reference to the terms of the deeds. The Lord Ordinary had somewhat misapprehended the use intended to be made of the holograph writings subsequent to the date of the contract. It was admitted, that writings prior to the date of the contract could not be looked to in order to explain the actual contract. But the father was a party to the deed, and acknowledgments by a party subsequent to the date of the contract might be taken into account in interpreting the obligation. As the contract was Mr Wright's onerous deed, and contained an important provision undertaken by him in favour of his daughter, it was competent to ascertain, by collateral evidence, what his understanding of its import was. The burdens created in Mrs Burns's favour in the contract, and the enumeration of the bonds, show the opinion of the father as to the extent of the provisions in her favour, and indicate the specific sum she was to receive in the event of his intestacy. The reservation of the power to make farther provisions instructs, that the provisions actually contained in the contract form the least

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Pleaded for Mrs Burns.

she should receive, and creates no inconsistency in the argument as to what was actually fixed. A change in the securities, or the power of testing as to the particular sums, was in no respect inconsistent with the obligation to provide the specific amount stipulated in the contract. The regulating principle in all discharges betwixt parent and child is, that whatever is held out as the sum to be received, must, to the extent of that sum, be given; and the obligation is construed liberally in favour of the child discharging her legal rights. The conduct of the parties, on the calling up of the Leitchtown and Silvermills' bonds, also instructs that Mr Wright distinctly recognised the obligation to provide Mrs Burns to the full extent indicated by the contract.

The holograph memoranda are most important. The first bears date 23d January 1828. This is plainly in reference to Mrs Burns's marriage-day, and not the true date of the writing, the document bearing internal evidence of its having been written of a date at least subsequent to the paying up of the L.400 bond in 1829. On the back of it is written, 'Mrs Mary Wright, L.5695,' in Mr Wright's handwriting. It is plainly the writing of a man who intended and understood that L.5695 was the amount of the sums to be given to his daughter, and to all parts of which she was entitled. The holograph marking on the other memorandum, setting forth the amount of the respective provisions of the two daughters, the one being subtracted from the other, also demonstrates the father's understanding. From the correspondence no other conclusion can be drawn, than that he was confessedly bound, and intended to reinvest the monies unexpectedly paid up. The Lord Ordinary considers the point open as to the L.400, in consequence of Mr Wright's letter of 7th May 1829, which he holds to be admissible on this particular point, and worthy of the serious consideration of the Court. But there is no reason for thus narrowing the obligation on Mr Wright's part, or partially to admit this letter as an adminicle of evidence, when it is equally illustrative of Mr Wright's views and intentions as to the sums generally outstanding in the joint names of himself and his daughter. Mrs Burns does not argue that she has a separate claim to the L.400, but founds on the letter referred to, as showing the father's understanding as to the whole other securities.

Another principle might be urged. If no proper communication be made to the child, as to the equivalent to be given for the discharge of legal rights, the deed is reducible; (Fraser v. Fraser, Jury Court, Nov. 1830). To exclude a child from nearly a half of the stipulated provisions would not only be hard, but would be a case rendered purposely hard by the father himself.

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Pleaded for Mrs Burns.

Keay.—The question raised by Mrs Burns is, whether the assignation of securities, which she maintains to be absolute in her favour, was not a contingent assignment. The inclination of the Lord Ordinary's note is plainly adverse to her plea, and is fully borne out by the terms of the contract. What other construction can be put upon the conveyance of the securities to Mr and Mrs Burns, to which no doubt her father was a party, than that beyond the L.3020 her claim was contingent? She got that sum on her marriage, either in cash or equivalent securities; and for the farther securities outstanding in her name, she just took the chance of her father's good will. The deed is so expressed, and in fact all the children were in the same relative situation as to expectancy; the disappointment arising from his intestacy being more or less, according as each of the daughters had a larger or a smaller amount of securities standing in her name at the period of Mr Wright's death.

As to the case of Mrs Burns in particular, Mr Wright's provisions were on the whole liberal. His intentions at the time are not disputed. It is not even necessary to argue, that it was his voluntary act calling up the Leitchtown or Silvermills' bonds, or that he would not at the time rather have allowed these securities to remain, or that he was not anxious to reinvest the money. But any allegation of fraud on Mr Wright's part is out of question. Suppose the most deliberate wish on his part to reinvest these sums, it was not done. At his death, the securities standing in the joint names of Mrs Burns and her father were diminished by L.1525, and she must suffer accordingly. To go out of the contract,—to enter upon conjectural statements,—or to allow collateral and extrinsic evidence as to Mr Wright's intention, that sums to the amount of the securities outstanding at the time of the marriage should, at any rate, be payable to Mrs Burns, as if outstanding at the period of his death, is wholly inadmissible. She took her chance of getting L.2675 at her father's death; but she took her chance also of getting more or less, just as he should happen to die intestate, or to leave securities in her name to an amount exceeding or falling short of what he, no doubt, at the period of her marriage, and when he wrote the memoranda, fully intended to give her.

The cause stood over for advising.

Opinion of Court.

Lord Justice-Clerk.—After considering these cases, and the additional observations from the bar, I have no hesitation in saying, I concur in all the observations in the note of the Lord Ordinary, with the exception of the indication of his opinion as to Mrs Burns's provisions. There can be no doubt that both Mrs Stewart and Mrs Burns

discharged their legitim, and also that the share of executry is discharged by Mrs Burns.

The question as to Mrs Burns's claim to the full amount of the provisions in her contract is one of delicacy, and depends on legal and equitable considerations. I have formed a clear opinion as to the obligation undertaken by, and incumbent on the father. This marriage-contract was based on bona fides; and as there is no reason to think that one party meant to take advantage of the other, Mrs Burns is entitled, upon principles of equity, to claim what it was fairly the purpose and intention of her father to give. At the commencement of the contract we find, that 'in contemplation of the 'marriage,' and in consideration 'of the tocher after mentioned, 'given by the said James Wright to his daughter, Mary Wright,' Mr Burns dispones to and in favour of his intended wife, her heirs and assignees whomsoever, heritably and irredeemably, the lands of Garvald belonging to him, (then supposed to be worth about L.7000). Then come the provisions to Mrs Burns. There is the payment of L.3020 on the marriage-day; but, moreover, it is declared she shall be entitled, over and above the L.3020, to whatever farther provisions he may give under his settlement; and in the event of his dying intestate, 'he hereby declares, that she shall be entitled 'to the various sums standing in her name in the after-named bonds 'and securities.' Then there is an enumeration of these securities, 'making in whole the sum of L.2675 sterling, which, with the sum 'of L.3020 now advanced, makes her patrimony to be L.5695.' I lay great stress on the whole of this clause: it contains an express declaration, that over and above the sums paid down, she shall get what farther he may provide by his settlements, and, in the event of intestacy, that she shall have right to the sums contained in the securities enumerated. There was thus an assurance given, either that she would be farther provided for by his settlements, or, failing that, that she shall abide by the sums in the securities thereby provided. Thus there was a clear obligation undertaken by Mr Wright, in consideration of which his daughter gave up her legal rights. An ample consideration was given by the husband; and I cannot deal otherwise with this contract, than upon the principles of sacred justice; so that it is impossible, upon a fair interpretation of the deed, to found upon the renunciation of her legal rights, without taking the counter part into view. To say that no substantial benefit was intended to be held out, would be to attach blame, by showing that there was an attempt to deceive and impose upon the parties. I must just put that construction upon the contract, and the conduct of the parties, which does justice to all, and gives to the daughter the provisions her father intended.

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I agree with Mr Keay, that we ought not to allow letters which passed prior to the contract, to interfere with the deed. But in order to interpret the intentions of the parties in relation to the obligations in that deed, we are entitled, inter familiam, to look to every scrap of paper after the date of the contract as legitimate evidence. There is clear evidence of Mr Wright's understanding as to the obligations. The holograph memoranda found put up among his papers are important. The memorandum of Mrs Burns's provisions, the body and backing of which is holograph of Mr Wright, shews, 1st, that it was written of a date subsequent to the date of the marriage written on it; and, 2dly, Mr Wright's understanding as to his obligation when that document was written. It sets forth the particular sums 'payable to her at her father's death by her contract of marriage;' it enumerates among these the half of the 'bond for L. 2250, which was secured over 'Leitchtown;' and the sum 'which *was* secured over Silvermills, 'but which was obliged to be received by Mr Wright at the death 'of the borrower in 1829.' This document, indeed, falls little short of an actual settlement in Mrs Burns's favour, so clear and explicit is the meaning and import of Mr Wright's will therein set forth. The marking on the memorandum of Mrs Clark's provisions is also an important piece of evidence. Mr Wright there deducts the provisions of the one sister from those of the other. The correspondence at the time of the paying up of the Silvermills' bond clearly demonstrates also the fixed opinion of Mr Wright as to the binding nature of his obligation, from which the hasty expressions made use of by his daughter would not induce him to depart. In short, Mr and Mrs Burns surrendered their legal rights; the father, on the other hand, became bound to secure them in these sums, as their patrimony.

Lord Glenlee.—I must say I am rather inclined to agree in the views taken by the Lord Ordinary, both upon the case generally, and also in reference to Mrs Burns's claim to the L. 1525. The contract itself must mainly regulate the decision of this point. No doubt, certain provisions are conceived in Mrs Burns's favour, and partly paid at the time, and partly postponed, or rather reserved by the father, and depending on a contingent event. There is a declaration that Mr and Mrs Burns shall get any farther provisions he may give in his settlements, or, in the event of intestacy, the sums of money which may be standing in her name in the above-mentioned securities at the time of his death, reserving to himself, at the same time, power to uplift these securities, and taking her bound to concur. That was the consideration in respect of which the legitim and dead's part were discharged. If he failed to test,

or if he put the bonds in a different situation previous to his death, I do not see that Mr and Mrs Burns could help themselves. They had no doubt strong expectations of something being left, but they entertained that expectation under the chance that their father might disappoint them. Suppose Mr Wright had, by a will, left Mrs Burns a small sum, could she have objected? The result we arrive at is this, what part of these securities, in which Mrs Burns had an interest, was truly outstanding at Wright's death? The correspondence does not alter my views of the obligation. Upon the occasion of one of the bonds being paid up, the daughter remonstrates for farther security, or an obligation on stamped paper. He refuses, and refers her to the contract itself. As to the Leitchtown bond, he says he did not wish to uplift it; but he does uplift it, and the proceeds, or at least Mrs Burns's share, (for the Clarks looked better after their interest,) became mixed with his other cash, and was no part of any outstanding security at the time of his death, but is really and truly part of his personal estate now to be distributed.

Lord Meadowbank, not having been present at the discussion at the bar, gave no opinion.

Lord Medwyn.—The opinion which I have formed upon this case coincides with what has fallen from the chair.

Upon the main points involved there is little difficulty. It is clear that Mrs Clark did not discharge either her share of the executry or legitim; that Mrs Stewart did discharge her right to legitim, but not to her share of the executry; and that Mrs Burns, in consideration of certain provisions, did discharge both these claims.

But the inquiry remains, how effect is to be given to the provisions in Mrs Burns's favour, in respect of which she certainly discharged her legal rights. Now, looking to the marriage-contract, it appears, that besides the sums, amounting to L. 3020, payable on her marriage, it was declared that she should receive, at her father's death, whatever farther provisions he might think proper to give her under his settlements; and 'in the event of his dying in-'testate,' he declared, that 'she shall be entitled to the various 'sums of money standing in her name in the after-mentioned bonds 'and securities.' Then there is an enumeration of the bonds, followed by these words, 'making in whole the sum of L. 2675, 'which, with the sum of L. 3020 sterling, now advanced, makes her 'patrimony to be L. 5695.' There would have been no difficulty if the clause had stopped here; but it proceeds thus, 'which sum 'of L. 3020, the additional provisions to be made for the said 'Mary Wright in her said father's settlements, or in place thereof, 'as before mentioned, the sums of money which may be standing 'in her name in the above-mentioned securities at the time of his

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'death, she, the said Mary Wright, and her said intended husband, 'hereby accept of 'in full of legitim, executry, or every thing else "she could claim of the said James Wright, her father, through "his death, or the death of her mother, or in any other manner of "way whatever, unless her said father shall be inclined, from good "will and favour towards his said daughter, to make any farther "provision in her power."

It has been said that any provision beyond the L.3020 thus depended essentially on the good will of the father. But the words referred to, I think, apply not to the provision of the bonds enumerated in the contract, but to the other, or farther provision which he reserved power to make, and which she was to receive instead of these bonds. But he made no new provision, and her claim stands on the marriage-settlement. Now, I do not think that the subsequent words, 'sums of money which may be standing in her name,' can control the prior destination to her of the enumerated bonds, which would not be a very reasonable construction of such a deed. I understand well the rule of law, that no proof by collateral circumstances can be allowed to control the terms of any writing where the meaning and intention of the parties is clear. But it is different where the object is to discover the intention of the parties; and it does appear to me that Mr Wright did not mean to depart from his original intention, or depart from his stipulation, to give Mrs Burns the specific sums provided in the contract. There is clear evidence that he did not mean to change the securities, so that they should not be standing in her name at his death, and repayment of the two was forced upon him by the creditors paying them up; and in the correspondence with his daughter, there is no indication of any change on his part. He was irritated, no doubt, and thought her ill advised in pressing him as she did for farther security; but still, it appears, he intended to reinvest the money in her name, thought himself bound to this, and tells her 'how anxious he was to do so.'

I lay great stress on the holograph memoranda. In one of these Mr Wright states, that the specific sums, amounting to L.2675, were payable by Mrs Burns's contract to her at her father's death; and it is clear, from the terms employed, that this memorandum was made subsequent to the payment of both bonds. In the other there is a clear indication of his estimate of the provisions of his two daughters, Mrs Clark and Mrs Burns, since the provisions or patrimonies of both are noted down, and the one deducted from the other. I think that it would have been unreasonable and unnatural, that a party giving up her legal rights should be defeated in obtaining what was provided, as the consideration in respect of which she alone surrendered those rights.

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Judgment.

The *Court* found, that Mrs Clark had not discharged her claim either to legitim or dead's part; that Mrs Stewart had discharged her claim of legitim; that Mrs Burns had discharged her claim both to legitim and dead's part, but that, 'over and above the sum 'of L. 3020 paid down to her on the day of her marriage, she was 'farther entitled, at her father's death, to claim the whole of the 'sums specially provided to her by her said contract, including 'therein the one-half of the sum that stood secured by bond over 'Leitchtown for L. 2250, and the whole of the sums of L. 400 se- 'cured over Silvermills, and that notwithstanding of any change in 'the state of these securities in the lifetime of her father;' and remitted to the Lord Ordinary to hear parties on the other matters in the conjoined actions.

Lord Moncreiff, Ordinary. For Mrs Clark, *Keay* and *Christison*. *W. Renny*, W. S. Agent. For Mrs Stewart, *Skene* and *More*. For Mrs Burns, *Dean of Fac. (Hope,)* and *Speirs*. *James Wright*, W. S. Agent. *T.* Clerk.

R.

SECOND DIVISION.

No. XXXVI. *28th January* 1835.

GEORGE, EARL OF DUNMORE, *against* COLIN MACINTURNER AND OTHERS.

ARBITRATION.—*Decree-arbitral reduced, in respect that an oversman took a final and important step in a submission in the absence of, and without notice having been given to one of the parties, or his known agent.*

IN 1821, the Earl of Dunmore and Mr Macinturner entered into a submission, for the settlement of all disputes relative to the marches of their respective lands in Argyleshire. The Earl named Archibald Currie, and Macinturner named Robert Harkness, as joint arbiters, to whom power was also given to appoint an oversman. Archibald Yuill, writer in Greenock, was appointed clerk to the submission. Duncan Paterson, writer in Inverary, acted as Lord Dunmore's agent in the matters submitted, his Lordship being resident at Dunmore Park in Stirlingshire. Mr Macinturner resided

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on his own property, and, being well acquainted with the subject-matter in dispute, had no separate agent.

In July 1821 the arbiters visited the ground, and led a proof as to the boundaries. Before any decree-arbitral had been pronounced, Currie, the arbiter named by Lord Dunmore, died, in August 1822. A few weeks before his death Archibald Fletcher was named as oversman, the arbiters having differed. Immediately before Currie's death, Lord Dunmore, being dissatisfied with the manner in which the nomination of the oversman had taken place, applied to the Sheriff, and obtained an interdict against Currie, Macinturner, Harkness and Fletcher, prohibiting their interference with the line of marches. This interdict was served on the three parties last named, and has never been recalled. Upon the petition being called in court, Fletcher obtained leave to retain it, and it has never been returned. Notwithstanding of the interdict, Fletcher accepted the nomination, and prorogated the submission.

In September 1824, Fletcher visited and inspected the lands in question, attended by Harkness, the surviving arbiter, and by Macinturner. No one attended in behalf of Lord Dunmore, and no notice of the intended perambulation was sent to his Lordship, or to his agent Paterson. The oversman, on the 17th September, mentioned to Peter Harvie, a superintendent of Lord Dunmore's farming operations in the neighbourhood, and who had previously taken no part in the proceedings, that he intended going over the ground on the following morning; but Harvie declined to attend. On leaving the ground, the oversman, along with Harkness and Macinturner, went to the house of the latter, when Yuill, the clerk, then drew up a minute, in terms of which the decree-arbitral was afterwards pronounced. Yuill sent a copy of this minute to Paterson, in a letter dated the 18th September 1824; and Paterson, in answer, wrote to the oversman, forbidding him from signing any decree-arbitral founded on the proceedings in his absence. After the lapse of two months, and without any farther visitation of the ground, the decree-arbitral was signed by the oversman.

Lord Dunmore brought a reduction of this decree-arbitral, founding on various alleged irregularities. A record, and additional record rerum noviter venientium ad notitiam, were made up. Among other objections, it was *pleaded* for the pursuer, that supposing the decree-arbitral pronounced by Fletcher to be otherwise unobjectionable, it was a sufficient reason for reducing it, that no one had been present in the pursuer's behalf at the perambulation of the marches, no instruction having been previously made to him or to his authorised agent; Heggie *v.* Stark and Selkrig, 1st Feb. 1825;

Pursuer's Pleas.

Sharp and others *v.* Byckerdyke, 3. *Dow's Rep.* 102; *Erskine*, (*Ivory*,) 1019, n. 194; Glennie, 24. Feb. 1825. Farther, the proceedings of the oversman and surviving arbiter, in the face of the subsisting interdict, were illegal.

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Answered—The overseer of the pursuer was bound to have been present, but failed to attend. Notes of the oversman's opinion were furnished to the pursuer's law-agent; but neither the pursuer nor his agent stated any objections to that opinion, nor demanded any other inspection of the ground, although the decree-arbitral was not executed till two months after Mr Paterson was certiorated of the oversman's opinion; Spearman *v.* Pitloh, 28th Feb. 1828.

Defenders' Pleas.

Farther, the interdict had lapsed before the proceedings of the oversman took place. Besides, the devolution being valid, the oversman could not, and ought not to have been interdicted from proceeding; Abbot *v.* Skelton, 12th May 1824; Fraser *v.* Gordon, 5th July 1834.

The Lord Ordinary having heard parties, held the facts relevant to reduce the decreet-arbitral; but appointed the pursuer to state, whether he demanded farther proof of averments not already admitted or proved scripto. His Lordship stated his views upon the whole case in a note. In reference to the above objections, he stated: 'The whole proceedings, at the second inspection, even as admitted, 'are inconsistent with the fair course of an arbitration. Without 'any previous notice to the known agent of the pursuer, who had 'charge of the business, and had attended before, the whole affair is 'transacted by the defender's agent, the arbiter named by him, and 'the oversman; and the attempt to get a tenant of the pursuer, 'who was known to have no charge, to attend on a moment's notice, 'only makes the matter worse.'

The pursuer renounced farther proof; but before the Lord Ordinary could decide the cause, he was succeeded by Lord Jeffrey, in the Reduction Roll, and therefore ordered cases, intimating, in a note, his 'decided impression, that sufficient grounds have been esta-'blished for reducing the decree-arbitral.' Lord Cockburn, who succeeded Lord Jeffrey, made avisandum to the Court with the cases.

Lord Justice-Clerk.—This is an important case in reference to decrees-arbitral. As farther proof has been waived, I shall lay out of view all objections founded on disputed and unadmitted averments. But there remain facts admitted clearly sufficient to entitle me to say, that the essential principles of justice have here been

Opinion of Court.

28 Jan. 1835.

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Opinion of Court.

overlooked. It is admitted that the oversman, accompanied by the surviving arbiter, and by Macinturner, the defender, a highland proprietor, versant in the whole matter, and knowing the ground well, did proceed to inspect the lands, without any notice having been given to the known agent of the pursuer. Harvie, to whom intimation is said to have been made, was merely the servant of Lord Dunmore. He had not previously taken any active part in the proceedings, and accordingly did not attend. Then, again, the inspection having been completed, the result is reduced into a minute or notes, which were afterwards embodied literatim in the decree-arbitral. And though Yuill communicated these notes to Paterson, who also wrote to the oversman, the gross injustice of these previous proceedings could not thereby be affected. Fletcher, instead of proceeding as he did, should have directed the clerk to intimate to Lord Dunmore or his agent, that on a given day he intended to inspect the marches. He should have certiorated the pursuer or his agent, that the minutes, if erroneous, must be objected to by a particular day. I am quite clear, then, that proceedings like these, carried on behind the back of Lord Dunmore and his agent, were contrary to the principles of fair dealing, and a gross violation of the principles of eternal justice, which Lord Eldon, in the case referred to, held to be indispensible in every case of arbitration.

Lord Glenlee.—I agree.

Lord Meadowbank.—I have no doubt whatever of the illegality of the procedure.

Lord Medwyn.—I am of the same opinion in regard to the nullity of the proceedings on the part of the oversman, because he took the final and important step in the submission, in the absence of, and without notice having been given to the pursuer and his known agent. There would have been no harm in the oversman taking Harkness, the surviving arbiter, along with him, provided Paterson also had been present in behalf of Lord Dunmore, when both parties might have given the necessary explanations. In short, Lord Dunmore's interest was completely overlooked; and the proceedings have not been conducted in such a manner as to secure the means of a fair award.

With regard to the interdict, the defenders are mistaken in supposing it had fallen. An interdict will fall to the ground, with the complaint on which it proceeds, if not called in Court within a year from its date; but if the complaint has been called in Court, it becomes a depending process, and may be revived at any time within forty years. Here it appears the complaint was called in Court, and the oversman took it to answer, so that the interdict did not fall; and it appears to be also a good objection to the proceedings,

that Fletcher went to the ground in the knowledge of it, and thus acted in the face of a subsisting interdict.

The *Court* decerned in the reduction.

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Judgment.

Lords Ordinary, *Moncreiff* and *Cockburn*. Act. *J. A. Murray* and *Jo. Tait*.
Tait & Young, W. S. Agents. Alt. *Dean of Fac. (Hope,)* and *Marshall*.
James Stuart, S. S. C. Agent. *F.* Clerk.

R.

FIRST DIVISION.

No. XXXVII. *29th January* 1835.

COLONEL ROBERT HENRY
against
DAVID BURNS, AND THE TRUSTEES OF THE DECEASED HENRY HEPBURN, AND DAVID HEPBURN.

ARBITRATION.—ASSIGNATION.—*One of the parties to a submission having, before decreet was pronounced, assigned all right which he had against the other in favour of a third party, with power to him to obtain decree in his own name, and the arbiters accordingly having, after an objection stated by the other party, pronounced their decree-arbitral in name of the assignee,—held, in an action of reduction thereof, on the ground of the incompetency of the proceedings, that it was competent for the arbiters so to give out their decree, and the defences accordingly sustained.*

THE defender, David Burns, acted for several years as agent for the pursuer, Colonel Henry, and in 1829 it was agreed that the accounts between them should be settled by arbitration; and a submission was accordingly entered into, (31st July 1830,) bearing, that the parties 'have submitted and referred, and hereby submit 'and refer all demands, claims, disputes and differences between 'them upon any account, occasion or transaction whatever, to the 'amicable decision, final sentence, and decreet-arbitral to be pro-'nounced' by the arbiters therein named. The deed contained the usual powers; and it was inter alia declared, 'that although either 'of the parties shall die before decreet-arbitral be pronounced in 'this submission, the same shall nevertheless continue in full force, 'and be, with the decreets-arbitral to follow hereon, binding upon 'the heirs and representatives of the party deceasing,' &c.

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The arbiters accepted of the submission. A variety of proceedings took place under it, and full notes were issued by the arbiters, containing their views of the respective claims of the parties. But, before decreet was pronounced, the present defender, Burns, (in February 1830,) granted an assignation of his claim against the pursuer to the late Henry Hepburn, and his heirs and executors, (and whose trustees are the other defenders in the present action,) 'with 'power to him, (the said Henry Hepburn,) to obtain decreet or de-'creets-arbitral, interim or final, in his own name, or to sue for and 'receive payment of such as may be obtained in my name.' A minute was thereafter lodged in the submission by Hepburn, narrating the assignation, and craving that the arbiters would issue decree in his favour accordingly, for the sums which, as expressed in their notes, they held to be due by the said Colonel Henry to the said David Burns.

The pursuer, however, objected to the competency of thus introducing Hepburn as a party to the submission, and to decree being pronounced in his name; but after considerable discussion, the arbiters pronounced their decree-arbitral, (3d June 1831,) containing various articulate findings relative to the accounting between the parties, and finding, upon the whole, that there was owing by the pursuer to David Burns, as at the date of the decree, a sum of L.529:2:6, including interest; and further, finding 'that Mr 'Henry Hepburn has, in virtue of the assignation duly intimated, 'produced by him, right to the sum so found due to Mr David 'Burns, and is entitled to have decree in his name and favour for 'the same, subject always to the conditions after specified,' &c.

Of the same date with this decree, Henry Hepburn granted an assignation of all claims in his person in favour of the other defender, David Hepburn, which assignation was duly intimated to the pursuer, and the decree subsequently put on record.

Thereafter the pursuer brought the present action of reduction of the decreet, on the ground, inter alia, of wilful corruption; but this was afterwards departed from, and the challenge confined to the alleged incompetency of introducing, instead of one of the original parties, another individual, the assignee of that party, as the direct party to the submission, and of the arbiters pronouncing decree in favour of the assignee, and not of his cedent, notwithstanding a timeous objection to such a course of proceeding on the part of the pursuer, by which both the arbiters, and Burns and his assignee, were duly put on their guard.

The Lord Ordinary ordered cases to be reported to the Court, and added the following note:

'The principal question which arises in this case, now that the

'charges of corrupt partiality are wholly removed from it, appears 29 Jan. 1835.
'to the Lord Ordinary to be in a great measure new, and of con-
'siderable importance. The question is, whether, where a sub- Henry v. Burns, &c.
'mission has been entered into between two parties for the decision
'of all questions, claims, and disputes, at that time existing between
'them, it is competent for one of the parties, by special assignation,
'to convey his contingent claim under the submission to a third
'party, to the effect of enabling that third party to make appear-
'ance, and become directly the party in the arbitration? And whe-
'ther it is competent for the arbiters to give decree to that assig-
'nee nominatim, notwithstanding an objection by the other party
'to the competency of the proceeding? The Lord Ordinary has
'difficulty in thinking that such a decree is competent; for a sub-
'mission being merely a contract, and the motives and good faith
'on which it may be entered into very often depending on the know-
'ledge of the character of the person who is the other party to it,
'it seems to be difficult to say that either of the parties can, by his
'voluntary act, change the nature of it, so as to compel his oppo-
'nent to proceed in such a transaction with a third party, with whom
'he never agreed to enter into any arbitration. I may be willing
'to enter into an arbitration with a friend or neighbour, for the set-
'tlement of accounts between us; or even to submit a disputed mat-
'ter with a person whom, though I have differed with him, I know
'to be a man of honour and fairness, rather than go into a court
'of law; and yet, if I had expected to have for my opponent per-
'haps the most notorious and troublesome litigant in the courts of
'the country, I would not have entered into any such contract.
'With a view, therefore, to the bona fides of arbitrations, it seems
'to be an important question, whether such a change, in an essen-
'tial point of the transaction, can be forced upon a man against his
'will?

'Cases of bankruptcy have occurred. But though such cases are
'not free from doubt in principle, they do not reach the present
'case; for, in such cases, there is no voluntary assignation of the
'particular claim in the arbitration. The immediate interest in it
'merely passes by the act of the law with the other estate of the
'bankrupt, and the bankrupt himself continues to have a direct in-
'terest. The trustee is merely sisted to enable him to go on. But
'if it be essential, in order to make a submission binding with the
'heir of the party, that this should be expressly provided, it is diffi-
'cult to see how, without any such clause, it should be made to pass
'in the much stronger case of an assignee.'

Pleaded for the pursuer—The whole powers of the arbiters named Pursuer's Pleas.

29 Jan. 1835. Henry v. Burns, &c. Pursuer's Pleas.

in a submission are dependent upon the terms of the agreement; and every thing that they do, to have any effect, must be in conformity thereto, and within the limits of the contract; *Ersk.* iv. 3. 29. and 32. In entering into a submission, parties proceed upon a complete view of the whole matter, and, in particular, regard is had by each to the character of his adversary; it being so much in the power of the parties to such a proceeding, to render it a satisfactory mode of adjustment, or the reverse. The most express words, therefore, would be required to validate an extension of it to others than the parties contracting. Unless it distinctly appear that a substitution of others was in contemplation, none ought to be permitted. It is accordingly laid down by Erskine, iv. 3. 29, that a submission conceived in the usual terms expires 'by the death of one of the sub-'mitters;' and in the present case, in order to avoid this legal consequence, it is expressly provided, that notwithstanding the death of either, the submission should be binding upon their heirs; and that the arbiters should be empowered to determine the matter submitted as if no such death had happened, 'any law or practice to the con-'trary notwithstanding;' thus shewing the intention and understanding of the parties. But if an express clause be necessary to entitle an heir to become a party to a submission, a similar provision must, a fortiori, be necessary to continue a submission in force, in the case of one of the parties assigning his claim to another, to the effect of the latter becoming a party to the contract. A provision for the continuance of the submission, in the event of the death of either of the parties, is no extension of the contract, or of the power of the arbiters, to the case of one of the parties divesting himself of his claim in favour of an assignee. On the contrary, the special provision for the one plainly infers an exclusion of the other. On the same principle, it has been held, that a submission falls upon the marriage of one of the submitters, if a female; Lady Elizabeth Maitland, 18 May 1796, 11. *F. C.* 507, *M.* 641.

Defenders' Pleas.

Answered—It cannot be successfully maintained, that the mere fact of an assignation being made of a claim under discussion before arbiters will vitiate the proceedings. But, in the circumstances of the present case, it is necessary for the pursuer to maintain this position, in order to support his argument. The proceedings in the submission were brought to a close by the parties submitters themselves. No one but the original claimant himself conducted the proceedings; and the assignee did not, during the discussion, make any appearance, or become directly a party to the arbitration. The facts, therefore, do not raise the question of the pursuer having been compelled to proceed in the arbitration; for it was not till the dis-

cussion was closed, and the arbiters were prepared to pronounce their decreet, that the assignee stepped forward, and maintained that the decree ought to be pronounced in his name. The simple question therefore is, whether the mere fact of the decree being so issued will be destructive of the decree?

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Henry v. Burns, &c.

Defenders' Pleas.

It may be true, that, in some cases, the transference of the interest to a third party may raise well-founded objections to the jurisdiction of the arbiters on the part of the cedent's opponents; but no special or substantive ground of objection, (such, for instance, as any alleged connexion between the assignee and the arbiter,) being proponed, and no injury being alleged, a mere general allegation, that, by the assignation, the proceedings may become more troublesome, cannot be sufficient to deprive a party of his indisputable right to assign every claim of debt in his person, or to prejudice the rights of those claiming under him, whether as creditors or as voluntary assignees.

The whole property of any individual is by law available to all having right under him. It may be attached by his creditors, or it may be taken by third parties, in virtue of voluntary assignation. It is a mere accessary that his right to the subject should at the time be in dependence, either in a court of law, or before arbiters. The fact of its being so attaches itself to the subject as an accessory condition, and passes along with the right to the third party. He cannot obtain the right, and shake himself free from the law-suit, or from the submission. But if the assignee be thus bound by what his cedent has done in relation to the subject, it surely cannot be held, that, in a mutual contract, such as a submission, although it is not open to one party to decline the contract, it is nevertheless in the power of the other to destroy it, unless some legal ground of objection be stated, why the submission should not be binding as on him with the assignee, as with his author, the cedent.

Where any real or substantive ground of objection to the assignation can be stated, the opposite party has effectual means of protecting himself; but in the absence of such, the issue of the cause submitted is in the hands of the arbiters, and the result is a matter in which every one deriving right from the parties, or claiming under them, whether as creditor or as assignee, has a legal interest. Neither of the parties can recall the consensual jurisdiction conferred on the arbiters, who come into the place of the ordinary courts of law. A claimant in this court of consensual jurisdiction, equally as if the claim were under discussion before a Lord Ordinary, is entitled to assign his claim; and the assignation must be effectual, or his creditors may attach it, and their diligence will transfer to them their debtor's interest in the claim. An assignee, whether voluntary or judicial, may appear for his interest in a court of law, and there is no

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reason why he should not do so in a submission; certainly none, when his appearance, as in the present case, is only to the effect of obtaining the decree to be issued in his own name. Upon these grounds, it has been decided that the judicial assignation effected by sequestration does not put an end to the submission, but that it subsists to the effect of allowing the trustee to appear; so that if he does not appear when duly warned of its dependence, the decision of the arbiters will be conclusive; Barbour v. Wright, 21st Nov. 1811; Grant v. Girdwood and Co. 23d June 1820; Anderson v. Wood, 25th May 1821.

Opinion of Court.

At the advising, the *Court* were unanimously of opinion, that on the general point which here occurred, there being no special objection to the assignation, there were no grounds for reducing the decreet-arbitral. Their Lordships did not participate in the difficulty which had occurred to the Lord Ordinary; nor could they distinguish the case on principle, from the ordinary one of a trustee on the estate of a sequestrated bankrupt being entitled, in virtue of the general conveyance in his favour, to carry on the proceedings in a submission entered into by the bankrupt. The effect of the submission could not be to prevent one of the parties from assigning all claims he might have against the other in favour of a third party not connected in any way with the arbiters; and he did so cum omni onere, the assignee being equally bound by the submission as the cedent. In the present case there was the less ground for the objection to the decreet-arbitral; because the proceedings in the submission were nearly terminated at the date of the assignation; and the only objection was to the decree going out in the name of the assignee, an objection merely in point of form, and which equally occurred in the case of a trustee on a sequestrated estate.

Judgment.

The *Court*, therefore, repelled the reasons of reduction, and assoilzied the defenders from the conclusions of the libel, and decerned, and found expenses due.

Lord Moncreiff, Ordinary. Act. *Shene* and *A. Wood*. Alt. *Dean of Fac.*
(Hope,) Cowan. *W. & J. B. Douglas*, W. S. and *George Ritchie*, W. S.
Agents. *D.* Clerk.

C.

FIRST DIVISION.

No. XXXVIII. 31*st January* 1835.

JAMES COCHRAN
against
ROBERT MACLAREN.

BANKRUPT.—SEQUESTRATION.—STATUTE 53. GEO. III, c. 137.—*A toll-keeper, who was at the same time a licensed spirit-dealer, held to be liable to sequestration under the statute.* 2. *A cautioner having rendered his debtor bankrupt by incarceration, and having allowed more than four months to elapse after the date of the incarceration before he applied for sequestration—held, that the application was thereby rendered incompetent, although the party continued in jail down to the date of the application.*

THE respondent, Maclaren, who had previously been engaged in business as a merchant, became tacksman of the toll-bar at Port Dundas at Whitsunday 1830, and he obtained licenses from the Justices of Peace for Lanarkshire in 1829, 1830, and 1831, in terms of the act 9. Geo. IV, c. 54, 'to keep a common inn, ale-house, or 'victualling-house;' and he accordingly bought quantities of ale and spirits, &c. which he sold by retail to the public, while he remained keeper of the toll-bar, which he did until Whitsunday 1832. Maclaren being unable to pay his rent, the petitioner, Cochran, became security for him, by becoming drawer of a bill for L.184, 13s. 6d. (dated 27th Nov. 1832,) and payable four months after date, which was accepted by the bankrupt and another party, his trustee. The bill was dishonoured, and the petitioner was ultimately obliged to make payment of the sum of L.121 : 19 : 5 to account of it, and he afterwards received an assignation to the bill and diligence from the payee, the treasurer to the Port Dundas trustees.

Thereafter the petitioner raised diligence, by horning and caption, against Maclaren, in virtue of which he was incarcerated in the jail of Glasgow, 11th Dec. 1833, and he remained in jail till September following, when the present petition for sequestration was presented.

In defence, it was *objected*—1. That the defender did not belong to any of the classes whose estates were subject to sequestration. He had not been engaged in trade or merchandise since 1826. His Pursuer's Pleas.

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Pursuer's Pleas.

only occupation had been that of a tacksman of tolls, and the debt on which the present application proceeded had relation solely to his obligation for rent as a tacksman of tolls. 2d, The statute provides, that if a person following any of the occupations there set forth shall have been duly made bankrupt by diligence, then 'it 'shall be lawful for any creditor of the said person, whose debt shall 'amount to the sum of L.100, at any time within four calendar 'months of the last step of the said diligence, to apply, by summary 'petition, to the Court of Session, for sequestration of the said debtor's estate.' The diligence here was used on the bill of which the petitioner was the drawer. The last step of that diligence was the incarceration of the respondent under the letters of caption. That took place on the 11th of December 1833; but the petitioner did not apply till 19th September 1834, being about nine months after the last step. When sequestration is applied for with the concurrence of the bankrupt, no time is limited, and even diligence is not necessary. But where, as in the present instance, it is made by a creditor, without the concurrence of the bankrupt, such creditor has no title to make the application under the statute, unless he make it at some time 'within four calendar months of the last step of 'the said diligence.'

Defender's Pleas.

Answered—1. Independently of the trade and dealings carried on by Maclaren previous to 1830, which undoubtedly were sufficient to subject him to sequestration, his transactions, since he became tacksman of Port-Dundas toll-bar, were such as to bring him within the words and spirit of the statute; for during the two years that he remained there, he carried on extensive transactions as a spirit-dealer, keeping a public house, selling to private families, and transacting the whole routine usual in such a trade. He was, in fact, a regular licensed dealer and trader; and this business and occupation he carried on down to the time of his incarceration.

2. The limitation of four months, in regard to the application for sequestration, appears to have been introduced for the purpose of allowing the debtor to recover his status by the lapse of a given time, although he should, at one period, have been incarcerated under a regular diligence. The character of bankruptcy is not indelible, and therefore, if a party be made bankrupt by incarceration, but immediately pays the debt and is liberated, it is very clear that any application for sequestration of his estates by another creditor must be made within four months of the date of the incarceration; and after that period the character of bankruptcy is wiped off, and a new series of diligence must be commenced, and carried into effect. But the last step of diligence (which, in this case, was the act

of incarceration,) continues in operation until liberation takes place. It is no doubt true, that more than four months had elapsed since the act of incarceration, before the present application was made. But the respondent had since been liberated; and when the petition for sequestration was presented, he was in jail. Ultimate diligence was in full force against him. He had since recovered his original status by the cessation of extreme diligence, but was at the time an imprisoned bankrupt. The execution of the caption could not be said to be the last step of diligence, for that execution was only the means by which the diligence of the law received its full effect.

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Defender's Pleas.

The *Court* ordered a condescendence as to the alleged dealings of the bankrupt, and in this they were set furth as stated in the narrative. On advising the condescendence with answers, their Lordships were unanimously of opinion, that the dealings of the bankrupt were such as rendered him liable to sequestration; but their Lordships were also of opinion, that more than four months having elapsed since the date of the bankrupt's incarceration, (which they held, under the words of the statute, to be the last step of the diligence against him,) the present application was rendered incompetent, and they therefore refused the petition.

Judgment.

Pet. the Petitioner, *Sandford.* *Alex. Hamilton*, W. S. Agent. Alt. *Dean of Fac. (Hope,) Russell.* *Wotherspoon & Mack*, W. S. Agents. *B.* Clerk.

C.

FIRST DIVISION.

No. XXXIX. 31*st January* 1835.

ELIZABETH NISBET
against
JAMES JOHN FRASER, W. S.

TRUST. — JUDICIAL FACTOR.—*A testator, by a trust-settlement, conveyed his property to three trustees, and to the survivor or survivors of them, for certain purposes declared therein, with power to them to assume additional trustees, 'recommending to 'them never to allow their number to be reduced below two, with-'out at least supplying the deficiency;' and declaring, that, 'in*

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'the event of their number amounting to two, the concurrence of 'both shall be requisite, without prejudice, nevertheless, to the acts 'ings of a single trustee, in case there shall at any time happen to 'be no more than one in the existing nomination.' The trustees named accepted, and for some time acted as such. One of them, however, having gone abroad animo remanendi, another having died, and the third having proceeded to act as sole trustee, without taking any steps for the appointment of additional trustees, the Court, on the application of the parties interested in the funds, appointed a judicial factor.

By deed of settlement, (28th Dec. 1829,) the late Mrs Black conveyed to 'James Jackson Maclachlan, presently residing in Dublin 'Street, Edinburgh, Mr James John Fraser, writer to the signet, '(the respondent,) and Walter Finlayson, writer to the signet, as 'trustees, for the purposes, and with and under the burdens, pro'visions, declarations, and reservations herein after expressed, or to 'such of them as shall accept, and to the survivors and survivor of 'them, and to such other person or persons as may hereafter be 'named by myself, or assumed by my said trustees,' the whole property which should belong to the testatrix at her death. 'More'over, I hereby nominate and appoint my trustees, before named and 'referred to, my sole executors and administrators of my moveable 'estates, and universal legators, to the exclusion of my nearest of 'kin and all others;' and it is provided, 'I likewise authorise and em'power my trustees, before named and referred to, to assume as 'trustees along with themselves, or in place of any of themselves 'who may happen to fail, such person or persons as they may think 'proper, recommending to them never to allow their number to be 'reduced below two, without at least supplying the deficiency,' &c.; 'providing always, that when the number of trustees shall amount 'to, or exceed three, a majority of them shall in all cases be a quo'rum; but that in the event of their number at any time amounting 'to two, the concurrence of both shall be requisite, without pre'judice nevertheless to the actings of a single trustee, in case there 'shall at any time happen to be no more than one in the existing 'nomination,' &c. &c.

Upon the death of the testatrix in 1831, the trustees named in the deed accepted, and Mr Finlayson for some time took the active management. He afterwards, however, (6th Jan. 1831,) left Scotland animo remanendi, without taking any farther steps in the trust, and Mr Maclachlan, another of the trustees, died, so that the respondent, Mr Fraser, was the only trustee alive and resident in this country.

In these circumstances, the petitioners, (the parties now interested in the succession,) not being satisfied with the management of Mr Fraser, presented a petition to the Court, in which, besides certain alleged acts of mismanagement, they pleaded, that by the removal of Mr Finlayson to America, and the death of Mr Maclachlan, the trust had come into a situation in which the business of it could not be extricated. By the terms of the trust-settlement it was provided, that while two accepting trustees were alive, they must concur in any act of administration. Two of the trustees, however, were now alive, but they could not concur in the management, because one of them was abroad. Hence, both at common law, and by the terms of the trust-deed, no trust-act could legally be performed.

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The petitioners therefore craved their Lordships to appoint Mr Murray Pringle judicial factor, with the usual powers, to manage the estate of the testatrix during the absence of the trustee.

It was *answered*—That no sufficient reason had been assigned for the strong step which was now proposed of superseding the trust, and taking the management out of the hands in which it had been placed by the truster. In the leading clause of the trust-deed it is taken for granted that the trust may devolve upon, and be exercised by, one person. The conveyance is expressly made to the three trustees, or such of them as shall accept; and afterwards more explicitly to the survivors or survivor. If two of the trustees, therefore, had declined to accept, or had died, it is plain, that, according to the tenor of the deed, the whole management must have devolved on the only accepting or surviving trustee. In the present condition of the trust there is no trustee capable of acting but the respondent. Mr Maclachlan having died, and the removal of Mr Finlayson to Jamaica, animo remanendi, being, with regard to the fulfilment of the trust, equivalent to his death or resignation, the trust has, by the course of events, devolved solely upon the respondent. It is true, that, in a subsequent clause, conferring on the trustees powers of assumption of other trustees, there is a recommendation by the truster to them not to allow their number to be reduced below two without supplying the deficiency. But that is a mere recommendation, which is not imperative on the trustees, but merely gives them an option to exercise this power, if they judge it expedient; and although, considering that so little remained to be done, the respondent had not thought it necessary to appoint additional trustees, this could still be effected, if it were thought advisable by the Court. But there was no room, in the circumstances of the case, for the summary interposition of the Court,

Respondent's Pleas.

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Nisbet v. Fraser.

by the nomination of a judicial factor. It is incompetent to take the management out of the hands where the trustee has placed it, so long as it is conformable to the terms and conditions of the trust, as decided in the case of Roughhead, *Shaw*, ii. 516.

Opinion of Court.

At advising, the *Court* were unanimously of opinion, that under the provisions in the trust-settlement, and in the circumstances which had occurred, it would be proper for their Lordships to appoint a judicial factor.

Lord Balgray observed—That every trustee was bound to follow the directions of the truster; and although the present trust-deed contained a special instruction or recommendation not to allow their number to be reduced below two without supplying the deficiency, the respondent, Mr Fraser, instead of taking means to follow out these directions, had continued for a considerable period to carry on the trust affairs on his sole responsibility, a proceeding which had not been contemplated by the testatrix.

Lord Gillies said—That the question was, whether the trust affairs were in such a situation as that Mr Fraser was not entitled, under the provisions of the deed, to act, and whether, therefore, the Court ought to appoint a judicial factor. It was a mistake to say that Mr Finlayson's removal to America was equivalent to his death, or non-acceptance of the trust; for he had actually accepted, and had acted for a considerable period, and was still liable to account for his proceedings. The respondent, however, after the death of Maclachlan, had continued to act as sole trustee, although the only case in which he was allowed to do this was, if he had happened to be the only one in the existing nomination; but there were two trustees alive, and Mr Fraser had not followed out the instructions of the truster. What he ought to have done was this: When Mr Finlayson went abroad, the respondent and Maclachlan ought to have appointed another trustee in his place; and upon the death of Maclachlan, the respondent ought to have communicated with Finlayson as to the appointment of additional trustees; but, instead of this, he continued to act by himself, which he was not entitled to do, there being two trustees alive in the existing nomination, and the remedy for supplying the place of the absent one being pointed out in the trust-deed. In these circumstances, his Lordship thought it was incumbent upon the Court to appoint a judicial factor.

Lord Mackenzie concurred. If the respondent had power to act at all as sole trustee, his first step ought to have been to appoint an additional trustee; and there were good reasons against the actings of a single trustee, as, for instance, in the case of money belonging to the trust; for where there was only one trustee, it was generally

mixed up with his private funds, whereas, when there were two, it was invested in their joint names; but his Lordship had great doubts whether, under the provisions of the deed, and in the existing circumstances, the respondent was entitled to take any step as sole trustee, and he therefore thought that the Court ought to appoint a judicial factor. 31 Jan. 1835. Nisbet v. Fraser.

The *Court*, therefore, 'in respect of the provisions in the trust-deed, appointed the said Murray Pringle judicial factor in the meantime, with the usual powers.' Judgment.

For the Petitioner, *Forsyth* and *Rutherfurd*. *Dan. Fisher*, Agent. Alt. *Dean of Fac. (Hope,) Buchanan*. Party Agent: *D.* Clerk.

C.

SECOND DIVISION.

No. XL. 31*st January* 1835.

Dr D. RITCHIE and Dr A. GRANT, and KIRK-SESSION of St Andrew's Church, Edinburgh, *against* The LORD PROVOST, MAGISTRATES and TOWN-COUNCIL of the City of Edinburgh.

Kirk.—*Interdict granted, and bill passed, to try the question, whether the Dean of Guild of the city of Edinburgh, and others, can demand and obtain possession of the key, and enter St Andrew's church, to hold public meetings connected with the election of Town-Councillors, without the consent and approbation of one or both of the ministers of that church.*

At a meeting of the Kirk-Session of the parish of St Andrew's in the city of Edinburgh, held upon the 19th October 1834, the following procedure took place: 'There was laid before the session 'a letter from one of the seat-holders, disapproving of the popular 'meetings which had of late been held in St Andrew's church on 'subjects not connected with the religious interests of the congre-'gation. The session was surprised to learn, that the meetings, 'of the nature above alluded to, had taken place without any com-'munication to any of the ministers of the church; and after full 'deliberation, were unanimously of opinion, that no meeting should 'be allowed to be held in St Andrew's church, except at the usual 'diets on Sunday and other religious occasions, without the con-

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'sent and approval of one of the ministers of that church. They 'direct their clerk to intimate this resolution to the Town-Council, 'and to inform the beadle not to deliver the key of the church to 'any one without the order of one of the ministers.' An extract of this minute having been communicated to the Magistrates and Town-Council, the session-clerk received, on the 22d October, an answer, accompanied with a copy of the following resolution, which had been 'unanimously adopted by the Council:' 'Resolved, while 'approving of the conduct of the Dean of Guild, that the Council 'consider that the areas of the city churches are the property of 'the community, and under the management of the Council, and 'that the Council cannot recognise any right of interference there-'with in any of the kirk-sessions of the city, and that this reso-'lution be respectfully intimated to the Kirk-Session of St An-'drew's.'

Previously to the above procedure taking place, the Town-Councillors elected by the fourth municipal ward had called a meeting of the electors of that ward, to take measures for the election of two councillors for the district at the ensuing election; the meeting to be held, (with permission of the Dean of Guild,) in St Andrew's church, on the 20th October. The beadle refused to deliver the keys, or open the church-door on the day of the meeting; but the Dean of Guild interfered, and ordered the door to be opened, and the meeting of electors took place. An adjourned meeting, to be held in the same place, on the 27th October, was called by intimation, signed by the Councillors for the district; and the Dean of Guild gave a written order on the 25th to the beadle, authorising the use of the church for holding the meeting.

The Ministers, with concurrence of the Kirk-Session, presented a bill of interdict, praying that the Dean of Guild, Town-Councillors, &c. might be interdicted from demanding and obtaining possession of the key of the church, and from entering the church to hold any public meeting connected with the election of Town-Councillors; and that the beadles might be interdicted from giving up the key without the consent and approbation of one or both of the ministers of St Andrew's. An interdict was granted (27th Oct.) by Lord Medwyn; and having been answered, Lord Cockburn, at the request of the parties, ordered cases to the Court on the question at issue, 'in order that the opinion of the Court might be ob-'tained with the least expense and delay.'

Complainers' Pleas.

In the cases, it was *pleaded* for the complainers—1st, The meeting against which the interdict was applied for was one of such a nature, as made it grossly improper and indecent that it should

take place within an established place of public worship; and as the church is protected by law, it was a meeting which it was incumbent on the Court to prevent, whoever was the party who pretended to authorise it. 31 Jan. 1835. Ministers of St Andrew's Church v. Magistrates of Edinburgh.

2dly, By the law of Scotland the minister of a parish church has the custody of the key, as being necessary to enable him to use the church, in the proper discharge of his duty; and the complainers were in the exercise of their legal right in applying for an interdict against the holding of a meeting which was authorised to take place without their consent and approbation. (1.) *Ersk.* ii. 1, 8; *Connell on Parishes*, 101; *Bank.* i. 3, 11, and ii. 8, 192; *Forbes*, 214, § 11; *Quoniam Attach.* act 86; *St.* 1503, c. 83; *Mackenzie's Obs.* 1579, c. 70. (2.) *St.* 1698, c. 2; *Records of Presbytery of Linlithgow, App. to Case; Forbes*, 212, 8; *Opinion by Lord Prestongrange, App. to Case;* 3. *Haggart's Reports*, 173; Innes, &c. v. Ministers of Elgin, 3d July 1713, *Robertson's Appeals*, 69. Complainers' Pleas.

Pleaded for the respondents—1st, There is nothing in meetings, such as those now in question, inconsistent with the proper uses of a church, or with those to which it has, ever since the Reformation, been habitually applied. 2dly, Neither the ministers nor the kirk-session have an absolute right of control over the church, except as to the use of it for public worship and other religious purposes; and after these purposes have been satisfied, the power of employing the church for other purposes is vested, with regard to country parishes, in the patrons and heritors; and with regard to town churches, on the footing with those in the city of Edinburgh, in the Magistrates and Town-Council, who, as representing the community, are both patrons and proprietors. (1.) *Bank.* i. 3, 11; ii. 8, 192, 194; *Mackenzie*, ii. 1, 4; *Mackenzie's Obs.* 115; *Dunlop, Parochial Law*, p. 48, § 101, 2 and 3. (2.) *Act of Privy Council*, 12th July 1690, *App. to Case; Ersk.* ii. 3, 36; Magistrates of Elgin v. Kirk-Session, 4th Dec. 1740, *M.* 7916; Magistrates of Gorbals v. Kirk-Session, 8th Feb. 1723, 2. *S. & D.* 194; *Dunlop*, 54-5; Hay v. Williamson, 2d Dec. 1758, *M.* 5148; Ure v. Ramsay, 5th June 1828, 6. *S. & D.* 916; *Robertson's Appeals*, 74. Respondents' Pleas.

The *Lord Justice-Clerk* declined judging in the cause, on the ground, as was understood, that he was father-in-law of one of the members of the kirk-session. Opinion of Court.

Lord Meadowbank.—I consider this a question of very considerable importance, and also a question of novelty; for there is no case in point referred to in the papers. I am clear for passing the bill. The question is, whether in landward parishes, the heritors, or in

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towns, those who build and maintain the church, are entitled at common law to appropriate, or authorise the appropriation of the edifice for any purpose except for public worship, and religious ends connected therewith, without the consent of the minister and session. 1. Can there be such a right? I have seen no authority for so appropriating churches. No such right exists at common law. Before the Reformation, the right to churches was in the clergy, the conversion of them to any other purposes than those of religious worship being considered sacrilege. The right in the clergy to the exclusive use and possession of the church would have been enforced by the civil magistrate. Has there been any change on this lawful right as it existed previous to the Reformation? If any such change is alleged, the onus probandi falls on the party making the allegation. Now, there has been nothing stated in the shape of legal authority or ecclesiastical learning to instruct such a change. Although, since the Reformation, the edifice is no longer held to be consecrated, no change is thereby created in the civil right. If the right was originally in the clergy, the civil right could not, without the sanction of the Legislature, have been taken away.

In the many statutes relative to the providing and maintaining of kirks for public worship, there is no indication that the Legislature contemplated any change in the exclusive purposes to which the church could be applied, nor any limitation of the right of the clergy to use the church; from all which it is clear, that the Legislature did not contemplate any change in the use of the church, which formerly had exclusively belonged to the Popish clergy. The obligation on heritors to build places for public worship was imperative against them; and it is most material to attend to the object which the statutes had in view, viz. to have places for public worship. It is clear, that the heritors are not bound, and the law has no power to force them, to erect edifices for any other purpose whatever. Now, what would be the effect if these places for public worship could be applied by the heritors, or by the magistrates in towns where they are bound to build the churches, to any other purposes than those which the statutes were intended to enforce? The additional use made of these churches would undoubtedly waste and dilapidate the buildings, and hence would arise a power of assessment against the heritors to build and keep in repair churches for objects which were never contemplated by the Legislature. I think what has been mentioned quite sufficient to authorise us to pass the present bill, and to continue the interdict.

But other views may be stated to confirm the opinion which I have formed upon the merits of this case. When the Legislature laid upon the heritors the expense of building and keeping in re-

pair churches, what was the object which they had in view? Most clearly it was not to confine the clergy to the use of these churches only on the Sabbath. It was that the clergy might have public worship in these buildings as often as and whenever they chose to have it, or deemed it necessary to have it, for the benefit of their parishioners. By no statute, and by no law, has any person a power to control the clergy in the use of their churches for religious purposes. It cannot for a moment be supposed that it was intended that the beadle should have such a power. This never could have been the view of the Legislature, and I cannot doubt that the custody of the key was meant to be with the minister. If there were an absence of authority upon this point, I would have been very much moved by the decided opinion of Lord Prestongrange, referred to in the case for the complainers. He was procurator for the church, and afterwards a judge of great reputation, and he entertained no doubt that the right to possess the keys of the church was in the clergyman. Without being aware of this authority, in a case which came before the Court some time ago relative to a dissenting meeting-house, and where this point fell under consideration, I had come to the same opinion, that the keys of the church fell to be in possession of the minister. In farther illustration of this point, it appears that originally, on the induction of the minister, the keys of the church were put into his possession, as one of the acts attendant on his induction. I consider this to be proof positive of the right of the minister to the possession of the keys of the church. It is true, in giving infeftment to a patron of his right of patronage, the key of the church is used as a symbol of possession; but then the patron possesses by his presentee, and must be presumed by law to deliver over his possession to the minister. A good deal is said in the papers of the practice of holding meetings of heritors in churches for purposes not religious, and the authority of various authors is referred to on this point. However useful it may be to us to have the opinions of such authors, I can never look upon them as any authority to guide us in the decision we ought to pronounce in cases which have not been previously decided. Certain it is that the practice alluded to is different in different parishes; and although such secular meetings may have taken place in some parishes, they have not in others. But whatever practice may have existed in this matter in particular parishes, it has never formed the subject of discussion in this Court, and it is not now necessary for us to decide that question, and I shall reserve my opinion upon it till it comes regularly before us. It may be quite right to hold in the church, meetings connected with the poor of the parish, or for any similar purpose; but how far meetings can

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be held for common secular purposes is a very different question, and it is not now before us. It is contended for the Magistrates, that they have a right to open the churches on week days to all and sundry, whether for meetings relative to the election of Magistrates, or of Members of Parliament, or for any secular purposes. The answer is, that the Legislature has said nothing on this subject, and has given them no such right; and my decided opinion is that they have no right whatever to authorise such uses of our churches. Having arrived at this conclusion, in point of law, after the fullest consideration of these cases, I confess I am happy it was of that complexion; for in my opinion nothing could be so contrary to good morals and the interests of religion as the allowing our churches to be converted into places for public meetings on questions of a political nature, where it is certain there will be wrangling and dissension, and angry passions are so apt to be excited. I think that the Magistrates ought to have considered this well before they had engaged in a question of this kind; for it is obvious, if the church is to be made the scene of political dispute and personal invective on the Saturday, it is not likely that it will be entered on the Sabbath with those right and proper feelings with which the house of God ought to be entered. I am clear, therefore, for passing this bill, and continuing the interdict.

Lord Medwyn.—Although I granted the interdict on the presentment of this bill, I feel, after the perusal of these cases, that the question is attended with considerable doubt, and I am hardly prepared to give so decided an opinion as that which has been now expressed. At the same time, I have no difficulty in agreeing to pass the present bill, and of continuing the interdict. I am not aware that we can be much assisted in forming our opinions in this case by what took place during the times of Popery; and the question for us to consider is, what is the proper use to which churches ought to be applied? On this subject I must be very much guided by the authorities, such as they are, which have been referred to in the cases before us. It appears from the passage referred to in the Quoniam Attachiamenta, that at a very early time it was not allowed to hold lay courts of justice in churches; and I do not see what objection can be stated to this authority. It is supported by the canons of the Scottish church. The authority of Erskine, ii. 1. 8, goes far to induce me to pass the bill. I should consider that it would be converting churches to the uses of private property, if meetings were allowed to be held in them such as are contended for. Because meetings in churches have been held regarding the poor, it by no means follows that meetings regarding the election of Town-Councillors, or other similar purposes, may also be held. There is no connection betwixt the one kind of meeting and the other. Lord Bank-

ton lays down the law, i. 3. 11, in nearly the same terms as Mr Erskine, and states expressly, 'nor can they (churches) be em-'ployed to common uses while they remain in that state.' These authorities are of sufficient weight with me to pass the present bill, and to continue the interdict. I, from curiosity, looked into the First Book of Discipline, to see if any thing was there stated upon this point. I am aware that this book never was adopted as the law of the church, but it was drawn up and approved of by our earliest reformers, and has always be considered of authority as to their opinions; and I find it there laid down, that great care should be taken to prevent the house of God from being brought into contempt, and that it should be specially used for the service of the Word of God, and for the good of the people; and I am not aware of any thing in practice to justify such a use of the church as the Magistrates ask for in this case. It appears from Quoniam Attachiamenta, that even in times of Popery the churches were in some degree under the charge of the Dean of Guild; but this may have arisen from the power vested in him to see that public buildings were kept in proper repair. The act 1551, c. 17, gives the Dean of Guild powers to aid the ecclesiastical authorities in preventing disturbance in churches.

I think it a more difficult question to whom the right of possession of the key of the church belongs. In the case of the town of Elgin, referred to by the respondents, the Court found that the Magistrates had the nomination of the beadle, and this officer generally holds the keys of the church. But I do not consider this of much moment; because, whoever holds the keys, he must hold them for the proper uses of the church, and not for uses to which the church ought not to be applied. I do not lay much stress on the acts of the Privy Council in 1690, referred to by the complainers, for these acts were of a temporary nature, and, from the terms of them, I should rather have drawn the conclusion, that the heritors had right to the custody of the keys. If so, however, they were clearly bound to give the use of the church to the minister when he wished it for any religious purpose; and I cannot think that the heritors had right to ask the keys for such uses as the Magistrates of Edinburgh now contend for. In short, I rather think both the property and possession of the church is in the heritors, but for its proper use, and that it is only the pulpit of which the minister has the exclusive disposal, and of which, it may be said, he has the possession. This is my present opinion, and I should hope, on farther consideration, I shall continue of this opinion, as I concur in what was stated by my brother of the evil consequences arising from churches being used for meetings relating exclusively to secular purposes.

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Judgment.

Lord Glenlee was of opinion, that, until the Magistrates could show that they had a right to give the use of the church for meetings having no relation to religious purposes, this bill should be passed. It was clear, when churches were first established, it was exclusively for pious and religious purposes: they had been hitherto so possessed, and he saw no reason for changing the practice which had prevailed.

The *Court* remitted to pass the bill, and continue the interdict, as craved.

Bill-Chamber. Lords Ordinary *Medwyn* and *Cockburn*. For Complainers, *Dean of Fac. (Hope,)* and *Geo. Grant*. *Walter Cook*, W. S. Agent. For Respondents, *Skene* and *Robert Thomson*. *Graham & Anderson*, W. S. Agents.

R.

SECOND DIVISION.

No. XLI. *3d February* 1835.

GEORGE LAW
against
Mrs HELEN GIBSONE and Spouse.

Proof.—Process.—*In an action of damages by a tenant against his landlord for wrongous sequestration, and defamation,—held,* (1st,) *that it is incompetent to prove, by parole testimony, an alleged verbal agreement by the landlord to abate the rent stipulated in the written contract of lease; and* (2d,) *adhering to the finding of the Lord Ordinary, that it is expedient that this question of law should be determined before any issues be sent for trial by a Jury.*

In May 1827, Mr Rigg of Morton, then proprietor of Morton Mains, entered into a contract of lease with George Law, whereby the latter became tacksman of that farm for nineteen years from Whitsunday 1825. The stipulated rent was L.1120 per annum, the rent for the crop of each year being payable at the terms of Candlemas and Whitsunday of the following year. A deduction of L.170 was soon after given, making the yearly rent L.950, the terms of payment also being altered to Candlemas and Lammas. In 1830, Mrs Gibsone purchased the estate of Morton, including the farm let to the pursuer. The first rent to which she acquired

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right was that of 1831, payable at Candlemas and Lammas 1832. On 8th February 1833, Mrs Gibsone obtained a warrant of sequestration of the crop, stocking, &c. on the pursuer's farm, in payment and for security of the half year's rent of L.475 due at Candlemas 1833, and of L.475 to become due at the ensuing Lammas.

Mr Law brought an action of damages against Mrs Gibsone, for wrongous sequestration, and for defamation.

In support of this claim to damages for wrongous sequestration, the pursuer averred on record, that in the course of the year 1832, and beginning of 1833, he made several applications and proposals to the defender for an abatement of rent; 'that the defender returned no written answer to these proposals. She had numerous 'interviews, however, with the pursuer, and frequently visited his 'farm; and on or about the 23d of January 1833, she expressly 'agreed to give an abatement of L.100 a-year, making the rent 'L.850, and to that extent the treaty and arrangement between 'the parties was completed; and the only question which remained 'in dispute between the parties was, whether the abatement should 'be limited to that sum, or should be extended to L.20 per cent., 'being L.90 more, or to some intermediate sum.' Mrs Gibsone sold the farm to Mr Trotter of Mortonhall, and the missives of sale were signed on 28d January 1833. It was farther alleged by the pursuer, that, in the treaty of sale, the defender admitted, and set forth to all or some of the persons connected with that treaty, that she had agreed to make the said abatement, and that the rent of the farm was L.850, and that the sale was concluded on that footing; and the pursuer pleaded, that, in these circumstances, the sequestration complained of had been wrongfully taken out and maintained.

Before the record was closed, a draft of proposed issues was prepared by the jury clerk; and parties were heard before the Lord Ordinary, on a demand by the pursuer for an issue in the terms proposed. It was pleaded by the defender, in bar of an issue being granted, that it was incompetent to prove, by parole evidence, a verbal agreement by the defender to grant an abatement of rent; and that the alleged abatement being denied, it could only be proved scripto of the defender; but no such offer of proof was made.

The Lord Ordinary pronounced the following interlocutor: 'The 'Lord Ordinary having heard parties' procurators on the demand 'of the pursuer for an issue to a jury, in terms of the first and se-'cond articles in the draft of issues reported by the issue clerks, 'and on the objections taken by the defender, that the condescen-'dence contains no averment that the defender entered into any writ-'ten agreement to qualify or modify the regular deed of lease un-'der which the pursuer possessed the farm in question, and that it 'is incompetent for the pursuer to prove by parole evidence any ver-

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'bal agreement to that effect, for the purpose of establishing that, 'on that ground, the sequestration complained of was wrongfully 'taken out and maintained; and having made avisandum, and now 'considered the record as closed with the concurrence of the pur- 'suer, finds, that it is expedient that the question of law, whether 'it is competent to prove by parole evidence the verbal agreement 'or agreements, averred in the condescendence to have been en- 'tered into by the defender, to abate L.100 of the rent stipulated 'by the written lease, should be determined before any issues shall 'be sent for trial by a jury; finds, that it is not competent, with re- 'ference to the terms of the condescendence and the proposed issues, 'to prove such verbal agreement or agreements by parole evidence, 'and appoints the cause to be enrolled, in order that parties may 'be heard in regard to the further procedure in the cause; and re- 'serves all questions of expenses.'

Note.—'When this case was debated, the record had not been 'closed. But as it was necessary that it should be closed before 'any judgment could be pronounced, the Lord Ordinary put it to 'the pursuer's counsel, after hearing the course of the argument, 'whether they chose to make any alteration on it, or to execute the 'diligence which they held for recovery of writings, before closing. 'They declined this, and the record was then closed as it stands.

'It will be observed, that though the summons bears that the 'defender did 'illegally, oppressively and maliciously' cause the 'sequestration to be used and maintained, the word maliciously is 'thrown out of the condescendence, which (in Art. 21.) merely 'states the sequestration to have been applied for 'nimiously, "wrongfully and oppressively;' and the issues framed correctly use 'the word 'wrongfully,' as embodying the whole averment. It is 'on this footing that the question must be considered.

'In the beginning of the debate, some inclination was shown by 'the pursuer to avoid the question, by saying that he was not 'bound to state in what manner he meant to prove his averment. 'But, in the end, it was fairly admitted that the question must be 'argued on the footing that he cannot prove the alleged agreement 'by written evidence.

'Looking at the 12th article of the condescendence, and the 'correspondence referred to there and in the answers, it is clear to 'the Lord Ordinary that the material averment is in the 13th ar- 'ticle. Up to the date of 23d January there mentioned, there is 'no averment of an agreement by the defender to grant an abate- 'ment, and it is clear from the correspondence that she had refused 'to grant it. But the statement in that article clearly imports an 'averment of a verbal agreement only, and all that follows has re- 'ference to this, or imports a verbal repetition of it. It may be

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'thought, and the Lord Ordinary owns he has a strong impression 'of it, that the assertion is in a great measure disproved by the 'defender's letter of the 4th February, (the terms of which are 'strong and precise,) followed by no averment, in the letter of Mr 'Parker of the 5th, that any such agreement had taken place, or 'had been acknowledged to him. But this is not at present the 'question. The question is, whether the averment, being distinct-'ly of a verbal agreement, and there being no offer to prove any 'agreement scripto vel juramento, such an averment should be re-'mitted to proof by parole.

'The pursuer referred to cases in which an offer in writing (for 'a lease, &c.) having been received, an acceptance of such offer 'has been allowed to be proved by parole. But the pursuer's pro-'posals were very different from the offers referred to in the autho-'rities. He was bound by a solemn written contract to pay a cer-'tain sum of rent which was actually due. What he calls his offer 'was simply a demand that the defender should give up a part of 'her legal constituted claim, then and in future. The question is, 'did she agree so to modify her written contract? The Lord Or-'dinary holds, that it is only competent to show that she did, by 'some written document under her hand, or for which she is respon-'sible. If not, any written contract may be altered or extinguish-'ed by the party under obligation first coolly proposing that it shall 'be so, because he wishes it, and then attempting to convert loose 'words in conversations, artfully sought for, into a finished agree-'ment to surrender the other's legal right. On this question, there-'fore, as it arises on the fixed rules of the law of Scotland, he has no 'doubt.—See Lawsons *v.* Murray, Feb. 16. 1825; Lang *v.* Bruce, 'July 7. 1832.

'This question might have been left to be raised in the trial of 'the case. But there is great inconvenience in this, and a great 'hazard of occasioning serious expenses and injury to the parties 'unnecessarily. And where the point does necessarily arise on the 'face of the record, it would be unjust to allow a party to be drag-'ged into an expensive trial, bills of exception, &c. in an avowed 'attempt to set aside his written contract by parole evidence, 'and on that pretence to make him liable in damages, as for a 'wrongful act. But the late case of Maclean *v.* Richardson, 1st 'July 1834, in the First Division, fully on bill of exceptions, seems 'to settle this question, as to the expediency of the course of pro-'cedure here followed, if the opinion of the Lord Ordinary be right 'on the point of law, and it is clearly within the letter and the spi-'rit of the Act of Parliament.

'What may follow, if the interlocutor becomes final, the Lord

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'Ordinary has not said. He will hear the parties. If the pursuer 'thinks he can recover written evidence, he may take and use the 'diligence of the law. If he means to refer to oath, he should say 'so, and the effect will be considered.'

Pursuer's Pleas.

The pursuer *reclaimed.* At moving the reclaiming note, Rutherfurd contended for the pursuer, that although direct parole testimony to redargue a written instrument was inadmissible, yet that facts and circumstances, inferring that the written contract had been departed from, or qualified, might be competently proved by parole; such, for example, as the fact, that in the verbal communings which took place between Mrs Gibsone and her agents, and the agents for Mr Trotter of Mortonhall, relative to the sale of Morton, the rent of Mr Law's farm had been stated to be L.850, and not L.950; and the pursuer therefore maintained, that he was entitled to have the Lord Ordinary's interlocutor so qualified. On this point the Judges were at first equally divided; the Lord Justice-Clerk and Lord Meadowbank thinking that the incompetency of parole evidence should be limited to direct parole evidence, that Mrs Gibsone had agreed to abate L.100 of the rent stipulated in the written lease; while Lords Glenlee and Medwyn, on the grounds stated in the Lord Ordinary's interlocutor and note, and also on the ground that there were no relevant averments of such circumstances as could go to proof in the record, were for adhering without qualification.

The case stood over. On resuming consideration of the reclaiming note,

Opinion of Court.

The *Lord Justice-Clerk.*—I am satisfied of the propriety of adhering. Attending to the 13th article of the condescendence, which contains his material averment, there is nothing so special set forth by the pursuer as to create an exception to the ordinary rule of law. All that is settled by the interlocutor is, that parole evidence is inadmissible; it being still competent to the pursuer to recover written evidence of the alleged agreement.

The other Judges concurred.

Judgment.

The *Court* adhered.

Lord Ordinary, *Moncreiff.* For Pursuer, *Rutherfurd* and *Marshall.* *Andrew Scott*, W. S. Agent. For Defender, *Shene* and *William Bell.* *Cranston, Anderson & Trotter*, W. S. Agents. *R.* Clerk.

R.

SECOND DIVISION.

No. XLII. *5th February* 1835.

JOHN SWAN AND OTHERS
against
THE BANK OF SCOTLAND.

SETTLED ACCOUNT.—STAMP ACTS.—*Held, that joint obligants in a cash-credit with a bank are not entitled, after the accounts betwixt the bank and principal obligant have been settled and doqueted, to plead, in bar of action for the ascertained balance, that sums drawn out were paid upon drafts or orders null under the stamp laws.*

WILLIAM MARTIN carried on business at Lockerby, as a writer and discounter of bills, for many years previous to his bankruptcy in 1831. In 1819 he obtained a cash-credit, to the extent of L.600, at the branch of the Bank of Scotland at Dumfries. Swan and two other individuals were joint obligants along with Martin in the bond. The operations under this bond continued down to 8th March 1830. The account was annually settled and doqueted, and the vouchers delivered up. In 1825, a new bond for a cash-credit, to the extent of L.10,000, was entered into with the bank. Mr Swan, Mr Little and Mr James Martin became joint obligants with William Martin, for 'all sums not exceeding L.10,000, as shall be drawn 'out from the said bank by William Martin, or as may be paid '&c. on any drafts, bills, &c. obligations and documents whatever, 'drawn, accepted, granted, indorsed, or any how signed by me, the 'said W. Martin, or on my procuration, or liable on me, by any legal 'construction; and whether discounted or paid to me, the said W. 'Martin, or to any other party, or retired by the said bank, or 'otherwise taken or holden by or for the said company, all thereby 'ipso facto to be due thereon and chargeable to the said cash-'account.' By subsequent clauses, the liability of the cautioners was restricted to L.5000; and an account or certificate, signed by the accountant of the bank, or by their agent and accountant at the branch, was declared to be sufficient to ascertain and constitute a balance, and warrant all executorials of law.

A new account was opened, upon which extensive operations took place. The account was settled annually betwixt the bank agent and Martin, agreeably to the alleged general practice of this and

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other banks; and at each periodical settlement, the account was doqueted by the parties, and the vouchers delivered up.

William Martin was sequestrated in July 1831, and Mr Barker, the bank's agent at Dumfries, was appointed trustee. At the last settlement in February 1831, a few months previous to his bankruptcy, the balance due by Martin was L.3236, 14s. He was farther debited by the bank with L.552 : 2 : 8, being the balance due at 1st March 1830 on the bond 1819. The bank ranked on Martin's estate for the balance due, without objection from the trustee, or from any other quarter. The total balance due to the bank, as ascertained by certificate, dated 3d August 1832, and signed by John Barker and James Caldow, the agent and accountant of the bank's branch at Dumfries, was L.4709 : 18 : 3.

It was alleged, on the other hand, that Martin carried on banking business at Lockerby, upwards of ten miles from Dumfries, by means of moneys drawn under drafts or orders issued at Lockerby. He was furnished by the bank with unstamped printed blank drafts, bearing 'Dumfries' as the place of issuing, and carried on his transactions with the bank wholly by means of these drafts, bearing the printed word 'Dumfries,' but all of them made and issued at Lockerby. These drafts were all postdated, or dated one or more days subsequent to the day on which they were really issued or delivered by Martin. Many of these drafts issued at Lockerby, and given to third parties for value, were made payable to particular individuals named in the drafts, and in many instances passed, by delivery and indorsation, through different hands. The bond of 1825 bore no reference to the bond of 1819, and the obligants in it did not, by any separate writing, undertake to be liable for any balance then due, or which might subsequently become due on Martin's operations under the bond of 1819. Farther, the cautioners were not parties to the operations on either bond, and did not recognise, directly or indirectly, the periodical settlement of accounts betwixt Martin and the bank.

In June 1833, the bank gave a charge to the cautioners, under the bond 1825, for the whole sums due on that bond, as well as on the bond 1819. A bill of suspension was passed by Lord Mackenzie; and a record having been completed, cases were ordered by the Lord Ordinary.

Suspenders' Pleas.

Pleaded for the suspenders—1st, They were not liable for, and could not be charged under the bond of 1825, for the old and separate balance arising under the bond of 1819, to which the suspenders were not parties. 2d, The whole claim of the chargers is illegal, and cannot be maintained against the suspenders, in respect it arises

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out of transactions contrary to, and entirely null under the stamp act, 55. Geo. III, c. 184; 1st, because the drafts were issued at Lockerby, more than ten miles from Dumfries,—bore a false date,—and were not payable to the bearer on demand; 2dly, because the knowledge of these facts by the bank was instructed. The act 9. Geo. IV, c. 49, passed 15th July 1828, only extended the distance at which such drafts may be issued from ten to fifteen miles; and though this part of the objection were removed, (Lockerby being within fifteen miles of Dumfries,) as to operations subsequent to July 1828, the objection founded on the postdating, and on the drafts not being made payable to the bearer on demand, remains good. This objection could not be overcome by the prejudicial pleas of the chargers; for the suspenders were not parties to the alleged settlements of accounts, and got no notice to attend. But farther, cautioners are not bound by any thing done by or against the principal; Arnot, 9th July 1625, (*M.* 14,051); Fairbairn, 22d Jan. 1629, *M.* 14,053; E. of Kinghorn, 11th Dec. 1678, *M.* 14,062; Dick, 12th March 1685, *M.* 14,064; Hamilton, 20th Dec. 1709, *M.* 14,064; *Ersk.* iii. 3. 64; Pringle *v.* Tate, 17th Nov. 1832. Even though accounts have been settled, cautioners are entitled to plead illicit transactions; Leith Bank, 12th May 1830. The English cases quoted by the chargers are opposed by the English cases of Scott, 3. *Taunt.* 226, and Preston, 2. *Stark*, 237. Lastly, The objection founded on the stamp act cannot be renounced or waived by any proceeding or agreement.

Chargers' Pleas.

Pleaded for the chargers—1st, The charge is formal, and warranted by the bond. 2d, The chargers having ranked on Martin's estate, the suspenders and other creditors are barred, by acquiescence, from insisting in the suspension. 3d, The balance due on the bond 1819 is not cut off by prescription, nor by the negligence or delay of the chargers; Aberdeen Bank *v.* Scott, 19th Feb. 1831. 4th, The balance charged for having been legally ascertained and constituted by certified accounts, as well as by settled and doqueted accounts, the averments of the suspenders are irrelevant. The suspenders do not deny that the sums charged for were truly advanced by the bank. Knowledge by the bank of alleged deviation from the requisites of the stamp act is denied. This is not a prosecution for penalties. Drafts of the description alleged may not be sustained as legal vouchers of debt, (Aytoun *v.* Dougal, 15th Dec. 1830); but the settled accounts are sufficient vouchers, and thus obviate the objection; 2. *Taunt. Rep.* 184. The suspenders' presence and concurrence was not necessary at the periodical settlements with Martin, and is not required by the bond.

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Counsel were also heard, after which,

Lord Justice-Clerk.—The charge proceeds upon the bond of 1825, and comprehends not only the balance due on transactions under that bond, but also a balance due on the bond of 1819. We cannot support this last part of the charge.

But with regard to the bond of 1825, the suspenders are co-obligants with Martin, under a restricted liability, for L. 5000. There is in that bond the usual clause, declaring that an account, certified by the bank agent and accountant, shall be sufficient to constitute a balance and charge against the co-obligants. This is perfectly legal; and to the regularity of the proceeding, in virtue of that clause, there can be no objection. A charge is given for a balance clearly arising on the transactions contained in accounts which have been annually settled and doqueted, and the vouchers given up. This is met by the statement, that though such a balance does appear, the transactions during the progress of these settled accounts were illegal under the stamp laws. It is said the unstamped drafts were not truly issued at Dumfries, were postdated, and were not payable to the bearer. The answer is, these accounts were settled according to the uniform practice of the bank; the parties were mutually satisfied, and the balance on the account for one year was carried forward to the account for the next year; and the stamp laws do not require a settlement of this description to be opened up. In such circumstances, the Court has never been called on to inquire whether there may not have been transactions in the face of the stamp laws. There has been no decision to the effect that the Court is bound to let in the inquisitorial investigation here demanded; and there is no principle on which such an investigation can be sanctioned. It is sufficient that there is no positive denial of the accuracy of the balance; and that the accounts have been finally settled and closed by regular doquets, which do not require to be stamped. But, looking to the stamp laws, I entertain great doubts, (independently of the settlement of accounts,) of their application in a case like this, which is not a prosecution for penalties. With the qualification as to the sum due on the first bond, I am for holding the letters duly proceeded.

Lord Meadowbank.—I concur. It would be dangerous to admit the competency of the objection. There is no authority for the application of the stamp act in circumstances like the present, where there has been a regular discharge betwixt the bank and principal party; and we ought not to extend the meaning of the statute. But I consider the suspenders liable only for the balance arising under the second bond.

Lord Glenlee.—As to the charge for the balance on the second

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bond, I concur. We ought not to extend revenue statutes beyond their express provisions. There is nothing in the stamp act declaring that a party who might have objected to particular transactions, but who does not object, can do so after a final settlement and discharge. But, with regard to the sum due on the first bond, I rather think, that, looking to the broad terms of the stipulated liability under the second bond, the suspenders are also liable for such part of the balance due on the first bond as accrued subsequently to the date of the second bond.

Lord Medwyn.—The preliminary points on which cases were ordered are, 1. Whether the annual settled and doqueted accounts preclude the inquiry, whether the sums drawn out were paid on vouchers null under the stamp laws. 2. Whether the sum due under the bond 1819 was properly transferred to the account covered by the bond 1825, and the charge under it was orderly given.

As to the 1st, It has been said, that although the suspenders bind themselves as joint obligants to the bank, which precludes them from pleading the septennial limitation, or claiming the benefit of discussion; still, that looking to the nature of the obligation, they are in fact cautioners to the bank for William Martin, and are entitled, even in questions with the bank, to all the privileges of a cautioner. How far this may be so, I am not at this moment inclined to hazard an opinion. I know of no case which has laid down any such proposition. The doctrine in the case of Mackenzie of Ardross deserves attention, considering the quarter from which it comes; but the case was not ultimately decided on any such view. But according to my view of the case, I am willing to consider the question as if with a cautioner merely,—a cautioner, however, under a bond such as this, and with the conditions therein contained. Now, I agree in every particular with the law as laid down by the suspenders. I admit that all legal defences pleadable by the debtor against the creditor are also pleadable by the cautioner; nay, a relevant defence, though it should be omitted by the debtor in an action against him, continues competent to the cautioner: nay, further, even a judgment against the debtor will not preclude the cautioner from going over the same ground again, if he hopes for a different decision in his case: all these fall under the rule of res inter alios, &c. But then sound principles will not support the suspenders in their present suspension.

The allegation is, that sums were originally advanced to their principal, Martin, upon drafts or orders null on the stamp laws. Now, without saying what might have been the effect of such a plea if the bank had been enforcing their claims by producing such vouchers as the grounds of their action, and whether, if the prin-

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cipal offered no objection on that ground, it would have been incompetent for the cautioner to do so, (which, looking to the words of the statute,) seems very questionable; the plea of the bank is, that the settlements and doqueted accounts preclude the necessity of their founding on the drafts as vouchers of their payments at all; and that they are entitled to rest on these acknowledgments of balances by Martin. In this the bank seems to argue justly.

The bond expressly bears, that the operations on the account are all to be by William Martin alone, whether by drafts on the cash-account, or by bills or other obligations granted by him. The other obligants are not to be present at such, but they bind themselves to a certain amount for his drafts. Now, suppose a sum of money advanced on an order null under the stamp laws, because drawn more than ten miles from Dumfries; if the agent, the first time he saw Martin at Dumfries, begged him to substitute a legal voucher, an acknowledgment granted in Dumfries for the other, which was returned to him, could he, or could his cautioners, afterwards object and say there was no legal voucher for the money? This I think would be impossible, just as much as if the money had been advanced on a verbal order, and had so stood for some time, and then a regular voucher furnished for it.

Now, the present case is not very different in fact, and is the same in principle with these. The account is examined, found correct, vouchers given up, and a single voucher, the doquet on the account, substituted for it. At such settlements the co-obligants are never called to be present: the clause in the bond authorising one party alone to draw, necessarily implies that he alone is to adjust the account. There was no such clause in the bond, but I think there is no occasion for any such clause. It is implied in the nature of the contract. When he does adjust the account, the other co-obligants must be bound, unless, indeed, they could show any errors, which, in all settlements of accounts, are always excepted, or could plead collusion. Neither of these is pleaded here. Now, it is very true, before such a settlement, the vouchers may have been objectionable; but was there any thing improper in the principal party to correct that, and substitute a legal for an illegal voucher, before the action came into Court? It was not only not improper to do so, but it was highly fit and proper that he should do so, just to preclude such an ungracious plea as this; and I do not think the cautioners are entitled to insist that he could not substitute a legal for an illegal voucher of debt; that, in short, Martin was bound to be a knave for their behoof. The very condition of the ground of suspension admits that money was truly advanced, though on illegal vouchers. Now, it would have been an ungracious plea, approach-

ing as nearly to a moral wrong as any thing which is sanctioned by a positive law can be, if Martin had either himself urged this plea, or left it competent to another to do so, when he actually had received the money; and having obviated the objection before action is raised for the advances, he has done what he was morally bound and legally entitled to do; and his cautioners, just as they must have been bound by his oath if he had not admitted the debt till it was referred to his oath, must be bound by this act, and are not entitled to quarrel it. If any other rule were adopted, it would run counter to the invariable practice, where the party who operates on the account in terms of the bond is always the person who vouches, adjusts and settles it. The other parties are just as little present at this operation, or thought necessary to be so, as they are at the operation of drawing out.

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2. I have doubts whether the balance under the bond 1819 was validly transferred to the account under the bond 1825, after the sequestration, when a charge was given under it of the whole debt.

The bond is entirely prospective. William Martin might, no doubt, have adjusted the account under the first bond, and paid the balance by an order on the account opened under the new bond. But this was not done. The two accounts were kept separate till after Martin's bankruptcy; and although the words may be thought to include this balance, ('as may be liable on me by any legal con-'struction,') I think the spirit of them is opposed to the including of an old contraction, or liability arising out of this old bond, to which the cautioners not bound in it have a title and interest to object, even in the first instance, although they might have relief from the parties in it.

If Martin had drawn upon this account for the balance under the first bond, or had settled an account with the balance transferred to the new account, this would have been quite different; but this he has not done, and I do not think the bank warranted in transferring the one account to the other of their own authority, and after Martin's sequestration.

Lord Justice-Clerk.—I may just add, that the English cases on the usury laws strengthen my view of the stamp act.

Skene, for chargers, moved for expenses.

Graham Bell.—Expenses ought not to be found, 1st, On account of the conduct of Martin and the bank; 2d, The objection did not rest on a groundless or false allegation; 3d, The suspenders have got quit of a part of the claim which they objected to in the outset.

Judgment.

The *Court* found the letters orderly proceeded, with the exception

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of the charge for the sum due under the bond of 1819, and found the chargers entitled to expenses, subject to modification.

Lord Ordinary, *Medwyn.* For Suspenders, *Dean of Fac. (Hope.)* and *Graham Bell.* *William Martin*, S. S. C. Agent. For Chargers, *Shene* and *Walker.* *Davidsons & Syme*, W. S. Agents. *T.* Clerk.

R.

SECOND DIVISION.

No. XLIII. *5th February* 1835.

CHRISTIAN STEWART
against
JOHN MENZIES.

PROOF.—*Circumstances in which the Court refused to allow a brother and sisters and other near relations of a pursuer of a declarator of marriage and legitimacy to be examined as witnesses in the pursuer's favour.*

IN a declarator of marriage, at Christian Stewart's instance, against Mr Menzies, (see ante, vol. xi. p. 125,) a remit was made to the Commissaries to take the proof. The pursuer went into a proof at large of circumstances tending to instruct the constitution of the marriage. Sixteen witnesses were examined for the pursuer, who, in the course of the proof, offered to adduce as witnesses her brother, sister, brothers-in-law and sisters-in-law, to establish the facts stated in the sixth article of her condescendence; and by her brother-in-law's evidence to establish the facts of the case generally. The averments in the sixth article of the condescendence in substance were, that although the defender acknowledged the marriage, yet with a view to the feelings of his relations, the pursuer did not publicly assume the rank of his wife. 'The defender not only made 'these acknowledgments to the pursuer, which were communicated 'by her to her relations, but in the presence of these relations he 'uniformly spoke of the pursuer as his wife, and so addressed her 'in their presence.'

The admissibility of these witnesses was objected to by the defender on the ground of relationship. The Commissary made avisandum with the objection to the Lord Ordinary; and his Lordship, after hearing parties, pronounced the following interlocutor:

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'The Lord Ordinary having resumed consideration of the debate 'on the admissibility of the near relations of the pursuers (the sisters 'and the sisters and brothers-in-law of the principal pursuer) as 'witnesses for her and her children in this declarator of marriage 'and legitimacy; sustains the objections of the defender to these 'relations being admitted as such witnesses, and refuses to remit 'to the Commissary to take their depositions: Appoints the cause 'to be enrolled, that the other objections taken by both parties in 'the course of the pursuer's proof may be disposed of.'

Note.—'The Lord Ordinary gives this judgment with some hesi-'tation, the authorities being somewhat contradictory, and their 'application to such a case as the present by no means without 'difficulty. On the whole, however, he thinks that it comes within 'the principle of the decisions in the cases of Dalzell *v.* Richmond, '10th July 1790; and Bell *v.* King, 21st Jan. 1797; and he has 'decided accordingly. In common reason, it is impossible to deny 'that the concern which such near relations will generally feel for 'the honour and (in cases like this) the aggrandisement of their 'family, must present at least as strong a motive for perverting the 'truth, as many of the patrimonial interests by which their testi-'mony would be peremptorily excluded. And though it is highly 'expedient to adhere to such general rules as are established, it is 'necessary, when questionable cases occur, to look carefully to the 'principles on which they are founded. On the other hand, it is 'not to be forgotten, that the very magnitude of the interest to the 'parties immediately concerned, as well as the general maxim, in 'dubio pro statu est respondendum, weigh strongly against the re-'jection of any evidence that can be safely admitted.

'If the Lord Ordinary had considered the pursuers as now seek-'ing to establish a marriage by open marital cohabitation and mu-'tual habitual acknowledgments, (as the defender endeavoured to 'represent,) he would have had no difficulty whatever in at once 'rejecting the evidence in question, such cases being necessarily 'the very reverse of those in which there should be any penuria 'of unexceptionable witnesses. But he cannot view the case as 'being truly of this description. A certain degree of privacy and 'concealment undoubtedly hung on the character of the connection 'which subsisted between the parties; and the allegation of the 'pursuer substantially is, that though there were disclosures made 'more or less freely in retired situations and narrow circles, which '(along with the written evidence) she hopes may be sufficient for 'her purpose, the marriage was, on the whole, intended to be con-'cealed for a time from the public, and the only full and complete

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'acknowledgments of it to be looked for, therefore, exclusively in 'the circle of their confidential and domestic friends.

'The great extent to which her examination of stranger wit- 'nesses has already gone, no doubt very much weakens this view 'of the matter, as well as some strong expressions both in the sum- 'mons and condescendence. And, on the whole, the Lord Ordi- 'nary feels that the course he has followed is, in a doubtful matter, 'the least liable to exception. It may be proper, perhaps, to ex- 'plain, that, by the deliverance now made, the Lord Ordinary means 'only to declare the witnesses referred to as incompetent to make 'out the case of the pursuers by their direct testimony. The 'effect of the written evidence, and especially of the letter of 25th 'March 1826, he understands to be still entire; and, if it should 'be necessary for the defender to make out his allegations as to the 'occasion of writing and delivering that letter, which plainly re- 'solve into a conspiracy or collusion, of a most private and occult 'nature, between him and the pursuer, the Lord Ordinary is far 'from thinking that it may not be competent to the pursuer to exa- 'mine her own relations, in meeting any proof which may be at- 'tempted of these allegations.'

The pursuer *reclaimed*—praying their Lordships to find, that, in the circumstances of the case, these persons were admissible as witnesses.

Pursuer's Pleas.

Cuninghame, in support of the note, *pleaded*—The witnesses objected to might be called as to two points; first, as to the constitution of the marriage; or, secondly, as to the purpose for which the letter of acknowledgment was granted; on which last point the Lord Ordinary did not hold them inadmissible. The Lord Ordinary had been swayed by the cases of Dalzell and Bell; but the rule as to admissibility of relations was much relaxed; Manuel, 1. *Mur. Rep.* 391; Bell, 14th April 1819, 2. *Mur.* 168; and Spence, 2 *Mur.* 168, 75; which shew a leaning by the Court to admit such witnesses, leaving their credibility to the jury. The Lord Ordinary seems to hold, that in an important contract, like marriage, the admissibility of such witnesses ought peculiarly to be guarded against. But this would go to admit them in a trifling case, and exclude them in a case of importance. In the case of Dalzell, no other proof than the evidence of relations was offered. In the case of Bell, the defender in a divorce was anxious to disprove, by her brother's evidence, a fact sworn to by one witness, but which fact could not materially injure her cause. In the case of Callender, in 1802, (*Ferguson, Consistorial Law, App.* 108-9,) 'a sister-in-law 'of the pursuer was admitted by direction of the superior court.'

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No doubt, in Lindsay, 23d Feb. 1826, a brother and sister were held inadmissible. But there the penury of proof was the act of the parties; it was a case of collusion. The present is a case of private marriage, in which a penury of witnesses is necessarily presumable. In Martin, 8th Feb. 1816, Lord Pitmilly and the Court allowed a brother and sister to be examined in corroboration of facts sworn to by another witness. In the present case, the defender would naturally make disclosures to the pursuer's relations, which he would not do to others. It appeared from the evidence already led that there were secret attentions, and addressing the pursuer by the term 'Wife.'

Lord Meadowbank.—Does not all this shew there is no penuria?

Cuninghame.—No; there are many circumstances proved by one witness only.

The counsel for the defender was not called on.

Lord Glenlee.—I think the interlocutor should stand; but the words, 'in hoc statu,' might be introduced, as these witnesses may, in an after-stage of the proof, be admissible in replication of the defender's proof, as to the purpose of writing the letter of acknowledgment.

Lord Medwyn.—I am unwilling to introduce any words which might raise a doubt as to the rule fixed in Dalzell and Bell. These cases were not decided on any specialties.

Lord Meadowbank.—I think the introduction of the words, 'in 'hoc statu,' would not tend to break down the settled rule.

Lord Justice-Clerk.—I have always considered the cases of Dalzell and Bell as fixing the law, and I hold the case of Lindsay to be an additional precedent on the point.

The *Court*, in respect no sufficient reasons had been stated for examining these relatives upon the allegations in the 6th art. of the condescendence generally, adhered to the interlocutor of the Lord Ordinary. Judgment.

Lord Ordinary, *Jeffrey.* For Pursuer, *Cuninghame* and *Patton.* *Greig & Morton*, W. S. Agents. For Defender, *Dean of Fac. (Hope,)* and *Whigham.* *James Ferguson*, W. S. *T.* Clerk.

R.

SECOND DIVISION.

No. XLIV. *5th February* 1835.

PETER BROWN
against
DAVID HUTTON SYME.

PROCESS.—BILL OF EXCEPTIONS.—PROOF.—*An objection to the admissibility of certain witnesses, on the ground of interest, having been repelled at the trial; bill of exceptions disallowed, in respect that the objector did not distinctly set forth in the bill the nature of the real interest which the witnesses had in the action.*

AT the trial of certain issues betwixt these parties relative to shares in the Alloa Glass Company, on 22d July 1834, the defender objected to certain witnesses adduced by the pursuer, on the ground of interest. The objection was overruled by the Lord President of the Second Division, and a verdict returned for the pursuer. The defender excepted, but the Court disallowed the bill, on the ground that the alleged interest was not sufficiently set forth in the bill, nor any precise explanation given of the nature of the real interest pointed at by the objector.

Jury Clerk. Act. *Dean of Fac. (Hope,) Cuninghame*, and *Maitland*. *Mackenzie & Macfarlane*, W. S. Agents. Alt. *Shene, P. Robertson*, and *A. M'Neill*. *Graham & Anderson*, W. S. Agents.

R.

FIRST DIVISION.

No. XLV. *6th February* 1835.

JOHN ARCHIBALD MURRAY AND OTHERS
against
THE TRUSTEES OF THE LATE SIR ROBERT BRUCE HENDERSON, AND AGAINST JOHN CHEAPE OF ROSSIE.

TRUST.—*Circumstances in which trustees, who had power to appoint one of their number as factor, and who, it was declared, 'shall not 'be liable for any omissions or neglects in their management, nor for 'the intromission or solvency of their factor,' &c., but shall only be*

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bound 'to act honourably, and shall only be liable for their actual 'intromissions, and each of them for himself, and his own actual 'intromissions respectively, and no further,' &c., having appointed one of their number as factor, and having allowed him to retain possession of sums, which, in a multiplepoinding brought by them, had been directed by the accountant (to whom the cause was remitted) to be set apart for answering certain annuities, and having generally allowed him, contrary to the instructions they had given him, to retain large sums in his hands, with which he ultimately failed,— held, in an action of relief at the instance of the heirs-at-law, (who, on the bankruptcy of the factor, had been obliged to pay the sums due to the annuitants, that, no mala fides or dishonesty being alleged, the trustees were protected from liability by the clause in question.

By trust-disposition, (3d August 1812,) the late Mr Anstruther of Ardit conveyed his whole property, heritable and moveable, (excepting the lands of Ardit, which were disponed in a separate disposition, executed of the same date,) in favour of the late Sir Robert Bruce Henderson, Mr Cheape of Rossie, Mr Heriot of Ramornie, writer to the signet, and certain other trustees therein named, and for certain purposes therein declared, with power to sell the subjects thereby conveyed, 'in whole or in part, at the discre-'tion of my said trustees, and the price and produce of the same, 'after deduction of the expense of executing this trust, applied by 'my said trustees towards payment and satisfaction of my death-'bed and funeral expenses, and of all the just and legal debts and 'obligations which shall be resting and owing by me, or to which 'I shall be liable; 2dly, That my trustees shall pay all legacies, 'gifts or provisions that I may appoint to be paid by a codicil 'hereto,' &c. The deed then proceeds to direct payment of a great many legacies to different individuals therein named, and contains directions for the disposal of any residue. It further gives power to the trustees, 'to appoint either one of their own number, or 'any other person, from time to time, as factors or cashiers, for 'collecting and receiving the said debts and sums of money, rents 'and arrears of rent, interest, annuities, dividends, and prices of 'stock, prices of lands, houses,' &c. 'and in general to do every 'thing necessary for the proper execution of the trust hereby crea-'ted, but with and under the conditions after written, as it is here-'by expressly conditioned and provided, that my trustees, or trus-'tee, acting under this trust, shall be holden and obliged to apply 'and employ the funds and subjects hereby disponed, and the price 'and produce thereof, for the uses and purposes before mentioned, 'or of any other uses and purposes to be herein after directed by 'me,' &c.; 'as also, declaring that my said trustees, and my exe-

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'cutors, acting under, and by virtue of these presents, shall not be 'liable for any omissions or neglects in their management, nor for 'the intromissions or solvency of the factors, or others whom they 'may employ, or the debtors whom they entrust, but shall only be 'bound to act honourably, and shall only be liable for their actual 'intromissions, and each of them for himself, and his own actual in-'tromissions respectively, and no further,' &c.

Mr Anstruther died, (June 1819,) and the trustees above named, viz. Sir Robert Henderson, Mr Cheape of Rossie, and Mr Heriot of Ramornie, writer to the signet, accepted of the trust, and entered into the management of the trust-estate; and the two former appointed Mr Heriot as their agent and factor under the trust; and they directed him, at their first meeting, to 'open a deposit-account 'with the British Linen Company, on their account, from which 'Mr Heriot can operate and draw the sums required to pay off the 'debts due by Mr Anstruther at the time of his death, and pay in 'such sums as he shall receive,' &c. Among the debts due, and obligations entered into by the late Mr Anstruther, there were a variety of annuities and bonds of provisions, granted by him in favour of different individuals, besides various gratuitous legacies.

In the year 1824, and after an unsuccessful challenge of the trust-deed by the heirs-at-law, the lands of Cruivie, conveyed in the trust-deed, were sold, and ultimately purchased by Sir Robert Henderson for L. 24,800; and at one of their meetings, (26th August 1824,) 'the trustees authorise Mr Heriot to receive the 'balance of the price from Sir Robert Henderson, and to place it 'in one of the banks, until an order of Court is obtained for a fur-'ther division.' This, however, was not done, and a considerable part of the price remained in the hands of Mr Heriot. Again, at a meeting in 1829, the trustees directed Mr Heriot to put the price of certain other lands which had been disposed of 'into one of the 'chartered banks, until a proper security was obtained, and recom-'mended that a good heritable security should be obtained as soon 'as possible.' But this money also remained in the hands of Mr Heriot.

In the same year that the lands of Cruivie were disposed of, (1824,) an action of multiplepoinding was brought by the trustees, on the narrative, that it was now ascertained that the trust-property would not be sufficient, after payment of the whole debts by Mr Anstruther, to pay the various legacies, provisions and annuities left by him; and subsuming, that the pursuers were willing to make over the whole funds and effects to such person or persons as should be found entitled thereto. A remit was made to an accountant, to make a report on the value of the annuities and legacies, and as to the propriety of making an interim payment to the various claim-

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ants; and the accountant, in an interim report, stated, inter alia, 'that from the price of Cruivie an interim payment of L. 11,696 'may be made to the various claimants, agreeably to the following 'scheme and states.' The report then sets forth, that 'from the 'fore end of which sum, there falls to be set apart sums to meet 'the following claims, till it shall be decided whether they are pre-'ferable to the annuities and legacies contained in the trust-settle-'ment of the deceased, or must rank pari passu therewith,' viz. *(the claims are here specified.)* Certain objections to this report were repelled by the Lord Ordinary; and in a second report, (after fixing the sum for division,) the accountant reported, that 'from the 'fore end of which sum there falls to be set apart the value of the 'following sums, to meet another claim specified by the accountant, 'and contained in a bond of provision granted by Mr Anstruther.'

There was no order of Court, nor any motion made by the parties interested, that the sums so set apart should be consigned or secured, and Mr Heriot retained them in his hands, and at the same time various payments were made to the gratuitous legatees. Mr Heriot became bankrupt in 1832, having, at the time, upwards of L.6000 of the trust property in his hands. Upon this event, the parties in right of the bonds of provision above referred to raised an action of relief against the heirs-at-law of Mr Anstruther, (the present pursuers,) who had succeeded to the estate of Ardit, and obtained decree therein for the sums due to them. Thereupon the pursuers (by their trustees, Mr Murray and others,) brought the present action of relief against Sir Robert and Mr Cheape.

Pursuer's Pleas.

The grounds upon which the pursuers chiefly rested their claim was, that although the clause restricting the liability of the trustees was expressed in strong terms, the defenders had not discharged their duty in regard to their factor, Mr Heriot. In particular, that instead of setting apart, as recommended by the accountant, and properly securing sums for the payment of the claims now pursued for, they had allowed a great part thereof to remain in the hands of their factor, while he made payment to a large amount to the gratuitous legatees under the first deed, without making provision for the discharge of the obligations come under by Mr Anstruther by the bonds granted by him; that they also had been guilty of gross negligence in allowing Mr Heriot, in violation of their own express directions to him, given both at their first meeting and at subsequent meetings relative to the disposal of the property which had been sold, to retain possession of such large sums belonging to the trust-estate, (to the extent occasionally of L.10,000 at a time,) and that by so doing, they had rendered themselves personally liable

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for their negligence, without imputing to them any mala fides. In the case of Moffat and others v. Robertson, 31st Jan. 1834, a trustee was found liable for a similar neglect, although it was declared in the trust-deed 'that the trustees should not be liable for neglects 'or omissions, nor for not doing diligence, nor in solidum, but only 'each for his own actual intromissions.'

Defenders' Pleas.

It was *answered*—That the terms of the trust-deed under which the defenders acted protected them from any further responsibility, except for their own actual and individual intromissions respectively, and that they should act honourably in the affairs of the trust. They were authorised to appoint one of their number as factor under the trust, without being liable for his omissions or solvency; and in appointing Mr Heriot, they acted with the most perfect bona fides. They were not only warranted in doing so by the trust-deed, but also by the universal opinion that was entertained of Mr Heriot's ability, integrity and solvency; and although large sums remained in his hands, the defenders had no reason to entertain any suspicion of his credit till the bankruptcy took place; and that being the case, they were completely protected by the clause in question. Besides, by raising the action of multiplepoinding, the trustees brought the whole matters of the trust under judicial discussion, and placed them in manibus curiæ. From that time they were relieved from all responsibility as to the management, situation and division of the funds; and as the pursuers themselves were aware that the funds were in the hands of Mr Heriot, they were not now entitled to plead that the trustees personally received and intromitted with them.

'The Lord Ordinary assoilzies the defenders from the conclusions 'of the libel, and decerns; finds no expenses due.'

Note.—'Mr Anstruther, in his trust-deed, bestowed extensive 'powers on the trustees, and restricted their liability by a clause 'expressed in unusual and very anxious terms. They are autho-'rised to appoint one of their own number, or any other person, 'factor or cashier. That individual is empowered to collect and re-'ceive all the trust-funds conveyed, and to apply them to the uses 'and purposes of the trust. It is afterwards declared, that the trus-'tees shall not be liable for any omissions or neglects in their ma-'nagement, nor for the intromissions or insolvency of the factor, 'or others they employ; but that they shall only be bound to act 'honourably, and shall only be liable for their actual intromissions, 'and each of them for himself, and his own actual intromissions re-'spectively. The accepting trustees appointed James Heriot of 'Ramornie, writer to the signet, one of their number, factor and 'cashier. It is not denied that he was of undoubted credit at the

'time, and supposed to be possessed of a large fortune. He had been 'the agent of the truster, and seems to be suggested as factor in 'the trust-deed, as none of the other trustees was a professional 'agent. It is admitted, that he alone intromitted with any of the 'funds, and that none of the defenders had any intromission in the 'sense of the trust-deed, where actual intromission is carefully dis-'tinguished from constructive intromission. The trustees directed 'him to open an account with one of the Edinburgh banks, which 'he did; and for some years, during which the trust-deed was un-'der challenge, he seems to have retained very small sums in his 'hands. After the conclusion of that suit in 1824, a multiple-'poinding became necessary to adjust the claims of the legatees 'and annuitants; and, on a remit to Mr Paul, accountant, an in-'terim report was made in July 1824, and a second report in 1828. 'In terms of these reports, payments were made, but the account-'ant directed a sum to be set apart for answering annuities. No 'suggestion was made by the accountant, that the funds so set apart 'should be lent out or secured, nor was there any order of the Court 'to that effect. Neither the pursuers, who were parties to the suit, 'nor any of the claimants, moved the Court that any part of the 'fund in medio should be consigned. Mr Heriot retained the sums 'which the accountant had reported should be excluded from the 'interim division, and he allowed an additional sum to accumulate 'in his hands, which remained till his bankruptcy.

'As the defenders, therefore, had no actual intromission, as they 'transgressed no order of the truster or of the Court, as they were 'guilty of no fault, except a neglect or omission to see that Mr 'Heriot had lodged his receipts regularly in the bank, which they 'had directed him to do, as it is not alleged that they had reason 'to entertain any suspicion of his credit till his bankruptcy took 'place, there is no ground, in the Lord Ordinary's opinion, for 'subjecting them to the loss which has occurred.

'From exuberant confidence in their factor, they acted imprudent-'ly and carelessly; but it was an omission only, and certainly it was 'no act of transgression, far less a dishonourable act.

'The case of Moffat *v.* Robertson, 31st Jan. 1834, on which the 'pursuers have founded, does not apply. There the trustees were 'directed to see certain annuities secured, or retain a sum in their 'own hands to answer them. Robertson, the defender, one of the 'two accepting trustees, interfered, to the effect of authorising the 'sum required to remain in the hands of his co-trustee without se-'curity. On his part, therefore, there was not a neglect, but a 'transgression of the truster's order; for the sum was neither se-'cured, nor was it, according to his plea, retained in the hands of 'the trustees.

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'A circumstance, which at first sight appeared suspicious, has 'been satisfactorily explained. One of Mr Anstruther's trustees 'purchased an estate falling under the trust-deed, but he did so not 'from the trustees, but from a person who had purchased it from 'them after it had been exposed by public auction. It is not aver-'red on the record that there was any collusion in this transaction.

'No expenses have been found due to the defenders; for, although 'legally irresponsible, they acted with great imprudence and negli-'gence, and, in particular, they allowed their own order for a pe-'riod of years to be disobeyed by their factor.'

Judgment.

To this interlocutor the *Court* unanimously adhered.

Opinion of Court.

The *Lord President* observed, that whatever might be the rule at common law, and in the ordinary case, as to the responsibility of trustees, it was in the power of the truster to create the trust under such conditions as he might think proper; and it was impossible to conceive a deed in which trustees could be more anxiously relieved from responsibility than in the present case; so that unless they had acted dishonourably or fraudulently, (which is not at all alleged, they having only placed too much confidence in Mr Heriot,) they were completely protected by the clause in question.

Lord Corehouse, Ordinary. Act. *Dean of Fac. (Hope,) Walker.* Alt. *Rutherfurd, H. J. Robertson.* *Walker, Richardson & Melville*, W. S. and *Thomas Leburn*, S. S. C. Agents. *F.* Clerk.

R.

SECOND DIVISION.

No. XLVI. *6th February* 1835.

JAMES GRANT
against
C. MACONOCHIE AND OTHERS, (M'EDWARD'S TRUSTEES.)

DILIGENCE.—COMPETITION.—1621, c. 18.—*Circumstances in which it was held that a trust-deed by an insolvent party, for behoof of creditors generally, was reducible under the second branch of the act* 1621, c. 18, *as in defraud of begun diligence.*

JAMES GRANT, writer in Elgin, was creditor of John M'Edward, merchant, Aberlour, by two bills, one for L.30, the other for L.28:10:9. On the 11th April 1831, he obtained letters of horning on both bills, and on the 13th charged M'Edward on the bill

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for L.30. After receiving this charge, M'Edward wrote to Grant, urging him to desist from farther proceedings till Thursday the 21st. On Saturday, the 16th April, Grant, in reply to M'Edward's application, wrote to him that he would, 'in the meantime, defer exe-'cuting the second horning until two o'clock on Thursday first; 'and unless a settlement in cash takes place at or before that hour, 'you may look for a poinding being executed on the first bill, and 'a charge upon the L.28 bill that evening.'

Upon Tuesday, the 19th of April, M'Edward executed a disposition of his whole property and effects to Maconochie and others, (the defenders,) for behoof of his creditors; and intimation of this trust-disposition was given to Grant on the same day, by a letter dated Keith, 19th April, from the 'agent for the trustees of John M'Ed-'ward.' This intimation, Grant alleged, was received on the 20th.

Early in the morning of Thursday the 21st, Grant proceeded with his poinding on the L.30 bill; but the messenger was prevented entering M'Edward's shop by the trustees, who had taken possession before the messenger attempted to poind. An execution of lockfast doors was returned by the messenger. At the same time, he gave M'Edward a charge of horning on the bill for L.28: 10: 9. On the 26th April a notarial instrument of possession was drawn up in favour of the trustees, the goods of M'Edward still remaining in his shop. Grant obtained letters of open doors, dated the 2d of May, and containing a new warrant of poinding; and on the 4th and 5th of May, by virtue of the letters of open doors, and also by virtue of both the letters of horning on the two bills respectively, each of which contained a warrant to poind, he carried through a poinding of part of M'Edward's shop goods, for payment of the two bills. The execution of poinding bears, that 'after proclamation 'of the said letters of open doors and letters of horning, which 'I conjoined, together with the respective executions thereof, and 'demanding payment of the sums contained in each of the said di-'ligences, I lawfully apprehended and poinded the goods,' &c. An application was made by Grant, on the 7th of May, to the Sheriff of Banffshire, for warrant to sell the poinded goods, which was opposed by the acting trustees of M'Edward; and the Sheriff, on a closed record, (9 Nov. 1832,) sustained the title of the claimants under the trust-deed, and hoc statu refused the warrant of roup; and found the poinder (Grant) liable in expenses.

Grant advocated, and brought a reduction of the trust-deed. It appeared in the course of the proceedings in this Court, that the L.28: 10: 9 bill was vitiated by an erasure in the figure 4 in the date, (4th Dec. 1830,) and also that, in the register of the horning on that bill, M'Edward is styled 'Merchant in Aberdeen,' while he was

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proceeded against as 'John M'Edward, merchant in Aberlour.' Various grounds of reduction were insisted in; but in reference to the facts now stated, the pleas of the parties were:

Pursuer's Pleas.

For the *pursuer*, Mr Grant—That the deed challenged is reducible under the second branch of the act 1621, c. 18, as a voluntary alienation made in defraud of begun diligence.

Defenders' Pleas.

For the *defenders*—1. The bill for L.28:10:9 being vitiated in date, can be the ground neither of diligence nor action, and therefore the poindings of the pursuer, which proceeded indiscriminately on both bills, are null in toto. 2. The poindings having been executed only in virtue of letters of open doors, which proceeded exclusively on the L.30 bill, no legal poinding on the other bill was ever executed.

The Lord Ordinary pronounced the following interlocutor:

'The Lord Ordinary having considered the closed record in these 'conjoined actions of reduction and advocation, with the relative 'documents, and heard the counsel for the parties thereon, repels 'the reasons of advocation; sustains the defences against the reduc- 'tion, and assoilzies the defenders therefrom, and decerns: Finds 'the pursuer liable in expenses in both processes,' &c.

Note.—'The challenge under the second branch of the act is not 'free from difficulty, because, on the 13th of April, the pursuer gave 'a charge on the unvitiated bill, when the debtors asked delay till 'the 21st, which being granted, he, on the 19th, executed the trust- 'deed. But, 1st, his thus divesting himself in favour of all his cre- 'ditors is no conclusive evidence of fraud, either on his part, or that 'of the trustees. 2d, The trust was caried into effect, and the goods 'in question were taken possession of by the trustees, before the 'pursuer had commenced any such diligence as is necessary, by the 'act 1621, to attach the debtor's property. His poinding was only 'attempted on the 21st of April, and the goods had been made over 'on the 19th to the trustees; who, when the poinding messenger 'appeared, were so completely in possession, that their not admit- 'ting the messenger to the shop is one of the charges made against 'them by the pursuer himself. This circumstance of possession 'prior to poinding seems to have been held decisive in the some- 'what analogous case of M'Haffie, 8th Feb. 1828.

'If the deed be saved from reduction, of course the pursuer must 'be held wrong in the advocation. But even though it were to be 'reduced, the judgment of the Sheriff was right when it was pro- 'nounced, because he was bound to give effect to the trust-deed so 'long as it stood.'

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The pursuer *reclaimed.*

Pursuer's Pleas.

Penney, in support of reclaiming note.—The ground of reduction he insisted in, was on the second branch of 1621, c. 18. It was erroneous in the Lord Ordinary to say there was no alleged evidence of fraud; the act does not require fraud. Here, diligence was begun; and the purpose of the act was not to protect completed diligence, but begun diligence. It would go to stultify the act, to hold completed diligence necessary. In the case of M'Haffie there was no reduction; and the Court merely gave effect to the possessory right of the trustees for creditors.

Defenders' Pleas.

Cuninghame, for the *defenders.*—The note of the Lord Ordinary is expressed in terms too general. The case is entirely different from what is now represented. Of the two bills, one was vitiated; —a charge was given on the good bill, but then the pursuer proceeds to poind in a certain form,—on the bad as well as the good bill. He could never have taken any thing under that poinding: it was null. The defenders were entitled to found on any nullity. The pursuer cannot be in a better situation here, than in the general case of a poinder proceeding irregularly. The authority of Mr Bell shews, that begun diligence, if followed up, must be regular, and the whole proceedings unexceptionable. The poinder must be so situated, that if he offer back the goods, he might get payment. The offer here was on both bills, when it was plain the diligence was bad.

Opinion of Court.

Observed on the Bench.—The case is different from that of Macbaffie, where there was no reduction. Here there was clearly begun diligence on a good bill, previous to the trust-disposition. And although the other bill was bad, and any diligence proceeding on that bill would be null, yet the attachment by the messenger proceeded indiscriminately on the good and the bad bill, and was, in so far as concerned the good bill, regular. By including the bad bill in the same attachment, the effect of the inchoate diligence on the other could not be destroyed.

Judgment.

The Lords recalled the interlocutor, and found the trust-disposition null and void; and remitted to the Lord Ordinary to hear parties as to the extent of the debt, and all other matters.

Lord Ordinary, *Cockburn.* Act. *Dean of Faculty*, (*Hope*,) and *Penney.* *Ro. Roy*, W. S. Agent. Alt. *Cuninghame* and *Russell.* *Greig & Morton*, W. S. Agents. *T.* Clerk.

R.

SECOND DIVISION.

No. XLVII. *6th February* 1835.

PETER FINDLATER'S TRUSTEES
against
PETER BARBER AND OTHERS.

PROVISIONS TO CHILDREN.—LIFERENT AND FEE.—*A testator having conveyed his property, in trust, for his daughters in liferent, and to the children whom they might have in fee, equally among them, per capita, and share and share alike,—held, in a question betwixt an only surviving daughter and the children of two other daughters deceased, that there is no room for the distribution of the fee among the children of the daughters, while any of the daughters are alive.*

IN 1825, Peter Findlater executed a trust-disposition and settlement, by which he conveyed to certain trustees his whole property, heritable and moveable, (with the exception of his household furniture, which he bequeathed to his wife, Sarah); and he directed them, after payment of his debts, to pay to the said Sarah, during widowhood, the whole free yearly produce of the free residue of his said estate,—her liferent to be restricted to a third of such free yearly produce in the event of her again marrying. He farther directed his trustees, at the first term after the death of the longest liver of him and his spouse, to make payment of certain legacies to his two daughters, Mrs Barber and Mrs Murray, and to John Findlater Barber, his grandson. In the *fourth* place, he directed, 'that, 'upon the decease of the longest liver of me and my said spouse, 'the said trustees shall, after deducting the amount of the legacies in favour of my two daughters and of my grandson, above 'written, pay over the free yearly produce of my said estate, heritable and moveable, to my children after mentioned, viz. To 'Ann Findlater, spouse of Robert Turner, surgeon, formerly in 'Dumfries, now abroad, Hannah Findlater, above mentioned, and 'Margaret Findlater, also above mentioned; and in case the said 'Mrs Findlater, my spouse, enters into a second marriage, then 'two-thirds of the said yearly produce shall be paid to my said 'children, equally among them, and that during all the days of 'their lives respectively; declaring always, that the sums hereby 'directed to be paid to my said children shall be so paid over to 'them respectively, exclusive of the jus mariti of their present hus-

'bands, or of any other husband they may hereafter marry, and the 'receipts and discharges to be granted for the same to my said 'trustees shall be valid and sufficient, without the consent of her or 'their husbands; and also declaring, that my said trustees shall 'dispone and convey the free residue of my said heritable and 'moveable estate to the lawful children of such of my children 'above named as shall happen to leave issue, equally among them, 'share and share alike, and that in fee, heritably and irredeemably; 'it being my will that the said residue shall belong to my grand-'children, equally among them, in capita, share and share alike, 'and that my own children shall have a right of liferent allenarly; 'and failing there being lawful issue of my said children, my said 'trustees shall be bound to dispone my said whole estate, heritable 'and moveable, to my own heirs whomsoever.'

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Mr Findlater died in 1826. His wife and three daughters survived him. Mrs Findlater died in July 1831, without having entered into a second marriage. One of her daughters, Mrs Murray, predeceased her; another, Mrs Barber, only survived her a few weeks. Both Mrs Murray and Mrs Barber left children. Mrs Turner, the only daughter of the truster in life, has been married several years, and has one child.

Findlater's trustees having brought a process of multiplepoinding and exoneration,—

Mrs Turner, as the only surviving daughter, *claimed* the liferent of the whole free residue of her father's estate, and *pleaded*—

Mrs Turner's Pleas.

1. As the testator disponed his property to his daughters in liferent, and to the children whom they might leave in fee, equally among them, per capita, and share and share alike, it is impossible that any division of the fee can take place till after the death of all the testator's daughters, and among such of their children as may be then alive; Burnet *v.* Burnet, *Mor.* 4274.

2. By desiring his trustees to pay over to his daughters equally among them, during all the days of their lives respectively, the yearly produce of his estate, the testator intended that the last surviving daughter should draw the whole yearly produce, and not that the shares of the predeceasing daughters should be drawn by his trustees, to accumulate for behoof of the fiars.

3. This intention of the testator, that the shares of the deceasing daughters in the liferent of his estate should accresce to the survivor, is the more evident from his not having enjoined his trustees to pay any fixed sum out of the said annual produce to his children nominatim, and from his providing that the receipts for payment of the said annual produce might be granted by his daughters, 'without the consent of her or their husbands.'

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The other claimants, the children of Mrs Murray and Mrs Barber, and grandchildren of Peter Findlater, *claimed*, that the liferent of Mrs Turner might be limited to one-third of the free residue; and farther *pleaded*—

1. Mr Findlater having directed the free produce of his estate, heritable and moveable, to be paid to his three daughters, equally among them, during their respective lives, the right of each was thereby limited to the liferent of one-third, and there being no provision that the shares of daughters predeceasing should accresce to the survivor, the liferents constituted in favour of Mrs Barber and Mrs Murray became extinguished on the death of these ladies; Paterson *v.* Paterson, June 1741, *Mor.* 8070; Rose *v.* Rose, 15th Jan. 1782, *Mor.* 8101.

2. The trustees having been directed by Mr Findlater to convey the free residue of his estate to his grandchildren in fee, those portions of the fund in medio, in regard to which the liferent is extinguished, ought now to be paid over to the claimants, and to the surviving child of Mrs Turner, equally among them.

3. At least those portions of the fund in medio which have been relieved from the burden of the liferents in favour of Mrs Barber and Mrs Murray ought to be paid over to the claimants, on their finding caution to account for the sums which they may respectively receive, to any children which may hereafter be born of Mrs Turner.

4. The remaining third of the fund in medio ought to be lent out on good security, and taken payable to Mrs Turner in liferent, and to the claimants nominatim, and the children procreated or to be procreated of Mrs Turner, in fee.

After a debate on the closed record, the following interlocutor was pronounced:

'The Lord Ordinary having renewed consideration of the debate, and the closed record, and whole process, finds, That, according to the sound construction of the trust-settlement of the late Peter Findlater, the claimant, Ann Findlater or Turner, being the only surviving daughter of the said Peter, is entitled to the total liferent of the trust-estate during all the days of her life, and that there is no room for any distribution of the fee among the children of the daughters while any of the daughters survive; and appoints the case to be enrolled, that parties may be prepared to state what decerniture they require, or would suggest, to apply this finding to the present state of the trust.'

Note.—'The Lord Ordinary considers this as a quæstio volun-

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'tatis, and, owing to the great vagueness of the expression, not unattended with difficulty. On the one hand, it may seem improbable that the testator should have meant that the children of his predeceasing daughters should get nothing, while any of their aunts was alive; but, on the other hand, it is still more improbable that, in the event of their predeceasing without children, their shares of the liferent should accumulate in the hands of the trustees, for some uncertain distribution, on the death of the survivor, rather than accrue immediately to that survivor, to whose children (if she had any) the whole must ultimately come. But what decided the opinion of the Lord Ordinary was, the obvious impossibilities of making any actual distribution of the fee, till it was seen, at the death of the last surviving daughter, in what shares, and among how many grandchildren it was to be divided. If it had been to be divided among the grandchildren per familias, and not per capita, and if each set of children had been to get the same share of the fee as their respective mothers had originally of the liferent, there would have been no difficulty in the construction. But the grandchildren are to get the whole fee equally among them, per capita; and how, therefore, can it be divided till it be seen how many are to share in the division? The claimant, Mrs Turner, has yet but one child, and her predeceasing sisters have left (between them) six or seven. But Mrs Turner may have seven more children yet before she dies; and how could the trustees divide the fee (or any part of it) among the eight existing children, when it may turn out that it should have been divided among fifteen?

'Another conclusive reason for holding that the liferent must have been meant to accrue to the surviving daughters arises from the absurd consequences which would follow, on any other supposition, in a case which must be held to have been in contemplation, and is indeed expressly provided for, as to the destination of the fee. If none of the daughters leave any children, the fee of the testator's whole estate is directed to be made over to 'his own "heirs whatsoever;' that is to say, to heirs more remote and less favoured than his immediate descendants. It seems strange enough that the testator should have confined his own daughters to a liferent, and reserved the fee to such persons; but it is utterly inconceivable that he should have meant to let two-thirds of the liferent also accumulate for their benefit, while his one surviving daughter was restrained to her original share of a third. The latter words of this clause plainly imply, that the trustees were to keep the whole of the estate in their hands, till it should be finally ascertained whether it was to go to grandchildren, or to remoter

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'heirs; and are therefore conclusive against the competency of 'any present or earlier distribution.'

On 13th December 1834, the Lord Ordinary having resumed consideration of his interlocutor and note of 9th December current, 'Finds the claimant, Mrs Turner, entitled to the liferent of the 'whole free residue from and since Martinmas 1831, subject to the 'necessary expenses of management, and ranks and prefers her ac- 'cordingly, and decerns. With reference to the condescendence 'of the fund in medio, lodged by the raisers, sustains Mr M'Gowan's 'accounts as taxed; repels the whole of the remaining objections 'thereto; finds the raisers entitled to their expenses out of the 'fund in medio: Further, in consideration of the ambiguity of 'the trust-deed, finds the whole of the claimants entitled to their 'expenses out of the fee of the property; appoints accounts thereof 'to be given in, and, when lodged, remits the same to the Auditor 'of Court to tax and report; of consent, ordains the raisers to put 'into process a state of the rents, and the expenses of management, 'from Martinmas 1831 to Martinmas 1834, and that by the box- 'day in the ensuing recess.'

Judgment.

The grandchildren *reclaimed;* but the *Court* adhered, and found the respondents liable in the expenses of opposing the note.

Lord Ordinary, *Jeffrey.* For the Grandchildren, *Dean of Fac. (Hope,)* and *A. Anderson.* *Joseph Mitchell*, W. S. Agent. For Mrs Turner, *Rutherfurd* and *D. Milne.* *Alex. Simson*, S. S. C. Agent. *T.* Clerk.

R.

SECOND DIVISION.

No. XLVIII. *7th February* 1835.

PATRICK IRVINE, W. S. CLERK TO THE TRUSTEES FOR THE CREDITORS OF THE CITY OF EDINBURGH,
against
ARCHIBALD BRUCE, ACCOUNTANT.

HYPOTHEC.—ACT 3. AND 4. GUL. IV. C. 122.—*Question, whether the right of a party, who was entitled to retain, and to refuse inspection of writs, the use of which essentially consisted in inspection, was impaired by the provisions of the City of Edinburgh trust-act.*

Mr Irvine was found entitled, by the Lord Ordinary, to inspection, but only under certain reservations, of writs over which Mr Bruce had a lien. At the moving of a reclaiming note for Mr Irvine, his counsel intimated his acquiescence in the interlocutor of Lord Moncreiff in the advocation; which was accordingly adhered to.

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(Lord Moncreiff, in a note to his interlocutor (20th Dec. 1834,) states his views of the law as to the above question.)

Lords Ordinary (in the Suspension) *Jeffrey* and (in the Advocation) *Moncreiff*. For Mr Irvine, *Dean of Fac. (Hope,)* and *A. Anderson*. Party Agent. For Mr Bruce, *Keay*. *Thos. Bruce jun.* W. S. Agent.

R.

SECOND DIVISION.

No. XLIX. *7th February* 1835.

Reverend JOHN M'NAUGHTON, Minister of the High Church Parish of Paisley, and the Kirk-Session, *against* The PROVOST, MAGISTRATES and TOWN-COUNCIL of PAISLEY.

Kirk.—*Interdict granted, and bill passed, to try the question, whether the Magistrates of Paisley can cause or authorise the bell of one of the established churches in that burgh to be rung for summoning meetings of voluntary church associations, or similar meetings for public worship, without the consent and permission of the minister and kirk-session.*

There are two steeples in Paisley, each provided with a bell. The one is situated at the Cross, where the town-hall and court to which it was attached formerly stood, and the bell in it was confessedly subject to be rung for all burgal matters, such as summoning courts, meetings of the inhabitants, &c. The other steeple is that of the High Church, the bell in which was provided by private subscription, some years after the church was built.

With the acquiescence of the minister and session, it has been the practice in this parish to have the bell rung daily (except on Sundays) at six in the morning and six in the evening, for the convenience of workmen going to and returning from their work, and also on occasions of national rejoicing. It was also averred by the

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Magistrates, that there had been a practice of ringing the bell, not only for various secular purposes, but on the occasion of meetings of the Society for the Reformation of Manners, the Sabbath and Week-day Evening School Society, and the Widow and Orphan Society; and that too whether the sermon was to be preached by the clergy of the established church, or by a dissenting minister, and whether in a parish church or dissenting chapel; and that the bell-ringers took their orders from the Magistrates.

In the course of last autumn, on the occasion of opening a new church in connection with the Establishment in the Middle parish, the Rev. Mr Begg, the minister of that parish, being desirous to have the High Church bell rung to announce the time of public worship, and Mr M'Naughton, the minister, being from home, applied to the Magistrates for an order to ring it for this purpose. The Magistrates granted the order, but at the same time inserted on their minutes a declaration to this effect: 'The principle being 'admitted, that the bells be rung on like occasions on the applica-'tion of any religious body for the purpose of public worship, and 'also for any public meeting.' In conformity with this resolution, the Magistrates, on the 18th November last, ordered the bell of the High Church to be rung for summoning a meeting of a voluntary church association. The session happened to be sitting at the time when this order was to be executed, and there being no access to the bell but through the session-house, the parties authorised by the Magistrates entered the session-house, passed through it, and began to ring the bell, but were immediately interrupted by the members of session present. Mr M'Naughton on this addressed a remonstrance to the Council; but on the 1st December, the church bell having been again rung by order of the Magistrates, for assembling a congregation of dissenters to public worship in a dissenting meeting-house, Mr M'Naughton and his session presented a bill of suspension and interdict, praying to have the Magistrates prohibited 'from causing the said bell to be rung, or from granting any war-'rant or order to ring the same, for any purpose, or on any occasion 'other than at the customary times in the morning and evening, 'for warning work-people to proceed to or leave their work, or on 'occasions of national rejoicing, to which the complainers will 'willingly, as heretofore, consent; or at least from causing the said 'bell to be rung, or granting any warrant or order to ring the same 'for the purpose of summoning meetings of voluntary church asso-'ciations, or similar assemblies, for calling people to public worship, 'or for any other ecclesiastical or religious purpose, without the 'consent and permission of the complainers.'

This bill having come before Lord Cockburn, his Lordship

(Dec. 16. 1834) appointed it to be answered, and in the mean time granted interdict, as craved; but, on advising, with answers, on the 20th January, his Lordship, while he passed the bill, recalled the interdict, stating his reasons in a note, as follows: 7 Feb. 1835. Minister of High Church Parish v. Magistrates of Paisley.

'The interdict has been recalled, 1st, From unwillingness to interfere summarily with the Magistrates in their municipal administrations, without absolute necessity. 2d, Because no irremediable injury is done by ringing these bells during the discussion of the bill, even although the Magistrates be wrong. 3d, Because the state of the practice is disputed, and the use of the bells for certain secular purposes is admitted in the bill.'

Mr M'Naughton, &c. having *reclaimed*, counsel were heard for both parties.

The *Court* altered the interlocutor of the Lord Ordinary, and granted the interdict as prayed; and found the complainers entitled to the expenses of the reclaiming note. Judgment.

Lord Justice-Clerk.—This is a very important question. The bill has been passed, but the Lord Ordinary has thought proper to recall the interdict granted on its presentment; and the question is, Whether this interlocutor is right? Looking at the statement of both parties, and seeing that the respondents, in their answers, oppose the interdict in toto, I cannot hold that we are called on solely to interfere as to the secular uses of the bell. The real gravamen of the complaint is apart from that, and is the manifest assumption of right by the Magistrates to use the bell for any purpose, and particularly to assemble congregations of dissenters without qualification, and meetings of all bodies of citizens. It just amounts to this, that these gentlemen, though bound by the law of Scotland, and by their oaths of office, to support the established institutions of the country, assert a right opposed to their duty as magistrates. While the Established Church is supported by the State it is under the protection of every magistrate; and it is their duty, which cannot be affected by their being elected by a popular constituency, as seems to be assumed by the respondents, to do every thing in the lawful sphere of their office to support and maintain it. We certainly live in strange times, when it should ever have entered into the minds of magistrates to countenance societies whose avowed object is to pull down the Church established by the blood of our ancestors, and which, it is to be hoped, under Divine Providence, may be preserved to our children's children. Yet we see it avowed, by the minute of 19th September, that the bells be rung 'on the application of any 'other religious body for the purpose of religious worship, and also 'for any public meeting.' Is that language consistent with the pro- Opinion of Court.

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fessions of these Magistrates in their answers, of regard for the rights and feelings of the members of the Established Church? Then the only access to the bell is through the session-house; and though the session was sitting, the bell was ordered to be rung for summoning this meeting, the object of which confessedly and notoriously was hostile to the Established Church. I am not moved by the circumstance that the bell is rung at work hours, public rejoicings, &c. as all such ringing is with concurrence of the session, and that does not affect the question here, with the full disclosure in the minute of the object intended; and I cannot entertain the smallest doubt that, as guardians of the rights of the people of Scotland, we are bound to interfere to prevent these proceedings; and I must farther add, that I cannot concur in any of the grounds given by the Lord Ordinary for recalling the interdict. The bill asks nothing that we are not perfectly warranted to grant, though I would not object to a qualification as to the use of the bell for particular secular uses, as hitherto exercised.

Lord Glenlee.—I am entirely of the same opinion. The question of interdict seemed to me identical with passing the bill. It is curious how this question arose. Mr M'Naughton being out of the way when Mr Begg wished the bell rung for his new church, the Magistrates, instead of just letting the bell be rung, and saying no more about it, make a minute, in which they insert this clause: 'The principle being admitted, that the bells be rung on like occasions, on the application of any other religious body, for the purpose of public worship, and also for any public meeting.' It is plain, from the very terms of this minute, that they are going to exercise a right they never were in the use of exercising, for they don't pretend to any practice, but lay it on the principle which they attempt to maintain, and on that they have not a word to say against recalling the interdict, which is a very moderate one.

Lord Meadowbank.—I so very recently had occasion to give an opinion as to the rights of ministers, magistrates, and heritors, regarding churches, that there is no call at present to enter fully into the question, having been confirmed by after consideration in every thing I then took the liberty of stating, and this case materially depends on the decision we then arrived at. My opinion was, that the clergy have right to the possession of churches for ecclesiastical purposes, and cannot be interfered with. Now, in point of fact, this steeple is part of the High Church of Paisley, and it would take some very strong argument, indeed, to satisfy me that we could separate it from the church, and hold that the minister was entitled to possess one part while he could not possess the other. If this were the case, the Magistrates might order the bell in the steeple

to be rung at the very moment the congregation were assembled in the church, and the worship of God interrupted. But what is the claim here? It is set forward in clear language in the minute, in which the Magistrates maintain 'the principle, that the bells be 'rung on like occasions, upon the application of any other religious 'body, for the purpose of public worship, and also for any public 'meeting.' The Magistrates are bound to maintain the Established Church, and to protect it from disturbance; and they are not entitled to order the bells to be rung on the application of any other religious body. Indeed, it might so happen, that a majority of the Magistrates and Council of Paisley were Roman Catholics, and under this minute they might summon the people to the sacrifice of the mass, or convocate any body of worshippers whatever. Now, they have not even a right to summon the people for public worship by means of a bell at all to any but the Established Churches. I conceive that, with the single exception of the King's Chapel Royal, the bell of which was transferred, by royal charter, to an episcopal chapel in Edinburgh, where it still is, no body of Dissenters is entitled to a bell. This is not a new idea. An attempt was made in Fife, some time ago, to put up a bell at a dissenting meeting-house. Opposition was given, however, and the law officers of the Crown (including the late Lord President Blair) gave a clear opinion, that no dissenting body were entitled to have a bell at all; and the attempt was consequently abandoned. Still more, therefore, must such use of a parish-bell be illegal. I need not enter into the practice alleged, which proceeded with consent of the minister, for we never could hold it a legal practice even with consent of the minister. Then the whole remaining question comes as to the right to ring for secular purposes; and we are not called upon to say whether it is proper to be rung or not at work hours, or for public rejoicings; for as to that point interdict is not craved. As to the voluntary church meeting, however, a more flagrant piece of indecency on the part of magistrates never fell within my notice. Their duty is to protect the Established Church, and maintain its privileges; and I do differ from the observations of the Lord Ordinary, that no irremediable damage will be done by allowing the bell to be rung for such purposes, pending the discussion of the question. I do think it is an irremediable injury, that the inhabitants of this populous town should have the example of magistrates set before them to countenance the pulling down the Established Church. On the whole, I have no doubt that the interdict should be granted as craved.

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Lord Medwyn.—I am of the same opinion with all your Lordships; and I would scarcely have occupied the time of the Court with any observations, but for the peculiar situation in which I am

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placed, being the only Judge present not connected with the presbyterian establishment. Being satisfied, however, that it is a privilege of the Established Church, and of the Established Church alone, to summon its worshippers by a great bell, I am for continuing the interdict. Here there is a proper burgh bell, as is not unusual in burghs, for calling courts and meetings. And I would like to know by what authority the Magistrates call this bell of the High Church a town's bell. It was not even supplied by the town, but by public subscription of the inhabitants. It is, no doubt, true, that the ordinary practice is to toll the bell, morning and evening, at work hours; and there is nothing incorrect in permitting such uses. The curfew was known in Scotland, as in other countries; (*Barrington on the Statutes*, '*Curfew*,' p. 153, *Stat. Civil.* Lond.) The act 1436, c. 144, ordains, that at nine in the evening the bell shall be rung within burgh. Sir George Mackenzie (p. 31,) observes, that the hour in Edinburgh was altered to ten, at the solicitation of the Countess of Arran, and hence it was called the Lady's bell. And practice may sanction the use of the church-bell for this useful purpose, especially since the Reformation, and when either the burgh bell wore out, or the town came to extend beyond the sphere of its influence.

But the ringing of the bell for mere secular purposes is totally different from what is here asserted. I am not moved by the circumstance, that there are three parishes here, and only one bell. The bell is for the use of the Established Church generally. The employing it to summon the congregations of the other two churches, alongst with the High Church, is totally different from ringing it for dissenting places of worship, or voluntary associations. This is a much clearer case than that of St Andrew's Church. If there the Magistrates had proposed to have worship by a dissenter, the two would have been more nearly the same. I concurred, however, in the judgment in that case, although I could not agree as to the ground taken by my brother, Lord Meadowbank. I did not think, that, since the Reformation, the possession of the church is in the clergy, when they ceased to be beneficiaries and became stipendiaries, conceiving that both property and possession are in magistrates and heritors, though in trust, for the proper uses of religion by the Established Church. Here the case is much clearer, and I see no occasion to qualify the interdict as originally granted. Even if this were no proper church-bell, but a town-house or court-bell, I would not be for allowing it to be rung for the meetings of dissenting congregations.

Judgment.

The *Court*, accordingly, unanimously altered the Lord Ordinary's interlocutor, in so far as it recalled the interdict, granted interdict

as craved, and found the Magistrates liable in the expenses of the discussion. 7 Feb. 1835.

Ministers of High Church Parish v. Magistrates of Paisley.

Lord Ordinary, *Cockburn.* For the Rev. Mr M'Naughton, &c. *Dean of Fac. (Hope,) Alex. Dunlop.* *Maclean & Giffen*, W. S. Agents. For the Magistrates, *Sol.-Gen. A. M'Neill.* *Alex. Nairne*, S. S. C. Agent.

R.

FIRST DIVISION.

No. L. 10*th February* 1835.

WILLIAM M'CRONE
against
JOHN SAWERS.

PUBLIC-OFFICER.—DAMAGES.—PROCESS.—*Held not to be necessary for a pursuer to libel malice in an action of damages against the procurator-fiscal of a county, for criminal proceedings and imprisonment at his instance against the pursuer, for an alleged offence committed beyond the bounds of his jurisdiction, though bona fide believed by the defender to be within the sheriffdom.*

THE defender, Mr Sawers, the procurator-fiscal for Stirlingshire, presented a petition to the Sheriff of the county, (Nov. 1833,) setting forth, that 'the petitioner has received credible informa-'tion, (viz. a signed information by the factor of the Duke of Mon-'trose,) that on the 31st day of October last, a fallow deer, the 'property of his Grace the Duke of Montrose, was, upon the island 'of Inchmurian, in this county, shot and attempted to be carried 'away,' &c. and praying for warrant, in the usual form, to apprehend and bring before the Sheriff for examination the pursuer and the other individuals whom the above information tended to criminate. The warrant was granted, and the pursuer and other two individuals were apprehended in virtue of it, and carried before the Sheriff of Stirlingshire for examination, and were, after investigation, committed to jail.

They were afterwards liberated on finding bail; and thereafter, the pursuer brought the present action, wherein, after stating the above facts, it was set forth, 'that the said John Sawers had no right, 'title or interest, as public prosecutor for the county of Stirling, to 'present the said application: That the said island of Inchmurian is 'not situate in the county of Stirling, but in the county of Dumbarton,

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'where the Sheriff of Stirlingshire has no jurisdiction, and to which 'the official authority of the procurator-fiscal of Stirlingshire does 'not extend: That, nevertheless, the said John Sawers, wrongfully, 'or at least without due caution, presented the said application, in 'relation to an offence charged to have been committed in a place 'which he knew, or by ordinary care and inquiry might have 'known, was not situated within the territory of the Sheriff of 'Stirlingshire, to which his own official duties, as procurator-fiscal 'for Stirlingshire, are limited,' &c.; and (after narrating the proceedings and imprisonment) concluding, that in consequence of the said irregular, illegal, oppressive and groundless proceedings, whereby the pursuer had been hurt in his feelings and reputation, deprived of his personal liberty, and sustained loss and damage, &c. the said John Sawers should be decerned and ordained to make reparation to the pursuer, by making payment to him of L.500 sterling, in name of damages and expenses, &c.

In defence, it was maintained, that the general repute and understanding in the district were, that the island of Inchmurian, (which was one of the numerous islands in Lochlomond, and situated near to that part of the latter at which the imaginary line of separation between the counties of Stirling and Dumbarton was supposed to pass,) formed part of Stirlingshire: That the defender, having it stated to him in a written information, on the part of the proprietor of the island, (who might be supposed to be the best qualified, from the title-deeds in his possession, to know the fact,) that the offence of which he complained had taken place within the shire of Stirling, conceived it to be his duty, as procurator-fiscal of that county, to take the necessary measures for investigating this criminal charge. In these circumstances, therefore, the defender *pleaded*—

Defender's Pleas.

1. As the summons does not charge either malice, or want of probable cause, or both of them, the action is not maintainable.

2. The defender acted bona fide, upon a signed information, lodged by the agent of the proprietor, that the alleged offence had been committed within the sheriffdom of Stirling.

3. In point of fact, the island of Inchmurian is situated within the sheriffdom of Stirling.

4. But, at all events, it was the belief and understanding of the defender, and the general belief in the district, that the island of Inchmurian is situated within the sheriffdom of Stirling; and therefore, in a case of doubt and obscurity, the defender, acting bona fide in the discharge of his official duties, according to the best information he could obtain, is not liable in damages.

5. In the circumstances of the case, the pursuer must have been incarcerated either in Stirlingshire or Dumbartonshire; and in no way has he sustained loss or damage, even on the supposition that a loss did occur *.

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'The Lord Ordinary having heard counsel for the parties, repels 'the first preliminary defence: Repels the second plea as a preli- 'minary defence, reserving its effect as a defence upon the merits: 'Reserves the third defence, as it turns upon a point of fact: Re- 'mits the cause, with the other defences upon the merits, to the 'Jury Roll; and, in respect the defender does not acquiesce in this 'interlocutor, finds him liable in the expense of this discussion; 'appoints an account thereof to be given in, and, when lodged, re- 'mits to the Auditor to tax and report.'

Note.—'Although Justices of the Peace, and certain other officers 'acting in the exercise of their functions, are protected by statute 'from liability for error, in actions of damages, unless malice is 'charged, that privilege does not extend to a procurator-fiscal who 'is accused of having instituted and carried into effect incompetent 'proceedings in the ordinary criminal court of the Sheriff.

'The procurator-fiscal is bound to know the limits of the district 'within which he is authorised to act; and a bona fide mistake in 'that respect is no bar to an action of damages, more particularly 'in a case like the present, affecting the liberty of the subject. If 'there was any doubt with regard to the bounds of the jurisdiction, 'he ought to have sent the case to a higher tribunal. But though 'his alleged bona fides is no bar to the action, and therefore can- 'not be sustained as a preliminary defence, it may have a great 'effect with regard to the amount of the claim against him.'

The defender *reclaimed*, but the *Court* unanimously adhered; the *Lord President* observing, that although the plea of bona fides might be a relevant defence to a party exercising a gratuitous office, such as that of Justice of the Peace, it could not be pleaded by the procurator-fiscal of a county, upon whom it was incumbent to know the bounds of his jurisdiction.

Judgment. Opinion of Court.

Lord Corehouse, Ordinary. Act. *Dean of Fac. (Hope.)* Alt. *Sol.-Gen. (M'Neill.)* *John Cullen*, W. S. and *D. Cleghorn*, W. S. Agents. *F.* Clerk.

C.

* The pursuer had, in the meantime, been tried for the alleged offence before the Sheriff of Dumbartonshire, when the Jury returned a verdict, finding the charges not proven.

SECOND DIVISION.

No. LI. 10*th February* 1835.

JOHN LOVE
against
WILLIAM HUNTER, EDWARD RAILTON AND OTHERS.

BANKRUPT.—TITLE TO PURSUE.—PROCESS.—*In an action for damages by a bankrupt under sequestration against certain parties, including a candidate for his trusteeship,—found, that he was not entitled to insist in the action, until he should either obtain the concurrence of the trustee, as a party along with him, or find caution to the defenders for expenses, in the event of expenses being ultimately found due to them.*

JOHN LOVE was sequestrated in July 1834. An interim factor was appointed; and thereafter, at a meeting for the election of a trustee, certain creditors voted for Edward Railton, others for Neil C. Maclaren. Love brought an action against William Hunter and others for damages on account of wrongous imprisonment; and also an action against Edward Railton for damages for written slander. At the raising of the actions no trustee had been confirmed.

The defenders having objected to the pursuer's right and title to insist without the concurrence of his trustee, or caution for expenses having been found, the Lord Ordinary pronounced the following interlocutor, 20th January 1835: 'In respect the pursuer's 'estate has been sequestrated, finds that he is not entitled to insist 'in this action unless he shall either obtain the concurrence of the 'trustee as a party thereto along with him, or find caution to the 'defenders for expenses to be incurred by them in the cause, in case 'expenses shall ultimately be found due to them; sists process for 'twenty-one days, in order that the pursuer may intimate the de-'pendence to the trustee on his sequestrated estate.'

The pursuer *reclaimed* in both actions.

Opinion of Court.

Lord Justice-Clerk.—On reference to the bankrupt statute, it is clear that creditors get the benefit of whatever may accrue to the bankrupt's estate, whether by succession or otherwise. Cases of this sort would be dangerous. A party might pick a quarrel with his trustee, in order to raise a personal objection. An application for the benefit of the poor's roll is open to him.

The other Judges concurred; Lord Meadowbank reserving his

opinion on the question, supposing the pursuer to be put on the poor's roll.

The *Court* adhered, and found additional expenses.

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Love v. Hunter, Railton and Others.

Judgment.

Lord Ordinary, *Jeffrey*. Alt. *Skene* and *A. M'Neill*. *C. F. Davidson*, W. S. Agent. Act. *Dean of Fac. (Hope,) Sol.-Gen. (M'Neill,) Monteith, Paterson, J. H. Hamilton*, W. S. *J. S. Anderson* and *John Cullen*, W. S. Agents. *T.* Clerk. R.

SECOND DIVISION.

No. LII. 10*th February* 1835.

D. S. PEDDIE, (HOWDEN'S TRUSTEE,) *against* DUNLOP & COMPANY, AND OTHERS, (CHALMERS' CREDITORS.)

AGENT AND CLIENT.—ACT OF SED. 6. FEB. 1806.—*An agent in a sequestration having presented an application, in terms of the Act of Sederunt, for payment of his accounts, against the trustee, and also against the creditors who had ranked under the sequestration,—held, that the application and procedure were competent.*

DAVID CHALMERS was sequestrated, on 20th December 1827, and William Muir was appointed interim factor, and thereafter trustee, on his estate. Mr A. C. Howden, writer to the signet, was successively appointed by Chalmers, and by the interim factor and trustee, as the agent to apply for and obtain the sequestration, and to conduct the necessary business under it. Dunlop and Company, and other creditors of Chalmers, had, as was alleged, claimed and proved their debts, and were regularly ranked under the sequestration.

Large accounts were incurred to Howden, who presented a petition to the Court, in virtue of the Act of Sed. 6th February 1806. He called as parties the trustee, and also the creditors ranked under the sequestration, and concluded, in common form, for taxation of his accounts, and payment. Dunlop and Company and other creditors of Chalmers gave in answers, and disputed their liability for the agent's accounts, on the ground of alleged mismanagement and general misconduct by the trustee. Howden was under the necessity of completing a record as to these objections, at the same time he denied their relevancy, as a defence against payment of his claim.

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Peddie v. Dunlop and Co. &c.

The Lord Ordinary had, at first, doubts as to the competency of the application against the creditors; but on hearing parties further, his Lordship held it to be equally competent against the creditors, the mandataries of the trustee, as against the trustee himself.

Dunlop and Company having reclaimed, the Court, 27th June 1733, 'appointed short cases, on the competency of the application 'and procedure under the Act of Sederunt, to be given in, in behalf 'of the petitioner and the respondents who have appeared; but 'quoad the trustee, remit the account to the Auditor.' Thereafter (17th Dec. 1833,) the Court having resumed consideration of the note, with revised cases, appointed the papers to be laid before the other Judges, for their opinion.

The Consulted Judges returned the following opinion: '5th July '1834. The Lords of the First Division and Permanent Lords 'Ordinary having considered the reclaiming note, with the mutual 'revised cases, and having also consulted together on the point re-'mitted to them, are of opinion that the application and procedure 'under the Act of Sederunt, 6th February 1806, were competent.'

Judgment. The *Court*, accordingly, found that the application and procedure were competent.

For Petitioner, *Skene* and *Marshall*. *Wm. Dalrymple*, S. S. C. Agent. For Respondents, *Dean of Fac. (Hope,)* and *P. Robertson*. *Smith & Kinnear*, W. S. Agents. *T.* Clerk.

R.

FIRST DIVISION.

No. LIII. 11*th February* 1835.

ELIZABETH MUIR
against
ALEXANDER GAIR, Trustee on the Sequestrated Estate of Hugh Rose.

Process, competent.—Decree by default.—*The Lord Ordinary having, in a petition and complaint against a trustee on a sequestrated estate, which had been remitted to him by the Inner-House, and in which a record was closed, dismissed the petition, in respect the petitioner's counsel was not instructed to debate when the cause was called, the Court holding, that it was incompetent for the Lord Ordinary, either to dismiss an Inner-House process, or to pronounce a judgment by default where a record had been closed,—recalled the in-*

terlocutor, but in respect of the incompetency of the judgment, found no expenses due to the respondent. 11 Feb. 1835. Muir v. Gair.

A PETITION and complaint, at the instance of the petitioner, against the respondent, having been remitted to the Lord Ordinary, his Lordship, when the cause was called, pronounced the following interlocutor: 'The Lord Ordinary, in respect the counsel for the petitioner states that he is not instructed to debate the case, dismisses the petition and complaint, and decerns; finds the petitioner liable in expenses, and remits the account thereof, when lodged, to the Auditor, to tax the same and to report.'

The petitioner *reclaimed*, and *objected*, 1st, That being a petition and complaint under the bankrupt statute, and therefore an Inner-House cause, his Lordship had no power to dismiss the process, but should have made avisandum to the Inner-House; 2d, That where parties have prepared the cause, and closed a record, in terms of the Judicature Act, as was done in this case, judgment by default could not be pronounced, and that a decision on the statements and pleas of parties, as contained in the closed record, ought to be given.

The *Court*, accordingly, on these grounds, recalled the interlocutor, and remitted to the Lord Ordinary to advise the closed record; but in respect of the incompetency of the judgment pronounced, found no expenses due to the respondent, as in the ordinary case of reponing against a decree in absence, or a judgment by default. Judgment.

Lord Cockburn, Ordinary. For the Petitioner, *Buchanan*. Alt. *James Macdonell*, W. S. and *Walter Horsburgh*, W. S. Agents. *D.* Clerk.

C.

SECOND DIVISION.

No. LIV. 12*th February* 1835.

DAVID MURRAY, GENERAL DISPONEE AND EXECUTOR OF GEORGE HOGARTH,
against
HOGARTH & CO. AND GEORGE AND WILLIAM HOGARTH.

SOCIETY.—TACK.—*The heir of a deceasing partner of a trading company, who is, by the terms of the contract of copartnership, excluded from all participation in the concerns of the company, is not entitled*

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Murray v. Hogarth & Co. &c.

to security from the surviving partners for his relief against the effect of current obligations becoming payable de futuro, under which the heir is bound, as representing the deceased partner.

THE copartnership of Hogarth and Company consisted of George Hogarth, deceased, George Hogarth jun. and William Hogarth. The late Mr Hogarth had been long engaged in salmon-fishing, by which the greater part of his fortune was realised. The copartnery was formed for the purpose of 'taking leases of salmon-fishings, &c. purchasing salmon at Aberdeen and other places, and 'sending the same to London and elsewhere for sale;' and it was to endure for sixteen years from 1st December 1829. It was provided, that the partners should contribute and draw profit equally, and that accounts should be balanced, and a balance struck, on the 31st December in each year.

The contract contained the following clause, relative to the contingency of the death of any of the partners prior to its natural expiration: 'Quinto, That the heirs or representatives of any partner or partners deceasing during the currency of the contract, 'shall have no right to succeed or come in his or their room, but 'shall be obliged to accept from the surviving partner or partners 'the value of the deceased's share of the company stock and profits, as the same shall stand at the credit of his account in company, at the annual balance immediately preceding his decease, 'with interest from the date of that balance till paid, but with deduction of all such debts as the partner or partners so deceasing 'may happen to be owing to the company at the time; and upon 'payment of the value as so ascertained, the heirs or representatives so receiving the same shall be bound to execute and deliver 'to the surviving partners such discharges, conveyances, or other 'deeds, as may be sufficient to exonerate them at all hands, and 'vest them absolutely in the deceased's share.'

Leases of various fishings were taken for behoof of the company, some of these, viz. the fishings on the Don, Dee and Findhorn, being rented by the company from the deceased Mr Hogarth himself. The principal lease was one of the salmon-fishings in the Spey, granted by the Duke of Gordon's trustees in favour of the three partners as individuals, and to their heirs, but secluding assignees, for fourteen years, from September 1831, with a break in favour of the tenants at the end of seven years. This lease was entered into with the express approbation, and by the advice of the deceased Mr Hogarth, who had been one of the tacksmen of these fishings for twenty-six years before. The rents paid for these fishings (including George Hogarth's fishings) amounted to upwards of L.10,000 yearly.

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George Hogarth died on 31st October 1832. Public notice was given that Mr Hogarth ceased, from that date, to have any right or share in the copartnership of Hogarth and Co. The annual balance of the accounts of the company and the partners had taken place at the 31st December 1831, but the pursuer denied that these accounts comprised any estimate of the prospective value of the leases. In 1812, Mr Hogarth had executed a general disposition and settlement in favour of Mr David Murray, under certain conditions and provisions; and also a last will and testament, ratifying the former, and inter alia bequeathing certain additional legacies. By the former of the deeds, the testator bequeathed to George Hogarth jun. his shares in the stock of a then existing copartnery of Forbes, Hogarth and Company of Aberdeen, including his shares or interest in the leases of fishings or other property belonging to that said copartnery. By the latter he declared, that in the general disposition and settlement, David Murray is directed to assign to George Hogarth the younger his rights, shares, and interests in the stock and other property of the copartnery of Forbes, Hogarth and Company; and that it is also his intention, that his shares and interest in the business carried on under the firm of George and George Hogarth, shall be included in the same direction; 'and also, that all balances 'on the accounts of Forbes, Hogarth and Company and George 'and George Hogarth, at the time of my decease, shall be assigned 'to George Hogarth the younger. I also give and bequeath unto 'him all balances which may happen to be due to me on all or any 'accounts between him and me at the time of my decease.' He farther bequeathed to George Hogarth jun. the sum of L.2000 sterling, over and above the provisions made to him in the former deed, and to William Hogarth the sum of L.500 sterling. He also left other legacies to a considerable amount. This last will and testament farther contains a nomination of David Murray and George Hogarth jun., as executors. No conditions were annexed to the payment of the legacies, nor was any stipulation made by the deceased Mr Hogarth that his partners should find security to his executor, Mr Murray, for the future rents to become due under the tacks of fishings above mentioned.

The legacies to George and William Hogarth became payable about October 1833, when it was intimated to them by Mr Murray, that payment was to be withheld until security should be given to him, as general disponee and executor of the deceased Mr Hogarth, against the whole obligations contracted by the copartnery of Hogarth and Company, of which he was a partner; and, in particular, for the payment of the rents to become due under the contracts of lease.

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All the rents due under the leases had then, and have since, been regularly paid by Hogarth and Company, and confessedly no demand for rents has ever been made against Mr Murray.

The surviving partners, who continue to carry on the business under the firm of Hogarth and Company, are confessedly in good credit, and produced receipts for the rents paid by them. On the other hand it was stated, that the trade of salmon-fishing in which they are engaged is very precarious and uncertain.

George and William Hogarth would not comply with Murray's demand for relief and security; but being desirous to avoid a legal question, George Hogarth wrote to Murray's agent, stating that he and his son had 'no objection to give our own obligation 'of relief, in regard of the different leases of fishings; but also, 'within a reasonable time after the day of payment of the respective 'rents, to exhibit receipts thereof, so that at any rate it may be in 'Mr Murray's power to take immediate measures for preventing 'another being left unsatisfied, and I cannot help thinking this is 'as much as can be expected of us.'

This offer was not satisfactory to Murray, who raised an action of relief or security against Hogarth and Company, and George and William Hogarth, the individual partners, concluding that they should be ordained to free and relieve, harmless and skaithless 'keep the pursuer, as general disponee and executor 'aforesaid, and the estate, means and effects of the deceased George 'Hogarth, of and from the aforesaid several tacks, and minutes, or 'missives or agreements of lease, and of all obligations for payment 'of rents, and other prestations, claims or demands, exigible, or that 'may become due or exigible, by virtue or in consequence of the 'same; and, for that purpose, to procure and obtain the pursuer, and 'the estate of the said deceased George Hogarth, exonered, releas-'ed, and fully discharged of and from all the said tacks, minutes, 'missives or agreements of lease, of whatever dates, tenor or con-'tents the same may be; and all obligations and clauses therein, so 'far as the same concern, or might be made to affect the pursuer, 'or the estate, &c. of the deceased George Hogarth; and failing 'thereof, to find good and sufficient security to the pursuer for the 'relief of him and the said estate in the premises; or otherwise to 'make payment to the pursuer of the sum of L.20,000 sterling, or 'such other sum, more or less, as shall be found to be necessary and 'sufficient to enable the pursuer to operate his relief, as aforesaid, 'and indemnify himself of all loss and damage which he may sustain 'or incur by or in consequence of the tacks and others aforesaid, 'and in procuring the same discharged, as aforesaid.'

It was *pleaded* in defence—

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Defenders' Pleas.

1. That a company is not bound, upon the death of one of its partners, to grant to the representative of that deceased partner any obligation separate from the implied obligation in the contract of co-partnery itself, to relieve the representatives of that partner for rents and other obligations thereafter to become due.

2. The representatives of such partner could not, in any view, without an express obligation to that effect in the contract of co-partnery, be bound, upon the death of a partner, to find caution for the amount of the future rents and obligations, for which the company was bound; no such obligation being implied against them by law.

3. In this case, there being no such obligation imposed on the company, either by the express terms of the contract of copartnery or by law, the pursuer is not entitled to demand that they shall find caution, or pay to him the sum concluded for; and could only, in any view, be entitled to demand the personal obligation of the remaining partners, which they have already offered, and are perfectly willing to give.

4. If such an obligation could in any case be inferred of a company, it could only be where the representatives of the deceased partner had already been called on to make payment of rents, or implement obligations, through the failure of partners to do so, or where the partners of the company were vergentes ad inopiam; neither of which circumstances are, or could be averred with truth in this case.

The Lord Ordinary (Medwyn) having heard parties on a closed record, ordered cases.

Pursuer's Pleas.

Pleaded for the pursuer—1. He is entitled to demand from the defenders relief from, or security against all claims or debts which may become due, or exigible, from the copartnership of Hogarth and Company, subsequent to the death of George Hogarth, arising from obligations come under by the company previous to his death, in respect that the obligations come under by the late Mr Hogarth were copartnership obligations, and that they have transmitted against the pursuer without any corresponding benefit, while it is contrary to the essential principles of copartnership obligations, that any partner or his representatives should continue bound for a company, without any corresponding benefit; Wright *v.* Gardner's Trustees, 10th June 1831, (9. *S. & D.* 721); Lindsay *v.* Inglis's Trustees, 6th Dec. 1832, (11. *S. & D.* 181.) He is entitled to retain the legacies till security be found; 2. *Bell*, 123; *Bell, Princ.* 1453; *Ersk.* iii. 4. 20; Brough *v.* Jollie, 26th Nov. 1793, (*M.* 2585.)

2. The pursuer is also entitled to relief or security, in respect the obligations in question involve the greatest speculation and

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hazard, and that upon the success of these speculations the credit and solvency of the defenders will depend; *Fell on Guarantee*, 128-140; *Brodie, Sup. to Stair*, 938; Aitken's Trustees v. Shanks, 18th May 1830.

Defenders' Pleas.

Pleaded for the defenders—In addition to the arguments in the defences, it was farther maintained, that the late Mr Hogarth's share of the stock and profits of the company, as it stood in the books at the balance immediately preceding his death, having been carried to the credit of the pursuer, he must be held to have actually received, by anticipation, his author's share of all future profits on the current leases, and is therefore justly liable to a subsidiary and contingent claim for the rents.

The cause having come before Lord Jeffrey, in room of Lord Medwyn, removed to the Inner-House; his Lordship, upon advising the cases, reported the cause to the Court, and at the same time issued the subjoined note:

'As this case must obviously go to the Inner-House, and as inhibitions have been used, and retention of liquid debts have been maintained, on the dependence, the Lord Ordinary has thought it better to present it for final decision, with the least possible delay or expense to the parties. They are entitled, however, to his opinion upon the question; and he shall now give it accordingly, as plainly and clearly as he can.

'Upon the main question of security, he is of opinion that the defences should be sustained, but not on the grounds most pressed, and apparently relied on, by the defenders, viz. that the pursuer must be held to have actually received, by anticipation, the deceasing partner's share of all future profits on the current leases, and is therefore justly liable to a subsidiary and contingent claim for the rents. The Lord Ordinary thinks, that the facts of the case are exclusive of this argument; and he is clear that there are no statements on the record, under which it can now be competently raised by the defenders; but he also apprehends it to be manifestly fallacious, and inconsistent with the cardinal and necessary admissions of the defenders themselves. If the pursuer had really been paid the full estimated amount of all the profits his author would have derived from the leases, if he had survived till their termination, it seems plain that he ought to be found liable for his full proportion of the future rents, not only without security for relief, but without right to any relief, except for what he might be called on to pay beyond that proportion. There is no escaping from this consequence of the defenders' proposition, in the broad terms in which they have here stated it. And when they admit

'that they must themselves pay all the future rents, and will be '(and in fact are) bound to grant the pursuer a total relief, when-'ever he is actually called on for any part of them, they palpably 'admit the fallacy of that allegation, upon which so much of their 'case is, rather imprudently, rested.

'The true question is much narrower. They admit (or ought 'to admit) that they are liable to relieve the pursuer of all future 'rents, but deny that they are bound to find security to him for 'their regular payment. Holding them clearly liable, as future 'and contingent (or even present and absolute) debtors for relief, 'the question is, are they also debtors for a present security, that 'this relief shall be forthcoming and effectual? The Lord Ordinary 'humbly conceives that they are not; and that upon the broad 'ground, that by the law of Scotland generally, no debtor for a fu-'ture obligation is bound to find present security, unless it be ex-'pressly stipulated, or in circumstances that necessarily imply such 'a stipulation.

'The defenders have argued the case mainly on the ground of 'the pursuer being substantially but a cautioner for the future rents, 'for which they are themselves primarily liable; and the Lord Or-'dinary does not mean to say, that there is not a great deal of truth 'and force in this view of the question. But he is disposed to put 'it on the simpler and broader ground which he has now indicated. 'Admitting to the fullest extent the pursuer's right to be relieved, 'whenever he is distressed, upon what ground does he justify his 'claim for a present security for such future relief? The claim it-'self arises from the terms of a written contract; but that is con-'fessedly silent as to any such security. The late Mr Hogarth 'bound himself, and his representatives, (along with the defenders,) 'for all the rents to become due during the currency of the leases; 'and the pursuer, having chosen to represent him, is indisputably 'liable in this obligation. Then he stipulated, in the contract of 'copartnery, that his representatives should take the value of his 'share, as at the balance preceding his death, and grant an absolute 'discharge of all farther claims on the company. Taking these 'two together, it seems plain that the pursuer, after taking the 'share, must continue bound subsidiarie for the rents; and that he 'has no claim, till this subsidiary obligation is enforced, against the 'surviving partners for relief. If it was intended that, on taking 'the share, he should also get security for his contingent relief, 'why was not this stipulated? Or on what principle or analogy is 'it now said to be implied? It is so far from being generally true, 'that persons entitled to a contingent benefit de futuro are also 'entitled to present security, that the general rule is clearly the re-'verse, even where the future benefit is not contingent, but certain.

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'Where there is a full admission of solvency, as at present, a purchaser, bound to pay his price at a future day, is not bound to find security in the interim, unless by express stipulation; nor is a tenant, for postponed rents; nor a debtor in a bond or bill payable at a distant date, either for interest or principal. In all these cases, there is a clear vested right in the creditor, and a fair and honest interest that it should not be defeated. But all this will not support a claim for present security, which is a separate and additional right, not stipulated for by the parties, and by no means implied in the ordinary case of a contingent or future obligation. Where it is contingent as well as future, (which is the case here,) the rule is still more unquestionable. The ordinary case of a sublease is almost identical with the present. Suppose a farm subset at the original rent, with an obligation on the subtenant to pay directly to the landlord: The principal tenant has no longer any interest, or possible benefit from the lease; yet he is still bound to the landlord, and must pay him, if the subtenant does not. But was it ever heard of, that, without stipulation, he could compel the subtenant to find present security for his relief from this contingent liability; more especially if his solvency and credit were unquestioned, and he had never been a day in arrear? If it is admitted that he could not, the Lord Ordinary is unable to understand on what ground the present claim can be justified.

'The neglect of this distinction seems to the Lord Ordinary to be the leading fallacy in the argument of the pursuer. He appears, throughout his case, to consider the existence of a right to be relieved from payment of future rents, as identical with a right to demand present security from the parties bound to relieve him: and when they admit their obligation to free him from any future demands on the part of their landlord, he thinks it follows, of course, that they should be ordained instantly to impledge L.20,000 or L.100,000 for his protection. Nothing, however, can be more distinct than an obligation to relieve a party from a future and contingent demand, if it should be made, and an obligation to provide and set apart a present fund for his security. The latter is manifestly a separate and distinct obligation, and, wherever the contingency is at all remote, a far heavier and more grievous obligation than the former. On what ground, then, can it be implied, from the mere admission of the former? And here, even the former is but an implication from the terms of the lease and the contract. But suppose they had been more explicit, and had expressly bound the defenders to free and relieve the pursuer from all future rents, would not this have been sufficiently implemented by their granting him a formal obligation so to free and relieve him, with a provision, if necessary, that within three days after he

'notified any demand upon him by the landlords for a past-due 12 Feb. 1835.
'rent, they should pay or consign the amount, with a clause of re-
'gistration for execution on six days' charge, &c.? Now, the Lord Murray v. Hogarth & Co. &c.
'Ordinary understands that the defenders have tendered such an
'obligation; and he is humbly of opinion, that nothing more can
'be required of them.

'The pursuer seems also to forget that his claim for relief (or se-
'curity) does not arise, in this case, from any casual or unforeseen
'occurrences, to which law and equity must apply the necessary
'remedies, at discretion; but from an event provided for by the
'deliberate contract of parties, who ought to have adjusted their
'rights in an explicit manner, and are not entitled to supply any
'alleged deficiency in their own stipulations, by constructive and
'additional obligations. The pursuer argues throughout, as if he
'had been excluded from a share of the future profits by the act of
'the defenders, or by some accidental disqualification to continue a
'partner; and complains that he, whom they have thrust out of their
'company, should be in any way accountable for their rents. But
'he forgets that all this arises from the deliberate act and contract
'of the party whom he has chosen to represent. The case would
'have been exactly the same, if the late Mr Hogarth himself, being
'bound, by his own act, as a joint tenant under the leases, had
'agreed, by the contract of copartnery, to quit the concern in the
'year 1832, on the same terms now imposed on his representatives.
'His consequent exclusion from the company, and his continued lia-
'bility to the landlords, would then have been the necessary result
'of his own deliberate act and agreement; and if he had not sti-
'pulated for security against the possible consequences, he would
'have had himself only to blame.

'It is not very easy to know what the pursuer means, when he
'says, that a right to such security, though not expressed, is *im-*
'*plied* in the nature of the agreement. Nothing, it is apprehended,
'can ever be held to be *implied*, but what it is certain that the par-
'ties, if it had been suggested to them, must have agreed to *ex-*
'*press*. It is in this way that the substantial obligation to relieve
'the pursuer from future rents, if he is ever distressed for them, *is*
'implied, in the provision, for excluding him from all that future
'possession, for the profits of which the rents are the equivalent.
'No persons of common honesty, insisting on such a provision,
'could refuse to grant such relief. But is it possible to say this of
'the pursuer's demand for *present security* against that contingent
'hazard? It has been shewn, that according to no analogy could
'such a demand have been justified; and will the pursuer seriously
'allege, that, if it had been proposed to the defenders, that on the

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'death of any one partner, the rest should not be allowed to go on 'with their business, till they had set aside L.20,000, (or rather 'L.100,000, for to that extent the claim might be carried if legal,) 'as a security to his representatives, they would *certainly* have 'agreed to such a stipulation?

'The pursuer founds a great deal on the cases of Wright and 'Inglis; but the Lord Ordinary thinks they afford no shadow of 'support to the claim he is here maintaining. There was nothing 'decided in either of these cases, but the right of a retiring partner 'to be free from subsequent responsibilities. There was no ques-'tion, and could be no decision, as to his right to obtain *security* 'against such demands; and the facts out of which they arose, ra-'ther shew that there was no practice or understanding in favour 'of such a right. In the last case, no doubt, some of the Judges 'appear to have stated that the partner, at his retirement, might 'have forced the company to settle the debts then due and exigible; 'and the Lord Ordinary fully concurs in that opinion, in which, as 'he understands, the present defenders have also distinctly expres-'sed their acquiescence. But the ground on which the opinion is 'rested, shows at once how inapplicable it is to a case like the pre-'sent. The ground is, distinctly, that the retiring partner *there left* '*in the hands of the company* funds, which he would otherwise have 'been entitled to carry away, sufficient to discharge his share of the 'debts then acclaimable. He took out his *free* share of the stock as at 'the preceding balance, but estimated (as was admitted) after de-'duction of the debts then exigible from the company; and hav-'ing thus left his share of those debts with the other partners, to 'answer the claims of the creditors, he was, of course, entitled to 'insist that those partners should in like manner advance *their* shares, 'and, by extinguishing the debts, relieve him of his pro indiviso 'responsibility. But there is plainly nothing parallel to this in 'the situation of the parties to this action. It is not pretended 'that the whole future rents were considered as present debts, and 'taken into calculation when the late Mr Hogarth's share was 'valued over and paid up to the pursuer, and that he then left in 'the hands of the defenders some L.30,000 or L.33,000, which he 'would have been otherwise entitled to take out, as his contribution 'towards payment of those rents. There is no such averment up-'on the record: The thing is in itself altogether absurd and incon-'ceivable, and is expressly contradicted by the pursuer's own state-'ment of what took place at the settlement. The future rents 'were not debts then actually due or exigible from the company; 'and the company certainly had not L.100,000 of stock, other-'wise divisible, set apart for their payment. The funds from which

'they were to become due, and both the future rents, and the fu- 12 Feb. 1835.
'ture profits, were left entirely out of view, in estimating the exist-
'ing stock of the company, and the present interests of its surviving Murray v. Hogarth & Co. &c.
'and deceased members.

'The Lord Ordinary has already said, that though he is of opinion 'that the case of the defenders is better rested on the general grounds 'which have now been explained, he does not substantially dissent 'from their assimilation of the rights of the pursuer to those of *a 'cautioner;* understanding that view to be introduced for the pur- 'pose of defining the cases and conditions (of insolvency, for exam- 'ple, ruined credit, or new and imminent perils) on which a person 'in that situation might be entitled to insist for a security, to which, 'in ordinary circumstances, he would not be entitled. Generally 'speaking, he concurs with the views of the defenders under this 'aspect of the case; and he has only to add, that he is clearly of 'opinion that nothing relevant is stated on the record to justify such 'a demand for security, on the supposition that it could not have 'been maintained, independent of these specialties.

'Upon the second branch of the case, the Lord Ordinary is of 'opinion, 1st, that the pursuer is not entitled to retain the legacies 'due to the defenders till the expiry or discharge of the leases, and 'merely in security of his possible liability under these leases: But, '2d, that he is entitled, before paying them, to have security for their 'repayment, in whole or in part, in the event of the claim of the 'landlords (or rather creditors of the late Mr Hogarth) being esta- 'blished against him, to such an extent as to exhaust the whole 'residuary succession, and make it necessary to apply the whole, 'or part of these, and the other legacies bequeathed by him, in sa- 'tisfaction of such claims.'

At advising, *Lord Medwyn* said—I prepared this cause as Ordi- Opinion of Court.
nary, and ordered cases, considering the question to be one of novelty and importance; and the opinion which I had previously occasion to form I still adhere to.

The claim of the pursuer must rest either on legal principle, or on the terms of the contract of copartnership. Now, no principle has been pointed out to support this extensive demand for relief or security; and I do not see any express authority referred to, to shew that such a demand as the present was ever sanctioned by the Court. The cases of Gardner's trustee and Inglis's trustee bear no analogy to the present. I do not differ from what is there laid down, that when a partner retires from a mercantile concern, leaving, of course, his share of all subsisting engagements, he is entitled to call upon the remaining partners, after allowing them a reasonable time

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for that purpose, to apply his share, and contribute their own proportions, so as to discharge all previous claims upon the company; but the doctrine, in these cases, does not admit of being applied to the case now before us. The plea of the pursuer is, that not only must all existing obligations be discharged, but security found for all future obligations that may arise. It is said there will be no farther benefit, and therefore there ought to be no farther obligation on the deceasing partner's representative. But the pursuer has chosen to represent the deceased partner. He was bound, before doing so, to ascertain his situation, and the nature and extent of the risk; and he knew, from the terms of the leases, that the landlord might, if necessary, call on the representatives of any of the deceased partners for the rents, even although these representatives derived no farther benefit from the copartnership; for, by the terms of the principal lease, the partners and their heirs were individually bound, and continue so bound; and if he was unwilling to undertake this responsibility, without the security he now claims, he should have abstained from representing.

The representative of a deceasing partner is, no doubt, entitled to relief from the other partners; but can he enforce such relief before distress? Why conclude for L.20,000, as in the present action, when he would, if entitled to relief at all for future rents, be equally entitled to demand relief to the amount of L.100,000, or the extent of the rents that may fall due under the lease?

If there be no principle in the law of partnership to support this demand, there is as little ground for it in the terms of the contract. There is no stipulation to this effect; and I cannot view this as a casus improvisus. The parties distinctly stipulated what should be done in the event of the death of a partner, and there is nothing about security against the future demands of the landlord. I lay out of view the argument for the defenders, that the pursuer has derived the full benefit of the leases. There was nothing done at the balancing of the books, previously to Mr Hogarth's death, to justify this argument; and I do not think that the facts on record are sufficient to raise this plea. Neither is the right to retain the legacies—a point touched on in the note of the Lord Ordinary—properly raised under the conclusions of this summons.

Lord Glenlee.—I agree. At the same time, I am not for sustaining the defences in toto. I think we may, by adding a few words, so modify the first conclusion of the summons, as to give the pursuer all the relief he is entitled to ask. He may take a decree that the defenders are bound to keep him skaithless of all claims for rents, &c. the terms of payment being first come and bygone. He could thus, the defenders failing in payment of the rent, charge on

the decree. Looking to the terms of the contract, and the admission that the rents have been properly paid, and the defenders not vergentes ad inopiam, I think we do quite enough in giving decree to the effect now proposed. 12 Feb. 1835. Murray v. Hogarth & Co. &c.

The other Judges concurred.

The Lords, accordingly, decerned so far in terms of the first conclusion of the summons, as to find that the defenders are bound to relieve 'the pursuer of all obligations, for payment of rents, &c. exigible, or 'that may become due,' the terms of payment being first come and bygone; but quoad ultra sustained the defences, and found the defenders entitled to expenses; and, with these findings, remitted to the Lord Ordinary. Judgment.

Lords Ordinary, *Medwyn, Jeffrey.* For Pursuer, *Keay, Jameson, A. Murray jun.* *Gibson & Hector*, W. S. Agents. For Defenders, *Dean of Fac. (Hope,)* and *Geo. Moir.* *James Shepherd*, W. S. Agent. *T.* Clerk.

R.

SECOND DIVISION.

No. LV. 13*th February* 1835.

Mrs S. HOGGAN or SMITH
against
THOMAS RANKEN.

Writ.—Sasine.—Vitiation.—*A sasine held to be null and void, the word 'three,' in the specification of the year of our Lord, One thousand eight hundred and three, having been written upon an erasure.*

In the ranking and sale of the estate of Land, Mrs Smith, the relict of the proprietor, claimed her terce, and produced the sasine in Mr Smith's favour. The instrument bore, that 'upon the se-'cond day of September, in the year of our Lord One thousand 'eight hundred and three, and of the reign of our Sovereign Lord, 'George the Third, &c. the forty-third year, in presence of me, no-'tary-public and witnesses,' &c. sasine had been taken. The sasine was duly recorded, 14th September 1803. Upon examination of the instrument by the common agent, it appeared that the word 'three,' in the specification of the year of our Lord, was written

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upon an erasure, and it was objected that the sasine was thereby vitiated in substantialibus, and therefore null and void.

Hoggan or Smith v. Ranken.

The Lord Ordinary held that Mr Smith was not validly seised in the lands, and that Mrs Smith had no right to claim terce. Mrs Smith *reclaimed.* The Court appointed the papers to be laid before the other Judges for their opinions thereon. At the first advising, Lord Cringletie gave his opinion in favour of the validity of the sasine *.

The following opinion was returned by the *Lords President, Balgray, Gillies, Machenzie,* and *Corehouse.*

Opinion of Consulted Judges.

We are of opinion, that the objection to the sasine in question, that the word 'three,' in the date of the year of our Lord, is written on an erasure, is a good objection.

A sasine is an actus legitimus; and in all such, therefore, the solemnities and forms fixed by statute, or by immemorial usage, must be strictly adhered to. In the case of a sasine, it has been the form, from time immemorial, that it shall mention the date both of the Christian era and of the King's reign; and it is remarkable that this requisite is not necessary, even in the disposition or heritable bond on which the sasine proceeds. We must hold, therefore, that this double date has been required in a sasine, that the one may be a check on the other; so that, by means of this precaution, the true date may be more certainly ascertained. And it is the more necessary that great precision should be required in the date of the sasine with reference to the registration, which, to be effectual against third parties, must be done within a given period.

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* *Lord Cringletie* observed—He could not assent to the interlocutor. He held, that an erasure was of no importance whatever, if it appears from the deed itself that the word written upon the erasure is that which truly should be there. Of course, if it is mentioned in the testing clause, that is proof; but the deed itself may bear evidence as well as the testing clause. In England, parole proof is allowed of the erasure having been made upon the execution of the deed, of which there was a late example in Macneill v. Beevan and Mandatary Now, although we hold no such proof competent, at least he was not aware of its having been allowed, we certainly held that the deed itself may afford proof that no vitiation has been committed. Accordingly, in the case of the Earl of Cassillis v. Kennedy, 2d June 1831, the common agent admits that reference was made to certain parts of the deed, to prove that the letter X, written on an erasure, was the letter which should have been there. He admitted that it was customary to mention the year of God, as well as the King's reign, in instruments of sasine; but he knew of no statute which required this as a solemnity; and it did not appear to him, that if either the year of God or of the King's reign were omitted, and one of them only clearly and distinctly inserted, the omission would be held to be a nullity in the sasine. But if this be the case, the erased year of God, according to the usual rules, may be held pro non scripto, and then you have the King's reign unexceptionably good.

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Opinion of Consulted Judges.

In this case, the word '*three*' being written on an erasure, it must be held that some other word had been originally written, but afterwards rubbed out, in order that the word *three* might be substituted in its place. *E. g.* That the date was originally 1801 or 1802, or 1804 or 1805, which, as neither of these corresponded with the 43d of the King, would have rendered the true date quite uncertain. Therefore it must be held that there was originally no date at all, by which the time allowed for registration could be regulated. But if the date was originally wrong, as being uncertain, it could not be remedied by the summary mode of inserting what is said to be the proper date, by means of an erasure of the wrong one. There are legitimate modes of rectifying such mistakes, which are well known in practice; and none of these having been adopted in this case, the erasure must be held to be fatal to the deed.

The nullity cannot be rectified by the mere fact of registration, because the clerks at the Register Office must record every deed that is presented to them for that purpose exactly as it stands; for they are not entitled to judge whether it is valid or not.

It is also proper to remark, that when an estate is to be purchased, or money lent on the security of an estate, the agent of the purchaser or lender never contents himself with the production to him of extracts of sasines or other deeds, but always calls for and examines the sasines themselves and other principal deeds; because, besides erasures, there are other fatal objections which cannot be discovered from the records; such as forgery,—the existence of a nearer heir,—objections on the ground of deathbed. Against such objections he must satisfy himself aliunde, or rely on the clause of warrandice; for the records, however valuable in other respects, neither do, nor by possibility can, afford protection to purchasers or creditors in all cases.

But against an objection arising from an erasure, the party can easily guard, by examining the principal sasine, which every agent, who knows any thing of his duty, always does.

This is no doubt a hard case; but there is no help for it; and in this case the objection, however late in point of time, was stated as soon as the interests of the party made it competent to do so.

Opinion of *Lord Moncreiff.*

I concur entirely in the substance and conclusion of the Lord President's opinion. I conceive it to be a very clear matter of law, that the registers were never intended to supersede the original instruments, as the essential grounds and evidence of the title, when called for, or to relieve such title-deeds from any fundamental de-

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fects or nullities. When, therefore, such an instrument is produced, the question, whether it is liable to any objection of nullity, must altogether depend on the nature and condition of the deed itself.

Opinion of Consulted Judges.

It is essential to the validity of every instrument of sasine, that it should bear the date both of the Christian era and of the King's reign. This fixed rule is, I conceive, independent of the system of registration; and it has not been altered by any of the statutes on that subject, though the importance of it may be increased by them. These dates, therefore, are inter essentialia of the instrument.

It is an established principle of the law of Scotland, that in all writs of importance, and especially in instruments of sasine, *erasures* in substantialibus are to be held as vitiations of the writ, inferring nullity. I think it unnecessary to inquire into the presumptions on which this doctrine of the law is founded, the rule itself being settled and indisputable.

The question, whether a particular erasure is in substantialibus or not, sometimes may depend on circumstances in the position and connection of the word or term which is written on it, but in other cases is at once determined by the nature of the word or term itself as essential to the deed.

In the present case, the word admitted to be written on an erasure is that which denotes the year of the Christian era; and that being so essential to the validity of the instrument, that it cannot be read without it, it must, in my opinion, be a case of erasure in substantialibus.

Having this view of the law applicable to the case, I humbly conceive that such an objection cannot be obviated by any reasoning of presumptions or probabilities, derived either from the year of the King's reign being fairly written, (that being equally essential by itself,) or from the state of the copy engrossed in the register, or from extraneous circumstances; and, further, that all arguments against the application of the rule of law to such a case, founded on the idea that the register ought to overrule or supersede the principal instrument, or relieve it from nullities of this description, or on supposed danger to parties who may look at the register alone, are inconsistent with the established law on the subject, and altogether irrelevant to the present question.

Lord Fullerton.—I concur in this opinion.

Lord Jeffrey.—I also concur.

Opinion of Court.

At the final advising, the Judges of the Second Division expressed their regret, that, in a case attended with such peculiar hardship, they could see no grounds for differing from the Consulted Judges.

The *Court*, accordingly, refused the note, and remitted to the Lord Ordinary. 13 Feb. 1835.

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Lord Ordinary, *Mackenzie*. For Mrs Smith, *Whigham*. *Alex. Goldie*, W. S. Agent. For Mr Ranken, *Rutherfurd, J. J. Reid*. *Party* Agent. *T.* Clerk. R.

Judgment.

SECOND DIVISION.

No. LVI. 14*th February* 1835.

WILLIAM YOUNG
against
JAMES BAILLIE.

BANKRUPT. — DISCHARGE. — PROCESS. — TITLE TO PURSUE. — *Found, that a discharged bankrupt, who had omitted to give up a particular claim in the list sworn to by him in the sequestration, was not barred from afterwards insisting in that claim against the debtor, although that debtor was a creditor of his own, and accepted of a composition without reservation.*

In September 1831, William Young, of the Omoa Iron-works, and coal-master, Glasgow, raised an action before the Sheriff of Lanarkshire against Baillie for the sum of L.84 sterling, 'being the 'agreed-on, or, at least, moderate and reasonable price of a quantity 'of cast-iron rails belonging to the complainer, and carried away 'from the works' in July 1826. Baillie in defence stated, that, posterior to 1826, Young had been sequestrated; that this claim was not included in the list of claims competent to or given up by him on oath; and, during the sequestration, no claim was made on the defender; that, at the date of the sequestration, the defender was a creditor of the pursuer for L.75. He did not rank; but the pursuer's trustee paid, under a composition, three shillings per pound to the other creditors, and the bankrupt was discharged. After that, the defender also lodged his claim and vouchers of debt, and was paid the composition without any objection or reservation, and this payment was made a short time before the action was raised. The Sheriff (9th August 1833) allowed the pursuer a proof, and the defender conjunct probation.

Baillie advocated, on the 40th section of the Judicature Act, and *pleaded*—1. Young is barred, personali exceptione, from insisting Advocator's Pleas.

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in the action; because the claim on which the action is laid existed prior to the time when his estates were sequestrated, and was not specified in any state of his affairs under the sequestration, by which the whole estates were invested, for behoof of his creditors, in a trustee; 54. Geo. III. c. 137, § 25, 29, 33. 2. The respondent is not reinvested in the right of action, and has no title to pursue.

Respondent's Pleas.

Answered—There is no bar to the present claim, for the respondent was discharged under a composition contract, approved of by the Court of Session, when the sequestration was declared at an end, and he was reinvested. 2. He is not barred from insisting by any thing which took place under the sequestration, and, in particular, by the claim on which the action is founded not having been specified in any state of affairs under the sequestration; and with regard to the effect of the oath, he referred to Sutherland *v.* Morson, 19th Jan. 1825, to shew that an oath taken by a party upon a particular point, in regard to which it may afterwards turn out that he was mistaken, does not bar the party from insisting; and he farther maintained, that it was jus tertii of the advocator to found on this circumstance.

The Lord Ordinary pronounced the following interlocutor:

'The Lord Ordinary having considered the closed record, and heard parties' procurators thereon, and made avisandum, advocates the cause; repels the first and second additional pleas in law for the advocator and defender, in so far as they are stated as constituting a bar to the action; reserving any question as to the effect of the advocator's claim as a creditor in the sequestration of the respondent's estate, in case the debt here sued for shall be found to be in other respects just and resting owing; finds, that as the existence of the debt is denied, the cause must be remitted to proof; but, before farther answer, appoints the cause to be enrolled, and reserves the question of expenses.'

Note.—'1. Though the summons is awkwardly expressed, the substance of it, as describing the cause of action, is clear enough, viz. that a quantity of iron rails, the property of the pursuer, were carried off by the defender, and that he is resting owing the sum of L.84, as the price or value of these articles. It says, indeed, "the agreed-on, or at least moderate and reasonable price." What the framer of the summons referred to in the words, 'agreed on,' does not appear. It may have been a communing after the abstraction, or perhaps the original price. But it is clear that there was no intention to libel an agreement for a sale, the words which follow being inconsistent with that idea. The statement in the

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'first article of the condescendence, therefore, is perfectly consistent with the summons, and clearly states the ground of action.

'2. The Lord Ordinary is of opinion, that the respondent is not barred from insisting in his claim by the proceedings in the sequestration. It is clear, that in virtue of the discharge by the composition contract, which, though not produced, is expressly admitted and averred by the advocator in the record, the respondent was fully reinvested in all his estate, whatever it might be; for, by the decree of the Court, the bankrupt is entirely discharged, except as to the payment of the composition, and the sequestration is declared at an end. But as he is reinvested, the Lord Ordinary conceives that the circumstance of a claim competent to him having been accidentally omitted in the state given up to his creditors, cannot bar him from making it effectual. If fraudulent concealment were averred, it might be a ground for reducing the composition contract. But fraud is not averred in this record; and, as the Lord Ordinary understands the affairs of the bankrupt to have been extensive and complicated, it is nothing surprising that such a thing should have been omitted. There is nothing in the statute to infer that the oath interposed to the state, 'to the "best of the bankrupt's knowledge,' shall afterwards be pleadable by a *real and true debtor*, against the payment of the debt either to the trustee during the sequestration, or to the bankrupt after discharge by composition. The bankrupt is liable to the pains of perjury for *wilful* false swearing; and the discharge may be reduced on *fraudulent* concealment; but the oath will not bar his action for recovering any part of his estate. This seems to be materially different from the case of a bankrupt or his cautioners, as in the case of Atkinson, &c. *v.* Walls, Feb. 22. 1833, allowing a debt to be stated in the proceedings before the Court, and after the discharge disputing the amount of it. The matter is there fully and judicially put in the view of the parties; and if, with the acquiescence of the bankrupt and his cautioners, the contract is settled on that footing, they ought not to be allowed afterwards to dispute the debts. But a bankrupt may have claims which are wholly unknown to him at the time he makes up his state; or, in complicated transactions, he may, with perfect bona fides, and after the greatest care, omit claims which do not arise on written documents of debt, but from facts such as that here libelled. Being reinvested, his *title* of action is clear; and how far he may be still liable to account to the creditors is not hujus loci.

'If the advocator had been purely a *third party*, the plea would be jus tertii, as held in the case of Chalmers *v.* Taylor, Nov. 20.

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'1832. But here he was a creditor, and has been paid by composition. The Lord Ordinary does think that this may *possibly* raise a question in *equity* as to him, in case the constitution of the debt be proved; and therefore he has left that open by reservation. But still there seems to be no bar to the action.'

The advocator *reclaimed.*

Opinion of Court.

The *Court* thought it would be a strict interpretation of the oaths taken by Young in his sequestration, to hold, that having subsequently discovered this claim, he was barred from suing for it. The objection was received with less favour, coming from the advocator, who brought up the cause on the mode of proof, and then turned round with this objection to the right of the respondent to insist.

Judgment.

The *Court adhered*, and found additional expenses.

Lord Ordinary, *Moncreiff.* For Baillie, *Dean of Fac. (Hope,) Buchanan.* *Jo.*
Cullen, W. S. Agent. For Young, *Sol.-Gen. (M'Neill,)* and *Cheape.* *Thos.*
Leburn, S. S. C. Agent. *T.* Clerk.

R.

FIRST DIVISION.

No. LVII. 19*th February* 1835.

ANDERSON AND M'NAB
against
RUTHERFURD OF REDFORDGREEN.

SOCIETY.—DISSOLUTION.—PRESUMED PAYMENT.—AGENT AND CLIENT.—*Circumstances in which one of the partners of a dissolved company of law agents having been allowed by a client, after intimation of the dissolution, to raise a sum of money, one of the alleged purposes of which was to discharge the debt due to the company,—it was held, on the bankruptcy of the partner receiving the money, but who had not applied it in extinction of the debt, nor granted a discharge thereof, that the client was liable in a second payment to the other partner.*

MESSRS LOCKHART and SWAN carried on business as law-agents, in copartnership, from 1st December 1824 to 16th May 1831, during which period they were employed by the defender, Mr

Rutherfurd, to conduct certain law-suits, whereby accounts to the amount of upwards of L.300 were incurred by him to them.

Early in 1831, Messrs Lockhart and Swan had arranged with the defender, that a sum of L.500, (belonging to a ward of Mr Lockhart's,) should be borrowed on heritable security over his property; and on 20th May, Mr Lockhart wrote to the defender, stating the transaction, and mentioning, that L.200 of the sum in question had been remitted to the defender's bankers in London; that the remaining sum would be employed in terms of his last letter, (viz. towards the discharge of the business accounts); and that a bond of security over the defender's property, which had been prepared by Mr Lockhart, had been forwarded by him to the defender, (who was then in France,) for his subscription.

In the same letter, Mr Lockhart intimated to the defender, that a dissolution of the company of Lockhart and Swan, (of which notice appeared in the Gazette,) had taken place a few days before, (16th May 1831); and both he and Mr Swan applied separately to the defender to be appointed as his agent.

In answer, (2d June 1831,) Mr Rutherfurd acknowledged the receipt of the L.200; but said that the bond had not been received. He also appointed Mr Swan to be his agent, and desired Mr Lockhart to 'hand over to him the L.250 for law expenses,' &c. In consequence, however, of the bond having miscarried, the transaction was not completed. The L.300 was not advanced by Mr Lockhart's ward, and the law expenses remained undischarged.

After some discussion about the security which Mr Lockhart was to have, for repayment of the sum already advanced of his ward's money, and for payment of the business accounts, out of the proceeds of a new loan for L.1500, which was about to be raised, Mr Lockhart delivered up the defender's title-deeds to Mr Swan, to enable him to effect this purpose. The alleged objects of the loan were, 1st, to pay off a sum of L.500, called up by an heritable creditor; 2dly, to repay to Mr Lockhart his advance of L.200, and to pay off the outstanding law accounts due to the partnership; and, 3dly, to place a balance of about L.500 at the command of the defender.

The following letter was accordingly written by Mr Swan to the defender: '21*st October* 1831. Dear Sir, I am favoured with your 'letter of yesterday. I have this forenoon procured a loan of 'L.1500 upon Redfordgreen, at four per cent., to be given at 'Martinmas next. This will enable you to pay off Mr Watson's 'L.500, which he has required, and the other L.500 arranged by 'Mr Lockhart, and give L.500 to yourself, which will more than 'relieve you,' &c.

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Some months after this, and after getting possession of the money, Mr Swan became bankrupt and was sequestrated, without (as alleged by the defender Mr Rutherfurd) having paid the bond, which had been called up, and (as alleged by Mr Lockhart) without either repaying the L.200 advanced by him, or accounting for the sums which were to have been employed in discharging the outstanding law accounts.

In these circumstances, Mr Lockhart first brought an action against the defender for payment of the sum of L.200, which was paid up; and thereafter Messrs Anderson and M'Nab, (who, in an action of count and reckoning, raised some time before by Mr Lockhart against Mr Swan, had been appointed interim custodiers of the books of the company,) with consent of Mr Lockhart, and of the trustee upon Swan's sequestrated estate, raised the present action against the defender, concluding for payment of the law accounts, and

Pursuers' Pleas.

Pleaded—That the account sued for having been incurred by the defender to the company of Lockhart and Swan, and no part thereof having been paid to that company, or to any person authorised to uplift and discharge its debts, the defender ought to be decerned to pay the same, with interest as libelled, to the pursuers, as the parties judicially appointed for that purpose.

Defender's Pleas.

In *defence* it was *maintained*—1. Where an account is paid to one partner of a dissolved firm, the debtor is liberated from any claim of repetition of payment at the instance of the other partner, should the former fail to account to him, unless notice have been given to the debtor not to pay except in a way pointed out.

2. Under the special circumstances condescended on in this case, the defender was entitled to presume Mr Lockhart's authority for a settlement of the account libelled on, through the medium of Mr Swan; and having acted on this presumption bona fide, no claim of repetition lies against him.

The Lord Ordinary repelled the defences, found the pursuer entitled to expenses, and added the following note:

Note.—'Considering that, even after dissolution, a partnership 'is understood to continue to the effect of settling the company's affairs, and that, on the present occasion, the notice of dissolution contained no specific appointment of a person to receive payment of 'the company debts, the Lord Ordinary rather thinks that a payment bona fide made by the defender, after the dissolution of the

'company, to Swan as a partner, and a discharge granted by him in 19 Feb. 1835.
'name of the company, would have been good. But there is no Anderson and M'Nab v. Rutherfurd.
'room for entering into the discussion of this question here, because
'the defender's averments on the record amount to no more than
'that, after the dissolution of the company, the defender, then em-
'ploying Swan individually as his own agent, allowed him, in that
'character, to draw a large sum of money, under the impression,
'that, among other purposes, part of it was to be applied to the dis-
'charge of the company debt. The Lord Ordinary cannot hold
'this to be a payment of which the defender, in settling with the
'company, is entitled to the benefit.'

The defender *reclaimed*, and the case was reported by Lord Cockburn, (Lord Probationer, 14th November 1834,) who was of opinion, that, under the circumstances which had occurred, the interlocutor of the Lord Ordinary was well founded. If a specific payment had been made to Swan, and a special discharge had been granted by him, his Lordship thought that this would have afforded a sufficient defence against the present claim; but this was not the state of the facts. The defender employed Mr Swan to raise a loan of L.1500 on his behalf. It was true, that one object of the loan was to pay off the very debt now in question, and Mr Swan ought so to have employed the money; but the defender relied entirely upon the honesty of Mr Swan, and upon the understanding, that the money would be applied, in part, to the extinction of the debt; but Mr Swan did not so employ it, and retained it in his possession until his bankruptcy, without even granting a discharge for it. In these circumstances, his Lordship did not think that the transaction amounted to such a payment of a company debt as was pleadable against the other partner.

The case stood over. When it came again to be advised, it was *pleaded by Skene* for the defender—That it was a case of great hardship upon the defender, and the interlocutor of the Lord Ordinary could not stand upon the grounds on which it was rested by his Lordship; for the letter of 21st October 1831, by Mr Swan to Mr Rutherfurd, whereby he undertook to pay off the very debt now claimed with the proceeds of the intended loan, was truly equivalent to an express discharge granted by him of the debt; and this, according to the reasoning of the Lord Ordinary, would have been sufficient. But moreover, under the special circumstances which had occurred, Mr Lockhart had barred himself from the present claim, by acquiescing all along on the proposed arrangement of the debt in question being paid to Mr Swan; for, in the first place, no answer or objection was made by him to Mr Rutherfurd's letter of 2d June 1831, wherein he desired Mr Lockhart to hand over to Mr Defender's Pleas.

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Swan the L.250 for law expenses; and, secondly, when the subsequent arrangement was entered into with regard to the new loan, although he had possession of the defender's title-deeds, he delivered them up, without insisting in his right of hypothec, and without even intimating to Mr Rutherfurd that payment of the debt should not be made to Mr Swan; so that the defender was entitled to conclude that Mr Lockhart had acquiesced in the proposed payment, which was accordingly made in perfect bona fide. If an objection had been stated, the defender would not have entrusted Mr Swan with the money as he did.

Pursuers' Pleas.

It was *answered* by the *Dean of Faculty*—That if there were any hardship in the case, it arose entirely from the defender having placed too implicit reliance upon his agent Mr Swan, and that the loss thence arising ought not to be allowed to fall upon a third party, who was not cognisant of the transaction, and could not know what was passing between the defender and Mr Swan. With regard to Mr Lockhart's alleged acquiescence in the defender's original proposal of his paying over the L.250 to Mr Swan, there was no occasion for him to take notice of this, as the transaction was never completed. If it had been so, Mr Lockhart, who was to advance the money, would have had the means, which he would have carried into effect, of seeing that the company debt was discharged; and with regard to the subsequent transaction, it was in vain to say that Mr Lockhart had acquiesced in what was done; for he was no party to what passed between Mr Swan and the defender. It was not so much the want of an express discharge by Swan to the defender that was insisted on by Mr Lockhart, but the absence of any thing like a specific payment of the debt in question. The defender seemed to have placed the most absolute reliance on Mr Swan, and allowed him to take possession of a large sum of money, upon an understanding only that the company debt would be discharged, but without seeing that the money was duly applied to the purposes for which it was intended; and as Mr Swan did not so apply it, it was upon the defender alone that the consequences of his neglect and subsequent bankruptcy ought to fall.

Judgment.

The *Court* unanimously adhered.

Opinion of Court.

The *Lord President* observed, that the arrangements between the different parties seemed to have been loosely conducted, and his Lordship had at first been moved by the apparent hardship of the case on the part of the defender. The payment to Swan might no doubt have been made in such a way as to have secured the defender against the present claim. But the difficulty was, that there seemed to have been no specific payment to Swan, as in dis-

charge of the debt due to the company. With regard to the original proposal by the defender, that Mr Lockhart should pay over the L.250 to Swan, and Mr Lockhart's presumed acquiescence, from stating no objection, there was no occasion for him to do so, as the transaction never was completed; and as to the subsequent arrangement, the defender seemed to have entrusted Mr Swan, as his sole agent, with a large sum of money, on the understanding apparently that he was to discharge the debt in question, but he had unfortunately misapplied it; and the defender must be answerable for this, in the same way as if he had employed Swan to pay a debt due to any third party as agent, and Swan had misapplied the money; and, under these circumstances, his Lordship could not but hold that the claim was well founded.

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In this opinion the other Judges concurred. Their Lordships therefore refused the reclaiming note, and found additional expenses due; and remitted to the Lord Ordinary to proceed in the cause as shall be just *.

Judgment.

Lord Fullerton, Ordinary. Act. *Dean of Fac.* (*Hope,*) *Miller.* Alt. *Skene, Handyside.* *Lockhart, Hunter & Whitehead*, W. S. and *Andrew Dun*, W. S. Agents.

C.

FIRST DIVISION.

No. LVIII. 19*th February* 1835.

ELIZABETH MILLER
against
JOHN STEWART.

PROCESS.—POINDING.—STAT. 54. GEO. III. c. 137.—*Held, that a delay of sixteen days in reporting a poinding, no sufficient reason for the delay being averred, was such a violation of the provision of the statute,* (§ 4.) *requiring the poinding to be reported 'forthwith,'*

* Some discussion arose, at the advising, as to the right of the pursuer to demand more than one-half of the debt due to the company; but as the whole was concluded for in the summons, and no objection stated on the record, their Lordships could not dispose of the objection. It was observed, however, that it would still be open to the parties, under the remit to the Lord Ordinary.

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as to render the diligence and subsequent proceedings null and void.

THE defender, Stewart, executed a poinding of the common debtor's effects, in Clackmannanshire, 11th July 1829. It was reported 27th July, and, of the same date, warrant of sale was obtained. Publication was made through Dollar, 30th July, and at the church 31st. The sale itself took place 6th August.

In the interval, viz. on 30th July, (three days after the defender's poinding was reported,) the pursuer also executed a poinding of the same effects, and now brought the present action of reduction of the proceedings under the defender's poinding, on various grounds.

Pursuer's Pleas.

The pursuer *pleaded*—1st, That the defender's poinding had fallen in consequence of its not having been reported 'forthwith,' in terms of the statute 54. Geo. III. c. 137, § 4, which provides, 'That 'the messenger, or other person employed in executing a poinding 'for debt, shall leave the pointed goods in the hands of the debtor, 'with a schedule of the pointed goods and note of the appraised 'values, and shall forthwith report his execution of poinding to the 'Sheriff.' In the present case, the poinding was executed on the 11th July, but it was reported to the Sheriff, not 'forthwith,' but only on the sixteenth day afterwards, viz. the 27th July. In consequence of this mora, the defender's poinding was not carried through in terms of the statute. It is true that the act of Parliament has not fixed any certain time as the maximum of days which shall be allowed to a poinder to report the execution of his diligence; but it has used words which point at a very plain rule, and which, at least, leave nothing to the discretion of the poinding creditor himself. When the statute requires that the poinding shall be reported 'forthwith,' it seems plainly to imply this much at least, that no delay shall be interposed for which a sound and satisfactory reason cannot be assigned. It can never mean that the poinder complies with the requisites of the act, if he gives to the word 'forthwith' any extension which his pleasure or convenience may require, and reports his poinding only after such delay as he may think fit. The statute, ex structura verborum, requires that the poinding shall be reported immediately on its being executed; and any delay, for which a satisfactory reason cannot be assigned, deprives the diligence of the character of a poinding carried through in terms of the statute; Carmichael *v.* Johnston, Feb. 10. 1821*.

* There were two other grounds of reduction, (as noticed at the end of this report,) but they were not disposed of by the Court.

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Defender's Pleas.

It was *answered*—That the report of the defender's poinding was made without any undue delay, and at a distance of time, which, according to universal practice, is held to be a sufficient compliance with the directions of the statute. But all right of competition and title to object, on the part of the pursuer, is excluded by the adjudication implied in the defender's execution of the 11th of July, whereby the property of the goods was carried for payment of the defender's debt; *Bell*, ii. 61. The pursuer's poinding was not executed till 30th July, that is to say, three days after the date on which the defender's was reported, and warrant of sale obtained by him; so that, by this priority, (and the shortest, duly ascertained by the executions, was sufficient,) the defender acquired a right to the poinded goods, exclusive of subsequent diligence at the instance of the pursuer, or any other individual creditor. This rule of common law has not been affected by the sequestration statutes, except in a class of cases of a totally different description from the ordinary case of a competition between individual diligences. But, in the present instance, no sequestration had been taken out, nor had the debtor, up to the present moment, been rendered notour bankrupt, so as to give rise to the pari passu preference established by the sequestration statutes. It therefore follows, that the defender's diligence remains at common law effectual and exclusive according to its priority in point of date, and the pursuer has no interest in the regularity of the subsequent procedure, and consequently no title to state any objection founded on alleged irregularities in that procedure. Neither of the sequestration statutes imposes on such irregularities the penalty of nullity, while the Act of Sederunt 1805 implies that they are cured by lodging the minute of sale with the clerk, which here took place on the 9th of August, three days after the sale itself.

The Lord Ordinary sustained the defences, and assoilzied the defender, &c.

Note.—'The defender's poinding was executed on the 11th July '1829, and the goods were then *adjudged* to him. It was reported 'on the 27th *July*. Warrant of sale was granted on *that day*. It 'ordained *publication* to be made not less than *eight* days from that 'date, nor more than twenty; and the Sunday publication to be *six* 'days before the sale.

'The pursuer poinded on the 30th July, that is, three days *after* '*the defender's poinding had been reported, and the warrant of sale* '*granted.*

'The question is, Whether the pursuer has a sufficient legal 'interest, and sufficient grounds on the merits, to set aside the

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'sale as illegal, and recall the goods, or their value, for his own 'benefit?

'Did the defender's poinding fall in toto, and become a *nullity*, 'on the ground that *sixteen* days elapsed before it was reported to the 'Sheriff, the statute requiring the messenger to report it '*forth-* "*with*?' The pursuer must make out absolute *nullity*, otherwise the 'objection will not avail him; for his own poinding was not used 'till three days after the pursuer's had been reported. The ques- 'tion might have been nicer, if *either* the pursuer had poinded *before* 'the report, *or* the debtor had disposed of the goods. Here the 'point is much narrower, Whether, the goods remaining, and no 'mid-impediment, or other interest, being raised, it was *incompetent* 'to report the poinding on the 27th July, on the ground that it had 'become a nullity by the delay of sixteen days. The Lord Ordi- 'nary can find no warrant for this in the statute, and no authority 'for so construing it.'

The pursuer *reclaimed*, and the Court ordered minutes of debate; upon advising which, they ordained the defender to give in a minute, stating the cause of the delay of sixteen days which had occurred in reporting the poinding.

In this minute it was *stated*—That the defender resided fourteen miles from Dollar, where the poinding was executed; that the poinded goods consisted principally of growing corn, which it was not the practice in Clackmannanshire to sell, until ready for the sickle; whereas, if the poinding had been reported immediately, a sale within twenty days would have been rendered indispensable, whether the crop was fit for it or not; and, moreover, that, according to the universal practice in the country, and particularly in Clackmannanshire, such a delay as had here occurred was not considered as an irregularity, but held to be quite consistent with the regulation of the statute.

In *answer*—It was denied at the bar that the residence of the common debtor, where the poinding was executed, was at the distance of fourteen miles from Alloa, where the Sheriff-court was held; but even were it at this distance, this afforded no sufficient reason for the delay of sixteen days. With regard to the objection, that part of the poinded effects consisted of growing corn, it was answered, that although this might have afforded a good objection to proceeding with the sale, it was no reason for not reporting the poinding 'forthwith,' in terms of the statute. Neither was any practice sufficient to justify so flagrant a violation of an act of Parliament.

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It was farther *objected* at the bar, on the part of the defender, that the party who challenged his poinding, on the ground that it had not been reported for sixteen days, stood in this anomalous situation, that her poinding had not, up to the present hour, been reported at all; so that, on this ground alone, she had no title to insist in the objection.

It was *answered*—1st, That the reporting of the pursuer's poinding had been rendered unnecessary by the sale, which had been immediately proceeded in by the defender; and that, at any rate, the poinding, which was an inchoate diligence, afforded a sufficient ground for challenging the proceedings; but, secondly, that as this objection had not been once stated on the record, it could not now be competently entertained.

Opinion of Court.

Their Lordships were unanimously of opinion, upon this last plea which had been brought forward, that as it had not been stated in the record, it was incompetent for the Court, consistently with the provisions of the Judicature Act, and relative Act of Sederunt, to entertain or dispose of it in any way, though it might still be competent for the defender, under the remit to the Lord Ordinary, and with consent of his Lordship, to bring forward the objection, and add it to the record.

Their Lordships were also unanimously of opinion, on the merits, that in consequence of the delay which had taken place, the poinding had not been reported in terms of the statute, which directed that this should be done 'forthwith,' and the defender, therefore, was not entitled to the benefit of its provisions. Whatever might be the case in Inverness-shire, and other mountainous and extensive districts, where the means of communication were more difficult, their Lordships were clearly of opinion, that in such a case as the present, a delay of sixteen days was not a due compliance with the statute; and no sufficient reason had been assigned for it. The Lord President, Lord Balgray and Lord Gillies were of opinion, that the neglect of the statute inferred a nullity of the proceedings; but Lord Mackenzie was not prepared to hold that the proceedings were thereby rendered absolutely null. He thought, however, that there was sufficient reason for the Court to proceed in depriving the defender of the benefit of the statute, on the lower ground of the mora which had occurred.

Judgment.

The *Court*, therefore, 'recall the interlocutor reclaimed against, 'and find that the defender's poinding, in respect it was not reported

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'in terms of the statute, was null; and remit to the Lord Ordinary 'to hear parties further in the cause,' &c.

Lord Moncreiff, Ordinary. Act. *Dean of Fac.* (*Hope,*) *Russell. Pyper.* *Wotherspoon & Mack*, and *Thomas Darling*, Agents. Alt. *Shaw, D.* Clerk.

C.

There were two other objections taken to the regularity of the proceedings under the defender's poinding, which (although not disposed of by the Court) it may be proper to notice, in order to introduce the note of the Lord Ordinary thereon. It was objected, 2dly, That the warrant of the Sheriff authorised the sale itself of the poinded goods to take place at any time not less than eight days, whereas the statute required that the *publication* should be made not shorter than eight free days from the date of the warrant. The Sheriff, 27th July, 'grants warrant to the petitioner, at sight of 'the clerk of court, or his servant, at any time not less than eight, nor more than 'twenty days from the date hereof, to sell, by public roup, the goods and effects con- 'tained in the execution of poinding; appoints publication of the roup to be made 'through the town of Dollar, and at the church door of Dollar, on a Sunday, at least 'six days before the day of sale.' The statute, however, provides, that the Sheriff 'shall give directions for keeping the goods poinded in safe custody, and selling them 'by public roup, after such publication, not shorter than eight free days, nor longer 'than twenty, from and after the day when the order was given, and at such time and 'place as circumstances may require.'

The warrant, therefore, granted by the Sheriff was illegal, because it substituted the day of sale for the day of publication. The Sheriff granted warrant to sell at any time not less than eight, nor more than twenty days from the date of the warrant, and on publication being made 'at least six days before the day of sale.'

To which it was *answered*, 1st, That the objection now stated was incompetent, as not being contained in the reasons of reduction; and, 2dly, That it was ill-founded in itself, in respect that the clear object and meaning of the statute were, that the eight days should elapse between the date of the order and the day of the sale, according to which construction it just followed out the regulation of the previous Act of Sederunt 1805.

But, 3dly, It may be objected that even six free days did not elapse betwixt the alleged publication at the church-door and the date of the sale: for the publication having been made on 31st July, and the sale having taken place on the 6th of August, six free days did not intervene.

On these points the Lord Ordinary added the following note:

'2. Was the sale null, on the ground that there were not eight free days between 'the day appointed for it, and the day of publication?

'(1.) If the poinding was validly reported, it may well be doubted, whether the 'pursuer has a legal interest to state the objection. For the value of the goods sold 'was not half the pursuer's debt; and his poinding being preferable—there being 'no question of pari passu preference—the defender could have taken nothing if no 'sale had taken place.

'(2.) The case of Carmichael *v.* Johnston, Feb. 10. 1821, seems to be decisive 'against the objection. It was there held and decided, that the eight free days from 'the date of the order of sale, mentioned in the statute, refer to the publication, and 'not to the sale—which the Lord Ordinary understands to mean, that the publication 'must be not less than eight nor more than twenty days after the order—leaving the 'time between the publication and the day of sale to be regulated by the subsequent 'words in the statute, 'at such time and place as circumstances may require.' He 'can make no sense of the decision on any other construction, though it seems to 'have been misunderstood.

'3. Was the sale null, because the Sheriff's order bore, that the publication on the

'Sunday should be at least six days before the day of sale; and the publication being 19 Feb. 1835.
'on the 31st July, the day of sale was Saturday the 6th August?

'(1.) The same objection of want of interest applies as in the other case. The pur- Miller v.
'suer is not in the right of the debtor; and being excluded by the prior poinding, he Stewart.
'suffers no injury.

'(2.) The words in the order, which are not statutory, do not require six free days 'to intervene, but only that the publication shall be six days before the sale. Where 'a certain number of free days are required to intervene, it is usual, in the statutes, 'to specify this—as, in this act, as to the eight days, in the old election statute, 35 'Geo. III. c. 65, § 1, as to the publication of the writs, and other similar cases. 'From Sunday to Sunday would leave six free days intervening. But where six days, 'simply from and after the Sunday of publication, are mentioned, the construction 'cannot well be the same; one of the days must be reckoned in the six, otherwise, in 'this case, it would, in fact, require seven free days intervening. But, according to 'the analogy of the law, in the case of deathbed, reductions on the act 1696, &c. the 'Lord Ordinary thinks, that both the day of sale and the day of publication are not 'to be excluded, on the principle of dies inceptus,' &c.

SECOND DIVISION.

No. LIX. 20*th February* 1835.

TRUSTEES OF W. H. NISBET, ESQ. OF DIRLETON, AND MR AND MRS FERGUSON OF RAITH,
against
SIR CHARLES HALKETT OF PITFERRAN, BART.

WARRANDICE. — PASSIVE TITLE. — SERVICE. — *Circumstances in which it was found,* (1.) *That the heirs of a disponee were entitled to relief from the heirs of the seller, from future augmentations of minister's stipend beyond what was payable at the date of the disposition:* (2.) *That the obligation of relief had transmitted, and remained effectual against the heir of line of the granter of the obligation.*

IN 1682, John Wedderburn of Gosford disponed to Sir John Nisbet of Dirleton the lands and barony of Innerwick, Thorntown and others, with the teinds, parsonage and vicarage, of the same, &c. with the right of patronage of the church of Innerwick. On the narrative that the teinds were disponed by him for the same price that he got for the stock, the disponer bound 'and obliged himself, 'and his heirs, as well male as of line, tailzie, conquest, provision, 'and all others, his heirs and successors whatsomever, conjunctly 'and severally, renouncing the benefit of the order of discussing

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'them, to warrant the foresaid teinds, parsonage and vicarage, of the 'lands and baronies thereby disponed, from all future augmentations 'of ministers' or schoolmasters' stipends, and from all other burdens 'and impositions, and all evictions of the said teinds, or any part 'thereof that should thereafter happen, by whatever act or law, 'made or to be made in any time coming, excepting only the par- 'ticulars after mentioned:' then follows an enumeration of the sums of stipend then payable for the lands sold, amounting to L.67, 16s. Scots, and eight bolls of oats, and L.13 : 2 : 7 Scots, payable, in name of grass-money, to the minister of the parish, to which it was declared that the warrandice did not extend.

The properties thus conveyed descended, by regular progress, to the late Mr Nisbet of Dirleton, who was infeft in 1788. The stipend then paid was the same as at the date of the disposition 1682. The first augmentation was obtained by the minister in 1790, to commence with crop and year 1789; and after considerable discussion in the locality, a scheme was finally approved of, and decree pronounced, in 1799. By this decree, an augmentation was, for the first time, imposed upon the lands of Innerwick; and in the year 1800, Mr Nisbet paid the minister his proportion of the augmented stipend from the date of augmentation, no demand having previously been made upon him for any sum beyond the old stipend. During the dependence of this process of locality, Mr Nisbet obtained letters of incident diligence for citing the late Sir John Halkett of Pitferran, as representing John Wedderburn of Gosford, and, as such, liable in the obligation of warrandice. Sir John gave in a minute, stating, that he was called into 'this process by Mr Nis- 'bet, in order to relieve him of any augmentation to be granted; 'and as he had reason to believe that he was entitled to relief from 'the representatives of Henry Wedderburn of Gosford, craved a 'diligence for calling them into process.' No farther proceedings towards obtaining relief were then taken by Mr Nisbet. Successive augmentations were obtained in 1807 and 1823, and a final decree was pronounced in 1825. The augmented stipends were paid by Mr Nisbet, and, after his death, by Mr and Mrs Ferguson, who succeeded him.

In 1832, the trustees of Mr Nisbet, and Mr and Mrs Ferguson, brought an action for repetition of the augmented stipends, and for relief against all future augmentations, against Sir Charles Halkett, as representing John Wedderburn, the granter of the disposition.

It was alleged that Sir Charles had incurred such representation by virtue of the following progress: John Wedderburn of Gosford, the granter of the disposition in 1682, died without issue, and was succeeded by his brother, Sir Peter, who, in 1688, made up titles, as nearest lawful heir-male and of line in general to John, his brother.

Sir Peter married Lady Halkett of Pitferran, of which marriage there were two sons, Peter and Charles. In 1706, the two spouses executed mutual deeds of tailzie of their respective properties of Gosford and Pitferran, in the form of procuratories of resignation, to themselves in liferent, and to the children of the marriage in fee, but reserving power to alter the order of succession, to sell and contract debt. The mutual settlements, which were expressed as nearly as possible in the same terms, bear to have been granted for onerous causes and considerations. By Lady Halkett's deed, her estate of Pitferran was destined to Peter Wedderburn, the eldest son of the marriage, and the heirs-male of his body, &c. The destination of Gosford was to Charles, the second son of the marriage, and the heirs male and female of his body; whom failing, to the younger children, in the same order as in the entail of Pitferran, the substitution in each of the entails terminating with the heirs and assignees of the respective entails. By the deeds, powers were given to the heirs of selling or contracting debt, and generally of doing all deeds, other than gratuitous, in regard to the succession. There is a clause of devolution in both deeds, directing that, in the event of the succession to Pitferran opening to Charles by failure of Peter and his heirs, Charles should be entitled to his option, either to keep Gosford and renounce Pitferran, or to betake himself to Pitferran, and denude of Gosford in favour of the next heir. To this clause there was annexed the provision, that in case of an heir renouncing Gosford and taking Pitferran, the debts contracted by him while in possession of Gosford should become a burden upon the heir succeeding him in that estate.

(*Order of succession to Pitferran.*) Upon the procuratory in the entail of Pitferran a charter was, in 1713, expede in favour of Lady Halkett and her husband in liferent, and of their eldest son, Peter Wedderburn, afterwards Sir P. Halkett, in fee.

Sir Peter Halkett had three sons, Peter, Francis, and James. Peter, the eldest, was fatuous; and, in 1751, his father executed a new entail, passing him by, and carrying the estate to Francis, who succeeded, upon his father's death in 1755. Francis died in 1760 without issue, and was predeceased by his brother James, who also died without issue. Sir Peter survived, but he had been excluded by the deed 1751.

(*Order of succession to Gosford.*) Charles, the second son of Sir Peter Wedderburn and Lady Halkett, in virtue of the entail of 1706, succeeded to Gosford upon the death of his father. In 1725, Sir Peter, the father, had executed a disposition in favour of Charles, proceeding on the narrative, that he had thought fit, for the better preservation of their name and family, to settle Gosford on Charles, and the heirs of his body, in manner mentioned in the bond

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of tailzie; and that he had disponed to Peter, his eldest son, his furniture, &c. at Pitferran, with the rents of Pitferran due at his death, and various other sums, for the payment of certain debts specified in the disposition; and that it was just and reasonable that he should also secure Charles in the goods, debts, &c. after assigned, 'for the better enabling him to pay my debts, wherewith I have 'burdened him, in manner after specified;' he therefore assigns to Charles and his heirs several bonds and sums, among which there was a wadset for 62,000 merks over Dirleton, besides all debts and sums of money 'which pertained to Sir P. Wedderburn, my father, 'or John Wedderburn, my brother; it being specially provided and 'declared, that the said Charles Wedderburn, and his foresaids, by 'their acceptation hereof, are and shall be burdened with, and 'bound and obliged to pay my haill just and lawful debts that shall 'happen to be resting at the time of my decease, excepting allenarly in so far as the said Peter Halkett, my eldest son, stands 'bound to pay by a bond of relief granted by him to me.'

Charles made up no title, but possessed upon his personal right till his death in 1754. He left two sons, John and Henry. John made up a title in 1754, by general service, as nearest heir-male and of *line*, tailzie, and provision to his father, and thereby obtained right, both to the subjects contained in the general disposition of 1725, and also to the unexecuted procuratory in the deed of 1706, upon which he expede a charter of the lands of Gosford, and was infeft. In the following year he sold a considerable portion of Gosford to Lord Elibank for L.8854, and thereafter continued to possess the remainder of the estate, until the death of his cousin, Francis Halkett of Pitferran, in 1760.

On that event John claimed Pitferran as nearest heir of entail; but his succession was for some time stopped, by certain proceedings which took place for the reduction of the deed of exclusion in 1751. These proceedings terminated in the year 1770, by a judgment of the House of Lords, finding that the deed in question was competent; and Sir Peter, the idiot, having died about the same time, John Wedderburn then made up titles, by service as nearest and lawful heir of tailzie and provision to his deceased cousin Francis, and assumed the name of Sir John Halkett of Pitferran.

Henry, the younger brother of Sir John, by deed of devolution got Gosford, under burden of the debts affecting the estate, which, in terms of the entail of 1706, attached to the heir succeeding to that property. By an arrangement betwixt Sir John and Henry, the amount of those debts was fixed at L.15,500, part of them being debts of John's own contracting, and part attaching to him as representing his predecessors. Sir John also conveyed to Henry the wadset for 62,000 merks, to which the said deceased Sir 'Peter

'Wedderburn Halkett, my grandfather, had right, as heir served 20 Feb. 1835.
'and retoured to the said John Wedderburn of Gosford, his bro-
'ther, on the day of , and to which the said deceased Nisbet's Trustees, &c. v. Halkett.
'Charles Wedderburn, my father, had right, by disposition from
'the said Sir Peter Wedderburn Halkett, his father, of date, &c.
'and to which I have right, as heir in general served and retoured
'to my father in 1754.'

Upon Henry's death in 1777, Gosford having been brought to a judicial sale, Sir John ranked as a creditor for L.17,205, the whole of which he obtained, partly from the price, and partly by the re-conveyance of the wadset. Sir John thus drew from Gosford, including the price of his sale to Lord Elibank, upwards of L.26,000, or nearly the whole value of the estate.

Sir John Halkett died in 1793, and was succeeded by his son, Sir Charles Halkett, the defender, who made up titles by special service, as nearest and lawful heir of *line, tailzie and provision*, under a trust-deed executed by his father. Sir Charles also got certain moveables, which he took without confirmation. By a clause in the trust-deed, Sir John imposed payment of any debt, in the event of a shortcoming of the funds, not on Sir Charles personally, nor as a burden upon the subjects conveyed, but upon the heirs generally succeeding to the truster in Pitferran.

In defence against the action Sir Charles *pleaded*—1st, That he was not liable, as he neither represented the granter of the obligation, nor has derived benefit from the property or succession of that individual: 2d, The obligation is cut off by the negative prescription. This last plea, however, was not insisted in.

A record having been made up, cases were ordered, and avisandum made to the Court. Additional documents were printed, and additions to cases were allowed by the Court.

Pleaded in support of the defences—As the mutual entails of 1706 were onerous deeds, and took effect without the pursuer's predecessors constituting a claim existent or contingent against either of the entailers, the right of the disponees and their heirs cannot be affected by this claim for fulfilment of the obligations of a preceding proprietor, and still less after possession has followed on these mutual entails long beyond prescription. As the defender has only inherited the estate of his great-grandmother, Lady Halkett, he is not liable, in respect of such inheritance, for implement of this obligation. Defender's Pleas.

He is not in the situation of the defender in the case of Justice, 1st Dec. 1826, who possessed lands belonging to the granter of the obligation. The pursuer can no more raise such a demand against him than they could have done against Lady Halkett. She could not be bound, because she entailed a large estate on he eldest son,

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taking her husband bound to entail a smaller estate upon the second son. It is no answer, that the mutual settlements were not recorded in the Register of Tailzies. Such mutual deeds may be pleaded by substitutes deriving their right under a contract onerous in itself, and binding on the granters; Sharp, in 1631, (15,562); Houston, in 1715, (15,572); 1. *Shaw's App.* 320. The disponees established a prescriptive right under the mutual deeds, which was indefeasibly secured from debts not made effectual against the estate; Porterfield, 1771, (10,698.) In reference to Gosford, the settlement was to the second son, who was not the heir-at-law of Sir Peter or of John Wedderburn. The passive title of lucrative succession did not apply to Charles, for that is only pleadable against one who is alioqui successurus; *Stair*, iii. 7. 7. and § 5; *Hamilton*, 21st Feb. 1762, (9775); *Ersk.* iii. 8. 92. Under the deed 1725, the assignee incurred no liability, but was bona fide entitled to uplift and consume the moveable and perishable funds left to him; Robertson, 29th July 1760, (9087).

If Sir John, his father, had ever been liable, still this claim would not be relevant against the defender, who does not represent him universally, for he has taken Pitferran under the entail 1706. He got right to any moveable estate or funds of his father, under a settlement, the burdens imposed by which more than exhausted the funds conveyed. The defender was not served heir in general, or heir of line, on a retour confined to that character, which alone was ever held to fix representation on the party served. The defender's was a special retour, bearing, that he had been served 'heir of line, tailzie and provision' in a particular estate. These characters were thus combined, and the term heir of line was only descriptive of the character whereby his right as heir of tailzie and provision to that estate was made out. He did not claim the separate character of heir of line to take up any right as such; but the effect of his retour is, that he is heir of tailzie and provision to Pitferran, because he was the eldest son and heir of his father; Home, 1710, *Robertson's App.* 47; Earl of Dalhousie, (14,014). The defender got no other property through his father. A special service as heir of line, tailzie and provision, when nothing is taken, will not subject the heir universally; Maitland, 1757, (11,116); Blount, 1783, (9731); Earl of Fife, 7th March 1828, *Fac. Coll.*

Besides, the fruits were bona fide percepti et consumpti by Sir John, when it was not known that this claim existed; *Stair*, i. 7. 12; *Ersk.* ii. 1. 25. Had a claim been raised against Sir John in respect of his having drawn part of the price, as a creditor at a judicial sale, it would not have been competent for creditors of the seller or his predecessors to call for the grounds of Sir John's debt, or to challenge his preference. Sir John took up Gosford under a

special and singular title, whereby he (not being the heir alioqui successurus of Sir Peter) incurred no universal representation either of Sir Peter or Sir John Wedderburn.

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As to the sale to Lord Elibank, 1. There had previously been prescriptive possession under the entail upon a singular title; 2. The price was more than exhausted by the debts of the preceding proprietor.

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As the defender's father ceded Gosford to another disponee more than sixty years ago, and as the pursuer's predecessor preferred no claim in the judicial ranking and sale of the estate, the pursuers would have been barred from insisting against the defender's father, and cannot therefore insist against the defender; Cathcart, 17th Feb. 1804, *Fac. Coll.*

Pleaded for the pursuers—The warrandice against augmentation of stipend in the deed of 1682, having been made binding upon John Wedderburn the granter, and his heirs of every description, the obligation was, upon his death, transmitted to his brother, Sir Peter Wedderburn, who succeeded to Gosford, and who was his heir of line and general representative.

Pursuers' Pleas.

Sir John Halkett, the defender's father, having succeeded to Gosford, as heir of provision to Sir Peter Wedderburn, his paternal grandfather, having been thirteen years in the beneficial enjoyment of that estate, and having burdened it with his debts when the succession to Pitferran opened to him, became thus liable in the obligation of relief, inasmuch as he stood in the situation of direct lineal descendent, as well as lucrative successor of a party by whom the obligation had unquestionably been incurred as heir of the original granter of the warrandice.

Sir Peter became liable for the obligations of John Wedderburn, which were thus as clearly debts of Sir Peter as any personally contracted by him; and whatever be their nature, immediate or contingent, they must continue burdens on his successors. Even though the entail 1706 were onerous, all contractions prior to its date were binding on the heirs; Agnew, 21st July 1822, House of Lords; Wilson *v.* Agnew, 1st Feb. 1831. But the mutual deeds of 1706 were not, in fact, onerous deeds,—merely family settlements. These mutual entails of Gosford and Pitferran could not have the effect of cutting off the line of succession, so as to put Sir Peter Wedderburn's heirs succeeding him in Gosford in the situation of singular successors to the original debtor, and thus free them from the obligation which Sir Peter himself had clearly incurred.

The defender's plea of bona fides, and that his father, Sir John, possessed Gosford without incurring liability for a debt never con-

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stituted against him, and of which he had no knowledge, is irrelevant. The rule of bona fide consumption is never applied to the protection of heirs against liability for an ancestor's debts and obligations; and this exception is stated in Stair, i. 7. 13. The doctrine of the defender, that there can be no representation by progress, and that there must always be direct representation between the granter and the party held as liable, is groundless.

The defender, Sir Charles, having taken Pitferran by special service, as nearest and lawful heir of line, tailzie, and provision of his father Sir John, having farther taken benefit under his father's trust-deed, whereby he acquired moveable property, has, in every view, subjected himself for his father's debts and obligations, and, by consequence, for the obligations of John Wedderburn, the granter of the disposition. He cannot, having thus served, repudiate the character of heir of line. He is bound to implement the obligations of his ancestor, though they should encroach on his own estate, or even absorb it; the extent of his liability not being measured by the advantage which accrues to him through the succession, but being as universal as the title adopted; *Ersk.* iii. 8. 50; *Stair*, iii. 5. 8; *Bank.* iii. 5. 59. The term 'heir of line' is not a superfluity of expression, as contended for by the defender. The case of Gordon, quoted by him, does not apply. There the service was as heir-male, and held equivalent to heir of provision; nor Blount, where cognition more burgi, in order to dispone to trustees for the benefit of a father's creditors, did not infer an universal passive title; nor Earl of Fife, where the heir served for the express purpose of enabling him to reduce an ancestor's deed, granted to his prejudice, and where the title was merely tentative, and nothing taken under it. As heir of line, Sir Charles represents his father universally, and as heir of provision to the extent of the fee-simple estate taken up by him. The pursuers have no occasion to plead that the representation was continued through both of the two successions; but they maintain that it was necessarily continued through one or other of them; and in this view, even supposing it could be held that Gosford was no ground of representation, and adopting the defender's doctrine as to the onerosity of the deeds of 1706, it is submitted as a fair alternative plea, that, at all events, Pitferran having been entailed in consideration of the counter entail of Gosford, and having been thus onerously acquired by Sir Peter Wedderburn to his heirs, those heirs, and, among others, the defender and his father, by successively taking and holding that estate, incurred representation of Sir Peter, and liability for his debts and engagements, precisely as if Pitferran had been entailed directly by Sir Peter, or they had taken and held the property in respect of the settlement by which Pitferran was entailed.

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Lord Justice-Clerk.—There can be no doubt as to the validity of the obligation undertaken by the ancestor of the defender. On looking to the terms of the clause of warrandice, there can be no question that it is sufficiently extensive and comprehensive to free and relieve thedisponee and his heirs from all future augmentations beyond the stipend then actually payable; and also that it is binding upon the heirs of the sellers. No augmentation was obtained until the year 1790; and no decree in the locality was pronounced till 1799. But in the process of locality, Sir John Halkett, as well as Sir Charles, the defender, was cited for his interest; and the party truly liable was never lost sight of. The sole question that remains is, whether the defender represents his ancestor, the granter of the obligation. Prescription cannot be maintained, as the period when relief under the obligation could be enforced did not occur till within these forty years, a point which we had fully discussed in the recent case of Lord Breadalbane.

Now, John Wedderburn, the granter of the obligation, was succeeded by his brother Peter, who was served as heir general to him, and incurred a universal representation. There can be no doubt as to Peter's liability for this obligation. Peter and his wife, Lady Halkett, afterwards executed mutual deeds of provision, not fortified by irritant and resolutive clauses, for, in fact, part of Gosford, and soon after the whole, was sold. The object was to keep the two families separate; and it was expressly provided, that the debts of the heir giving up Gosford should be strictly chargeable on that property. Then there is another very material deed executed by Sir Peter in favour of his second son Charles, in 1725, whereby he lays the whole burden of his debts on Charles by the acceptance thereof. Nothing can be more clear, than that it was not possible, by any contrivance, to have relieved that estate from liability for the debts thus devolved on the heirs succeeding. Charles, the second son of Sir Peter, made up no title, but possessed Gosford till his death in 1754, when he was succeeded by Sir John, the father of the defender. Sir John made up titles by a general service as nearest heir-male and of line, tailzie and provision, and having thereby obtained right to the unexecuted procuratory in the deed 1706, was infeft, possessed Gosford from 1754 down to the time when the succession to Pitferran opened to him. He then surrendered Gosford to his brother Henry; but under burden of the whole previous debts. On Henry's death again, the whole debts previously affecting the property were made good and effectual by Sir John's claim in the ranking: so that it seems clearly established, that Sir John not only took Gosford, having incurred representation of his father Charles, but that he derived a lucrative succession from that property, by not only enjoying the rents, but by the sale to Lord Elibank, and the sums after-

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wards drawn in the ranking, protecting himself from payment of the debts contracted by himself and his predecessors in that property. Then the present defender, Sir Charles, served heir of line, tailzie and provision to his father. Is it not proved, therefore, that he is the representative of Sir John? Pitferran itself, in fact, is held in fee-simple. He might sell it; there are none of the clauses of an entail in the deed 1706 which would prevent his doing so; so that he clearly reaps a beneficial interest in that estate through his succession to his father. I hold this opinion apart from any consideration of the conveyance of moveables in trust for Sir Charles. As heir of line, tailzie and provision, he is liable for the debts of the ancestor with whom he thus connected himself; and this obligation of relief is just one of those debts.

Lord Glenlee.—I am also for decerning. It is clear that Sir John incurred representation of his father Charles. In fact, he declares so in his own disposition to Henry in 1771, where he says, 'To which 'contract of wadset lands and baronies and sums, on payment 'whereof they are redeemable, the said Sir P. W. Halkett, my 'grandfather, had right; and to which his father Charles had right; 'and to which I have right, as heir in general served and retoured 'to my said father before the bailies of Edinburgh, 20th June 1754.' Sir John made over the property to Henry, as heir of line to Charles, which was just the same as if he had sold it to some third party. It makes no earthly difference that Sir John afterwards got it back, or nearly so, out of the proceeds of the judicial sale. He could not shake himself clear of the obligation in this way. The case of Lord Fife was different, as he took nothing by the service. Sir John might have reduced his service, and thus put himself in a different situation.

Lord Meadowbank.—I have arrived at the same conclusion, after a deliberate consideration of the very able papers in the cause.

Lord Medwyn.—This is no doubt a hard case for the defender, and neither the granter of the disposition in 1682, nor Sir John Nisbet of Dirleton, could probably have anticipated what was to be the effect of this clause of warrandice.

Sir Peter, the brother, was unquestionably the heir of John Wedderburn, the granter of the obligation. He took up his estate of Gosford as heir, and was thus debtor in this obligation, and incurred representation. By the deeds which he and his lady executed in 1706, an anxiety was manifested to preserve the two branches of the family separate. The burden of the debts affecting Gosford was specially laid on Charles, the second son, to whom that property was destined.

Charles possessed Gosford, in the character of heir-apparent, till his death in 1754; but he had also a general disposition and assig-

nation to a large wadset sum, and various debts and claims, under the express burden of being liable for all his father's debts. He took up the subjects thus conveyed to him, and further exercised his power over Gosford, by selling Ballencreiff, a portion of it, for above L.8000. Charles thus became universal representative of his father, in virtue of the general assignation.

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Sir John, by his service to his father, and the title he completed to Gosford under the deed 1706, incurred the same representation as his father did. The only question is, what was the effect of this, in consequence of his succession to the other estate? The present claim not having been made a real burden on Gosford, how far Sir John, after giving up the property, remained responsible? The active representation being at an end, it might be thought that the passive representation should cease also. But this is not the case of a person compelled to give up an estate on the appearance of a nearer heir, like the case of Mackerich: He might have retained Gosford, provided he did not claim Pitferran; but this being the more valuable of the two, Sir John chose to accept Pitferran, and made over Gosford to his brother. Suppose Sir John had sold the whole of Gosford, he, in fact, did sell part of it, worth upwards of L.8000, and drew out of the proceeds of the judicial sale upwards of L.17,000 more. But I apprehend that he could not, by selling the property, have got quit of the representation of Sir Peter, and of his father, Charles Wedderburn of Gosford. What took place in reality amounted to a sale; and being the representative of former debtors in this obligation, Sir John could not get quit of that representation by taking up the other property: besides, he would also be liable, under the assignation, to the extent of the subjects conveyed, which must be much more than the present claim.

Looking again to the nature and character of Sir Charles's service, I have no doubt also that he incurred representation to his father, and is liable for the obligation of relief now sought to be made effectual.

The *Court* repelled the defences, and decerned, and remitted to the Lord Ordinary to adjust the amount due to the pursuers, but found no expenses due.

Judgment.

Lord Medwyn, Ordinary. For Pursuers, *Rutherfurd, Geo. Dundas.* *Dundas & Wilson*, C. S. Agents. For Defenders, *Dean of Fac. (Hope,)* and *Cunninghame.* *Warren H. Sands*, W. S. Agent. *F.* Clerk.

R.

FIRST DIVISION.

No. LX. 21*st February* 1835.

THOMAS PATON, TRUSTEE FOR GEORGE PENTLAND, AND THE SAID GEORGE PENTLAND,
against
WILLIAM RENNY, COMMON AGENT IN THE RANKING AND SALE OF THE ESTATES OF WALTER STIRLING GLAS.

PACTUM ILLICITUM.—STATUTE 1661, c. 24.—APPARENT HEIR.—ADJUDICATION IN IMPLEMENT.—PERSONAL OBJECTION.—*A party having, by a minute of sale, bound himself to convey to a creditor his expected inheritance, within six months after his father's death, and an adjudication in implement having been led upon the minute many years after the death of the father,—held, in an action of reduction at the instance of the common agent on the son's bankrupt estate, that the minute of sale, and the adjudication in implement, and charter and sasine which had followed thereon, were reducible under the above statute. 2. The creditor also found barred, personali exceptione, from founding upon the minute of sale.*

THE late Dr Glas was proprietor of the lands of Longkerse of Corntown, and of Sheriff-muirlands. In January 1813, his son, Walter Stirling Glas, who was indebted to Pentland, under a bond, in the sum of L. 2500, entered into a contract or minute of sale with him, whereby, on the narrative, that, upon his father's death, he would be 'entitled to succeed to the lands and others above mentioned,' and in consideration of the price of L. 4200, payable upon a title being given to the property, and towards which the sum in the bond of L. 2500, with what interest might be due, was to be imputed, 'he bound and obliged himself, his heirs, &c. within 'six months after he should succeed to the said lands and others, 'to execute and deliver, upon his own proper charges and expenses, a valid and sufficient irredeemable disposition to and in 'favour of the said George Pentland, and his heirs and assignees, 'of all and whole the lands of Longkerse,' &c.

Dr Glas died in 1822, leaving debts, as alleged, to a greater amount than the value of his property. In the meanwhile, Pentland's estates were sequestrated, and a trustee appointed; but the sequestration was recalled, on a settlement made by him with his creditors in 1827.

A trust-disposition was afterwards executed by him (Dec. 1831,)

of all his property, (including, per expressum, his right under the above minute of sale,) in favour of certain parties, who thereafter, (Nov. 1831,) by a deed of devolution, and with consent of Pentland, made over their whole right in favour of the present petitioner, Thomas Paton, who, in order to complete Pentland's title under the minute of sale, raised against Mr Glas (May 1832) a summons of adjudication in implement, concluding for adjudication of the lands in question, in implement of the foresaid contract of sale, in common form. 21 Feb. 1835. Paton and Pentland v. Renny.

Decree of adjudication was pronounced, followed by charters of adjudication in implement from the superiors of the lands, and by infeftment.

In the meanwhile, Walter Stirling Glas, who had made up titles to his father's property, under precepts of clare constat, also became bankrupt. He first obtained a process of cessio bonorum, in which Pentland was appointed trustee; and a ranking and sale of his heritable property was afterwards brought at the instance of certain of his creditors, some of whom had been creditors also of his father, and Mr Renny was appointed common agent.

In this process a petition was presented by Mr Paton, (Pentland's trustee,) to have the lands in question struck out of the ranking and sale, on the ground that, in virtue of the titles above recited, they were the petitioner's property, and could not be taken or sold for Mr Glas's debts. On the other hand, and while a record was in preparation on this petition, the common agent brought an action of reduction of the titles which had been made up in the person of Mr Paton under the adjudication, and the Lord Ordinary took the case to report to the Inner-House.

In answer to Paton's petition, and in support of the reduction, it was, inter alia, *pleaded* by the common agent—

1. That Walter Stirling Glas's alleged minute of sale, in January 1813, binding him, during his father's lifetime, to convey his expected inheritance, within six months after his father's death, falls under the act 1661, c. 24, by which it is enacted, 'that no 'right or disposition made by the apparent heir, so far as the same 'may prejudge his predecessor's creditors, shall be valid, unless made 'and granted a full year after the defunct's death;' and that as Dr Glas had left debts to an amount much larger than his property, it follows that the petitioner and George Pentland cannot derive any benefit from the minute or contract founded upon by them, &c. The act expressly declares, that no right or disposition by the apparent heir shall be valid to the injury of the ancestor's creditors, without distinguishing whether it be made or granted before or Common Agent's Pleas.

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after the ancestor died, unless it be made and granted a full year after his death. And the views of the Legislature, as explained in the preamble of the statute, call for a liberal interpretation. Mr Erskine, accordingly, in reference to the 62d chapter of the same statute, observes, that it has, 'by a liberal interpretation, been extended to cases not expressed in the letter of it;' *Ersk.* ii. 12. 34; see also *Stair's Decis.* 19th June 1668, Burnett; *Fount.* 26th Feb. 1685, Campbell; *Bell's Princip.* 3d edit. sect. 1932, p. 524; (as to the present statute,) Magistrates of Ayr, 14th June 1780, *M.* 3135. All pacta de hæreditate viventis are viewed unfavourably, and, in older times, have been ever found to be unlawful; Lyle *v.* Tailzeour, 24th Jan. 1650, *Brown's Sup.* i. 474; Stewart *v.* Earl of Dundonald, 7th Feb. 1753, *M.* 9515; *Elch. Pact. Illic.* No. 25. In reference both to the nature of the transaction between Walter Stirling Glas and George Pentland, as contra bonos mores, and to the general scope of the statute, the res gestæ here bring the case under its sanction.

The minute of sale, however, seems to fall under the very words of the statute. Nothing is more usual, in common language, than to designate an eldest son as an apparent heir during his father's life. And this use of the term has been sanctioned by express legal authority, and by the decisions of the Court; *Ersk.* ii. 12. 34; *Bell,* 3d edit. p. 524, sect. 1932 and 1933; Magistrates of Ayr, 14th June 1780, *M.* 3135.

The object of the Legislature would be completely defeated, were a bond or contract, granted during the ancestor's lifetime, to be kept concealed, like the one in question, for a period of years, and then to be reared up as a valid obligation, capable of being made the ground of a preference by an adjudication in implement.

2. The adjudication in implement cannot make the minute of sale valid. That diligence, and the subsequent titles, could only be in fulfilment of the previous contract, and according to its very terms, so that they can have no greater effect given to them, than if Glas had granted a regular voluntary conveyance within six months after Dr Glas's death, which would have been clearly reducible.

3. George Pentland and the petitioner are, in the particular circumstances of the case, and by the acts and deeds of the said George Pentland, barred, personali exceptione, from founding upon the minute of sale in 1813; and have, besides, both judicially and extrajudicially, abandoned all right under that minute, and are not now entitled to found upon it to any effect whatever *.

* There were a variety of other pleas and questions raised between the parties, which it is unnecessary to notice, as they were not disposed of by the Court; neither is it necessary to state the circumstances upon which the personal objection (which was sustained by the Court) was founded.

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It was *answered*—1. The statute in question strikes only at voluntary deeds of the heir, and not at diligences at the instance of his creditors. 2. Even voluntary deeds are not struck at unless granted by the heir within a particular period, viz. a year after the death of the ancestor. Upon the same principle on which deeds granted after the expiry of the year are unchallengeable under the statute, deeds, contracts and obligations of all descriptions whatsoever, granted by the heir before the death of the ancestor, are equally untouched by the statute. The act applies only to 'apparent heirs;' and no man is, in the eye of law, an 'apparent heir' until after the death of his predecessor, whatever may be the popular understanding of the term; Laird of Arniston *v.* Lord Ballenden, Nov. 1685; *Harcarse*, 28, No. 137, *Sup.* vol. 30; *Bell*, i. 730. The Legislature had no intention to tie up the hands of the heir anterior to the death of his predecessor; all that was intended was, that for a year after the ancestor's death, in other words, during the annus deliberandi, he should do nothing to make the situation of any of the parties who contracted with him better than the others, who cannot do diligence against him. In the present case the statute is altogether inapplicable, in as much as there is nothing brought under challenge done by Walter Glas within a year after the death of his father. The minute of sale was executed nine years prior to that event. Walter Glas did not execute any voluntary disposition in implement of the contract 1813. The creditor in the obligation was entitled, at any time, to go on with all manner of diligence upon the contract. The contract made in 1813, and the diligence following upon it, are wholly untouched by the statute in question.

Moreover, the object of the act was exclusively to benefit the creditors of the ancestor as such, and the creditors of the heir have no title to found upon the statute; but there are no creditors of the ancestor in the field to try this question, they, by neglecting to do diligence within three years after the death of their debtor, having lost the preference which they would thereby have acquired, and having become mere ordinary creditors of W. S. Glas, the heir. In the present ranking the creditors all stand in the same predicament, having a pari passu preference over whatever lands may be sold. But this is conclusive against the title of the respondents to found on the statute, which was intended for the benefit of the creditors of the ancestor, when forming a separate and distinct body, and pursuing for their own interest as such.

2. There are no grounds for maintaining that the defender, or his author, George Pentland, renounced the right arising under the onerous contract of 1813, which, on the contrary, Mr Pentland and his successive trustees have all along endeavoured to enforce.

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The Lord Ordinary made avisandum to the Court, with cases.

At the advising *Lord Balgray* observed—That, in his opinion, the transaction in question was struck at by the statute 1661. The adjudication in implement and subsequent titles could not render the transaction valid, if the original contract or minute of sale was challengeable, because they could only be in fulfilment of that contract, and must be presumed to have been followed out in ipsissimis verbis thereof. His Lordship had always considered it to be undoubted law, since the passing of the statute, that no apparent heir could legally dispose of the estate of his predecessor until the lapse of a year after his death; and that, if he did so, the disposition was null and void. His Lordship thought that this had long ago been settled by the decisions of the Court; and there was one judgment to that effect soon after the date of the act, reported by Harcarse, No. 144, *voce Alienation*. The case of Taylor was also referred to by Bankton, b. iii. t. 5, § 67, though the date was erroneously given by his Lordship. The true date was Nov. 1747, instead of Nov. 1647, *Kames, Rem. Dec.* 2. 142; *Elchies, Fraud*, No. 17, *M.* 3128. Then came the case of Campbell, in 1685, referred to by the pursuer, and reported by Lord Fountainhall, and the case of the Magistrates of Ayr in 1780, also quoted by the pursuer, and referred to by Mr Bell, 3d ed. p. 524, § 1932. His Lordship also thought, that, independently of this objection, Mr Pentland had, by his proceedings under Glas's cessio, and other acts and deeds, completely barred himself from founding upon the minute of sale.

Lord Mackenzie spoke to the same effect, and in these opinions the other Judges appeared to concur.

Judgment.

Their Lordships therefore pronounced the following interlocutor: 'The Lords having advised the application for Thomas Paton, 'trustee for George Pentland, and the action of reduction repeated therein at the instance of the common agent and creditors of 'Walter Stirling Glas, with the record and cases for the parties, 'and heard counsel, they refuse the desire of the petition to strike 'the lands of Longkerse of Corntown and Sheriff-muirlands out of 'the sale, and reduce, decern and declare in terms of the conclusions of the summons of reduction: find the petitioner and defender in the reduction liable in the respondent's and pursuer's expenses: appoint an account thereof to be put in, and remitted.'

Lord Cockburn, Ordinary. For Pentland's Trustee, *Dean of Fac. (Hope,) Penny.*
Alt. *Shene, Christison.* *Ro. Roy*, W. S. and *Wm. Renny*, W. S. Agents.
D. Clerk.

C.

FIRST DIVISION.

No. LXI. 21*st February* 1835.

LOVE AND MACLAREN, WITH CONCURRENCE OF THE LORD ADVOCATE,
against
RAILTON.

PROCESS.—STATUTE 1701.—BANKRUPT.—*A party having, upon a warrant of the Sheriff, committed to prison, for trial, on charge of certain criminal proceedings, an individual who was afterwards liberated under the act* 1701, *and the same party having thereafter, and principally upon the same grounds, presented a petition and complaint to the Court of Session against the same individual, praying their Lordships* 'to find that the conduct of (the respondent) in 'the different respects before set forth, in so far as the petitioners are 'respectively concerned, was grossly illegal and culpable, and that 'the (respondent) is not a fit and proper person to discharge any 'office in the sequestrated estate of the said (petitioner,) and to in-'flict such punishment or censure on the said (respondent,') &c. 'as 'may seem proper,' &c.—*held,* 1*st, in so far as related to the criminal charges, on which the proceedings before the Sheriff had been taken, that the petition and complaint was, in virtue of these proceedings, incompetent, the only competent procedure, thereafter, being by a regular libel within sixty days, or by criminal letters before the Court of Justiciary; and,* 2*dly, (and with regard to the general declaratory conclusions, to have it found that the said respondent was* 'not a fit 'and proper person to discharge any office in the sequestrated estate 'of the petitioner,') *that such a declaratory conclusion could not competently be made the subject of a petition and complaint.*

THE petitioner, Love, became bankrupt, and was sequestrated; and the other petitioner, Maclaren, and the respondent Railton, were competitors for the office of trustee on Love's sequestrated estate, the question of competition being in dependence.

In August 1834, Love, with the concurrence of the procurator-fiscal, presented a petition and complaint to the Judge Ordinary against the respondent Railton, setting forth, inter alia, 1st, that he had concocted and got up a false and fabricated minute, relative to the meeting for election of an interim factor, on 21st July 1834; and, 2dly, that he had used that minute in certain judicial proceed-

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ings, which he had instituted in the names of some of the creditors, without their authority or knowledge, &c., and praying the Sheriff 'to grant warrant for apprehending and bringing the said Edward 'Railton and William Hunter before you for examination, upon 'the subject-matter of the foregoing petition and complaint, and 'crimes there referred to; and thereafter to commit the said Edward 'Railton and William Hunter prisoners to the jail of Glasgow, 'therein to remain until liberated in due course of law, and grant 'warrant to cite and precognosce witnesses in common form.'

The Sheriff granted warrant as prayed for, and the respondent was brought up for examination, and examined. A precognition was taken, and the respondent was committed for trial. He made intimation under the act 1701, was thereafter liberated on bail, and the period under the statute expired without criminal letters being served upon him.

Thereafter the present petition and complaint, (with the concurrence of the Lord Advocate,) was presented, setting forth the two charges above recited, and also that the respondent had altered and manufactured certain affidavits, in order to make fictitious votes in his own favour at the election of trustee; and praying the Court, inter alia, 'to find that the conduct of the said Edward Railton, in 'the different respects there set forth, &c. was grossly illegal and 'culpable; and that the said Edward Railton is not a fit and pro-'per person to discharge any office in the sequestrated estate of 'the said John Love; and to inflict such punishment or censure on 'the said Edward Railton, or otherwise to deal with him, as to 'your Lordships may seem proper,' &c.

At the advising of this petition, with answers, (which contained a denial of the charges above recited,) an objection was stated to the competency of the petition and complaint, on the ground, 1st, That the Court did not possess jurisdiction to inquire into the charges for the purpose of awarding censure or punishment, in respect that the respondent was not a member of Court; and, 2dly, Because although of the nature of a criminal accusation, no list of witnesses had been annexed to the petition: and the Court ordained the parties to lodge minutes of debate on the question of competency of this petition and complaint, and therein to state the course of practice as to the annexing of lists of witnesses to such petitions and complaints, &c.

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In support of the competency it was *pleaded*—That Mr Railton was amenable to the Court as a notary duly admitted; 2dly, in so far as it was alleged by him that he was a practising law-agent; and, 3d, because he was a party in a depending process in the Court,

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with reference to which process the alleged malversations were committed, and through the medium of which he was seeking to commit very gross injustice, as well as to commit a great indignity towards the Court; and various cases were referred to, where similar delinquencies, in regard to depending processes, had been brought under the cognisance of the Court, by petition and complaint, and which were noticed in the printed Acts of Sederunt; Cochran *v.* Barr and Spence, 6th July 1739; Russell *v.* James Adie and Marion Shaw, 28th July 1739; Buchanan *v.* James Wilson and Thomas Philipps, 12th July 1740; William Fraser, 28th Feb. 1741; Denham *v.* Daniel Aitken, 7th Feb. and 2d June 1750; Leith Ropery Co. *v.* Robert Wells, 20th July 1751; Robert Raeburn, 20th Dec. 1760; William Dunbar, 26th Feb. 1762; John Marshall, 11th Feb. 1763; John Rankin, 31st Jan. 1786; Robert Wright, 26th May 1812; James Blair Hunter, 11th March and 28th June 1818; James Lyon and Alexander Mackenzie, 10th June 1819.

2. That, with regard to the want of the list of witnesses, it had never been the practice in the Court of Session to hold it necessary that the complaint should, in the first instance, be accompanied with a list of witnesses, although, in the interlocutor allowing probation, the Court sometimes ordered a list of witnesses to be served. In trials before the Court of Justiciary, indeed, the indictment or criminal letters, when served, must be accompanied with a list of witnesses; but the necessity was enjoined by the statute 1672, c. 16. But there was no such provision in regard to procedure before the Court of Session; nor had it ever been the practice to append a list of witnesses to a petition and complaint, whether at the instance of the Lord Advocate, or at the instance of a private party, with his concurrence; but it was only necessary to refer to the later cases reported by Shaw and Dunlop; the Lord Advocate *v.* Jameson, 20th Nov. 1821, *A. S.*; Lord Advocate *v.* Hay, 12th Dec. 1821, and 17th Jan. 1822, *A. S.*; Maclachlan and Black, 15th Dec. 1821; Stoddart *v.* Duncan, 22d Jan. 1822; Bell *v.* Stewart, 26th Jan. 1822; Macalister and Husband *v.* Orr and others, 21st Feb. 1822; Baillie *v.* Waddell, March 1. 1822; Lord Advocate *v.* Prentice; March 8. 1822; Lord Advocate *v.* Duncan, 21st Jan. 1823; Duke of Athol *v.* Dalgleish, 28th June 1823; Jack *v.* Pearson, 3d July 1833, (*A. S.* p. 42); Gilfillan *v.* Ure and others, May 18. 1824; Campbell *v.* Macgown, 10th July 1824; Henderson *v.* Sang, 10th Dec. 1824; Murray *v.* Thompson, 15th Dec. 1824; Macmillan *v.* Hamilton, 10th Dec. 1825; Maclachlan *v.* Carson, 16th Feb. 1826; Lockwood *v.* Davidson, 21st Dec. 1826; Macfarlane *v.* A. B., 6th March 1827; Keltie *v.* Wilson, 18th Dec. 1828; Johnston *v.* Small, 14th Jan. 1829; Robertson *v.* Macdonald, 16th

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Jan. 1829; Mackenzie v. Magistrates of Dingwall, July 1829; Anderson v. Spence, 27th May 1830; Mackenzie v. Walker, 25th June 1831; Lord Advocate v. Blair Hunter, 11th March 1818.

Pursuers' Pleas.

3. With regard to the proceedings before the Sheriff, the reason that these were relinquished was, that it was found that it would be necessary to bring subsequent acts, or acts subsequently discovered, under the notice of the Court, by the present petition and complaint; and it was thought that it might afford room for complaint, if the respondent were prosecuted before the Sheriff, or in the criminal court, and at the same time complained of to the Court of Session, in relation to similar charges; and it was therefore resolved to include the whole in one complaint; and, at all events, the objection applied only to part of the charges, and these not the most serious.

4. As to the present complaint being barred by the dependence of the competition for the office of trustee, it was that very dependence, supposing there was no other ground, which made the complaint competent. The complainers could not have insisted in their present demand by a mere motion in the competition, and the charges now made could only be brought forward in the shape of a complaint.

Defender's Pleas.

To the competency of the petition and complaint it was *objected*—

1. In so far as relates to the demand for a general declaratory finding, that the respondent is not a fit and proper person to discharge any office in the sequestrated estate of John Love, the complaint is clearly incompetent. 1st, In regard to the office of trustee, the qualifications of the respondent are already the subject of discussion in the proper place, viz. in the competition for that office. In that process, it is competent to state every personal objection to either of the candidates; and all the objections now stated here, accordingly, have been brought in that process, in which a record was in preparation, and in which they would have been duly disposed of; and, 2d, With regard to any other office in Love's sequestration, for which the respondent was not a candidate, the proposed general character of ineligibility was quite preposterous. As well might the Court be called upon to declare, that the respondent is not a fit and proper person to discharge the office of trustee in the sequestrated estate of any third bankrupt party; and neither the bankrupt himself, nor Maclaren, had any right or title to bring such a declarator.

2. In so far as relates to the conclusion for punishment or censure, the complaint is also incompetent and irregular. In this point of view it is a criminal complaint, and the proceedings before the Sheriff not only establish the criminal nature of the charges, but they give rise to a fatal objection to the present complaint. Under these

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proceedings, the respondent had competently obtained the protection of the statute 1701, and the complainer was not entitled to deprive him of that protection. It was the duty of the complainer, if he meant to follow out the charge at all, to have served a regular libel within sixty days. Had he done so, the respondent would have had the benefit of a minute and accurate statement of the charge, of the regular inducies of a list of witnesses, and of a peremptory diet. Not having served a libel in due time, it was, under the act 1701, incompetent for the complainer to proceed against the respondent in any other way than by criminal letters in the Court of Justiciary; in which case also, the respondent would have had all the benefits above mentioned. But having failed to serve his libel in due time, and not venturing to resort to criminal letters in the Court of Justiciary, it was in vain for the complainer to attempt now to escape out of the position into which he had brought his accusation, and to render nugatory the act 1701, by bringing his prosecution for punishment, as it were, in the Court of Session, by this petition and complaint, without regard to time, without a list of witnesses, and without any of the proper formalities. It was the petitioner who chose to put the petitioner within the act 1701, by taking the criminal proceedings before a magistrate, and obtaining the warrant of commitment, until liberated in due course of law. From that act arose, of necessity, under the statute, the right of being able to regulate the proceedings in terms of the act, and of securing the mode of trial therein provided, and all the other protections of the statute. The only exception from the operation of the act 1701, after a criminal warrant of commitment had been granted, was in the case of Duncan v. the Lord Advocate, decided by this Court, and affirmed by the House of Lords, 28th June 1825, *Wilson and Shaw's Appeal Cases*, p. 608. But the decision in that case went entirely upon the ground, that the offence, (that of fraudulent bankruptcy,) was cognisable only in the Court of Session.

3. With regard to the want of a list of witnesses, the proceedings before the Sheriff had given the charges against the respondent the character of accusations for crime, and therefore clearly rendered such a list necessary. But independently of this, both the form of the present proceeding, and the nature of the charges, marked the necessity of a list of witnesses. There may have been many cases in which this form has been overlooked, and no obligation taken. But in the case of Macdonnell v. Cameron, 12th June 1824, there was a deliberate decision of the Court, finding that such a list was equally necessary in a case of fraudulent bankruptcy as in a criminal indictment.

4. It was also maintained generally, that under the charges brought

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against the respondent, the question was not one in which the Court had jurisdiction.

Judgment.

The *Court* unanimously found the petition and complaint incompetent, and refused the desire thereof, and found the respondent entitled to expenses, &c.

Opinion of Court.

Their Lordships held, that so far as the charges against the respondent were of a criminal nature, and had been made the subject of criminal proceedings before the Sheriff, the complainer had completely barred himself from proceeding in the petition and complaint, supposing it to have been otherwise competent. He had selected his forum, and criminal proceedings had been taken before the Sheriff, after which, the only competent procedure for the complainer, (if he intended to persevere in the charge,) was either to have served a regular libel upon the respondent within sixty days, or, after that period, to have proceeded by criminal letters against him before the Court of Justiciary; but it was not now competent for him to proceed by a petition and complaint before the Court of Session, and thus to evade the operation of the statute 1701. With regard to the remaining charges, so far as related to the qualifications of the respondent to be trustee on the sequestrated estate of the petitioner, and to the punishment that might be due for the alleged delinquencies, that was a matter which would be disposed of in the competition which was now depending; that, if the charges were established in that proceeding, the Court had power to make any award which would meet the justice of the case, whether as regarded the right to be appointed, or the punishment, if any, that should be inflicted: and as to the general declaratory conclusions against him, to have it found that he was not a fit or proper person to discharge any other office on the sequestrated estate, (about which there was no competition,) that was of the nature of a declaratory action, and could not competently be brought forward in a petition and complaint, so that the present proceeding was out and out irregular and incompetent.

For the Petitioner, *Skene, A. M'Neill.* Alt. *Dean of Fac. (Hope,) Sol.-Gen. (M'Neill.)* *C. F. Davidson*, W. S. and *John Cullen*, W. S. Agents. *B.* Clerk.

C.

SECOND DIVISION.

No. LXII. 21*st February* 1835.

H. A. DOUGLAS AND OTHERS, (STEIN'S ASSIGNEES,)
against
GEORGE DUNLOP & COMPANY.

SASINE.—COMPETITION.—*An infeftment taken upon the* 17*th July, and recorded in the Register of Sasines upon the* 11*th September, found to be preferable to another infeftment taken upon the* 20*th July, and presented along with the other, and also recorded on the* 11*th September.*

UPON the 17th day of July 1811, John Hogg and his wife executed a bond and disposition in security over a tenement of houses belonging to them in Greenlaw, in favour of Dunlop and Company, for security and payment of L.129 : 6 : 2; and infeftment passed, upon the same day, in favour of the disponees.

On the 20th day of July 1811, Hogg and his wife executed a bond and disposition in security over the same tenement in Greenlaw, in favour of Mr Stein, in security for the sum of L.140; and infeftment was passed, upon the same day, in favour of Mr Stein.

Both instruments of sasine were, upon the 11th day of September 1811, presented to the Keeper of the Particular Register of Sasines at Greenlaw, by the same person, and at the same time, viz. betwixt the hours of 11 and 12. Both instruments were entered in the Minute-book, and were duly recorded. The sasine of Dunlop and Company stands first in point of order upon the record.

In 1813, Dunlop and Company sold the tenement of houses in question to Purves, tailor in Greenlaw, for L.300, and granted a disposition, upon which Purves has since possessed the subjects and drawn the rents. The sale was conducted by Mr Wilson, who was agent both for Mr Stein and Dunlop and Company. Wilson paid Dunlop and Company the amount of their claim, with interest and expenses, and retained the balance in his own hands.

Mr Stein's assignees, in 1826, raised an action against Dunlop and Company and Purves for payment of the L.140, with interest since 1811, and expenses.

The defences for Dunlop and Company were—

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Defenders' Pleas.

1. The infeftment in favour of the defenders having been first taken and first recorded, was preferable to the infeftment in favour of Mr Stein.

2. The subjects having been sold by the agent of both the heritable creditors, and he having paid to the defenders no more than the amount of their debt, retaining the balance as the agent of Stein's assignees, the defenders are not liable to account for that balance.

The Lord Ordinary having heard parties on the closed record, pronounced the following interlocutor:

'The Lord Ordinary having considered the closed record, and 'heard parties' procurators thereon, and made avisandum, finds, That 'the defenders, by virtue of sasine bearing date the 17th July 1811, 'as recorded in the register of sasines on the 11th September 1811, 'obtained a valid and effectual preference over the subject in ques'tion, for the debt expressed in their bond and disposition in secu'rity narrated in the record, and all interest and expenses, against 'any claim competent to the pursuers, in right of John Stein, by 'virtue of the bond and disposition in security narrated in the sum'mons and record, and the sasine following thereon, of date the 20th 'July 1811, and recorded on the said 11th September 1811; and 'to this extent sustains the defences.

Note.—'The Lord Ordinary has a clear opinion on the point 'determined by the interlocutor. It is a question of importance; 'but he thinks that no other judgment would be either just or safe.

'The sasine of the defenders is *first* in *date*. That certainly 'does not determine the question of preference, according to the 'ruling statutes; but it may not be altogether foreign to the ques'tion of *priority* of *registration* on the facts in this record.

'By the statute 1617, sasines, if recorded within sixty days after 'their respective dates, were preferable according to their *priority* 'in *date*. That act being thought defective in respect of the prin'ciple of the system of registration, the acts 1698, c. 13 and c. 14, 'were passed. The first declared, that all sasines should be pre'ferable 'according to the *date* and *priority* of the *registrations* of "the sasines,' &c. But it being known from experience that there 'might be delay in making the registration after a sasine was pre'sented to the keeper, it was readily perceived that, after the pre'ference was made to depend on the priority of registration, undue 'partiality and injustice might take place, unless a precise and de'finite rule were laid down for determining both the *date* and the '*priority* of the legal act of registration. Therefore the succeeding

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'act, c. 14, was passed, which provides, 'That all the keepers of "the said registers shall keep minute-books of all the writs pre- "sented to them to be registered in their several registers, express- "ing the *day* and *hour* when, and the names and designations of "the persons by whom, the said writs shall be presented, and that "the said minute be *immediately signed* by the *presenter* of the writ, "and also by the *keeper*, and patent to all the lieges who shall de- "sire inspection of it *gratis*. And that *the writs shall be registrate* "*exactly according to the order of the said minute-book*,' &c.

'The statute says, that the minute shall express 'the day and *hour* 'when the writ was presented. The Lord Ordinary apprehends, 'that in speaking of *the hour*, there could be no intention to limit 'the question either of *date* or *priority* of registration to the separate 'measured period of sixty minutes in the usual reckoning of time 'in a day; but that it was implied in the term *hour*, that there might 'be an equally clear case of priority within the *minutes* of the *same* 'nominal hour. It meant the *precise point of time* in a day. In 'practice, no doubt, it has not been usual to enter the fractions of 'time in the minute-book, it being thought enough to state that the 'writ was presented *between the hours of and* . But look- 'ing to the practical operation of the statute, on what principle has 'this been held sufficient? Evidently because the statute itself has 'provided another sure test for fixing the priority. The minute 'must be made *immediately* on the writ being *presented*, and must 'be signed by the *presenter* and the *keeper*; and the actual regis- 'tration of the writs must be in the *precise order* of the minute-book. 'There can never, therefore, be any difficulty when the minute- 'book and registers are made up, simply in the ordinary form, of 'telling with *certainty* which of two sasines is, according to the sta- 'tute, the *first* in *date* and *priority* of registration, whether they were 'both presented within the same nominal hour of the day, or in 'different hours. The *order* of the minutes, *as subscribed*, and the 'registrations following it, must fix the point conclusively, if the 'statute is at all effectual to its purpose.

'A case, no doubt, may be figured, though apparently it has never 'occurred, of *two persons* presenting two sasines at the very same 'instant; and it may be asked, how such a case is to be regulated 'under the statute? It is not necessary here, more than in any other 'question, to resolve a supposed difficulty which does not arise in 'the case before the Court. But the Lord Ordinary has little 'doubt how such a case must be extricated if it did not occur. The 'keeper could not arbitrarily prefer the one sasine to the other, and 'he could not compel the one presenter to yield to the other in the

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'priority of the minute to be subscribed. And, therefore, although 'the statute is silent on the matter, the nature of the fact, with re- 'ference to the keeper's prescribed duty, would render it indis- 'pensable that he should, in some form, *make a minute of the two* '*sasines as presented at the same time*, and have that minute sub- 'scribed by both the presenters and himself; and that he should 'afterwards make the registrations in such a way as to exhibit on '*the face of the register* that there was no actual or legal priority of 'the one before the other. Some such course would arise out of 'the *necessity* of the case; because the keeper *could not* make a 'minute of *either* before that of the other, without violating his ex- 'press duty and incurring the penalties of the statute. And when 'the register was so made up, the *fact* would be seen in it, out of 'which the question of *pari passu* preference might arise.

'But there is no such case here. The minute-book and the 'register are in the usual form; the minute of the sasine of Dunlop 'and Company, *subscribed by the presenter and the keeper without any* '*qualification*, being first in the minute-book; and that of Stein, '*also subscribed simply*, being posterior to it. The registration is in 'the same order. What, then, is it on which a claim of pari passu 'ranking is raised? Nothing but this, that the minute-book bears, 'as to each sasine, that it was presented between the hours of '*eleven* and *twelve* of the same day. But as the statute requires 'that the minute shall be made and subscribed *immediately* on the 'writ being presented, is it not the legal and necessary presump- 'tion that the keeper did his duty, and that though both sasines 'were presented within the same space of sixty minutes, the minute 'first made and subscribed does, notwithstanding, designate the 'writ which was *first presented*? The Lord Ordinary can see no 'justice or safety in any other rule.

'But, if the actual case be looked into more narrowly, there are 'other considerations which appear to be sufficient to resolve it. 'The two sasines were presented, not by *two persons*, but by the '*same person*; and the averment is that he presented them at the '*same time*. But there is not only no evidence of this in the re- 'gister, but actual and *statutory* evidence of the reverse; for the 'presenter has subscribed both the minutes without reserve or qua- 'lification; and the statute says, that the *order* of these minutes 'shall be the *precise order* of the registration. By so subscribing, 'the presenter legally *attested the fact*, and the keeper confirmed it 'by also subscribing, that the sasine of Dunlop and Company *was* 'the *first presented*, the minute whereof was *immediately* made and 'subscribed. Can the Court allow this to be contradicted by pa-

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'role evidence? The Lord Ordinary apprehends that it cannot, and 'that it would be most dangerous so to do.

'But there is also a presumption of ordinary law and justice in 'support of this state of the register. The two sasines had been 'taken by the *same agent*, that of Dunlop and Company being three 'days anterior to the other. It is averred on the one hand, and 'denied or not admitted on the other, that Mr Stein, in transacting, 'or before advancing his money, was aware of the right previously 'constituted. There can be little doubt of the fact. But, at any 'rate, Mr Stein's agent, for whom he is answerable, having him-'self taken the first sasine, *of course was aware of it.* If he had 'done his duty strictly, he should have recorded Dunlop's sasine, '*even before he took the other.* But as that was delayed, *what was* '*his duty after* both were taken? Clearly to present Dunlop's for 'registration *first.* In that he did only justice to Dunlop and Com-'pany, and no injury to Stein. Supposing, therefore, that he did 'go to the register, having *both in his possession* at the same time 'what is the *presumption* independent of the evidence of the regis-'ter? Is it to be presumed, that he committed a gross fraud by 'presenting both at once, so as to render the securities equal? Or, 'that he did justice between his clients as his duty required? The 'Lord Ordinary conceives, that the presumption of fact and law, 'arising from the situation of the presenter of both sasines, is in 'precise conformity with the fact, as he has solemnly attested it by 'his subscription of the minutes, that, whether he held both in his 'hand or not, he did *present* the one for *registration first*, and the 'other only after it had been duly entered, or, what is the same 'thing, that he presented them *in that order*, and with that ex-'planation of his act and purpose.

'But though these views are not without importance, the Lord 'Ordinary rests his opinion on the legal effect of the minute-book 'and register as they stand.

'The Lord Ordinary has not decided the other point of the 'cause, viz. Whether Dunlop and Company, as the venders of the 'subject, are accountable for the residue of the price, after payment 'of their debt, expenses of the sale, &c., which was left in the 'hands of Wilson, the agent who carried through the sale; be-'cause, on looking over the record and the notes of the debate, he 'is afraid that the cause might get into some perplexity, and he 'might proceed in error, if he did not first hear what it is precisely 'which Wilson pleads in defence to the action of relief.'

The pursuers *reclaimed*, craving to be found entitled to be pre-

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ferred, pari passu with the defenders, to the price of the subjects in question; but the *Court adhered*. *Sandford*, for reclaimer, referred to Wight *v.* Anderson, 28th Jan. 1774.

Judgment.

Lord Ordinary, *Moncreiff*. Act. *Dean of Fac. (Hope,)* and *Sandford*. *D. Fisher*, S. S. C. Agent. Alt. *Jameson* and *Rutherfurd*. *Thos. Johnstone*, S. S. C. Agent. *R.* Clerk.

R.

SECOND DIVISION.

No. LXIII. *24th February* 1835.

WILLIAM CAMPBELL
against
JAMES YOUNG AND OTHERS.

JURISDICTION.—STATUTE 55. GEO. III, c. 71.—*Justices of the Peace having exceeded the powers expressly conferred by the provisions of the Hawkers' and Pedlars' Act, found that the jurisdiction of the Court of Session is not excluded.*

By statute 55. Geo. III, c. 71, entitled the Hawkers' and Pedlars' act, it was enacted, under section 6, 'That if, without having a 'licence, in the manner directed by this act, any hawker, pedlar, 'petty chapman, or any other person, shall go from place to place, 'or to other men's houses, or shall travel, either on foot or otherwise, 'for the purpose of selling any goods, &c. or shall open an occa-'sional room or shop and expose to sale by retail any goods, &c. 'in any town,' &c. he shall be liable in a penalty of L.25. By § 10. it is enacted, that if 'any hawker, &c. shall trade as aforesaid, 'without, or contrary to, or otherwise than as shall be allowed by 'such licence, such person shall, for each and every such offence, 'forfeit L.10; and any hawker, &c. refusing to show his licence, or 'not having his licence ready to produce, shall forfeit L.10;' 'and 'for non-payment thereof shall be treated as a common vagrant, and 'be committed to the nearest jail or house of correction.' By § 13. it is enacted, 'that on the parties being brought before him, the said 'Sheriff, or Steward, or Justice of the Peace, is hereby authorised, 'and strictly required to examine into the fact or facts charged; 'and upon proof, either by confession, &c. or by the oath of one or 'more credible witness or witnesses, &c. to commit the offender so

'trading without a licence.' By § 18. it is declared, 'that in all cases 'where the penalty imposed does not exceed L.25, it shall be re- 'coverable before the Sheriff or Steward, or before one of the Jus- 'tices of the Peace of the county, burgh, or place wherein the of- 'fence shall be committed, on proof of the offence, either by volun- 'tary confession of the party accused, or by the oath of one or more 'credible witnesses; and one moiety of every such last-mention- 'ed penalty shall belong to his Majesty, &c. and the other moiety 'to the informer prosecuting for the same; and in case of non-pay- 'ment, the Sheriff, Steward, or Justice, by warrant under his hand, 'shall cause the same to be levied, by poinding and sale of the of- 'fender's goods and effects, or of the goods and effects with which 'such offender shall be found trading, and the surplus of the money 'raised, after deducting the penalty and the expense of the poind- 'ing and sale, shall be rendered to the owner; and shall also com- 'mit the offender to the prison of such county, &c. burgh, or place, 'there to remain until the said penalties, and the reasonable charges 'of the poinding and sale, shall be levied as aforesaid, or until the 'same shall be paid or satisfied by such offender.' By § 20. it is provided, 'that no person committed to any jail, &c. for any offence 'committed against this act, shall be detained in such jail, &c. for 'any longer space of time than three calendar months.' It is provid- ed by § 21, that any person finding himself aggrieved by the judg- ment of any such Justices 'shall or may, upon entering into a bond 'with two sufficient sureties, to be approved by such Justice, to the 'amount of the value of such penalty and forfeiture, together with 'a sum which, in the judgment of such Justice, shall be adequate to 'the amount of the expenses which may be awarded, conditioned 'to pay the amount of such penalties, forfeitures and expenses as 'shall be adjudged, in case such judgment shall be affirmed, appeal 'to the Justices of the Peace at the next general sessions, who are 'hereby empowered to summon and examine witnesses upon oath, 'and finally to hear and determine the same; or, at their discretion, 'to state the facts specially for the determination of the Court of 'Exchequer; and in case the judgment of such Justice shall be af- 'firmed, it shall be lawful for such court to award the person or per- 'sons to pay such expenses, occasioned by the proceedings before 'them, as to them shall seem meet.' By § 22. it is provided, that no conviction by the Sheriff 'shall be removed into the Court of 'Session by advocation, nor shall the same be suspended, but the 'Sheriff, if required, in the case of any appeal to the quarter ses- 'sions, shall state the facts specially for the determination of the 'Court of Exchequer.' By § 26. it is enacted, 'that if any per- 'son or persons shall, at any time, be sued, molested or prosecuted

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'for any thing by him or them done or executed in pursuance of 'this act, or of any clause, matter, or thing therein contained, such 'person or persons shall and may, in the Court of Exchequer in 'Scotland, plead the general issue, &c. and in the Court of Session 'in Scotland, the defender or defenders shall and may deny the libel, 'and shew that the act complained of was done in pursuance of and 'by authority of this act.'

On 26th November 1833, James Young, merchant in Cromarty, presented to the Justices of the Peace for that county a petition, bearing, 'that he is in the certain knowledge that William Camp- 'bell, travelling chapman or hawker, has been in the habit, for some 'time past, of going about the country and vending his wares with- 'out a licence, as required by 55. Geo. III. c. 71. § 10; and there- 'fore craves that the said William Campbell may be brought be- 'fore your Honours, and, upon confession or probation of what is 'set forth, to decern and ordain him to pay the fine ordained by 'the Act of Parliament.' Joyner and Ross, two of the bailies of Cromarty, granted warrant for bringing Campbell before them, at a court 'to be held here this day, at twelve o'clock noon, for exami- 'nation.' Campbell appeared before the Justices, and the minutes are in these terms: '*Cromarty, 26th November* 1833. In a court 'of Justices held here this day: Present Jeremiah Joyner, Esq. and 'Robert Ross, Justices of the Peace. The said William Campbell 'compeared, and being interrogated, confessed that he had been in 'the habit of selling his wares without a licence, as set forth in the 'petition, and therefore throws himself upon the mercy of the court. '(Signed) WILLIAM CAMPBELL.' The minutes further bear, 'The 'Justices therefore, upon consideration of the foregoing confession, 'ordain the said William Campbell to find sufficient security to ap- 'pear for judgment when called for, and failing of which, to be im- 'prisoned as the act directs, or pay the penalty specified in the 'act.'

The Justices thereupon allowed Campbell to go, in charge of an officer, to find the proposed caution. He soon after returned, and intimated that he declined to find caution; and he was imprisoned. After Campbell had remained a few days in jail, caution was found. It was alleged, but denied, that the bond of caution was procured by the Justices. The following farther procedure took place: '*Cromarty, 30th November* 1833. The Justices having resumed 'consideration of the case of William Campbell, convicted of sell- 'ing his wares without a licence, contrary to act of Parliament, 'and now in the jail of Cromarty, and being satisfied with the 'within security, grant warrant for liberating the said William 'Campbell.'

Campbell, in the meantime, had presented an application to the Lord Ordinary on the Bills for suspension and liberation on these grounds: 24 Feb. 1835. Campbell v. Young and Others.

1. That the warrant pronounced was altogether ultra vires. The petition does not pray for imprisonment, neither does it pray for caution or security. It prays for a penalty which the warrant does not grant, while it does grant that which is not concluded for.

2. There was no conviction, and, until conviction, there were no termini habiles for imprisonment.

3. The suspender was ordered 'to find security to appear for 'judgment when called for;' and before judgment was pronounced he suffered imprisonment. There is no authority in the statute for ordaining such security to be found, or for imprisoning on failure to find caution.

4. The offence charged falls not under the 10th, but under the 6th section of the act, and the procedure is ab initio null.

5. There is no specification of the time and place of the alleged trading, neither does the warrant specify the amount of the penalty, nor put any limitation upon the length of the suspender's imprisonment.

Answered—1. It was needless to pray for imprisonment, which only followed if the sentence should not be fulfilled.

2. The suspender, by pleading guilty of the offence against the 10th section of the act, thus became liable in the penalty of L.10, which the Justices were entitled to impose, and in default of payment de plano, to imprison until the fine was paid.

3. The warrant for punishment is in terms of the statute. The suspender was ordained 'to be imprisoned as the act directs, 'or pay the penalty stated in the act;' that is, to be imprisoned as the statute ordains, until the penalty was paid. The qualification as to finding caution was introduced for the suspender's benefit, and at his own request.

4. The suspender is barred from pleading that this section was otherwise than rightly libelled on. Besides, it was not averred or known whether he had ever taken out a licence or not.

5. The complaint was in precise conformity to the act.

The bill having been passed upon answers, the respondents *reclaimed*; and doubts having been expressed upon the question of jurisdiction, the Court remitted to the Lord Ordinary, who, of consent of parties, appointed that question to be argued in cases.

Pleaded for the complainer—1st, The objection to the jurisdiction of the Court of Session, founded upon the 21st section, which enacts, that in case of any alleged grievance, the party 'shall appeal Complainer's Pleas.

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'to the Justices at the next general quarter sessions for the county, '&c. who are hereby empowered, &c. finally to hear and determine 'the same,' does not apply. This complaint is not against a sentence of the Justices, pronounced within the just limits of their jurisdiction, and erroneous merely in its form or findings; but is founded upon the illegality of the warrant, which was ultra vires of the Justices, and radically null, as deriving no authority from the statute. The quarter sessions is the only competent court of review, where the procedure has been within the statute. But when there has been an excess of power—a direct contravention of the statute, review by the Court of Session, by suspension, is competent; Mair, 7th June 1822; Lord Pitmilly in Alexander, 2d Dec. 1828.

Even where an inferior court has a final and privative jurisdiction, still, if its proceedings be inconsistent with, and not recognised by statute or other originating authority, the Court of Session may afford redress. As to proceedings under road acts and other local statutes, see Countess of Loudon, 28th May 1793, *M.* 7398; Young, 28th June 1814, *F. C.;* Shand, 28th July 1814, 2. *Dow*, 519; Knowles, 5th July 1815, 3. *Dow*, 280. The case of Cooper, 22d June 1781, *M.* 7388, corrected certain previous decisions. In reference to excess of powers by ecclesiastical tribunals, see Heritors of Corstorphine, 10th March 1812, *F. C.;* Brown, 1st Feb. 1825, 3. *W.* and *S.* 441; Ross, 2d March 1826; Mathison, 16th Dec. 1829. This Court is not entitled, and is not called on, to review the merits, but may review and correct the excess of power; Dawson, 18th Feb. 1809, *F. C.*

2d, The objection, that this process is from the beginning an Exchequer process, and that this Court cannot interfere, is groundless. The cases of Poole and others apply to Crown debtors, and the review of acts of a competent court competently pronounced; but see Reid, 19th July 1765, *M.* 7361; Campbell, 8th Feb. 1765, *M.* 7359; Macara, 15th Dec. 1821, *Mair, sup. cit.;* Campbell, 28th June 1823.

(The objection, that the Court of Justiciary was the competent tribunal, was argued in the cases; but, with the concurrence of the Court, was abandoned by the respondents at the advising.)

Respondents' Pleas.

Pleaded for the respondents—1st, When a statute introduces a new subject of judicial cognisance, which did not antecedently belong to the ordinary courts, and appropriates specific tribunals for its consideration, the law will hold the intention of the Legislature to be, to confine the jurisdiction, in all matters connected with the subject in question, to the statutory tribunals. See as to recruiting and

militia acts, Robertson, 25th July 1714, *M.* 7340; Foot, 9th Aug. 1778, *M.* 7385; Chivas, 11th July 1804, *Mor. App. Juris.* No. 12; Imrie, 2d March 1811, *F. C.*

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Respondents' Pleas.

It was necessary, in the first instance, to follow the statutory course of proceeding, and to appeal to the quarter sessions, and that whether the complaint was against irregularity of procedure, excess of power, or error on the merits; Cook, 17th May 1823; Campbell, 28th June 1823; Craigie, 11th Feb. 1826, and 1. *W.* and *S.* 642; Alexander, 2d Dec. 1828.

2d, The Court of Exchequer is expressly marked out by the act as the supreme court for determining the matters provided by it for judicial cognisance. Of the penalties imposed under this act, one moiety is leviable by the receiver-general, and falls into the revenue. It was held incompetent for the Court of Session to suspend a charge for Crown feu-duties, even though given on letters of horning; Warrender, 19th June 1810, *F. C.* The Court of Session possesses no jurisdiction as to the mode of liberation competent to debtors incarcerated under Exchequer process; Poole, 17th Dec. 1831; Roy, 17th Feb. 1824; Black, 12th Feb. 1833.

The Lord Ordinary sustained the jurisdiction, and added this note:

Note.—'The question on the merits in this suspension is, whether 'the suspender was imprisoned *without a lawful warrant.* That 'question would not be altered by his being liberated on caution, 'found under the compulsion of imprisonment. But he denies the 'fact, and says that the finding of caution was an artifice of the re-'spondents.

'The *imprisonment* might be without lawful warrant, although a 'good sentence for the penalty of the statute had been pronounced; 'for example, if the Justices, on a correct petition, had found the 'fact proved, and decerned for the penalty, but granted *no* warrant 'of imprisonment.

'It seems to the Lord Ordinary that the question of jurisdiction 'cannot be discussed without taking some view of the objections to 'the warrant of imprisonment; for, in general, the Court of Ses-'sion is the proper court to give liberation where there is imprison-'ment without a lawful warrant, and it must depend on the nature 'of the alleged warrant whether that jurisdiction is excluded. 'But the question of jurisdiction being preliminary, and the dis-'cussion summary, no record has been made up. The case must 'at present stand on the record of the proceedings.

'The *application* seems to have been of very doubtful competency, 'in so far as no *time* or *place* for the habit of trading alleged was

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'specified. As the act provides that the penalties shall be sued for 'before the Sheriff or Justices of the *county wherein the offence may* 'be committed, the *locus* is essential to the jurisdiction; and here 'it does not appear, *in any part of the proceedings*, that there was any 'act of trading in the county of Cromarty. In considering the 'warrant of *imprisonment*, such a thing cannot be taken for granted.

'But the more material questions are, 1st, Whether there was 'a legal sentence or decree? and, 2dly, Whether there was a good 'warrant of imprisonment under the statute?

'So far as the Lord Ordinary can judge at present, he thinks that 'no sentence under the statute was pronounced. The order is, 'to "find sufficient security to appear for judgment, when called for.' 'The Lord Ordinary can make no meaning of these words, if they 'do not mean that, if caution were found, judgment was not to be 'pronounced till a *subsequent time*, and consequently that judgment 'had *not yet* been pronounced. Then it goes on, '*failing which*, "to be imprisoned as the act directs.' The words which follow, "or *pay the penalty stated in the act*,' have been *manifestly* written 'after the subscription of the Justices. But taking all as it is, 'it is quite away from the statute. It is an order of imprisonment, 'not for enforcing a judgment of conviction, but as a *penalty* for '*not finding security* to *come* to *receive* judgment. But the statute 'gives no warrant for ordaining the party to find caution to appear 'for judgment, or in default to be imprisoned. Neither does it 'give any warrant for a sentence of imprisonment, without a judg-'ment finding the charge proved and the penalty due. Nay it gives 'no warrant for a sentence of imprisonment at all, except in aid, in 'the first instance, of a warrant granted *at the same time* for levying 'the penalty by poinding and sale. There is no such thing in the 'act as a warrant to imprison *simply till the penalty might be paid.*

'Supposing, however, that the Court could, by implication, and 'by cutting out the leading order, hold this to be a good judgment, 'finding the complaint proved and the penalty due, the Lord 'Ordinary cannot think that it would be a *good warrant of impri-'sonment.* For the reasons already stated, it is not authorised by 'the statute. But separately, it is not a legal warrant, because it '*does not express distinctly the cause of imprisonment.* The party is 'ordained *either* to find caution to appear for judgment, *or* to be im-'prisoned '*as the act directs*,' *or* to be imprisoned till 'he pay the "penalty *stated in the act.*' This warrant does not tell *what secu-'rity* was required, nor *what is the imprisonment* which the act di-'rects, nor *what is the penalty* stated in the act; and the alterna-'tives are left in complete ambiguity. Who was to judge of these 'things? Was the jailor to study the statute and the petition,

'and to determine on *what terms* and *how long* he was to detain his 24 Feb. 1835.
'prisoner. The Legislature never could contemplate that any man
'should lose his personal liberty on an alternative and indefinite Campbell v. Young and Others.
'warrant like this. Supposing, therefore, that the objections to it
'as a sentence could be overcome by reference to the petition and
'the statute, it still could not be a good warrant of imprisonment
'in such a form.

'The statement of the respondents, that the first part of the de-
'liverance was put in at the desire of the suspender, cannot avail in
'this question. No such fact is in the recorded proceedings; and
'whether, if true, it might avail or not in an action of damages, it
'cannot be considered here, at all events, in the view of the case
'necessary for the question of jurisdiction.

'The objections to this jurisdiction of this Court must be consider-
'ed principally with reference to the nature of the warrant.

'1. If the warrant were ex facie good in itself, and in conformity
'with the statute, the question, whether a party complaining of *irre-*
'*gularities* in the *proceedings* was bound to go to the quarter sessions
'might perhaps depend, in a great measure, on the nature and ex-
'tent of such irregularities as inferring *nullity* or not. The Lord
'Ordinary does not think that the authorities support the plea of
'the respondents even in this view. But if the grounds of suspen-
'sion go directly to impeach the *form* and *substance* of the *warrant*
'*itself*, as contrary to the general law, and not sanctioned by any
'special statute, he has no idea that the ordinary redress against
'wrongous imprisonment in this Court can be excluded, merely be-
'cause it originated in proceedings meant to be under a statute
'which has been perverted. Was the suspender to lie in jail on
'an *illegal warrant* till the meeting of the quarter sessions? In short,
'if the warrant was illegal, this plea against the jurisdiction cannot
'avail.

'2. For the same reason as well as others, the Lord Ordinary thinks
'that the Court of Exchequer had no jurisdiction in the matter.
'That Court never had power to judge generally of the legality of
'a warrant of imprisonment, or to grant liberation. And if the
'warrant was not authorised by the statute, how can the case be-
'long to the Exchequer? But the Lord Ordinary is of opinion
'that the case is not in any sense an Exchequer case; and there
'is also a strong implication against the plea in the 22d section of
'the act.'

The respondents *reclaimed*, but the *Court* adhered, and found ex- Judgment.
penses due.

Lord Justice-Clerk.—The jurisdiction of the Court of Session has Opinion of Court.

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been properly sustained by the Lord Ordinary. The complaint related to a statutory offence—the going about the country without a licence, and selling goods; and the way of dealing with that offence is specially provided for by the statute. It is not to be said, that because parties profess to act on a statute, they are to be held entitled to go beyond it. If there be a deviation from the clear rule of statutory procedure, the alleged offender is as much entitled to the protection of law, as if the statute on which the complaint was founded had not existed. It is intended that Justices shall conform to the provisions of the act. The irregularities committed in the present instance were not of a slight kind. Can the warrant or sentence here be viewed as a judgment or conviction? Certainly not. The act says, if the offender do not pay, poinding and sale of the offender's goods may be resorted to, and failing that, imprisonment may follow; so that the deliverance of the Justices is neither in form nor in substance what was indispensable.

The question therefore is, Can the suspender, after having been thrown into jail by a gross perversion of the provisions of the act, not apply to this Court for redress, by suspension and liberation? Before a different course can be pointed out as the only proper one, it would be requisite to shew that there had been a conviction under the act, and that the procedure had otherwise been conform to statute.

The act, in providing the mode of appeal to the quarter sessions, or by laying a case before the Exchequer, always presumes that the proceedings have in the first instance been conformable to statute, which they clearly were not here; and the cases wherein redress against proceedings, regularly conducted, by inferior tribunals, was refused in this Court, do not apply. Even in the consideration of statutes where the jurisdiction of this Court has been expressly excluded, if the provisions of the acts have been departed from, we have had no hesitation in giving redress. I allude to a late complaint against proceedings under the small debt act, where there was an omission to comply with some statutory requisite—I think, furnishing the defender with a schedule of the debt. We paid no regard to the objection to our jurisdiction. The act had been departed from, and the party was entitled to relief. The same principle applies here. The Justices professed to act under the statute, but completely disregarded its enactments. The 26th section also bears out my view. There is no intention expressed of confining redress in every instance to the Exchequer, for it makes ample provision for proceedings in the Court of Session. Having no wish to trench on the jurisdiction of other courts, I think that the Lord Ordinary is right, and that we must sustain the jurisdiction.

The other Judges concurred.

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Lord Ordinary *Moncreiff*.
Donald, W. S. Agents.
Ro. Roy, W. S. Agent.

For Campbell, *Shaw* and *Ivory*.
For Respondents, *Dean of Fac. (Hope,)* and *Penney*.
T. Clerk.

H. Inglis & R.

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Judgment.

SECOND DIVISION.

No. LXIV. *24th February* 1835.

TRUSTEES OF THE LATE SIR JOHN NISBET OF DEAN, BART. *against* LADY NISBET.

FOREIGNER.—TERCE.—IMPLIED DISCHARGE.—JUS RELICTÆ.—1. *Found, that a lady born in North America, previous to the treaty of independence between Great Britain and the United States, is not to be considered as an alien, and that the claim of terce over her husband's estate in Scotland is not subject to the objection of alienage.* 2. *Circumstances in which it was found that a claim of terce was not discharged or excluded by the terms of a contract of separation between a husband and wife, or by certain proceedings and transactions following thereon.* 3. *Found, that terce is not due out of feu-duties payable from lands feued out for building in the neighbourhood of Edinburgh.* 4. *That a husband having died domiciled in England, his widow was not entitled to her jus relictæ.*

In the multiplepoinding at the instance of the trustees of the late Sir John Nisbet of Dean, the following questions were raised:

Upon the 4th of July 1776, the British colonies in North America declared themselves free and independent states, by the name and style of The United States of America. Maria Alston, afterwards Lady Nisbet, was born in one of the states, (South Carolina,) 2d February 1778. On the 3d September 1783, a definitive treaty of peace was concluded between his Majesty King George the Third and the United States, by which his Majesty acknowledged the independence, and relinquished all claims to the government, proprietory and territorial rights of the states, 22. Geo. III. c. 46; confirmed by 37. Geo. III. c. 97, § 34. Sir John Nisbet married Miss Alston in 1797.

It was objected to her claim of terce by Sir John's trustees, that

24 Feb. 1825. Nisbet's Trustees v. Nisbet. Lady Nisbet, the daughter of an American citizen, and born after the declaration of independence, not being at the time of her marriage under allegiance, and therefore an alien, could not, by her marriage with Sir John, acquire a right to the terce of any lands in Scotland, and *pleaded*—

Pursuer's Pleas. 1. Lady Nisbet is an alien. The case of Stewart *v.* Horne, in which such a claim is said to have been sustained, is disregarded in the English courts; 2. *Barn.* and *Cress.* 790; 5. *Barn.* and *Cress.* 778 and 779; *Blackstone's Com.* i. 17; Leslie *v.* Forbes, 8th June 1749, *M.* 4636.

2. Lady Nisbet, as an alien, is not entitled to terce; *Ersk.* iii. 10. 80; Lord Kincardine's Creditors, March 1683, *M.* 4635; *Bell's Principles*, 418 and 571; 1. *Bell*, 59; *Ersk.* ii. 9. 46. 50. and 48; *Alien Act*, 7. Geo. IV. 54.—English authorities; *Blackstone*, i. 1. 10; ii. 2. 8; *Petersdorff's Abridg.* voce *Alien*, 465, and vol. viii. voce *Dower*.—American authorities; 3. *Wheatson's Reps.* 12. 13, and cases there cited.

Defender's Pleas. Lady Nisbet, in support of her claim of terce, *pleaded*—

1. That having been born in America while that country was subject to Great Britain, she is not to be considered as an alien, but as a subject of Great Britain residing in a foreign country, and is entitled to her terce accordingly.

She is not an alien; Stewart *v.* Horne, 18th May 1792, *M.* 4649; Shedden *v.* Patrick, 1st July 1808, *D. App. Foreign*, No. 6.—English authorities; *Vaugh.* 279-281; *Black.* 32. 9; *Fost. Cr.* 1. 59. *Dyer*, 298. b. 300; *Dyer*, 229; 7. *Coke*, 20; 2. *Vin.* 261. pl. 11; 8 *Dowling*, 593.

2. Even though she were, she would be entitled to terce; Jankouska, 20th Nov. 1791, *M.* 6457; Countess of Findlater *v.* Earl of Seafield, 8th Feb. 1814, *F. C.*

The cause having been reported on cases, the following interlocutors were pronounced: 'On the report of Lord Medwyn, Ordinary, and having advised the cases for the parties, with the whole 'proceedings, and heard counsel thereon, the Lords repel the objection of alienage to the claim of terce on the part of Lady Nisbet, founded on her having been born in South Carolina, in respect that, at the time of her birth, the North American colonies 'still remained within the dominion of the Crown of Great Britain; 'and before further answer, and in the view of obtaining the opinions of the Lords of the First Division, and the Permanent Lords 'Ordinary, appoint the parties to prepare cases on the remaining

'points of the cause, to be interchanged on the second box-day in 'the next vacation, and revised, printed and boxed, on the third se- 'derunt-day in the Summer Session thereafter.' 24 Feb. 1835. Nisbet's Trustees v. Nisbet.

'The Lords appoint the parties to lay their cases before the Lords 'of the First Division, and the Permanent Lords Ordinary, for their 'opinions in writing on the points of law argued in these cases.'

The points of law upon which the other Judges were consulted are fully stated in the subjoined opinions.

The questions were, 1. Whether the claim of Lady Nisbet to her legal provision of terce is altogether excluded by the terms of the contract of separation between her and Sir John Nisbet in 1810, or by the proceedings in the American court, and the transaction which followed on them in 1821? 2. Whether, supposing that a claim of terce is still competent to her, she can claim such terce of the feu-duties payable from the estate of Dean, and forming part of the estate descending to the heir? and, 3. Whether she is entitled to jus relictæ?

Opinion of Consulted Judges.

Opinion of Lord President, Lords Balgray, Gillies, Mackenzie, Corehouse, Jeffrey, and Cockburn.—The late Sir John Nisbet and his Lady having separated in 1810, a deed of agreement was executed by them on that occasion, to provide a maintenance or alimony to Lady Nisbet during the subsistence of the marriage, and an annuity for her life after its dissolution, in the event of the predecease of her husband. By that deed it was stipulated, that the real and personal estate which then belonged to Lady Nisbet, or to which she might afterwards succeed, should be left at her own disposal, and that Sir John should pay her L.300 per annum from the date of the deed during her life. It was provided, that if Sir John was sued for any further sum in name of alimony or maintenance, he should be entitled to retain whatever sums he was thus compelled to pay, with the costs of suit, from the termly payments of the annuity as they should afterwards become due.

In 1821 Lady Nisbet did claim an additional sum, in name of alimony, in the Court of Equity in South Carolina, and obtained a decree for 3000 dollars per annum, including the annuity, no appearance having been made for Sir John. By this decree Lady Nisbet's alimony was increased during the subsistence of the marriage; but no addition was made to the annuity settled upon her in the event of her surviving her husband.

Afterwards an agreement was entered into between the parties, by which Lady Nisbet accepted 20,000 dollars in one sum, in lieu of all her claims for alimony and arrears during the joint lives of herself and her husband; and in terms of that agreement, on re-

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ceiving payment of the stipulated sum, she granted a discharge of the decree, and in full satisfaction of all future alimony while the parties continued to live separately.

It appears, therefore, that the deed of agreement in 1810 consists of two parts,—the one is a contract of separation, and the other a contract making a provision for Lady Nisbet in the event of her survivance. It is unnecessary to consider whether the contract of separation was revocable or not. The parties never afterwards cohabited; and Lady Nisbet sold her whole interest under the deed, in so far as it was a contract of separation, to her husband, for a specific sum; which she accordingly received.

The question in this multiplepoinding is, what is Lady Nisbet entitled to in consequence of her husband's predecease?

She claims the jus relictæ and terce. To this it is objected by Sir John Nisbet's trustees, that, by the transaction in 1821, she discharged not only the sum stipulated as maintenance during the subsistence of the marriage, but all claims upon her husband's estate after his decease, in consideration of the 20,000 dollars which she received in one sum. We are of opinion that there is no ground for this objection. Both the decree and the discharge are restricted in the most express terms to alimony, and have no relation whatever to the annuity of L.300 provided to Lady Nisbet after her husband's decease.

2*d*, Next, it is said that Lady Nisbet, having accepted a life annuity of L.300, is not now entitled to betake herself to her legal claims, particularly as she took benefit, to a certain extent, under the deed 1810, by drawing her yearly allowance for alimony for some time, and then transacting for the remainder. In so far as the deed 1810 was intended to regulate Lady Nisbet's interest after her husband's death, we are of opinion, that it always was, and is now, subject to revocation by Lady Nisbet, as a donatio inter virum et uxorem stante matrimonio, if she can shew that it was an inadequate provision, reference being had to the state of her husband's circumstances at the date of the contract. We are of opinion, that it is proved, by the admissions in the revised case for the trustees, that it was an inadequate provision, and that Lady Nisbet is entitled to revoke, if she thinks it her interest to do so.

Further, we are of opinion, that her taking benefit under the agreement, as a contract of separation, will not bar her from revoking it, in so far as it relates to her rights after the dissolution of the marriage, the one provision for maintenance during the subsistence of the marriage having no connexion with the other, which was to take place at her husband's death. On this point we think the case of Palmer *v.* Bonar, (Jan. 25. 1810,) a decisive precedent. The

deed of separation in that case, as in this, provided an alimony during the separation, and made a settlement upon the lady in the event of her husband's predecease. She received the alimony during her husband's life; but the Court held that she might nevertheless have revoked, on the ground of donation, if the annuity after her husband's decease had been inadequate, which, however, in reference to his circumstances, they thought it was not.

We are of opinion, therefore, that Lady Nisbet, notwithstanding the contract 1810, is entitled to betake herself to her claims at law as a widow.

With regard to these claims, we think that Sir John Nisbet was not domiciled in Scotland at the period of his death, and therefore that the objection to Lady Nisbet's claim for the jus relictæ is well founded.

We are of opinion, that Lady Nisbet is entitled to a terce of the heritable estate in which her husband was infeft at the time of his death, with the exception, however, of superiorities and feu-duties, to which, by the law of Scotland, the terce does not extend. Lady Nisbet has argued, that there is no ground in equity for exempting feu-duties; that in the present state of society it is unreasonable to do so, because the practice of feuing has recently increased to a great extent, particularly in the neighbourhood of large towns; and further, that in the case of Lady Dunfermline, referred to as a precedent on the point, the Court were moved by the specialty, that the lady was otherwise amply provided. We do not think this argument conclusive. If the rule of law is clearly fixed, we cannot disregard it because we do not know the principle upon which it was first introduced, or because a change of circumstances has rendered it more inexpedient than it originally was. These are considerations for the Legislature, but not for a court of justice. It is true, that in the case of Dunfermline it is stated in Durie's report that the lady had other provisions; but it is also stated, that by the custom of Scotland terce was never allowed out of feu-duties. Accordingly, although Lord Stair refers to the case of Dunfermline, he lays down the rule in absolute terms, without reference to the specialty; and in this he is followed by Lord Bankton and Mr Erskine. If the unanimous and unqualified opinion of these writers, contradicted by no other authority, and by no precedent, is disregarded, we do not think that any rule in the law of Scotland can be held as fixed. It also appears that a similar judgment had been pronounced in the case of Lamington, Feb. 14. 1628.

In her original condescendence and claim, Lady Nisbet does not very distinctly demand that she shall have her option to betake herself either to the terce and jus relictæ, or to the annuity of L.300

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under the contract. But becoming sensible, that, if she failed in obtaining the jus relictæ and a terce of feu-duties, it might be for her interest to fall back upon her annuity, she does make the claim alternatively in her revised case. We think she is entitled to do so. She was not barred from claiming under the contract by the proceedings in the American court; for these proceedings were no repudiation of the contract. The parties foresaw that an alimony of L.300 might not be sufficient for Lady Nisbet, and therefore it was stipulated in the contract, that if she succeeded in obtaining a larger sum, by an action at law or otherwise, it should have the effect, not of annulling the contract, but of authorising Sir John Nisbet to retain the sum so awarded, with the costs of suit, in paying the annuity as it should afterwards fall due.

On these grounds we are of opinion, that Lady Nisbet is entitled either to a terce of the estate in which her husband died infeft, exclusive of superiorities and feu-duties, or alternatively to an annuity of L.300 during her life.

Opinion of Lord Fullerton.—I concur in the preceding opinion, that the objection to Lady Nisbet's claim of jus relictæ is, in the circumstances of the case, well founded. I also concur in the opinion, that the terce does not extend to superiorities and feu-duties.

The only other question arising under the record is, Whether or not Lady Nisbet is now entitled to claim the terce? Upon this point too, I am inclined to agree in the result of that opinion.

The ground upon which the demand is objected to by the trustees, viz. that, by the transaction between Sir John and Lady Nisbet in 1821, she discharged not only all claims for alimony during the joint lives of the parties, but her whole claims against him and his representatives, during her own life, seems to me untenable. I think it obvious, from the terms of the 'deed of release' then executed, as well as from the 'supplemental order' of the American court of the 9th April 1821, referring prospectively to that release, that her discharge was limited to her claims for 'alimony' during the 'period 'of her separation,' as it is expressed in the deed of release, or 'during the joint lives of complainant and defendant,' as it is expressed in the order of court.

Holding this, then, to be clear, and considering that the deed of separation of 1810 is admitted by both parties to have contemplated and provided the payment of an annuity of L.300 a-year, not merely during the joint lives of the parties, but during the lifetime of Lady Nisbet, there remains the question, How far this deed bars or affects in any way Lady Nisbet's claim of terce? I think that it does not. And I do not feel so much hesitation in answering the question, as in assigning the special ground on which that conclusion

is arrived at. This difficulty arises from the legal proceedings resorted to by Lady Nisbet in America in 1813-1816, to obtain an increase of her alimony; from the different views which may be taken of the effect of those proceedings; and, more especially, from the manner in which the parties, perhaps unavoidably, have argued the case.

It seems to me that there are only two lights in which those American proceedings can be considered. In the first place, they may be viewed as entirely extinguishing the agreement of the parties contained in the deed 1810 in all its particulars, including that relative to the annuity subsequent to the death of Sir John Nisbet; and as substituting for that agreement the obligation to pay the increased alimony during the joint lives of the parties, without any reference to her rights in the event of his predecease: Or, secondly, as leaving in force the deed 1810, and merely superinducing upon its provisions the obligation to pay the increase of alimony during Sir John's life. Now, in the first view, viz. that of the American proceedings 'sopiting and extinguishing' the deed 1810, during the lifetime of Sir John Nisbet, the claimant's right to terce is unanswerable; as in that view it is not barred, under the act 1681, by any deed of provision in her favour existing at his death. But, 2dly, and even adopting the other view, her right to claim the terce is not excluded; inasmuch as the deed 1810 does not appear to me to be, from its terms, exclusive of her right to resort to her legal claims,—was not so construed during the lifetime of the parties,—and, on the contrary, if held to have been accepted and acted on by Lady Nisbet at all, from the date of the American proceedings of 1813-1816, was clearly accepted, only under the proviso of her right to resort to her legal claims in the event of its being for her advantage to do so. It is clear, that if, after the American proceedings 1813-1816, Lady Nisbet must still be considered as accepting, to a certain extent, the deed 1810, her acceptance of it was always under the condition, necessarily implied in the decree which she had obtained in the American Court, that her legal claims for additional alimony were not barred. And if that was the case in regard to the part of the deed 1810 applicable to the joint lives of the parties, it seems impossible to apply a different rule to the right of annuity emerging under that deed, after Sir John Nisbet's death. It would be incongruous to infer Lady Nisbet's absolute acceptance of the annuity of L.300, to the exclusion of her legal claims after Sir John's death, from the acceptance of the alimony during his life, combined as it was with the admitted fact, that the stipulated alimony was increased by an addition claimed by and awarded to her, on the single ground, that the deed left her legal claims during his life in full force.

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In whatever light, then, the proceedings in America are viewed, in relation to the deed 1810, I think the claim of terce well founded. But I am the less disposed to give any definitive opinion upon the comparative merits of those views, because they may, in one event, by no means unlikely, affect the rights of parties in a matter of very considerable importance indeed, and which I do not think has as yet been fairly argued:—I mean the right of the claimant, Lady Nisbet, to make an option between her right of terce and the annuity provided by the deed 1810. It is evident, and indeed the claimant does not disguise it, that if the Court shall consider the superiorities and feu-duties not to fall under the terce, it will be for her interest to hold by the annuity provided by the deed 1810. Accordingly, in some parts of her revised case, she seems to reserve to herself the right of making such option, if the Court shall come to that conclusion. Of the competency of that option, however, under the record as it stands, I have very great doubts indeed. Her condescendence and claim are expressly limited to her legal rights. There is no claim whatever for the annuity, even alternatively; and indeed the main branch of the argument in her case rests upon a proposition, absolutely exclusive of the claim of annuity, viz. that the deed 1810 was 'sopited and extinguished.' She evidently maintains that as the true view; and although she does refer to the other, it is only hypothetically, for the purpose of supporting, through the medium of her option, her claim to terce. And it may be observed that, on the other hand, the trustees lay down, as the foundation of their argument, that the proceedings in America left the deed 1810 in operation,—a proposition which, though a relevant argument against her claim of terce, affords, as has been already mentioned, a ground in support of her claim of annuity. This course of argument on both sides was perhaps unavoidable, in consequence of its being still undecided whether the terce included feu-duties or not, and, consequently, which view of the deed 1810, and of the effect of the American proceedings, it was the interest of the parties respectively to maintain.

Whatever, then, may be the claimant's right to choose between the terce and the annuity, and to resort to the latter if it proves the most valuable, and however proper it may be to allow a claim and plea of this nature to be added to the record, as fairly arising out of the facts of the case, I do not see how it can be determined on the present pleadings. It rather appears to me that this would be fair to neither party; as, in the first place, the trustees have not argued, and were not bound to argue it under the present record; and, secondly, as the claimant, though alluding to it hypothetically,

has truly argued the point properly raised in the record, on grounds subversive of any claim for the annuity.

In these circumstances, I cannot help thinking that the most equitable course would be, for the Court first to determine what the terce truly includes, and, in the event of that determination being unfavourable to the claimant on the subject of the feu-duties, to allow the record to be amended, and the parties to be further heard on any claim she may make for annuity, if so advised.

Opinion of Lord Moncreiff. — The opinions of the consulted Judges are required on three questions: 1. Whether the claim of Lady Nisbet to her legal provision of terce is altogether excluded by the terms of the contract of separation between her and Sir John Nisbet in 1810, or by the proceedings in the American Court, and the transaction which followed on them in 1821? 2. Whether, supposing that a claim of terce is still competent to her, she can claim such terce of the feu-duties payable from the estate of Dean, and forming part of the estate descending to the heir at his death? and, 3. Whether the claimant is entitled to jus relictæ?

1. On the first of these questions I am of opinion, that the claim of terce was not excluded by the contract of 1810, or by the subsequent proceedings and transaction.

The deed of 1810 is a deed of voluntary separation, proceeding simply on the narrative, that, on account of certain unhappy differences, the parties had agreed to live apart from each other, and that Sir John had agreed to pay to Lady Nisbet an annuity of L.300 during her life, *for her maintenance and support.* He accordingly binds himself to permit her to live separately from him, and not to interfere with any separate funds which she had, or might acquire. The obligation for the annuity bears, that Sir John Nisbet 'shall 'and will yearly and every year, during the natural life of the said 'Dame Maria Nisbet, well and truly pay,' &c. an annuity of L.300, which is declared to be 'for the *sole and separate support and* 'maintenance of the said Dame Maria Nisbet,' and not to be subject to the debts or control of Sir John. So far, no doubt, the provision is apparently for the whole life of the lady. But that it was not intended or understood as a final settlement of her rights, even during the joint lives of the parties, and still less in the event of her surviving Sir John, appears to me to be clear, both from the nature of the contract itself, and from the express terms of the remaining clauses which it contains. For not only does the deed contain *no discharge*, either general or special, by Lady Nisbet, either to Sir John himself, or his heirs or executors, of any other claims competent to her, whether of greater aliment during their lives, or of terce, jus relictæ, or any thing else, after his death; but

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it goes on in express words to contemplate and provide for the case of her bringing a suit against him *during their joint lives*, 'in order 'to *compel* him to pay and allow unto her, *while she and the said* 'Sir John Nisbet shall live separate and apart, any *further* or other 'sum or sums of money, for or by way of alimony or otherwise;' and the provision is, that all such sums, as well as any debts which might be made to affect Sir John, shall be deducted from the annuity of L.300, '*as far as the same will extend.*' The import of this I take to be, that it was clearly understood that the lady might, notwithstanding the contract, bring a suit for a *legal* award of maintenance, and that in that case the annuity should cease, or suffer abatement. I cannot therefore think, that a contract which was so conceived could be intended, or can legally operate, as a final settlement of the rights of the parties after the dissolution of the marriage, there not being a word from the beginning to the end of it to indicate such an intention. The deed in this case appears to be a contract of *separation*, and nothing else: and therefore I cannot construe her assent to such an arrangement, which might be temporary, merely by subscribing the deed, without any obligation of discharge of any kind, as an acceptance of the annuity in lieu of all that she could ever claim.

I think that it is also very material, in regard to the actual intention and understanding of the parties, that, when Sir John subsequently came to execute his first settlement of 1813, and gave to Lady Nisbet a legacy of L.2000, he did so under an express declaration, that it should not be payable '*unless* the said Dame Maria 'Nisbet *shall agree to accept of the same in full satisfaction of all claim* '*for dower or terce, and every other claim whatsoever out of my estate,* '*heritable and moveable*,' &c. Sir John never could have made a provision in such terms, if he had then imagined that there was already a conclusive settlement of all the lady's claims upon his estates after his death, or, in particular, that the terce was already barred or discharged.

Supposing, therefore, that nothing more had taken place, I could not have held that the contract of 1810 excluded the terce; and I am of opinion, that none of the cases which have been referred to, and to which I shall allude afterwards, afford any authority for holding that it did.

But the proceedings which followed in America appear to me to demonstrate, that the contract of 1810 was known and understood to be only a temporary arrangement, and not to exclude even a demand for further aliment in Sir John's lifetime. In an action *for alimony*, in which the deed of separation, and the aliment thereby provided, were distinctly set forth in the record, decree for an alimony

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of 3000 dollars was pronounced; the Judge, though giving it without an answer having been filed, holding *expressly*, and upon consideration, that the deed *did not bar the claim for alimony at law.*

That decree contained an injunction against the sale of an estate in America. And, in order to get rid of that injunction, Sir John appears to have proposed, some time afterwards, to purchase up the alimony which had been awarded by the decree. Although that alimony of 3000 dollars of course comprehended, or rather sunk in the larger sum, the L.300 of annuity, I apprehend that, after taking that decree, Lady Nisbet could *only* claim her aliment *by virtue of it;* and that if, in the subsequent transaction, she discharged what was thereby given, such discharge could not, from the nature of the thing, go beyond the judgment itself, which was for an alimony simply, clearly confined to the *joint lives of the parties.* Accordingly, the *first order* in the later proceedings, which is for dissolving the injunction, expressly bears *narrative*, that Lady Nisbet had agreed 'to accept of a specific sum in lieu of all her claims *for alimony*, 'either *now or during the joint lives of complainant and defendant.*' The deed of release and indemnity which followed, in like manner bears, that, in consideration of the sum of 20,000 dollars paid to her, Lady Nisbet discharged Sir John 'of and from all *maintenance and* 'alimony *whatsoever*, and of and from all agreements and contracts 'for providing and securing *the same;* and also from all dues, rec-'konings,' &c. which she might claim 'under or by virtue of the de-'cree of the court of equity of South Carolina aforesaid:' And then it has this clause, 'And also of and from the payment of *all alimony and* 'maintenance whatsoever, which the said Maria Nisbet at any time here-'after may claim or demand DURING THE CONTINUANCE OF THEIR 'SEPARATION.'

I think that it appears from these proceedings and transaction, 1st, That the contract of 1810 was not understood by either party, or held in law, to be a final settlement: 2d, That the decree of the American court, which was for an alimony simply, and which merged the annuity of L.300 in that alimony, was by its nature and terms a provision of aliment only during the joint lives of the parties and their continuing to live apart: 3d, That the transaction by which this alimony was purchased for 20,000 dollars could not operate as a discharge of any thing more than the alimony *thereby given* during *the joint lives* of the parties; and, 4th, That by the *express* words, both of the first order, and of the last and broadest clause of discharge in the deed of release itself, the acceptance and discharge were specially *so limited.*

Being of opinion, therefore, that the terce was not discharged by the contract of 1810, I am also of opinion that it was not discharged

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either by the decree of the American court, or by the transaction which followed. And I also think, that by these later proceedings the provision in that deed was entirely superseded.

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Having this opinion, I do not think it necessary to advert particularly to a different view taken by the claimant, on the supposition that the transaction in 1821 did not supersede or do away the effect of the contract 1810. But certainly, if it were to be held that the annuity provision of the deed 1810 was not totally put an end to in all its effects by the American decree and transaction, I should think it very difficult to dispute the proposition, that, in that case, the discharge, expressly limited to an alimony for the joint lives of the parties, could not be held as a discharge of the annuity of L.300 *after the death of Sir John Nisbet.*

It may be proper that I should now shortly advert to some of the cases which have been referred to. The first case quoted by the respondents is Miller *v.* Brown, Jan. 19. 1776. In that case, the contract between the parties, consisting of mutual deeds, contained an *express* clause of discharge, in the broadest terms, by the wife, of all right to *any of the goods, gear, or other effects belonging to her husband,* or to *any aliment* or *other provision of the law* competent to her as his wife, in the same manner as if they had never been married, &c. The wife revoked when the husband was at the point of death; and the Court found that the clause was sufficient to import a discharge of the jus relictæ. If there had been any such clause in the present case, there could have been no doubt as to the intentions of the parties; and, if a question as to the revocability of the deed had arisen, it would have stood on a very different footing from any question on the facts as they are. Here the point is, that *the deed contains no such discharge;* and my opinion is, that from its own terms it appears that it was not intended or understood to have any such effect.

The next case mentioned is that of Sutherland *v.* Syme, July 1. 1772. But there also there was a still stronger and broader clause, discharging the terce and every thing else; and therefore I do not think it necessary to advert more particularly to the circumstances, which are fully reported by Lord Hailes, and have been commented on by the parties. But I must observe, that the respondents, in quoting from the report, omit altogether the clause of discharge.

The case of Palmer *v.* Bonar, 25th Jan. 1810, is also referred to. The deed in that case was called a postnuptial contract, containing an agreement to live separate, and a provision of an annuity of L.150. But it contained clauses expressly with reference to the event of the wife surviving the husband; and declared, that the annuity and the furniture of a house '*shall be held in full satisfaction*

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'*of all claims of moveables, terce of lands, or other claim*,' &c.; and there was, besides, in the counterpart of the contract, *an express discharge* by the wife to the same effect. No revocation of the deed took place in the lifetime of the husband; and the question was simply, whether, after his death, the wife could repudiate the *express* contract between them for settling the rights of the wife and the husband's representatives on that event. The Court held, though with difficulty, that the contract should be taken as consisting of two parts, the first an agreement to live separate, and the second a settlement mortis causa; and that though, as a contract of separation, it might be revocable in the husband's lifetime, yet, as a settlement of the rights of the parties, it could not be repudiated after his death. But it is to be observed, that, even upon such a deed, there was no decision as to what might have been the effect in regard to *all* its parts, if, *during* the *joint* lives of the parties, the wife had bona fide revoked the contract as a contract of separation, or had brought an action at law for aliment.

Without at all impeaching the authority of that case, I humbly conceive that it has no application to the present case. I cannot find in the contract of 1810 any of the features which were in the contract in Bonar's case, and on which the Court decided. There is in fact *no obligation by the wife at all*, except an obligation to live separate from her husband. Far less is there any discharge of terce, jus relictæ, &c. The deed in this case cannot be divided into two parts. It is simply an agreement to live separate, with a provision of aliment. There is nothing like a settlement mortis causa by Sir John Nisbet, accepted of by the claimant; the words, '*during her* '*natural life*,' which occur in the clause granting the annuity, being clearly explained, by the after clauses, to mean nothing more than *her life*, while *Sir John lived also*—their *joint lives*, or *continuing to live separate*. But at any rate I am satisfied, that, in this case, it was not at all the meaning of the parties to make any such settlement of their rights mortis causa finally and irrevocably.

II. The *second* question is, whether, supposing the claimant to be entitled to her terce generally, she has a right to terce of the feu-duties payable from the estate of Dean, under the feu-contracts entered into by Sir John recently before his death?

I do not think that this question can be taken as if it were merely the abstract question, whether feu-duties payable under rights of superiority, in virtue of feu-contracts or dispositions long before constituted, and the feu-duties being of the ordinary description, are a subject of the right of terce? However the question may be resolved, I think that the Court are bound to consider it on the special facts set forth in the record; and, in this view, it is the case of nearly

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one-half of a valuable estate being granted in feu by the deceased husband himself, not for a price paid down with a small feu-duty as an acknowledgment to the superior, but for a very large feu-duty or *perpetual rent;* and, considering it in this view, I certainly think it a question of importance, and not free from difficulty.

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There is no doubt that all the institutional writers without exception, from Craig to Erskine, have expressly laid down the doctrine, that there is *no terce of feu-duties;* Mr Bell alone intimating a doubt as to such a case as the present. And, what is still stronger in my opinion, the practice appears to have been uniform at all times, no instance being stated of a widow having been served to a terce of feu-duties. This state of the law and practice appears to me to be so strong, that, though I have had and still retain considerable doubts on the special case, I should have great difficulty at present in coming to the conclusion, that the general rule can or ought to be overcome.

Nevertheless, I feel it to be my duty to state the serious doubt which I entertain. When the matter is sifted, on the one hand, it does appear, that the *reason* why no terce in superiorities was allowed is of a nature which really ought not to affect such a case as the present. Craig, ii. 22. 34, says, 'Nullus triens hominii debetur, 'nullus superioritatis: *nam hæc viduam non decent;* neque præs-'tationis albæfirmæ, quæ nihil aliud est quam *nuda superioritatis re-'cognitio;* triens vero UTILITATES MULIERIS TANTUM SPECTAT, *et 'proinde neque earum rerum quæ non ad usum sed voluptatem perti-'nent aut comparata sunt,*' &c. It is impossible not to see, that the doctrine here laid down is rested on principles which could not be at all applied either to a feu like this, or to the present times. There is no terce in a superiority, *because* that does not *become* a widow; no terce of a blench duty, *because* that is a mere acknowledgment of superiority: *Terce regards only things useful to a woman,* &c. We could find nothing *unbecoming* in a woman enjoying the third of what is really the rent of her husband's estate; and the third of such rents must be admitted to be of serious utility to her.

On the other hand, while the institutional writers do all in a single word assert that there is no terce of feu-duties, it does not appear that the rule was very firmly fixed on any principle. Stair, Bankton, and Erskine, all refer for their authority to the case of Lady Dunfermline, Feb. 13. 1628. But when the report of that case is looked into, it is far from shewing that the matter was then thought to be very clear. That report certainly does shew, that there had been *no previous custom* of allowing terce in feu-duties. But all that the *case* itself in other respects imports is, that the Lords 'would 'not *begin* to institute a new consuetude, *where the lady was beside*

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'*provided sufficiently with a conjunct fee*;' and the only other case in the books is that of Lady Lamington, dated the next day, Feb. 14. 1628, where, according to the Auchinleck Manuscript, it was decided, that 'the lady falls not a terce of feu-duties;' which point does not appear in two other reports of the same case.

I am very sensible, that a rule of law may be well fixed, where the reason of it is either lost in obscurity, or may not precisely apply to modern usages; and also, that a rule of law laid down by all the doctrinal writers, and sanctioned by the practice of centuries, may be very firmly settled, though the original authority for it in judicial proceeding may appear to have been imperfect or insufficient. And I am very far from thinking that any rule so settled ought to be disturbed or inverted upon any arguments derived simply from the ancient history of it. On the contrary, I should think such a principle of judgment in the highest degree dangerous; and therefore, though I have a doubt in the present case, I can only express it as a doubt which I cannot remove from my own mind, derived from considerations which appear to me to be altogether distinct from any such principle.

The question, then, which I think it is necessary to resolve in the present case is, Whether the very large returns stipulated by Sir John Nisbet to be paid annually from the land previously held by him in full property are to be considered as *feu-duties* in a question with his widow, *in the sense* in which the authorities use the term when they say that there is *no terce of feu-duties*? In the plain sense of the thing, these feu-duties, created by Sir John Nisbet himself, are neither more nor less than *very full though perpetual rents* of the lands. If the rights had been constituted on long leases even for 999 years, and the same returns had been to be made, the claim of terce would have been good. And yet the Court have held, (Queensberry,) that to certain effects such leases are truly *not leases*, but *alienations* of the property, as complete as if they had been feu-rights. Again, the Court and the House of Lords have decided, (Roxburghe,) that titles may be constituted in the *form* of feu-rights, which, *in certain questions involving the interests of third parties*, shall *not* be considered as really *feu-rights*, though in any other question they would certainly have had that character. In such questions, the Court have looked more to the reality of the thing than to the mere form of it.

But, if this principle be fully recognised, does it not deserve consideration, Whether it shall be held to be competent for a husband, *by his own act*, so to place the rental of his estate, by means of feu dispositions, as that, while he retains to himself and his heirs the full enjoyment of a greatly increased rental, the terce of his widow shall

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be totally excluded? It is not here said, that the feus were made *for the purpose* of excluding the terce; the temptation of what the respondents call the *monstrous feu-duty* offered may be supposed to have afforded a sufficient motive. But the question is, Whether the thing done, in making such a monstrous feu-duty, is so fairly within the principle of the law, as that it ought to be allowed to produce such an effect *on the rights of the widow?*

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I am rather led to think, that this point, which appears to me to be forced on the consideration of the Court, could not be met by any considerable practice, and far less by any decision or authority. The respondents have referred to no such practice or authority. They allude to the case of burgage-holding as analogous. But it appears to me to afford no fair analogy. The burgage-holding is *not created by the act of any party;* nor can there be any doubt as to the reality of it, where it does exist: And, the rule of law being quite fixed in that case, there could be no doubt of its application in the case referred to.

On the whole, therefore, I find myself at present unable to concur in the opinion, that there is no terce in the feu-duties in such a case as this: But, at the same time, I should require further consideration and discussion of the question, before I could deliver a positive opinion that it is due.

III. The *third* question is, Whether the claimant is entitled to *jus relictæ*. But as it is quite clear that Sir John Nisbet died domiciled in England, I am of opinion that the succession to his personal estate must be regulated by the law of England; and as it is not averred by the claimant, that by that law the present claim could be sustained, I do not think it necessary to go farther into this point.

At the advising, while the Court concurred in the opinions returned, Lords Meadowbank and Medwyn thought there was much in the doubts expressed by Lord Moncreiff, as to the terce of the feu-duties payable from the lands of Dean.

Judgment.

'The Lords having resumed consideration of this cause, with 'the cases for the parties formerly ordered, and opinions of the 'Consulted Judges, find, That the claimant, Dame Maria Nisbet, 'is not entitled to claim her jus relictæ: find, That her claim of 'terce is not barred by any of the transactions or proceedings that 'took place between her and her late husband, Sir John Nisbet; 'but find that the terce is not due out of the feu-duties payable 'out of the estate of Dean: and further find, That the claimant is 'entitled to her election as between the claim of terce and the annuity of L. 300, settled upon her by the deed of 1810, referred 'to in the proceedings; and that if she shall repudiate her right of

'tence, she shall be entitled to claim and be preferred on the fund 24 Feb. 1835.
'in medio for payment of the said annuity: And with these find-
'ings, remit the case to Lord Jeffrey, in place of Lord Medwyn, Nisbet's Trustees v. Nisbet.
'to apply the same, and proceed further in the cause as his Lordship
'shall see just.'

Lord Ordinary, *Medwyn.* For Sir John Nisbet's Trustees, *Keay* and *Paterson. Scott & Balderston*, W. S. Agents. For Lady Nisbet and Others, *Shone, Rutherfurd, A. Wood. John Renton*, W. S. *Robertson & Spence*, W. S. Agents. *T.* Clerk.

R.

FIRST DIVISION.

No. LXV. 25*th February* 1835.

MARGARET SMELLIE
against
JOHN COCHRAN.

PRESCRIPTION, TRIENNIAL.—STAT. 1579, c. 83.—*Circumstances in which a claim made by a party for remuneration as a governess or housekeeper, no specific wages being agreed on, but an understanding averred that such were to be given, was held to fall under the operation of the statute.*

THE pursuer raised an action against the defender, Cochran, setting forth, that, in the year 1820, she had gone to Linlithgow as a housekeeper or governess, for the purpose of taking charge of the children of the defender, (her brother-in-law,) while attending the schools, and receiving their education at that place; that a house had accordingly been taken in Linlithgow, which was kept and superintended by her, from 6th October 1820 down to the 1st day of August 1826, during which time several of the defender's children had successively been entrusted to her charge, &c. &c.; that there was no specific agreement made with the pursuer at the time she entered into the said engagement, nor during its currency, in regard to the amount of salary or remuneration to be paid to her by the said defender, but that there was an understanding between the parties that she was to receive such; and concluding for L.15 a-year as a remuneration for her services.

In defence it was stated, that the pursuer had been left in very destitute circumstances by her father, and that in order to prevent

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her from being forced to support herself by manual labour, the defender (along with another brother-in-law of the pursuer) had undertaken, chiefly for the purpose of providing board and maintenance for her, to take a house at Linlithgow, to which their children might be sent, for the purpose of attending the schools there, and in which the pursuer might reside: That in return for her board and lodging, the pursuer was to take charge of the children, and superintend the household arrangements;—and that, although no wages were to be given to her, the defender, Cochran, made her various presents of clothes and other articles.

In these circumstances the defender denied that he was indebted in any sum whatever to the pursuer, and any services she might have rendered to his family were amply compensated by her board and lodging, and the various presents she received; and he also pleaded prescription.

'The Lord Ordinary found that the triennial prescription applies 'to the claim of the pursuer: Sustains the defence of the said pre- 'scription accordingly: Finds, that the said claim can only be prov- 'ed by writ or oath, and allows the pursuer to give in a minute, 'stating in which of these modes she undertakes to prove her claim.'

Note.—'The pursuer states in her condescendence that she was 'engaged by the defender, in 1820, to go to Linlithgow to take 'charge of his children as a housekeeper, and she concludes for the 'sum of L.85: 5: 6, in name of salary or remuneration for her ser- 'vices in that capacity. More than three years elapsed, after her 'services as housekeeper ceased, before the present action was 'brought. The Lord Ordinary is clearly of opinion, therefore, 'that the triennial prescription is applicable to this claim, under the 'express words of the statute 1579. The pursuer says, that it is 'not libelled that a specific fee was fixed as a remuneration for 'these services, nor was the term settled at which the wages were 'to be payable. But the Lord Ordinary sees nothing either in the 'words or purview of the statute, nor in the authority of the text 'writers, nor in the decisions of this Court, which leads him to 'think that either of these circumstances affects the plea of pre- 'scription.

'It is true, that, in the case of the pursuer against Gillespie, 23d 'November 1833, which occurred precisely in the same circum- 'stances, the Court allowed a proof *prout de jure*. But the Lord 'Ordinary can account for this judgment only from the circum- 'stance mentioned on the Bench, that the defender, whether from 'mistake or otherwise, allowed the defence of prescription to drop 'out of his pleas on the record. As neither the constitution nor 'subsistence of this debt is admitted here, it is thought that the

'only mode of proof competent is by the writ or oath of the de- 25 Feb. 1835.
'fender.'

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The pursuer *reclaimed*, and *pleaded*—That the transaction in question did not fall under the operation of the statute. Although it was stated, in the narrative of the summons, that the pursuer had been employed as a housekeeper or governess, yet it went on to state that no agreement had been made with regard to the wages or salary that she was to receive; nor could she make any demand, until the termination of her employment, for a proper remuneration, as that would depend upon the number of children placed under her charge, and that varied during the course of each year, so that, in these circumstances, the statute did not apply; and it was not alleged that any wages had been paid to her, although distinctly averred on her part that there was a clear understanding between the parties that she was to have a liberal remuneration. Pursuer's Pleas.

It was *answered*—That the case fell under the very words of the statute, and that it was in vain to say that the circumstance of there being no specific agreement as to the amount of wages took the case from under its operation. Although a servant might engage with a master, trusting to his liberality, and without stipulating for specific wages, this did not alter his character as such, or render it the less incumbent upon him to bring forward his claim within the period prescribed by the statute, in order to save it from prescription. The defender had also expressly averred in his condescendence, that it was in return for his having provided board and lodging for her, that the pursuer was to take charge of the children, and superintend the household arrangements, and that this was in reality an allegation of payment. Defender's Pleas.

Lord Gillies had at first some doubts of the application of the statute, arising from the special terms of the defender's condescendence; but his Lordship ultimately concurred with Lord Balgray, and with the Lord Ordinary, in thinking that the case fell under the words as well as the meaning of the statute; and that the mere circumstance of there being no specific agreement as to the amount of wages did not alter her legal character, or affect the operation of the statute; and in this opinion Lord Mackenzie appeared also to concur. The *Lord President*, however, had some doubts as to the true character and capacity in which the pursuer had served. If it was as a servant, there could be no doubt that the statute applied; but his Lordship was inclined to consider her more in the character of a mandatary, or as præposita negotiis domesticis, to which character the application of the enactment would be more doubtful. Opinion of Court.

25 Feb. 1835. The *Court* adhered, but found no expenses due.

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Judgment.

Lord Corehouse, Ordinary. Act. *Dean of Fac. (Hope.)* Alt. *Rutherfurd, Sandford:* *Wotherspoon & Mack*, and *J. B. Watt*, Agents. *D.* Clerk. C.

FIRST DIVISION.

No. LXVI. *26th February* 1835.

JOHN M'GROUTHER, Factor loco tutoris of Charles Campbell Graham, Petitioner.

Factor loco tutoris.—Pupil.—*Circumstances in which the Court authorised a factor loco tutoris to a pupil, who had no property, but who was, after an uncle, the next heir of entail to an estate of L.800 a-year, to insure a sum of L.500 upon the life of the pupil, and to borrow the one-half of that sum on the security thereof, to be applied towards the maintenance and education of the pupil.*

On advising this petition, on a remit from the Court, the Lord Ordinary remitted the case to the Clerk of Court to inquire into the facts stated in the petition, and to report, and the following report was accordingly made:

'It appears from the statement in the petition, that on 21st December 1833, the petitioner was appointed factor loco tutoris for Charles Campbell Graham, a minor: That the only fund which the minor then possessed was a sum of about L.150, left to him by a grand-aunt, and deposited with R. Graham Burden of Tedall, the minor's uncle, who died very much in debt: That it has now been entirely lost, and the minor is now without any means for his support and education.

'It is also stated in the petition, that the minor is next heir of entail to the estate of Craigbarnet in Stirlingshire, worth L.800 per annum: That Mr Stirling, now in possession of that estate, is about sixty-five years of age, and in rather delicate health; that he has been married many years, and Mrs Stirling, who is upwards of forty years of age, is alive; and that in the event of Mr Stirling leaving no children, and the minor surviving him, he will succeed to that entailed estate.

'It is further stated, that the minor is between seven and eight

'years of age, and is maintained at school at the expense of the pe- 26 Feb. 1835.
'titioner, who is desirous that he should obtain such an education as
'may fit him to fill the station in society which he may eventually M'Grouther, Petitioner.
'hold, and that the present expense of his board and education is
'from L.20 to L.30 a-year.

'Under these circumstances, and to enable the petitioner to con-
'tinue to maintain and educate the minor, the petitioner proposes
'to raise a fund, by insuring the minor's life against the life of Mr
'Stirling, the present proprietor of Craigbarnet, to the extent of
'L. 500, but one-half of that sum only to be raised in the mean-
'time; and the application now before your Lordship is to ob-
'tain the sanction and authority of the Court to make insurance to
'the amount of L.500, and to borrow the one-half of that sum on
'the security thereof.

'The petitioner is aware that the measure is an act of extraor-
'dinary administration, and refers to a case somewhat similar as a
'precedent. The case referred to was before the Court in 1833,
'on the petition for John Hannay, factor loco tutoris for Ewarts.
'The reporter has not found the case noticed in any of the printed
'collections, but he has looked into the proceedings themselves;
'and the Court, no doubt, did, in that case, 11th Feb. 1833, autho-
'rise the factor to borrow L.350 upon an insurance of the life of
'Robert Ewart, and an assignment of the necessary portion of the
'rents of a small heritable property belonging to the minor, to be
'applied for his education, &c.

'There is, however, this difference between the two cases, that
'in the one now before your Lordship, the minor has no estate
'whatever in possession, while in the other the minor had a small
'heritable property belonging to him, under the management of
'Mr Hannay the factor, out of which the premiums could be paid.

'Such being the fact, the Court may not perhaps see cause to
'give any directions to the present petitioner. It is only in very
'particular cases that the Court have been in use of specially au-
'thorising acts of administration by their factors. In general, the
'factors act according to the best of their judgment, and on their
'own responsibility.

'In the present case, the reporter humbly conceives that the
'insurance proposed by the petitioner may be a very proper mea-
'sure for securing repayment to him of the advances made, or to
'be made by him for the minor's board and education; but, with
'great deference, that may be done by the petitioner on his own
'discretion and responsibility, and without any special authority
'from the Court. The minor has no estate from which the pre-
'mium and expenses attending the insurance can be advanced.

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'These, for the present, must be found by the petitioner himself 'out of his own funds; and it is for your Lordship, and the Court, 'to judge whether, in these circumstances stated, there is any ne- 'cessity for the Court's sanctioning the proposed act of administra- 'tion.'

The *Court*, however, on again advising the case, with this report, pronounced the following interlocutor:

Judgment. 'Upon report of the Lord Ordinary, the Lords authorise the 'petitioner to insure the sum of L.500 sterling upon the life of 'Charles Campbell Graham, and to borrow one half of that sum 'on the security thereof, to be applied as set forth in the petition, 'and decern.'

Lord Cockburn, Ordinary. For the Petitioner, *Buchanan, Whigham.* *Ainslie, M'Allan & Graham*, W. S. Agents. *D.* Clerk.

C.

FIRST DIVISION.

No. LXVII. *26th February* 1835.

WILLIAM WALLACE
against
THE EARL OF EGLINTON.

PRESCRIPTION. — INTERRUPTION. — SUPERIOR AND VASSAL. — ANNUALRENT. — 1. *A subvassal having obtained a decree of tinsel of superiority, and (after some interval) an unlimited crown charter and infeftment, followed by possession,— held, that a prescriptive right to the superiority in his person had been interrupted by an action of declarator of non-entry, raised at the instance of an adjudger on a trust-bond granted by one of the heirs of the superior, although the action was held to be incompetent, in respect of an erroneous deduction in the title of the pursuer.*

2. *A title made up by adjudication on a trust-bond, directed against one of two heirs-portioners, held to be a habile title for transferring a right of superiority, where the representative of the other heir-portioner subsequently concurred in a conveyance of it to a purchaser.*

3. *Held that interest was not due on arrears of feu-duties.*

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In 1742, Patrick Montgomery, vassal in the lands of Caprington, obtained a decree of tinsel of superiority against the heirs (portioners) of Sir William Cunninghame of Cunninghamehead, the superior, on which decree a preceptum amissionis superioritatis issued from Chancery, followed by infeftment. In the same year, (1742,) the said Patrick Montgomery sold the lands to Robert Hamilton, (the ancestor of the defender,) who, on the procuratory in the disposition, obtained a crown charter and infeftment, both of them referring in gremio to the decree of tinsel of superiority.

In 1774, the Countess of Crawford, (eldest daughter and institute under a deed of entail executed by Robert Hamilton,) on the death of her father, obtained a crown charter and infeftment, upon a procuratory of resignation in the deed of entail, absolutely and without reference to the limitations of her author's right as affected by the decree of tinsel.

In the previous year, however, (1773,) Sir William Hamilton of Westport, in the character of heir of Sir William Cunninghame *, the superior, granted a trust-bond in favour of James Ferrier, writer to the signet, who thereon led an adjudication against him, as heir of Sir William Cunninghame. Mr Ferrier then assigned the decree to Sir William Hamilton, who expede a crown charter of adjudication. Sir William afterwards assigned this crown charter to Ilay Ferrier in liferent, and to James Ferrier in fee; and these parties obtained infeftment in 1775, and were enrolled as freeholders of the county in 1780.

In 1776, the Messrs Ferrier, as superiors, raised a process of declarator of non-entry, and of maills and duties, against the Countess of Crawford; but, after a submission, which expired without decree being pronounced, the process was allowed to fall asleep.

In 1791, Colonel Fullerton of Fullerton called in question the character which Sir William Hamilton had assumed as heir of Sir William Cunninghame; and in a competition of brieves, these two parties were served heirs-portioners of the said Sir William; and in 1798 the Messrs Ferrier, Colonel Fullerton and Sir William Hamilton, granted a conveyance of the lands of Caprington, &c. with all right and interest in them, in favour of Alexander Walker, who expede a crown charter, and was infeft.

In 1805 Alexander Walker wakened the process of declarator which had been raised by his predecessors against Lady Crawford, and which was immediately afterwards submitted to the late Adam Rolland, Esq., and, after some procedure had therein, Mr Walker died. In 1824, his son and heir, William Fullerton Walker, having

* This character was erroneous, as will appear from the proceedings in 1791, Colonel William Fullerton being also an heir-portioner of the superior.

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attained majority, and made up a title to his father, wakened the process, which had been allowed to sleep during his minority, and transferred it against the Earl of Eglinton, (the heir of Lady Crawford, under the entail made by her father,) and his tutors. In the same year Mr Walker disponed the superiority to Mrs Cheshire or Wallace, in whose favour crown charters were expede, and her husband (the pursuer) was enrolled as a freeholder.

Mrs Wallace and her husband thus became parties to the process of declarator; and after some procedure it was inter alia objected to the demand for an entry, that the fee was full at the date of the action in 1776, by the crown charter and infeftment which had passed in favour of Countess Crawford in 1774. Thereupon, and in order to obviate this objection, the present action for reducing the infeftment of Lady Crawford, and the subsequent titles now in the possession of the defender, was brought by Mrs Wallace, (since deceased), and her husband, the present pursuer, on the ground chiefly that they had been made up in fraudem, and to the hurt and prejudice of the superior, (and this action was conjoined with the process of declarator of non-entry.)

It was objected to the title of the pursuer, that the trust-adjudication had been adduced upon an erroneous charge, while the general service expede in 1791, being of the nature of a tentative title, and personal to the individuals served, could not be made available to a disponee after their death.

The Court, however, upon advising cases, which were ordered by the Lord Ordinary, repelled the preliminary defence, &c. and sustained the title of the pursuer, (7th July 1830.)

The processes having afterwards been conjoined, and a record made up on the merits, came before Lord Fullerton, and his Lordship pronounced the following interlocutor:

'The Lord Ordinary having heard parties' procurators, and considered the closed record and process in these conjoined actions, finds, That the lands now possessed by the defender were, in the year 1721, granted in feu by Sir William Cunninghame of Cunninghamehead to James Montgomery of Pearstonhall: finds, That on the death of the said James Montgomery, his eldest son and heir, Patrick Montgomery, (Sir William Cunninghame, the superior, also being dead,) with the view of making up his title, adopted the usual measures against William Fullerton of Fullerton, and Captain Walter Hamilton of Westport, described as heirs-portioners of the said Sir William Cunninghame: finds, That these persons having declined to enter, Patrick Montgomery, on the 22d of July 1742, obtained decree of tinsel of superiority against the said heirs-portioners, by which it was declared, that the said parties had amitted and lost their right of superiority 'together

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"with the whole benefit and casualties of the said superiority, "during all the days of their lifetime:' finds, That on this decree 'a preceptum amissionis superioritatis issued from Chancery, on 'which the said Patrick Montgomery was infeft on the 14th day 'of October 1742: finds, That Patrick Montgomery, immediately 'afterwards, sold the said lands to Robert Hamilton, the ancestor 'of the defender, who, on the procuratory in the disposition, ob-'tained a Crown charter and infeftment in 1742, the heirs-portioners 'against whom the decree of tinsel of superiority had been obtain-'ed being then alive, and the Crown charter and infeftment special-'ly referring to the said decree as the ground of the said titles: 'finds, That Robert Hamilton was succeeded in these lands by his 'daughter, the Countess of Crawford, who, in the year 1774, ob-'tained a crown charter and infeftment, as vassal to the Crown, 'absolutely, and without reference to the rights of the mid-supe-'rior, suspended by the foresaid declarator of tinsel: finds, That in 'the year 1775 another Crown charter of the said lands, or at least 'of the superiority, was obtained by Sir William Hamilton, on a 'charge and decree of adjudication against him, described as the 'heir to the above-mentioned Sir William Cunninghame, on a trust-'bond granted to James Ferrier, writer to the signet: finds, That 'the said Crown charter having been conveyed by Sir William 'Hamilton to James Ferrier and Lieutenant-Colonel Ilay Ferrier, 'these parties were infeft, and upon the said infeftment and su-'periority were enrolled as freeholders in the county of Ayr in the 'year 1780: finds, That, in the year 1776, the said James Ferrier, 'and Colonel Ilay Ferrier, raised, as superiors, a process of decla-'rator of non-entry, and of maills and duties, against the Countess 'of Crawford: finds, That this process was allowed to fall asleep 'before any step of importance was taken in it: finds, That in the 'year 1791, Colonel William Fullerton, then of Fullerton, and the 'said Sir William Hamilton of Westport, were served heirs-por-'tioners to the foresaid Sir William Cunninghame of Cunning-'hamehead: finds, That, in the year 1798, the said William Ful-'lerton, and Sir William Hamilton, granted a disposition and as-'signation, alongst with the foresaid James Ferrier and Colonel 'Ilay Ferrier, by which all these parties conveyed the said superio-'rities, with all right, title and interest they respectively held in 'them, to Alexander Walker, who made up titles to them by Crown 'charter in 1799, and was also enrolled in the roll of freeholders 'of the county of Ayr: finds, That Alexander Walker was suc-'ceeded in the year 1802 by his son, William Fullerton Walker, 'from whom the right to the said superiorities was transmitted to 'Mrs Zelica Cheshire, and her husband, William Wallace, now in-

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'sisting as pursuer in these actions: finds, That the process of 'mails and duties, and declarator of non-entry, raised in the year '1776, was wakened first by Alexander Walker in the year 1804, 'and afterwards by William Fullerton Walker in the year 1824: 'finds, That afterwards, in the year 1829, the said William Fullerton 'Walker brought an action of reduction for setting aside the Crown 'charter obtained in the year 1774 by the Countess of Crawford, 'and the title following thereon; and that a similar action was brought 'by Mrs Zelica Cheshire, who at that time had obtained right to part 'of the superiorities; and that these processes of reduction were 'conjoined with the wakened process of declarator: finds, That 'the title of the pursuer in the reduction, founded on the joint con-'veyance by the Messrs Ferrier and both the heirs-portioners of 'Sir William Cunninghame, the superior, has been sustained by the 'Court: But finds, That the title of the Messrs Ferrier, at the time 'of raising the action of declarator of non-entry in 1776, was defec-'tive and insufficient to support the said action, being a title made 'up on a deduction of propinquity admitted and proved to be er-'roneous, by the service of Colonel Fullerton of Fullerton, and Sir 'William Hamilton, now founded on by the pursuer: Therefore, 'in the declarator, sustains the objection to the title, dismisses the 'action, and decerns: In the reduction, finds, That the said action 'of declarator of non-entry, though brought on a title now found 'to be defective, was, more particularly when taken alongst with the 'other proceedings of Messrs Ferrier in obtaining enrolment, suf-'ficient to interrupt prescription; and therefore repels the plea of 'exclusive title offered by the defender: finds, That the Crown 'charter and other titles sought to be reduced were illegal, and 'unauthorised by the rights of the parties; and therefore reduces, 'decerns, and declares regarding the same, in terms of the libel, and 'decerns: And the foresaid title in favour of the Countess of Craw-'ford, and others following thereon, being reduced, finds, That the 'pursuer, as the sole lawful and undoubted superior of the said lands, 'is entitled to the whole duties and casualties appertaining to the 'said superiority: finds, That the said lands are now, and have 'been in non-entry since the death of Robert Hamilton, the father 'of the said Countess of Crawford: finds, in respect of the title pro-'duced and founded on in these actions of reduction, that the claim 'for the arrears of feu-duties cannot be competently insisted in in 'these actions, prior to the death of Alexander Walker in 1802; 'but decerns for the arrears of feu-duties from the said year, *but* '*without interest*: *Lastly*, Finds no expenses due, and decerns.'

Both parties *reclaimed*, the pursuer praying the Court to find that the defender must enter to Patrick Montgomery, who obtained

the decrect of tinsel, as last vassal entered, and not to Robert Hamilton, &c. and also to find the defender liable in the whole arrears of feu-duties, and interest thereon, at least from the date of the original summons of declarator in 1776. The defender also *reclaimed* on the merits, and the Court ordered cases.

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The pursuer *pleaded*—

Pursuer's Pleas.

1. The pursuer has a good and valid title, fortified by prescription, to the heritable subjects and rights libelled.

2. Neither the defender himself, nor any of his predecessors, Lady Cathcart, the Countess of Crawford, or Robert Hamilton, ever had any right whatever to the superiority in question.

3. The titles made up, first by Robert Hamilton in 1742, and next by the Countess of Crawford in 1775, never were fortified by prescription, that having been interrupted repeatedly and effectually by the process of declarator, commenced in 1776, and the process of reduction, commenced in 1829, both still in dependence; and by the proceedings of the pursuer, and his several predecessors, on which admission to the roll of freeholders followed; and the currency of prescription was also prevented from running during the minority of William Fullerton Walker, for nearly eighteen years, viz. from 1805 to 1823.

4. The whole pleas of the defender are, in the special circumstances of the case, untenable in law, and groundless in fact, and amount to such a complete and unqualified disclamation of the title of the superior, as to found in the pursuer, as superior, an effectual claim to insist for a total forfeiture of the feu.

5. The lands have been in non-entry since the death of Patrick Montgomery, and the feu-duties are due to the pursuer from the term of Whitsunday 1735, being forty years prior to the date of the infeftment of Messrs Ferrier, in September 1775, which was followed up by the action of declarator of non-entry, the summons in which was dated 16th, and signeted 17th January 1776, together with the legal interest on said feu-duties since the same was demanded in judgment by the said action of declarator, but payment of which has been opposed by the defender, and his predecessors, from the year 1775 to the present time. (On this point, as to the composition for entries, reference was made by the pursuer to the cases of Lockhart, 10th July 1760, *F. C.*, *M.* 15,047; Mackenzie, 4th July 1777, *F. C.*, *M.* 15,053; 2. *Hailes*, 760; *Br. Supp.* 613; Duke of Argyle, 19th Nov. 1795, *F. C.*, *M.* 15,068; Duke of Hamilton, 6. *S. D.* and *B.* p. 94; *Ersk.* ii. 12. 27; E. of Stair *v.* E. of Stair's Trustees, *W.* and *Sh.* 24th May 1826; Id. *v.* Id. *S.* and *D.* 5. 480, 481, 489, 494; Dick *v.* Gillies, 6. *S.* and *D.* 1076; 3. *Blackst. Comm.* 438; *Fonblanque on Equity*, 1. 6. 7.)

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With regard to the claim for feu-duties, the pursuer referred to *Ersk.* iii. 8. 80; *Bell*, 2. *Com.* 8, 9, 10; Duke of Buccleugh v. Officers of State, 1st Feb. 1770, *F. C.* and *M.* 10,751.

Defender's Pleas.

Pleaded for the defender—

1. The lands in dispute, including both property and superiority, having been possessed by the defender and his predecessors, in virtue of unqualified titles, for upwards of forty years, his right is secured by prescription; and it is incompetent to inquire into the nature of the title in virtue of which they may have been originally acquired; D. of Buccleugh *v.* Cunningham, 30th Nov. 1826.

2. As the defender has produced an absolute and irredeemable infeftment in favour of his predecessors, prior, in point of date, to the infeftment in favour of the Messrs Ferrier, his right is preferable to that of the pursuer.

3. As the pursuer and his authors have not enjoyed peaceable, uninterrupted possession of the superiority of these lands for a period of forty years, and as the payment of the feu-duties and other casualties, which is the proper evidence of possession, has invariably been resisted, the pursuer cannot pretend to plead the positive prescription in support of his right.

4. The right of the pursuer to the lands in question, connected as it is through the inept title made up by the Messrs Ferrier, is altogether null and void; and as the service expede in 1791 was merely a general service, and did not vest the fee of the lands in Sir William Hamilton and Colonel Fullerton, the disposition executed by them in favour of Alexander Walker, and the infeftment following thereon, was ineffectual as a feudal conveyance of the superiority.

5. As the declarator of non-entry was raised at the instance of parties who had not a valid or legal title, it is not competent for any one else, whether connecting with them, or otherwise, to awaken or insist in it. It cannot, even under the circumstances of the case, be founded on as an interruption of prescription. There is no case in which it has been found that an action, at the instance of a party having no right to an estate, can interrupt the positive prescription. Neither is a conveyance or transmission of a right considered as an interruption of prescription, even when intimated to the debtor. In like manner, citation against a debtor, proceeding on a blank summons, does not interrupt prescription; E. Marischal, 14th July 1669, *M.* 10,323; see also the cases of Macdougall, 30th Nov. 1739, *M.* 11,273; Gordon, 23d June 1784, *M.* 7,532; Menzies, 16th Feb. 1699, *M.* 11,528; Hay *v.* Lord Advocate, 9th March 1756, *M.* 11,276; neither is prescription interrupted by informal diligence, or by a summons executed without the requisite formalties;

E. of Hopetoun v. Creditors of York Buildings Company, 21st July 1784, *M.* 11,285; Baillie v. Doig, 2d March 1790, *M.* 11,286.

6. The pursuer's claim for arrear of feu-duties, and the interest thereon, is entirely groundless, in respect the claim is unfounded on its merits, and cannot competently be urged in the present action.

7. The lands cannot be found to be in non-entry for any period prior to the death of Robert Hamilton, the father of the Countess of Crawford.

Opinion of Court.

At the advising, *Lord Balgray* said—When this was formerly before us, (7th July 1830,) I had formed a clear opinion in point of law, and to that opinion I still adhere. The sole question is, in whom is vested this superiority which belonged to Sir William Cunninghame of Cunninghamehead? and I am quite clear, looking to the titles of the parties, and to the facts of the case, that it is now vested in the person of this pursuer. Upon the death of Sir William Cunninghame, the right of superiority naturally devolved upon his two sisters, as heirs-portioners. After remaining in that situation, it was unquestionably taken out of their persons by the adjudication led by Mr Ferrier on the trust-bond which had been granted by Sir William Hamilton in 1773, (the son of one of these heirs-portioners,) as heir of Sir William Cunninghame. The effect of such an adjudication was well known in our law. It vested the heir in the right of his predecessor, in the same way as if he had made up a title by a special service and retour. It was, no doubt, true that Sir William Hamilton was only an heir-portioner, and thus had only right to one-half of the property which fell to the two sisters; but, after twenty years, it was impossible to question the decree then pronounced in his favour, as the heir of Sir William Cunninghame; and supposing that there was an error in the proceedings, it was incompetent now to bring a challenge. But, independently of this ground, any error which may have occurred was remedied by the subsequent service of William Fullerton, the son of the other heir-portioner; for he and Sir William Hamilton, after completing their right by services as heirs-portioners, joined in granting a conveyance in favour of Alexander Walker, by which means all original defect in the title was completely remedied. There could not, therefore, be any doubt that the title of the pursuer was good; but whatever objection there might originally have been to it, more than forty years had elapsed since that title was made up, and the right of superiority was now vested, by regular conveyances, in the person of the pursuer, Mr Wallace. With regard to the title rested on by the defender, I remain of the same opinion as when the case was formerly before the Court. The title made up by Patrick Montgomery was an entry from the Crown, in lieu of

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Opinion of Court.

one by his subject superior, who had declined to enter. It was plain, on the face of that title, that it was only per vicem that the Crown had interfered; and it was also clear that the subsequent unlimited title, made up by the Countess of Crawford in 1774, was obtained obreptione. Still, however, if forty years' possession had followed on this title, all right of challenge would have been cut off by prescription. But, in this case, such possession unquestionably did not follow, and any prescription which might otherwise have been pleaded was interrupted by the proceedings referred to in the pleadings. The other point of the case, as to the consequences of the judgment of the Court, must go back to the Ordinary.

Lord Gillies.—After considering this case, with the very able and luminous argument in the papers, I am now prepared to accede to the opinion of Lord Balgray, except as to the interpretation put by his Lordship on the vicennial prescription of retours; for, with regard to that prescription, it appears to me, that although twenty years have elapsed, a party may be called upon to produce the grounds and warrants of his title, for the vicennial prescription is not, in this respect, placed upon the same footing as the prescriptio longissimi temporis. But, in the present case, it is of no consequence whether the warrants are produced or not; for the judgment of the Lord Ordinary, in which I entirely acquiesce, proceeds on this, that supposing the title in Mr Ferrier to have been originally defective, it was afterwards rectified by the joint conveyance by Sir William Hamilton and Colonel Fullerton, who had previously made up a title in their own persons, as heirs-portioners. I am also clearly of opinion that the defender has made out no title.

Lord Mackenzie.—As I concur entirely in what has been stated by Lord Gillies, I think it unnecessary to repeat what has fallen from his Lordship. I participate in the same doubts as to the import and effect of the vicennial prescription; but I am satisfied that the interlocutor is well founded on the other ground his Lordship has referred to.

The *Lord President.*—I am entirely of the same opinion. I never could reconcile the two prescriptions; but it is not necessary to reconcile them here. There is no doubt that the original title was erroneously made up in the person of Sir William Hamilton, he being only an heir-portioner; but then it was cured by the subsequent service in the person of Mr Fullerton.

A good deal of discussion took place at the advising, and before the interlocutor was adjusted, with regard to the consequences of the judgment to be pronounced,—whether the finding, that the lands were in non-entry since the death of Robert Hamilton, should not be altered, to the effect of holding the lands to have been in non-

entry since the death of the heirs charged by Patrick Montgomery, in 1742, to make up a title to Sir William Cunninghame, and also with regard to the claims of the pursuer to the arrears of feu-duties, and as to the period from which this claim ought to be enforced. On this point the pursuer reclaimed against that part of the interlocutor of the Lord Ordinary which found that the claim for arrears of feu-duties could not competently be insisted in, in the present action, prior to the death of Alexander Walker in 1802. He also reclaimed against the last part of the interlocutor of the Lord Ordinary, finding that *no interest* was due on the arrears of feu-duties; but to these findings the Court also adhered.

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Their Lordships ultimately pronounced the following interlocutor: 'The Lords having advised this reclaiming note, with the reclaiming note for the Earl of Eglinton, with the cases for the parties, and heard counsel, adhere to the interlocutor of the Lord Ordinary reclaimed against, and refuse the desire of both reclaiming notes; and in respect that the claim for the arrears of feu-duty, previous to 1802, when Alexander Walker died, forms no part of the record of this action, find it unnecessary to make any reservation of that claim; find no expenses due to either party; quoad ultra, remit to the Lord Ordinary.'

Judgment.

Lord Fullerton, Ordinary. Act. *Keay, Rutherfurd, Wilson.* *Adam Wilson*, Agent.
Alt. *Dean of Fac. (Hope,) Anderson.* *Tod & Hill*, W. S. Agents.
S. Clerk.

C.

FIRST DIVISION.

No. LXVIII. *26th February* 1835.

WRIGHT
against
SIR JAMES STEUART DENHAM.

CONTRACT. — CAUTIONER. — ARRESTMENT. — *Circumstances in which a party having entered into a building contract, and having failed, his cautioners having finished the work, and the remainder of the price being paid to them, the payment was sustained, though made in the face of an arrestment by a sub-contractor, as creditor of the failing party.*

SIR JAMES S. DENHAM, &c. wishing to build a new farm-steading, entered into a contract for that purpose with James Bennet. The

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missive of agreement ran in name of James Bennet, and of William Cadzow and John Burns, as his cautioners. It provided, inter alia, that the contract price, viz. L.338, 16s., 'should be paid 'in four instalments, according as the work goes on; it being always understood, that the value of work equal to one instalment 'of the money remains unpaid, until the whole work now offered 'for is completed and taken off our hands by the inspector.'

This missive was dated 5th November 1824. Bennet, on 10th December thereafter, entered into a contract with the pursuer, to execute the slater work to be performed under the above contract. Bennet proceeded with the contract, and had received two corresponding instalments of the price, when, in consequence of his failure and that of one of the cautioners, Cadzow, a subsidiary obligation was entered into by Burns, and a person of the name of Wilson, to see the work completed before the 11th November then next. Two days afterwards the third instalment of the price was paid, and for that instalment Bennet granted a receipt along with Burns and Cadzow. At that time the slater work had been nearly finished by Wright. Objections having been made to some part of it, he applied to the Sheriff to have it inspected. Under that application, which was directed against Bennet, and in which the cautioners appeared for their interest, the work was inspected and finished. Sir James, however, was not a party to it. The cautioners did the remaining work. When finished, the inspector named in the contract objected to and condemned some of the slater and other work; and Sir James (but without notice to Wright) employed workmen to alter the work, so as to correspond with the report of the inspector. After deducting his disbursements in those alterations, a balance of the contract price remained in his hands.

On the 14th March 1826, the pursuer, before the alterations were completed, used arrestment in the hands of Sir James, on the dependence of an action against Bennet, for the price of the work done under the sub-contract with him. On the 17th June thereafter, Sir James made a payment of L.30 to Burns, for work done by him in completion of the original contract. On 12th July 1827, the pursuer having constituted his debt against Bennet, raised an action of forthcoming against Sir James, who raised a multiplepoinding, in which the Sheriff found that Sir James was entitled to take credit for the L.30 paid to Burns after the arrestment, as well as for the expenses which he had disbursed in the alterations, and preferred Wright to a trifling balance which remained due after those deductions.

Of this decree Wright brought the present action of reduction, so far as concerned the finding with regard to the payment of the L.30, and certain findings as to expenses; and the record was

closed by a condescendence for pursuer, and separate answers for Sir James and Burns. 26 Feb. 1835.

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Pursuer's Pleas.

On the point of the legality of the payment made by Sir James Stewart to Burns, the cautioner for Bennet, the pursuer *pleaded*— That Sir James was not entitled, in the face of the arrestment used by him as a creditor of Bennet, to make such payment. There was no necessity for him to do so. He was entitled to refuse payment after arrestment; and what he ought to have done, was to have raised a multiplepoinding, for the purpose of having it judicially determined who had the best right to the balance of the instalment. It was payable by the contract to Bennet; and as a fund payable to Bennet, it was attachable by Bennet's creditors, and was accordingly attached by the arrestment used by the pursuer.

The defender's answer is embraced in the note of the Lord Ordinary.

The Lord Ordinary sustained the defences, and assoilzied the defenders, and found expenses due.

Note.—'Though the Lord Ordinary may not feel very sure that 'the pursuer has got full justice in the transactions referred to, he 'thinks that the action cannot be maintained, and that it is impossible 'to give judgment to the only effect which is asked by the summons.

'The point may be stated more briefly than it is in the Sheriff-'depute's notes. By Sir James Steuart's contract with Bennet, 'the work was to be executed to the satisfaction of Davidson; and 'whether Davidson was a judge of slater work or not, this was the 'contract, to which both Bennet and his cautioners were bound. 'The sub-contract between Bennet and Wright bore, that the 'slater work was to be executed to the satisfaction of two persons 'to be named, without alluding to Davidson. Bennet was bound 'to this in a question with Wright. But neither Burns nor the 'other cautioners were parties to this sub-contract. They were 'bound to Sir James Steuart; and as, in any question with him, 'they could not found on the sub-contract, so in any question with 'Bennet, as to the sufficiency of the work for which they were 'cautioners, they were entitled to stand in the place of Sir James 'Steuart.

'Attending to these things, the state of the case is, that David-'son reported to Sir James Steuart that the slater work was not 'sufficient; and, throwing aside other circumstances, Bennet be-'coming bankrupt, Burns, one of the cautioners, undertook to fi-'nish the work, and make it sufficient, and is said to have done so. 'And, by the contract, Sir James Steuart had retention of the last 'instalment of the price until it should be done. In the meantime,

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'Wright had applied to the Sheriff for an inspection. Sir James 'Steuart was not made a party, but Burns and the new cautioner 'appeared. Persons of skill were named, and a report made and 'sustained, which substantially found the work sufficient. Then 'Wright brought his action against Bennet, and on the dependence 'arrested in the hands of Sir James Steuart, and he obtained decree 'in the action. In the face of the arrestment, Sir James Steuart 'paid L.30 to Burns, the cautioner, as for work done in the com-'pletion of the original contract. The real question in the cause 'is, whether he was warranted in paying that sum.

'As Sir James Steuart was entitled to retain the last instalment 'till the work should be finished to the satisfaction of Davidson, it 'is plain that the pursuer could never have made the money forth-'coming till the slater work was made sufficient to the satisfaction 'of Davidson; and as Sir James Steuart had nothing to do with 'the sub-contract, or the inspection by other persons, he could not 'be bound by them, and would still have had his right of retention. 'But if he had the right to retain till the matter should be so spe-'cifically closed, he must have had a right to pay to the cautioner 'Burns, when he did what Bennet ought to have done by himself 'or others; and abstractedly from the inspection allowed by the 'Sheriff, Burns had a right to the money, upon getting the work 'executed, in consequence of Bennet's failure.

'The whole matter, therefore, comes to be, that Burns may have 'committed a blunder in going into the inspection asked by the 'pursuer; and if he bound himself by it in a question with Wright, 'he might be liable to relieve him to the extent of the L.30 paid to 'Burns. But this is nothing to Sir James Steuart, and there are 'no conclusions in the present action for subjecting Burns to any 'thing but a claim of expenses. At the same time, it would not 'be quite a simple matter in any form to tie down even Burns, 'who was no party to Wright's contract, to the inspection before 'the Sheriff, at the same time that he was bound to Sir James 'Steuart by the inspection of Davidson, and entitled to stand upon 'it in a question with Bennet.

'The case of Wright may be hard, if the slater work really was 'sufficiently done, though not to the taste of Davidson, who is said 'to be no slater: And perhaps it would have been better if David-'son's report had been made under judicial authority. But the 'pursuer trusted the credit of Bennet alone; and though he might 'arrest in the hands of Sir James Steuart, he could only arrest, 'subject to the conditions of Sir James' own contract; and it is by this 'natural course of the double transactions that he necessarily suffers.'

The pursuer *reclaimed*, and the Court, (6th Dec. 1834,) ordered

minutes of debate; on advising which, they delivered their opinions substantially in accordance with that of the Lord Ordinary.

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Opinion of Court.

The *Lord President.*—Bennet, the original contractor, failed, not having executed the work he undertook to do. He was fully paid for the work he had actually done; therefore, instead of Sir James being debtor to Bennet, Bennet was liable to him in damages for breach of contract. Might not Sir James have said, I will finish the work by my own masons and carpenters? The cautioner comes forward, and says, I will execute it. Is not that the same thing? Sir James owed nothing to Bennet. It was very rash, very foolish in him to pay in the face of the arrestment; but his answer is, No doubt there was an arrestment, but there was nothing due to Bennet: He was fully paid.

Lord Balgray.—I take precisely the same view. Burns did the remaining work; and I cannot see the distinction between him and any ordinary tradesman Sir James might have employed for this purpose.

Lord Gillies.—I have a difficulty here. If a cautioner finishes work contracted for, the party for whom he is cautioner is the party to whom payment is strictly due. If I agree to build a house, and my cautioner does it, what is the consequence? As regards the other party to the contract, the money is due to me.

Lord Mackenzie.—I doubt whether there is an admission on record sufficient to bring out whether Burns actually did work to the amount of L.30. The record contains a sort of denial; but assuming Burns actually did work to the amount, I concur. I rather think, in the case of a cautioner ad factum præstandum, for a piece of work or furnishing of articles,—if he is called on, in consequence of the failure of the party bound to perform, he is entitled to the price.

Lord Gillies.—No new agreement is alleged: It was all in implement of the original one.

Lord Mackenzie.—Burns was in reality bound jointly with Bennet. But suppose a party implicitly bound as cautioner in an obligation ad factum præstandum, as, for instance, to furnish a certain article, and that he is called upon to do it, he replies, Very well, but you must pay me. The question would be, Is he bound to furnish the article without payment? The party who has failed is certainly not entitled to it; and how can an arrester or assignee be in a better situation?

Their Lordships, therefore, *refused* the reclaiming note, and adhered to the interlocutor of the Lord Ordinary.

Judgment.

Lord Moncreiff, Ordinary. Act. *Shene, Rutherfurd, Paterson.* Alt. *Dean of Fac. (Hope,) Marshall.* *John Cullen*, W. S. *Ainslie, M'Allan & Graham*, W. S. and *Mack & Wotherspoon*, W. S. Agents. *S.* Clerk.

C.

FIRST DIVISION.

No. LXIX. *26th February* 1835.

THE MAGISTRATES OF BRECHIN
against
GUTHRIE, MARTIN & CO.

PROOF.—WITNESS.—HAVER.—*A witness allowed, before examination, to see a deposition made by him as a haver, some years before in a different cause, though relating to the same facts, and in which, although the pursuers were different, the defenders (the objectors to the competency of the demand) were the same.*

IN an action of proving the tenor at the instance of the Magistrates of Brechin v. Guthrie, Martin and Co., a witness for the pursuers having appeared before the commissioner, to give evidence in regard to a certain writing which was produced, and to which a doquet, signed by the deponent, (25th Feb. 1826,) was annexed, deponed, that he recollected having seen the said writing on former occasions. Deponed, 'That his memory is by no means so good now 'as it has been; and before proceeding further with the present deposition, the deponent requests that the deposition emitted by him 'to which the doquet bears reference, might be read over to him;' and the agent for the defenders having objected to the competency of the demand, the commissioner reported the point to the Court.

Defenders' Pleas.

In support of the objection, it was *pleaded*—That if the deposition alluded to had been taken in the present process, or even in a separate process depending between the same parties, the present demand might have been reasonable and competent. But the former deposition had been taken in a process where the parties were different, of which the object was different, and which had been settled out of court many years ago *; and, in such circumstances, there was no precedent in support of the present demand.

Besides, the witness in the former cause was examined as a haver; and if questions were put to him as to the contents of any particular deeds, the examination was quite irregular, and could not in any way be used against him.

* The case referred to was an action of astricted multures, at the instance of John Ogilvie, (one of the present defenders,) and David Dakers, (then tacksman of Brechin mills,) against the present defenders, Guthrie, Martin and Company.

It was *answered*—That the general rule, as to the privilege of a witness to have his prior deposition read over to him, to prevent his falling, through want of recollection, into apparent contradictions, being undisputed, there was nothing in the special objections which have been urged; for although, in the former process, the pursuers were different, the defenders (the present objectors) were the same, and the matter in dispute was also the same; and although it might have been irregular, in the former examination of the witness as a haver, to put questions to him on the merits of the cause, that was no reason, (the examination having been taken,) for depriving him of his privilege of seeing what he had deponed, in order to refresh his memory.

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Lord President.—This is a question touching more the privilege of a witness than the interest of parties; and it appears to me as a general rule, that a person who has formerly emitted a deposition as a witness, is entitled to see the same, when examined again on the same subject at a subsequent period.

Opinion of Court.

Lord Balgray.—In questions of marches, when I was a Sheriff, depositions were frequently taken at an interval of years; and I have known witnesses again and again insist to see their previous depositions. I always allowed it.

Lord Mackenzie.—I am of the same opinion. With regard to the argument here used, that his former deposition could not in any way be used against the witness, I should not wish to admit the proposition, that if any person should swear inconsistently with his former testimony, he would be free from a charge of perjury.

The *Court* accordingly remitted to the commissioner, with instructions to allow the witness to see his previous deposition, and found the objectors liable in the expenses of this discussion.

Judgment.

Act. Geo. *Bell.* Alt. *Skene.* *Graham Binny*, and *James Imrie*, Agents.
D. Clerk.

C.

SECOND DIVISION.

No. LXX. 27*th February* 1835.

Mrs DONALD and Others
against
ROBERT GILMOUR COLQUHOUN.

Passive Title.—Act 1695, c. 24.—*Circumstances in which an heir of entail, who did not enter into possession upon the death of his an-*

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cestor, (the estate continuing under the management of trustees named by the ancestor,) having become bankrupt, and his reversionary right to the estate having been sold by the trustees under his bankruptcy within three years from the death of the ancestor, and purchased by a trustee for behoof of the family of the bankrupt, and the estate having been made over, after the bankrupt's death, to his son,—it was found, in a question betwixt a creditor of the bankrupt and his son and grandson, that no representation on the passive titles of the bankrupt had been incurred by the son and his descendents.

In 1741, Robert Colquhoun (first) of Camstradden, by a postnuptial contract of marriage with Helen Johnston, disponed that estate to the heirs-male of the marriage. In 1774, he executed a strict entail, with reservation of power to alter, settling Camstradden on James Colquhoun, his eldest son, and the heirs whomsoever of his body; whom failing, on Walter Colquhoun, merchant in Glasgow, his second son, and other heirs of tailzie therein mentioned. In 1784 he executed a trust-deed for the payment of his debts, annuities and provisions, by which it was expressly provided, that the trustees should be obliged to apply the rents of the tailzied estate, and the produce and price of the other subjects disponed, for the uses and purposes of the trust, deducting the charges of executing the trust, as also denude in favour of the heirs of tailzie; the heir being taken bound to concur with the trustees in any measures necessary for extricating the trust.

Robert Colquhoun (first) died in 1787. At a meeting of his trustees soon after, it appeared that the interest of the debts and annuity provisions exceeded the rents of the estate; but the trustees resolved, from regard to the deceased, to act. Mr D. Erskine, writer to the signet, one of the trustees, took charge of the affairs as man of business. The minute of the first trust-meeting also bears, that no decisive step should be taken until Walter, the heir, should be made acquainted with the state of matters; but the trustees went on to act on the trust-deed.

James, the eldest son, having predeceased his father, the second son, Walter, was the heir entitled to succeed to Camstradden. Walter, after being settled in Glasgow, had gone to Antigua as a planter, where he was unsuccessful; and on 13th August 1788, when in London, the year after his father's death, a commission of bankrupt was issued against him. Walter never made up titles as heir of entail to Camstradden, nor drew the rents, and had no possession, natural or civil. He had, in 1785, executed a power of attorney to certain persons to ratify his father's settlements, which was produced at the first meeting of the trustees. His father's trustees continued to act. They alone had the entire possession of the estate

and effects of the truster, levied all the rents, cut and sold wood, and had the sole possession during the lifetime of Walter, and down to 1823. The debts of the entailer, Robert, had not been paid off during the lifetime of Walter. There never was any reversion to Walter, and the purposes of the trust were not executed for many years after his death.

At a meeting of Walter's creditors, called (21st Oct. 1788) to consider the best mode of disposing of the bankrupt's interest in Camstradden, it was agreed that the assignees should sell it either by public or private sale; and upon 29th January 1789 they did sell Walter's reversionary interest for fifty guineas to Mr David Erskine, who paid the price out of his own funds. Mr Erskine, in his settlements, declared that he held the right, after payment of his outlays and expenses, for the benefit of the children of Walter Colquhoun; and the right so acquired by Mr Erskine was conveyed by his trustees, in 1811, to Mr Dennistoun and Mr Colquhoun of Killermont, as trustees, for behoof of Robert Colquhoun, the son of Walter. Mr Erskine's trustees had got repayment of his advances, with interest, from the trustees, upon 18th June 1802, after Walter's death.

Walter died on 12th February 1802, when his son, the late Robert Colquhoun, (second,) became entitled to succeed to Camstradden, after the conditions of his grandfather's trust were fulfilled. Robert returned from the West Indies soon after his father's death, and he accepted of the office of factor on Camstradden, under his grandfather's trustees. He availed himself of the power of redemption of a lease of the mansion-house and grounds, granted to his daughters by the entailer; and Robert lived in the mansion-house, and charged himself in the factory account with a rent of L.56, 10s. He possessed the grounds for some time, and then advertised them to be let; and he applied for authority to sell part of the entailed estate for redemption of the land-tax.

In 1805, on leaving Scotland, Robert granted a commission, containing powers to make up and establish such titles in his person, by general or special service or otherwise, as heir to his grandfather, as should be thought necessary to vest and complete a full right to the lands. He was accordingly, in 1806, served heir of tailzie and provision in general to his grandfather, Robert Colquhoun, the entailer, and was infeft. But having been afterwards advised that he might complete a fee-simple title to the lands, as heir-male, under his grandfather's contract in 1741, Robert obtained a precept of clare constat as heir of line to his grandfather, and was infeft in 1826. Camstradden was then sold by Robert to Sir James Colquhoun for L.32,500; and certain proceedings relative to the validity of the

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title having taken place in this Court, and in the House of Lords, it was finally found that the sale was valid, the claim of the heirs of entail to the application of the price being reserved.

Robert Colquhoun (second) having died, was succeeded by his son, Robert Gilmour Colquhoun, who entered heir cum beneficio inventarii.

In 1805, an action was raised against Robert Colquhoun, by the executors of Robert Graham of Dominica, for the amount of two bonds said to have been granted by Walter Colquhoun, and upon which judgment had been obtained in the colonial court. Robert Colquhoun pleaded, among other defences, that he did not represent his father. That process fell asleep, the last step in it having been taken in 1811.

A summons of wakening, and also a supplementary summons for the same debt, were, in 1832, brought by Mrs Donald and others, as representing Mr Graham, against Robert Gilmour Colquhoun, as representing his father Robert, and also his grandfather Walter.

In the supplementary summons, which is founded upon the two branches of the act 1695, c. 24, it is set forth, that 'Robert Colquhoun the second was the eldest son of Walter Colquhoun, having served himself heir of line to Robert Colquhoun, his grandfather, the father of Walter Colquhoun, and thereby acquired right to the lands and estate of Camstradden, which had belonged to, and been possessed in apparency, as the legal heir and disponee thereof, by the said Walter Colquhoun, for three years and upwards, viz. from the day of October 1787 to the day of 1802, or at least for a period thereof exceeding the space of three years. Robert Colquhoun the second did thus become liable, under the *first branch* of the statute 1695, c. 24, for the debts of Walter Colquhoun his father, to the extent of the value of the estate: And that, farther and separately, the said Robert Colquhoun the second, by the proceedings and measures before narrated, by which he acquired right to, and vested himself legally with the right, title and interest which had belonged to his said father in the said lands and others, did thereby, in terms of the *second* branch of the foresaid statute, purchase by himself, or others for his behoof, a right to his said predecessor's estate, or part thereof, or to legal diligence or other right affecting the same otherwise than by the said estate being exposed to a lawful public roup, and as the highest bidder thereat without any collusion; and therefore the said Robert Colquhoun the second's said purchase constituted behaviour as heir; and he thereby, by making up a title to, and taking possession of the said lands, incurred a sufficient passive title, under the second branch of the statute, to make him represent the

'said Walter Colquhoun, his father, universally, and thereby ren- 27 Feb. 1835.
'dered himself liable for his whole debts.' The action concluded against R. G. Colquhoun, as representing his father, Robert the second, for L.2000 Dominica currency. Donald and Others v. Colquhoun.

Besides the defences on the merits, it was *pleaded* in defence—1. No representation on the passive titles of Walter Colquhoun was ever incurred either by Robert Colquhoun the second, or by the defender. 2. Walter Colquhoun was never in possession, either by himself, or others for his behoof, of the estate of Camstradden, and therefore no representation of him has been incurred under the statute.

The Lord Ordinary having heard parties on the closed record, pronounced this interlocutor:

'The Lord Ordinary having considered the closed record in 'these conjoined processes, and heard parties' procurators thereon, 'and thereafter made avisandum, and particularly considered the 'writs produced, finds, That the pursuers have not condescended on 'any facts, in connection with the deeds and writings produced, re-'levant or sufficient to infer a legal obligation incurred by the de-'fender, Robert Gilmour Colquhoun, or his father, the late Robert 'Colquhoun, for the debts of Walter Colquhoun, the alleged debtor 'of the pursuers, by representation or a passive title, either under 'the provisions of the statute 1695, c. 24, or on any other ground: 'Finds it unnecessary, in this state of the case, to call for proof as 'to the reality, legal subsistence, or effect of the bonds and judg-'ment sued on, as involved in the 4th, 5th, and 6th defences, and 'the corresponding pleas in law for the defenders: sustains the 'first and second defences; assoilzies the defenders, and decerns; 'finds expenses due,' &c.

Note.—'It may be thought that the objections to the constitu-'tion and subsistence of the debts sued on is prejudicial. But if 'there be not any sufficient facts in this record to render the de-'fenders liable for the debts of Walter Colquhoun, the defence of 'non-representation appears to be equally prejudicial with the ob-'jections to the validity of the debt. If the defenders do not re-'present the debtor, they are not bound to investigate the merits 'of the debt.

'The original action, raised in 1805, was laid in very general 'terms against Robert Colquhoun, as heir served, or executor con-'firmed, to his father and grandfather, as charged to enter, or as 'representing them on one or other of the passive titles. The sum-'mons contained no allusion to the act 1695.

'The supplementary summons, raised in 1832, proceeds on the

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'narrative of the former summons, and of a summons of wakening 'and transference, and is laid entirely on the act 1695 in its two 'branches. It is admitted that the defender, R. G. Colquhoun, 'represents his father; so that the question is, whether Robert the 'second represented Walter?

'The statute 1695 was an equitable infringement on the feudal 'law for the protection of creditors against the frauds of apparent 'heirs; and the authorities state, that 'it has received a strict in-"terpretation,' (*Ersk.* iii. 8. 94.) Walter Colquhoun was the heir-'apparent or conditional institute in the estate of Camstradden un-'der the entail 1774. He was the heir-apparent of line of his fa-'ther, and is said to have been the heir in a postnuptial contract. 'It is certain that he made up no titles to the estate; for, though 'a precept of *clare constat* as heir of *entail* was once made out in his 'name, it was not even delivered, and was never acted on; and it 'would have been inept according to the late decision. The ques-'tion, therefore, in the first branch of the act 1695, is, whether 'Walter was *three years in possession of the estate of Camstradden.*

'The Lord Ordinary understands the meaning of this in the sta-'tute to be, not that a man survives his predecessor three years, 'having the character of heir-apparent, nor even that he is so situa-'ted that he might have possession of the estate, but that, as a 'plain matter of fact, he *has the possession and enjoyment of it*, at 'least to some real extent. It is settled, on the one hand, that the 'possession of a tutor, (and it is said even of a protutor,) will be 'held the possession of the heir, (*Elchies*, 4, *Passive Title*,) and that 'the possession of a disponee of the heir will be taken as his pos-'session. On the other hand, it is equally settled, that the mere 'existence of a right of fee, where the liferenter has the actual pos-'session, is not in possession of the heir within the statute; M'Caul, 'June 26. 1745, *M.* 9748; Johnston, Dec. 17. 1733, *M.* 9809; 'and that the possession of a judicial factor in a ranking and sale 'will not infer the passive title in the heir passing by; Buchan v. 'M'Donald, Dec. 7. 1796. The Lord Ordinary thinks this last 'an important authority in the present case.

'The present case, independent of some specialties, is this: 'Robert the first had executed an entail reserving power to alter. 'Then he executed a trust-deed for the payment of his debts, an-'nuities and provisions. That deed may be defective in so far as 'it does not convey the property. But it was plainly *intended* to 'enable the trustees to take *entire possession* of the estate, and to 'draw all the rents and profits; and it expressly gives them power 'to sell the unentailed lands, taking the heir bound to concur with 'them in any measures necessary for extricating the trust. Now,

'the *fact* is, that these trustees did *take entire possession of the estate,* 'and of all the truster's effects; that they, and they alone, by their 'factor, levied *all* the rents; that they cut woods and sold them, 'and continued their possession, not only during the whole lifetime 'of Walter Colquhoun, but for at least eighteen years after his 'death. This is not a case in which there can be any doubt or 'ambiguity; for all the progressive accounts of the factors are re- 'gularly kept and preserved, and the Lord Ordinary has minutely 'examined them. Walter Colquhoun died on the 12th February '1802, (see Condescendence in first action, p. 8.) And whatever 'else there may be in the case, it is certain that, down to that date, 'and long after, the *whole rents, issues, and profits of the estate were* '*drawn by the trustees alone.*

'The Lord Ordinary is of opinion, that the possession of these 'trustees was not the possession of the heir. If, indeed, it could 'be shewn that the immediate purposes of the trust had been an- 'swered in Walter's lifetime, the idea would be intelligible, that 'after that they were possessing for the heir. But if the debts 'were not paid, and the annuities not provided for, the possession 'under such a trust was no more the possession of the heir, than 'the possession of a judicial factor was so in Buchan's case.

'The Lord Ordinary apprehends, farther, that even if the trus- 'tees had found it necessary to ask the concurrence of the heir to 'enable them to extricate the trust under the clause in the trust- 'deed, such concurrence, though given, would not have been made 'a possession by the heir, in the sense of the statute. But, in fact, 'no such thing took place. At first, the trustees made a minute, 'bearing that nothing could be done till Walter should be informed 'of the state of his father's settlements and affairs. But they went 'on to act upon the trust-deed; and the plain fact is, that Walter 'never attempted to take any possession, and did no act regarding 'the estate, except one to be afterwards mentioned.

'It is clear that, at first, and for many years, the income of the 'trust-estate was barely sufficient, and sometimes not sufficient to 'cover the annual charges on it, without the possibility of liquidat- 'ing any part of the capital debt; and in 1796, the trustees made 'a minute, bearing that it would be impossible to go on without 'selling some part of the unentailed lands, unless Walter chose to 'advance money. But Walter was a commissioned bankrupt, and 'advanced no money. By great good management, the trust affairs 'afterwards improved; and about the time of Walter's death, there 'was a considerable turn in its favour, chiefly by the sale of coppice 'wood. But at his death the debts were not paid, *nor was there even* 'an approach to the liquidation of them. For example, there was a

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'debt of L.2000 to Mr Dennistoun of Colgrain remaining, after 'payment of a sum to account of a larger debt, which was not ex- 'tinguished till the 2d of June 1820; and there were various other 'large debts and annuities, which remained burdens on the trust 'during many years after Walter's death.

'The trust, therefore, subsisted necessarily for its proper pur- 'poses during all the fifteen years that Walter survived his father. 'And how then could it be said, in any reasonable sense, that Wal- 'ter *possessed* the estate as heir apparent?

'The pursuers found on certain special circumstances.

'1. The trust-deed appointed the trustees to pay to the heir an 'annuity from certain slate quarries, but it was not acted on. It is 'very doubtful whether, in any view, this, though acted on, could 'have made a possession by the heir. The state of the trust did 'not enable the trustees to pay these annuities. But the conclusive 'fact is, that, while all the rents of the slate quarries are entered in 'the factory accounts, there is no trace of any part of them, or any 'annuity, or any money whatever, having been paid to Walter 'Colquhoun. If he *did not* ask and receive the annuities, the clause 'being in the deed could never constitute a *possession* by him.

'2. Certain bonds or bills were paid, in which Walter was a 'joint obligant with his father. The nature of these obligations is 'not ascertained. But Walter was a bankrupt. In respect of the 'creditors, these were *debts of Robert*, the father, and the trustees 'were obliged to provide for them. But surely the circumstance 'of their paying the interest, or ultimately the principal of those 'debts, for which *the truster was bound*, could never make a *posses- 'sion of the estate* by Walter, whether they might have a claim of '*relief* against his bankrupt estate or not.

'3. At an early period, the assignees on Walter's estate, seeing 'that there was scarcely any chance of benefit from the estate du- 'ring Walter's life, determined to sell the reversion; and on the '29th January 1789, they did sell it to Mr David Erskine for 'L.52, 10s. Mr David Erskine, in his settlements, declared that 'he held the right *not* for *Walter*, but, after payment of his outlays 'and expenses, 'for the benefit of *the children* of Walter Col- "quhoun;' and it was subsequently conveyed by Mr Erskine's tras- 'tees to *Robert* Colquhoun in 1811. The pursuers found on this 'transaction as bringing the case within the *second* branch of the 'statute; but they seem also to found on it under the first; and 'they say that the price was paid out of the rents of the estate. It 'would be very hard to convert such an act of the *assignees* into a 'possession of the estate, to create a passive title in the next heir, 'where there was nothing to possess as a reversion, and the money

'was, in fact, at first paid by Mr Erskine out of his own funds. 'The defender's counsel urged, that the sale of the reversion being 'considerably *within three years* after the father's death, rendered it 'impossible that there could have been three years' possession; and 'that if the price was paid from the rents as a reversion, it was only 'paid from the thing purchased, as a third party might have done. 'The Lord Ordinary doubts whether this argument is solid; be-'cause the possession of a disponee from the heir has been held to 'be imputable as his possession; and the pursuer's notion seems to 'lie in this subtlety, that the possession of the fifty guineas by the 'assignees, if paid from the rents, was a possession of the estate. 'But the plea is answered by the plain fact. There was no *reversion* 'to *Walter*, from which that or any sum could be paid. The deed 'of Mr Erskine's trustees bears, that his advances had been paid 'to them in 1802. Walter died on the 12*th February* 1802. (The 'date is blank in this record, but will be found in the pursuer's old 'condescendence above referred to.) Now, upon turning to the 'accounts of the trust, it appears that the debt to Mr Erskine, 'amounting to L.144, 18s., was paid on the 18*th June* 1802. At 'this time the trustees, so far as they held the estate for the heir, 'held it for *Robert* Colquhoun, not for *Walter*; and they were only 'enabled to pay this and some other debts by means of an instal-'ment of the price of copsewood, amounting to L.750, received on 'the 21*st May* 1802, three months after Walter's death. In this 'view of the point there seems to be no substance in it. The sale 'and the purchase were a mere speculation, and the conveyance by 'Mr Erskine's trustees was of no use or importance, except to put 'an end to the apparent title in Mr Erskine.

'The Lord Ordinary is therefore of opinion that no grounds 'have been laid for inferring representation under the first branch 'of the act 1695.

'The plea on the *second* branch of that statute appears to be al-'together untenable. What the statute contemplated was, not such 'a transaction as the sale and purchase of a reversion, but the pur-'chase of rights affecting the estate, held by *third parties*, to be 'made the ground of a title to the estate. But it is a sufficient an-'swer, at any rate, that *Walter* made *no* purchase, and none was 'made for him, the purchase being declared by Mr Erskine to have 'been, not for him, but for *his family*.

'The pursuers have alleged, in general terms, representation by 'actual intromission with Walter's effects; but the only special 'averment is, that Robert took possession of the furniture in the 'house of Camstradden. In the 11th article of the defender's state-'ment, which, though not admitted, is not denied, it is explained

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'that the house and furniture were held in lease by the unmarried 'daughters of old Robert, by a tack dated in 1781, subject to a 'power in the trustees to give the heir possession as a tenant for a 'fixed rent; and that one of these daughters is *still alive.* The 'tack seems not to be produced; but the estatement in the article 'is strongly confirmed by this fact, that, during the short time that 'Robert lived in the mansion-house, *he did pay a rent for it.* He 'was then acting as factor, and he charges himself with a rent of 'L.56, 10s. This part of the case therefore will not do; and any 'other allegations of intromission in the condescendence are a great 'deal too vague and indefinite, especially post tantum temporis.

'Much was said to the Lord Ordinary about a marriage-contract 'in 1741, and it was assumed that Walter could have reduced the 'entail. The entail probably could not have been reduced on this 'ground. But the point is foreign to the case. It is enough that 'Walter *never did reduce, or attempt to reduce the entail.* Neither 'was it ever reduced. The *title* made up by Robert under it was 'indeed reduced as inept, in consequence of its being by service to 'old Robert; and a fee-simple title having been in the meantime 'made up, and a bona fide sale made to a third party, the estate 'was found to be validly alienated. But so far from reducing the 'entail in respect of the marriage-contract, the Court expressly re-'*served the claim of the substitutes to the price.*'

The pursuers *reclaimed.*

Pursuers' Pleas.

Skene for pursuers.—The question is, whether, upon the facts as averred, there are grounds for holding that Walter was in possession so as to bring him under the act 1695. In no two cases which have occurred has the nature of the possession alleged been the same; and in all the cases the question of possession has been considered as attended with difficulty. Possession may be actual or constructive. It is not necessary that there shall have been actual possession, granting leases, and drawing rents, because the heir might not enter but sell the estate; and the possession of the disponee is held to be the possession of the heir; Yule, 10th Feb. 1758, (5299); and possession by a protutor has also been held sufficient; *Elchies*, No. 4, *Passive Title*, M'Brair.

Robert (the first) left a trust-deed; but the trustees had no conveyance to the estate, and no title of possession, but a mere assignation to the rents, which must have terminated on the death of the granter.

They remained in possession solely upon consent emanating from Walter, and their actings were rendered valid by communication

with Walter, and by his authority. The letter in answer by Walter is lost; but there can be no doubt the trustees communicated with him as to the affairs, and acted for his benefit. Suppose Walter had granted a trust-right, these trustees were virtually in that situation, and no matter what the quantum of benefit was derived by Walter: it was just as if Walter had entered, paid the debts, and exercised other acts of management; and more than this, it is not disputed that the management was beneficially conducted for Walter.

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Then, again, on Walter's bankruptcy the right fell to his assignees, who sold it with Walter's concurrence; no matter for what price, and no matter though the understanding was that Mr Erskine had purchased for the benefit of the family. The estate thus passed to Walter's disponee, just as an heir looking into the state of his ancestor's property, finds it small, and sells it to a third party, who enters and possesses. There is thus no distinction betwixt this case and that of an heir selling, when the disponee's possession is the heir's possession. Unless cases of constructive possession are to be struck out of the law, this case clearly comes under either branch of the act.

Dean of Faculty. — This case must have been misunderstood, otherwise it might have been made much shorter; for it is clear, even upon the assumptions of the pursuers, that it comes under neither branch of the act. The aspect of the case upon the *second* branch of the act is the most important, and is quite conclusive. It is admitted, and even set forth in the summons as the ground of action, that the purchase was made by Robert (second,) as for his behoof, and that this purchase *by Robert* constituted behaviour as heir; thus proceeding on the supposition that Robert's purchase could make him liable for the debts of Walter. Now, upon a right construction of the act, it is evident, that if the purchase had been by Walter, that would have made him liable; but if the purchase was made for a third party, other than the heir, and the price not paid out of the funds of the heir, that third party could not be liable. The deeds shew that it was a sale by Walter's assignees, and not a purchase by Walter, but by another party for the benefit of Robert, and not of Walter.

Defender's Pleas.

Previous to this, Walter had not connected himself with the property. He was the heir unentered, and had no possession. The power of attorney by Walter in 1785 could not constitute a lucrative title to him: it was a mere ratification of his father's settlements, and of the powers of the trustees to pay off the debts of his father. There is a large class of cases to shew that nothing done by the heir, if only to assist his father's trustees in the performance of

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the trust, can subject him; Hall, 19th Nov. 1760, (9730); Blount, 26th Feb. 1783, (9731); Gordon, Jan. 1789, (9733). Walter would thus have been entitled to a general representation to validate the trust-deed without incurring liability.

Defender's Pleas.

Walter became bankrupt in the year after his father's death, a fact of no small moment in the question of possession. The assignees had to consider the state of Robert the father's debts, and the possibility of any reversion; and, after consideration, they resolved to sell what was a hopeless and useless chance. It is quite clear, from the terms of the statute, that any act by the assignees of the bankrupt, in selling such reversionary interest, could not render the bankrupt liable. A direct purchase, even by the heir, will not necessarily subject that heir; for the object of the statute was to prevent the heir, by collusion, privately acquiring for an undervalue a right to the estate. It is essential, first, that the purchase shall be made with the funds of the heir; and, secondly, that it shall be made for behoof of the heir himself. But this was not a purchase by, but a sale for the heir; and it would have been necessary to shew that the right purchased was held for Walter. The act does not prevent any substitute heir coming forward and purchasing without incurring representation.

Any right in Walter was thus completely extinguished by the sale in 1789, and this strikes at the root of the action on both branches of the act, being destructive of the allegation of the requisite possession by Walter, and also of a purchase by or for Walter, which could alone have brought it under the act. Walter was not the ancestor last infeft, or the immediate predecessor, to whom Robert (second) stood in the relation of apparent heir; for Walter himself was truly the apparent heir, who, being unentered, might, by a collusive purchase, have incurred a passive title.

Lord Glenlee.—Certainly.

Dean of Faculty.—Then as to the alleged possession by Walter; but this is superseded by what has been said.

Skene.—We have the heir's possession, along with the disponee's possession beyond the three years.

Lord Glenlee.—Aye; but it must be a voluntary disponee.

Opinion of Court.

Lord Justice-Clerk.—I am perfectly satisfied. The act is not applicable to the circumstances of this case. There was no fraud or collusion, and nothing improper in regard to the disposal of the reversionary right. The assignees were doing their duty. They, being well informed as to the state of affairs, fix a price, certainly rather a whimsical one; but they chose to accept of it as the price of the reversionary interest, which was accordingly sold by the as-

signees, and purchased by Mr D. Erskine, for the benefit of the children of Walter. Mr Erskine coming forward to perform a friendly act for the benefit of the children, seeing the affairs in disorder, acted kindly, as one of the trustees in old Robert's settlement. He advances fifty guineas for it, and a conveyance is made out. I cannot look on this as the voluntary act of Walter. He could have been compelled by the assignees to sign the conveyance along with them; and he did sign it. It is demonstrated in the clearest manner by the expressions in Mr Erskine's conveyance, that he held the reversionary right for the children of Walter, and not for Walter himself. It appears to me, if we are not to depart from the act, and make a purchase and sale, the same thing as a voluntary conveyance, it is impossible to bring this under the second branch.

It is undeniable that, at the time of the conveyance, Walter could not have been three years in possession. All that took place subsequently is of no consequence. If Walter had been asked, in 1796, if he could give any assistance; suppose we had his answer, that he could give no assistance, what would be the effect of that? All allegations of subsequent acts of the trustees are of no consequence. I cannot find any ground for differing from the Lord Ordinary. Some nice points have been mooted, but I cannot find any case which will affect the judgment here.

Lord Meadowbank.—I am of the same opinion. The cases cited for the pursuers cannot apply at all.

Lord Glenlee.—I concur most entirely. At the same time I must admit, that the Dean stated a strong confirmation, when he adverted to the circumstance, that Walter's possession was totally extinguished. In the first place, I agree on the grounds stated by the Lord Ordinary. Walter was never, in any common sense understanding of the word, in possession. I am quite satisfied of that. What is done in 1789 confirms the idea, that the first branch of the act is out of the question. The Lord Ordinary does express some doubts of the effect of a voluntary disposition by Walter, and there a different case would have arisen. But I can no more consider that there was any representation incurred by any thing done here, than if the estate had been adjudged. Could a creditor's adjudication become Walter's possession?

By the second branch of the act, the law counteracts any attempt on the part of an apparent heir to defeat his liability, by possessing and remaining unentered, or by purchasing otherwise than lawfully, and without collusion. The heir possessing his predecessor's estate, though unentered, or purchasing illegally and collusively, subjects himself, by such possession or purchase, to the passive title; but that did not occur here.

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Opinion of Court.

Lord Medwyn.—The passive representation introduced by the first branch of the act 1695, was supplementary to the gestio pro hærede, (which, being penal, does not affect the heir,) and applies, provided the heir-apparent was three years in possession. The heir must have actually possessed, naturally or civilly. Possession by a tutor or a trustee, for his behoof, is his possession; so is a disponee's possession proceeding from him; Yule, 10th Feb. 1758. Now, it appears that here the trustees of the ancestor, having an assignation to the rents, drew those rents, which were not sufficient for the debts and burdens; and that Walter had not been in possession, nor derived any benefit from the estate, when, within three years from his father's death, he became insolvent. His interest in the succession was sold by the assignees, and purchased by a friend for fifty guineas, for behoof not of him but of his family. Walter died in 1802, without any change of possession; the trustees still drawing the rents and applying them to pay off debts. After his death, the trustees pay up the purchase-money of his life-interest, and the right is conveyed to the trustees in 1811. Now there was no possession by the purchaser of Walter's interest during his life, which can be pleaded as Walter's possession by his disponee. Neither was the sale a voluntary one; it was just as if a creditor had adjudged his life-interest in the estate, which never would have been reckoned his possession in terms of this act, so as to make his heir passing him by liable for his deeds.

As to the plea under the second branch of the act, the object of which was to obviate the defence of the apparent heir ascribing his possession to a right acquired by or for him, instead of his title as heir, there seems as little room for a representation of Walter on this ground. Walter was the seller along with his assignees, and not the purchaser or acquirer of the right; and his interest in the estate was purchased not for him, but for his family. He never possessed in virtue of it: it never was made over to him, nor was the price paid out of his funds, nor till after his death; and the conveyance to the trustees in 1811 was for behoof of Robert. This transaction, then, can infer no obligation so as to make him or his heir liable in Walter's obligations.

Judgment. The *Court* adhered.

Lord Ordinary, *Moncreiff.* Act. *Skene* and *Christison.* *Wm. Ranny*, W. S. Agent. Alt. *Dean of Fac. (Hope,)* and *Sandford.* *Alex. Scott*, W. S. Agent. *T.* Clerk.

R.

FIRST DIVISION.

No. LXXI. *28th February* 1835.

ROBERT DOBSON AND OTHERS
against
ROBERT CHRISTIE, TRUSTEE ON THE SEQUESTRATED ESTATE OF ROBERT ALLAN AND SON.

BANKRUPT.—CONCURSUS DEBITI ET CREDITI.—CASH-CREDIT.—COMPENSATION.—*Parties being taken bound, as co-obligants, in a cash-credit in favour of one of them,—held, on the bankruptcy of the bankers, and on a charge by their trustee against the party who held the cash-credit for the balance due by him, that the other obligants were entitled to plead compensation on a balance due to them on their deposit-account with the bank, so that the balance of one account might be imputed against the other, and a bill of suspension passed accordingly.*

JOHN LUNN, Robert Dobson, Richard Fraser, and William Traquair were co-obligants in a bond for a cash-credit for L.500, with Robert Allan and Son, to be kept in the name of Lunn; and, on the other hand, Dobson and Traquair were creditors, on deposit-account with Allan and Son. Upon the bankruptcy of the latter a balance of L.397 : 5 : 9 was due by Lunn, while Dobson and Traquair were creditors of the bank to a larger amount.

The trustee on Allan's estate having charged Lunn for the balance due on the cash-credit, a suspension was brought in his name, and in those of Dobson, and of the representatives of Traquair and Fraser, who *pleaded*—That the balance on the one account should be imputed against the other, and a settlement made of the debt as it should then stand. Whatever rights of relief the different parties in the cash-credit might have inter se, there was no difference between them in a question with the bank, they being all equally debtors for the balance on the cash-account, and all liable singuli et solidum for the whole debt. Every draft made by the complainer, John Lunn, upon the account created a debt, not merely against him, but against each and all of the obligants, who were all bound by his acts; and, all being bound to pay, were also entitled to discharge the debt, or to plead in compensation a balance due by the bankrupts to themselves. It was plain that the

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charger could not have legally enforced full payment of the balance of the cash-account from the complainers, Dobson and Traquair, and at the same time have paid only a dividend on the balance of their respective accounts; but the right of Dobson and Traquair to insist that the one balance should be set off against the other could not be defeated by this indirect way of making a demand upon the complainer Lunn alone. A demand upon one was a demand upon all; and the parties now appearing had a distinct interest that the accounts should be settled in the way contended for, and to be relieved of the hardship of being held liable for full payment of a balance in which they were debtors, and of being put off with a dividend on a balance on which they were creditors; *Bell*, ii. 111-129, et seq. 4th ed.

Defender's Pleas.

It was *answered*—1. That Lunn was the true and proper debtor in the cash-account, and bound to relieve the others, who were only his cautioners. All they could ask of him was to pay up the cash-account, and thereby relieve them of their obligations; but they had no right to interfere as between the charger and Lunn, unless they had been called upon for payment; nor were they entitled to plead compensation with a private debt of their own, on the balance due by Lunn. 2. That the balance on Lunn's account having varied on both sides since the death of Traquair and Fraser, no debt could be stated against their representatives: no demand could be made against them, and they had therefore no right to appear in the present suspension: And, 3. That no money having been actually received by Dobson, Fraser, or Traquair, or by the representatives of the two latter, by means of Lunn's cash-credit, they were not real debtors under the bond, but liable only subsidiarie.

The Lord Ordinary 'refused the bill,' and added the following note:

Note.—'The suspension is only of a charge—not of a threatened 'charge, and therefore does not apply to any suspender except Lunn, 'who alone has been charged. Independently of this, each of the 'obligants being liable for the whole debts, it is competent for the 'charger to proceed against any one of them; and it is not alleged 'that Lunn, who has been selected, (he being the person for whose 'behoof the credit was granted,) has any ground of compensation. 'When any obligant to whom money is due by the bankrupt shall 'be charged, that person will have the benefit, whatever it may be, 'of this circumstance. It is admitted that the bankrupts owe Lunn 'nothing.'

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The suspenders *reclaimed*, and at the advising *Lord Gillies* observed—That, from the circumstance of the suspenders being, on the one hand, bound jointly and severally, and liable each to be called upon directly for payment, they were, on the other hand, entitled to offer payment of the debt, and, in the same way, to plead compensation. All that the bank had in view, in taking the bond in this form, was to secure themselves; but when they took the benefit of such a security, they must have taken it with its legal consequences. By taking all the parties bound as joint obligants, all were entitled to pay, and also to compensate.

Opinion of Court.

Lord Balgray.—It is true that all the suspenders were not entitled to operate on the cash-credit, which was taken in the name of Lunn. But Allan and Son could not have refused to take payment from any one of the co-obligants, and in this respect it might be said that Lunn was merely a mandatary. The object in taking them all bound as co-principals was merely to get the better of the benefit of discussion, and division, which the parties would otherwise have had. The point, however, was an important one, and his Lordship would rather take time to consider it.

Lord Mackenzie had formed a clear opinion, which coincided with that of Lord Gillies; and he had the less doubt about it, as the point merely regarded the passing of a bill. The view which his Lordship took of the case was, that the bank having taken an express obligation from all the parties to the bond to pay the account, it did not signify to which of them the cash-credit was given. It would have been quite incompetent and irregular for any third party to have come forward; but here all the parties were directly and instantly bound to pay. Any of them, therefore, had a right to pay, and, on the same principle, to plead compensation on any debt due by the bank to them.

The *Lord President* also concurred, and considered that it had been deliberately settled, by the last decisions of the Court, that wherever a party was bound, as a co-obligant, in payment of a debt, he was entitled to plead compensation on a debt due to him.

Judgment.

The *Court*, therefore, altered the interlocutor reclaimed against, and remitted to the Lord Ordinary to pass the bill.

Lord Cockburn, Ordinary. For the Suspenders, *Buchanan*. Alt. *Wood*. *James Pedie*, W. S. and *John Wight*, W. S. Agents. *D.* Clerk.

C.

SECOND DIVISION.

No. LXXII. *3d March* 1835.

WILLIAM JOHNSTON, LAMB'S TRUSTEE, *against* WILLIAM GRANT.

BANKRUPT.—PROOF.—OATH.—*Circumstances in which a reference by defender to oath of a bankrupt, whose trustee was pursuer of the action, was held incompetent.*

WILLIAM JOHNSTON, trustee for the creditors of James Lamb, manufacturer in Arbroath, a bankrupt, brought a reduction, on the act 1796, of a vendition of a share in a vessel, and of an assignation by Lamb to William Grant, tailor in Arbroath, his brother-in-law, whereby he gave Grant power to recover and receive certain linens or similar goods consigned by Lamb, or the proceeds thereof.

After certain procedure, Grant, the defender, offered to refer to the oath of James Lamb, the bankrupt, whether, on the 21st February 1832, the defender did advance to Lamb the sum of L.30, on receiving delivery of the assignation to the linens.

Johnston, the trustee, opposed the reference as incompetent, in respect that Lamb, the bankrupt, was not a party in the cause; that he could not be adduced as a witness against his creditors; and that he was disqualified, from relationship to the defender.

The Lord Ordinary having considered the minute and answers, and heard counsel, found the reference to be incompetent.

Note.—'The Lord Ordinary thinks the reference inadmissible; '1. Because of the whole circumstances of the case, which are sus-'picious; 2. Because the bankrupt, whom it is proposed to examine, 'is the brother-in-law of the pursuer, who refers to him; 3. Be-'cause the bankrupt has now no interest in the matter, having con-'veyed all he had to his creditors on obtaining a cessio. The case 'of Mein, 11th July 1829, makes relationship an objection; and 'that of Ferrier, 10th Feb. 1831, was of interest.'

Judgment. The defender *reclaimed;* but the *Court* adhered, reserving all questions of expenses.

Lord Ordinary, *Cockburn.* Act. *Skene* and *Neaves.* *James Morgan*, Agent.
Alt. *Keay* and *Small Keir.* *John Brown*, Agent. *T.* Clerk.

R.

FIRST DIVISION.

No. LXXIII. *3d March* 1835.

MRS ELIZABETH SINCLAIR AND OTHERS *against* BROWN AND OTHERS.

PRESCRIPTION.—DECREE IN ABSENCE.—PUPIL.—MINORITY.—PERSONAL OBJECTION.—1. *Circumstances in which a decree obtained against a pupil was considered as a decree in absence, and as such held liable to be opened up within forty years.*

2. *In estimating this period, found, that minorities were to be deducted.*

3. *Circumstances in which transmissions of property, following on these decrees, in favour of bona fide onerous purchasers, were held not to bar the heirs of the pupil from their right of challenge.*

In January 1775, Henry Hay, proprietor of the lands of Auchinstarry, executed a disposition of the same in favour of his brother-in-law, Henry Sinclair, (grandfather of the pursuers). This disposition was in the form of a sale; but, as alleged by the defenders, no price was paid for it, and it was a trust for the benefit of the seller, who immediately thereafter went to America. Sinclair was infeft, and his infeftment recorded 10th May 1775. Prior to this disposition, Henry Hay was debtor to Thomas Baird, who, in 1785, obtained against him a decree of adjudication of the lands of Auchinstarry.

In July 1786 Baird obtained decree of certification contra non producta, in an action of reduction instituted against Henry Sinclair junior, (son of the original disponee, and) father of the pursuers, reducing the disposition and sasine of 1775.

In January 1788, Alexander Baird, after serving heir to his father, Thomas Baird, granted a full conveyance in favour of William Hay, (son of the said Henry Hay,) of the debt contained in the adjudication, with the decrees of adjudication, certification, and reduction themselves.

In February following, William Hay, after serving heir to his father, brought another action of reduction-improbation and declarator against the said Henry Sinclair, (then in pupillarity,) and his tutors and curators, and against his mother and stepfather; Henry Sinclair and the two latter being cited personally, and the tutors

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and curators edictally. Appearance was made for the defenders generally, the production was satisfied, and decree of reduction was pronounced, 'the defenders failing to compear.'

William Hay then expede a charter of confirmation and precept of clare constat, as heir to his father, and was infeft, (11th April.)

In the same month William Hay sold the lands to Cowburgh, who obtained a disposition, and was infeft, (29th April). Cowburgh sold to Dr Lapsley, whose son was infeft, (March 1803). The son's commissioners sold to Campbell, who was infeft, and obtained confirmation 1820. Campbell disponed to the defenders, Brown and others, who obtained infeftment, and made a transaction of sale with the defender, Mr Murray Gartshore.

In these circumstances, the pursuers, (the daughters and representatives of Henry Sinclair junior, against whom the above decrees were obtained,) brought the present action, for setting aside these decrees, and the various titles which had been completed to the property, subsequent to the disposition in 1776, in favour of Henry Sinclair senior, in order to enable them to take up the lands under that deed. It was stated by them, and not denied, that when the decree was obtained against their father, Henry Sinclair junior, in 1788, he was between eleven and twelve years of age, and that he died in April 1806.

In defence, the defenders, (the trustees of the last disponee, Mr Campbell,) pleaded a title to exclude, founded upon the decree of reduction in 1786, and upon the decree of reduction-improbation in 1788.

The Lord Ordinary pronounced the following interlocutor and note: 'The Lord Ordinary having considered the closed record, 'and heard parties' procurators thereon, and thereafter made avi-'sandum with the process, sustains the title to exclude, founded by 'the defenders on the decree of certification, dated 19th July 1786, 'and the decree of reduction-improbation and declarator, William 'Hay against Henry Sinclair and others, dated 27th February '1788, produced, together with the several conveyances executed, 'and titles made up posterior thereto, and prior to the execution of 'the summons in the present action on the 8th February 1832, as 'set forth and produced in this process: Therefore sustains the de-'fences, assoilzies the defenders, and decerns; finds expenses due, 'and remits the account, when lodged, to the Auditor to be taxed.'

Note.—'Baird obtained a decree of adjudication of the lands in 'question in 1785. This right being apparently affected by a dis-'position of Henry Hay, the debtor, in favour of Henry Sinclair, 'his brother-in-law, in January 1775, on which infeftment had 'passed, Baird brought a reduction of these titles, and obtained de-

'cree of certification against Henry Sinclair, the son of the origi-
'nal disponee, in July 1786. Baird then made a full convey-
'ance to William Hay; and this William Hay, after being served
'heir to his father, brought another action of reduction-improba-
'tion and declarator against Henry Sinclair, then said to be a minor
'or pupil, and his tutors or curators, if he any had, and against
'his mother and his stepfather. The extracted decree bears that
'Henry Sinclair, Margaret Hay, and David Auchinvole were *per-*
'*sonally cited*, and the tutors or curators edictally. Appearance
'was made for the defenders generally, and the production was sa-
'tisfied; but no order was made for the defenders to abide by the
'writs as in an improbation on forgery. Great avisandum was made,
'and the case remitted for discussion; and then the extract bears
'that decree was pronounced, reducing, improving, &c. 'the de-
"fender failing to compear.' This was followed by a charter of
'confirmation and precept of *clare constat* in favour of William
'Hay, on which he was infeft in April 1788. William Hay sold
'the lands to Cowburgh, who obtained a disposition, and was in-
'feft, April 29. 1788. Cowburgh sold to Dr Lapsley, and his
'son was infeft in March 1803. The son's commissioners sold to
'Campbell, who was infeft and obtained confirmation in 1820.
'Campbell disponed to the defenders, Brown and others, who ob-
'tained infeftment, and made a transaction of sale with the defender,
'Mr Murray Gartshore.'

'Henry Sinclair, against whom the decree in 1788 was obtained,
'is stated by the pursuers (Cond. Art. 18 & 20,) to have been of the
'age of between ten and eleven, and to have died on or about the
'27th April 1806, having thus survived the date of the decree, and,
'according to the pursuers' statement, at the age of twenty-eight.

'In this state of the case, the question is, whether the pursuers
'are entitled now to open up the decrees obtained in 1786 and
'1788, to the effect of setting aside the titles on which the *pursuers*
'and their authors have been in possession of the property, as one-
'rous purchasers, for considerably upwards of forty years before
'the date of the summons. The Lord Ordinary thinks that it
'would be a singular case of hardship if this could be done, or if
'these third parties purchasers were *post tantum temporis* required
'to support the decree of reduction by an investigation of the merits
'of them—a thing next to impossible, however good the grounds
'might be; but it does not appear to him that the plea of the pur-
'suers can be sustained in point of law.

'The pursuers say, 1*st*, That the decree was against a pupil
'having no tutors or curators, and therefore null, as no tutor was
'appointed. But it is settled by the case of Sinclair against

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'Stark, Jan. 15. 1828, that the decree was not thereby rendered 'null; though, if it was a decree in absence, it might be liable to be 'opened up on the merits.

'But the pursuers plead, 2*d*, That the decree was in *absence*, 'and that the writs having been produced, and no order made for 'the defenders to abide by them, it has not the force of a proper 'improbation. The defenders say that it was not a decree in ab- 'sence, in so far as appearance was made for all the parties, and 'the production satisfied. There may be some doubt on this point, 'according to the principles held at that time. But as there was 'no discussion on the merits, and no proof taken, it rather appears 'that it must be held that it was a decree in absence. But it does 'not appear to the Lord Ordinary to follow from this, that it may 'be opened up at this distance of time, and in the circumstances of 'the case.

'The defenders plead *negative* prescription on the old statutes '1447 and 1467, and maintain that minority cannot be pleaded 'against prescription in such a case. This plea may deserve at- 'tention; but as the reduction affected the titles of an heritable 'estate, the Lord Ordinary rather thinks that the act of 1617 must 'govern.

'But supposing this to be so, the Lord Ordinary apprehends 'that there is another principle of the law sufficient for the decision 'of the cause. A decree in absence may be opened up by a man 'who was of full age, as well as by a minor; and in the case of 'Campbell against the representatives of Graham, Dec. 5. 1752, '(*M.* 9021,) it was even laid down, 'that *quoad* a decree in absence, "minority cannot enter into the question, because a major may be "reponed *quandocunque* against a decree in absence, upon paying "expense and damage, and that a minor can have no stronger "privilege.' Perhaps this may not be perfectly accurate; but the 'Lord Ordinary apprehends it to be clear, that if a man of full age 'would not be heard in a reduction of a decree as in absence, after 'acquiescing in it for twenty years, and seeing the property sold 'and resold to third parties on the faith of the decree, as little will 'any party be allowed to challenge a decree which was acquiesced 'in by the party many years after he became of age, and till his 'death; and farther acquiesced in by his heirs during many years, 'and after titles had been repeatedly constituted in favour of third 'parties purchasers. The Lord Ordinary is humbly of opinion, 'that though by our law a decree in absence may be opened up to 'the effect of inquiring into the merits of it, the demand must be 'made *debito tempore*, within some reasonable time. The principle 'of the thing is, that accidents may occur to prevent the party from 'appearing, and that he ought not to be foreclosed by a decree

'pronounced without discussion, if the other party can be replaced 3 Mar. 1835.
'in the situation in which he was. But to give this the least colour
'of justice, the claim must be made within such time as to render it Sinclair and Others v.
'reasonably possible to restore both parties. The Lord Ordinary Brown and Others.
'never heard that it was a general rule that any decree may be
'opened up at any time within forty years, and in *any* circum-
'stances, *merely because* it was allowed to pass in *absence*. Such a
'rule would lead to the most intolerable injustice. Parties would
'keep up their case till the means of contradicting it were lost.
'Accordingly, in the case of Campbell against Graham's represen-
'tatives, above mentioned, where there was no room for prescrip-
'tion, and the defender in the action was an infant, 'the Lords
"sustained the defence, that the minute of sale was at an end by
"the decree of reduction, and by the after sale to Edward Cutlar,
"in consequence thereof.'

'In the present case the parties were cited personally; the mi-
'nor's mother and stepfather appeared, and entered appearance for
'him; the decree was acquiesced in, not only till he came of full
'age, but for eight years after he was of age, and till his death;
'and after that, it was acquiesced in for twenty-six years more;
'while, in the meantime, the property had been repeatedly sold on
'the faith of the decree, and titles by charters and sasines com-
'pleted. Under these circumstances, the Lord Ordinary is of opi-
'nion, that *post tantum temporis*, and in respect of the sales made
'and titles created, it is too late for the present pursuers to chal-
'lenge the decrees as decrees in absence.'

The pursuers *reclaimed*, and the *Court* ordered cases.

The pursuers *pleaded*—1. It is plain that the decree obtained Pursuers' Pleas.
by Baird in 1786 was a mere decree of certification contra non producta in absence; for, although the summons was taken out to see, the production was not satisfied, nor was any further appearance made for the defender. And under the circumstances which occurred in the said action, (as set forth in the note of the Lord Ordinary above recited,) there being no discussion on the merits, and no proof taken, the decree in 1788 has in no respect the force of a proper improbation, but is a mere decree of simple reduction pronounced in absence; *Ersk.* iv. 1. 69; *Bank.* iv. 36. 6; Chirurgeons of Glasgow *v.* Reid, 17th Dec. 1701, *M.* 12,193; Smith's Representatives *v.* Semple, 14th Dec. 1711, *M.* 12,194; *St.* iv. 20. 19; *Ersk.* iv. 1. 85; iv. 4. 69; Henderson *v.* Henderson, 20th June 1672, *M.* 6755; Grant *v.* Grant, 10th June 1675, *M.* 6756; Dunbar *v.* his Vassals, 20th Dec. 1662; E. Lauderdale *v.* his Vassals,

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5th Dec. 1667, *Stair's Dec.* and *Fol. Dict.* i. 450, 451; Henderson v. Knockhill, 1st July 1628, *M.* 8969.

2. The decrees in question being thus obtained in absence, might competently (unless the challenge were barred by special circumstances) be opened up by reduction at any time within forty years, even although they had been pronounced against a party of full age, and valens agere. Unless this be held to be the period within which a challenge may be brought, there are no data for limiting the period at all. To say that it ought to be limited to a reasonable period, would be to introduce a new prescription into the law of Scotland, founded on the most uncertain of all rules. It would, in every case, be made a question, what should be held as a reasonable time, and this would be differently decided by different judges, according to their peculiar views.

But whatever might have been the effects of the decreet in 1788, if obtained against a party of full age, and valens agere, such a decree cannot be held, any more than the certification of 1786, as a res judicata, or conclusive, having been pronounced against a pupil undefended, without tutors or curators, and without even a tutor ad litem. The personal citation of the pupil himself could be of no avail; and that of his mother, Margaret Hay, and of his stepfather, was equally unavailing, they not being his tutors, nor having any right to appear for him; and the terms of the edictal citation, as appearing from the extract decree 'against the tutors and curators 'of the said Henry Sinclair, if he had any,' prove both that he was in pupillarity at the time, and that in truth he had no tutors, or they would have been named; and, in these circumstances, to render the proceedings at all binding upon him, it was necessary that a tutor ad litem should have been appointed; *Stair*, i. 6. 31; *Ersk.* i. 7. 13. 34. 38, and 43. But there is no evidence that this was done, and it is not even alleged by the defenders. The doctrine as to the nullity both of judicial and extrajudicial acts of pupils not properly authorised, is confirmed by numerous decisions; Bruce, 24th Jan. 1577, *Fol. Dict.* i. 579; Ker v. Hamilton, 25th Feb. 1613, *M.* 8968; Lockhart v. Lockhart, 25th July 1626, *M.* 8958; Fleming v. Forrester, 17th July 1661, *St. Dec.* i. 52; *Fol. Dict.* i. 586; *M.* 9042; Aitken v. Hewat, 8th Jan. 1628, *Durie*, p. 324; *M.* 8908; Jack v. Haliburton, 1743, *Kam. Rem. Dec.* ii. 62; *M.* 9003. The more recent decisions also establish the necessity, in an action against a pupil without tutors or curators, of appointing a tutor ad litem, so as to prevent the decree from being funditus null; Bannatyne, 14th Dec. 1814; Macturk v. Marshall, 7th Feb. 1815; Agnew v. Earl of Stair, House of Lords, 31st July 1822, *Shaw's App. Cases*, i. 333; Rankin, May 1821, *Sh.* and

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D. i. 43; and although not a direct authority on the point, the principle recognised in the case of Maule *v.* Maule, 7th July 1831, is applicable to the present case. The circumstances of the case of Sinclairs *v.* Stark, 15th Jan. 1828, (referred to by the Lord Ordinary,) were so far different from the present, that the extract decrees now sought to be reduced bear that appearance was entered for the pupil; whereas, in the case of Sinclairs, the ground on which the majority of the Consulted Judges held that the decree was not intrinsically null, was, that no appearance had been entered for the pupil, so that no tutor ad litem could be appointed.

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3. In calculating the prescriptive period within which the decrees founded on by the defenders may be challenged, the minority of the parties in right for the time to bring that challenge is to be deducted; and, on this principle, little more than twenty years have elapsed since the date of the decreet. Minority is equally applicable to the prescription introduced by the statutes 1469 and 1474, as to that introduced by the act 1617, except that, under the last statute, the burden of proving forty years' majority is expressly laid on the party pleading the prescription; but the first-mentioned statutes do not govern a question like the present of feudal rights, which falls under the express words of the act 1617; *Ersk.* iii. 7. 8; *Kames's Stat. Law*, p. 291; *Mackenzie on the Statutes*, p. 67.

4. Neither can the present challenge be held to be barred by sales and transferences which have taken place; and the doctrine laid down by the Lord Ordinary on this point is new, and would lead to dangerous results. This point is quite distinct from the question as to the effect of the lapse of time; and if the pursuers are not entitled to be heard now on the merits of the decrees, they could not have been heard thereon within twelve months after they were pronounced, provided the subjects had passed into the hands of singular successors. But the defenders do not found on homologation of any kind, but on mere acquiescence in the acts of the opposite party; for it is not alleged that the pursuers, or their authors, were parties to any of the transferences in question, or in any way homologated or recognised them. Even in the case of moveable rights, the doctrine of acquiescence is of doubtful effect; but to apply it in a question of feudal rights, would be to introduce a new and indefinite kind of prescription, which would shake the security of heritable property; Lyndsay *v.* Ewing, 15th Jan. 1770, *M.* 8997; Agnew *v.* E. Stair, House of Lords, *Shaw's App. Cases*, i. 333.

Answered—

Defenders' Pleas.

The decree in 1788 cannot be considered as a decree in absence. Appearance having been made for the defender, and the production

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satisfied, the quasi contract between the parties was entered into, whereby the Court were enabled to pronounce decree as a res judicata upon the validity of the deed; *Ersk.* iv. 1. 69; A. v. B, 16th June 1618, *M.* 6748; Glendinning v. Gordon, 5th Jan. 1699, *M.* 6744; Preston v. Erskine, 24th Nov. 1710, *M.* 6747; *Darling's Form of Process*, ii. 379. After the time which has elapsed since the decrees thus obtained were pronounced, it is not now competent to open them up; but, even considering them as decrees in absence, there is no authority or principle for the doctrine laid down by the pursuer, that a decree in absence can at any period be opened up within the term of the long prescription; and, in many cases, this doctrine would give rise to great injustice. According to former practice, a direct reference to oath was contained in gremio of the summons; and one of the certifications was, that if the defender did not appear, he should be held pro confesso; and accordingly it has in many cases been held, that where the defender was personally cited, and afterwards died, the decree in absence against him could not be opened up by his representatives; Goldie v. Macdonald, 13th Jan. 1758, *M.* 12,195; Blair v. Common Agent of Kinloch, 23d July 1789, *M.* 12,196; Macdonald v. Id., 4th April 1790, *M.* 12,196; Campbell v. Graham's Representatives, 5th Dec. 1792, *M.* 9021; but the general reasoning on this point is fully stated by the Lord Ordinary. But,

2. Decree of certification and of reduction-improbation, although pronounced in absence, having been pronounced against defenders who were personally cited, and are now dead, cannot be set aside, especially when more than forty years have elapsed since its date; a decree of improbation being considered of so much importance to the security of landed rights, that it can hardly be opened up, whether pronounced in absence or not; *Stair*, iv. 20. 4; *Ersk.* iv. 1. 21; Rankine v. Crawford, 16th Jan. 1735; *Elch.* ii. 202; Auchintorry v. Bruce, 31st Jan. 1622, *M.* 6734; Glendinning v. Gordon, 5th Jan. 1699, *M.* 6774. In these cases the same effect was given to a decree of improbation as to a decree of certification. The one is held to be equally irreducible with the other; and, consequently, if the decree of certification is held to be a decree of that nature, that (although pronounced in absence) the party cannot be reponed against it, even although he makes the production de recenti, a decree of improbation, pronounced after the deed has been actually produced, cannot be set aside after a length of time, and especially if it has been acted upon, and received as a title upon which property has been disponed.

3. A decree of certification and reduction-improbation cannot be set aside upon the allegation that it was pronounced against a

minor to whom no tutor ad litem had been appointed, when possession has followed, and the property has been sold, trusting to the security of the decree, and the possession following thereon. All that the law requires is, that the minor should be called, along with his tutors and curators, if he has any; and an edictal citation against the last is sufficient; *Stair*, iv. 38. 23; *Ersk.* iv. 1. 8. A minor, when properly cited, is not considered in a different situation from any other litigant, if the proceedings are otherwise regularly conducted; Henderson *v.* Knockhill, 1st July 1628, *M.* 8969; A. *v.* B. July 1631, *M.* 8969; Bailey *v.* Silvertonhill, 31st Jan. 1621, *M.* 6616; Campbell *v.* Graham, 5th Dec. 1732, (already referred to.)

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Defenders' Pleas.

4. After the lapse of the long prescription of forty years, the decrees now sought to be reduced form a good title to exclude; and the pursuers cannot found either upon their minorities, or upon the minorities of their authors, for the purpose of interrupting that prescription.

5. The benefit of deducting minorities is not applied to a mere right of action, which might have been pursued by the parties long prior to the lapse of the period of prescription; and their right of action is cut off by the negative prescription.

6. The parties, against whom the decrees sought to be reduced were pronounced, having homologated and acquiesced in them, after his attaining majority, although he survived the period when they were pronounced for many years, it is not now competent to the pursuers, upon the allegation of his minority, to set them aside.

At advising, the following opinions were delivered:

Opinion of Court.

Lord Balgray.—The difficulty which presented itself to the Lord Ordinary does not occur to me, particularly as the cases so admirably set forth the grounds maintained by the parties. In the first place, I cannot view these decrees but as decrees in absence; and therefore, being decrees in absence, the usual consequence follows, that they may be opened up any time within forty years. The question then is, Is there any thing in the circumstances of this case which prevents the operation of that rule of law? I see no such circumstance. Indubitably a decree in absence cannot be opened up after the lapse of forty years. I should be sorry to see that rule altered. In this case, the defender in the summons of certification was a minor at the time the decree was taken. I have yet to learn that minority is not to be deducted as well from the negative as the positive prescription. Now, if you deduct the minority of the defender in that decree, is not the pursuer here within the forty years during which the decree may be opened up? But the ques-

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tion is raised, whether it is not competent, from extraneous circumstances, to bar a party by personal objection. A party may no doubt, by homologation, place himself in such a situation that he may be so barred; but here the facts and circumstances founded on are not acts on the part of the pursuer, but of the person who obtained the decree in absence, and of those deriving right from him. That he and they may have relied on these circumstances I have no doubt; but I am afraid they are extraneous to the pursuer; and being so, I cannot hold them as homologation. The Lord Ordinary has been misled by the case of Grahame. The Court are said to have proceeded on the idea, that, after a sale taking place, parties are no longer in the same situation, and are therefore barred. I am afraid this is not sound: it would result in the introduction of a species of prescription totally different from that presently established. I am therefore of opinion that the pursuer in this case is entitled to have the decree opened up.

Lord Mackenzie.—I agree in the opinion given. It appears to me that two views are taken of this case by the defender. First, he rests his case on these decrees, as decrees in foro. Secondly, considering them as decrees in absence, he argues that they cannot, under the circumstances, be opened up. But if the decrees were in foro, then, being taken contra minorem indefensum, against a pupil who had no legal guardian, they are void altogether, and cannot be a title to exclude. This, however, is not the view taken by the Lord Ordinary, who does not consider the decrees as in foro; and I do not incline to take that view, and rather consider them to be decrees in absence. The general rule then is, that a decree taken in absence against a minor indefensus is not null; and the reason why it is not null is, that it may be opened up, unless there is some sufficient ground of exception. A considerable number of grounds are contended for by the defender as exceptions; but I cannot say, on looking through the papers with attention, that I have been able to find that any one of these grounds can avail him. It is said, that a decree in absence cannot be opened up when it is a decree of improbation. I do not wish to appear to concur in that, even in the case of a major, without great consideration. When one considers the facility with which decrees in absence may be obtained in improbations,—that the most precious rights may be invaded—the largest estates carried off by such decrees,—it would be a formidable doctrine to hold that such decrees, once obtained in absence, even of a major, were absolutely unchallengeable. But when it is considered that the decrees in this case were taken against an undefended pupil, it is out of the question to consider them irreversible. It is monstrous to maintain that an undefended pupil is absolutely and

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Opinion of Court.

conclusively to lose his right, by a decreet taken against him when only six years of age. If such a decree were even good against a major, it could not be good against a pupil. Again, it is said a decreet cannot be opened up when the party is personally cited; and this seems founded on the assumption that there might have been a reference to oath if the party had appeared; but here is a pupil, whose oath could not have been taken, even if present. Again, it is pleaded that the decrees cannot be opened up, because the pursuer is met by the negative prescription. The prescription pleaded here seems to be rested on the old statutes; but that is not the prescription applicable to heritable rights and actions. Heritable rights and actions fall under the statute 1617; and in that statute there is an express exception of minority. The only remaining ground is that, during the elapse of a time short of the prescriptive period, certain conveyances and transmissions have taken place, with the knowledge of the party having right to reduce, which, it is said, prevents his taking advantage of that right. I am not satisfied this forms a proper personal objection. I am not aware of any authority for holding that a party is bound to come forward in a shorter time than forty years; and that the transmission of a real right obtained under a decreet in absence, with knowledge of the party entitled to reduce, bars the reduction, I know of as little authority. Say that a party has right to reduce ex capite lecti, or on the ground of insanity, or any other ground, although there be an intervening onerous conveyance of the reducible right, would his right of reduction vanish, if he does not come forward immediately with his challenge? If he does no act approbatory, his merely remaining silent is no discharge by him; and the right to reduce a decreet in absence seems like other rights of reduction, which cannot be held as barred, if the party entitled to reduce has not done any thing to commit himself. Nothing was done by the party in this case by which he can be said to have committed himself: he is in no way mingled up with these transmissions. On the whole, therefore, I think that the decrees are liable to be opened up, and being so, cannot form a title to exclude the present reduction.

Lord Gillies.—I am of the same opinion. With deference, I think the Lord Ordinary has taken an erroneous view. The defender maintains that he has a complete feudal title. Now, what is the foundation of his title? A decree in absence. But this is not a sufficient title, because it is not fortified by prescription. But the Lord Ordinary says, although it is a decree in absence, it can only be opened up debito tempore. I am much afraid this is a dangerous doctrine, the result of which would be, that prescription is not constituted by the lapse of a period of so many years, but of a rea-

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sonable time. But how are we to determine what is a reasonable time? What is the use of the law of prescription, if judges are to determine what is this reasonable time? I am of the same opinion with the other Judges as to the effect of these transmissions. They may have been made in bona fide, but that has nothing to do with the legal rights of this party. There is no authority for saying that this is to deprive the pursuer of his right of reduction. It is certainly with reluctance that I differ from the Lord Ordinary, but I cannot concur in the view which he has taken.

Opinion of Court.

The Lord President.—I am also of the same opinion. In the case of Paul *v.* Reid, the only question was, whether the negative prescription could be pleaded by a person who had not in him the positive. There was no question of minority. It certainly was a strange maxim, that a person who had not the positive prescription could not plead the negative. Lord Hermand, who then sat on my right hand, observed to me, that he had acted all his life on the maxim, but he never could understand it: he never could see the reason of it. Lord Gillies was the first person who ventured to call it in question. We had then one of the most able arguments I ever heard by the late Lord Eldin. The ground he took was, Very well, you have a right by the positive prescription. I don't dispute that, but I have an adjudication, which you have not set aside. You have therefore lost your right of action, which you have not brought within forty years. Therefore keep the property, but I will keep the adjudication. That has been law ever since. As to these transmissions, if you could make out that the pursuer had been participant in them, it might be very well; but otherwise, there is no ground for sustaining the personal objection.

Judgment.

The *Court*, therefore, 'recall the interlocutor of the Lord Ordinary reclaimed against; find that there is no title to exclude, and remit to the Junior Lord Ordinary to proceed further as shall be just, reserving all questions of expenses.'

Lord Moncreiff, Ordinary. Act. *Keay, Deas.* Alt. *Dean of Fac. (Hope) Sandford.* *George Gordon* and *Thomas Grahame*, W. S. Agents. Bi Clerk.

C.

FIRST DIVISION.

No. LXXIV. 3*d March* 1835.

MARY YOUNG OR MALCOLM AND HUSBAND *against* MARGARET DUFF OR GREIG, AND MARGARET JAMES, ALEXANDER, AND PETER DUFF.

IMPLIED WILL.—TESTAMENT.—CONDITIO SI SINE LIBERIS, &c. —*A testator having, in his settlement, provided certain legacies to his nephews and nieces, and to their heirs and executors, with a clause of mutual substitution between such of them as should die before majority, and without issue, in favour of the survivors or survivor,—held, that the child of one of the legatees who had predeceased the others, as well as the testator, was entitled to the share which would have fallen to her mother, (had she survived the period of division); but that the rule si sine liberis had no application, so as to entitle such child to a share of the other legatees, who died afterwards without issue, but before the testator, and before the period of division.*

By a trust-deed of settlement, (23d December 1795,) the late Peter Duff appointed his trustees 'to satisfy and pay to James Duff, (his 'brother-german,) L.750 in liferent, during all the days of his life, 'for his liferent use allenarly, of the annualrent thereof only, and 'the fee thereof as follows: To Margaret, James, and Alexan-'der Duff, children of the said James Duff, L.150 sterling each, 'and to Thomas, Henrietta, and Jean Duff, also his children, L.100 'each, and their heirs, executors or assignees; and failing of them 'before they attain the age of twenty-one years complete, or be 'lawfully married, the deceaser's share to fall and belong to the 'survivor, or equally to the survivors of them, and to the survi-'vor's heirs, executors or assignees, in fee.'

The testator died 21st June 1805, three of the children of James Duff having predeceased him, viz. Jean, Alexander and Henrietta. Jean died in 1802, leaving a daughter, Mrs Young or Malcolm, (one of the present claimants). Alexander and Henrietta also died in the same year, both intestate, and without issue; the former while a minor and unmarried, and the latter a few months thereafter, but after reaching majority.

On the other hand, three of the children of James Duff (senior) survived the testator, viz. Thomas, James (junior,) and Margaret.

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Young or Malcolm and Husband *v.* Duffs.

Thomas died intestate in 1812, and without issue. James (junior) died February 1817, leaving children, (claimants in the present process); and Margaret (also a claimant) was the only surviving child of James senior, the liferenter of the bequest of L.750, who died in 1818.

At the period of division in 1824, the trustees of Peter Duff raised a process of multiplepoinding before the Sheriff of Perthshire in order to ascertain the rights and preferences of the different parties, and the process was brought before the Court by advocation. It was not disputed that the claimant, Margaret Duff, was entitled to her own bequest, that the children of James Duff junior were entitled to the bequest left to their father, and that the claimant, Mary Malcolm, had a right to the bequest left to her mother, Jean Duff.

But a competition arose between these parties in regard to the shares provided to Alexander, Henrietta, and Thomas Duff, who all died intestate, and without issue, before the legacies became payable, and edicts were accordingly applied for by Margaret Duff, by Mary Malcolm, and by the children of James Duff junior, to be confirmed executors to the deceased legatees. The only question, however, which was ultimately litigated between the parties, and decided by the Court, related to the shares of Alexander Duff and of Henrietta Duff, both of whom survived Jean Duff, the mother of the claimant, Mary Young, but predeceased the testator.

Pursuer's Pleas.

On the part of Mary Young it was *pleaded*—That she was entitled to the same share both of Alexander Duff and Henrietta Duff's succession which her mother, Jean Duff, would have been entitled to had she survived them. This claim was founded on the conditio si sine liberis decesserit, and was rested on the general principle, that the testator, in framing his settlement, had not contemplated the event of a legatee predeceasing, but leaving issue, and that if he had foreseen such an event, he would have provided for the issue of the legatee all that he designed for the legatee himself; and it was on this principle, accordingly, that the claimant was confessedly entitled to the share left to her mother, Jean Duff.

By the decisions of the Court in the cases of the Magistrates of Montrose *v.* Robertson, 21st Nov. 1738, *M.* 6398; of Wood *v.* Aitchison, 26th June 1789, *M.* 13,043; of Roughead *v.* Rennie, 14th Feb. 1794, *M.* 6403; of Wallace *v.* Wallace, 28th Jan. 1807, *App.* 1. *Clause, No.* 6.; and of Christie *v.* Paterson, 5th July 1822, three points were established:

1st, That a child is entitled to any legacy, or share of a legacy,

to which the parent would have succeeded, supposing such parent to have survived the period of division.

2d, That the implied substitution, thus introduced in favour of children, has the effect of defeating a general substitution in favour of survivors or others: And,

3d, That where a legacy is left to a family, or class of legatees, the issue of the first predecessor takes not only the original share bequeathed to the parent, but every enlargement or addition accruing by the subsequent decease of any of the co-legatees after the death of the parent, but before the period of distribution; and the ground on which this rests is the presumption, that if the testator had foreseen the decease of the legatee before the period of distribution, leaving children, he would have provided for them all that he intended for their parent, although actually dead. The parent legatee is presumed to be surviving through the issue, and accordingly that issue comes into the place of its deceased parent, and takes the share which he or she would have had, if alive at the term of distribution. The claimant, Mary Young, therefore is entitled to those shares of the succession provided to Alexander and Henrietta Duff, which her mother Jean would have had if now alive.

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It was *answered*—That the general rule was different from that laid down by the claimant, Mary Young. The ruling principle with regard to legacies is, that a legacy is granted from personal regard to the legatee, and the legacy lapses if the legatee do not survive the testator. It is true that, in particular cases, an exception has been admitted to this general rule, on the principle of the conditio si sine liberis decesserit; but that exception has no application to the circumstances of the present case. It is the result of an equitable interposition of the law, to the effect of supplying a supposed oversight by a testator in making his will; and it cannot therefore apply where no such oversight occurs. In the case of a parent making provision for his children, or of a party so far adopting a family, as to grant provisions to them as members of a family, it is presumed that an oversight has occurred in not substituting the issue of a child or grandchild to the parent, contrary to the presumed intention of the testator. But wherever it can be shown that the testator has had under contemplation the effect of a child or grandchild dying, leaving issue, the application of the rule is excluded. Such was the principle on which the case of the Earl of Lauderdale was decided, 19th May 1830, and it is directly applicable to the circumstances of the present case. The legacies granted to the individual legatees were granted to them, and to their heirs, executors and assignees, shewing that the testator had the children of the

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legatees in view; and in virtue of this provision it is admitted, that the claimant, Mary Young, is entitled to the legacy left to her mother, Jean Duff; but immediately thereafter, and in the same clause, the testator makes a substitution, declaring, that in the event of Alexander, or any other of the legatees, dying before majority or marriage, their share should be divided among the survivors, and the survivors' heirs and executors; thereby distinguishing between the two provisions, and shewing that it was not his intention that such share should go to the children of a predeceasing legatee. In the cases referred to by the claimant, Mary Young, unless for the application of the rule si sine liberis, the children of the predeceasing legatees would have been entirely cut off from the succession. But there is a wide distinction between cases where, but for the rule, the issue would be entirely cut off from the succession, and cases where, from the terms of the deed, they are necessarily entitled to the parent's share. The rule is admitted in one class of cases, but not in the other.

On this point the Lord Ordinary, in conjoined advocations, found as follows: 'With regard to the shares destined to Alexander Duff and 'Henrietta Duff, finds it admitted, that Alexander died in minority, 'and predeceased the testator; and that Henrietta, although she sur- 'vived majority, also predeceased the testator: finds, therefore, that 'their shares did not vest in them, but were carried to, and vested in 'their surviving brothers and sister, who outlived the testator, and 'were major, in equal portions, viz. James Duff junior, Thomas 'Duff, and Mrs Margaret Duff or Greig, in virtue of the condi- 'tional institution contained in that deed: finds it admitted, that 'Jean Duff, the mother of the claimant, Mrs Malcolm, predeceased 'both Alexander and Henrietta Duff: finds, that the conditio sine 'liberis decesserit pleaded by Mrs Malcolm and husband, in refer- 'ence to the shares destined to Alexander Duff and Henrietta 'Duff, does not apply, and therefore repels their claim: finds, that 'the claimant, Margaret Duff and others, children of the said James 'Duff junior, entitled to the third of the shares of Alexander and 'Henrietta, which vested in their said father, and quoad ultra re- 'pels their claim: finds Mrs Margaret Duff or Greig entitled to 'the two other thirds, one in her own right, and the other as in 'right of her brother Thomas, in her character of executrix-dative 'qua nearest of kin to him, and quoad ultra repels the claim to these 'shares: ranks and prefers the parties accordingly, and decerns.'

Note.—'Parties were originally at issue on various points; but 'after mutual explanations at the debate, one only remained for de- 'cision—Whether Mrs Malcolm was entitled to a share of the suc-

'cession of Alexander and Henrietta, in right of her mother who 3 Mar. 1835.
'died before them?

'When legacies are left to certain individuals as institutes, and Young or Malcolm and Husband v. Duffs.
'they are mutually substituted to each other, without mention of 'their heirs or executors, it is presumed that the testator had not 'contemplated the event of the legatees leaving issue, and, there-'fore, if that event takes place, the issue are preferred to the sub-'stitutes, on the ground of an implied condition in the substitution, 'Si institutus sine liberis decesserit. This doctrine, which we have 'borrowed from the Roman law, proceeds entirely on the presump-'tion, that the testator having overlooked or forgotten the contin-'gency of the institute having children, has left children unprovided, 'if they come into existence. But this presumption may be de-'feated by opposite presumptions or evidence; and there can be no 'stronger evidence to that effect than a clause in the settlement, by 'which the testator does make a provision for the issue of prede-'ceasing legatees, because it incontestably shews that he had them 'in view when he made the substitution. That is the case here. 'The legacies or bequests to the children of James Duff are not 'left to each of them as institutes, and to the survivors as substi-'tutes, but to each and *to his or her heirs and executors;* consequently 'Mrs Malcolm, without dispute, succeeds to the share of her mo-'ther, Jean Duff, and is thus provided for, not by virtue of an im-'plied condition, but by the express will of the testator. In these 'circumstances, she is not entitled to claim a share of Alexander 'Duff's or Henrietta Duff's succession, to whom the surviving chil-'dren were substituted, the testator, at the time he made the sub-'stitution, having clearly had her contingent interest in view.

'There is thus an obvious distinction between the present case 'and that of Roughead, on which Mrs Malcolm chiefly relies. The 'provision there was granted to Archibald Roughead, his heirs and 'executors, with a substitution, if Archibald died in minority, with-'out lawful children, to his five sisters. Archibald died (without 'issue) in minority, and Jean, his sister, having predeceased him, 'her son William was found entitled to his mother's share of Ar-'chibald's succession. If he had not, he would have got nothing 'by his mother's death, and have been left, by the testator, totally 'unprovided for, while his four aunts took the whole succession of 'their brother. But if Archibald and his five sisters had been in-'stitutes, with a clause in favour of their heirs and executors, Wil-'liam would have got his mother's share as her executor, and there-'fore he would have got no part of Archibald's succession. It is 'the omission of the bequest to heirs and executors which makes 'room for the application of the condition si sine liberis. Accord-

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'ingly William's claim is expressly founded on that distinction. He 'pleads Roughead *v.* Rannie, *Mor.* 6403, Feb. 14. 1794. 'Be- "sides, it is a general maxim of law, that when a father grants pro- "visions to his children without mentioning their heirs, and appoints "substitutes to them, the substitution takes place, only si instituti "sine liberis decesserint.' But the mention of heirs is the circum- 'stance which makes the difference between the case of Roughead 'and this case.'

Judgment. To this interlocutor the *Court* unanimously adhered, on advising a reclaiming note for Mrs Young and her husband.

Lord Corehouse, Ordinary. For Mrs Young and Husband, *Graham Bell, Jas. Anderson.* Alt. *Forsyth, M'Kenzie.* *David Gray*, and *David Burns*, Agents. *D.* Clerk.

C.

SECOND DIVISION.

No. LXXV. *5th March* 1835.

WILLIAM ALLEN FLOWERDEW *against* JOHN BUCHAN.

ASSIGNATION.—COMPETITION.—*A liferentrix having granted an assignation of rents and duties, falling due 'from and after Martin- 'mas* 1829, *and in time coming;' and also of the liferent disposition in her favour, in so far as it related to those rents; and intimation having been made previous to Martinmas, viz. in July* 1829, *when no rents were due;—found, that the assignation was preferable to a posterior adjudger insisting in an action of maills and duties.*

MRS ELIZA FOREMAN held a liferent right to certain subjects in St Andrew's. In 1829, Mr John Buchan, writer there, was a creditor of Mrs Foreman, by bills current, to the extent of L.116, 7s. 8d. Upon the 16th June 1829, Mrs Foreman, on the narrative of her liferent right, and of the instant payment to her of L.100, granted an assignation to Buchan of the rents and duties of the subjects, 'and that from and after the term of Martinmas following, and in time coming during her life;' and also of the trust-disposition in her favour, 'in so far as it relates to said rents.' The

assignation was intimated to the tenants on 25th June and 9th July 1829. 5 Mar. 1835.

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Mr W. A. Flowerdew, writer in Dundee, a creditor of Mrs Foreman, obtained decree of adjudication of her liferent interest in these subjects, upon 23d January 1830, and which was recorded upon the 17th February 1830. He then raised a summons of maills and duties before the Sheriff against the tenants, who in their turn brought a multiplepoinding.

The Sheriff, 'in respect that the assignation in favour of Mr 'Buchan was completed by intimation prior to the adjudication,' found it 'preferable, and therefore prefers Mr Buchan to the 'fund in medio,' reserving to Mr Flowerdew to reduce the assignation.

Mr Flowerdew advocated, and also brought a reduction of the assignation, upon the act 1621, and on other grounds.

The Lord Ordinary having heard parties on the closed record in the conjoined actions, pronounced this interlocutor: 'The Lord 'Ordinary having resumed consideration of the debate, which was 'concluded before him in the conjoined actions on the 20th day of 'this month, and also of the previous debate, on the 6th of December 'last, in the action of reduction as to the preliminary point reserved 'in his former interlocutor of the 8th of the said month of Decem-'ber, repels the objections stated for the pursuer and advocator to 'the validity of the defender's assignation, as not being duly com-'pleted, either by actual possession, or due or timeous intimation: 'before answer as to the charge of fraud at common law, appoints 'the cause to be enrolled, that parties may state in what way they 'propose the disputed facts as to the onerosity of the defender's 'debt, and the solvency or insolvency of the cedent at the date of 'the assignation, to be established; reserving, in the meantime, 'all questions as to expenses.'

Note.—'There was a separate and very elaborate argument on the 'first point decided by this interlocutor. The pursuer at one time 'maintained that the assignation could be completed only by actual 'possession. But the Lord Ordinary never had any difficulty as to 'this. The assignation is primarily of the rents and duties, and of 'the liferent right itself, only 'in so far as relates to these rents;' 'and it is admitted that the subjects were at the time under lease to 'tenants who had a title of permanent possession, and by whom they 'have ever since been possessed.

'The main objection, however, was, that as the assignation was 'only to the rents falling due 'at and after Martinmas 1829,' and as 'the only intimation to the tenants was previous to that term, viz. 'in July 1829, at which time it is said the tenants were in no respect

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'debtors to the assignee, so the intimation was altogether inept, and 'could carry nothing in competition with a posterior adjudger insist-'ing in an action of mails and duties.

'The point perhaps is not entirely without difficulty; but the 'Lord Ordinary holds it to be substantially settled by the decisions 'in the case of Hope and M'Caa *v.* Waugh, 12th June 1816; and 'Russell *v.* M'Dougal, 6th Feb. 1824. In the former, though the 'discussion was mainly on another point, the very objection now in-'sisted on presented itself, if possible, in a stronger shape than here; 'since not only was the intimation made when no rents were due by 'the tenant, but it was found effectual, even as to the rents of a future 'year, coming afterwards into the hands *of the factor*, to whom also 'it had been made, by anticipation. In Russell's case, the assigna-'tion was of a fiar's interest in a subject burdened with a liferent; 'and though intimation was made to trustees no less than *eighteen* '*years* before the liferent fell in, the right of the assignee was found 'preferable to that of the adjudging creditors of the fiar, who com-'pleted their titles after the liferent had fallen.

'The radical fallacy of the pursuer's argument seemed to be in 'considering the intimation of an assignation as more closely analo-'gous *to the using of an arrestment* than it really is. They agree no 'doubt in this, that both, in order to be effectual, must be used in 'the hands *of a debtor*. But arrestment will not cover either what 'is properly a future, or a contingent debt, whereas an intimated as-'signation will generally carry both. Thus, not to go beyond the 'class of cases to which the present belongs: *An arrestment* laid in 'the hands of a tenant will only cover the rent actually due, or for 'the term then current; but *an assignation* regularly intimated will 'carry all future rents, as long as the landlord and tenant remain the 'same, in the same way as an assignation of the principal lease, when 'intimated to a subtenant, will carry all future subrents while the 'subtenant continues in possession. These cases seem indeed to 'the Lord Ordinary to be decisive of the present question; for if an 'intimation made this year will carry the rents for the year ensuing, 'it is difficult to see why an intimation made *last year* should not 'carry the rents of this. The principle seems to be, that tenants 'under a lease are debtors ab initio for all the rents to fall due till its 'expiration; and the primary purpose of intimation being to certio-'rate them of the transference of the jus exigendi, it is enough if 'they are formally certiorated, before any competing claim is esta-'blished.'

The pursuer *reclaimed*.

The *Court* considered the case identically the same as that of

Hope and M'Caa *v.* Waugh, 12th June 1816, *F. C.* and adhered, and found the defender entitled to the expenses of this discussion.

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Flowerdew *v.* Buchan.

Judgment.

Lord Ordinary, *Jeffrey.* S. S. C. Agent. *R.* Clerk.

Act. *Dean of Fac. (Hope,)* and *Neaves.* *William Miller,* Alt. *Anderson* and *Gowan.* *Patrick Pearson,* Agent.

R.

FIRST DIVISION.

No. LXXVI. *7th March* 1835.

HAY AND MILLER, PURSUERS.

CESSIO BONORUM.—The Court, (no opposition being offered,) granted the benefit of a cessio to two individuals claiming the same as partners of a company, they alleging that their creditors were all company creditors, that they had no private debts, and that their object was to save the expenses of double dispositions.

For the Pursuers, *Ad. Anderson.*

C.

FIRST DIVISION.

No. LXXVII. *7th March* 1835.

MARGARET DUFF OR GREIG
against
HEPBURN'S TRUSTEES.

LIS ALIBI PENDENS.—*An arrestment having been used of the sum contained in a bill, the creditor disregarding the arrestment, and a consequent multiplepoinding in the inferior court, raised an ordinary action upon the bill before the Court of Session, and advocated ob contingentiam,—held, that the proceedings were incompetent, on the ground of lis alibi pendens.*

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Duff or Greig v. Hepburn's Trustees.

In defence against an action for payment of a bill for L.500, granted by the late Mr Hepburn, (the truster,) to Messrs R. and J. Greig, and to which the pursuer had acquired right by indorsement, it was stated by the defenders, that they were ready to pay the debt to whom it might be found to be due, but that the amount had been arrested in their hands by a creditor of the pursuers: That they had consequently raised a multiplepoinding in the Sheriff-court of Perthshire, for the purpose of ascertaining the rights of the claimants to the fund, and had called as defenders the arresters and the pursuer, by both of whom claims had been given in, as well as a condescendence of the funds by the present defenders: That although the subject-matter of the present process was thus regularly depending before a competent tribunal, where consignation might have been demanded, as the debt was liquid and admitted, though the defenders had counter claims, the pursuer, disregarding these proceedings, had thought proper to raise an ordinary action for payment before this Court; and, in these circumstances, the defenders *pleaded*, as a preliminary defence, that the action was incompetent, on the ground of lis alibi pendens.

It was *answered*—That upon its being objected by the defenders against a demand for payment, that arrestments had been laid in their hands, the pursuer had written to them, offering to find security in any counter claims which they might establish against her, but that as no payment was made, the present action became necessary; that it was proper also that the matter should be discussed in this Court, as one of the parties interested was resident in England; and that, in this state of matters, the pursuer had accordingly advocated the other process ob contingentiam.

Judgment.

The Lord Ordinary repelled the defence; but the *Court*, after hearing counsel for the parties on a reclaiming note for the defenders, holding, that as, at the date when the present action was raised, the subject-matter of it was in dependence before a competent tribunal, where the pursuer was entitled to insist for consignation, the action was unnecessary,—altered the interlocutor.

Lord Fullerton, Ordinary. Act. *Forsyth*. Alt. *Cuninghame*. *D. Fisher*, and *Jas. Peddie jun.* W. S. Agents. *D.* Clerk.

C.

FIRST DIVISION.

No. LXXVIII. *7th March* 1835.

ISABELLA REID OR ARNOT AND OTHERS *against* JOHN KEDDER.

PROOF. — WRIT. — TESTING CLAUSE. — *The grantee's Christian name in a disposition and deed of settlement was erased throughout, and another substituted: In the testing clause, after the names and designations of the writer and witnesses, it was stated, that these presents, &c. 'are subscribed by me, in favour of the said John Kedder:' The word 'John' was that superinduced in the previous parts of the deed: Held that the deed was null in toto.*

JAMES KEDDER, proprietor of Daviesdykes, died in December 1814, leaving three natural sons, John, James and Thomas. John, after his father's death, took possession of Daviesdykes, in virtue of a disposition said to have been executed in his favour in October 1810, and upon which infeftment had followed in August 1811.

The pursuers, the heirs-at-law of the deceased James Kedder, brought the present reduction of that disposition, on the ground of its being null, and vitiated in substantialibus, the Christian name of the alleged disponee, 'John,' having, in all parts of the deed where the name of the disponee occurred, been written upon erasures, except in the testing clause, where it was correctly inserted; the deed bearing to be subscribed by the granter, 'in favour of the 'said John Kedder, at Daviesdykes.' The original name was admitted to be James. The action contained conclusions for removing, and for past profits.

In defence, the erasures were admitted; but the defender offered to prove, by the writer and the instrumentary witnesses, that the erasures and alterations were made in presence of the testator, and by his desire, he having at first intended the disposition to be in favour of his son James, but having afterwards altered it in favour of John; that accordingly the alterations were made before, or at the time, he subscribed the deed, and that the testing clause was also then filled up, as it now stood, in his presence.

The Lord Ordinary (Moncreiff) found the proof competent, and, before answer, allowed a proof accordingly.

The *Court*, however, after hearing counsel on a reclaiming note

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for the pursuer, recalled the interlocutor reclaimed against, and found that the proof allowed by the Lord Ordinary was not competent, (24th June 1834; vide report).

The case accordingly came before Lord Cockburn, Ordinary, to be decided on the merits, viz. on the effect of the erasures as they appeared upon the deed.

On this point the pursuers *pleaded*—

Pursuer's Pleas.

1. A deed vitiated in substantialibus is null and void, or liable to reduction; and the name of the grantee in a deed of settlement is essential.

2. In a gratuitous deed of settlement, heritable property cannot be effectually conveyed except by the use of words of alienation de præsenti; and as the testing clause of the deed under reduction contains no such words, it would have been ineffectual, though it had been regularly executed.

3. The testing clause of the deed under challenge is void as a conveyance, because evidently written posterior to the subscription of the deed.

Pleaded for the defender—

Defender's Pleas.

1. Where any deed, though relating to heritage, is corrected or altered, even in substantialibus, it is valid if the correction or alteration have been made prior to its execution; and such act is legally authenticated by being mentioned or referred to in the testing clause; *Stair*, iv. 42. 19; *Bankt.* i. 11. 34; *Ersk.* iii. 2. 6.

2. The testing clause of the deed under reduction is so conceived as, by its relative terms, clearly to authenticate the correction of the *Christian* name of the disponee in the body of the deed.

3. Supposing that the testing clause of the deed had not contained such an authentication of the correction, or that it were inept for the purpose, as no fraud has been or can be alleged, the only effect of the disponee's Christian name being written on an erasure in the body of the deed would be, that it might be held pro non scripto; Adam *v.* Drummond, 12th June 1810, *Fac. Coll.*

4. Holding the disponee's Christian name pro non scripto, the deed would still be effectual in the defender's favour, because his designation in the preamble, or the dispositive clause, as well as the whole of the special inductive onerous cause, clearly points out him as the grantee; *Ersk.* iii. 2. 6; Dickson, &c. *v.* Logan, 22d Dec. 1710, *Mor.* 16,918; Gordon *v.* Murray, 21st June 1765, *M.* 16,818; Adam *v.* Drummond, supra; Keiller *v.* Thomson's Trustees, 16th June 1826, *Shaw*, iv. 724; Morton *v.* Hunter and Company, 10th Dec. 1828, *Shaw*, vii. 172, affirmed 26th Jan. 1830; *Wilson and Shaw*, iv. 379.

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The Lord Ordinary pronounced the following interlocutor and note: 'The Lord Ordinary having considered the closed record, 'and heard the parties thereon, finds, That the deed of 6th Octo- 'ber 1810, sought to be reduced, is invalid, and therefore reduces 'the same, as also the instrument of sasine following thereon, and 'decerns: finds the pursuers entitled to the expenses incurred by 'them in discussing the reductive conclusions, &c.: quoad ultra, 'appoints parties to be heard.'

Note.—'The summons contains conclusions for removing, and 'for past profits. It is in reference to these that the Lord Ordi- 'nary has appointed the parties to be heard, as these matters have 'not yet been discussed, and could scarcely be so till the validity of 'the deed should be finally determined.

'As to the reduction, the Court having decided that the evidence 'which Lord Moncreiff had directed to be received is inadmissible, 'the deed must be considered strictly by itself, and no regard can 'be paid to the moral probabilities urged on either side. Now, it 'is admitted that the word *John* is written upon erasures, except 'where it occurs in the testing clause, and that the erased word 'was *James*. This erasure occurs in the most important part of the 'deed, the name of the disponee, and is in every part where this 'name is; and the sole question is, Whether the objection, arising 'from the vitiation, has been legally removed by the testing clause?

'This clause declares, that '*these presents*' are subscribed by the "granter in favour of the *said John* Kedder, my son;' and the spe- 'cification of John in this clause is said by the defender to be a 'sufficient legal correction of the error and of the vitiation in the 'body of the instrument, especially as a Christian name was not 'necessary, and as the deed contains words (such as, 'residing at "Kirkhall, my son,') which adequately denote the person meant.

'But here the granter, whether necessarily or not, chose to de- 'signate his disponee by the Christian name, and has thus made 'the word essential. Now the testing clause is not only inadequate, 'but, in reference to the legal precedent, it is dangerous, as a sub- 'stitute for the original use of the right name, or as a correction of 'this essential erasure; because, so far as appears from the deed, 'there is not enough to exclude the supposition that James may have 'been the person truly meant, that this word may have been erased, 'and John put in *after signature*, and that the testing clause may 'have been made to suit the instrument thus altered; and, as test- 'ing clauses are generally filled in after subscription, this may often 'be done. There is said to be a legal presumption, that testing 'clauses are written before subscription; but any such presump- 'tion must be counteracted by the circumstances appearing on the 'instrument. Now, the two last words of this testing clause, viz.

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" writer hereof,' though they were superfluous, have evidently been ' added after the granter's signature, and by a different hand. But, ' independently of this, the very mode in which the alleged error ' has been attempted to be corrected seems inconsistent with the ' idea that it was discovered prior to subscription; because, if it had ' been known, it is scarcely credible that it would not have been ' corrected *fully and directly*, and by express words, especially as ' there was a whole page left clear, instead of merely slipping in the ' word John, without ever noticing any erasure. But, assuming ' the clause to have been written before the granter signed, it does ' not follow, from any thing it contains, that the word James had ' been previously erased. Even ' *the said John*,' which is what the ' defender relies on, does not establish that there was such a name ' in the deed at any time; for, that word being on an erasure, is, ' in law, not there at all.

' There are cases where a slighter defect has proved fatal; but ' none where one so strong has been disregarded. The subsequent ' filling in of testing clauses being legal and usual, it is impossible ' not to see the consequences of allowing one name to be changed ' for another, by erasing the one first inserted, and then, without ' openly noticing this, putting a new name to fit it into the testing ' clause.'

Both parties *reclaimed*, the pursuer craving the Court to decern in the removing, and the defender praying for an alteration on the merits, and of the finding against him of expenses.

Defender's Pleas.

Keay, for the defender, on the merits, *pleaded*—That when vitiations or erasures occur in a deed or instrument, the Court may be entitled to hold pro non scriptis the words so vitiated or erased. If the words are essential to the validity of the deed or instrument, (e. g. the date in an instrument of sasine,) the instrument will necessarily be rendered void and null. But in each particular case the question must arise, whether, without the words so vitiated, the deed or instrument may not nevertheless be effectual. That there may be valid deeds, in which various words are written on erasures, cannot be doubted, in the same way as there may be valid deeds, in which words have been omitted from clerical errors. The question in the present case was, whether the insertion of the Christian name of the disponee was essential to the validity of the grant, if the disponee was sufficiently described by his place of residence or otherwise? If there had been a mistake in the name, by inserting James instead of John, the Court would be entitled to correct it, if there was sufficient evidence of the error. This the Court had repeatedly done in the case of legacies. Still more, if the

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Christian name were left blank, the Court would be entitled, si constabat de persona, to give effect to the intention of the granter. In short, if written wrong, it was competent for the Court to alter the name; and, if not written at all, to supply it. The quotation from Stair, (p. 10. of the defender's case,) sufficiently illustrates the principle, as did also the decision of the Court in the cases of Keiller, and of Adam *v.* Drummond. This latter case was the same in principle as the one now before the Court, although the particulars were not precisely alike. The opinion of Lord President Blair in that case was of great importance. It was a claim of enrolment; and it was objected, that the charter produced was not the charter confirmed, because the word 'præsenti' was written on an erasure. There was also an argument, that confirmation was not necessary; but the judgment seemed to assume that it was necessary. The vitiation was in the charter, after it was sealed and delivered; but the case was put entirely on the vitiation being fraudulent or not fraudulent; and the deed was sustained. The present case was stronger on the part of the defender, because the alteration was avowedly made by the granter. That is the plea in the pursuer's summons. He says, however, that the words must be held pro non scriptis; but suppose they are, the description corresponds to John. No claim is made on the part of James, the other natural son of the granter, whose name was first inserted. The case is strengthened by the testing clause. A question is raised as to the time of filling it up: it must be presumed to have been filled up before it was signed, and that the granter had sanctioned it. Now, unless you allege, and offer to prove, that it was done ex post facto, the testing clause must be held to have specified the number of erasures, with the approbation of the granter. The question, in short, is, whether what is in the testing clause is not equivalent to a supplying of any deficiency, and a cure for every defect? There is one other consideration, the erasures are in the same hand and same ink as the body and testing clause of the deed; so the fair inference is, they were all written at the same time. It is said the testing clause is written across the granter's name. The words, 'writer hereof,' certainly come closely upon it; but it is plain these words were not in the testing clause originally: the ink is different; they have been added from over anxiety; but the words, the said James Naismith, were enough without the addition.

Pursuers' Pleas.

It was *answered* by the *Dean of Faculty*—That intention has nothing to do with the sufficiency of the deed to carry into effect the purpose of the granter, and cannot relevantly be referred to in considering the solemnities of execution, or in aid of a deed not executed in terms of the statute. It has already been decided, that it

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is incompetent to examine the writer of the deed, or the witnesses, to ascertain the intention of the granter. This case differs from the others cited, in so far as it is the primary deed, not a deed executed in consequence of a regular conveyance. The will of a party must be proved in an authentic manner. In the case where the word Coblehouse was in part erased, it was in a sasine, and before registration. There was truly a conveyance of Coblehouse: the blunder was in the deed of the grantee, not of the granter. The case of Adam has been quoted in all the cases from its date downwards; and quoted to show that it has no application to a case regulated by the statute 1681; but that, in cases not regulated in construction by statute, in looking to the consequences of an erasure, you are to consider, whether it could not be corrected by another part of the instrument. With deference to the high authority of President Blair, if a person got a sasine wrong confirmed, and altered it, for whatever purpose, this was, in the eye of law, a legal fraud. The principles laid down in that case cannot be sanctioned. There is another class of cases, where the deed may be separated into parts; where, for instance, there is an erasure in regard to one set of lands, where there are separate acts of infeftment. In a case of this description, the Second Division have ordered the opinion of the other Judges to be taken, as to whether a deed is or is not to be null in toto. In the present case there is an erasure in all the operative parts of the deed in the name of the grantee; and neither this erasure nor the superinduction were mentioned in the testing clause. Throwing aside the testing clause, what is the effect of a disposition erased in the name of the grantee? Is it not plain, that, without the aid of the testing clause, words superinduced are not authenticated as the words, and expressing the will of the granter, that is, they are not authenticated in the way required by the statute? Apart from the testing clause, the presumption is, that the granter did not sign the deed with the superinduced words. There is not a possibility of explaining the act 1681, except by holding that the words superinduced, apart from the testing clause, form no part of the deed. On the supposition that the testing clause is insufficient to authenticate the words, it is in vain to contend that the superinduced words form a part of the deed; for the Court will not admit evidence to prove it. But then the principle of the statute becomes important. It cannot be said, a man may not sign a deed, if he has made an alteration upon it; but then that alteration must be authenticated: the act requires that the party shall subscribe before the witnesses to the deed, as the Court see it; but is there any evidence that the Court now see it as it was subscribed, if no notice is taken of the alteration in the testing clause, so that the words introduced by the alteration may be authenticated, in the same way

as the rest of the deed, by the granter's subscription to these words being proved and tested in the regular manner?

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Opinion of Court.

The *Court* were unanimously of opinion that the interlocutor of the Lord Ordinary was well founded.

Lord Balgray thought it was impossible to get over the erasures which occurred in the deed.

The *Lord President* observed, that the testing clause ought to have stated, that certain words were erased, and others superinduced before signing.

Lord Gillies could not entertain a doubt that the objection to the deed was insuperable. His Lordship was inclined to think that the opinion attributed to Lord President Blair might have been erroneously reported. (*Lord Mackenzie* here stated, that he had been present at the time, and could vouch for the report being correct). At all events, he could not concur in the doctrine. (All the other Judges concurred in the same dissent; *Lord Mackenzie*, who reported the case, adding, that he remembered the surprise occasioned by the opinion.) But even applying the very doctrine of that case to the present, his Lordship did not see how it could benefit the defender. The vitiated words were, it was said, to be held pro non scriptis; but, in that view, there was here no deed at all in favour of John Kedder. His name could not be held to be in the deed at all; and it was not sufficient to supply that defect to say, that there occurred in the testing clause the words, 'subscribed in 'favour of the said John Kedder,' &c.

Lord Mackenzie.—Abstracting from the peculiar expression of the testing clause, the deed is to be read as if it was in favour of James. Can the defender, in that view, be allowed to prove aliunde, that James, who was the actual disponee, did not live on the farm, but that John did; and so make it a deed in favour of John? That seems to me extravagant. Attending to the expression of the testing clause, two views of it may be contended for. The first view is, that it is a change of the deed, by signing in favour of John, though James is to be held as previously disponed to. I do not think that view is admissible, for it is in favour of the 'said John,' not of John as in place of James; and, at any rate, it would be too loose to dispone to one person, and merely sign in favour of another not disponed to. An express declaration in a deed, that wherever the word 'James' occurred it should be read 'John,' might be effectual. But the clause here is not sufficient for that effect. But farther, I do not think the testing clause a competent place for such alterations. That clause may be filled up by a different writer, after subscription. It may be left blank at signing: it may be corrected after signing; see the case of the Bank of Scotland *v.* Telfer, 17th Feb. 1790. I

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cannot therefore allow it to go beyond its own province of a testing clause, and to express the will of the granter as to other things than attestation. If that were allowed, deeds must be open to any change by the act of the writer of the testing clause. The second view is, that the words imply a notice of the erasure and superinduction. Neither am I satisfied with this view. I doubt whether even this would be competent in a testing clause. It would lead to danger of changes after signing by erasure, and the act of the writer of the testing clause. Even the notice of an erasure is not a proper part of a testing clause. But if at all, such notice must be clear, certain and explicit. Here there is nothing of the sort,—no mention of erasure or superinduction at all—no sufficient certainty that 'the said John' was used in reference to erasures and superinductions, and not by error, before the erasures were made,—still less that all the erasures and superinductions, or the essential ones, were made before signing the deed. On this last point I think the argument of the pursuer is superior.

Opinion of Court.

The *Lord President.*—I only wish to say a word as to the application of the maxim, 'si constat de persona.' In the only cases where the Court has corrected the effects of a wrong description, there was no erasure. In the case of Keiller, it turned out that the granter had been described by a wrong Christian name; but it was plain there was no other person of the same surname to whom the description applied. But it is a very different thing if there is an erasure in the Christian name. I never knew the doctrine, 'si constat de persona,' applied, where an erasure was the foundation of the mistake.

Lord Gillies farther mentioned, as an illustration of the doctrine si constat de persona, that a person might, by a misnomer, leave an estate to the Right Honourable James Hope, Lord President of the Court of Session, in which case it would be plain who was the person meant, though even there the deed would probably only be made effectual by an adjudication in implement.

Judgment.

The *Court*, on the reclaiming note for the defender, 'adhere to the interlocutor reclaimed against, and refuse the desire of the note, except as to expenses; alter in that respect, and find no expenses due:' And on the reclaiming note for the pursuer, their Lordships 'alter the interlocutor reclaimed against, and decern in the removing prayed for; quoad ultra, remit to the Lord Ordinary to hear parties, and to do further in the cause as shall be just.'

Lord Cockburn, Ordinary. Act. *Dean of Fac. (Hope.)* Alt. *Keay.* *Daniel Fisher*, and *R. Welsh*, Agents. *D.* Clerk.

C.

FIRST DIVISION.

No. LXXIX. *7th March* 1835.

MRS BALLENDINE
against
TURNER, TRUSTEE ON THE SEQUESTRATED ESTATE OF THE LATE CRAWFORD TAIT.

PROCESS.—EXPENSES.—JURY TRIAL.—*Damages to the amount of £.2000, for injury done to property, being concluded for in a summons, and the defender, before trial, having made a tender of £.25, and the jury having given a verdict in favour of the pursuer for £.88,—held, that the latter was entitled to the full expenses, as taxed by the Auditor, amounting to £.286 : 17 : 7.*

IN an action of damages, raised by the pursuer against the late Mr Tait, for alleged illegal encroachments upon her property, now defended by his trustee, she concluded for damages to the amount of L.2000. Before the case was sent to a jury, the defender made an offer of L.25; which being refused, the case went on to trial, when the jury gave verdict in favour of the pursuer for L.88. The expenses of process were afterwards taxed by the Auditor to L.286 : 17 : 7; and the question arose, whether the pursuer was entitled to the whole amount, or only to expenses, subject to modification.

The Court having ordered minutes of debate, the pursuer *argued* —That the general rule of law and practice was undoubtedly in her favour. The principle was, that a person who is compelled to become a litigant, in order either successfully to enforce, or successfully to resist, a demand, which his antagonist, as a defender, ought never to have opposed, or, as a pursuer, ought never to have made, should be kept indemnis. The expenses of the litigation ought to be borne by the party who had rendered it necessary that they should be incurred; and the party to whom this character belonged was the pursuer, who had insisted in an untenable claim, or the defender, who had maintained an untenable defence. In the present case there could be no doubt that the pursuer was the successful party at the trial, which became necessary, in consequence of the very inadequate offer made by the defender; and although there was a random sum of L.2000 concluded for in the summons, that could not affect the question; but having obtained a verdict in her

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favour, as the damages awarded were quite disproportioned to the loss she has sustained, it would be an extreme hardship if the benefit of this small sum should be neutralised by the pursuer being saddled with any part of the expenses; and in no such case had a modification been allowed.

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The exceptions, where expenses were refused or modified, depended upon this, that the action was one in which no substantial interest was at stake, and which, therefore, ought not to have been raised; or that, although right in his demand, an application to a court by the pursuer was unnecessary; or that his own improper conduct had in some degree been the cause of the litigation; or that, while he had partly gained his cause, he had likewise partly lost it. But none of these exceptions applied to the present case; for although the pursuer had not obtained the full sum concluded for, she had not failed in any particular plea, but her demand had been sustained as legal and well founded, and any adequate remuneration had been refused by the defender, which rendered the trial, and consequent expenses necessary; Kirk *v.* Guthrie, *Murray*, 1. 271; Grubb and Matheson *v.* Mackenzie, 2. *Murr.* 1; Longmuir *v.* Thomson, 16th March 1833, 11. *Shaw*, 571; Mackenzie *v.* Henderson, 2. *Murr.* 227; Heriot *v.* Thomson, 29th Nov. 1833, *Shaw*, 12. 145.

Defender's Pleas.

It was *answered*—That a tender having been made by the defender, the pursuer had been successful only to the extent of the difference between that sum and the amount awarded by the jury, the tender being in truth tantamount to a verdict in favour of the pursuer, so far as it went; but, at all events, the sum actually awarded was so entirely disproportioned to the sum concluded for, that the pursuer could not be said to have originated the action in bona fide, and had therefore no equitable claim for an award of expenses in her favour, or at least that the same ought to be greatly modified; Paterson *v.* Ronald, *Murr.* 2. 188.

Opinion of Court.

When the case came to be advised, the *Lord President* stated that the other Judges had been consulted, and that, with one exception, their Lordships were unanimously of opinion that the expenses could not be modified below the amount taxed by the Auditor. The Court did not lay any stress on the random sum of damages concluded for in the summons, which in practice was well understood to afford no criterion. Their Lordships, however, were much moved by the terms of the tender; for as a greater sum was given by the Jury than had been offered by the defender, it was clear that the latter was in fault in compelling the pursuer to proceed judicially in obtaining a larger sum, and that he should therefore bear the burden

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of the expense thereby created. His Lordship added, that he wished to take this opportunity of suggesting, that in cases where a tender was made, which the other party was not inclined to accept, the party making the tender should call upon his adversary to say what he would take; and if, after this, the parties could not agree, their expenses might be awarded, according as the one or other of the parties was most in the wrong.

The *Dean of Faculty* observed, that he doubted the power of the Court to take cognisance of such proceedings; that the pursuer could not be called upon to make a tender, and was entitled to the opinion and estimate of a Jury; that the defender made the tender to avoid loss, and because in the wrong; that in all cases of special damage, the defender might compel a statement of the grounds of the damage; and in all the cases he had seen, there was a schedule stating what damages were claimed, if special; but that it would be out of the question to say that the pursuer must prove these exact sums: therefore, that in cases where the damages were not in solatium, the defender was sufficiently protected, by having the power of demanding a schedule, by which he might regulate the amount of his tender on the one hand, and, on the other, by making the pursuer separate the damages, by which means he was enabled to meet them in detail at the trial. He hoped no such principle would be adopted.

The *Lord President* observed, that this was merely a suggestion of the Court for the convenience of parties, which they were at liberty to adopt or not, as they thought proper.

The *Court*, therefore, 'approve of the Auditor's report upon this 'account of expenses, and, in terms thereof, decern and ordain the 'defender, William Ainslie Turner, accountant in Edinburgh, trus-'tee on the sequestrated estate of the late Crawford Tait of Har-'vieston, to make payment to the pursuer of the sum of L.286:17:7 'sterling, being the taxed amount of said account of expenses, with 'the expense of extract.' Judgment.

Act. *Dean of Fac. (Hope,) Russell.* Alt. *Cuninghame.* *Wotherspoon & Muck,* and *R. Rutherford*, W. S. Agents.

C.

SECOND DIVISION.

No. LXXX. *7th March* 1835.

JOHN MILLER, Petitioner and Complainer.

Jurisdiction.—Nobile Officium.—Process.—*A pursuer in an action for damages having, during the dependence of the action,*

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Miller, petitioner and complainer.

printed and distributed a statement alleged by the defenders to be false and injurious, and likely to create a prejudice against them in the depending action,—the Court, on a petition and complaint by the defenders, ordained the statement to be sealed up, and interdicted its farther circulation.

Mr William Mitchell, some time manager of the Western Bank of Scotland, raised an action against Mr John Miller, as manager of that establishment, for damages for alleged illegal dismissal from his office by the directors.

Mr Miller presented a petition and complaint to the Court, in which he stated, that 'pending this action, which it is the object of 'the said William Mitchell if possible to have tried by a jury, he 'has been guilty of a most unwarrantable and illegal attempt to 'interfere with the course of justice, in so far as he has caused to 'be printed and circulated, among the shareholders of the Bank and 'the public, a false, malicious, libellous and defamatory statement, 'directed against the defenders in the action, the object and ten-'dency of which statement is to create a prejudice against the Bank 'and its office-bearers. This printed statement is entitled, 'Me-"morial (and Queries) for William Mitchell, Esq. late Manager of "the Western Bank of Scotland;' and bears to be, and the petitioner 'really believes is, the memorial which the said William Mitchell 'laid before counsel before raising the action of damages. But 'though described as a Memorial and Queries, the queries are not 'given, nor is the opinion of counsel subjoined, the statement being 'closed by the following sentence: 'Advised to raise an action, which "has been done. Damages laid at Fifteen thousand pounds sterling." It was farther stated, that the statement had evidently been printed in a form intended for circulation; that, as the petitioner was informed, 1200 copies had been thrown off; and that it had already been circulated among the shareholders and others. Founding upon the precedents in Gilfillan, 18th May 1824, 3. *S. and D.* 21; Henderson, 10th Dec. 1824, 3. *S. and D.* 384; and Maclauchlan, 16th Dec. 1826, 5. *S. and D.* 147; the petitioner prayed the Court to ordain Mr Mitchell to recall and deliver up the whole of the copies of the said statement in his possession; and farther, to prohibit and interdict its farther publication, distribution, or circulation.

Judgment.

Upon advising the petition, with answers, in which the alleged motive and the extent of the circulation were denied, the *Court* ordained the copies of the statement to be sealed up, and interdicted its farther circulation; and remitted to the Junior Lord Ordinary to prepare the cause.

Act. *Skene* and *Wm. Bell.* Alt. *Dean of Fac. (Hope,)* and *Whigham.* *Graham & Anderson*, W. S. and *J. T. Smith*, Agents. *T.*

R.

SECOND DIVISION.

No. LXXXI. *7th March* 1835.

WILLIAM WADDEL, (P. WOOD AND MRS. R. VEITCH'S TRUSTEE,)
against
CHARLES FERRIER, (WHITE'S TRUSTEE.)

RANKING AND SALE.—BANKRUPT.—PROCESS.—*Found, that an heritable creditor, who was infeft for payment of an annuity, with penalty and expenses, and who obtained an interim warrant for payment of his annuity during the dependence of a ranking and sale of the bankrupt estate, was not entitled to an interim warrant for payment of the expenses incurred by him in his application for payment of his annuities.*

Mr WOOD and Mrs Veitch were the assignees of an heritable bond of annuity over Graham of Gartmore's estate. The bond provides for the regular half-yearly payment of the annuity, and 'a fifth part 'of liquidate penalty and expenses in case of failure.' Power is given to uplift the rents, &c. the creditor being accountable for his intromissions, after payment of the annuity, penalties and interest, 'together with the expenses incurred in levying the said rents, 'mails and duties, or any part thereof.'

These estates were sequestrated on the application of Mr Ferrier, trustee for White, an adjudging creditor, and a judicial factor was appointed. Ferrier at the same time brought a ranking and sale of Mr Graham's estate, which was opposed by Waddel, as trustee for Mr Wood and Mrs Veitch, and by other annuitants, creditors; and the Court (2d June 1832) sisted procedure in the ranking, until it should be determined whether the lands to which it related were held in fee-simple or under entail.

On 13th May 1832, Waddel applied for an interim warrant for payment of the arrears of the annuities, which was resisted by Ferrier; but the Court (6th July) granted warrant for payment of the annuities, 'with interest from 9th February last, till payment, and 'reserve to the petitioners their further claim under the heritable 'bond of annuity assigned to them.' No expenses were found due. Ferrier appealed, but the judgment was affirmed, with certain costs, which were paid.

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The petitioner having thus been put to considerable expenses in obtaining the interim warrant for payment of the annuities, applied to the Court for warrant on the judicial factor for payment of the expenses, and *pleaded*—

Petitioner's Pleas.

An heritable creditor, situated as he is, is as much entitled to payment of his expenses fairly incurred, as far as they are covered by the penalty, as he is to payment of the debt itself; Mein, 26th May 1829, 1. *Bell*, 266-7; Duff, 19th Feb. 1755, *M.* 10,046; Allardes, 19th June 1788, *M.* 10,052; Inglis, 23d June 1825, *Sh. Digest*, 344; Ramsay, 22d June 1826. The petitioner represents annuitants entitled to termly payment out of the rents; and if the annuities are not paid at the term, they bear interest,—and all expense incurred in recovering payment is covered by the penalty. The annuities are burdens upon the annualrent; and any ranking and sale would have applied only to the reversion, after deducting these annual payments. The situation of the petitioner is different from that of a creditor upon the fee of the estate. In an ordinary ranking and sale, the object of which is the division of the whole funds arising from that sale among the creditors, according to their preferences, each creditor must bear the expense of applications for interim warrants, since he obtains a benefit, the expense of which he ought to defray. Accordingly, in Dickson, 4th Feb. 1795, *M.* 13,343, and Inglis's Trustee, 14th June 1825, the Court refused to grant the expense of such interim warrants. Besides, the warrants have not been obtained in a ranking and sale; no ranking and sale has been proceeded with, and the Court may not determine for years whether it can proceed.

Pleaded for the respondent—

Respondent's Pleas.

There are no circumstances in this case which can take it out of the rule established in the case of Dickson and Sir Hugh Inglis's trustee, referred to. That rule is not affected by the principle, that a preferable creditor is entitled to rank for his expenses under the penalty in the security. An application for an interim warrant differs greatly from a final ranking. It is made for the special accommodation of the creditor, and is not a necessary result of the process of division of the estate of the bankrupt debtor. The respondent, like the petitioner, looks to the rental of the estates for his payment. With regard to the petitioner's plea, that this warrant of payment was not obtained in a process of ranking and sale, it is to be observed, that the petition for sequestration was an incidental application to the Court, arising out of the process of ranking and sale, and any warrant upon the judicial factor is necessarily

a warrant in that process. Besides, the process of ranking was stopped by the petitioner himself.

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Judgment.

The *Court* considered the case precisely analogous to those of Dickson and Inglis's trustee, and refused the petition, with expenses, without prejudice to any claim in the event of the ranking being dismissed.

For Petitioner, *Cuninghame* and *Sandford*. W. S. Agents. *Thomson Paul*, and *J. B. Gracie*, For Respondent, *Forsyth*. *H. Inglis & Donald*, W. S. Agents. *T.* Clerk.

R.

FIRST DIVISION.

No. LXXXII. 10*th March* 1835.

JAMES CAMPBELL
against
JOHN MACFARLANE, ROBERT MACLAUCHLAN AND WILLIAM BLACKADDER.

PROCESS.—ARBITER.—*In an action of damages against a contractor for making an embankment, for alleged deviations from the contract, (whereby loss was said to have been incurred,) and against an inspector, or referee, mutually chosen by the parties, for alleged connivance or gross negligence, issues being taken against them both, and approved of by the Lord Ordinary,—held, that the proper course was first to decide as to the true character and powers of the referee, and the issues accordingly in hoc statu disallowed.*

MR HAY and others, proprietors and tenants of lands on the banks of the Isla, entered into a submission before the defender, William Blackadder, a land-surveyor, the object of which was to raise an embankment on the banks of the Isla, to protect the properties of the parties from periodical floods, with full power to the arbiter to fix the line, dimensions, &c. of the embankment, to enter into contracts necessary for executing the same, and to decide as to the sufficiency thereof. Estimates were given in by different contractors; and at a meeting of the parties, that given in by the defender, John Macfarlane, was preferred, on his finding security to complete it according to Mr Blackadder's specifications, and to his satisfaction, &c.;

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and the arbiter accordingly (17th May 1831) 'authorises any of the 'proprietors, or their agents or trustees, to enter into a contract for 'the works with the said John Macfarlane, in terms of his offer, and 'the specifications signed by them referring thereto.'

A contract was accordingly entered into between Mr Hay and others, and Macfarlane, as contractor, and the other defender, Robert Maclauchlan, as his cautioner, specifying the nature and extent of the operation, and concluding, 'The whole works to be carried for-'ward, and finished in a proper and workmanlike manner, and that 'to the entire satisfaction of said William Blackadder, whose award 'is to be final and binding on the parties, and subject to no re-'view or modification in any court whatever.'

The work was accordingly commenced, and some time afterwards the pursuer, James Campbell, (tacksman of part of the lands on which the embankment was to be made,) raised an action of damages against Macfarlane, Maclauchlan and Blackadder, setting forth, that Macfarlane had, in various ways, deviated from the terms of the contract, whereby loss had been incurred by the pursuer, in consequence of the insufficiency of the work; and that the other defender, Blackadder, had, by his connivance, or gross negligence, allowed the deviation to take place, and concluding therefore against them both for L.200 damages, &c. In defence, the alleged deviations were denied; and it was objected, as a preliminary defence, that, in terms of the submission and contract, the action had been incompetently instituted; the defender, Blackadder, having been appointed arbiter, with full power to decide finally in all questions which might arise in reference to the works to be executed, without review in any court of law, &c.

The cause was remitted to the Jury Clerk, by whom the following issues were prepared:

'Whether, on or about the 26th day of May and the 9th day of 'June 1831, the defender, John Macfarlane, agreed and undertook 'to make or execute a certain embankment on the south side of the 'river Isla, with what is called a land-arm at the east or upper 'end, in terms of the contract and specification, Nos. 5. and 9. of 'process; and whether the said defender wrongfully failed to fulfil 'the said agreement and undertaking, to the loss, injury and da-'mage of the pursuer?

'Whether the defender, Robert Maclauchlan, admitted to be the 'cautioner for the said John Macfarlane for the execution of the 'said agreement, is indebted and resting owing to the pursuer in the 'sum of L.150, or any part thereof, as the damage caused by the 'failure of the said John Macfarlane?

'Whether the defender, William Blackadder, was the inspector of

'the said work, under the deed No. 4. of process, and the said con- 10 Mar. 1835.
'tract and specification; and whether the defender last aforesaid, by
'negligence, or fraudulent connivance with the said John Macfar- Campbell v. Macfarlane and Others.
'lane, wrongfully failed in the execution of his duty as inspector of
'the said work, to the loss, injury and damage of the pursuer?

'[Whether the said William Blackadder was arbiter in any dis- Struck out by the Lord Ordinary.
'pute between the said parties as to the execution of the said work,
'and approval of the work executed as aforesaid; and whether the
'said William Blackadder acted corruptly in approving of the said
'work?] Or,

'Whether those parts of the work complained of as the cause of
'the alleged damage were executed by direction, and under autho-
'rity, of the pursuer, or were afterwards acquiesced in or approved
'of by him.'

Damages claimed, L.150.

'The Lord Ordinary approves of the draft issues prepared by the
'issue clerks, with the exception of the fourth issue, which he ap-
'points to be struck out.'

The following notice of motion having been served upon the defender, the cause came to be advised this day:

'Take Notice, That, on Tuesday next, or as soon thereafter
'as may be convenient, the Court will be moved, on the part of the
'defenders, to direct that, before farther procedure, the prelimi-
'nary defence, founded on the subsisting reference to Mr Black-
'adder, shall be discussed and disposed of; in respect that the re-
'ference in the contract to, and award of, Mr Blackadder, exclude all
'other inquiry or trial of the sufficiency of the work in question,
'until such reference and award shall be reduced in a regular action
'for that purpose, on relevant grounds; or otherwise to sist process
'and the trial of the issues in which Macfarlane and his cautioner are
'concerned, until the issues taken against Blackadder are tried;
'or to ordain a separation of the issues which relate to these de-
'fenders respectively; or such other order as the circumstances of
'the case may require.'

In support of the motion the *Dean of Faculty pleaded*—That the Court could not allow any issue against the contractor, Macfarlane, until the proceedings of the arbiter, Blackadder, who was stated to have indicated his approval of the work, were regularly challenged and reduced, or until it was proved, in a regular form, that he had disqualified himself as arbiter, and could not proceed, consistently with justice to the parties, to execute the office. Full powers were conferred upon him by the submission, to decide as arbiter as to all Defender's Pleas and Objection to Issues.

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matters connected with the work; but before he had time to write out his approval of the operations, the present action was brought, libelling on the contract, and alleging that Macfarlane had been guilty of a breach thereof. But the first question is, what is the true nature of the office conferred upon Blackadder? It was manifestly that of arbiter under a regular and formal submission. It is no doubt true, that if an arbiter acts corruptly, the party injured is entitled to redress; but he must, in the first place, bring a reduction of the award; or, if he wishes to stop the submission, he must prove that the office has been forfeited by the arbiter. There is no other way of proceeding, as long as the arbiter is able and willing, and qualified, to do what he undertakes; Robertson v. Hannay's Trustees, 22d Jan. 1835. It would, on the one hand, be incompetent for the contractor to insist for payment of the price, if the arbiter should refuse to sanction the work, as insufficiently done, and, on the other, for the other parties to refuse payment, the work being approved of by the arbiter, without setting aside the award.

Pursuer's Pleas.

Keay, for the pursuer, admitted that the submission was a subsisting contract, and that none of the parties wished to resile from it. But the statement of the pursuer was, that the arbiter never looked near the work, which was not finished in due time, and which was deficient in the necessary height, in consequence of which more damage had been done by a flood in 1831, than if there had been no embankment. The pursuer alleged a fraudulent connivance on the part of the arbiter with Macfarlane, whereby he was permitted to deviate. In all operations of a similar nature, the practice was to appoint a skilful preson as superintendent, whose judgment was final; but it surely could not be contended, that if this party acted unfairly, his award was to be conclusive; and the question was, whether this point was sufficiently brought out by the issues. As to the necessity of a reduction, there was nothing to reduce. The pursuer had no interest to set aside the agreement, and there was no decree-arbitral; but the pursuer insisted that Macfarlane should not be allowed, by the connivance of Blackadder, to deviate from his engagement; and it was for the convenience of all parties that all the issues should go to trial together, without multiplying legal proceedings. All defences would be competent to both parties; and the pursuer took upon himself the risk of establishing what was necessary to make out his case, and it was for the Judge presiding at the trial to say what was the situation of Blackadder.

Defenders' Reply.

Replied—That the primary question, whether Blackadder was

eferee or not, could not be established at the trial, but ought first o be decided by the Court.

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Judgment.

The *Court* ' disallowed the issues in this case in hoc statu, and remitted the case to the Lord Ordinary, to dispose of the preliminary defence founded on the subsisting reference to Mr Blackadder, reserving all questions of expenses.'

Lord Fullerton, Ordinary. Act. *Keay*. Alt. *Dean of Fac. (Hope.)* Agents, *Miller & Forbes* for Pursuer, *James Imrie* for Blackadder, *Henry Tod* for Macfarlane and Cautioner. Jury Clerk.

C.

SECOND DIVISION.

No. LXXXIII. 10*th March* 1835.

Miss EUPHEMIA KERR
against
ALEXANDER COCHRAN and Others, and against WILLIAM KEITH, (Archibald Cochran's Trustee.)

Clause. — Personal and real — Legacy. — *Circumstances in which a party, having executed two entails, and a general disposition of his other property, which three deeds were held together as forming one entire settlement, and certain special legacies and provisions having been left by the general disposition, which contained this declaration, ' Whereas the estate and funds, real and personal, here- ' by settled by me on my said son, in fee simple, may be nearly ade- ' quate to the special burdens with which the same stand charged, ' as well as the foresaid restricted provision, therefore my said son, ' by accepting hereof, or my entailed estates, in terms of the settle- ' ments thereof, and the heirs succeeding to him therein, stand pledg- ' ed and engaged to satisfy and procure discharges and extinctions ' of every debt and obligation, provision and bequest of every de- ' scription, created, or contracted by, or incumbent on me, and that ' in such habile, proper and effectual manner, as that the same shall ' hereafter cease to exist, or afford action or exaction against my ' entailed estates ;' and the son having completed his titles without the provisions and legacies having been made real burdens on the lands ;—found, in a question betwixt a legatee and the trustee for the creditors of the son, who had become bankrupt, and the substi-*

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tute heirs of entail, (1.) *that the entailed estates were not liable in payment of the legacies or voluntary provisions, in the same manner as the onerous debts of the testator, and that, under the settlements in question, the legatees had no right or title to affect the entailed estates for payment of their legacies; and,* (2.) *that in respect of the title completed in the person of the trustee on the sequestrated estate of the heir in possession, the legatee had no preferable right to the rents, to the prejudice of the trustee and the personal creditors, but must rank as a personal creditor on the sequestrated estate.*

ARCHIBALD COCHRAN of Ashkirk executed, upon August 3. 1809, an entail of his estate near Musselburgh, and of other lands in the counties of Edinburgh and Haddington. The destination was to himself in liferent, and 'Archibald Cochran, my son, in fee, and the 'heirs whatsoever of his body; whom failing, to Euphan Cochran, 'my second daughter, spouse of John Johnstone in Southfield, and 'Jean Cochran, my third daughter, spouse of Thomas Brown, sur-'geon in Musselburgh, equally between them, and to the survivor 'or longest liver of them in liferent allenarly; whom failing, to 'William Kerr, second son of my eldest daughter, Margaret Coch-'ran, now deceased, by William Kerr, merchant in Leith, her hus-'band, and the heirs-male of the body of the said William Kerr, 'my grandson; whom failing, to Robert Kerr, eldest son of my 'said daughter Margaret, and the heirs-male of his body; whom 'failing, to Archibald Kerr, third son of my said daughter Mar-'garet, and the heirs-male of his body;' along with other substitutes.

The prohibitory clause is thus expressed: 'It shall not be 'lawful to, nor in the power of, the said Archibald Cochran, my 'son, nor any of the heirs and substitutes succeeding to the lands 'and estate, to sell, alienate, impignorate, or dispone the same, 'or any part thereof, either irredeemably or under reversion; nor 'to grant infeftments of annualrent, mortgages, nor any other 'right or security whatever, redeemable or irredeemable; nor to 'contract debts, nor suffer nor allow the superior's duties, or any 'other burdens legally chargeable on the premises, to run on un-'satisfied, nor to do any other act or deed, civil or criminal, or 'otherwise, whereby the same may or can be apprised, adjudged, 'evicted, or forfeited, nor to vary or alter the present tailzie or or-'der of succession, in any shape or manner, nor to do any other 'act or deed, whereby the same might be affected, frustrated or in-'fringed, contrary to the true meaning, purport and intendment 'hereof.' And again, 'it is expressly provided, &c. that in case 'Archibald Cochran, my son, or any of the heirs and substitutes

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'succeeding to the lands and estate, shall neglect to observe any of 'the injunctions and conditions before written, or shall act, or do 'in the contrary of any of the restrictions or limitations before writ-'ten, directly or indirectly, then, and in such case, not only shall 'all and every one of such acts and deeds be, as they are hereby 'expressly declared to be, ipso jure, void and null, and of no effi-'cacy or avail whatever; but also, the person or persons so neglect-'ing or contravening shall, for him or herself alone, immediately 'on such failure or contravention, amit, lose and forfeit all right 'and title which he or she had, could have, or pretend to the said 'lands and estate, or to the rents, profits and issues thereof, and 'the same shall, ipso facto, exclusively devolve on the next heir or 'substitute of entail, although descended of the body of the defaulter 'or contravener, in the same manner as if such defaulter or con-'travener was naturally dead; and it shall be lawful to such next 'heir or substitute to establish a title, in virtue and in terms here-'of, to the lands and estate in his or her person, by declaratory ac-'tion of irritancy, adjudication, or by any other mode competent 'in such cases at the time, and without being subject or liable to 'the debts, acts and deeds of any description whatever, of such de-'faulter or contravener, inconsistent herewith in any circumstances 'whatever, the heir or substitute so claiming and taking, in any of 'these cases, being always subject to the whole conditions, provi-'sions and limitations, clauses irritant and resolutive, herein con-'tained.'

It is further provided: 'Whereas, by marriage-contract, enter-'ed into betwixt the said Archibald Cochran, my son, and Mrs 'Elizabeth Somerville, his late wife, I became bound with him to 'make provision for the issue of that marriage, in the several events 'therein specified, not exceeding, in all, the sum of L.6000 ster-'ling, payable at such times, and in such proportions, as the father 'should deem proper and direct; and whereas, by general settle-'ment, executed by me, of the date hereof, in favour of my said 'son, and the heirs whatsoever of his body, of my personal and cer-'tain real estate therein referred to, under the conditions, burdens, 'and regulations therein specified, I have directed a fund, (in as 'far as shall be deemed necessary at the time,) to be raised and set 'apart, for the special use and purpose of satisfying and discharg-'ing the obligation, for provisions to the issue of the said marriage, 'contained in the said contract, whenever, and to the extent, that 'the same shall become exigible, in terms thereof: And whereas, 'besides the lands and estate now settled under entail by this pre-'sent deed, also conceived in favour of my said son in fee, and the 'heirs whatsoever of his body, I have, by another deed of entail,

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'executed by me, of the date hereof, settled and devised, in the 'same manner, my lands and estate of Ashkirk; and whereas, in 'consequence of the destination contained in these settlements, my 'whole entailed estates may eventually devolve on, and vest in the 'person of an heir of the body of the said Archibald, by the said 'marriage; therefore, and in that case, it is my will, and I hereby 'declare, that the heir of the said marriage succeeding to these 'estates shall, and must hold the same in lieu, and in full compen-'sation and satisfaction of all claims competent to such heir, and the 'descendant of the body of such heir, under, or by provision of the 'said contract; and that under the pain of forfeiting all right and 'interest competent to such heir in the entailed estates; which, 'upon such forfeiture being declared, shall, ipso facto, devolve upon 'the next heir of tailzie who would be entitled to succeed on the 'natural death of such forfeiting person, in terms of the said en-'tails.' There is a reservation of power to revoke and alter, in whole or in part; and also to sell or burden the lands and estate; and a declaration, that in so far as not altered or revoked, or the premises otherwise settled or disposed of, this deed shall be effectual and held as a delivered deed.

Another deed of entail was also executed by Mr Cochran, bearing the same date as the former, of his estate of Ashkirk, and other lands in Roxburghshire, containing the same clauses, irritant, resolutive and prohibitory, as the Musselburgh entail. Mr Cochran proceeded on this narrative: 'Considering that I have settled my 'lands and estates, lying in the county of Edinburgh, under entail, 'devised to myself in liferent, and to my only son, Archibald Coch-'ran, in fee, and the heirs and substitutes therein named, and that 'for certain grave and proper considerations, I have resolved to 'settle my lands and estate of Ashkirk, after described, in manner, 'and under the conditions and limitations after written.' The fee of the estate is disponed, as in the former deed, to Archibald Cochran, as the institute; but the substitution of heirs is different. It runs thus: 'Whom failing, to Samuel Johnstone, son of my said 'daughter, Euphan Cochran, and the heirs-male of his body; whom 'failing, to any other son to be procreated of the body of my daugh-'ter, the said Euphan Cochran, whether of her present or any future 'marriage, and the heirs-male of the body of such son; whom fail-'ing, to Archibald Kerr, third son of my daughter, Margaret Coch-'ran, now deceased, by William Kerr, merchant in Leith, her hus-'band, and the heirs-male of the body of the said Archibald Kerr; 'whom failing, to Robert Kerr, eldest son of my said daughter 'Margaret, and the heirs-male of his body; whom failing, to Wil-'liam Kerr, second son of my said daughter Margaret, and the heirs-

'male of his body; whom failing, to Thomas Macmillan Brown, 'son of my said daughter, Jean Cochran, and the heirs-male of his 'body; whom failing, to the heir of entail then in possession of my 'lands and estate in and about Musselburgh, and the succeeding 'heirs of entail to that estate, as contained in the separate deed of 'entail of these lands above narrated;' and reserving power to alter or revoke.

Of the same date with the preceding deeds, Mr Cochran executed a general disposition and settlement, upon the following narrative: 'Whereas I have settled and devised my estate of Ashkirk, 'in the county of Roxburgh, and certain other lands and estate, 'lying in the county of Edinburgh and Haddington, upon Archi'bald Cochran, my only son, in fee, and the heirs of his body; 'whom failing, the other heirs and substitutes, in the order, and 'under the limitations of entail specified in two separate deeds, 'duly executed by me, of the date of these presents; and whereas 'I have, by three separate settlements, disponed certain subjects 'in Musselburgh, therein mentioned, to each of my daughters, 'Euphan and Jean, and to Marion, my youngest daughter, since 'deceased, and their issue; and whereas I formerly advanced and 'paid certain sums of money, as the patrimonies of my daughter, 'Margaret Cochran, on occasion of her marriage with Mr Wil'liam Kerr; of my daughter Euphan, on her marriage with Mr 'John Johnstone; and of my daughter Jean, on her marriage with 'Mr Thomas Brown: and having it now in contemplation, in con'sequence of the decease of Marion, my youngest daughter, to 'make certain additional provisions on my grandchildren by Mrs 'Kerr, and on my two surviving daughters, Euphan and Jean; 'and considering, farther, that it is my meaning and intention, that 'the said Archibald Cochran, my only son, if he survives me, shall 'be my residuary legatee, after discharging my debts, legacies, and 'provisions, have therefore resolved to make a final settlement of 'my affairs, in manner under written.'

Mr Cochran conveyed to Archibald, his son, and the heirs whatsoever of his body, whom failing, to certain substitutes, his lands of Gilston and Overbrotherstone, &c.; 'as also, all and sundry lands, 'tenements, and other heritages, presently belonging to me, or which 'shall happen to belong to me at the time of my death, other than 'those now settled under the aforesaid two dispositions of entail, and 'the three separate dispositions, in favour of my said daughters, be'fore referred to;' as also his whole personal property. This disposition is granted under burden of the payment of 'all my just and 'lawful debts and funeral charges; and also with and under the 'burden of the payment of the following additional provisions to my

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'grandchildren by Mrs Kerr, and my said children, Euphemia and 'Jean, viz. to Robert, William, Euphemia, and Jean Kerr, my 'grandchildren, by my daughter, Margaret, now deceased, to each 'of these four, the sum of L.400 sterling of principal money; and 'to Archibald Kerr, also my grandchild, by my daughter Margaret, 'the sum of L.500.' These provisions are declared to be in full of all claims, 'excepting what I may think fit farther to bestow on my 'said sisters, and grandchildren by Mrs Kerr, of my own free will.'

Then follow a variety of provisions in favour of other parties, and this declaration: 'And in order to render this present settle-'ment the more effectual, and in confirmation also of my tailzies, 'and other settlements aforesaid, I do hereby nominate and appoint 'Archibald Cochran, my son, and the heirs of his body, whom 'failing, the other heirs and substitutes before mentioned, in the 'order aforesaid, to be sole executors of this my last will and set-'tlement, with full power to take possession, confirm and adminis-'trate, according to law, and in terms hereof; but with and under 'the burden of payment of my debts, provisions, legacies and others, 'before and after mentioned, and under the qualities and condi-'tions thereto annexed.'

Then follows a declaration, on the import of which the question betwixt these parties mainly turned: 'And whereas the estate and 'funds, real and personal, hereby settled by me on my said son in 'fee-simple, may be nearly adequate to the special burdens with 'which the same stand charged, as well as the foresaid restricted 'provision, therefore, my said son, by accepting hereof, or my en-'tailed estates, in terms of the settlements thereof, and the heirs 'succeeding to him therein, stand pledged and engaged as afore-'said, to satisfy and procure discharges and extinctions of every 'debt and obligation, provision and bequest, of every description, 'created, or contracted by, or incumbent on me, and that in such 'habile, proper and effectual manner, as that the same shall here-'after cease to exist, or afford action or execution against my en-'tailed estates.'

The above declaration is followed by a clause, providing a special arrangement for payment of part of the debts out of the rents of one of these estates, in these terms: 'And whereas I deem it 'expedient, for the purposes after mentioned, that, after my de-'cease, a sum, not exceeding L.500 per annum, shall be set apart 'from the rents and revenues of the estate of Ashkirk, and stocked 'out at interest, until a capital shall, by progressive accumulation, 'be raised therefrom to the amount of L.6000, the capital originally 'assured to him under the aforesaid contract of marriage, subject 'to the regulations therein mentioned; and I accordingly direct

'and enjoin the same to be so done at the sight of the trustees after 'mentioned, namely William Kerr, John Johnstone, and Thomas 'Brown, my sons-in-law, or the survivors or survivor of them, who 'are hereby authorised and empowered to demand and recover such 'sum annually, not exceeding that before specified, from the rents 'of the said estate of Ashkirk, as they shall deem necessary, until 'the aforesaid capital shall be raised therefrom, or by anticipation, 'by larger advances to that end and purpose being voluntarily 'made by the said Archibald Cochran, my son, or the heirs suc-'ceeding to him, and to see the same laid out in proper securities, 'these being always taken and devised to him in liferent, and also 'to him and his heirs and assignees in fee, but in trust, for the 'purposes in the different events after specified, viz. first, In the 'event of the said Robina Cochran, his daughter, being excluded 'from the succession to the said entailed estates of Ashkirk and 'Musselburgh by an heir-male of his body, for payment to her of 'the aforesaid restricted provision of L.4000 sterling, in terms of 'her mother's contract of marriage, the surplus or remainder of the 'said capital being in such case at his absolute disposal; but in the 'event of her succeeding to the said entailed estate, in default of 'heirs-male of his (the father's) body, then, and in such case, she 'shall have no claim to that provision; but that the same shall, 'together with the surplus of the said L.6000, belong to and be 'at the disposal of her father; and she shall accordingly be bound 'to make up titles under her mother's contract to the said special 'provision, and convey the same to him and his disponees, as a debt 'affecting the aforesaid fund, but not the entailed estate.'

Codicils were added to the general settlement by Mr Cochran, bestowing additional provisions on the pursuer, Miss Kerr, and his other grandchildren.

On the death of his father, in April 1812, Archibald Cochran, now of Ashkirk, succeeded to the two entailed estates, and also to the unentailed lands and other property conveyed by the general disposition. Titles were completed by him to the entailed property, and he also took infeftment under the disposition; but the several provisions and legacies, under the burden of the payment of which that conveyance was expressly made, were not inserted in the instrument of sasine, and were not created real burdens on the unentailed lands.

The affairs of Mr Cochran became embarrassed some years after his succession, and his estate was sequestrated, and David Paterson, accountant in Edinburgh, was appointed trustee. Paterson completed titles to the unentailed property, and to the bankrupt's liferent interest of the entailed estates, for behoof of the personal credi-

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tors of the bankrupt. Paterson subsequently resigned the trusteeship, and Mr Keith was chosen his successor.

After Mr Cochran's bankruptcy, Miss Kerr brought an action of constitution of her provisions, calling Mr Cochran and the trustee on his sequestrated estate as defenders, and she obtained decree for her several provisions. This decree was qualified by a finding, 'that the pursuer, on receiving payment of the principal sums and 'interest, or a dividend thereon from the sequestrated estate of the 'said Archibald Cochran, was bound to assign the same, or such 'part thereof as should be paid, to the person paying the same; such 'assignation, in the event of a partial payment only, not interfering 'with the pursuer's right to recover from the entailed estate of the 'said Archibald Cochran, or otherwise, payment of any balance of 'principal and interest which should remain unpaid.' In virtue of this decree, the pursuer ranked on Mr Cochran's sequestrated estate for the sum of L.933:4:10, and drew a dividend of L.119:3:1½ being at the rate of 2s. 6d. per pound, with bank interest. The balance of the pursuer's provisions remains unpaid.

Miss Kerr accordingly brought the present action, calling, as defenders, Mr Cochran of Ashkirk, the trustee on his sequestrated estate, and the heirs-substitute under the two entails, concluding to have it found, 'that the foresaid provisions bequeathed to, and 'settled upon the pursuer, with the legal interest of the same, all 'as fixed and ascertained by the foresaid decree of constitution, under deduction always of the said dividends or other sums received 'in part payment and satisfaction of the same, form a burden on the 'said fee of the entailed estates, and rents and proceeds of the same, 'or, at least, the said entailed estates, and the rents and proceeds 'of the same, are liable for the pursuer's provisions, as aforesaid; 'and that the pursuer, in payment and security of her said provisions and legal interest thereof, is entitled to institute and follow 'forth against the fee of the said entailed estates, and the rents, 'profits, and duties of the same, all manner of real diligence competent by law against real property, for payment or security of 'debt; and, in particular, that the pursuer is entitled to lead adjudication against the said entailed estates, for the said provisions, 'principal, interest and penalty, under deduction aforesaid: Or, at 'least, it ought and should be found and declared, by decree foresaid, that the said Archibald Cochran, and the said substitute heirs 'of entail, in their order, as they may successively succeed to, and 'take possession of, the said entailed estates, are bound and obliged 'as the condition of holding the said entailed estates, and drawing 'the rents and proceeds of the same, for and according to their respective rights and interests, to satisfy and pay the foresaid pro-

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'visions, bequeathed to and settled upon the pursuer, with the legal 'interest of the same, as fixed and ascertained by the foresaid de- 'cree of constitution, under deduction always as aforesaid: And it 'ought further to be found and declared, that the said William Keith, 'as trustee on the sequestrated estate of the said Archibald Coch- 'ran, and the creditors whom he represents, are not entitled to take 'any benefit or advantage from, or to draw, in payment of their 'debts, any part of the proceeds of the said entailed estates, with- 'out making payment of the said provisions bequeathed to, and set- 'tled upon the pursuer, with legal interest as aforesaid: And the 'same being so found and declared, the said Archibald Cochran, 'and the said William Keith, ought and should be decerned and 'ordained to rank and prefer the pursuer primo loco upon the 'rents and proceeds that have been already drawn, or that hereaf- 'ter may be drawn, from the said entailed estates, until such time 'as her said provisions, and legal interest of the same, fixed and as- 'certained as aforesaid, shall be fully paid and discharged.'

Separate defences were given in for the trustee, and for the substitute heirs.

A record having been completed, the Lord Ordinary ordered cases.

Pursuer's Pleas.

Pleaded for the pursuer—1. The deeds of entail, and the general disposition and settlement, with its relative codicils, form together one entire and joint settlement of Mr Cochran's whole means and estate, heritable and moveable.

2. According to the true and genuine construction of those deeds, the two entailed estates, as well as the estate conveyed by the general disposition and settlement, are liable for, and subject to, not only the more immediate and direct debts of the testator, but also the provisions and bequests of every description left by him, the whole of which form a burden upon his succession, as well entailed as unentailed; and, in particular, the entailed estates are liable for, and subject to, the several provisions of L.400, L.100, and L.200, settled upon the pursuer, with interest.

3. Archibald Cochran, and the other heirs of entail in their order, as they shall succeed to the entailed estates, are pledged and engaged, and bound and obliged, by the fact of their taking up the entailed estates, and as the necessary and indispensable condition of their holding the same, to procure discharges and extinctions of all debts and obligations of the late Mr Cochran, the entailer, and of the bequests and provisions left by him, and, in particular, the provisions in favour of the pursuer; and in the event of the defender,

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and the substitute heirs of entail, in their order, failing to make payment and satisfaction of, and to procure the discharge and extinction of the said debts and provisions, and, more particularly, of the provisions made and settled upon the pursuer, she is entitled, in security, and for payment of these provisions, to follow out against the entailed estates, and against the heirs of entail, as they successively take the entailed estates, all action and execution competent at law, in security and payment of an entailer's debt.

4. The creditors of the defender, Mr Cochran, and the trustee upon his sequestrated estate, neither were nor are entitled to take any benefit or advantage from the entailed estates, nor to draw, in payment of their debts, any part of the proceeds of the entailed estates, without making payment of the debts and provisions left by the entailer, and particularly of the provisions in favour of the pursuer; inasmuch as the discharge and extinction of these debts and provisions forms the express and necessary condition, under which alone, and no otherwise, according to the true construction of the entailer's settlements, the entailed estates can be held; and this the more especially, that if these debts shall remain unpaid, or undischarged, diligence may be done upon them against the entailed estates; by which diligence, contravention and irritancy of the entails would be incurred, and the estates be subject to be evicted and carried off from Mr Cochran and his creditors; Erskine *v.* Wemyss, 13th May 1829; Hamilton *v.* Bennett, 14th Feb. 1832, affirmed 16th Aug. 1833; Bruce, 9th June 1831; Greirson, 16th May 1821.

Defender's Pleas.

It was *pleaded* for the trustee of Archibald Cochran—1. The pursuer stands in no better situation than an ordinary creditor of the bankrupt; and neither at common law, nor by the conception of the various deeds of settlement executed by Mr Cochran senior, is entitled to adjudge the entailed estates, or in any way, direct or indirect, to maintain to any extent a preference out of the rents and proceeds thereof; *Ersk.* iii. 9. 11; Hill *v.* Hunter's Trustees, 14th May 1818, *F. C.*; Earl of Stair, 19th June 1827, 2. *Wil.* and *Sh. App.* 624; *Ersk.* iii. 9. 12; Robertson, 29th July 1760, *M.* 8087; *Ersk.* iii. 9. 46; Wallace, 16th May 1821, *F. C.*

2. The heirs of entail are not bound to make payment of the provisions and legacies left by Mr Cochran, as a condition of their right to the rents and proceeds of the entailed estates, and much less of the pursuer's claim for legitim.

3. The right vested in the defender, as trustee for the whole creditors, to the life-interest of the bankrupt in the entailed estates,

is preferable to any right which the pursuer, by adjudication or otherwise, can possibly acquire; 1. *Juridical Styles*, 232.

4. The pursuer must, at all events, assign over to the defender, for behoof of the creditors, the security she may, by adjudication or otherwise, be entitled to acquire over the entailed properties, or the rents and annual proceeds thereof; *Ersk.* ii. 12. 66; *Principles of Equity*, p. 1; 2. *Bell*, 283; Hawkins, 28th May 1800, *F. C.*; *Sandford, Entails*, p. 270-2.

Pleaded for the substitute heirs—

Substitute Heirs' Pleas.

1. The pursuer's provision not being created or declared a real burden upon the entailed estate, either by the deed of entail itself, or by the general disposition and settlement, it is incompetent for the pursuer to have it found and declared that she can adjudge the fee of the entailed estate for payment of her said provision.

2. There is no declaration, either in the deed of entail, or in the general disposition and settlement founded on, which effectually imposes upon the heirs of entail, by their succeeding to and taking possession of the entailed estates, an obligation to pay the pursuer's legacy.

Bank. iii. 8. 47. and 50; *Ersk. Princip.* iii. 9. 4; *Stair*, iii. 8. 39; *Ersk.* iii. 9. 12; Hill *v.* Hunter's Trustees; E. of Stair, 19th June 1827; 1. *Bank.* iii. 5. 68, 69; *Ersk.* iii. 8. 52; *Stair*, iii. 5. 17. 20. 21; Craufurd, *M.* 2578; Nasmyth, 25th June 1672, 2. *Brown's Sup.* 659; *Fount.* 547; Walls, 10th Feb. 1700, 3561; Allan, 25th Jan. 1715, *Ersk.* iii. 3. 61; iii. 8. 53; Innes, 13th Jan. 1773, (3567); *Ersk.* iii. 9. 46; Robertson, 29th July 1760.

Upon advising the cases, the Lord Ordinary pronounced this interlocutor:

'The Lord Ordinary having considered the closed record, the 'revised cases for the parties, and whole process, finds, That the three 'deeds executed by the late Archibald Cochran on the 3d August '1809, refer to, and are connected with one another, and must be 'viewed as constituting one settlement of his estate: finds, That in 'the general disposition, which must be regarded as the last of these 'deeds, and as forming the completion of the settlement, Archibald 'Cochran expressly declares: 'Whereas the estate and funds, real "and personal, hereby settled by me on my said son, in fee simple, "may be nearly adequate to the special burdens with which the "same stand charged, as well as the foresaid restricted provision; "therefore my said son, by accepting hereof, or my entailed estates, "in terms of the settlements thereof, and the heirs succeeding to

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" him therein, stand pledged and engaged, as aforesaid, to satisfy " and procure discharges and extinctions of every debt and obliga- " tion, provision, and bequest of every description, created and con- " tracted by or incumbent on me; and that in such *habile*, proper, " and effectual manner, as that the same shall hereafter cease to " exist, or afford action or execution against my entailed estates:' ' finds, That this declaration necessarily implies that the entailed ' estates were, by the entailer, intended to be subject not to his ' debts only, but to his legacies, and that the institutes and heirs of ' entail were bound to pay off these legacies as well as the debts, in ' order to clear these entailed estates: finds, That this declaration ' is followed by a clause, providing a special arrangement for pay- ' ment of part of the debts out of the rents of one of these estates; ' but finds no evidence in the deeds, that the liability of the entailed ' estates, or heirs of entail, was intended to be limited to the effect ' of this provision: finds, That the above declaration cannot be ' held *pro non scripto;* nor effect be denied to the intention of the ' maker of the deeds appearing thereby: therefore finds, That the ' entailed estates are liable to be affected for payment of the lega- ' cies libelled, in the same way as for payment of the entailer's debts; ' and finds, That the said estates being so liable, the pursuer is pre- ' ferable on the rents of these estates to the defenders, who claim ' only by virtue of assignation to those rents from the heir of en- ' tail: finds, decerns, and declares in terms of the first conclusion ' of the libel: finds no expenses due to either of the parties.'

Both defenders *reclaimed.*

The *Court* appointed counsel to be heard in their presence; and allowed a minute to be given in for the substitute heirs, in regard to the application of the rents and funds intromitted with by the trustee for Archibald Cochran, and answers to be lodged for the trustee. Thereafter counsel were farther heard upon the matters contained in the minute and answers.

Opinion of Court.

At the final advising, the *Lord Justice-Clerk.*—After considering the able arguments in the hearing, together with the cases, I have been induced to alter the opinion which I was at first inclined to form upon this question.

It is indispensible to attend to the nature of the action. The pursuer is one of the legatees of old Mr Cochran, pursuing for her own interest alone. But there are a great many others in the same situation. She brings her action to try the question, how far her provision can be made effectual against the fee of the estates, and Archibald Cochran's right as heir, and the other heirs subsidiarily. It

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is in regard to the entailed estates alone the question has been raised.

We must lay entirely out of view the points discussed in the minute and answers relative to the proceeds of the unentailed property, which passed to Archibald Cochran, the present heir, and have been expended by him. The liability of the unentailed succession cannot come under the abstract question, now alone raised, as to the liability of the entailed estate. Keeping in view the nature of the action, and looking to the findings of the Lord Ordinary, I have no hesitation in concurring in the first of these findings, namely, that these deeds must be viewed, and taken in combination, and construed as one settlement of affairs by Mr Cochran.

Then, as to the important findings, by which the Lord Ordinary holds these provisions to be effectual against the entailed property, I must confess, when the case came first before us, my opinion was, that the intention of the testator was as assumed by the Lord Ordinary. But, on considering more anxiously the terms of the several clauses founded on, (which I admit cannot be held pro non scriptis,) I am satisfied that it was not the intention of Archibald Cochran to render his entailed estates liable for these provisions, and that they cannot be considered in the light of entailer's debts, forming a burden on the lands entailed. In providing for the payment of these legacies, there can be no doubt that the testator understood there was an ample sufficiency of funds arising out of his other property. We have settled, by a judgment of this Court, that the trustees are bound to appropriate L.500 a-year, as a fund to meet the provisions for which the sinking fund was created; and the creation of that fund shews Mr Cochran had not formed an over estimate of his available funds. But, so far from intending that the fee of his entailed properties should be liable for these provisions, the reverse is evident. A personal obligation is, in the strongest terms, laid on his son, and done, too, in such a way as to protect the entailed properties, so that they should not be affected by these provisions; and the intention, therefore, evidently was, that the fee might not be encroached on, although the burdens should be effectual against the heir personally, and each heir in succession.

Had the testator intended to lay these burdens on the fee, he could easily have done so in express terms; but his declaration falls short of making them express burdens. I am satisfied not only that these provisions were not declared to be burdens on the fee, but also, from the cases referred to, that this could not have been effectually done, unless there had been the most clear and unquestionable intention expressed of creating them real burdens.

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The legatees delayed proceeding. If they had done so immediately, they could have made their debts effectual against Archibald Cochran, when taking these properties. He was allowed to take up the estates without the provisions having been made real burdens, and no steps were taken. There was thus, in the first place, no intention by Archibald Cochran; and, secondly, the provisions were not made real burdens. The case of Lord Macdonald, in which Lord Glenlee was in the minority, was different. In that case, there was not only a manifest intention to impose the obligation, but the second Lord Macdonald did nothing to counteract the obligation imposed upon him.

Lord Medwyn.—I agree in the view that is taken of these three deeds, which are executed unico contextu, and bear reference to each other, that they are to be viewed as if all their provisions were contained in a single deed; and I think the general settlement was expressly made as a final settlement of his affairs, and in confirmation of his tailzies and other settlements.

The entails contain no provision as to his debts, provisions, or legacies; but the general disposition specially dispones Gilston and Brotherstone, under a prohibition to sell gratuitously, but under the burden of debts and funeral expenses, and certain additional provisions to his grandchildren, appoints his son, whom failing, the other heirs, executors and residuary legatees, 'but with and under the 'burden of the payment of my debts, provisions, legacies, and others 'before and after mentioned.' While his object unquestionably was that these provisions should be effectual, I think it quite clear he intended that they should be paid out of the other means and estate, rather than the entailed estate. Then follows the clause, upon the meaning and import of which the present question turns.

Upon this I beg to remark, 1. If by this clause it was originally intended to impose upon the heirs in the entailed estates the burden of provisions and bequests which the tailzies did not impose, and the law would not impose, it is the most awkwardly worded clause I ever met with. The clause seems to me to have been framed to relate, if not solely, certainly mainly, to the provision for raising L.6000 from the rents of Ashkirk, to meet the marriage-portion in his son's contract of marriage. It begins with referring to the said contract of marriage, and the sum of L.6000, to be restricted in a certain event to L.4000; *and whereas*, by the predecease of the wife, this event had occurred; *and whereas* the estate and funds, hereby settled, may be *nearly* adequate to the special burdens and the restricted provision. Now, after such a narrative as this, and when he was to follow it up with providing a fund, out of the rents of Ashkirk, to raise, by progressive accumulation, the sum of L.6000,

it might rather have been expected, that instead of imposing the burden of bequests on the entailed estates, if any thing was said at all about them, it should rather have been a declaration that the entailed estates were not to be burdened by them, as in fact the tailzies did not so burden them. But, instead of distinctly burdening the heirs of entail by such words as these, I hereby expressly burden them with payment of every debt and obligation, provision and bequest; the words are, Therefore my said son, by accepting hereof, *or my entailed estates*, &c. stand pledged and engaged, *as aforesaid*, to satisfy and procure discharges, &c. so as not to affect the entailed estate.

Now, although I do not mean to say the words, *or my entailed estates*, are to be held pro non scriptis, or that due effect is not to be given to them, I am satisfied they had not been in the original draft of the deed, and had been added without much consideration. Read the clause without these words, and they express, what is true, that, on accepting this general disposition, the disponee stands pledged to satisfy these provisions and bequests, which it is declared he is pledged to do *as aforesaid*, which, not only from these limiting words, only applies to what is provided in the previous part of this deed, but also because no such burden is mentioned in the other two deeds. Hence, as originally drawn, it could not be intended to apply to the tailzies, which impose no such obligation.

But holding that the clause imports a substantive provision for payment of this bequest, it may be useful, before inquiring as to its effect upon the entailed estates, or the heirs succeeding to them, to consider, 2. What is the import or amount of the burden on the property conveyed under the general disposition, upon which it is unquestionably laid? The disponee is to take, under burden of payment of certain specified provisions; but these are not specially enumerated in the instrument of sasine. Now, in such a case, they are not burdens on the fee made real by infeftment; neither are they conditions or qualifications of the disponee's right, but merely burdens imposed upon him, importing a mere personal obligation to pay. I am not satisfied he ever meant to make them real, even over these unentailed lands. There is no clause obliging the heir to insert them specially in the sasine; and it appears, that after providing for the provision in the marriage-contract, he left more personal property than sufficient to pay his L.8000 of provisions.

3. It is admitted that the provisions are not constituted real burdens on the entailed estates; and here, before going further, it would be proper to advert to the conclusion of the summons, and what the Lord Ordinary has found.

The first conclusion contains an alternative. It concludes, that

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the provision to the pursuer forms a burden on the fee of the entailed estates, and rents, and produce of the same; *or, at least*, the said entailed estate, and the rents and proceeds, are liable for the provisions; and that the pursuer is entitled to use all manner of real diligence, and, in particular, adjudication against the entailed estates and rents; and then there is a conclusion as to future heirs of entail. The Lord Ordinary has given effect to the alternative of the first conclusion, not finding the provision a burden on the entailed estates, but that they are liable to be affected in the same way as for an entailer's debts; and that the pursuer is preferable on the rents to the defender, who has only an assignation to the rents from the heir of entail.

This provision then is assimilated to an entailer's debt; but it has no resemblance to such. A debt is a burden contracted by a person binding himself to pay as well as his heirs. Here the provision is never binding on the ancestor, but is a burden imposed by him upon his heir. It is, in short, an injunction upon his heir to pay a sum of money, the burden of which he did not impose upon himself, and which the heir has neglected to obey. I do not think that the creditor in this obligation, by doing diligence upon it within three years of the granter's death, would secure a preference against the proper creditors of the son. But it is said, the heir of entail, by accepting the entailed estates, stands pledged and obliged to satisfy the provision. Be it so; but still this is merely a personal obligation on the heir, which may entitle the creditor in it to affect the rents of an entailed estate, or the fee of an unentailed, like any other funds belonging to the heir; but it creates no *nexus*, nor gives a real lien over the estates themselves, in aid of the right. It is not made a condition of the grant, nor even a burden on the disposition—simply a burden on the heir. Besides, the heirs who are thus said to stand pledged and engaged to satisfy these provisions are also 'to procure discharges, so that the same shall hereafter 'cease to exist, or afford action or execution against the entailed 'estates;' so that the declaration, that they are pledged to pay, seems introduced, not with the view of burdening the estate, but with the expressly opposite intention, that they should not affect the entailed estates. It is not said that this is to be done, so that they shall cease to affect the entailed estate, as if he intended or understood that previously they did so; but the debt is to cease, and a discharge to be taken, so as not to afford action against the entailed estate. The expressed intention of the granter throughout is, that payment shall be made from his other property—not the entailed estates.

It is held, however, that this declaration as to the discharge

implies that the entailer intended his entailed estate to be subject to these provisions, and that the heirs were bound to pay them off to clear the entailed estates. But I do not think this inference sound.

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It was argued, that this injunction applied only to debts which did affect, or might be made to affect the entailed estate, of which there are some; and in this way this difficulty was supposed to be got over. But, according to my idea, the injunction applies to the provisions as well as debts; and that, as the deed lays on the heirs the burden of paying them, whether debts or provisions, it further imposes the obligation of taking discharges, in extinction of them, so as not to keep them up as burdens against the entailed estate, which otherwise the heir might have done, if he had not been expressly prohibited from doing so, as was found in the case of Crawford, 11th March 1809; and such an obligation is quite consistent with the burden, being one wholly personal on the heir,—indeed naturally follows from its being so; and that it neither is a burden upon the estate, nor in any event was ever to be permitted to become so.

It is not necessary to discuss how far the creditor might have affected the bankrupt's interest in the entailed estate. No attempt has been made to do this prior to the adjudication of this right by the trustee, which seems to have been done in a competent form; and after the real right thus vested in his person, a mere personal creditor cannot, by any diligence, improve his right, so as to obtain a preference over the trustee's infeftment, for behoof of the creditors. The trustee who adjudges a debtor's right, it has often been argued, takes it tantum et tale as it was in his person: he does so, but it is according to the extent of the real right in the debtor at the time, and a personal obligation can have no effect against the legally constituted diligence of a creditor, or of a trustee for them. Therefore, as this appears to me to import no higher than a personal obligation on the heir, and cannot have the effect of an entailer's debt, I cannot see how, by any diligence, it can be made preferable to the right acquired by the trustee.

Lord Meadowbank.—After the most anxious consideration of this cause, my inclination was to agree with the opinion of the Lord Ordinary; and having again maturely weighed the arguments submitted to us, I still concur in the opinion given by his Lordship, that these provisions must be effectual as burdens upon the entailed estates, and that Archibald Cochran took up these estates under an obligation to discharge the provisions.

I throw entirely out of view the amount of these provisions. The obligation, if good in one respect, must be so in every other.

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The grounds of my opinion then are,—In the first place, I hold that these different documents must be considered as forming one deed, and that the clause in one must be taken as if repeated in the others. If, then, these different deeds are to be viewed as one settlement, I may just refer to what your Lordships have done about the sinking fund of L.500 annually, as highly important in deciding this case. There is, it will be attended to, no declaration as to that fund in the Ashkirk estate, but in the settlement only. Yet the Court have held that the entail of Ashkirk is so qualified by that declaration, that a sum from the rents must be laid aside to meet that burden imposed by the general settlement. It has thus been held that this sum, as a sinking fund, has been as adequately provided for as if it had formed part of the Ashkirk deed of entail, and that the clause rides over the whole deeds.

In the next place, I have never been taught that, in construing a settlement, no precise form of words is necessary, in order to indicate the intentions of the granter. Courts of law must gather from the expressions actually used what construction the instrument admits of. We must here, therefore, as in other cases, gather the meaning from the whole context. The question must be treated exclusively as one of intention, and not whether these provisions have been, in legal form, made real burdens, but whether Mr Cochran, in executing these deeds, did not mean that parties taking his estates should be liable for these provisions. Here, then, the nature of the settlements ought to be considered. He, the testator, no doubt, favours his son and his heirs; but he shows an equally anxious wish to provide for all descendants of his own body. There are strong expressions, which tend to satisfy me that he did not mean to leave the legatees to be dependent entirely on the proceeds of the unentailed estates. He says, in relation to the first class of provisions, I have left what may be nearly sufficient to meet these special burdens out of my fee-simple property; but, at a subsequent date, he goes on to make additional provisions, which, if the unentailed estates had only been nearly sufficient to meet the original provisions, would have more than exhausted those unentailed properties. The providing of the sinking fund shews Mr Cochran's understanding at the time, that the estates would otherwise have been responsible for the whole; and he accordingly provides for the accumulation of L.500, so that the estates may not be affected.

Then comes the clause mentioned by the Lord Ordinary, by which the estates are said to be pledged as aforesaid, for the liquidation of the debts and provisions. Had the clause stopped there, we might not have been able to collect sufficient evidence of intention; but the clause goes on, 'against my entailed estates,' &c.

and thus we have got his declaration, that the provisions had been placed upon the precise same footing as his debts. And the question which we have to answer is this, was it incompetent to place them on the same footing? If it had been incompetent, I should have concurred with your Lordships. But as there is no reason why it should be held incompetent, and as the testator has stated what his will and intention was, I cannot agree to sustain the defences.

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Lord Glenlee.—I agree with the majority. No doubt these different deeds must be viewed in the light of one entire settlement. But the question arises, whether provisions embraced in one of these deeds can be held to apply to, and become real burdens on, the lands disposed of in the other deeds. As to the intention of the testator, my idea is, that he thought he had left funds sufficient to meet these provisions, and he accordingly goes on to provide a sinking fund to meet other provisions. It was not natural for him to contemplate a deficiency, and lay on a burden in consequence; for the whole tenor of the declarations in the deeds is, take care and do not make these provisions a burden on my estates; his impression being, that there were ample funds otherwise. It was natural for him, however, to say, that unless I take the heirs bound, they may make away with the funds, and thus the burden might fall on all the future heirs. He therefore wished, and provided accordingly, that these provisions should be immediately extinguished, in order to prevent such a contingency, and thus expediting his real intention, so that the burdens should be immediately annihilated. It would be against all rule to disappoint the intentions; and there is no room for holding that he placed these provisions on the same footing as his proper debts.

Judgment.

'The Lords having resumed consideration of the reclaiming notes, 'with the whole proceedings, and heard counsel in their presence, 'alter the interlocutor of the Lord Ordinary complained of: find, 'That the declarations in the general disposition and deeds of entail, 'executed by the late Archibald Cochran on the 3d August 1809, 'founded on by the pursuer, do not import as his intention that the 'estates entailed by him should be liable to the payment of the le'gacies, or voluntary provisions bequeathed by him, in the same 'manner as his own onerous debts: find, That, under the settlements 'in question, the pursuer has no right or title to affect the entailed 'estates for payment of her legacies: find, in respect of the title 'completed by infeftment in the person of the trustee on the se'questrated estate of the present heir of entail in possession, she 'has no preferable right to the rents of the estate, to the preju'dice of the trustee, and the personal creditors whom he represents,

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'and that, in the sequestration of his estate, she must rank as a personal creditor thereon; therefore sustain the defences for the trustee, and assoilzie him from the whole conclusions of the libel: find no expenses due to any of the parties, and decern; and, quoad ultra, remit to the Lord Ordinary.'

Lord Ordinary, *Mackenzie.* Act. *Rutherfurd, Ivory.* *James Malcolm*, S. S. C. Agent. Alt. *Shene* and *Cowan, Dean of Fac. (Hope,)* and *Milne.* *Donaldson & Campbell*, W. S. *Warren H. Sands*, W. S. Agents. *R.* Clerk.

R.

FIRST DIVISION.

No. LXXXIV. 11*th March* 1835.

GARDNER
against
GRANT.

PUBLIC OFFICE.—MACER.—ACT OF SED. 11TH MARCH 1791.—PACTUM ILLICITUM.—*Found, that a party holding the office of macer, under Mrs Tindal Bruce, as coming in place of Moncrieff of Reidie, who had a grant of the office from the Crown, was entitled to a proper remuneration, and action refused on an agreement not having this effect.*

THE family of Moncrieff of Reidie held a hereditary right of macership in the Court of Session, in virtue of a feudal grant in 1483, which was confirmed by a royal charter in 1690, and ratified, in the following terms, in Parliament, in 1693: 'Their Majesties, 'for clearing of the right of the said heritable office, and making 'the same effectual in all time coming, have, by the said charter, 'given and granted full power and privilege to the said George 'Moncrieff, during his lifetime, and, after his decease, to the said 'John Moncrieff, his son, and his foresaids, in all time coming, to 'nominate and present one of the four ordinary macers before the 'Lords of Council and Session, fit and qualified for the same office, 'for whom the said George and John Moncrieff shall be answer-'able.'

This right, with the barony of Myres, was sold by Moncrieff of Reidie to the late Mr Bruce of Falkland, to whom succeeded the present Mrs Tindal Bruce; and in the rental on which the purchase

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was made, there was included the sum of L.45 paid annually by the macer to Mr Moncrieff.

On a vacancy occurring in the macership in 1830, Mr and Mrs T. Bruce, with a view of benefiting the pursuer, Gardner, (who, from holding another situation, could not, in person, execute the duties of a macer,) granted a commission in favour of the defender, Grant, on the understanding that he should pay annually to them the usual sum of L.45, and a like sum of L.45 yearly to the pursuer, the whole salary being L.130 per annum, besides the fees of office, the average amount of which was not specified; and Grant accordingly granted a bond to that effect.

The defender having refused to make payment of the sum of L.45 to the pursuer, in terms of the agreement, the present action was raised, for the purpose of compelling him to fulfil it.

In defence it was *pleaded*—That the agreement was pactum illicitum, and could not be confirmed; and, 2. That the defender having been misled by the pursuer with regard to the fees and emoluments of the office, which were greatly exaggerated, he was not bound to give effect to the arrangement.

The Lord Ordinary having ordered cases,

Pursuer's Pleas.

The pursuer *pleaded*—The stipulation in question is not pactum illicitum. It does not relate to any office which was not legally saleable both before and after the 49th of Geo. III. It relates to an heritable office, an estate of inheritance, and therefore it does not fall under any of those rules, to which the plea maintained by the defender applies, but falls under the exception to which Lord President Blair adverts in the case of Thompson *v.* Dove, 16th Feb. 1811. Though doubts seem to have been entertained as to this heritable office before the statute 1693, whereby the right to it was fully confirmed and ratified in Parliament, it has, from that time, downwards to the present date, been uniformly recognised; and accordingly, in the stat. 1. and 2. Geo. IV. c. 38, § 28, which provides salaries to the macers, 'including the one by 'hereditary right, or his deputy,' this heritable right is again expressly recognised by the Legislature. Similar contracts have been sustained even as to offices which were not saleable; Haldane *v.* De Maria, 6th March 1812; Young *v.* Thompson, 9th Feb. 1759, *M.* 9525. The English case of Sparrow *v.* Reynold, 6. *Dowland and Ryland*, 364, establishes the point, that, with regard to a saleable office, such an agreement as that now founded on is legal, and may be enforced by a court of law, provided there be sufficient evidence that it was made with the knowledge and concurrence of the patron.

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Defender's Pleas.

Pleaded by the defender — 1. The arrangement libelled on is not actionable, as it is a pactum illicitum, contrary to the law and policy of the country, as was ruled in the analogous case of Thompson *v.* Dove, 16th Feb. 1811, and various prior authorities therein referred to; see, in particular, the Lord Chancellor's opinion in the House of Lords, in the case of Sir Robert Anstruther, 25th Feb. 1802, annexed to the report of Thompson *v.* Dove.

The *Court*, on advising the cases, appointed copies of the whole papers to be laid before the other Judges, with the view of their giving their opinion on the following question, 'whether the agree-'ment libelled on is legal and actionable?'

The following opinions were returned:

Opinion of Consulted Judges.

Lords Mackenzie, Medwyn, Corehouse, Fullerton and Moncreiff.— In this case it appears that Moncrieff of Reidie, holding, in virtue of a feudal grant dated in 1483, hereditary right to a macership, this right was confirmed and explained by royal charter, dated in 1690, ratified in Parliament in 1693. By this last grant, 'their 'Majesties, for clearing of the right of the said heritable office, 'and making the same effectual in all time coming, have, by the 'said charter, given and granted full power and privilege to the 'said George Moncrieff, during his lifetime, and, after his decease, 'to the said John Moncrieff, his son, and his foresaids, in all time 'coming, to nominate and present one of the four ordinary macers 'before the Lords of Council and Session, fit and qualified for 'the said office, for whom the said George and John Moncrieff 'shall be answerable.' This right was all along, by the law of Scotland, alienable, and was acquired by Moncrieff of Reidie by a progress of alienative conveyance from John Scrymgeour, to whom the original grant had been made. From Moncrieff of Reidie it was purchased for a price by Mr John Bruce, to whom succeeded Mrs Tyndal Bruce. It appears to us, that under the terms of this grant, fairly interpreted, the right was not a mere patronage of the office of an ordinary acting macer, but an hereditary right of macership, with a power of naming a deputy. This, we think, appears not only from the form of the original grant, and the confirmation of the grant of hereditary macership to the grantee himself, but most especially from the provision, that the feudal grantee shall be answerable for the ordinary macer he appoints to do the duty,—a responsibility never attaching to a mere patron, always to a principal appointing a deputy. And this responsibility, we observe, has by this Court been clearly understood not to be nominal; for the executor of Alexander Mitchell, macer named by

Mr Moncrieff of Reidie, having melted down his mace, the Court, by Act of Sederunt, 4th March 1760, ordered Mr Moncrieff 'to 'provide Francis Scott, the successor of Alexander Mitchell, with 'a proper mace against the 12th June.' And on the 17th June 1760, 'the doers for Mr Moncrieff of Reidie delivered into the Court the 'mace appointed;' see Acts of Sederunt, 14th March and 17th June 1760. And we observe that the same view is taken, not only by the Commissioners on the Courts of Justice in Scotland, who state that one of the macers 'acts as deputy' under Mr Moncrieff, but in the Act of Parliament 1. and 2. Geo. IV, c. 38, which speaks of 'the whole 'seven macers, including the one by hereditary right, or his deputy.' We therefore think that the right of Mrs Tyndal Bruce is that of an hereditary office, with the power of appointing a deputy, for whom the principal is to be responsible. Such being the nature of the right to the office, we conceive that, according to the general law of Scotland, it is not unlawful, but recognised as legal, for the principal to make a contract with his deputy, by which, in some way, the profits of the office are divided between them. It is indeed obvious that such hereditary offices cannot be exercised except by deputy; and that it is not possible to expect either that the principal will allow the deputy to draw the whole profits, while he has the responsibility for the proper appointment and exercise of the duty, or that the deputy will undergo the trouble of that exercise without reward. We believe that such contract is almost always made in cases of such deputation, and, so far as we know, has never been found to be illegal. Accordingly, the act 49th Geo. III, c. 126, for preventing the sale and bickerage of offices, expressly provides, 'that nothing in this act contained shall extend, 'or be construed to extend, to prevent or make void any deputation 'to any office in any case in which it is lawful to appoint a deputy, 'or any agreement, contract, bond or assurance lawfully made in re-'spect of any allowance, salary or payment made or agreed to be 'made by or to such principal or deputy respectively, out of the fees 'or profits of such office.' It is true that in this case the royal grant directs the Lords of Session to receive the nominee of Moncrieff of Reidie 'to the said office of macerie, and fees, salaries and casual-'ties thereof.' But we think it would be unreasonable to interpret this clause as meaning any thing further than that the acting macer, or deputy, should be allowed and empowered to draw the ordinary fees of the office from the public. We have no idea it was at all intended to exclude the principal macer from sharing those profits after they were drawn. Accordingly, it seems to be admitted, that as far back as memory goes the practice has always been,

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that Moncrieff of Reidie and his successors have, in fact, shared the profits of this office, by a contract made by the principal with the acting or deputy macer on occasion of his appointment; and so fully was this understood to be unobjectionable, that Mr Bruce purchased the heritable office for a price calculated with reference to the emolument thus derived by the hereditary macer, as part of the rental of the estate to which the feudal office was attached. On the whole, then, we are satisfied that it was competent for Mrs Tyndal Bruce, with concurrence of her husband, when a vacancy of this ordinary or acting macership occurred, to fill it up by an appointment, accompanied by a contract for sharing the profits; and we see no restriction to which they were liable except this, that they were bound to appoint a fit person to do the duty, and so to leave as much of the profits to the deputy as would induce such competent person to accept and properly exercise the duty. They did, accordingly, nominate the defender, and accompanied his nomination with a contract, by which he was bound to pay to themselves L.45 per annum, and to the pursuer, as their donee, another sum of L.45 annually, retaining to himself the surplus of the profits as the reward of the acting or deputy macer. The defender accepted of the office, and it is not stated that he is not a fit person, or has not properly exercised the duty. We therefore do not see any thing illegal in his appointment and contract. The circumstance, that instead of paying the whole L.90 to the principal, the deputy pays half of it to a donee of the principal, we think is very plainly irrelevant. We see no objection to the particular mode in which the profits are agreed to be shared, more than would have existed if this object had been effected in any other form whatever. We therefore think that the question submitted to us must be answered in the affirmative.

Lords Justice-Clerk, Glenlee, Meadowbank, and Cringletie.—By the titles in virtue of which the proprietor of the estate of Myres is now vested with the heritable right of nominating one of the macers of the Court of Session, it appears to us, that nothing more is thereby truly conferred, than the right of appointing or presenting to the Court a fit and qualified person for discharging the duties of an ordinary macer. The Crown charter of 5th July 1828 conveys to Mr and Mrs Bruce, all and haill the lands and barony of Myres, and as an appendage to the barony, 'Officium clavigeri et 'armorum sergeandi coram Dominis Concilii et Sessionis, cum po- 'testate et privilegio nominandi et presentandi unum ex quatuor 'ordinariis clavigeris coram dict. Dominis Concilii et Sessionis, 'cum usitatis, feodis, salariis et casualitatibus ejusdem.' The na-

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ture of the right is more fully detailed in the first report of the Commissioners on the Courts of Justice in Scotland; but although it is there stated that the family of Myres, in whom the office of one of the macers of the Court of Session is heritably vested, has possessed it as a pertinent of lands secured by infeftment, with the usual fees, salaries and casualties of the office, and that in presenting one of the ordinary macers, who is received by the Court, and acts as deputy under his constituents, the proprietor of Myres has for some time been in the use of receiving L.45 a-year out of the office, yet there is nothing there stated, indicative of the existence of any right or usage of exacting, over and above, any further deduction from the emoluments of the office, for the use, either of the proprietor of Myres, or of any one else whom he might choose to favour. We observe that, in 1810, the Court had thought the nature of this right, and the practice of exacting the above-mentioned sum, to be a matter of so much importance, as to require the appointment of a committee of their number to inquire into it, and that a report was made by that committee, and approved of by the Court; but no farther steps were taken thereon. Whether this right of the proprietor of Myres, to reserve the above proportion of the emoluments of the office, may or may not be well founded, we are not now called upon to give any opinion in regard to it. But admitting that the heritable right of the patronage of the office is legally saleable, we do not consider that the actual nomination of a macer, or the emoluments of the office, can, on each vacancy, be legally made the subject of sale, as we can discover no grounds for holding, that, either under the original confirmation of the grant in 1690, by which power was given 'to name and present one of the ordinary macers of the Court of Session, who is to have right to the usual fees, salaries and casualties of the office,' or the ratification in Parliament in 1693, which is narrated in the papers, or the Crown charter of 1828, any power of selling the appointment of macer, or of appropriating any part of its emoluments to a third party, was thereby conferred upon the grantee. It is, indeed, quite manifest, that if, by a private stipulation, the holder of this office could legally be burdened with the payment of the sum claimed in this action, the emoluments might, on the same principle, be still farther frittered away, so as to leave next to nothing to the person actually performing its duties, and consequently to render him totally unfit for the situation, and make it imperative upon the Court to refuse to receive him.

We are therefore disposed to view the transaction which took place at the appointment of the defender, Alexander Grant, to which the patrons were parties, as very similar in its nature to

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what occurred in the case of Dove *v.* Thompson, 16th Feb. 1811, in which the reservation of a part of the emoluments of the office of keeper of the Parliament-House, in favour of an individual who had been a candidate for the situation, by the interference of the Magistrates of Edinburgh, who held the right of presentation, was pronounced by this Court to be a pactum illicitum. Concurring, therefore, as we do, in the sentiments expressed by the Lord President in that case, we are of opinion that the agreement libelled on in the present case is not legal or actionable.

When the case came again to be advised with these opinions, a majority of their Lordships, viz. Lords Craigie and Balgray, were inclined to concur in the opinion of those Judges who held the agreement as actionable, while Lord Gillies agreed with the other Judges *. But before giving judgment, a doubt was stated from the bar, how far the opinions already given were decisive, as they were directed rather to the question, how far such an obligation as that set forth by the pursuer was to any effect relevant, rather than to the mode of disposing of this particular case, in the event of its being ascertained, by proof or otherwise, that the share of the emoluments left to the defender was inadequate to his decent support and appearance in the office.

The *Court*, accordingly, 'before answer, allowed the defender to 'put in a minute, stating the facts which he avers and offers to prove 'relative to the amount of the remuneration which, under the agree-'ment in question, he draws, as inadequate for a person exercising 'the office of macer,' &c.

In this minute it was stated, that the whole emoluments of the office, including fees as well as salary, were not, on an average, equal to L.140 a-year; and reference was farther made to the Act of Sederunt 11th March 1791, which, in reference to this macership, contains the following proviso: 'And whereas the office of 'one of the macers, or the right of presenting him, is hereditary, 'and has been in use to be exercised by a deputy, the said Lords 'do hereby declare, that the fourth share of the said additional fees 'upon emoluments, and upon bills of suspension and advocation, 'which is meant to be appropriated to the said macers, shall belong 'to the said deputy alone, and no part thereof to the principal; 'and that, in time coming, no deputy shall be allowed to officiate 'in the said office, until it be explained, upon oath, if required, 'what transaction has been made between the principal and the 'deputy, and until the Court is satisfied that the deputy is to have

* The Lord President was absent.

'a sufficient and reasonable allowance for enabling him to exercise 11 Mar. 1835.
'the duties of the office.'

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The *Court*, after advising this minute, with answers, and ordering additional cases, remitted the same to the other Judges, and requested their Lordships to reconsider the opinion formerly given by them, and to return their revised answer to the question submitted to them; and the following opinions were returned:

Opinion of Consulted Judges.

*Lords Medwyn, Corehouse, Fullerton and Moncreiff**.—We have reconsidered our opinion formerly given, with the benefit of the additional cases now lodged for the parties. The single question still put to us is, 'whether the agreement libelled on is legal and actionable?' And we remain of opinion that the agreementis legal, and that action is competent upon it.

Whatever views may be entertained as to the expediency of the law recognising such rights, it is certain that, from the earliest period of our law till the present time, as well as in the laws of most of the countries of Europe, certain offices, some of greater and some of less importance, have been acknowledged as offices of inheritance or of fee, as contradistinguished from offices which are not of inheritance, but personal and simply of trust; see Craig, iii. 2. 15, and every later authority. Such offices of inheritance have these qualities, that they are legitimately the source of profit and permanent emolument to the proprietor in the fee; that they may be sold or alienated; that they may be adjudged by creditors for payment of their debts; that they may be the subjects of subinfeudations; that the proprietor in the fee may act either by himself or by a deputy.

This subject was very fully and minutely investigated in the reported case of Sir James Cockburn *v.* Sir William Cockburn, July 10. and 23. 1747, (*Mor.* 150, 157.) The question was, whether the heritable office of *usher* to the King could be *adjudged* for debt; and the Court, though put in doubt at first by speculative arguments, at last came to all but a unanimous judgment, sustaining the adjudication, on seeing a condescendence, the heads of which are given in Falconer's Report, (*M.* p. 162,) shewing the long-established and undisputed practice of the law in regard to titles of this kind in *eighteen* distinct cases. The last example in the list is, 'Progress of 'titles *to the office of macer* and King's serjeant.' In the later case of Stewart *v.* Campbell, Jan. 17. 1782, the same office of heritable usher was found to have been effectually *subfeued.*

* Lord Mackenzie, who had concurred in the opinion formerly given by these Judges, was now in the First Division.

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The principle, therefore, being clear as to the peculiar nature of such offices of inheritance, we are decidedly of opinion, both on the terms of the title produced, and the practical recognition of it from time immemorial, that the office described in the charters as 'Officium clavigeri et armorum serjeandi coram Dominos Concilii 'et Sessionis,' is an office of fee and inheritance of this character in law. And, accordingly, we do not understand it to be doubted, that it has been validly alienated by the former proprietor, and acquired by onerous purchase by Mrs Tindal Bruce.

One of the privileges of this office is that of acting by deputy, or, as expressly given by the charters, of naming one of the ordinary macers of the Court of Session. The right to do so has accordingly been recognised ever since the date of the grant, and the only title which the defender in this action possesses depends on that right.

But the legal power and competency of the hereditary officer in the fee to transact with the deputy whom he so appoints, in regard to the emoluments of the office, is inherent in the nature of the office itself, *and has at all times been acknowledged by the Court.* What circumstances or qualities the Court may be entitled to require, as necessary to the legal fitness of the person for the discharge of the duties required of the acting macer, before admitting him, is a question not at all involved in the single point submitted for our opinion. The question is, whether a particular agreement into which the defender deliberately entered with the pursuer, acting by the express mandate and authority of the principal macer, is so tainted with *illegality*, that the Court must *deny action altogether* for enforcing it? We cannot answer that it is not legal or actionable, consistently either with the view we have of the nature of the office, or with the undoubted practice of the Court up to this time.

The Act of Sederunt of 11th March 1791, which has now been referred to, does, in our view of it, very strongly confirm our opinion. It, in the first place, in express terms declares the office of macer to be *hereditary*, and the acting macer to be merely a deputy. 'Whereas the *office* of one of the macers, or the right of presenting 'him, is *hereditary, and has been in use to be exercised by a deputy,*' &c. In the second place, it appropriates the new or additional fees per expressum to the *deputy*, implying that, without this, he might have been *legally* required to account for them to the principal macer under existing agreements between them. But the *third* part of the act, in our opinion, puts the question as to the *legality* of such transactions at rest; for it in express terms recognises them as in themselves lawful, and only provides this salvo against them, as otherwise binding between the parties, that no deputy shall be re-

ceived till it be explained to the Court, on oath if required, 'WHAT 'transaction has been made between the *principal* and *deputy*, and 'until the Court is satisfied that the deputy is to have a *sufficient* 'and REASONABLE *allowance* for enabling him to exercise the duties 'of the office.' This enactment distinctly recognises the *legality* of such *transactions;* and it as distinctly supposes that the principal may *lawfully*, by transaction, reserve a portion of the emoluments to himself; for it only contemplates, that a sufficient and *reasonable allowance* be left; and the substantive provision made is only a declared purpose or rule for the Court itself, inferring nothing like a nullity in any particular transaction, as between the parties themselves.

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In the present case, the Court might have called for disclosure of the transaction before admitting the defender, and, on the principle of the act, they might have *refused to admit him*, if they thought the *allowance* inadequate. But we do not see that they could have done any thing else, unless there was undue delay in appointing a proper macer, with a sufficient allowance. What may be the effect, in regard to the power of the Court, of the defender having been admitted without inquiry, while he discharges the duties correctly, and *to what effect* this action should be ultimately sustained, are questions not involved in the point put before us. We are only of opinion, that there is nothing illegal in the transaction itself to bar action for implement of it.

And it farther appears to us, that, whatever may be in the power or competency of the Court, when the state of the case is made known to it,—as to which, or any thing to follow, we are not called upon to give any opinion,—neither the provision of the Act of Sederunt, nor the principle of it, can afford any defence to this defender against the demand for implement of his own deliberate contract. And, indeed, while we rest our opinion on the principle already explained, we should also think, that if the defender were allowed to state such a plea, or the Court should refuse implement to the pursuer, the consequence ought to be, that, by thus entering into an agreement by which he secured the appointment, and then openly breaking his engagement, he rendered himself unfit to hold the office.

Lords Justice-Clerk, Glenlee, and Meadowbank.—We have considered the minute and answers, and additional cases in this cause, ordered to be laid before us by the Judges of the First Division, and observing that no new or additional question has been submitted to us, we have only now to state, that we have seen no reasons in the pleadings that have last been transmitted, for altering the opinion

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we have already delivered upon the only question on which it was required.

Lords Jeffrey and Cockburn.—We concur, on the whole, in the opinion of the Lord Justice-Clerk, and the other Judges who subscribe that opinion. But there are two considerations, not specifically stated in the opinion, which have tended much to confirm us in the practical conclusion.

1. We do not think it at all clear, that the 'one of the four ordinary macers' whom the proprietor of Myres acquired the right of appointing, by the charter of 1690, is to be considered *as the deputy* or representative of that proprietor; or that he himself, if so inclined, could claim to act, and to draw fees and salary, as one of the four ordinary macers; who were plainly all existing and officiating at the date of that charter.

It rather appears to us, that the office confirmed to him by that charter was an ancient honorary place, altogether distinct from that of an actual attendant and officiating servant of the Court; and that, when the right of nominating one of those inferior persons was first conferred on him in 1690, it is to be regarded as a new and additional grant of a right of patronage or presentment to a separate subsisting office, and not as the mere recognition of a power to act by deputy, in that which he already held.

The terms and nature of the grant are not a little peculiar. It appears, from the recital of the parliamentary ratification in 1693, (see Mr Thomson's edition of the Statutes, vol. ix. p. 337,) not only that there was no power of presenting an ordinary macer (or any other subordinate person) in the original grant, but that it did not even specify *in which of his Majesty's courts* the general office of 'sergeandrie and macerie,' which it conferred, should be exercised; and it proceeds accordingly to narrate, that, partly from this cause, and partly because his Majesty's predecessors had been in the use (notwithstanding this grant) of gifting all such offices as soon as they became vacant, or even before, the grantee and his predecessors had not, 'for a long time,' had any possession under it. In short, it had never, up to that time, been any thing but a mere titular and barren honour.

Now, it is upon this narrative (and that of the merits and services of the Moncrieffs) that the charter and ratification of 1690 and 1693 proceed 'to grant the power and privilege to George Moncrieff 'and his heirs, in all time coming, *to nominate and present one of the 'four ordinary macers* in the Court of Session; commencing the very 'first time any of the said offices shall be vacant.' These are the leading words of the first and only grant of the power of presentation. They occur immediately after the recital already quoted;

and are not connected, in this part of the deed, with any notice or recognition of the right conferred by the ancient titles; and though they are afterwards followed up by a novodamus of the old 'office 'of sergeandrie and macerie in the Court of Session,' together with the new power of presenting one of the four ordinary macers, it appears to us that they truly constitute, in relation to this last power, an original and distinct grant of a right of patronage to a separate office, and can never be construed into a mere permission to execute the duties of the ancient hereditary office itself, by deputy.

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There cannot, we think, be any doubt that the right of appointing an officiating macer, whether a deputy or not, was a right *granted for the first time* in 1690; and when the question is, what was the true nature of this indisputably *new* grant, it is very important to look to the words in which it is conceived. Now, the words are undoubtedly those usually employed in conferring such a jus patrocinatus merely; and we are not aware of any instance in which any such words have been used to express a power of granting a deputation. It is remarkable also, not only that in no part of the charter do the marking words, of *deputy and principal*, occur, or any analogous words; but that the epithet of '*ordinary*,' which is there applied to the officiating macers, and applied equally to them *all*, seems to fix upon the hereditary officer the character, not of *principal*, but of *extraordinary* macer; and thus to indicate a relation quite different from that of principal and deputy, and apparently inconsistent with its existence.

It is at all events perfectly apparent, that at the time of making this grant, 'the four ordinary macers' of the Court of Session were existing officers, all appointed by competent authority, and seemingly by the Crown; and that, if the owner of Myres had then any right to appear in the Court, it could not be as one of them, but as a separate and much higher person—the honorary and extraordinary hereditary macer and sergeant-at-arms of the Court,—exempted from the humble services exigible from its ordinary officials, and entitled to no share in the paltry emoluments by which those services might be remunerated. There is no recognition or intimation, any where, of his right to act, if so inclined, as one of 'the four ordinary macers;' or to draw, by means of a deputy, any share of their fees and emoluments. He is merely *confirmed* in the hereditary office and dignity of the one ancient and hereditary macer; and then invested, for the first time, with the new and additional right of nominating and presenting one of the four ordinary attendants; from whom he seems to be, in the most emphatic manner, set apart and distinguished.

That he is made answerable for the person he presents, may be

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unusual in cases of mere patronage; though we believe it not to be unprecedented. But this appears a very insufficient ground from which to infer, in opposition to the whole strain of the instrument, that a right of 'nominating and appointing one of the four ordi-'nary macers' truly implies that the person holding that power was himself already one of those four, and was merely permitted thereafter to exercise his office by deputy. If he was not himself one of the four, and entitled, as such, on the death of his nominee, to officiate and draw fees in that character, then none of them could be *his deputy;* and there is an end of all argument founded on the assumption of that relation.

It is clear that, before 1690, there were four ordinary macers in the Court, though the owner of Myres had for 200 years been also an hereditary and extraordinary macer. He must, therefore, during all that time, have been a *fifth* and quite separate officer; and there is certainly no hint in the charter, that one of them had been, all this while, usurping his place; and that by giving him a right to present one of them in common form, it was meant that he should either resume it in person, or execute it by deputy, as he thought best. The office to which he appoints, it may also be observed, is granted *for life;* exactly as that of the other three, who certainly are *not* deputies; and does not fall, as deputations almost always do, by the death or denuding of the supposed principal.

If these views be well founded, they make the case of *Dove* a case strictly in point; and raise great doubts, not only as to the legality of the present claim for an additional L.45, but of the stipulation for the original sum; as to which, indeed, we observe, that strong doubts are also expressed, in the report by the committee of Judges, printed in the Acts of Sederunt of 7th April 1810. The same view will also dispose of any argument which may be raised upon the exception in the Act of 49. Geo. III, c. 126, against the sale and brokerage of offices; as that exception applies only to the proper case of principal and deputy.

2. Even holding the nature of the right to be doubtful, and the old exaction of L.45 to have been legalised by long-continued usage, it appears to us, that *the innovation* upon that usage, attempted by the transaction with Gardner, now in question, would be illegal, and not actionable. The true way to test this, is to suppose that, the terms of the grant and charters being as they are, there had been, up to this time, no usage to take *any money* on making the appointments; and, on that supposition, to ask, whether it would be legal, now for the first time, to levy an assessment of L.90 a-year from that one of the ordinary macers who was appointed by the owner of Myres? To this, we think, the answer

could not be doubtful; and yet, if it required ancient consuetude to legalise any such exaction, it appears to us, that no exaction which has not the protection of such consuetude can be legal. 11 Mar. 1835. Gardner v. Grant.

We do not in the least question, that the *hereditary office itself* is adjudgeable and saleable; but we consider the exercise of the right of patronage attached to it to be in quite a different situation; and we have the strongest possible jealousy of permitting any act of patronage in the nomination of a public officer to be exercised for a price. If such a proceeding be not essentially corrupt, it is at least nearly allied to corruption; and ought never to be sanctioned, without the clearest legal necessity, by a court of justice. Opinion of Consulted Judges.

We do nót think that the Act of Sederunt 1791 has any material bearing on the question; and we do not conceive that it is of any binding authority, except, perhaps, as to the resolution it announces to require explanations, before admitting the presentees of Myres, *de futuro*, which resolution appears *not* to have been acted upon in the present case. But however this may be, we cannot hold ourselves bound, by the incidental assumption it appears to make, of that presentee being a deputy of the patron, an assumption in no way material to the practical part of the enactment, and which we humbly conceive to be erroneous.

What the consequences may be of holding the agreement not legal or actionable, we are not required to consider. If they should go to annul the appointment of Grant altogether, it may probably be thought right that Mrs Tyndal Bruce and her husband should be made parties to the cause.

At final advising, *Lord Gillies* said—Since we last gave our opinions, this Act of Sederunt has been referred to, which materially alters the case. Whether this agreement be, or be not, altogether illegal, the Court cannot be satisfied that a reasonable allowance has been reserved to the defender, the party now exercising the office of macer. Opinion of Court.

Lord Mackenzie.—I concur very much in the opinion now given. I should wish, however, to explain how I arrive at the result, because I take rather a narrow ground, and do not assent to many of the views which have been taken. If the right of Mr Bruce were a mere patronage, I do not think he could legally exercise that right, for the consideration of profit to himself. But, in the case of an heritable right to an office, with a power of delegation, there seems to be no doubt, that the heritable officer may take a price for the nomination of a substitute; nay, I even think he may take from his substitute a share of the profits, though that is doing a much stronger thing; for a price leaves on the buyer the full in-

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ducements to exercise duly the office he has bought, whereas the taking a share of the profits withdraws these inducements, as far as it goes, and seems therefore necessarily to require limitation.

Looking to the facts of this case, then, Moncrieff of Reidie had originally an heritable right of macership, which, like all such rights, implied a power of delegation; but it was not expressed as referring to a macership in any particular court. He obtained a charter of novodamus from the King, granting it, as in the Court of Session, with the power of naming one of the four ordinary macers of that Court, for whom he was to be answerable. Looking at the expressions of that deed, it seems not to have been a conveyance of a distinct right of patronage of the ordinary macership, but a renewal of his original right in an effectual form, viz. a grant of an heritable macership in the Court of Session, with a power of delegation, by appointing one of the ordinary macers to act for him. The validity of this grant was disputed, and the Court of Session decided that it was valid. See the case in Fountainhall, 11th Jan. and 2d Feb. 1693. The ordinary macership then rested with one Adam, who, Fountainhall notices, paid 2200 merks for it to Moncrieff. This charter of novodamus, decision, and appointment, seem all ratified by the Act of Parliament referred to in the pleadings, which must therefore have recognised the right of Moncrieff as an heritable macership, with a power of appointing a delegate, for an onerous consideration, in the way that was usual in such cases. Accordingly, as far as can be seen, all the subsequent appointments seem to have been made by Moncrieff or his successors, either for price paid, or a share of the profits reserved; and the right to appoint in that way was all along recognised by the Court, as appears clearly from the Acts of Sederunt cited in the pleadings. It seems therefore impossible now to doubt that the right of Moncrieff, and of Bruce, as his successor, was that of an heritable office, with a power of delegation for a price paid, or in consideration of a share of the profits, to be paid over by the delegate.

But then, per contra, the law of Scotland seems to have required, in such cases, that the heritable holder of an office of actual and important duty to the public should, if he stipulated for a share of the profits, at least leave as much to the delegate doing the duty as was necessary to enable him, and induce him to do the duty decently, and with reasonable motive for attention and fidelity; see the case of Rose, 17th Nov. 1761, where it was laid down on the Bench, that the appointment of a Sheriff-substitute to do the duty in a district, without a salary, was contra bonos mores, which implies, as a corollary, that the salary must be a reasonable one. On this rule of law, the Court proceeded in making the Act of Sede-

runt 1791. They could not, by this act, take away or create any limitation, not warranted by law, in the right of Moncrieff, which stood on the acts of the King and Parliament; but they could provide for the due observance of the existing law of Scotland, by which the exercise of that right was regulated; and they made a provision accordingly. That provision, however, neither created the rule of law, nor superseded it, but proves, as well as any decision, what it was. I cannot hold that Act of Sederunt to have been made against law; and, if not, it demonstrates the rule to have been, that Moncrieff had right to name an ordinary macer, for a price, or even for a portion of the profits of the office reserved to himself, but was bound to leave the ordinary macer a reasonable portion, to enable and induce him to do the duty competently.

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Such being the law, I think it is too plain that Mr and Mrs T. Bruce have violated that law. They have, through the operation of a middleman, ground down the effective macer to an allowance decidedly below that admitted by law, or the Act of Sederunt. I therefore think the agreement, by which they and their middleman did this, was contra bonos mores, and a pactum illicitum; and, as the present libel is laid on that contract, I think the action must be dismissed. I do not see how the failure of the Court to enforce the Act of Sederunt, at the time of the defender's appointment, could make the secret agreement, by which that appointment was accompanied, legal, if by law it was otherwise, or how it can bind us to give effect to a pactum illicitum. The failure of a provision to exclude such a pactum cannot make it a lawful one, when it comes to be detected. I therefore cannot entirely agree in the opinion which I formerly gave, an opinion given when this point had not, as I now think, been fully considered.

Lord Balgray.—According to the principles of common law, and the provisions of the Act of Sederunt, it was necessary to make a reasonable allowance to the party holding the office of macer. In the present instance, this had not been done; but as any thing beyond such allowance was at the disposal of Mrs Bruce, I incline to think that she and her husband had such an interest in the question as entitled them to be made parties to the action.

Lord Gillies.—I am afraid it is now too late to take this step.

The *Court*, therefore, 'in respect of the opinion of the majority 'of the whole Judges, dismiss the action, assoilzie the defender, 'and decern,' &c.

Judgment.

Lord Fullerton, Ordinary. Act. *More*. Alt. *Dean of Fac. (Hope,) Cunninghame*. *Walter Cook*, W. S. and *Greig & Morton*, W. S. Agents.

C.

SECOND DIVISION.

No. LXXXV. 11*th March* 1835.

LESLIE
against
DRUMMOND.

PROCESS.—ARBITRATION.—EXPENSES.—AN action was remitted by the Lord Ordinary to a judicial referee, who decided the cause, and found one of the parties entitled to expenses. The successful party included the amount of the fee to the judicial referee in his account of expenses.

Lord Moncreiff reported the above point, with a view to obtain the opinion of the Court, as to the propriety of decerning for these expenses, as matter of practice. Their Lordships were unanimously of opinion that it was competent to decern for the fee.

Lord Ordinary, *Moncreiff.* Act. *Pyper.* Alt. *A. M'Neill.* *James Adam,* W. S. *M'Millan & Grant,* W. S. Agents.

R.

SECOND DIVISION.

No. LXXXVI. 11*th March* 1835.

EARL OF HOPETOUN
against
EARL OF ROSEBERY.

PATRONAGE.—ANNEXATION.—KIRK.—*Circumstances in which, there having been separate rights of patronage vested in the same individual, but held of different superiors and under different destinations, and one of the parishes A, having been annexed to the other parish, D, the united kirks to be called the parish kirk of D, and both rights of patronage having thereafter been sold, and feudally transmitted, with their privileges, through separate titles, to the heirs and assignees of the two purchasers,—it was found that the party feudally vested in the patronage of A was entitled to exercise, alternis vicibus, with*

the patron of D, the right of patronage of the church and united parish of D.

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Earl of Hopetoun *v.* Earl of Rosebery.

THE parish of Auldcathy, with the kirk, constituted a parsonage, and was, previous to 1618, a separate and independent parish and kirk. In that year it was annexed to the parish and kirk of Dalmeny. At the date of the union of the parishes, Thomas, Lord Binning, formerly Sir Thomas Hamilton, and afterwards successively Earl of Melrose and Haddington, was patron of both kirks, and proprietor, and feudally vested in the lands and barony of Dalmeny, and the lands of Auldcathy. Sir Thomas had purchased the lands and patronage of Auldcathy from Lauder of Bass, whose family had long held them base under the Hamilton family. Sir Thomas was infeft in 1608, and his right was confirmed by the superior, the Marquis of Hamilton, in 1611; to which charter of confirmation was added a novodamus and precept of sasine, on which he was infeft. In these deeds the destination is to Sir Thomas Hamilton and the heirs-male of his body; whom failing, to Thomas Hamilton of Priestfield, his father, and the heirs-male to be procreated between him and his second wife; whom all failing, to the heirs and assignees whomsoever of the said Sir Thomas Hamilton; and the subjects are described as 'all and whole the lands of Auldcathy, parts, pendicles and all their 'pertinents, with the advocation and right of patronage of the kirk 'thereof.

At the date of the union of the parishes, Sir Thomas Hamilton also held of the Crown the lands and barony of Dalmeny, with the kirk lands and patronage of the kirk of Dalmeny, under a destination, as contained in a Crown charter 1617, to Thomas, then Lord Binning, and the heirs-male of his body; whom failing, to his nearest and lawful heirs-male and assignees whatsoever; and these subjects and others were erected into the lordship of Binning.

The decree of annexation contained a ratification of Lord Binning's titles to the patronages, and his rights to, and tacks of, the teinds of Auldcathy; and the same are declared to be valid and effectual rights for possessing the teinds, and others therein contained. In 1621, the charters and infeftment of the lordship of Binning, in favour of Thomas, Lord Binning, then Earl of Melrose, afterwards Earl of Haddington, and the decreet of union of the two parishes, were ratified in all points by act of Parliament. Thomas, Earl of Haddington, continued to possess the lands and patronages of Dalmeny and of Auldcathy under different superiors, and destined to different series of heirs. The feudal rights to both patronages remained distinct and inconsolidated, and they were so held by the several successors of the said Earl.

In 1646, John, Earl of Haddington, disponed to James Monteith

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of Carsebank the lands of Auldcathy, with the pertinents thereof, and the advocation, donation and right of patronage of the kirk of Auldcathy, with procuratory and precept in which the patronage is contained, with a clause of absolute warrandice. He also assigned to Monteith the tacks of the teinds of Auldcathy, together with his other rights of teinds. Monteith was infeft, in 1647, in the lands and patronage of Auldcathy, upon a charter of resignation by the superior, the Duke of Hamilton, proceeding upon the resignation of Lord Haddington. The sasine bears, that the symbols for transferring the patronage were given within the church. The lands and patronage of Auldcathy remained in the family of Monteith till 1721, several of the proprietors in the interval having been infeft under the Hamilton family as superiors, and the infeftments bearing that the proper symbols, both for the lands and for the patronage, had been given. In 1721, James Monteith sold the lands and patronage of Auldcathy, and the teinds belonging thereto, to Charles, Earl of Hopetoun, the great-grandfather of the pursuer. There is a clause of absolute warrandice to the Earl and his heirs, of the 'peaceable possession of the said lands, right of patronage, and 'others above disponed.' Charles, Earl of Hopetoun, obtained a charter of resignation of these subjects in 1727, from the superior, the Duke of Hamilton. He thereafter entailed the lands and patronage of Auldcathy, with the teinds, along with his other estates, in the marriage-contract of his son John, Lord Hope, upon a certain series of heirs. John, Lord Hope, afterwards Earl of Hopetoun, the pursuer's grandfather, died before completing his titles; but his son, James, Earl of Hopetoun, was duly infeft in the lands and patronage of Auldcathy, and teinds, conform to sasine, upon a charter of resignation by the Duke of Hamilton in 1784, the sasine bearing that the proper symbols of patronage were given. At the date of the raising of the present action the pursuer was in the course of making up his titles with the superior to the lands of Auldcathy, and the patronage and teinds of the kirk thereof, as heir of entail to James, Earl of Hopetoun, his uncle.

The lands of Dalmeny, with the patronage and titularity of the parish and kirk of Dalmeny, remained in the family of Haddington, after the sale of the lands and patronage of Auldcathy, until 1662, when they were conveyed to Sir Archibald Primrose, Clerk-Register, and they are now possessed by his descendant, the Earl of Rosebery, the defender.

The disposition to Sir Archibald Primrose conveys the lands and barony of Dalmeny, &c. 'with the advocation, &c. and right of pa-'tronage of the chaplainry and altarages of St Adaman, founded 'within the kirk of Dalmeny, and of all other kirks, altarages,

'chaplainries of the samen, with the pertinents, lying within the 'sheriffdom of Linlithgow, and sicklike all and sundry the kirk 'lands of Dalmeny, parts, &c. of the samen, whatsoever; and like- 'wise all and haill the parish kirk of Dalmeny, with all and sundry 'teind-sheaves and other teinds, fruits, rents, emoluments and 'duties, as well parsonage and vicarage of the samen, with the 'advocation, donation, right of patronage of the said parish church 'and parish of Dalmeny, parsonage and vicarage thereof.'

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The right of patronage of Dalmeny is contained in Lord Rosebery's titles, in the same terms as it was in the titles of Thomas, Lord Binning, and his authors, before the union of the parishes, and the defender's titles do not contain the patronage of the parish of Auldcathy.

From the union of the parishes in 1618, no opportunity occurred for either the patron of Dalmeny or the patron of Auldcathy exercising his alternate right of presentation of a minister to the united parish until 1775. In 1618, Mr John Gibbison was minister of both kirks, and continued minister of the united parishes until after the patronage of Auldcathy had been sold to Monteith, in October 1646. In August 1646, Mr John Durie was appointed by the presbytery college-minister and fellow-helper to Gibbison. Lord Haddington then protested that the admission of Durie should not be prejudicial to his right of patronage. By Act of Parliament 1649, the rights of patrons were taken away, and the appointment of ministers given to congregations. Durie became minister of the united parish on Gibbison's death, and continued so till 1656, when, upon his death, Mr A. Hamilton was ordained minister, by a call from the heritors and elders. The rights of patrons were restored in 1661, and taken away, by act of Parliament, in July 1690. In 1691, Mr Charles Gordon was admitted minister, upon a call from the heritors and elders. In 1711, the year before the act of Queen Anne, 1712, c. 10, restoring to patrons their rights, Mr James Naamyth was appointed, and continued minister of the united parish till 1715. In April 1775, a presentation by Neil, Earl of Rosebery, designing himself sole patron of Dalmeny, in favour of the Reverend Thomas Robertson, was given in to the presbytery, when John, Earl of Hopetoun, entered a protest, as patron of Auldcathy, against the presentation prejudicing his right as vice-patron of the united parishes, and the protest was recorded in the presbytery records. Robertson continued minister till 1800, when, upon his death, Lord Rosebery granted a presentation to Mr James Greig. James, Earl of Hopetoun, did not grant a presentation in favour of another, but protested that his agreeing to the admission of Mr Greig should not prejudice his right as patron of Auldcathy, and

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vice-patron of the united parishes, and the protest was recorded in the presbytery books. Mr Greig died in 1829, when intimation was made, through the agents for the parties, that from a desire not to keep the cure vacant, Lord Hopetoun would agree to grant a presentation along with Lord Rosebery, or that he would be willing that Lord Rosebery should alone present, if it was admitted that the acquiescence of Lord Hopetoun should in no respect prejudice his right. The matter not having been so arranged, Lord Rosebery granted a presentation to the Reverend Mr Scott, in May 1829; and Lord Hopetoun raised an action of declarator, in June 1829, for having his right of vice-patronage determined, and also protested when the presentation was given in to the presbytery.

It was alleged, that the pursuer and his predecessors had, from time to time, since the acts 1649 and 1690, exercised the right of titularity, qua patrons of Auldcathy, in the localities of the united parish, and had exercised other privileges resulting from the right of patronage of Auldcathy, and of the teinds thereof, with the consent of the defender. This was denied generally; but it was admitted that Mr Gibbison had, with consent of Sir Thomas Hamilton, patron of Auldcathy, granted a tack of the teinds of Auldcathy to the eldest son of Sir Thomas; and the Commissioners, by decreet of union, modified a stipend to the minister of the united parishes, whereof a part was to be paid out of the teinds of Auldcathy by the tacksman; and, at the same time, an extension of the tack of the teinds was granted; that in the locality 1658, the teinds of Auldcathy, belonging to Mr Monteith, were not localled upon before those of the other heritors; that Monteith disponed to Lord Hopetoun the teinds of Auldcathy, which he had acquired qua patron, transferring thereby not merely the right of tack, but an heritable right to those teinds; that the locality 1658 subsisted till 1777, and that a process of locality of the stipend, as augmented in 1777, subsisted till 1786; and that Lord Hopetoun's right to the teinds was not contested in that locality, or in the final locality 1794, or the interim localities of 1806 and 1823, the augmentation being allocated proportionally on the free teinds of the whole heritors, including Lord Hopetoun's, for the teinds of Auldcathy.

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Upon these facts it was *pleaded* for the pursuer—1*st*, The two parishes of Dalmeny and Auldcathy having been united by the Commissioners of Teinds in 1618, the two separate rights of patronage of these parishes were converted into rights of vice-patronage, or alternate presentation of the minister to the united church, by virtue of the act 1617, c. 3, and practice in Scotland ever since; Brodie *v.* Earl of Moray, July 1777, *Dict.* 9987, and *App.* No. 1;

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Fac. Coll.; see also Observation from the Bench, in the case of Grant v. Duke of Gordon, 7th Feb. 1788, *Dict.* 9945; Officers of State v. Gordon of Cluny, 13th Nov. 1821, *Fac. Coll.*; Case of union of East Calder and Kirknewton, Decision on Right of Patronage; *Connell on Parishes*, p. 167-8; Case of union of Lochiel and Cushney, 28th Jan. 1795, *Connell*, p. 206, and many others; *Mackenzie's Observations on the Statute* 1617, cap. 3. 2*d*, The right of patronage of the parishes of Auldcathy and Dalmeny having been acquired by Sir Thomas Hamilton, afterwards successively Lord Binning, Earl of Melrose and Haddington, at different periods, from different persons, before the union of these parishes; and having been possessed by him by regular feudal titles, held of separate superiors, and destined to different heirs; the circumstance, that, at the time of the union, these patronages were both vested in his person, could not affect the legal character and effect of either, or prevent him from holding each, with its respective right of alternate presentation, separate from and independent of the other; Case of union of Broughton, Kilbucho and Glenholm, *Connell on Parishes*, p. 200; where, at the time of union, the Duke of Queensberry was patron of two churches, and effect was given to his separate rights, just as if they had belonged to two individuals. 3*d*, Neither by the act of Parliament 1617, cap. 3, nor by any other act, was the power conferred upon the Commissioners of extinguishing or suppressing rights of patronage, or of merging one right of patronage into another. 4*th*, It was not necessary, in order to preserve separate and entire Lord Haddington's right of patronage of the parish of Auldcathy, with its resulting right of vice-presentation to the united church, that an express declaration to that effect should have been inserted in the decree of union. 5*th*, As the decree of union of Auldcathy and Dalmeny differs from all other decrees of the Commissioners upon record, in so far as it contains an express ratification of Lord Haddington's writs and titles to the two feudal rights of patronage in favour of him and his heirs therein mentioned respectively, and the said decreet having been ratified and confirmed by act of Parliament 1621, 'in the haill heads, 'points, clauses and articles thereof,' the right of patronage of Auldcathy was preserved entire and separate, as effectually as it could have been by the most express declaration to that effect that could have been inserted in the decreet. 6*th*, Lord Haddington's title to the patronages of these parishes, after they were united, consisted of his previous feudal titles, not to the patronage of one or other parish, but jointly and equally of his titles to both. 7*th*, A conveyance by Lord Haddington, of the right of patronage of either parish, must necessarily convey the corresponding right of vice-presentation to

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the united parish; and in order to have this effect, it was not necessary that the conveyance should per expressum mention the right of vice-presentation. 8*th*, As the conveyance of the patronage of Auldcathy by Lord Haddington to the pursuer's author was sixteen years previous to the conveyance, by the Earl, of the patronage of Dalmeny to the defender's author, and was granted under absolute warrandice; and as the defender's titles contain no right to the patronage of Auldcathy, and are not, in point of expression, more ample than they were in the titles of his predecessors previous to the union, the defender can found upon them no good claim, either absolute or prescriptive, to the patronage of Auldcathy, or to the undivided patronage of the united parish. 9*th*, There is no ground in law for holding that the defender has acquired the undivided right of patronage of the united parish of Dalmeny and Auldcathy, by the operation of the positive prescription, or that the pursuer has lost, or could have lost, his feudalised right of patronage of Auldcathy, by the operation of the negative prescription; Macdonell *v.* Duke of Gordon, 26th Feb. 1828, and authorities therein referred to. 10*th*, The appointment of Mr Robertson in 1775, being the first occasion, since the union of the parishes in 1618, on which either the patron of Dalmeny, or the patron of Auldcathy, could exercise any right of presentation, one or other of the patrons must have had the first presentation; and, therefore, the presentation granted on this occasion by the patron of Dalmeny must be ascribed to his own undoubted right of vice-presentation, and cannot be held as an act of prescriptive possession, exclusive of the pursuer's right, qua patron of Auldcathy; *Mackenzie's Observations*, p. 175; Lord Corehouse's Opinion in causa Macdonell *v.* Duke of Gordon. 11*th*, A single act of presentation, even when it is confessedly referable to the prescriptive title, is not sufficient possession to complete a prescriptive right to a patronage or vice-patronage; see case of Macdonell. 12*th*, The protests taken by the pursuer's predecessors were quite sufficient to save his rights, and to interrupt the currency of prescription in favour of the defender; *Ersk.* iii. 7. 3. *sub fine.* 13*th*, The possession of the teinds of Auldcathy, qua patrons, by the pursuer and his predecessors, is sufficient to save their right of patronage from prescription. 14*th*, The pursuer is entitled to an alternate right of presentation to the united parishes of Dalmeny and Auldcathy, along with the defender; and the defender having already exercised his vice, the next vice or presentation belongs to the pursuer; Officers of State *v.* Gordon, 13th Nov. 1821, *Fac. Coll.*; Brodie *v.* Earl of Moray, and other authorities.

Defender's Pleas

The defender *pleaded*—1*st*, Although, in virtue of the act 1617,

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the Commissioners were entitled to unite churches, in all cases where the teinds of either were insufficient for the support of a minister, it was only where the patronages were in the possession of diverse patrons that they were entitled to award presentation, alternis vicibus; nor was it competent for them, in virtue of the powers given by that act, to annex an alternate presentation to each of two different estates, in the possession of one proprietor; and the cases referred to on the other side do not shew that, in circumstances similar to the present, the Commissioners ever attempted to annex such alternate right of presentation to such estates, or that it was competent for them so to do. 2*d*, Supposing that the Commissioners might, on the application of the person in possession of both patronages, have competently made the presentations alternate, that could only have been done by an express declaration in the decreet itself; the presumption of law otherwise being, that where the union was applied for by the person vested with both patronages, the patronage of the suppressed kirk was to merge in that of the kirk to which it was annexed as a dependency. 3*d*, By the decreet of 1618, obtained on the application of Sir Thomas Hamilton, who was in the right of both patronages in fee-simple, and had the full power to dispose of them to any series of heirs he might think fit, and with the consent of all parties interested, by which the kirk of Auldcathy was annexed as a pendicle to Dalmeny, and in which no reservation of the patronage of the suppressed kirk occurs, the patronage of Auldcathy was effectually merged in that of the new or enlarged parish of Dalmeny, and incapable of being thereafter revived or transferred as a separate subject by Sir Thomas Hamilton; nor was this counteracted by the ratification of Sir Thomas's writs and titles contained in the decreet of union, these being only ratified and approved, as modified and affected by the operation of the act 1617, and by the mergency of the patronage of Auldcathy in that of Dalmeny, on the application of Sir Thomas himself. 4*th*, It was not the intention of Sir Thomas, by the disposition of the lands and patronage of Auldcathy to James Monteith, to convey to him any right of alternate presentation of Dalmeny, but simply to secure him in the lease of the teinds; nor do the terms of that disposition, taken in connection with the circumstances in which it was granted, imply such intention; and, on the contrary, the whole conduct, both of the proprietors of Dalmeny, and those of Auldcathy, after the date of the decree of annexation, is inconsistent with the supposition that the conveyance of the patronage of Auldcathy was meant to give a vice-presentation in Dalmeny; *Ersk.* i. 5. 13; *Forbes*, p. 42. 41; *Stair*, ii. 8. 35. 5*th*, Even if it had been the intention of Sir

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Thomas Hamilton to convey to Monteith an alternate right of presentation in Dalmeny, it could not have been competently carried into effect by conveyance of the patronage of Auldcathy, Lord Torphichen *v.* Gillon, 1765, *F. C.*, the only means of transferring a vice-patronage in Dalmeny, (supposing it were competent for a patron, suo arbitrio, to split his patronage,) being by a conveyance in terminis of a vice in the kirk of Dalmeny; and, consequently, the conveyance to Monteith, and the successive sasines taken at the suppressed church of Auldcathy, were utterly inept. *6th*, Supposing the titles in favour of the pursuer's predecessors had been capable of carrying a vice-presentation in Dalmeny, the pursuer has long since forfeited his right by the negative prescription, while the defender and his authors, by various presentations which they have given, and by the exercise of other rights as patrons, have secured their right to the undivided patronage of Dalmeny by the positive prescription; *Connell on Parishes*, p. 479, 485–6. *7th*, The act of gifting the vacant stipends, during the time when the right of presentation was, by the act of Parliament, vested in the presbytery, being an act which none but the patron could perform, is equivalent to an actual exercise of the right of presentation; and the gifting of the vacant stipends by Sir Archibald Primrose in 1698, the mortification by Lord Rosebery of part of these stipends in 1702, and the gifting of the rent of the minister's glebe by Lord Rosebery in 1712, without interference by the proprietor of the lands of Auldcathy, fall therefore to be considered as acts done by them as undoubted and sole patrons of Dalmeny and Auldcathy, and the only acts by which they could vindicate their right of patronage. *8th*, The protests taken by the pursuer's predecessors were incapable of interrupting the currency of prescription in favour of the defender and his author, not being instruments of interruption recorded in terms of the statute, the first of them being taken after the presentation had been sustained, without appearance or objection, in name of an individual who never had any feudal right in his person to the subject claimed, and both being prescribed; *Erskine*, iii. 7. 39, 40, 41, 42, 43, 44; Act 1669, c. 10; Act 1696, c. 19; *Stair*, ii. 12. 27; Innes, 15th Feb. 1695; Douglas, 2d Feb. 1753, *F. C.*; Miller, 7th Feb. 1766, *F. C.* *9th*, Supposing even that Lord Hopetoun, as proprietor of Auldcathy, were entitled to a share in the presentation of Dalmeny, the decreet being silent as to the nature of the vice, he could only be entitled to claim one proportioned to the share of teinds payable from Auldcathy, as compared with those payable from Dalmeny, and could not, in any point of view, be found entitled to an alternate presentation; Act 1617.

The Lord Ordinary reported the cause on cases, at the advising of which,

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Opinion of Court.

Lord Glenlee.—This is a totally new case. There is no authority, and scarcely an analogy applicable to it from other cases. As to the point, whether the right, if it existed, has been lost by prescription, I am disposed to think it has not, and that prescription cannot be pleaded with effect. If there had been no effectual protest taken, or if the protest had fallen, there might have been grounds for the plea; but I do not think this can be maintained. If the protest here had been pleaded upon against a singular successor, then it might have required registration in the register of interruptions, in virtue of the act 1696, c. 19; but not when, as in this case, it was against the heir of the party against whom it was used. Then the act 1669, c. 10, as to the prescription of interruptions of rights of lands, applies only to citations, not to protests, which may last the forty years, though certainly such a distinction between interruption by citation and by private protest looks a little anomalous. There is another sort of prescriptive possession alluded to, on which my mind is not fully made up, viz. the acts said to have been done during the time when there could be no presentation, such as the application of the vacant stipend. This is said to be an exercise of the right of patronage; but I should like to consider that more fully.

I would propose to lay the cases before the whole Court.

On the other point, I think there is very considerable difficulty. The Commissioners were appointed merely to supply the defect arising by the abolition of the canon law; but the words of the act certainly are, 'If it fall out that necessitie offer to unite 'kirks belonging to the presentation of divers patrons, the presen-'tation of the ministers shall pertain to the patrons alternis vici-'bus.' Now, can that apply where patronages are held by the same person, though under different titles, and descendible to different heirs? Would the alternate right or vice-presentation be given to the heirs when the succession came to be split? This is attended with difficulty. One sees the reason of the provision when there are different proprietors, but not when the patronages belong to one. That, at any distance of time, an alternate right of presentation should still continue to take place, where no interest had been violated at the time of union, seems very questionable. It seems more reasonable to expect, as a matter of prudence, that it should be merged. Suppose Lord Haddington had continued to possess till now, and that within a year ago the succession had split for the first time: Nothing in the cases adverted to touches this. The case of the Duke of Queensberry is the only one that comes somewhat near it; but it does not decide the question, what would be the effect of the conveyance by the

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Duke of Queensberry of one of the annexed patronages, after they had been united under a new name. Besides, presentation is not necessarily identical with patronage. In its own nature it is a peculiar status, involving other things. True, it is very much reduced now; but originally in Scotland and in Europe, the mere right of patronage was a pretty lucrative possession. The patron was tutor or protector of the church. The act 1617 does not declare that patronages are to be united, but only churches. Patronage is still left untouched. Then, why might not the term patronage be continued in the Auldcathy titles, not as inferring a right of presentation, but the other rights annexed to patronage? Lord Rosebery's titles to Dalmeny are very different, because he has a grant of the new church and patronage in terminis.

Opinion of Court.

The Court thereupon, 'in respect of the novelty and importance 'of the case, allow the parties to prepare and lodge mutual minutes; 'and appoint the whole cause to be laid before the Judges of the 'other Divisions, and Lords Ordinary, for their opinion.

Opinion of Consulted Judges.

The following opinion was returned by *Lords Balgray, Gillies, Mackenzie, Corehouse, Fullerton, Moncreiff, Jeffrey and Cockburn.*— The summons at the instance of the pursuer concludes for having it 'found and declared that he has good and undoubted right and title 'to the right of patronage of the parish of Auldcathy, and that, in 'consequence of its annexation to the parish of Dalmeny, he has 'right to the advocation, donation, and right of patronage of the 'church and united parish of Dalmeny, alternis vicibus, along with 'the defender, Archibald John, Earl of Rosebery.'

In consequence of the interlocutor of the Second Division of the Court, we have considered the cause, and the papers given in by the parties, and we have particularly observed that the patronages of Dalmeny and Auldcathy were derived from different authors, and held of different superiors; and we are of opinion, that the right of patronage of the parish of *Auldcathy*, which was held of the Duke of Hamilton, was completely vested in the person of Thomas, Earl of Haddington, the common author of the parties, and that the same has been correctly, legally and feudally transmitted to the pursuer, with all the privileges thereunto annexed by law.

It is indisputable that the right of patronage, when once feudalised, is an heritable and feudal right, and therefore, *in its exercise, in its transmission,* and *in its extinction,* is subject to all those rules and principles of law, which are fixed, and are acknowledged to apply to all rights of that kind and nature.

We consider that the defender has pointed out no legal or rele-

vant grounds upon which the pursuer can be deprived of his right, or by which it can be extinguished.

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We are clearly of opinion that the mere union of the two parishes or churches of Dalmeny and Auldcathy did not extinguish the respective rights of patronage, separately vested in the parties concerned; but that the same existed thereafter, with such *rights* and *privileges* as were consistent with law and practice. This appears to us, in the case of union, to be the rule both of the canon law and of the law of Scotland. (See *Mackenzie, Obs. on the Act* 1617, c. 3.) We therefore think that the pursuer is entitled to a judgment, in terms of the summons.

Opinion of Consulted Judges.

At the final advising, *Lords Justice-Clerk, Meadowbank and Medwyn*, concurred in opinion with the consulted Judges. *Lord Glenlee* adhered to his former opinion. The *Court* accordingly decerned in terms of the conclusions of the summons, and found expenses due.

Judgment.

Lord Ordinary, *Mackenzie*. Act. *Dean of Fac. (Hope,)* and *H. J. Robertson*.
James Hope, W. S. Agent. Alt. *Skene* and *G. Moir*. *J. & W. Ferrier*, W. S.
Agents. *F.* Clerk.

R.

SECOND DIVISION.

No. LXXXVII. 11*th March* 1835.

NORMAN MACQUEEN
against
JOHN JOHNSON.

PROCESS.—PACTUM ILLICITUM.—AGENT AND CLIENT.—*Found, that a party who had done law business, and made disbursements on account of his employer, was not entitled to claim or take credit on account either of trouble or disbursements incurred by him as agent before a court, either in his own name, or that of a licensed agent, while he himself had no licence as agent, or while he was not legally qualified to act in his own name, as such agent, by being a writer to the signet, solicitor, or advocate's first clerk.*

MR JOHNSON was trustee for Angus Murray, and did a variety of law business, came under advances, and incurred obligations on his account. While in the management of the trust-estate, he adver-

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tised some of the heritable subjects for sale, when Norman Macqueen, a creditor of Murray, presented a bill of suspension and interdict against the sale being proceeded with, and also brought a multiplepoinding, calling the different parties interested in the trust-estate, for the purpose of having the trustee exonerated and denuded of the trust. The actions having been conjoined, a question arose out of the following objection taken to Johnson's account of business: 'Not having been a licensed practitioner, nor even admitted a procurator or solicitor in any court during the currency of the accounts, he is precluded by statute from demanding or setting up these accounts by way of claim, retention or compensation.' Mr Johnson stated, that he had attorney certificates from the years 1821 to 1832 inclusive, with the exception of 1827, 1828, and 1829; and that he had been duly authorised to practise as an agent since 1828, previously to which time the law business for the trust had been done in the name of a regularly entered and licensed practitioner.

Defender's Pleas.

Minutes of debate were ordered, and Johnson *pleaded*—1. In respect to business, not properly court business, done by him when he had a licence, in order to entitle him to payment of disbursements, and the ordinary fees for trouble in such business, it is not necessary that he should be entered as an agent in any court, nor have authority to practise there. Any person who has sufficient skill, and more especially any one having an attorney licence, may transact business of that description; and if employed to do so, the employer is bound to pay at the usual rate. 2. In respect to court business done when he had an attorney licence, but was not entitled to practise as an agent, and which was transacted in the name of a regularly entered practitioner, the claim is clearly well founded. The business was in rem versam of Murray's estate, and it was jus tertii to him, or any one in his right, by whom it was done. The principle of pactum illicitum is inapplicable. All the cases decided on that ground involved questions between the agents themselves who had made the agreement, and did not touch the question of a claim against the party for whom the business had been done. 3. In respect to business done while he had not an attorney licence, but while he was notary-public, the objection of no licence can apply only to those portions of the business which are described in the statute as requiring a certificate: 'The suing out any writ or process, or commencing, carrying on, or defending any action, suit or proceeding, or doing any act whatever, in any court in Scotland, as a solicitor, agent, attorney or procurator of such court, or acting as a public notary, or exercising the office of a notary

'in any manner, or doing any notarial act whatever in Scotland.' The want of licence, then, could strike only against those portions of the account incurred for court business during the period when he had failed in taking out one; A. v. B., 12th May 1832; Brash, 17th March 1820, *F. C.*; Henderson v. Mackay, 20th Dec. 1832; 9. *Geo. IV. c.* 49, sect. 5, 9; Gibson v. Dods, 15th Jan. 1829.

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Macqueen *pleaded*—1. Any compact between the defender and the agents whose names he alleges to have used was turpe pactum, and cannot found a claim against any one. Such a practice has been reprobated as illegal by the Court. It is therefore of no consequence to inquire of what items the charges consist. 2. The defender, not being possessed of an attorney's certificate during the currency of the accounts, is not entitled to insist in the claim; *Acts of Sederunt*, 10th March 1754, and 10th March 1772; Brash; Henderson v. Mackay; Henderson v. Gilfillan, 12th July 1833, House of Lords; Blair Hunter, 5th March 1833.

Pursuer's Pleas.

The Lord Ordinary pronounced the following interlocutor: '13th 'May 1834. The Lord Ordinary having considered the closed record; 'the revised minutes for the parties, and whole process, finds, That 'the defender, John Johnson, has not right to claim or take credit in 'this action, on account of either trouble or disbursement incurred 'by him as agent before the court, either under his own name, or that 'of any other person, while he, the said defender, was either not 'legally qualified to act in his own name as such agent, by being 'either writer to the signet, solicitor or advocate's clerk, or had not 'a licence as such agent: finds the said defender liable to the pur-'suer in the expenses of this discussion, of which appoints an ac-'count to be given in, and, when lodged, remits the same to the 'Auditor to tax, and to report.'

Johnson *reclaimed*, when the Court pronounced the following interlocutor: 'The Lords having considered this note, with the other 'proceedings, and heard counsel thereon, adhere to the interlocutor 'complained of, in so far as it finds that the defender is not entitled 'to claim or take credit for his disbursements at the time when he 'had no licence or certificate as an agent; quoad ultra, remit to the 'Lord Ordinary to hear parties further, and do as to his Lordship 'may seem just; reserving questions as to expenses.'

The Lord Ordinary, Moncreiff, having heard parties, pronounced this interlocutor:

'Having considered the closed record, with the remit by the Court, 'and having heard parties' procurators on the question, whether

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'the defender, Johnson, is entitled to take credit for the disburse-
'ments made by him during the time when he was not an entered
'procurator? In respect of the decisions of the Court, particularly
'that pronounced by the Lords of the First Division, in the case
'of Urquhart *v.* Brown, Dec. 21. 1833, finds, that the said de-
'fender is entitled to take credit for such disbursements: finds no
'expenses due.'

Note.—'It will be understood, that this interlocutor refers to the
'period during which Johnson had an attorney's licence, but was
'not an entered procurator. Supposing him to be a person who
'was then acting as agent for others, though not qualified to do so
'as an entered procurator, it appears to the Lord Ordinary, that
'the case of Urquhart, as reported, is directly in point. That de-
'cision and others are conclusive against any charges made by
'such a person for agency or trouble; but the Court certainly
'made the distinction between such charges and actual outlay. The
'Lord Ordinary, therefore, does not see how he could pronounce
'any opposite judgment, whatever his opinion might be.

'If the defender could be considered as the party in the cause
'to which the account relates, on the ground that he was a trustee
'with a conveyance for his security, the cases of Stewart, 16th
'May 1827, and Macgowan, 6th March 1828, would afford him
'a separate ground for claiming the mere disbursements made; for,
'though these cases related to the want of licence, the claim seems
'to be at least equally good to the party acting for his own behoof,
'when not a qualified agent, though he cannot claim fees for agency,
'&c. not being an entered procurator. But it seems to be very
'doubtful whether Johnson could be considered as in this situation
'at the time when the business was carried on.

'It was stated to the Lord Ordinary, on the authority of counsel,
'that, in the case of Urquhart, the party had agreed to pay the
'outlays. If it were to appear that the judgment on that point
'was pronounced *of consent*, it might alter the weight of the case as
'a precedent. But the report, though short, is very pointed. It
'bears, that the defender stated that the pursuer *had not paid the*
'*account*; and it bears a short note of the Lord President's speech,
'in which he in the most positive terms makes the distinction be-
'tween the *fees of agency and the outlays.*

'The Lord Ordinary confesses, that but for that decision he would
'have had considerable doubt of the point, and would rather have
'been inclined to follow the original interlocutor of Lord Mackenzie
'in the present cause. And certainly, an English case (in re Clarke,
'*Petersdorff*, vol. ii. p. 532, and in the reports of *Dowling and*
'*Rayland*, 3. 260,) shows that in England the whole sum of costs

'would be disallowed, and even ordered to be paid back, if already 'paid in such a case. Neither is there any thing in the statute '22. Geo. II, c. 46, § 11, there referred to, at all stronger than the 'law of this country, as declared in the Act of Sederunt, 10th 'March 1754.'

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At the moving of the note, the cause was allowed to stand over till their Lordships should consult with the Judges of the First Division, in regard to the case of Urquhart, decided in that Division.

Thereafter, at the final advising, the *Lord Justice-Clerk* stated, that after consulting with the other Judges, they were satisfied that the case of Urquhart could not be held an authority on the general point; that the interlocutor now reclaimed against ought to be altered, and that they ought to return to the interlocutor of Lord Mackenzie; but that, as they were enforcing the strict rule for the first time, no expenses ought to be found due applicable to this part of the discussion.

Opinion of Court.

The *Court* pronounced this interlocutor:

'The Lords having considered this note, with the proceedings, 'and heard counsel thereon, alter the interlocutor here complained 'of, and return to the interlocutor of Lord Mackenzie, dated 'May 13. 1834: find no expenses due, in so far as regards the dis-'cussion to which the interlocutor of the Lord Ordinary here com-'plained of refers, and remit to the Lord Ordinary to proceed fur-'ther in the cause as to his Lordship shall seem just.'

Judgment.

Lords Ordinary, *Mackenzie, Moncreiff.* Act. *A. M'Neill. Mackintosh & Gemmell,* S. S. C. Agents. Alt. *A. Wood. C. C. Stewart,* W. S. Agent. *T.* Clerk.

R.

FIRST DIVISION.

No. LXXXVIII. 12*th May* 1835.

MACFARLANE'S TRUSTEES
against
JOHN HAMILTON DONALDSON, THE REV. DR JOHN SOMERS, AND AGAINST LOW & RUTHERFORD, W. S.

SOCIETY.—REPARATION.—FACTOR LOCO TUTORIS.—DISCHARGE. —*A person who was partner with another, in a firm of writers to the*

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signet, having been appointed factor loco tutoris to certain children entitled to provisions under a trust-settlement, received payments, as such, at different times, from the trustees, but without having obtained caution, or extract of the factory, and he afterwards absconded. Some of these payments were entered in the company books; but it was alleged that the greatest part of the money had been embezzled by him. In these circumstances, the trustees being sued by the children, and found liable, an action of relief at their instance against the remaining partner sustained.

Question between the trustees and the other legatees as to the effect of certain words in a discharge.

THE circumstances of this case are fully brought out in the following interlocutor and note of the Lord Ordinary, wherein his Lordship 'finds, That by the trust-deed of the deceased Charles Donaldson, 'dated in July 1806, the late William Macfarlane and certain other 'persons were appointed trustees, for the purpose, inter alia, of 'dividing the whole residue of his fortune, after payment of his debts, 'among his children, upon the youngest child attaining majority; it 'being also provided, that the lawful children of any of those de-'ceasing should draw the share of their deceased parent: finds, 'That upon the death of Charles Donaldson in 1807, William 'Macfarlane and certain of the other trustees accepted the trust, 'the said William Macfarlane acting as cashier and manager: finds, 'That upon the 16th of April 1826, John Hamilton Donaldson, the 'youngest child, attained majority: finds, That at that time the 'children of Hamilton Donaldson, another of the testator's sons, 'who had died some time before, were under age: finds, That with 'a view to the division of the funds, it was arranged among the 'parties that a curator bonis and factor loco tutoris should be ap-'pointed to the said children of Hamilton Donaldson: finds, That 'a petition was presented to the Court in the name of Henry 'Donaldson and John Hamilton Donaldson, sons of the testator and 'uncles of the minors, and Margaret Scott, mother of the minors, 'praying the Court to appoint Henry M. Low 'to be curator bonis "and factor loco tutoris foresaid to the said children:' finds, That 'Messrs Low and Rutherford, of which firm Henry M. Low and 'the defender, George Rutherford, were partners, acted as agents 'in the said application: finds, That on the 28th day of February '1826, the Court nominated and appointed 'Henry M. Low with "the usual powers, the said Henry M. Low always finding suffi-"cient caution before extract:' finds, That, in consequence of ob-'jections to the caution proposed, no extract of the said appoint-'ment ever was obtained by the said Henry M. Low: finds, That

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'although Mr Henry M. Low had no title to act in those capacities until he found caution and obtained extract, all parties proceeded in the arrangement of the trust-affairs as if his title had been complete: finds, That on the 10th of May 1826, a scheme of division of the funds was made up by Mr Macfarlane, and approved of by all the parties concerned, the surviving children of the testator, and including Henry M. Low, there designed as curator bonis and factor loco tutoris to the children of Hamilton Donaldson: finds, That agreeably to this scheme of division a discharge was prepared by the late William Macfarlane, to which the said Henry M. Low was made a party under the foresaid designation*: finds it proved by the books of the copartnery, that the discharge so framed was revised by Low and Rutherford, that the said discharge was executed on the 17th day of May 1826, by the said Henry M. Low, and the other parties entitled to share the succession of the testator, including Dr Somers and John Hamilton Donaldson, the defenders in the present action: finds, That subsequently to the signing of the said discharge, large sums of money, (about L.3000,) exhausting the whole share of the testator's effects

* The discharge proceeds in the name of Henry Donaldson and John Donaldson, sons of the testator, of William Stewart, as administrator-in-law, and taking burden on him for his children, and Dr John Somers, as administrator-in-law, and taking burden on him for his children, and 'Henry Malcolm Low, writer to the signet, as curator 'bonis and factor loco tutoris for the children of the now deceased Hamilton Donaldson, procreated between him and Margaret Scott,' &c. 'and we all, with mutual 'consent, and as taking burden on us, for each other.' The discharge then narrates the trust-deed, the management of the trustees, the death of some of their number, &c. 'and 'that, to avoid all legal questions, and expenses in dividing the trust-funds, and placing confidence in the said William Macfarlane, as our father had done, we unanimously agree to abide by the state and division of the sums that he should make out, and 'for our mutual behoof,' &c. Thereafter the discharge narrates, that the trustees had 'transferred to William Stewart, Dr John Somers, John Hamilton Donaldson, and 'Henry Malcolm Low, each of us, for our own respective rights and interests as aforesaid.' (It then goes on to state the proportions paid to each.) 'Therefore we, as before named and designed, for our respective rights and interests, &c. have not only 'approved, &c. but also exoner and acquit, and simpliciter discharge the said ——, 'and William Macfarlane, and their respective heirs, executors and successors, &c. of 'all intromissions whatever had by them, or either of them, &c. under the foresaid trust-deed, and of all deeds of administration, &c. and of all omissions which we, or either 'of us, can lay to their charge, &c. and of all action, diligence and execution competent at our instance against them, or either of them, thereanent, in any manner of way.' &c. The clause of warrandice is in these terms: 'We, for our respective rights and interests, or taking burden, and of mutual consent, as aforesaid, bind and oblige ourselves, and our respective constituents, to warrant to the said Thomas Kennedy, William Kennedy, and William Macfarlane, the surviving trustees, and their foresaids, 'and the heirs, executors and representatives of the deceasing ones, as a sufficient exoneration of the premises at all hands, and against all mortal; and we, the said 'Henry Malcolm Low, as curator bonis and factor loco tutoris, and Dr John Somers, 'as trustee foresaid, from our own facts and deeds only.'

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'falling to the said minor children of Hamilton Donaldson, were 'paid by Mr Macfarlane to the said Henry M. Low: finds, That 'the company of Low and Rutherford not only acted as agents in 'the application to the Court, but continued to act in the transac- 'tions with Mr Macfarlane as the agents for Henry M. Low, as- 'suming the character of factor loco tutoris and curator bonis for 'the minor children; and that their actings, as agents, in regard to 'these transactions, are entered in their books as articles of charge 'against the said minors: finds, That part of the sums drawn by 'the said Henry M. Low, as aforesaid, were entered to the debit of 'the company in their books in account with the said minors: finds, 'That in the year 1830, Mr Low left this country, leaving large 'debts unpaid, and, in particular, having failed to account to the 'children of Hamilton Donaldson for the sums which had been paid 'to him by Mr Macfarlane: finds, That these parties, upon discovery 'that caution had not been found by Low, and that his appointment 'had not been extracted, raised an action against Mr Macfarlane 'and his co-trustees, as well as against the firm of Low and Ruther- 'ford, concluding that those persons should be found liable for the 'foresaid sums alleged to have been unwarrantably paid by the trus- 'tees: finds, That on the 18th day of June 1833, the Court de- 'cerned against the defenders, the trustees of the testator: finds, 'That the present action is brought by the representatives of Mr 'Macfarlane and the other trustees of the testator, against John 'Hamilton Donaldson and Dr Somers, two of the parties who signed 'the discharge above mentioned, and also against Low and Ruther- 'ford, and the individual partners of that company, concluding for 'relief of the sums in which they have been found liable to the 'children of Hamilton Donaldson, in the action above mentioned: 'finds, That the terms of the discharge libelled do not found any 'claim of relief, at the instance of the pursuers, against the said 'John Hamilton Donaldson and Dr John Somers, and therefore 'sustains the defences for these parties, assoilzies them from the 'conclusions of the libel, and decerns: finds them entitled to ex- 'penses, and allows an account thereof to be given in and to be 'taxed by the Auditor: Further, and in regard to the conclusions 'of the action against Low and Rutherford, and the individual part- 'ners of that company, finds, That Low and Rutherford, acting as 'agents in the application to the Court for the appointment of Mr 'Low as curator bonis and factor loco tutoris, had the means of 'knowing whether caution had been found and his title completed, 'and were bound to ascertain that point before proceeding to act 'as his agents, in that assumed character, in transactions with par- 'ties who were evidently dealing on the understanding that that

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'title had been completed: Finds it proved in the present case, by 'the books of Low and Rutherford, that they did so act, and were 'besides cognisant of the large payments made by Mr Macfarlane 'to Mr Low, as holding a completed title: finds, That no commu- 'nication was made by Low and Rutherford to Mr Macfarlane and 'the trustees, of Mr Low's failure to find caution, and of the im- 'perfect state of his title: Therefore, finds the said company, and 'the individual partners thereof, are bound to relieve Mr Macfar- 'lane and his co-trustees of the loss they have sustained in conse- 'quence of the neglect or concealment practised by the said com- 'pany; decerns against them accordingly for such sums as Donald- 'son's trustees may be subjected in the payment of, in the original 'action at the instance of the children of Hamilton Donaldson; and 'appoints the case to be enrolled, that parties may be heard on the 'amount.'

Note.—'The discharge granted to Donaldson's trustees by the 'parties interested in the succession is in very general terms, and 'contains a clause of absolute warrandice. But the discharge was 'prepared by the trustees, or by Mr Macfarlane, their manager, 'and himself a professional man, and in that discharge he inserted 'the name of Mr H. M. Low, as factor and curator for the minor 'children of Hamilton Donaldson. In such a case it appears to the 'Lord Ordinary that the clause of warrandice, though perfectly 'effectual to protect the trustees in all the matters of accounting, 'on the supposition of Mr Low truly possessing the character which 'Mr Macfarlane, in framing the discharge, chose to ascribe to him, 'cannot, in sound construction, be held as a warrandice by the 'other parties interested to the trustees that he truly held that cha- 'racter, a point which they, the trustees, were bound to verify be- 'fore they dealt with him as a party, and made over to him the 'share belonging to the minors.

'The other branch of this cause, viz. the claim by the pursuers 'against the company of Low and Rutherford, involves a question 'of some difficulty. There seems no reason for holding that Low 'and Rutherford acted as agents for Donaldson's trustees, and 'therefore the usual ground of liability against agents for blun- 'ders or omissions does not here exist. They were the agents of 'the minor children, and of Low, assuming the character of cura- 'tor bonis for them, that is, of the parties with whom Donaldson's 'trustees were acting; and it is maintained by Low and Ruther- 'ford, upon the authority of the case of Wilson, &c. against Riddel, '20th June 1826, that whatever claim a party may have against 'his own agent for the consequences of his professional mistakes 'and omissions, he has none against the agent of the party with

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'whom he transacts. The present, however, is a special case, and 'it appears to the Lord Ordinary to warrant the application of a 'different principle from that which seems, upon very reasonable 'grounds, to have been adopted in the decision referred to. Messrs 'Low and Rutherford were the agents in the application to the 'Court for the appointment of one of the firm, Mr Low, as factor 'loco tutoris and curator bonis. It was their duty to know, and 'they must be presumed to have ascertained, whether caution had 'been found and the act extracted, before proceeding one step 'farther, as agents for Mr Low, in that character. Still more was 'it their duty to ascertain that fact before they, as agents, counte-'nanced the payment to, and the appropriation by Mr Low of large 'sums of money, which he was entitled to receive only in that cha-'racter. Now it follows, from the entries in their books, that the 'company must be held to have been cognisant, not only of Mr 'Low assuming that character in dealing with Mr Macfarlane and 'Donaldson's trustees, but of those trustees paying large sums of 'money, on the reliance of his title having been complete. Not 'only are the revisal of the discharge, the meeting with Mr Mac-'farlane for the purpose of signing the discharge, and the various 'letters addressed to Mr Macfarlane in relation to the transference 'of the shares of the minors, entered as articles of charge in the 'company's books, but various of the payments received by Mr 'Low, as curator, are entered in the company's books at the credit 'of the minors, under the designation of 'Donaldson's Executors.' 'In short, it rather appears from the books, that although Mr Low 'was appointed the factor and curator, the business charges of his 'actings in that capacity truly formed part of the profits of the com-'pany. In these circumstances, the Lord Ordinary thinks the 'company, and the individual partners of the company of Low and 'Rutherford, must be held liable in relief to the trustees. The 'company were cognisant not only of the defect in Mr Low's title, 'but of the trustees' reliance on that defective title, a reliance which 'they were actively instrumental in producing, by acting as agents 'for the pretended curator bonis; and were certainly instrumental 'in continuing, by their perfect silence on the defect of his title 'during the whole course of the transaction. Whatever negligence 'there may be justly chargeable against the trustees and Mr Mac-'farlane, in a question with the minors, the Lord Ordinary has ar-'rived at the conclusion, that the trustees have, in the circum-'stances of the case, a good claim against Low and Rutherford.'

Against this interlocutor the pursuers, Mr Macfarlane's trustees, *reclaimed*, so far as it assoilzied Mr Donaldson and Dr Somers;

and the defender, Mr Rutherford, *reclaimed*, so far as it contained a decerniture against himself. 12 May 1835.

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Pursuers' Pleas.

Pleaded for Macfarlane's trustees, (*Cowan*)—The appointment of Low, as factor, was not by the trustees. He got that character from the parties with whom they dealt, who chose to hold him out as regularly appointed. The only duty the trustees had to perform was to protect themselves by the nature of the discharge. They might have brought an action of exoneration, and paid the money into Court; but to save expense to the parties, they consented to an extrajudicial arrangement, on condition of receiving such a discharge as would fully protect them from all after-claims. Accordingly, this discharge was framed with that view. It is not a discharge by each for their own share, but with mutual consent, each taking burden for the other. It contained a mutual cautionary obligation: every one was bound as cautioner for the others as well as for their own share. In taking absolute warrandice in such terms, there can be no doubt the several title of each was the leading object. It is impossible they could have expressed an intention to effect this purpose more clearly. This is a most important general question, affecting the interest of all trustees who might wish to save the expense and delay of judicial proceedings, and, if the terms of the discharge are disregarded, may put a stop to all extrajudicial settlements of this kind. According to the view taken of this discharge by the Lord Ordinary, it imports truly only warrandice from fact and deed, which they would have had without making any provision on the subject. Every one of these parties knew they were going farther; and they undertook the obligation mutually and for each other, scientes et prudentes. If it could be made out that Mr Macfarlane intended to mislead them, the case might have been different; but it is plain he had no interest in misleading them in a single point: his only object was to prevent liabilities to claims by any party concerned.

Defender's Pleas.

Pleaded for the defenders, Dr Somers and H. Donaldson, (*The Solicitor-General*)—The succession was to be divided into five parts. It was necessary to have a factor loco tutoris appointed to the minors, who were to receive a certain proportion; and it was incumbent on the trustees to see that he was regularly appointed, before they paid him, or permitted him to join in the discharge. Instead of doing so, they paid him before the final and most important step was gone through. The idea entertained as to the import of the discharge would tend to convert it to a use which no lawyer could for a moment suppose was in the contemplation of the parties. It was prepared by the party himself; and the reason why they are

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made to take burden for one another was simply this, there was a peculiarity in the terms of the will, which might have raised the question, whether a share should be set apart for each child when he came of age, or whether there should have been an accumulation. Mr Macfarlane followed the first alternative, and it was to prevent any after dispute on this point that the discharge was so framed. He dealt with them all separately, so that it could not by possibility have been in contemplation that they should warrant one another.

Rutherford's Pleas.

Pleaded for the defender, Mr Rutherford, (*Rutherfurd*)—The Lord Ordinary, while he has sustained the defences of the other parties, has held Mr Rutherford liable in relief to the trustees, on the ground, that the firm of which he and Mr Low were partners acted as agents in the application to the Court for the appointment of Low as factor loco tutoris. But this was entirely a personal transaction of Mr Low's. Mr Rutherford was no way implicated in his proceedings in regard to it. It is true he was his partner, but he never intromitted with a farthing of Donaldson's funds. He gained nothing by the copartnery; and the consequence of the decision of the Lord Ordinary, if adhered to, will lead him into great distress, if not to ruin. In order to a division of the funds in the hands of Donaldson's trustees, and to protect the rights of minors, it was necessary to have a factor loco tutoris. No doubt the firm appear as agents in the application which produced the appointment of Mr Low. No doubt Mr Low should not have acted without finding caution; but Mr Macfarlane knew that he did so act, and was it not his plain duty to have required to see the extract before paying the money? If he had done so, Low would not have got sixpence into his hands. By not doing so, he put himself into the place of Low: he virtually became security for him. It is true, part of the money was at one time in the firm; and it might have been a question, if it had remained there, whether the partners might not have been liable for that part; but that is a separate question. In this case, the money was all drawn out by Low; he lent a part upon good security, another part on questionable security, but which ultimately turned out good, and he got the money; but he never put it into the copartnery account: he kept it to himself. A great part of the money received by him never entered the account at all. In these circumstances, Macfarlane brings an action of relief against the partner of Low, to subject him to the consequence of his own neglect: the firm were Low's agents, not Macfarlane's: they may have incurred responsibility to Low: they may even to the children; but there is no action at their instance,—no ac-

tion by any party in their right. Instead of acting for Macfarlane, the duty of the firm was to act in opposition to him. The case of Riddel (referred to in the note) was precisely similar. If the point at issue be disposed of in terms of that case, there can be no proper legal question to try here. Suppose this money had been actually applied to the liabilities of the firm, there are many cases in point in England where they have never gone further than this, that the partnership could only be rendered accountable for money which actually got into the books, and of which there had been a fraudulent application. The liability of partners in such cases rests entirely on retention or improper appropriation. The liability here is not put on retention of funds, but on this, that one partner is bound to know the defect of title in his copartner, even when he receives money not in the partnership transactions, and whether that money is retained or made use of in the partnership concerns or not. There is not a single case where responsibility was made to attach to an agent for neglect in the business of his employer, but because he did not attend to the interest of a party directly opposed to that of his employer. Suppose the matter had been conducted by different agents altogether, upon the same principle, an equal responsibility would have attached to them. There has been lately a great deal of discussion in matters of a similar nature in England, particularly in reference to those in which Mr Fontleroy was engaged. In the last of these cases, the only ground of liability which it was considered could legally attach, was not that stated here, viz. that the partners were bound to see that he acted correctly, but it was this, that Fontleroy, although he forged powers of attorney, had, before he used the money for his own purposes, deposited it in a banking house, with which the company had an account; and then the responsibility was made to rest, not on his having obtained the money by fraud, but on this, that the company had complete control over the banking account, and must be held to have given their concurrence in the withdrawal of it. If Low, having got these funds, had employed them for the benefit of the company,—if, instead of being kept in a separate account, they had been left at the disposal of the company,—if, instead of being withdrawn by Low in his separate character, and otherwise invested by him, they had remained in the hands of the company, there might have been some ground upon which to establish liability. But such a question is not raised here: there are no facts to raise the question. The Lord Ordinary has put his decision on the bare and simple point of law, that as this firm acted as agents for Low, they, knowing, or being bound to know, of the defect in his title, were bound to communicate it to the party with whom he transacted. This is

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quite a novel ground, and to say the least of it, as the Lord Ordinary has himself admitted, is one of great difficulty, and if the view now taken be confirmed, will infer responsibility, which not one of the parties concerned ever dreamt of.

Lord Mackenzie.—I wish to call attention to this part of the interlocutor: 'In short, it rather appears from the books, that al-'though Mr Low was appointed the factor and curator, the busi-'ness charges of his actings in that capacity truly formed part of 'the profits.'

Rutherfurd.—Suppose there had been an arrangement that they should share the profits arising from this factory, that would not involve Mr Rutherford, unless, in acting for Low as agents, the company were bound to make a disclosure to the opposite party of such defects in his title as it was his duty to discover.

Lord Balgray.—This may be a very hard case, but I think the defender, Mr Rutherford, is completely identified with Low. I can't get the better of the statement in the books, from the commencement of the application.

The *Lord President.*—That is the ground on which I go. All the money transactions were in the books.

Rutherfurd.—Not all of them.

The *Lord President.*—But there is a debtor and creditor account in reference to this factory.

Lord Balgray.—With respect to the discharge, it is very material that it was drawn by Macfarlane: it was his duty to have seen an extract before he paid away one shilling.

The *Lord President.*—If a person pays money, he is bound to see that the receiver can give him a proper discharge.

Lord Gillies.—I concur. As to the first point, I have no doubt. A copartnery of writers is very common. Your Lordships can't appoint all of them factors; but still, if one is appointed, the others are responsible for his actings, unless separate books are kept. It is a very different thing, where another man is appointed, and a writer merely acts as agent for him, from one of a firm of writers being appointed, the others joining with him in conducting the business of the factory, and charging profits. No doubt Rutherford might have kept himself quite clear of responsibility, if he had said to Low, You are factor; keep separate books, and don't connect our firm with it.

Rutherfurd.—I wish to make the Court aware of this fact not set forth in the record, that several thousand pounds of the money of this factory never were in the company books,—never passed through the hands of the company at all.

More.—It appears from the company letter-books, that the Bank

of England stock, which was the only part of the funds not actually entered in the books as intromissions by the company, was to be transferred to Low, in consequence of certain meetings and correspondence with the trustees, and all of which were charged for in the books of the company. 12 May 1835. Macfarlane's Trustees v. Donaldson and Others.

Lord Mackenzie.—I was at first puzzled by the extremely broad terms of the discharge, and am not yet quite clear as to the precise effect of it. I can understand a party taking burden for an absent person, as if he had agreed; but where the party is present, it is not easy to see the object of taking it in such terms, as he could grant his own discharge. I have little doubt as to the other point: substantially, I think the company liable.

The *Court* unanimously adhered. Judgment.

Lord Fullerton, Ordinary. For the Pursuers, *More, Cowan.* For Mr Donaldson and Dr Somers, *The Sol.-Gen. (Cuninghame,) Forsyth.* For Mr Rutherford, *Rutherfurd. James Learmonth, Graham & Anderson*, W. S. *Geo. Rutherford, (Party,)* Agents. *S.* Clerk.

C.

FIRST DIVISION.

No. LXXXIX. 12*th May* 1835.

Poor LAWRENCE SKEEN
against
JAMES TAYLOR.

Process.—Statute 6. Geo. IV. c. 120.—A reclaiming note by a pursuer, against an interlocutor of the Lord Ordinary, sustaining a preliminary defence,—held to be incompetent, in respect the summons and defences were not appended, nor notice served upon the defender, in terms of the 18th section of the Judicature Act.

Lord Cockburn, Ordinary. Act. *B. R. Bell.* Alt. *John Wilson.* *John Martin*, W. S. and *Party*, Agents. *D.* Clerk.

C.

FIRST DIVISION.

No. XC. 13*th May* 1835.

THE REV. PINKSTAN FRENCH AND MANDATARY
against
HARRIET PINKSTAN OR KILPATRICK, AND OTHERS.

PRESCRIPTION.—INTERRUPTION.—*Circumstances in which it was held that there was no prescription against an entail.*

THE late Fleming Pinkstan died in 1792, leaving a deed of simple destination of his lands of Limehouseboig, dated 24th November 1781, and also a deed of entail of said lands, dated 23d May 1791, revoking the former deed. In this deed of entail he called Ann Pinkstan, his only lawful daughter, as institute, (under burden of a liferent in favour of his brother, Hugh Pinkstan,) and the heirs whatsoever of Ann Pinkstan's body; whom failing, Fleming Pinkstan, son of said Hugh Pinkstan, in liferent; and after his decease, to and in favour of Dr Hugh French, his nephew, and the heirs whatsoever of his body, &c. The destination in the deed of settlement was the same as regarded Hugh Pinkstan and Ann Pinkstan.

On the death of the testator, Fleming Pinkstan, Ann Pinkstan took infeftment on the deed 1781, disregarding the entail, and she possessed the property till March 1793, when she died unmarried. On her death, Fleming Pinkstan, who was called as a liferenter under the entail, entered into possession of the estate, but, without completing titles, possessed till his death in 1832, when the defenders, his daughters, made up titles, as heirs-portioners of Ann Pinkstan. The pursuer, the son of Dr Hugh French, raised the present action of reduction of these titles. The further facts and circumstances, with the grounds of reduction, will sufficiently appear from the following note of the Lord Ordinary:

Note.—'Fleming Pinkstan the first settled the lands, by the deed 'of 1781, under which the defenders claim. In 1791 he revoked 'this deed, and executed the entail on which the pursuer founds. 'The plea of the defenders is, that the second deed has been extin-'guished by prescription on the first.

'The facts on which this prescriptive title rests are these: The 'granter died in 1792; his niece, Ann Pinkstan, was the institute, 'and *ought* to have made up her title under the entail, because this 'was the only subsisting deed, and because an omission to hold by 'it alone implied an irritancy. Nevertheless, she made up her title

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'under the revoked settlement of 1781, and died unmarried in 1793. 'The entail had been recorded during her life by the pursuer's fa-'ther. She was succeeded by her brother, Fleming Pinkstan (the 'second,) who was called as a liferenter by the entail, but had been 'a fiar under the deed 1781. He entered into possession, but *made* '*up no title at all*, and continued to possess from 1793 till his death 'in December 1832. His daughters, the defenders, then served 'heirs of line and provision to Ann, under the deed of 1781, and 'have been possessing since. This action was raised in 1833; but 'the defenders maintain, that the possession by Ann and her succes-'sors having endured from the date of the service in 1792 till inter-'rupted by this process, the entail has been worked off.

'And so it would, if Fleming Pinkstan (the second,) who held 'the lands from 1793 to 1832, had always possessed *unequivocally* 'under the settlement of 1781. But I do not think that he did. 'His possession is ascribed by the defenders to his apparency to Ann, 'who had passed the entail by; and certain acts are referred to, as 'evincing that he meant to possess as fiar under the first deed, and 'not as liferenter under the second. These acts are far from deci-'sive. Some of them, such as cutting wood, letting leases, and quar-'rying minerals, are often done, though irregularly, by liferenters; 'and the only sale that took place was a compulsory one for a pub-'lic improvement under a statute, and it is not averred that any of 'them were known to the fiar. Now, if there be any *doubt* as to the 'true character of his possession, it must be presumed that he in-'tended to do what was his duty, and in reference to forfeiture of 'his interest, which was to hold solely by the entail.

'But all doubt was removed by the proceedings between the pur-'suer and him in 1824. The substance of these proceedings is, that 'when legal measures were about to be resorted to for compelling 'him to connect himself directly with the entail, and when he was 'required to do so, he virtually acknowledged himself to be but a 'liferenter, (that is, to be under the deed of 1791,) because, after 'consulting counsel, he instructed the pursuer that the correct mode 'of proceeding was for him, the pursuer, to make up his title as fiar 'under the entail, burdened with the liferent.

'*This was accordingly done*, at his suggestion, and for his accommo-'dation, and after this both parties rested on the faith of this arrange-'ment. Fleming Pinkstan was himself personally a party to these 'proceedings, but the actings of his agents would be enough.

'Now, whether this be viewed as an interruption of the prescrip-'tion, or as an election and renunciation by him of the title he really 'held by, or as both, I think it conclusive. Its import is, that his 'possession, if not during the whole period, at least after 1824, must 'be ascribed to the deed which he himself then solemnly adopted.

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'It has been urged, that a correspondence cannot interrupt prescription. But there was a great deal more than a mere correspondence here; and it is not as an interruption only, or chiefly, that these proceedings are decisive. They are more important, as making the true title of possession. According to what the defenders now state, their father had incurred a forfeiture; and when required to save himself from this, by making up his title under the entail, he *did so* in what he thought (no matter whether correctly or not) the proper way, viz. by coming in as a burden on the title then made up under that deed by the fiar. I cannot understand how his subsequent possession can be immediately ascribed to a title totally inconsistent. And without the whole of his possession there is no prescription.'

In these circumstances his Lordship repelled the defences; found that the pursuer had the legal right to the lands in dispute, and is entitled to have the writings called for set aside; therefore declared and reduced accordingly, and found the defender liable in expenses, &c.

Judgment.

The defender *reclaimed;* but the *Court*, without hearing counsel for the respondent, unanimously adhered.

Lord Cockburn, Ordinary. Act. *Keay, Rutherfurd.* Alt. *Dean of Fac, (Hope,) More, Sandford. W. & D. Allester*, W. S. and *W. A. G. & R. Ellis*, W. S. Agents. *D.* Clerk.

C.

FIRST DIVISION.

No. XCI. 14*th May* 1835.

JOHN RUSSELL
against
THOMAS FREEN AND OTHERS.

TACK.—*The tenants of lands, under a lease for nineteen years, having, after a year's possession, advertised the farm to be sublet for eighteen years, and an offer having been made by a party to the person referred to in the advertisement, without specifying any term of endurance, but containing various stipulations as to meliorations, &c. and agreeing to follow the rotation of cropping laid down in the original lease, which offer was accepted, and possession given;—held, in an action at the instance of the subtenant against the lessors, to have it found that he was entitled to renounce the lease at any time, on due*

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notice being given, in respect that it contained no specific term of endurance,—that the fair meaning of the contract was, that the lease was to be binding for eighteen years, the term mentioned in the advertisement, and the period of the original lease which had yet to run.

Question as to construction of a special clause in the lease.

At Martinmas 1826, the proprietors of the Halbeath Colliery took a lease of the lands of Halbeath, with their minerals, from the proprietor, Colonel Lindsay, for a period of nineteen years. In Autumn 1827, it was determined to sublet these lands, so far as they consisted of an agricultural subject; and they were accordingly advertised to be sublet in three separate farms, 'for eighteen years,' from Martinmas 1827; and offers were directed to be lodged with Mr Beveridge, writer in Dunfermline.

A few days thereafter, the following offer was addressed by the pursuer to Mr Beveridge, with regard to one of the farms, called the Hall farm: '*Dunfermline, 9th Nov.* 1827. Sir, I hereby 'make offer of L.2, 10s. per Scots acre (of what the plough takes) 'for the remaining part of the Halbeath lands unlet, commonly 'called the Hall farm. The families in the houses west of the farm-'house to be removed by the 1st of February next, and me to have 'the liberty to take them down at any time that may be suitable 'to me. The dwelling-house to be put in proper repair, and the 'houses west side of the close to be converted into byres. The 'house on the north side, if large enough, to be converted into 'servant's house and stables, with sufficient loft. A new barn to 'be built, also a cart-shade, with granary. Should the houses on 'the north side not be large enough, they will require to be en-'larged, and any other alterations or additions I may find necessary, 'after proper inspection. The whole houses to be put into habit-'able and tenantable condition at my entry, and which I shall leave 'in like manner at my removal. The rent to be payable at Mar-'tinmas and Whitsunday, by equal portions. I have also no ob-'jection to advance the money for the repairs and buildings, 'being allowed 5 per cent. interest for the same, deducted from the 'rent yearly. The principal to be deducted for the last rents pay-'able. And as to cropping the lands, I shall observe the mode point-'ed out in the Halbeath Colliery's tack, for the portion let to me. 'Entry at Martinmas first. I am, Sir,' &c. (Signed) 'John 'Russell. Further, I bind and oblige myself to provide and fur-'nish the Halbeath Colliery, or their successors or assignees, du-'ring the continuance of the lease of the farm, or for such period 'thereof as the said colliery shall require, with three good and 'able horses, and drivers, for leading their coals or other minerals, 'from their workings or coal hills, to the shipping port at Inver-

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'keithing, for which I am to be paid at the rate of 6d. sterling for 'each ton of 21 cwt.' (Signed) 'JOHN RUSSELL,' &c.

This offer, (which contained no specific term of endurance,) was accepted, and the pursuer entered into possession at the term; but thereafter, (in February 1834,) he brought an action of declarator and damages against the defenders, (the trustees of the Halbeath Colliery,) setting forth, that although he, the pursuer, had, in terms of the above agreement, kept three horses and drivers expressly for the use of the lessors, they had never been regularly or fully employed by the company, who, on the contrary, employed other horses and drivers, which was a deviation from the contract, and concluding, inter alia, to have it found, that as his offer did not specify any definite period of endurance for the proposed lease, he was entitled to give up the same, on due and reasonable notice, (which he alleged had been given,) more especially after the colliery had ceased to give employment for his horses; and he concluded farther for damages for the loss he had sustained from this alleged breach of contract.

In defence it was *pleaded*, that although no term of endurance was specified in the offer, the plain intention (as was apparent from the whole tenor and terms of the offer,) was to constitute a lease for a term of years. The rent was expressly described as payable for a successive course of years, and provision was made for a settlement of the meliorations with the last year's rent. A rotation of crops was also referred to, which of itself implied a term of years, the pursuer binding himself specially to observe the same rotation laid down in the principal lease by the Halbeath Colliery. The obvious meaning of this was, that the sublease was to endure for the whole term of the principal lease, for it was in this way only that the subtenant could follow out the prescribed rotation of crops; and this construction was established by the circumstance, that the offer made by the pursuer was in consequence of an advertisement which expressly imported a lease for eighteen years; and it was upon this understanding that the offer was accepted and possession given to the pursuer.

The Lord Ordinary assoilzied the defenders, and found the pursuer liable in expenses, &c. adding the subjoined note:

Note.—'This is an action of declarator, brought to have it found, 'that a missive of lease, followed by possession for several years, is 'not binding, or that the lease is now come to an end; and there 'is also a conclusion for damages against the defenders, on account 'of alleged non-implement of their part of the compact as lessors. 'The pursuer contends that the lease is not binding for more than 'one year, because the missive does not specify the period of en- 'durance. To this, it is a sufficient answer, that the missive clearly

'shows that the lease was not to continue for one year only. It specifies a rotation of crops, being the same which the lessors, the principal tenants of the farm, were bound to observe. There is a provision as to meliorations or repairs to a considerable amount, and the pursuer agrees to advance the expense of these repairs, interest at the rate of 5 per cent. being deducted from the rent yearly, and the principal to be deducted from the last rents payable. But the precise endurance is fixed by the advertisements which were inserted in the newspapers, and the hand-bills which were circulated and posted up, mentioning that the farm was to be let for eighteen years from the then ensuing term of Martinmas, and directing written offers to be lodged with Mr Beveridge, writer in Dunfermline, before the 16th of November in that year. In terms of these advertisements, the pursuer's offer, dated the 9th of November, was lodged with Mr Beveridge. Now, it is settled law in the case of a lease, in which no term of endurance is defined, but where it is clear that parties intended it should continue for more than one year, that the Court are entitled and bound to fix the period, according to the ordinary rules of construction, from such evidence as can be obtained. The evidence here seems conclusive.

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'There is a condition not contained in the original offer, but subsequently added, by which the pursuer became bound to furnish the company during the continuance of the lease, or for such period thereof as they should require, with three good and able horses and drivers, for carrying their coals to Inverkeithing, he being paid at the rate of 6d. per ton. The pursuer does not allege that the horses were not employed, but he maintains that he was entitled to insist that they should be fully employed, which it is admitted was not the case. The Lord Ordinary cannot construe this clause into an obligation that the pursuer's horses should have full or constant employment. On the contrary, it seems a condition in favour of the company, that they should have the command of these horses when they had occasion for them. Nor was this any hardship upon the pursuer, as it appears from the missive that the establishment on the farm was to consist of no less than ten horses. It is alleged that the company improperly employed other horses at a time when the pursuer's were idle; but there is no specific statement in the record sufficient to infer mala fides in the conduct of the defenders in that respect. The horses employed on the occasions alluded to might have belonged to the defenders themselves.

'As the non-implement alleged does not infer extinction of the

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'contract, neither does it, in the Lord Ordinary's opinion, found 'any claim of damages.'

Pursuer's Pleas.

The pursuer *reclaimed*, and *pleaded*—That although it was true, that, in particular cases when no definite period of endurance was specified in the contract, it might be competent, where the intention of the parties could be clearly gathered from the other stipulations of the lease, to extend the duration of it to a particular period, yet the general rule in such cases, where more than one year appeared to be in the view of parties, was, to adopt the next shortest period to what was the legal term, viz. two years. But the argument here was, that the sublease was to endure for eighteen years, viz. the whole remaining period of the original lease, not on the ground maintained by the Lord Ordinary, that it was in arbitrio judicis to fix upon any particular period, as might be gathered from the circumstances and evidence of the case; but on the ground, that the terms of the advertisement and offer established of themselves a complete and binding contract, so as to exclude all doubt, and all discretion on the part of the Court in fixing any particular period. But there were no grounds for such a construction, or for holding that a sublease, granted in such terms and in such circumstances, would be effectual for the whole period of the original lease. If good against the landlord, it would be good against singular successors, which, it was believed, was contrary to all the precedents.

Opinion of Court.

The *Lord President* observed, that a lease in such circumstances might be rendered binding upon the granter and his heirs from his own actings, though it might not be effectual against singular successors.

Lord Balgray.—The only question is, What was the real nature of the contract between the parties? If the argument of the Dean of Faculty were good, the effect would be to set aside half the leases in Scotland. The offer was made upon seeing the advertisement, so that the fair meaning to be attached to the contract is, that the offer was intended to be in terms of the advertisement. The whole transaction was equivalent to a specific offer, and acceptance in similar terms.

The other Judges concurred as to this, and they also assented to the construction put by the Lord Ordinary upon the other stipulations.

Judgment.

The *Court* therefore adhered, but found no additional expenses due.

Lord Corehouse, Ordinary. Act. *Dean of Fac. (Hope,) Sol.-Gen. (Cunninghame.)*
Alt. *Rutherfurd, Penney.* *Wm. Hunt*, W. S. *Smith & Kinnear*, W. S. Agents.
D. Clerk.

C.

FIRST DIVISION.

No. XCII. *14th May* 1835.

SIR JAMES GIBSON-CRAIG & JAMES BRIDGES, W.S. TRUSTEES FOR THE CREDITORS OF THE LATE MRS COLEBROOKE OR TAAFFE,

against

HENRY THOMAS COLEBROOKE, AND MACKENZIE & SHARPE, HIS MANDATARIES.

PRESCRIPTION.—TERMS LEGAL AND CONVENTIONAL.—LIFERENT PROVISION.—*A widow being heritably secured in a liferent provision, payable half yearly, at Whitsunday and Martinmas, and she, after surviving her husband for several years, having died between these terms, the annuity due at the term preceding her death having been paid to her,—held, that nothing was due to her representatives.*

THE late Mr Colebrooke of Crawford-Douglas executed a bond of this date, (5th Feb. 1808,) by which he bound and obliged himself, and his heirs, to pay to his wife 'a free annuity of L.800 yearly, 'without any deduction whatever, during all the days of her life, 'in case she shall survive me, at two terms of the year, Whitsun-'day and Martinmas, by equal portions, beginning the first term's 'payment, being L.400 sterling, at the first of these terms which 'shall arrive next after my death, for the half year immediately pre-'ceding that term, and so forth thereafter, termly and proportional-'ly, during her lifetime, with a fifth part more than each term's 'payment of liquidate penalty, for each term's failure in punctual 'payment thereof,' &c. And in the obligation to infeft, Mr Colebrooke further bound and obliged himself, and his foresaids, to infeft and seise his said wife 'in the said free annuity of L.800 ster-'ling yearly, during her life, in case she shall survive me, to be up-'lifted and taken at the aforesaid two terms in the year, Whitsun-'day and Martinmas, by equal portions, beginning the first term's 'uplifting thereof, being L.400, at the first of these terms which 'shall arrive after my death, for the half year immediately preced-'ing, and so forth termly thereafter, during her lifetime,' &c.

In the course of the same month, Mr Colebrooke executed a will in England, whereby he bequeathed, inter alia, to Mrs Colebrooke 'the sum of L.500, to be paid to her immediately after my decease, 'without any account to be at any time rendered by her,' for mournings, household expenses, &c. 'and for her own use, until she shall

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'come into the receipt of the income herein after provided for her,' (viz. an additional annuity out of his English property.)

Mr Colebrooke died 23d April 1809, and his widow (who afterwards married Mr Taaffe) immediately received the sum of L.500, and at Whitsunday following she received a half-yearly payment of the annuity provided to her, and the same was paid half yearly, down to Martinmas 1831 inclusive. She died 15th March 1832; and, after her death, Sir James Gibson-Craig and Mr Bridges, who, as her creditors, had used arrestments in the preceding December, instituted a claim against the heir of Mr Colebrooke, which came to be tried in conjoined actions of multiplepoinding, ranking and sale, &c. the particulars of which it is unnecessary to detail.

They *pleaded*—

Pleas of Mr Colebrooke's Creditors.

I. That the annuity in question being expressly declared payable to Mrs Colebrooke 'during all the days of her life,' and she having confessedly lived till 15th March 1832, her creditors, as in her right, were entitled to draw the annuity down to Whitsunday 1832, or at least the proportion of that annuity effeiring to the period between Martinmas 1831 and 15th March 1832.

II. That the half-year's annuity, which fell due at Whitsunday 1809, being, by the express terms of the bond, payable 'for the 'half year immediately preceding,' and in like manner, the payment made at Martinmas 1831, being for the half year preceding that term, none of the payments made at or preceding Martinmas 1831 could be imputed to the subsequent half year, or to the period between that term and 15th March 1832.

III. That the arrestments used by the claimants in December 1831 effectually attached the half year's annuity, which was then current, and entitled the respondents to be preferred for the half year's annuity down to Whitsunday 1832; or, at all events, to the proportion of it effeiring to the period between Martinmas 1831 and 15th March 1832.

On the other hand the Heir *pleaded*—

Plea of Mr Colebrooke's Heir.

That as Mr Colebrooke's bond of annuity was secured over an heritable estate in Scotland, and was declared to be payable termly, at the terms of Whitsunday and Martinmas, it could not be held to run de die in diem. And as Mrs Taaffe, or those in her right, drew, during her life, the whole termly payments exigible under the bond, there were no arrears due by the pursuer which could be claimed by her creditors.

The Lord Ordinary repelled the claim of the creditors, but found no expenses due, adding this note:

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Note.—'The late Mrs Taaffe, the widow of George Colebrooke, 'Esq. of Crawford-Douglas, was secured on Mr Colebrooke's Scot-'tish estates in a liferent annuity of L.800, payable half yearly, at 'Whitsunday and Martinmas. She died on the 15th March 1832; 'and the question is, whether her creditors are, in her right, enti-'tled to a part of the annuity proportioned to the period between 'Martinmas 1831, the last payment, and the day of her death? 'The Lord Ordinary has decided this question in the negative, on 'the following grounds: In the first place, the annuity was secured 'on land; in which case it is laid down, that 'the same rules are "observed as in a proper liferent of lands, where the different in-"terests of the heir and executor, and of the liferenter and fiar, are "fixed according to the legal terms of land-rent, Whitsunday and "Martinmas.' *2dly*, Even in the case of a personal bond of annuity, 'payable at Whitsunday and Martinmas, and otherwise framed in 'terms not appearing to the Lord Ordinary to differ substantially 'from those of the bond in dispute, it has been found, that the an-'nuitant having died on the 2d of November, no annuity was due 'for the period current between the preceding Whitsunday and his 'death. *Lastly*, Any equitable ground which might otherwise 'have existed for adopting a different construction, in consequence 'of the alimentary nature of this annuity, is here excluded by the 'considerations, that the bond contemplated the provision of a sum 'of money for the maintenance of the annuitant until the first term's 'annuity became payable; that such provision was made in the se-'parate settlements of the husband; and that the sum so provided 'was actually claimed and received by the annuitant in this multi-'plepoinding, on the ground of her being legally entitled to such a 'maintenance.'

Creditors' Pleas.

The creditors *reclaimed*, and the *Dean of Faculty*, in support of the reclaiming note, *pleaded*—This was a conventional provision, by the express terms of which, the widow of the granter was to enjoy the provision during all the days of her life. This is not the case of a contract, or a purchased annuity; it was a gift to a widow, to the most favoured of all parties. A few days after the execution of this bond, Mr Colebrooke executed an English will, by the terms of the bequest in which a provision was created in favour of his wife, until she should come into the receipt of the income provided for her; and it was expressly declared, that what she took by the will was not to affect the provisions made in her favour in Scotland, or elsewhere. There is a clear distinction between such a case as this, and that where an annuity is purchased, as in Lord Dalhousie's case, referred to by the

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Lord Ordinary. The consideration which chiefly moved the Court there was, that even if the annuity were due, there was no stock to answer it. There is nothing in the observation, that the widow would receive a portion effeiring to the period when the husband was alive. It is not the husband, but the heir who is to pay the annuity, and there was power to burden him to any extent. The Lord Ordinary saw the distinction in this case, as to a gift to a favoured party. He says, however, there was a provision in another deed, but the terms of that deed expressly exclude the application. His Lordship further says, that this was an annuity secured on land, and that its payment must be fixed by the legal terms. That observation might have applied, if the words had not been sufficiently explicit to the contrary. This is not the case of a liferent of lands, or of an annualrent drawn from land; it is a mere personal bond, payable by the representatives of the obligant, which, for more security, is made a burden on land; in other words, there is an alternative power to take possession, and draw the annuity from land, on failure of the primary obligation. This is the first case where there has been an opening for the determination of the effect of an annuity, where there is no locality,—no immediate payment to be made from lands, but a mere power to revert to the land in the event of failure in obtaining it otherwise.

The counsel for the respondents were stopped by the Court.

Opinion of Court.

Lord Gillies.—This is just the common case of a jointure. By the terms of the obligation to infeft contained in the bond, the granter binds himself to infeft his widow in lands, and that for payment of an annuity termly, not proportionally. It is the obligation to infeft which must regulate the payment of the annuity. According to the terms of it, if the granter had died the very day before the term of Whitsunday, his lady would have been entitled to a half-year's annuity. Now, he died in April 1809, and she was paid at Whitsunday, exactly in terms of the bond. She has got payment at every term since. It is said the words are, during all the days of her life; but that does not signify, because such half-year's annuity was payable only termly, when the term arrived. If she had died on the 15th of May, her representatives would have been entitled to the preceding half-year's annuity; but having died in March, it is impossible that any thing could be due to her, as she did not survive the term.

Judgment.

The other Judges concurred, and the *Court* therefore *adhered.*

Lord Fullerton, Ordinary. For the Creditors, *Dean of Fac. (Hope,) Walker.*
Alt. *A. Anderson, Scinton.* *Jas. Bridges*, W. S. and *Mackenzie & Sharpe*,
W. S. Agents. *D.* Clerk.

C.

SECOND DIVISION.

No. XCIII. 14*th May* 1835.

CHARLES WALKER
against
JOHN MACGILP.

BANKRUPTCY.—DISCHARGE.—*Two creditors who had ranked on a sequestrated estate, and drawn dividends, signed a minute consenting to the bankrupt's discharge, and afterwards assigned their debts,—held, after the lapse of six years, during which no application had been made to the Court for a discharge, that the assignee was entitled to raise action for payment against the bankrupt; but, in respect of the discharge being obtained, pendente lite, decree granted only to the effect of drawing dividends in the sequestration.*

CHARLES WALKER, merchant in Glasgow, was sequestrated in 1818. At that period he was due to George Sinclair a bill for L.83, 12s., and to George Young a bill for L.75, 14s. These persons were ranked upon his sequestrated estate, and drew a dividend of 5s. in the pound in 1820; and in 1823 they both subscribed a minute, addressed to the trustee, consenting that an application should be presented for the discharge of the bankrupt; and they never afterwards attempted to withdraw their concurrence. No application was then made for a discharge; and in May 1829 John Macgilp obtained assignations, not only to the grounds of debt held by these persons, but expressly to the benefit of the ranking on the estate, under deduction of the dividends already received. Upon these assignations he raised action before the Sheriff in August 1829, concluding personally against the bankrupt for full payment of the debts, under deduction of past dividends, and for expenses. Some groundless objections were stated by the bankrupt; but his main defence was, that the pursuer was barred, by the consent of his cedents to his application for a discharge, from insisting in the action. The Sheriff repelled the defences, and decerned in terms of the libel.

Walker advocated, and on 19th September 1834, while the advocation was in dependence, he obtained his discharge in the sequestration. He was afterwards allowed to add a plea to the record, founding upon the discharge as excluding the action. The Lord Ordinary, (Jeffrey,) on 10th February 1835, pronounced this interlocutor: 'In respect that the cedents of the respondent had,

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'previous to the assignation in his favour, on which he founds, not 'only ranked and drawn dividends on the sequestrated estate of the 'advocator, but had concurred by a signed minute in his applica- 'tion for a discharge, which discharge has been since granted on 'the strength of other concurrences contained in the same minute, 'advocates the cause, alters the interlocutors of the Sheriff, and as- 'soilzies the advocator from all the conclusions of the action, re- 'serving always to the respondent the benefit of his own ranking, 'and that of his cedents, on the sequestrated estate, in relation to 'any dividend that may still be recoverable therefrom; finds the 'advocator entitled to the expenses incurred by him in this Court; 'allows an account thereof to be given in, and remits the same, 'when lodged, to the Auditor to be taxed, and decerns.'

His Lordship stated the grounds of his opinion in a note, in the following terms:

'To the extent of holding that the assignee was in all respects in 'the same situation with the cedents, the Lord Ordinary has no 'difficulty in adopting the views of the advocator. This he appre- 'hends to be the general rule as to assignations; but it has been 'specially decided as to this very case, of a debt assigned, after a 'consent by the cedent to a discharge in a sequestration; Sheriff 'v. Steele, 23d Nov. 1809, *F. C.* The report bears it to have 'been the unanimous opinion of the Court in that case, that it was 'incompetent, by such a transference, to deprive the debtor of that "consent, which had been once fairly and regularly given, and in "which he had acquired a jus quæsitum; and that the debt, if "afterwards purchased, must be taken cum omni onere, and the "bankrupt be entitled to rank it among the number of consenting "votes.' The Lord Ordinary, therefore, must deal with this case 'exactly as if the action had been brought before the Sheriff by 'the original ranked and concurring creditors, Sinclair and Young, 'in their own persons; but, even on that supposition, it is not free 'from difficulty.

'In the first place, he cannot adopt the general and sweeping 'doctrine of the advocator, that no creditor who has once claimed 'and drawn dividends on a sequestrated estate can afterwards sue 'the debtor in an action of constitution. It may generally be un- 'necessary, and often oppressive to proceed in this way; but the 'Lord Ordinary does not think it incompetent. The trustee's rank- 'ing gives no right to any thing but a dividend from the seques- 'trated estate; and after one dividend is paid, such ranking may 'even be retracted upon farther consideration before another; and, 'at all events, it is no warrant either to attach *future acquisitions* by 'the bankrupt, or to do diligence against his person. Yet these

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'are *all the legal rights* of all creditors by decree; and there is no 'provision in the law of sequestration, which declares or implies 'that they cannot be acquired by any creditor who has once claim- 'ed or drawn dividends from the estate. If there was no more in 'the case, therefore, the Lord Ordinary would be inclined to hold 'the action competent, and the judgment of the Sheriff right. He 'has put his judgment, therefore, entirely on the effect of the ce- 'dent's *consent to the discharge*, which the bankrupt has (since the 'advocation, no doubt,) actually obtained. Such a consent neces- 'sarily limits the right and interest of the creditor to the dividends 'which the funds in the hands of the trustee may yield; and, be- 'yond all question, imports a renunciation of all right, either to 'attach acquirenda, or to do diligence against the person of the 'bankrupt. It seems therefore utterly inconsistent with the exist- 'ence of any title or interest to convene him in a personal action for 'any prior debt.

'The respondent scarcely ventured generally to dispute those pro- 'positions, but rested chiefly on the specialty, that though his con- 'sent was given in 1823, no application was actually made for a 'discharge for ten years after; and that it was in the middle of this 'long interval, when all notion of such a thing seemed abandoned, 'viz. in 1829, that he acquired right to the debt by assignation, 'and brought his action before the Sheriff; and he referred to the 'case of Megget, 10th July 1830, (8. *Shaw*, 1063,) and to that of 'Duncan and Cunninghame, 3d June 1834, (12. *Shaw*, 678,) to 'shew that a consent of this sort may be retracted, on sufficient 'grounds, and does not operate as a *perpetual* bar to other proceed- 'ings. But these cases do not apply. In that of Megget, the 'bankrupt having attempted to *vary the conditions* on which the 'creditors had consented to his discharge, they signified that they 'would withdraw their consent; and the Court 'having intimated "an opinion,' (for there was no judgment,) that, in such circum- 'stances, they would be entitled to withdraw, the bankrupt aban- 'doned his new conditions, and the discharge was awarded. In 'Duncan's case, the discharge had been deliberately *refused* by the 'Court, and there seemed to be no purpose of again applying for 'it, when action was raised against the bankrupt, upwards of eleven 'years afterwards; and accordingly this concurrence was never 'founded on as a ground of defence. In the present case, it is not 'pretended that the discharge was ultimately sought on any other 'conditions than those to which the concurring creditors originally 'assented; and the discharge, instead of being refused, was granted, 'though no doubt after a long interval, on the very first application.

'The only difficulty in the case, therefore, arises from this long

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'interval, during which nothing was done to render the concurrence available, and before the lapse of which the action was raised, and decreet given by the Sheriff. But though the Lord Ordinary feels that it raises a very considerable difficulty, he thinks that the circumstances, when properly attended to, sufficiently warrant the conclusion to which he has come. There was not only no refusal of the discharge, and no change of circumstances to justify a retractation of the consents given in 1823; but, in point of fact, no attempt was made to retract them; and they were actually taken into account when the discharge was ultimately granted in 1834. There was some misapprehension upon this subject, at first, during the debate; but the facts turned out to be these: When the discharge was at last applied for in 1833, the minute of 1823, containing the consent of Sinclair and Young, and of several other creditors, was produced along with a more recent minute, containing the consent of other creditors, and *both* were taken into computation in making up the statutory concurrence, as new consents being given for those who had subscribed the minute of 1823. The respondent, no doubt, objected to Sinclair and Young being reckoned as consenting creditors, as he contended that this would interfere with his pleas in this depending advocation, and as it turned out that there was a sufficient concurrence without taking them into account, the Lord Ordinary merely states this fact in a note to the interlocutor granting the discharge, and gives no judgment on the merits of the objection.

'The result of the matter then is, that the consents given in 1823 were not held to have fallen by the long period of inaction that had followed, or to require to be renewed when the discharge was at last applied for; and if this was the case in 1834, still less could these consents have fallen or ceased to be operative and binding in 1829, when the respondent brought his action against the bankrupt; and it is upon this ground mainly that the Lord Ordinary has proceeded in holding that the defence founded on these consents ought to have been sustained.

'Nothing is said in the interlocutor as to the advocator's right to withdraw a plea of compensation advanced by him, and *sustained* in the inferior court, or to have his right of action on the compensating claim reserved to him; and the Lord Ordinary means to give no decision on these points. The plea of compensation will probably be thought to have fallen, when the debt against which it is stated is disallowed in toto; and if the advocator has a legal right still to insist in his counter claim, it needs no reservation.'

...dent's

Against this judgment the respondent, Macgilp, *reclaimed*, and *pleaded*—1st, The consent given by Sinclair and Young to the

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bankrupt's application for a discharge did not imply any abandonment of their right to draw dividends in the sequestration, and the action was competently raised by the respondent, as their assignee, to constitute his debt, and enable him to be ranked upon the sequestrated estate. 2d, From the lapse of time, and change of circumstances which took place after this concurrence was granted, it was not binding upon the respondent; and he was entitled to resile, and proceed with diligence against the bankrupt. And, 3d, Even supposing this concurrence to have been obligatory upon the respondent, it could not operate as a bar to the action, or prevent him from attaching the person or property of the bankrupt, before the discharge was actually granted by the Court, seeing that the discharge itself has only that effect subsequent to its date; 2. *Bell, Com.* 454.

Respondent's Pleas.

Answered for the advocator—1st, As the debts sued for were constituted by liquid documents of debt, an action of constitution was not necessary to enable the respondent to be ranked. 2d, The respondent, as the assignee of Sinclair and Young, was bound by their concurrence to the advocator's discharge, and barred from insisting in this action. 3d, At all events, the advocator having obtained a final discharge, any decree against him is incompetent.

Advocator's Pleas.

The *Court* were of opinion that the Sheriff's decree was right at the time it was pronounced; but in respect of the discharge, they held that the respondent's debt could only be made effectual, to the extent of drawing the dividends in the sequestration. It was observed on the Bench, that the concurrence granted by Sinclair and Young was not binding on the respondent, after the long delay which had taken place in presenting the application for a discharge; and farther, that such concurrence could not have the effect ascribed to it by the Lord Ordinary, because the discharge itself only protects the person of the bankrupt, and property acquired by him after its date.

Opinion of Court.

Their Lordships recalled the Lord Ordinary's interlocutor, advocated the cause, and in respect of the discharge, found, that the respondent's debt was extinguished, except as to the dividends to be received in the sequestration; and to that extent they altered the interlocutor of the Sheriff, and found no expenses due to either party.

Judgment.

Lord Ordinary, *Jeffrey*. For Walker, *A. Anderson*. For Macgilp, *T. Mackenzie*. *Stewart & Sprot*, W. S. and *Bowie & Campbell*, W. S. Agents. *T.* Clerk.

R.

FIRST DIVISION.

No. XCIV. *15th May* 1835.

SIR MICHAEL SHAW STEWART
against
DR MACFARLANE.

TEINDS.—PROVING THE TENOR.—*Circumstances in which the Court found the adminicles not sufficient to prove the tenor of the deed libelled.*

THIS was a special case. The parish of Greenock formed anciently part of the parish of Innerkip, from which it was disjoined about the end of the sixteenth century. The lands of Greenock originally belonged partly to John Crawford of Kilbirnie, and partly to Malcolm Crawford of Cartsburn, the former being proprietor of a seventeen merk land, and the latter of a forty shilling land. The seventeen merk land now bears the name of Easter Greenock, and belongs to the pursuer: the forty shilling land now forms the property of Cartsburn, belonging to Mr Macknight Crawford.

In 1793 a process of augmentation, modification and locality was instituted by the minister. There were then only three heritors in the parish, the pursuer's author, Sir John Shaw Stewart of Greenock, Mrs Macknight Crawford of Cartsburn, and Mr Hamilton of Craiglaw. In the course of this process the heritors (the whole appearing) maintained, that there existed certain old decreets of valuation of the teinds of their different lands, and, in support of their plea, produced, inter alia, the following documents: 1*st*, Extract of agreement between Lord Semple, the tacksman of the teinds, and Malcolm Crawford, in these terms: 'I Hew Lord Semple, 'takisman of the teind sheavis in the paroch kirk and parochin of 'Innerkip and Greenock, within the whilk paroche the fortie-shil-'ling land of Cartsburne after spect. lyes: Be thir p'nts obli's me, 'that at what tyme, and how soone Malcolm Crawfurd of Cartsburne, 'heritor of the lands foresaid, sall procure from James Earle of Aber-'corne, patron of the said kirk, his commissioners their consent to the 'valuation of the parsonage teinds of the said fortie-shilling land, to 'be yearlie as follows, viz. thrie bolls meal as the constant rentall 'of the saidis teinds yearly of the saidis landis; that immediately 'thereafter sall lykeways give my consent thairto, as tacksman foir-'said. Lykeas than as now, and now as than, I be thir p'nts give

'consent to the fores'd valuation, on the condition above spec't and 'no otherways; and for the mair securitie, I am content and consent 'that thir p'nts be registrat in the Books of Councell and Session, or 'Hie Commission, therein to remain ad futuram rei memoriam. And 'for this effect constitutes,' &c. This deed, which bears to have been executed on 16th February 1663, was admitted to be in every respect formal and regular. 2*d*, Extract agreement between the commissioner of Lord Abercorne, titular of the lands, and Malcolm Crawford, in these terms: 'I S^r^ Thomas Boyd of Ballinschaw, Knicht, 'as commissioner, and having full power from James Earle of Aber-'corne, to deale, treate, agrie, value and settle with all parties with 'whom he hes intres, tuitching the matters of his teinds, be thir p'nts 'agrie and consent that the lands of Cartsburne, pertaining to Mal-'colme Crawford of Cartsburne, extending to ane fourtie-shilling 'land, lyand within the parochin of Greenock, and of whilk teind 'scheaves the saide Erle is titular, be valued to the old rental teind 'bolls thairof, extending yearly to thrie bolls meill, but ease or de-'duction, and humbly desyres that the Lords and uthers of the 'Commission may allow heirof, with consent of parties, but furder 'actioun and process to be moved heiranent. And for that effect 'constitutes,' &c. This deed bears to have been subscribed on the 26th February 1633, and was also admitted to be quite formal and complete. 3*d*, A decreet of valuation of the Commissioners for Teinds, confirming and ratifying the above two deeds, of date 27th February 1633. Upon considering these documents, and advising memorials, the Lords found, 'that the teinds of the lands of Carts-burn are valued 'by a regular decreet, but find no sufficient evi-'dence that the teinds of any of the other lands of the parish are 'valued.' The following quotation from the memorial for the minister, prepared by the late Lord Robertson, will shew the grounds of judgment: 'Although the mode of proceeding in fixing the amount 'of the teinds of these lands of Cartsburn was certainly very irregu-'lar, yet as all parties concerned—the minister, titular and heritor '—concurred, and as their agreement was ratified by the High 'Commission, the memorialist does not mean to oppose its being 'now received as a sufficient valuation of these teinds. The above-'mentioned ratification by the minister relates not only to the teinds 'of Cartsburn, but it also contains an approbation of the valuation 'of the 17 merk land of Easter Greenock at twenty bolls meal and 'two bolls bear. But this ratification of the minister can have no 'effect as to the teinds of Easter Greenock, because there is not 'produced any agreement between the titular and heritor, nor any 'ratification thereof, such as took place with respect to the teinds 'of Cartsburn; nor is there any decreet or valuation of any kind

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'produced, so that the ratification of the minister, which is merely 'a relative deed, cannot have any effect without the production of 'those deeds to which it refers. Non creditur referenti nisi con-'stet de relato.'

The pursuer now resorted to the expedient of bringing a proving of the tenor, which he founded principally on the above documents.

Pursuer's Pleas.

Speirs, for the pursuer, *pleaded*—The casus amissionis libelled is the fire in the Parliament Square, by which the teind records were destroyed, and therefore the evidence in support of the decree must be favourably construed. The decree of the Commissioners of Teinds is not liable to the objection of there being an opening for diversity of construction, because it could only prove one single fact. It is not like the proving the tenor of a bond. There can be no doubt Malcolm Crawford obtained a valuation of his lands. It is not easy to say whether the missing decree formed a part of Malcolm Crawford's decree: It is rather thought they were separate, as there were separate parties. It is obvious that the minister never can be presumed to have ratified a decree which was not in existence. The coincidence between the amount of teind in the ratification, and in the decree of modification in 1672, strongly fortifies the presumption of the existence of a previous decree of valuation. The whole valued rent of the parish is also mentioned; and how could it be so, unless there had been previous valuations of the whole?

Defenders' Pleas.

It was *answered* by *Graham Bell* for the defenders—Without taking advantage of the previous decerniture as a foreclosure, there was a full discussion at that period, and a proving of the tenor might have been brought then. This matter has been treated rather as if the existence of the valuation were proved, and there were merely some disputes as to the precise construction of it. The adminicles here are not those generally adduced, such as scrolls, or extracts to prove the originals, or instruments of sasine, charges of horning, &c. to prove their warrants. The deed of ratification is not a judicial deed. The statement of the minister is evidently a mere mistake: at all events it expressly refers to one valuation, and the extract valuation of Cartsburn clearly satisfies this reference. There is nothing in the circumstance, that the present defender is the successor of the party making the ratification, seeing that the error of one incumbent is not binding on his successor. There is no mention of any decreet of valuation in the after proceedings. It is easy to see why, because the old rental bolls were taken. It is not valued teind, but valued rent which is spoken of.

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Lord Balgray.—There is no doubt the decree of valuation, proceeding of consent, is a competent valuation, and such valuations have been sustained again and again: but then it applies solely to the lands of Cartsburn.

Opinion of Court.

Lord Gillies.—The ratification, if it proves any thing, proves that the valuation of the lands of Kilbirnie did not proceed on the deed ratified by it, but that there must have been a separate deed, and if that deed was an agreement, a separate ratification. It is a mistake to suppose that it even shews there was a separate agreement between the parties interested in the teinds of the lands of Kilbirnie. It does not say, Forasmuch as both parties have entered into agreements to value their teinds, therefore their agreements were ratified; but it limits itself expressly to the agreement as to Cartsburn. I quite agree there is no evidence that the teinds of Kilbirnie were not valued; and if the onus had been with the minister, the proof would have been invincible. On the other hand, I consider the argument of Lord Robertson quite incontrovertible.

Lord Mackenzie.—The ratification has no application except to Cartsburn. It certainly does so happen that the minister, in a loose way, mentions that there had been a valuation of the lands of Kilbirnie, and, of course, if they had produced a formal decree, there would have been no need for a ratification; but if, on the other hand, they had produced an agreement, then there would have been no ratification of it as to these lands.

Judgment.

The *Court*, accordingly, found that the adminicles were not sufficient to prove the libel; therefore sustained the defence of want of adminicles, assoilzied the defender, and decerned, but found no expenses due to either party.

For the Pursuer, *Speirs.* Alt. *Graham Bell.* *Patrick & Crawford*, W. S. and *And. Clason*, W. S. Agents.

C.

FIRST DIVISION.

No. XCV. 15*th May* 1835.

WILLIAM SCOTT, Petitioner.

Process.—Judicial Factor.—In this case a petition was presented for the appointment of a judicial factor, by the son of a party deceased, who had left a trust-deed, with power of sale and distribution, inter alios, in his favour, in consequence of the death of the trustee. The petition prayed specially for power to the factor to obtain himself feudally invested in the trust-estate, and dispone the same, when the purposes of the trust might require it; to uplift and discharge the price, and to divide the same, together with the whole other effects, in terms of the trust-deed.

Judgment. The *Court* appointed the factor, but simply with the usual powers, observing, that they could not grant special powers at the time of appointment. The factor himself would apply for them, if necessary.

For the Petitioner, *J. S. More.* *Dav. Williamson*, W. S. Agent.

C.

SECOND DIVISION.

No. XCVI. 15*th May* 1835.

WILLIAM ARNDALE CHILD
against
ARCHIBALD HORNE and Others, (Ferguson's Trustees.)

Cautioner.—*Circumstances in which the trustees and representatives of a co-obligant in a cash-credit to a bank were found liable in payment to a party who had paid to the bank a debt incurred under that cash-credit, without giving any notice at the time of payment to those representatives, whereby they might have taken steps to secure their relief against the principal debtor.*

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Child v. Horne and Others.

In 1813, James Lyon, S. S. C. obtained a cash-credit for L.500 with the Bank of Scotland, for which he, along with William Ritchie, Walter Paterson, and Charles Sheriff, and their heirs, became bound to the bank. The bank having required additional security, the late Mr Thomas Ferguson granted a bond of corroboration in 1814, whereby he bound himself, with the obligants in the original bond, to make payment to the bank, or their assignees, of the L.500, or such part of it as might be advanced to Mr Lyon, or placed to his debit. Mr Ferguson died solvent in 1821.

In November 1825, a partnership was entered into betwixt Mr Lyon and Mr William Arndale Child, writer to the signet. At that time Lyon's credit under the bond was exhausted, there being due to the bank, at 1st November 1825, L.525 : 8 : 1. A new credit with the bank, to the extent of L.1500, was obtained by Mr Child's father for the company of Lyon and Child. In 1826, as Mr Ferguson was dead, and the other obligants, with the exception of Mr Lyon, were either bankrupt, or had left the country, the bank became urgent for payment of the sum due on Lyon's bond. In order to relieve Lyon, the company of Lyon and Child paid out of the funds of the company to the bank, upon 12th October 1826, the amount due, being L.526 : 7 : 10, upon getting delivery of the original bond and bond of corroboration, together with an obligation by the bank to grant an assignation in favour of the company of Lyon and Child, when required. In January 1827, the company of Lyon and Child was dissolved. Lyon died, in September following, indebted to the company, although the extent of that debt was not admitted. It was alleged for the defenders, that 'the 'bond was delivered after the payment to Mr Lyon, in whose 'custody it remained till his death, at which time Mr Child got 'possession of the whole papers of Mr Lyon;' which statement was denied, it being on the contrary averred, that the documents had been uniformly retained by Mr Child, and had never been in the possession of Mr Lyon. No intimation of what had taken place in reference to the bond was given to Ferguson's trustees. With a view to secure his relief from the obligants in the two bonds, the pursuer applied to the bank for an assignation; and in March 1833 the bank granted an assignation in favour of the pursuer, as the sole surviving partner of Lyon and Child, to the sum of L.526 : 7 : 10, with interest.

The late Thomas Ferguson had, previous to his death in 1821, conveyed all his property to trustees. By his trust-disposition, one-half of the free residue was bequeathed to Mr Lyon, and, as was

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alleged by the pursuer, was held by the defenders for behoof of his representatives, and that the defenders thus had in their hands the most effectual means of relief, so far as concerned Lyon. It was, on the contrary, denied that they had any such means of relief, as Mr Lyon's interest in the residue in question had been assigned away.

Child, in virtue of the assignation by the bank, raised an action against the trustees of Thomas Ferguson, as the granter of the bond of corroboration, and the representative of Lyon, the original debtor, for the sums paid.

Defenders' Pleas.

It was *pleaded* for Ferguson's trustees, in bar of the action, that the payment made to the bank being made by an arrangement betwixt the principal obligant and the company, of which he was a member, the sum so paid and placed to his debit operated as an extinction of the debt; and the claim having been so satisfied, cannot be revived and made effectual against the cautioners. 2. At all events, the claim, as made by a party in the right of a company, in which the principal obligant was a partner, cannot be made effectual to the extent of that right and interest. 3. On the assumption that the debt might have been otherwise available against the defenders, they are relieved by the acts done by the creditors in the obligation, and by their negligence and mora.

Pursuer's Pleas.

The pursuer *pleaded*—1. The pursuer, as the surviving partner of Lyon and Child, and as the assignee of the bank, is entitled to demand payment of the sums concluded for from the defenders, as representing the late Mr Ferguson. 2. Nothing has been done or omitted on the part of the pursuer which bars or excludes the claim made by him.

The Lord Ordinary pronounced the following interlocutor:

'The Lord Ordinary having considered the closed record, and 'heard parties' procurators thereon, and made avisandum, repels 'the defences; decerns in terms of the libel; finds expenses due, 'and remits the account, when lodged, to the Auditor to be taxed.'

Note.—'It seems to be unnecessary in this case to explain mi-'nutely the grounds of judgment. The defences are evidently 'groundless.

'Lyon got a cash-credit from the bank, in which he had cau-'tioners, who are all bankrupt. But the deceased Mr Ferguson 'granted a bond of corroboration, and he died solvent.

'When the credit was entirely drawn out, and a further debt

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'contracted, Lyon entered into partnership with Child. The bank 'having insisted for payment, the firm of Lyon and Child (evidently 'distinct as persona juris from Lyon individually) paid up the 'debt, *taking an obligation from the bank to assign the bond to the* 'company when required. Then Lyon died, largely indebted to the 'company. The pursuer, as in right of the company, *and by vir-* 'tue of the assignation obtained from the bank, insists for payment 'against the representatives of the granter of the bond of corrobo- 'ration.

'Unless it can be maintained that the bank would have been 'barred from demanding payment if the debt had not been paid to 'them by Lyon and Child, it is not imaginable how the pursuer 'should be barred from suing in virtue of the assignation from them. 'The firm of Lyon and Child were no more bound to pay that debt 'than Mr Child individually was bound to do so. They paid it as 'a third party, and became onerous assignees; and the idea sug- 'gested in the debate, that the firm could not have sued Lyon, 'their partner, for a debt due to them by him as an individual, is 'equally contrary to all principle and daily practice.'

Defenders' Pleas.

The defenders having *reclaimed*, *Dean of Faculty pleaded*—The facts bring out a different case from what the Lord Ordinary states. We offer to prove that the bonds were found in Lyon's repositories at his death, and were taken possession of by Child. Upon Lyon's death, no notice of the existence of such a claim was given to these trustees. This was a result very inconvenient to the cautioners. Nay more, the debt was paid to the bank, and the company of Lyon and Child was dissolved, without notice having been given to the representatives of the cautioners. We do not deny that payment by the company is not the same as payment by Lyon; but if payment was made by the company for the honour of its partner, the case is different.

Pursuer's Pleas.

More.—The constant practice in such transactions is to get a friend to pay up the money to the bank, just to save its troubling these cautioners, when it is inconvenient for the proper debtor to pay. Cautioners continue still bound, and the bank grants an assignation. Here the debt was paid by the company, but Lyon was a debtor of the company. Is this debt not part of the company funds which the pursuer is entitled to recover? The assignation shows that it is.

Dean of Faculty.—True, when an obligant and his cautioners

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cannot pay up the bond, they ask a friend to do so. But Mr Ferguson's estate was solvent in 1826. If the trustees had been then called on, they would have required security from Lyon. Now, Mr Lyon's interest in these funds has been assigned to the North British office. In short, time was given to the principal debtor.

Opinion of Court.

The Lord Justice-Clerk.—I must confess I have some doubts as to the fairness of this transaction. The paying up of the bond and the assignation having been done behind the backs, and without notice to the cautioners, places them in a situation of hardship.

The other Judges were for adhering.

Judgment.

The *Court* refused the note, with additional expenses.

Lord Ordinary, *Moncreiff.* Act. *J. S. More.* *Jas. Stuart*, S. S. C. Agent.
Alt. *Dean of Fac. (Hope,)* and *Patton.* *Smith & Kinnear*, W. S. Agents.
T. Clerk.

R.

SECOND DIVISION.

No. XCVII. 16*th May* 1835.

PETER MORRISON
against
JOHN CUTHBERT.

PROCESS.—SUMMARY APPLICATION.—*A petition having been presented to the Sheriff, by a private party, with concurrence of the procurator-fiscal, setting forth that certain goods had been taken from his possession upon a false pretence, and praying for warrant to apprehend the party complained of for examination, and for warrant, after proof, to imprison him till he should deliver up the goods, and to do farther and otherwise as to the Sheriff should seem just, and certain proceedings having taken place under this application, and decree having been pronounced, bill of suspension passed without caution.*

A PETITION was presented to the Sheriff of Lanarkshire, upon 2d September 1834, in name of 'John Cuthbert, carrier betwixt Glas-'gow and Ayr, with concurrence of George Salmond, procurator-'fiscal for the public interest,' of the following tenor: 'That upon

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'Wednesday last, the 27th ultimo, Hugh Kennedy, agent in Ayr, forwarded, by one of the petitioner's carts, a parcel of cloth lappets, containing 182 pieces, which parcel was addressed to the petitioner, and was to remain in his custody until Mr Kennedy should call for them.

'That upon the forenoon of Friday, the 29th ultimo, and while the petitioner was absent, Peter Morrison, manufacturer in Glassford Street, of Glasgow, called at his quarters in Mile's Place, and ordered the foresaid parcel of goods to be delivered to him; at the same time stating that he had been authorised by Mr Kennedy to get delivery of them, and that the latter was waiting in his warehouse to receive them. On this representation, the petitioner's clerk was induced to give the said Peter Morrison delivery of the goods.

'That on the afternoon of the same day, however, Mr Kennedy himself called at the petitioner's quarters, for the purpose of obtaining delivery of the foresaid parcel of cloth lappets, when it appeared that the representation made by the said Peter Morrison to the petitioner's clerk, that Mr Kennedy had been in his warehouse at the time above stated, and had authorised him to get delivery of the goods on his account, was false, Mr Kennedy not having given Morrison any authority whatever to receive the goods from the petitioner.

'That upon this fact coming to the knowledge of the petitioner, he immediately made application to the said Peter Morrison for redelivery of the foresaid parcel of goods obtained by him from the petitioner in the false and fraudulent manner above set forth; but as he still refuses delivery, and as the petitioner is threatened with an action of damages at the instance of the said Hugh Kennedy, because of his parting with the goods without authority, the present application becomes necessary.'

The prayer was in these terms:

'May it therefore please your Lordship, upon considering what is before stated, to grant warrant to officers of court to apprehend the said Peter Morrison, and to bring him before you for examination; and upon his admitting, or the private petitioner proving, the facts before stated, grant warrant for imprisoning the said Peter Morrison, until he shall deliver up to the private petitioner the foresaid parcel of cloth lappets obtained by him under the false and fraudulent pretence before mentioned; find the said Peter Morrison liable in the expense of this application,' &c.

On the same day the Sheriff-substitute granted warrant to cite

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the complainer for examination, on an inducias of twelve hours. He was so cited and appeared. The minute of Court runs thus: 'At 'Glasgow, the 5th day of September 1834, in presence of the 'Sheriff-substitute, in the application at the instance of John Cuth-'bert, carrier between Glasgow and Ayr, with concurrence of George 'Salmond, procurator-fiscal for the public interest, against Peter 'Morrison, manufacturer in Glasgow, compeared Peter Morrison, 'who being judicially examined,' &c.

The declaration having been concluded on the 5th, the proceedings were taken possession of by Cuthbert and the procurator-fiscal, and kept by them till the 10th, when, without an order of court, a minute was given in, craving leave to amend the petition, in so far as related to the description of the articles.

The Sheriff, (16th September,) before answer, allowed Morrison to see the minute, and to lodge answers, if so advised, within two days. Morrison in his answers objected to the amendment, but the Sheriff-substitute pronounced this interlocutor:

'Having advised the minute, &c. repels the objection to the pro-'posed amendment of the petition, in respect it is craved before 'proof has been allowed, and the complainer in this action seeks 'to recover a parcel forwarded to him by a conveyance specially 'described, and bearing his address, but the contents of which were 'unknown at the date of the petition; allows the petition to be 'amended as craved, but finds the respondent entitled to the inte-'rim expense of replying to the application for said amendment; 'but, before farther answer, allows a proof to both parties.'

This interlocutor was adhered to by the Sheriff, 22d September. The following interlocutor was then written on a previous step of the process, and not where another interlocutor of the same date was, viz. '*Glasgow, 20th September* 1834.—Upon the motion of the pursuer, 'grants warrant at his instance to remove the parcel in question 'to the warehouse of Barclay and Skirving, auctioneers in Glas-'gow, to be left to the issue of this process, or the future orders 'of court.' Morrison and his partner had disposed of the goods some time prior to this order. The Sheriff refused to recall the interlocutor, and found Morrison liable in certain expenses.

The execution of the warrant so granted, as produced by the charger, ran thus: 'Neil Macfarlane, sheriff-officer in Glasgow, passed 'to the warehouse of Peter Morrison and Company, manufacturers 'in Glasgow, in order to put the above warrant into all legal exe-'cution, by removing the parcel in question to the sale-rooms of 'Barclay and Skirving, auctioneers in Glasgow, but was informed

'by the said Peter Morrison that the said parcel was sold about a 'fortnight previous to the date thereof.' This execution is subscribed by the officer and two witnesses, and was reported by the charger to the Sheriff. 16 May 1835. Morrison v. Cuthbert.

The parties then entered upon the proof ordered by the Sheriff, and after it was led and concluded, the Sheriff-substitute, Watson, pronounced the following interlocutor: '*Glasgow*, 18*th October* 1834. 'Having advised the proof for both parties, notes by them severally 'renouncing probation, judicial declaration of the defender, productions and whole process, finds it proved that a bag or parcel, containing goods manufactured for the defender, was sent to Glasgow 'from Ayr, under charge of the pursuer, on 27th August last, by 'Hugh Kennedy, agent in Ayr: finds, That the defender ordered 'and caused said bag to be taken to his own premises on 29th 'August last: finds no proof that the said bag bore the address of 'the defender, or that he had authority from said Hugh Kennedy, 'or those to whom it was addressed, for taking possession: finds, 'That the pursuer is entitled to interim custody of the bag, for his 'own and Kennedy's behoof, subject to the store-rent due to Barclay and Skirving for the carriage from Ayr to Glasgow, and to 'the hypothec of Hugh Kennedy for the account due in relation to 'the contents: Ordains the bag to be delivered to the pursuer accordingly, and finds the defender liable in expenses; allows an 'account thereof to be given in, and remits the same, when lodged, 'to the Auditor to tax and to report, and decerns.' The Sheriff-substitute and the Sheriff successively adhered to that interlocutor.

Thereafter the expenses of process were taxed, and decree pronounced against the complainer for L.10, 12s. sterling as the amount.

Morrison having been charged, by virtue of letters of horning, to implement this decree, brought a suspension on the following grounds:

1. The original application is in reality a prayer for warrant to imprison the complainer until he shall deliver up the goods to Cuthbert, and, as such, is plainly illegal and incompetent. In Murray *v.* Bisset, 15th May 1810, the Court held it incompetent for a Sheriff to compel performance of his decree in a civil action, although ad factum præstandum by a summary warrant of imprisonment; and in Haig, 20th June 1823, it was held, that a summary petition to an inferior court, for restitution of a bill illegally retained, and praying for warrant to imprison, was incompetent as to that prayer. The Sheriff did not and could not legally grant the prayer of the petition. 2. It was incompetent to cite the complainer to Pursuer's Pleas.

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attend for examination on such short notice. 3. It was irregular to take possession of the proceedings and to retain them for five days. The Sheriff ought to have appointed service of the petition, and allowed answers, so as to bring the complainer properly into court. 4. It is incompetent to amend a criminal application, after the party has undergone examination on the charges originally set forth; and particularly to amend any complaint, civil or criminal, by an irregular minute. 5. All the judgments were premature and incompetent. 6. The judgments are not warranted by the prayer of the original petition. 7. The interlocutors are indistinct and unintelligible as to the articles to be delivered up. *Lastly*, The allegations in the original petitions are unfounded.

Defender's Pleas.

Answered—1. Viewing this as a civil action for restitution of goods fraudulently abstracted by the complainer, its competency is undoubted. In Murray *v.* Bisset, the Sheriff of Perthshire had granted a warrant for imprisoning a party until he signed a deed of submission; and the Court here held that such a warrant was illegal and incompetent, as the Sheriff had no power to enforce implement of his own decree in such a manner. But here the Sheriff granted no warrant of imprisonment. All he did was, upon an examination and proof, to ordain restoration of the goods. 2. The cause required extraordinary dispatch, and the Sheriff has a discretionary power by the Act of Sederunt, (part 2, chap. 1, sec. 1,) either to order a copy of the original petition to be served or not. 3. If the complainer had suffered from the proceedings being kept up for five days, he had it in his power to force back the process. 4. It is quite competent to amend an application like the present, in reference to a more specific description of the goods in dispute. The complainer was allowed to give in a long answer, and was allowed certain expenses applicable to the amendment. 5. The proceedings were regular. The complainer did not ask that a record should be made up. 6. The order of the Sheriff to restore the bag unquestionably means, that the complainer must restore the contents of it carried off by him. *Lastly*, Upon the merits, the respondent has clearly established the grounds of his original petition.

The Lord Ordinary in the Bill-Chamber pronounced the following interlocutor:

'The Lord Ordinary having considered this bill, with the answers and inferior court process, in respect that it appears to him that the only substantive prayer or conclusion of the original petition was incompetent, and that the proceedings, and decree taken

under it, were also incompetent, passes the bill *on juratory caution*, and appoints the complainer to appear and depone; and grants commission,' &c.

Note.—'The Lord Ordinary has fully considered the proceedings and proof in the inferior court. But, whatever may be his opinion as to the state of the case, in regard to the fraudulent practice alleged against the complainer, he cannot refuse a bill of suspension of a charge on a decree, where his opinion at present is, that the whole proceeding from first to last was *incompetent*: Nor does he think that he can do so, even though ordinary caution is not offered.

'The petition presented, with *concourse* of the *procurator-fiscal*, sets forth the fact of obtaining possession of the goods on a false pretence; and it prays, 1st, For warrant to apprehend the petitioner for examination; and, 2d, For warrant, after proof, to imprison the said Peter Morrison *till he shall deliver up the goods*; 3d, For expenses; and, 4th, To do further, or otherwise, as the Sheriff should think just.

'The Lord Ordinary did observe, in reading the bill, that, if the complainer held the process to be criminal, there might be ground for thinking that the suspension belonged to the Justiciary. But the answer to this is, that, whatever might be thought of the nature of the application, *it has not been so treated.* The decree is of a *civil* nature, and the complainer is charged on letters of horning. The charger, therefore, cannot take this objection; and, if *he* says that the process was *criminal*, the incompetency of the proceeding would only be the clearer.

'Now there can be no doubt, after the judgment and very pointed opinion of the Lord President, in the case of Murray *v.* Bisset, May 15. 1810, followed by the case of Haig, June 20. 1823, that it was altogether incompetent to ask the *Sheriff* to grant warrant of imprisonment ad factum præstandum: whether the process was civil or criminal, that was incompetent. But the petition contained *no other substantive prayer*; and the question seems to the Lord Ordinary to be, Whether, under that, and with a view to explicate it, the Sheriff could competently take the proceeding which he did, or whether he could pronounce the decree charged on? No doubt the Sheriff *granted* no warrant of *imprisonment*; but the question is, Whether the *petition* on which he proceeded, which asked nothing else specifically, was a legal ground for the proceeding and decree?

'There is, indeed, a sweeping conclusion, to do *farther* or *other-*

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'*wise* in the premises. But the Lord Ordinary cannot think that 'this relieved the difficulty. It would be very dangerous, in his 'opinion, so to hold. It was evidently not intended for such a pur-'pose. But if the only specific conclusion was incompetent, would 'a petition which prayed for nothing at all have formed a process 'in which these proceedings could have taken place? The Lord 'Ordinary thinks not. The Sheriff seems to have interpreted the 'prayer for *imprisonment* as *implying* a demand for a decree *ordaining* '*delivery*. But the Lord Ordinary cannot see ground for such an 'implication in the writ which is the *foundation* of the process; and he 'thinks it the *less* admissible in regard to a complaint with concourse 'of the procurator-fiscal, which did contemplate a very summary 'proceeding.

'There are other things in this process which the Lord Ordinary 'must think irregular. It was, in every view, right to *cite* the com-'plainer, instead of apprehending him as the petitioner asked; and 'if a competent prayer had been put in, it would also have been 'perfectly warrantable to cite on short *inducia*. But the Lord Or-'dinary does think that a copy of the complaint should have been 'served, and the respondent's construction of the Act of Sederunt 'is entirely erroneous. The words, 'if he see cause,' refer to the 'alternative of simply ordering answers, or appointing *service and* '*answers* on short *inducia*.

'If the cause was to be treated as a civil process, Mr Kennedy 'appears to have been an incompetent witness, as being really the 'party *interested*. But the complainer having expressly given up 'the objection, cannot revive it. Whether it was necessary to close 'a record may be doubtful. But there certainly ought to have 'been answers to the petition before proof was entered on.

'The great cause of irregularity seems to have been, that the 'case was treated, in the first instance, somewhat like a criminal 'proceeding, and at last was considered and disposed of as purely 'civil.

'The Lord Ordinary will say nothing on the merits of the proof. 'It is certainly with reluctance that he passes the bill. But he 'feels himself constrained to it, and considers the correctness and 'regularity of such summary proceedings of far more importance 'than the result of any particular case.'

Cuthbert reclaimed, and *pleaded*—

Pursuer's Pleas.

Dean of Fac.—The cases cited may be referred to, to shew that there is a distinction betwixt an application for a warrant to imprison,

Pursuer's Pleas.

founded on a civil claim, and an application for imprisonment when there has been something done involving fraud and swindling. Here a person, without paying the price, and knowing that otherwise he would not get possession of the goods, gets the carrier's man to deliver up the parcel to him. It is similar to the case from Kincardineshire, Walker *v.* Innes and Wyllie, 21st Nov. 1822, *F. C.* There, quantities of potatoes had been shipped by Wyllie and others, farmers, who suspected Walker was about to go off with them without paying the price. Accordingly application was made to the Sheriff for a warrant 'to apprehend the person of the said James 'Walker, and to detain him in safe custody for examination, and 'thereafter to imprison him in the tolbooth of Stonehaven, therein 'to remain till he find caution to pay the price.' The Sheriff granted 'warrant to, and authorised the officers of court to appre-'hend James Walker, and to bring him before the Sheriff for exa-'mination, and if need be, to detain him in safe custody for this 'purpose.' Walker appeared and found caution. He then brought an action for wrongous imprisonment; and also brought a suspension and liberation, founding on Murray *v.* Bisset. The report bears, that 'the Judges were unanimously of opinion that the power 'in question was necessarily inherent in the Judge Ordinary's juris-'diction, and that the circumstances of the case fully warranted the 'application and proceedings that followed;' and they repelled the reasons of suspension, and found the letters orderly proceeded, and found the pursuer liable in expenses. The case of Haig illustrates the distinction betwixt fraudulent and ordinary cases. There a party, alleging no fraud, attempted to try a civil right. There was no swindling scheme there; here there was a getting possession fraudulently. We bring the present case within the rule in Walker's case, the principle of which sanctions the interference of the Sheriff to stop a swindling transaction.

Lord Meadowbank.—Is this a civil or criminal application?

Dean of Fac.—I think civil, though the concourse is given unnecessarily. If it be an application for any thing in a party's own behalf, it is a civil application. Walker's case shews you may have a civil remedy for a wrong done to yourself.

Defender's Pleas.

Sol.-General.—The Court will agree so far with the Lord Ordinary, that the cases of Murray and Haig were rightly decided. The case of Walker has been referred to, but that of Haig is precisely similar to the present. There it was found that a party could not apply summarily for imprisonment. In Walker's case, as the

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rubric bears, the order 'was to find caution,' &c. But here the prayer was different.

Opinion of Court.

The *Lord Justice-Clerk.*—It appears to me that the matter was so doubtful as to justify the Lord Ordinary in passing the bill.

Lord Meadowbank.—I am most clearly of the same opinion.

Lord Medwyn.—I am quite clear that the procedure was competent. It would be extraordinary if the Sheriff, as in Walker's case, had not the power of preventing a wrong of the kind complained of being done, by granting the necessary redress or remedy to the party aggrieved. The local judge must have such a power; and if so, it is competent for him, whenever it is necessary, to proceed by apprehension and imprisonment, as was done in that case, because it would often be impossible to obtain redress by any less summary mode. Where the object, however, may be secured without resorting to this step, it is the more ordinary practice for the Sheriff to cite the party to appear, when there is an examination into the circumstances set forth in the complaint. That was done here, and the party thus was called upon to state his defence viva voce, instead of through the medium of a procurator. The Lord Ordinary seems to think the application incompetent, because there was no other substantive prayer than for a warrant to apprehend and imprison. But there is a prayer also, to do otherwise, which justifies what actually took place. It is not competent for a judge to exceed the prayer of a petition; but it is quite competent for him to grant something less than, and within its prayer. I never heard this questioned; and as I think the Sheriff might have gone farther, if he had thought the circumstances of the case required it, he was at least warranted to do what he did. He was here applying a civil remedy to a criminal offence—a fraudulent act—which, as Judge Ordinary, it was his duty to prevent, and to prevent by the procedure adopted.

The case of Murray was quite different from the present. The imprisonment was used by the inferior judge to enforce a decree pronounced by himself in a purely civil process, where horning and caption was the proper mode of execution. In Haig's case there was merely an opinion given by the Court. The bill, on account of which the party had been imprisoned, was delivered up in the Bill-Chamber, and no judgment was called for.

Lord Justice-Clerk.—I want to go no farther at present than merely to pass the bill.

Lord Meadowbank.—There is such a jurisdiction, no doubt, in the

local magistrate; but then he must proceed according to form. He cannot, for instance, go beyond the prayer of the petition, or grant something totally different from what is asked. Here the party applied for imprisonment: the Sheriff did not grant warrant for imprisonment, but granted a warrant for something else to be done. We ought not to sanction any such deviation. I do not at present go farther than passing the bill. I am not for throwing any doubts on the powers of the Judge Ordinary.

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Opinion of Court.

Lord Glenlee.—The Sheriff has a double jurisdiction. A party ought to present an application either properly civil or criminal. The application being equally civil as criminal, the Sheriff was entitled to bring the whole matter before him. But then the procedure ought to have been regular.

The *Court* adhered.

Judgment.

Bill-Chamber. *Lord Moncreiff*, Ordinary. For Suspender, *Sol.-General, (Cuninghame,)* and *James Anderson*. *John Cullen*, W. S. Agent. For Respondent, *Dean of Faculty, (Hope,)* and *W. B. D. D. Turnbull*. *Wotherspoon & Mack*, W. S. Agents. *F.* Clerk.

R.

FIRST DIVISION.

No. XCVIII. 19*th May* 1835.

ROBERT SCOTT
against
MARY CASSELLS AND HUSBAND.

INTERDICT,—*What sufficient grounds for granting?*

THE respondents presented a petition to the Judge Ordinary, setting forth that the advocator, Robert Scott (a coterminous proprietor) and his family had been in the practice of annoying the petitioners in various ways, and that, amongst other modes of annoyances, they had been in the habit of mounting the roof of a shed *,

* The shed had been erected by the advocator along the wall of his house, and the roof of it (by sufferance of the proprietor) rested upon the wall of the house occupied by the respondents.

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and throwing water and filth into the petitioner's dining-room, through a window in the side-wall of their house; and that the said Robert Scott is also in the practice of putting up occasionally, when he thinks it will annoy the petitioners and their customers, an old door, or large board, the bottom of which is rested on the roof of the shed, close to the said wall; and it is placed opposite and close to the petitioner's dining-room window, in such a manner as to cover the window, and intercept both light and air, &c.; and praying the Sheriff to prohibit and discharge the said Robert Scott, &c. from throwing filth, or water, or any thing else, through the said window, into the petitioners' dining-room, or from putting up any board or other obstruction to intercept the light, &c.

The Sheriff, 'in the mean time, granted the interdict as craved,' and after closing the record, allowed the petitioners a proof of their averment, 'that the defender and his family were in the habit of 'throwing water and filth into the petitioners' dining-room, through 'the window in question,' &c. &c.; and on advising the same, the Sheriff 'finds it established that the defender's daughter threw a 'panful of water in at the window in question: finds, That the pursuer has failed to prove by whom the filth was thrown in at the 'same window: finds, That the defender erected a board upon the 'roof of the shed in question, and that such board intercepts the 'light from the pursuer's window: finds, That the said board was 'erected upon the roof of the said shed, which roof rests, by consent of the proprietor, on the wall of the pursuer's house: finds, 'therefore, that the pursuer is not entitled to make use of the roof 'to the injury of the proprietor or tenant of the house; therefore 'continues the interdict as craved; and, farther, interdicts and discharges the defender, by himself or others, from erecting any 'such board to intercept the view from the said window, or in any 'way to disturb or molest the pursuer in the peaceable possession 'of the premises in question,' &c.

The defender having brought an advocation, the Lord Ordinary 'advocates the cause; finds, in regard to the first head of the interdict craved, that the respondents have failed to prove the averment on which the interdict was demanded, namely, that 'the advocator and his family had been in the practice of throwing water "and filth into the respondents' dining-room;' therefore recalls 'the interdict, in that particular, as unwarranted and unnecessary: 'Farther, and in regard to the erection by the advocator of the 'board intercepting the light of the respondents' dining-room window, adheres to the judgment of the Sheriff, and continues the in-

'terdict; finds no expenses due to either party, either in this Court 19 May 1835.
'or in the inferior court, and decerns.'

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Note.—'It is to be regretted that such a case as this ever should 'have been made the subject of legal proceedings.

'On the *first* point, it is proved, that on one occasion filth had 'been thrown into the respondent's window; but it is not proved 'by whom. On another occasion, it is proved, that in a sort of 'scuffle between the respondent, then standing at the window, and 'one of the advocator's daughters, standing on the top of the shed, 'she threw a panful of water at him, wetting him as well as some 'furniture in the room. But it does not appear to the Lord Ordi-'nary that such a proof as this is sufficient to support the allega-'tion of the practice, as set forth in the respondent's demand of an 'interdict, or to warrant, on any reasonable ground, their recourse 'to such a measure against the advocator.

'On the other point, the Lord Ordinary thinks the judgment of 'the Sheriff well founded. He gives no opinion on the advocator's 'right to erect, entirely on his own property, a wall or screen, 'which may interfere with the light or prospect of the respondent's 'window, a question which might possibly turn on points of fact 'requiring proof. But here it is admitted by the advocator, that 'the roof of the shed on which the board complained of was put up 'does not rest entirely on walls within the advocator's property, but 'is let into the wall of the house occupied by the respondents, by 'sufferance of the proprietor of that house. And the Lord Ordi-'nary concurs with the Sheriff in thinking, that, in these circum-'stances, the advocator is not entitled to make any alteration, or 'raise any erection on such roof, to the detriment or annoyance of 'the premises which afford the support.'

Respondent's Pleas.

The respondent, in the advocation, *reclaimed* against that part of the interlocutor of the Lord Ordinary which advocated the cause, and recalled the interdict granted by the Sheriff, in regard to the first head of the interdict craved; and contended, that it ought to have been generally, as granted by the Sheriff. It was proved that water had been thrown in at the respondent's window by the advocator's daughter; and it was also proved that filth had been thrown in; and although it was not directly established by whom this had been done, the presumption was, that it was by the same parties; and these circumstances were sufficient to justify the interdict as granted by the Sheriff.

It was *answered*—That the libel was expressly laid on alleged prac-

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tice, by the advocator and his family, of throwing in water and filth at the respondent's window, but there was no proof of any such averment. It was proved, indeed, that, on one particular occasion, some water was thrown at the respondent by a daughter of the advocator; but although this might be a blameable act, it afforded no proof of a practice; nor was there any proof of the alleged throwing of filth by any of the advocator's family.

Opinion of Court.

Lord Balgray.—I don't know a more useful form of process than an interdict. If it can be shewn to have been improperly or nimiously granted, it may be recalled, and there may be room for a claim of damages. In this way the law of Scotland provides a remedy to any person apprehending wrong. It is far better to have a mode of prevention, than to drive a party to seek for reparation in an action of damages. It is sufficient to warrant a party, in applying for an interdict, to aver that he has probable ground for apprehending the evil he wishes to prevent.

Lord Gillies.—I am of the same opinion. In this particular case it is proved that not only a pail of water was thrown in at the window, but that, a few days after, some filth was also thrown in. Why does the advocator oppose the interdict, if he and his family do not mean to do that against which the interdict is craved? If I see a person shooting on my property, instead of prosecuting him, I choose to apply for an interdict, would it be any answer to the application to say, that he had only shot once? The present case is similar. If the advocator does not mean to throw water, the interdict is of no consequence to him; if he does, then there is a sufficient ground for it, and he is guilty of a contempt of Court. He cannot pretend to say that he has any right to do it.

Lord Mackenzie.—I take the same view. I think the parties were very ill advised in opposing this interdict. With respect to interdicts generally, there prevailed at one time an opinion, while I was a Sheriff, that an interdict might be obtained at any time, periculo petentis, and without stating any ground. From that opinion I dissented; and I believe that, according to the subsequent practice, it was held necessary that some ground for the application should be stated; but positive proof of a practice is not required. In this case there was one sufficient instance proved of the propensity, and there was strong ground for suspicion that the succeeding acts of aggression came from the same quarter. The Court of Session ought not to interfere, in matters of this kind, with the local magistrate, except on strong grounds. I think we shall do right, instead

of recalling, as the Lord Ordinary has done, to affirm the interlocutor of the Sheriff, with expenses.

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Judgment.

The *Lord President* having also concurred in this view, the Court 'altered the interlocutor of the Lord Ordinary, and remitted the 'cause simpliciter to the Sheriff; and found expenses due by the 'advocator to the respondents, both in this Court and in the Sheriff-'court,' &c.

Lord Fullerton, Ordinary. For the Advocator, *Dean of Fac. (Hope,) Wood.* Alt. *Sol.-Gen. (Cuninghame,) James Paterson.* *Francis Hamilton*, W. S. *James Macdonell*, W. S. Agents. *B.* Clerk.

C.

FIRST DIVISION.

No. XCIX. 19*th May* 1835.

CRANSTONHILL WATER COMPANY
against
HENRY HOULDSWORTH.

CLAUSE.—*Question as to the construction of peculiar clauses in a disposition.*

THIS was a special case, which gave rise to a great deal of discussion, in reference to the interpretation of certain clauses in a disposition of a portion of land, granted to certain persons, (among whom was the disponer,) with a view to erect works to supply the town of Glasgow with water. The following are the clauses: 'Declaring always, &c. That the said grounds are disponed for 'the sole purpose of a water-work being erected thereon, &c. And 'it is also further provided, that in the event of the said company 'abandoning the said works, or discontinuing the use of the same, 'for the period of ten years, the grounds before disponed are to revert 'to me, or my foresaids, proprietors for the time of the lands of Cran-'stonhill, upon paying to the said company, or their assigns, a price 'equal to three shillings per square yard, &c. Or in either of the 'events foresaid taking place, it shall be optional to me to allow the 'company to retain the grounds, and build dwelling-houses thereon, 'under the same restrictions as I or my successors may adopt, with 'respect to my other grounds of Cranstonhill, and lands adjoining; 'and which obligation upon me and my foresaids, to take back the

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'grounds at the aforesaid price, shall be binding for ten years from 'the date hereof only,' &c.

The works were never properly in operation, but still the premises were not entirely vacated till after the ten years.

The disponer contended, that the period of ten years must be construed as creating a limit both to the option and obligation. The company denied both these positions, and contended, that, at all events, if they were bound to continue the feu-duty, they were entitled to build.

There were various specialties, upon which pleas of acquiescence, &c. were founded. The nature of these will sufficiently appear from the following interlocutor and note of the Lord Ordinary:

'The Lord Ordinary having heard counsel for the parties, and 'having afterwards considered the closed record, productions, and 'whole process, sustains the defences, assoilzies the defender from 'the conclusions of the libel, and decerns; but finds no expenses 'due.'

Note.—'The Lord Ordinary is of opinion, that the pursuers are 'right in the construction which they put upon the disposition, 'dated the 10th of October 1808. He thinks there is nothing un-'fair or unreasonable in the condition, that if the pursuers abandon 'the works within ten years from the date of the agreement, the 'proprietor should be bound either to pay a price of three shillings 'per square yard for the ground if he resumed possession, or, in 'his option, to allow the company to build dwelling-houses, under 'the same restrictions as those adopted with regard to the other 'grounds of Cranstonhill. If the proprietor had been obliged to 'pay the price without an alternative, it would have been a very 'absurd condition; because the pursuers might have abandoned the 'works within the year, and the proprietor would have been out of 'pocket to the extent of the whole of that price, minus L.92, 4s., 'being one year's feu-duty. But as the proprietor had the alter-'native of forcing the company to retain possession, he secured 'to himself the feu-duty, which was no inconsiderable object. If 'this action, therefore, had been brought within ten years of the date 'of the agreement, it is thought that the pursuers must have been 'successful: But that period having elapsed, the power of abandon-'ment on the part of the company ceased, for it had been natu-'rally enough assumed, that ten years were sufficient to enable 'them to judge whether their water-works were a profitable specu-'lation or not.

'When the requisition of the 16th November 1831, therefore, 'was served on the defender, he was unquestionably entitled to re-'fuse either to pay the price of three shillings per square yard, or

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'resuming possession, or to allow the pursuers to build on the ground 'in the event of their retaining it. The whole question, therefore, 'turns on the communications between the parties, which took place 'afterwards, and which are represented by the pursuers as forming 'an entirely new and binding agreement. The Lord Ordinary 'cannot view it in this light. It is true, the defender, in his answer 'to the protest, offered to take back the lands, upon the terms and 'conditions specified in the disposition; but he coupled that offer 'with a provision, that all disputes and differences which might arise 'should be referred to an eminent counsel, to be named by the par-'ties. The pursuers did not accept the offer, under the qualifica-'tion of the reference, but sent the draft of a reconveyance, with 'a claim for the price, at the rate of three shillings per square yard. 'This gave the defender an opportunity of stating his notion of the 'import of the agreement; and as it was not acquiesced in, he re-'siled from his unaccepted offer, and it is thought, rebus integris, 'that he was entitled to do so. If any thing had followed on the 'faith of his offer, the case might have been different.

'The Lord Ordinary has found no expenses due, because the 'defender ought to have been more guarded, when, after due deli-'beration, he made the offer, and ought not to have led the com-'pany to believe that he consented to take back the ground.'

Against this interlocutor the pursuers *reclaimed*, and the defenders also presented a counter reclaiming note, praying that they might be found entitled to expenses.

Opinion of Court.

Judgment.

At advising, the *Court* considered that they were bound to confine their attention to the terms of the deed, and they gave effect to the defender's interpretation; Lord Gillies observing, that if it was the object of conveyancing to puzzle and perplex, it had been effectually done in the present case, and that he had never met with any question which gave more room for the exercise of human ingenuity.

The *Court* therefore adhered simpliciter.

Lord Corehouse. Act. *Dean of Fac. (Hope,) Graham Bell.* Alt. *D. M'Neill, Donaldson. Wm. Renny*, W. S. and *Campbell & Trail*, W. S. Agents. *R.* Clerk.

C.

SECOND DIVISION.

No. C. 19*th May* 1835.

DANIEL INNES
against
DAVID PHILLIPS AND WILLIAM PHILLIPS.

MASTER AND SERVANT.—APPRENTICE.—SUNDAY.—*Found that a barber is entitled to the services of his apprentice in shaving his customers, on the mornings of Sunday, until ten o'clock.*

IN May 1834, Daniel Innes, barber and hairdresser in Dundee, presented a petition to the Magistrates of that burgh, stating, 'That 'by indenture entered into between the petitioner, on the one 'part, and William Phillips, son of David Phillips, licensed porter 'in Dundee, with consent of his said father, and the said David 'Phillips, as cautioner and surety for his said son, on the other part, 'the said William Phillips, with consent foresaid, became bound 'apprentice and servant to the petitioner in his trade and business 'of barber and hairdresser; and that for the full space and term of 'four years from and after the 1st day of July 1833; and during that 'space to serve the petitioner, as a faithful and obedient apprentice, 'and not to absent himself from his master's business, holiday or 'weekday, late hours or early, without leave first asked and obtained, and that under the penalty of ten pounds sterling, over and 'above performance.

'That, from the nature of the petitioner's trade and business, he 'requires the attendance of his apprentice on the mornings of 'Sunday as on other days, till at least ten o'clock; and accordingly, 'from the period of his entering the petitioner's service, on 1st July '1833, until Sunday the 4th day of May current, the said William 'Phillips did attend the petitioner's business on the Sunday mornings: That having absented himself on that morning, the petitioner caused his agent write the said David Phillips, the father 'and cautioner for the said apprentice, complaining of such absence, 'and he was in hopes that such would not be repeated: That in 'this, however, the petitioner was disappointed, as the said apprentice did absent himself again on the morning of Sunday, the 11th 'day of May current; and this, as the petitioner understands, by 'the order of the said David Phillips: That the petitioner suffers 'considerable loss and inconvenience from the absence of his ap-

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'prentice on the Sunday mornings, which renders the present application necessary.' And praying that the Magistrates might 'find that the petitioner is entitled to the services of his said apprentice at his trade and business on the mornings of Sunday, and 'until ten o'clock at least, and ordain him to attend to the petitioner's trade and business accordingly;' and upon his failure to attend, to find him and his cautioner liable for L.10, as the penalty in the indenture, reserving to the petitioner to claim the services of the said apprentice, on the issue of the indenture, for four days, in lieu of the two Sundays before mentioned, as stipulated in the indenture.

The apprentice and his father gave in answers, in which they 'denied that the petitioner's business requires the attendance of the 'respondent, William Phillips, on the mornings of Sunday, and the 'respondent is not bound to work to his master on the Sabbath.' They founded on 'the following acts, viz. 1503, c. 83; 1579, 'c. 70; 1592, c. 124; 1593, c. 163; 1594, c. 201; 1661, c. 81. 'All ordinary or every-day's labour is prohibited by these acts. But 'what the petitioner wants the respondent to do, is neither more 'nor less than that he shall carry on his trade of a barber and hair-'dresser on the Sabbath. In the case of Learmonth *v.* Blackie, 13th 'Feb. 1828, the Lord Justice-Clerk stated, that the boy's being out 'on the Sunday was no breach of the indenture, as the master cannot 'make him work on that day.' 'PLEA IN LAW. It is illegal for 'any person to work at his ordinary business on the Sabbath, and 'a master cannot compel his servant to work on that day.' Thereafter the Magistrates pronounced this interlocutor: 'Having advised 'the minutes of debate, and whole process, finds, That it is matter of 'public notoriety, that among the great body of mechanics, common 'labourers, and seafaring men, residing in and frequenting this 'town and its port, a very considerable number are not in the use 'of shaving their beards with their own hands, but resort to barbers' 'shops in order to be shaved, many on the evenings of Saturday, but 'some on the mornings of Sunday: finds, That however desirable 'it may be that the resorting to shaving shops on the mornings of 'Sunday should be discontinued, if that could be effected without 'greater evil, yet it does not appear to be either necessary or ex-'pedient, for a due observance of the Sabbath, to forbid the exist-'ing usage, so long as the shops continue as at present open early 'in the morning, and closed before the time fixed for the commence-'ment of divine service; for on no occasion have the authorities of 'the town seen any cause to regard the conduct of the barbers in 'their vocation, or the conduct of those resorting to their shops on 'the mornings of the Sundays, as other than decent and orderly,

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'or as apt to give reasonable cause of offence to any man; and it 'appears very obvious that if working men, who are not themselves 'accustomed to shave, were forbidden the aid of the barbers in their 'shops on the Sunday mornings, many decently-disposed men would 'be prevented from frequenting places of worship, and from asso- 'ciating in a becoming manner with their families and friends 'through want of personal cleanness; and the attempt to reduce 'the minor evil might lead to some more serious: finds, therefore, 'That in so far as the defender, the apprentice, is called upon to 'aid his master in shaving his customers on the mornings of Sunday 'before ten o'clock, it is not contrary to the spirit of the statutes 'regarding the Sabbath, nor contrary to the recognised usages un- 'der them, that the apprentice should give such aid: but finds, 'that the apprentice is not bound, nor is it lawful for him, to work 'in the making of wigs, or in similar employment not immediately 'necessary for the day; and with this explanation, ordains the de- 'fender, the apprentice, to aid his master on the mornings of Sun- 'day, when his master has occasion for his services, in shaving his 'customers, the work not continuing after ten o'clock in the morn- 'ing.'

Upon a reclaiming petition, the Magistrates pronounced the following interlocutor: '20*th August* 1834. Finds it admitted by 'the defenders, that the apprentice entered to the pursuer's service 'on or about the 1st day of July 1833, and that he attended at the 'pursuer's shop, and did what was required of him on the morning 'of every Sunday from that date, until the 4th day of May last, be- 'ing for a period of ten months: finds also, that it was not until the '18th of March last, that is to say, after an experience of more 'than eight months, that the indenture was entered into, and by 'it the apprentice, with his father's consent, became bound not to 'absent himself from his master's service, 'holiday or weekday:' 'finds, therefore, that it is now too late for the apprentice and his 'father and cautioner to allege, that though not contrary to law, 'the service on the mornings of Sundays is not according to their 'own sentiments, and on that ground to seek to be relieved of their 'civil engagement so deliberately made; and, with this explanation, 'adheres to the interlocutor of 13th August current, complained 'of; and decerns.'

The apprentice and his father advocated; and parties having debated on the record as closed in the inferior court, the Lord Ordinary pronounced this interlocutor:

'The Lord Ordinary having heard counsel on the closed record, 'and whole process, advocates the cause; alters the interlocutors of 'the Magistrates complained of; sustains the defences, and assoilzies

'the defenders from the conclusions of the action, and decerns; finds 19 May 1835.
'the advocators entitled to their expenses, both in this Court and
'before the Magistrates; allows an account thereof to be given in, Innes v. Phillips.
'and remits the same, when lodged, to the Auditor for his taxation
'and report.'

Note.—'This is the first instance, in so far as the Lord Ordinary 'is aware, in which a court of law has directly and positively *or-* 'dained a handicraftsman (without any pretence of necessity, or 'serious urgency,) to work at his handicraft on a Sunday; and he 'certainly is in no way anxious to establish such a precedent.

'The cases of apothecaries' shops, Sunday travelling, and others 'that were cited, are evidently quite inapplicable. These excep- 'tions have been admitted (with more or less scruple and reluctance) 'on the ground that they may frequently be requisite for purposes 'of *necessity* and *mercy*, and that it would be impracticable to inves- 'tigate cases of occasional abuse. But it is ridiculous to speak of 'a public shaving-shop as an establishment of such necessity as not 'to admit of interruption for a single day in the week. If the ad- 'vocator had refused to shave the head of a lunatic, or one whose 'skull had been fractured, the cases would have been parallel. The 'pretence of usage, especially such a partial usage as is alleged, is 'irrelevant in a question of illegality, by violation of a public law.

'That, and the mitigated nature of the offence, may account for 'the connivance of the civil and ecclesiastical authorities, and may 'raise a doubt as to the wisdom of proceedings for interdict and 'penalties. But it is impossible to connive, when these authorities 'enjoin what they may have blamelessly *permitted*, and actually sub- 'ject a man to penalties for not doing what the law has forbidden.

'As to the alleged contract of the parties, it was admitted by the 'respondent at the bar, that if what was required was *illegal*, the 'contract must go for nothing. The words are ambiguous; and 'the whole argument of the respondent imported that his sense of 'them could not be maintained. If *holidays* meant *Sundays*, (which 'is his construction,) then the contract must have meant that the 'apprentice should serve on Sundays *exactly* as he did on weekdays, 'and that there should be no distinction between them. Yet he 'admits that he could not require him to work, even at shaving, 'during divine service, nor at wig-making even on the Sunday 'morning. If he says he should only work when consistent with 'law and decency, then the Lord Ordinary is of opinion that he 'should not work on that day at all.'

Innes *reclaimed*, praying their Lordships to alter the interlocutor, to remit simpliciter to the Magistrates, and to find expenses due.

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Defender's Pleas.

P. Robertson and *A. M'Neill*, in support of the note, *pleaded*—That the question was, whether the practice of shaving on Sunday morning was illegal or not; for if the practice was illegal, it would not be in the power of the parties, by any usage in Dundee, to make it otherwise. Here the apprentice had for about eight months been in the habit of attending on Sunday mornings at his master's shop, and the Magistrates had found that he was only bound to give attendance early on Sabbath morning, and previous to the hours set apart for divine worship. Now, shaving on Sunday must be made out to be either against the statute law, or to be contrary to religion or morality. The statutes referred to did not bear that such a custom was illegal. And could it be said there was any thing immoral in the habit of shaving on Sunday? Prima facie, long custom had sanctioned the practice in Dundee. Although it is undoubtedly the general rule not to work on Sunday, this was so far a work of necessity as to be indispensable for the comfort and decent appearance of many wishing to attend divine service. Ships may arrive late on Saturday and early on Sunday, and the sailors were no doubt anxious to have their beards shaved after a long voyage, and to appear decently on Sunday. This, like other questions of the sort, is a question of degree; and no case has been made out for interfering with the exercise of the practice of shaving, which is just one of those privileges of which the lieges have been in the undisturbed enjoyment. The only one of the statutes which has the most remote reference to this subject is 1579, c. 70, the object of which, however, from its rubric, appears to be the discharge of mercats, and labouring on Sabbath days, or playing and drinking in time of sermon; and the statute directs certain pecuniary fines, for the benefit of the poor of the parish, to be awarded against those transgressing against the statute. Neither can the Confession of Faith be said to make the practice illegal. In short, was there here such an outrage on public decency, in requiring this apprentice to continue his attendance on Sunday morning, as to sanction any deviation from what has been the general practice throughout the country?

Advocator's Pleas.

M'Neill and *Patton*, for the advocator, *pleaded*—That no practice can control the general law on this question; and looking to the sort of practice alleged, it appears, from the interlocutor of the Magistrates, that it has not been of that general kind as to sanction an averment, that a constant and uniform practice on the subject had prevailed. As to the law, the statutes are quite precise and peremptory in condemning the practice; for, by 1579, c. 70, in particular, the exercise of all handicrafts is condemned, and shaving for

hire on Sunday must be comprehended within this class of occupations. The Confession of Faith has, by 1690, c. 5, been made the law of the land; and many passages in it may be referred to, as showing that works of necessity and mercy only are permitted on Sunday. The cases referred to, of houses of refreshment, travelling, and so forth, may be said to come under the rule of necessity, although it may sometimes be difficult to make a distinction betwixt necessitous cases and those for which no proper excuse can be stated. There is no wish to break the indenture; but the question is, whether a party who wishes to abstain from working on Sunday, and is willing to go to church, is compellable to work. There is clearly a working for profit, and there is no necessity to justify the practice; for it would be just as easy for those parties who are accustomed to have themselves shaved once a-week to have the operation performed on Saturday night, instead of as at present being worse occupied, and postponing the shaving till Sunday morning.

The Lord Justice-Clerk.—I am satisfied that this interlocutor ought to be adhered to. In the course of the proceedings, I see reference made to the case of Blackie *v.* Learmonth, 13th Feb. 1828; and I am still of the opinion, then expressed by me in that case, that 'the boy's being out on the Sunday was no breach of indenture, as the master cannot make him work on that day, although he is bound to see that he does not go to any improper place.' Applying this to the present case, can this boy, in terms of the indenture, which declares that he will 'serve as a faithful and obedient apprentice, and not absent himself from his master's business, holiday or weekday, late hours or early, without leave first asked and obtained,' be compelled to work on Sunday? The boy says he is not willing to work on that day; and the question is raised broadly by the prayer of this petition, whether the master is entitled to the services of his apprentice at his trade and business on the mornings of Sunday, and until ten o'clock at least. The Magistrates, in decerning in terms of the prayer of the petition, no doubt confine the practice to the early part of the day, previous to ten o'clock, and limit the exercise of the trade to shaving his customers merely.

Now, 1st, There is nothing in the interlocutor of the Magistrates which establishes that the practice there alleged had been proved; and, 2dly, I beg to say, that I am not satisfied that, either by the statutes or at common law, it is legal to keep a shop open on the Sabbath-day for the exercise of a trade like this. I cannot lay out of view the words of the statute 1579, c. 70, which declares, 'and sicklike that nae handielabouring nor working be used on Sabbath day.' Now, shaving was truly 'handielabouring.' The Confession

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of Faith is declared to be part of the law, by 1690, c. 21, § 8, and is to the point. The Christian religion also is part of the common law, and therefore to be observed. Now, can such a shop be kept open legally? Can shaving for hire in an open shop be held 'a work 'of necessity and mercy?' Is it not on the contrary plain, according to the Magistrates' interlocutor, that many resort on the evenings of Saturday to have themselves shaved, and that some only resort to the shops on Sunday morning. The shops are kept open till a late hour on Saturday; but it is to be feared that some, instead of going to have this necessary operation performed on Saturday, resort to scenes of dissipation, and are not in a fit state to shave themselves, or to have the operation performed next morning. But there is clearly no necessity for their resorting to the aid of another for having the operation performed on Sunday, when it can more properly and legally be carried into effect upon Saturday. Upon the terms of the indenture, I am clear that we cannot compel the apprentice to give attendance on Sunday. The fact of the apprentice having served some months on Sundays is entitled to no consideration. The question is one strictly of conscience, and he was entitled to alter his mind in that respect at any given moment.

Lord Meadowbank.—It is never without regret that I find myself at any time entertaining an opinion different from that expressed by your Lordship; but, in the present case, I find it quite impossible for me to concur in that which has now been delivered. Without resuming the circumstances of the case, I may lay it down, that there can be no doubt that the Confession of Faith forms part of the statute law of the land, and that the Christian religion is part of the common law. But in the former I can find no authority, and in the general precepts of our holy religion as little, for putting down the practice of shaving on Sunday, which is here complained of. It would be quite improper and unnecessary, upon this occasion, to enter into any discussion as to the mode in which it is required that the first day of the week should be observed by those professing the Christian faith, or to dwell upon the distinction which is obviously drawn by St Paul between the Jewish Sabbath and the Christian Sunday. That there is, and was in the first ages of the Church, such a distinction, no one can doubt who has considered the subject, any more than that the Jews kept the seventh day holy, while the first day is that which is required to be observed as the Christian Sunday. Not much is to be found in Scripture of the precise mode in which the Sunday was observed in the first ages after the establishment of Christianity; and it would be to very little purpose for us to enter into an investigation at present upon such a matter; for of one thing there can be no doubt, that it is

clearly pointed out as incumbent upon us to set that day apart for the worship of God, and that it is required of us to keep it reverently, and to refrain from all such ordinary avocations as are not included under works of necessity and mercy. But, again, what are to be held to be works of necessity must always depend upon considerations connected with the conditions of the individuals and society concerned; and what in one individual and in one state of society would obviously be altogether a matter of amusement, might in another be one of the most indispensable necessity. Accordingly, it is, in my humble opinion, one of the most distinguishing characteristics of the Christian dispensation, and one which clearly points out its universality, and its being intended, by its divine Author, for the whole race of man, and applicable to him in his different states of progress and advancement, that there are so few rites and observances required as fixed and unchangeable. No sacrifice of the ordinary habits of society, where those habits are not inconsistent with morality, are required from any people among whom the faith may be introduced; and the exigencies and the wants which the progress of manners has introduced are left unaffected by the precepts of the Gospel. In considering, therefore, what is to be deemed a work of necessity, in determining such questions as the present, we must first see whether it is an immoral act; and if not immoral, whether, according to the usages of the country, it is a work, the performance of which can or cannot be decently dispensed with. During the first era of the Christian church the operation here immediately in question could never be considered or pointed out as a work of necessity, because the professors of the faith, our Saviour himself, and the whole Jewish people, allowed their beards to grow, and shaving was altogether unnecessary. In the present day, and over the whole Christian world, the case is entirely changed. No man can appear in public with a long beard without indecorum, and being an object of remark, which renders it impossible for any one with ordinary feelings to go into society without being shaved. Accordingly, it never has been pretended, that, in the strictest sense of the word, every man is not entitled, without breaking through the precepts of religion, to shave himself upon the Sunday, as well as upon any other day; and in a state of society where an act of this sort has thus become one of absolute necessity, it would be thought strange and anomalous if I could not employ another to do that which I might lawfully do myself, but which age, infirmity, or a hundred other causes, prevented me individually from performing. From the effects of palsy, I may be unable to shave myself, and must, if able to pay him, engage a servant to do it for me: If I am poor, I must go where the work

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may be done more cheaply: But, according to the doctrines which are here maintained, I presume, in the former case, *that* servant might refuse performing the operation upon Sunday, and his refusal would be no legal ground for his dismissal. In such an opinion, however, I cannot concur. In such a case, the operation is, in so far as the disabled master is concerned, a work of necessity, and becomes the same on the part of the servant, from the relative positions in which he and his master are placed by the gradations of society.

Again, the administering of medicine is a work of necessity on a Sunday as well as on any other day; but it might be said, every one may have medicine for himself, and therefore the having open upon Sunday an apothecary's shop is, in one sense and at first sight, unnecessary. But from the habits of society few men have a store of medicine for their own use; and hence the daily wants of the people requiring supplies of medicine, no one has ever questioned the legality of the shops of the apothecaries being at all times kept open for the use of the public. But if the argument which is here maintained be correct, the apothecary's apprentice, or his servant who works for hire, would be entitled to refuse to perform all those services to his master, which are as indispensable on Sunday as on any other day.

In like manner, in this city the article of milk is one in general use, though not perhaps of indispensable necessity, though the milking of the cows undoubtedly is; and there is not a house of any consideration in this great city to which it is not brought by the servants of the dealers, at least once, and probably twice, on every Sunday in the year. Now I should doubt that any one of your Lordships would hold that a person engaged not merely as a milker but as a milk carrier, would be justified to refuse to carry it to his master's customers on Sunday any more than on the other days of the week.

All these works and the like are works of necessity, according to the artificial state of society in which we are living; and in a town like Dundee, the operation of shaving is one of no less necessity than any one of them. Without being shaved, no man can go to church with that decency and propriety which the feelings and usages of society require; and it would be most extraordinary for a court of law to interfere to prevent that, which, to so great a portion of the people, is absolutely indispensable to their due attendance upon public worship, and the performance of the ordinary rites of the established religion. No doubt it has been said, that people may get themselves shaved upon Saturday night, instead of postponing it till the Sunday morning; but multitudes of cases are

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of daily occurrence, and many can easily be figured, where this is practically impossible. Many labouring men, whose wives and families reside in Dundee, must be employed at the distance of miles during the week from their homes, and their working hours cannot terminate till six o'clock on the Saturday night; after that they have to undergo the additional fatigue of walking home; and it does seem to me utterly unreasonable to expect, that men suffering under the fatigue which all this must necessarily produce, should be required immediately to set off to their barber, under the penalty of being otherwise deprived of the privilege of joining in the public worship of God upon the Sunday. If such rules were to be established, the inevitable result would be, that going to the church on the Sunday would be generally dispensed with in such cases, and the time that would otherwise have been passed there spent in the gin shop.

In the case before us, too, we are told that no disorder is created, and no indecorum is produced by the practice complained of. We have the authority of the Magistrates to the contrary; and I pray your Lordships to consider well the consequences, both to religion and morality, from sanctioning a principle that would inevitably have the effect of precluding multitudes from attendance upon divine service, while the practice itself can be attended with injury to no human being; for it is only before ten o'clock on Sunday morning that the attendance is required.

I have omitted to observe, that one ground for maintaining the illegality of the practice in question is, that the act of shaving is performed *for hire*. But this ground is, with deference, altogether untenable; for if the taking of hire for its performance is the criterion by which a work is to be deemed illegal, the principle would equally apply to the case of the purveyors of milk, of apothecaries, and of domestic servants; and I do not think, that, upon consideration, the Court would relieve persons in those situations from the discharge of those duties, which, as in the present case, they had virtually engaged to perform.

Upon the whole, as I can see nothing in the work in question contra bonos mores,—nothing against the precepts of Christianity,—nothing but what the actual wants, decencies, and even necessities of life require,—and as I think that the apprentice entered into his indenture with the knowledge that he was binding himself to give the attendance and aid to his master now in question, I am of opinion that this indenture ought to be enforced, and, therefore, that the interlocutor in question ought to be altered.

Lord Glenlee.—I take pretty much the same view of the matter. It is true, that the prayer of the petition is somewhat broad; but

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what we have to deal with is the interlocutor of the Magistrates, which merely ordains the apprentice to aid his master on the mornings of Sunday, when he has occasion for his services, in shaving his customers, the work not continuing after ten o'clock in the morning. The act of shaving is here required to be performed only during the early part of the morning of Sunday; and the employment is limited to shaving the beards of his master's customers. Now, the question we must first settle is, whether the act of shaving be in itself unlawful. I own I can find nothing in the statutes preventing this being done. Is the act in itself lawful? I think so; for it is decent and proper that people should not go unshaven on Sunday. But the same thing that makes it not wrong in a person to shave himself, makes it not illegal to have the operation performed by deputy. If a servant be required to shave his master, or an apprentice to shave his master's customers, he is merely called on to do that which is not illegal, but which it is right and fitting should be performed. There is nothing illegal and improper in a man's shaving himself on Sunday. The ministers themselves do it; and there can be no question, they ought to do it. It would be very indecent and unbecoming for a minister to appear in the pulpit with a beard of perhaps twenty-four hours' growth; and if he is unable to shave himself, (which may very well happen, for it has been my own case for five years,) is it to be contended that he cannot employ his servant to fit him for appearing in church with decency and propriety? It is in fact rather a keeping of the Sabbath than a violation of it. It is necessary to enable a man to attend a place of worship in a manner that accords with his notions of the sanctity and decency of the place; and it is therefore a means to enable him to attend.

There are few trades less necessary on Sunday than that of a blacksmith; but suppose I were riding to church in the country, and my horse should cast a shoe near a blacksmith's shop, would it be a violation of the law for him to replace it, and thus enable me to go to church? Or must it be said that I ought to have had my horse shod, or looked if his shoes were right on the Saturday night? What would be the consequence if the Dundee workman could not get himself shaved on Sunday morning? Why, he would stay away from the church, and spend his penny, which would have shaved him—in whisky of course. Now, I really cannot see how this would be either beneficial to religion or productive of morality.

Lord Medwyn.—Ever since I heard of this case, I have felt great unwillingness to approach it; and much should I lament if, from the view which I take of it, any portion of the community should suppose that I have not the same respect for the Christian Sabbath

that the Lord Ordinary has shewn; or if any opinion of mine should in the smallest degree lead to its profanation. I assuredly do not participate in any of the doubts which have been recently raised, or rather renewed, by one eminent both for talent and station, as to the enduring obligation of the Sabbath; and most anxiously do I desire to see both its rest enjoyed, and its duties discharged, generally, by all ranks of society, both high and low, in a very different manner from what human laws can ever enforce, or ought ever to attempt to enforce. By the law of this land, the profanation of the Sabbath is to be prevented, and open violations of that sacred day are to be punished; and we are called upon to say, when sitting in a civil court, whether by the law and practice of this country it is unlawful to enforce a special contract of apprenticeship in the way in which the master claims right to enforce it here. This, like every other question of the kind, is a question of degree. The apprentice here cannot pretend that he did not know what would be required of him before he became the respondent's apprentice. He went into the service on 1st July 1833; but it was only in March 1834 that he entered into a regular indenture; and, it is admitted, that he attended every Sunday during the hours required of him, till 4th May 1834. His indenture specially binds him to attend holiday and weekday. Thus, he well knew the custom of the trade, and what would be required of him; and if he had scruples which prevented him from acting according to any of its customs, he should have betaken himself to another employment. And, even now, if it were said, which it is not, or if it appeared with the least degree of probability to be true, that sincere religious scruples influenced the conduct of the apprentice, and that he was acting under the conscientious advice of his father; that a warmer zeal, and a deeper sense of his duties to his Maker, had induced the father to establish in his family a morning religious exercise, which this secular employment alone prevented the boy from attending; or, if he could say, that there being no evening Sabbath school, he wished to join some morning institution of this kind during those hours, I should have much more sympathy with the plea of the advocator than I at present have. But the question is, Is this illegal? The act 1579, c. 70, is founded on, which is for 'discharge of markets 'and labouring on Sabbath days, or playing or drinking in time of 'sermon.' For execution of this act, a commission of justiciary is to be granted to some person in every parish at the request of the minister. Whether in many, or in any parishes, this act was ever enforced, we know not; and sure I am, that it never was enforced in such a manner as would have interfered with such a practice as this; for it is a melancholy truth, that at that time, and for long

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after, our people had not thrown off the licence of Roman Catholic times, and the sanctity of the Sabbath was violated with an indecency which, in the present day, would be regarded with the utmost abhorrence; see *Dr Cook's History*, vol. ii. p. 43. How little this act was ever enforced, and how thoroughly it must have fallen into desuetude, appears from the acts against going of salt-pans and kilns, fishing of salmon, hiring of shearers, on Sundays, passed in 1640. The only act to be attended to is 1661, c. 18, which came in place of those which were rescinded at the Restoration; and farther prohibits using of merchandise on the Lord's day, and all other profanation thereof. Now, when I recollect that the law could not interfere either with the apprentice himself, or the keeper of a public-house, if he spent those three hours every Sunday morning in drinking there, so as to unfit him for appearing in church, I cannot but think it would be a singular interpretation of a law which would yet shut up that place, where the common people who are not qualified to shave themselves may be fitted for appearing decent and clean in the sanctuary. Since the law allows public-houses to be kept open, except during divine service, could you sanction a servant hired to attend in it, refusing to attend at all on Sunday? What is required of the boy in this case does not interfere with his own attendance at church, and the evening Sabbath school too; and, if he was not to assist in shaving his master's customers to fit them also for attending, I agree with the Magistrates, that, to avoid a smaller evil, you would be encouraging a much greater; and I am not for giving any apology to the lower classes of Dundee to absent themselves from church on Sunday. This apprentice refuses to shave on Sunday morning, because it is working on the Sabbath-day. May not a domestic servant who shaves his master say the same? Are you to make an exception in his case? If he may refuse to shave, may he not also refuse to do any other work in the house? May not the cook on the same ground object to dress the dinner, and the footman to place it on the table? I see no distinction in point of principle,—only a little, and but a little, in degree. No doubt, to shave a poor man on Sunday, who has not the implements or skill to shave himself, is not altogether a work of necessity or mercy. There is no absolute physical necessity; but surely there is a moral necessity, to fit him with decency and propriety to associate with his fellow Christians in worshipping together their God and Saviour, who has said, that the Sabbath was made for man, and must, in some measure, be accommodated to his state and condition here. I know of no instance where the views which have dictated this judgment have been carried so far, except by the Puritans, in 1651,

who, in petitioning for an enactment, referred to a code of laws made in the dominion of Newhaven, in 1637, by emigrants from England, in which there are these prohibitions: 'No one shall run on the Sabbath day, or walk in his garden, or elsewhere, except reverently to and from meeting, nor travel, cook victuals, make beds, sweep house, cut *hair, or shave;' Burton's Diary*, ii. 262. I do not wish to see the prevalence of such enactments in our times. They would lead to no good, but most probably to much evil; and I shall conclude my opinion in the words of a Council of the Church, regarding the principles inculcated by some zealous preachers in those days: 'Quia persuasum est populis, Die Dominico, cum caballis et bobus et vehiculis itinerare non debere, neque ullam rem ad victum praeparare vel ad nitorem domûs vel hominis pertinentem nullatenus exercere: Quae res ad Judaeam magis, quam ad observantiam Christianam pertinere, probatur; id statuimus, Die Dominico, quod ante fieri licuit, licere.'

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The *Court* altered the interlocutor of the Lord Ordinary, affirmed that of the Magistrates, and found the advocator liable in expenses.

Judgment.

Lord Ordinary, *Jeffrey*. For the Master, *P. Robertson* and *A. M'Neill*. *C. Fisher*, S. S. C. Agent. For the Apprentice, *D. M'Neill* and *Patton*. *C. F. Davidson*, W. S. Agent. *T.* Clerk.

R.

TEIND COURT.

No. CI. 20*th May* 1835.

Rev. JOHN STEWART, Minister of Blair-Athol, *against* JAMES, LORD GLENLYON.

Teinds.—Glebe.—*Found, that a glebe, considerably above the ordinary extent and value, might be taken into consideration by the Court in modifying an augmentation of the stipend.*

In 1813, the stipend of the minister of Blair-Athol was fixed at six chalders of victual, with L.52 : 10 : 4½ sterling of money. In 1833, he brought an augmentation. The rental upon which the heritors were held as confessed amounted to L.14,120; and he craved sixteen chalders.

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Among other objections by the heritors, it was stated, that the minister possesses a glebe, from which he draws income to an unusual extent, and such as ought to weigh with the Court in fixing a proper augmentation.

Blair-Athol consists of four united parishes, each of which had originally a separate glebe. The glebes of Lude and Kilmaveonaig are of small extent. The united glebes of Blair and Strowan lay in front of Blair Castle, and the Duke of Atholl being desirous to obtain possession of that ground, induced the minister, about seventy years ago, to excamb that glebe for lands of greater extent, about two miles from the church. The excambion was ratified by decree of presbytery. It was admitted by the minister that the glebe so given in exchange is more extensive and valuable than ordinary glebes; and that, including the part possessed by himself, (valued at L.15,) the annual value of the whole glebe might be stated at L.95, 10s. The heritors averred that the value of the glebe was L.129, and mostly free of public burdens.

The *Court* ordered minutes upon the point, whether the value of the glebe ought to be taken into account; and thereafter heard counsel in presence.

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Dean of Fac. (Hope) — It will be necessary to go back to principle, and to the statutes. Recognition of the claim of ministers on teind was matter of constitutional arrangement. If, in giving a right to stipend, the manse and glebe were not to be taken into account in individual cases, but held to be benefits for all, over and above stipend, no new principle can be introduced now. If, in fixing original stipends, the value of glebe was not regarded an element for consideration of Court, it would be unwarrantable so to regard it now. The argument upon the statutes is conclusive. It was said that all the clergy were provided, or supposed to be provided, with manses and glebes, before a claim on teinds was recognised. This is quite true as general statement. The stipend was to be given to persons having a residence, with some ground attached to it. But it leaves the point in the present case untouched,—whether, in fixing amount of stipend, the Court were to value the glebe in particular cases, and to diminish the stipend proportionably to its value.

On the statutes, practice and cases, the argument the minister maintains is, that the benefit of the residence (mansio) at the cure, house and ground, was held to be an advantage belonging to benefice generally in all cases; that the amount of the stipend for the cure was fixed without valuing the benefits of that residence in par-

ticular cases; that the house and glebe originally did not come from eritors at all, and that the stipend was to be fixed as a fitting sum r their maintenance, over and above the residence, which all were pposed to have; and whatever in particular cases might be the lue of that residence, the mansio, which, all authorities admit, cluded house and glebe, was originally a burden on parsons and icars; *Canons of Perth*, No. 13; *Lord Hailes, Con.* p. 241. Before e Reformation, manses and glebes were no burden upon, and not ken from heritors. First notice, 1563, c. 72; 1572, c. 48. Four res of the glebe were given, but that was not, generally speakg, the whole of the old glebe. The Act 1587, c. 29, saving lebes and manses from annexation, describes them for better reidence. The Act 1593, c. 165, gives them out of kirk lands hen there is no old glebe. 1594, c. 202, gave relief only against ther proprietors of kirk lands. 1612, c. 8, laid the burden of nses on beneficed clergy. By 1644, c. 31, glebes were first to e designed out of kirk lands, then out of others. The object of ese acts was to annex to each cure a residence, including house d ground. This was annexed to the cure as part of the beefice: not taken from heritors originally, but given before the ergy had any acknowledged right to the stipend.

So completely is proper glebe, of whatever size in any particular ace, held to be a standing quality of the benefice, that after additional benefit of grass was given to ministers, it was no bar to the aim that glebe was above the minimum of four acres, or of an tra size; 1663, c. 21; *Elchies;* Beaton *v.* Dallas, Feb. 8. 1734, *Glebe;* Dundas *v.* Somerville, Dec. 6. 1805, *Mor. Dict. App. v. Glebe; Fac. Coll.; Bankton*, ii. 8. 124; *Ersk.* ii. 10. 62. The prinple is, that statute makes no distinction whether the proper glebe is reat or small, or whether over and above the minimum: it gives mple grass for horse and two cows. A united parish giving seveal glebes, yet has right to grass; Beaton *v.* Dallas. Erskine (ii. 10. 2.) mentions another case, where the Court thought on the facts, at there was ground to presume that the land had been given for lebe and grass. Such being the right of the clergy to glebe, the egislature recognised their claim for stipend out of the teinds.

It will be seen that the glebe was taken as a separate endowment belonging to the benefice in all cases, varying it might be in value, ut not estimated in fixing the amount of stipend; see 1617, c. 3. st, Minimum in all cases, with manse and glebe. 2d, Maximum. The Act 1621, c. 5, applies to disjunctions, and to other cases not included expressly in the former act. See Commission 1627, which as ratified by Act of Parliament, (*Connell*, 2d edit. ii. 78,) fixing the minimum at eight chalders. Thus, the extra value of glebe

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was not deemed to enter into consideration at all. The manse and glebe were not overlooked, but were in the view of the Legislature in fixing the minimum. The Act 1649, c. 45, relates to the minimum, and the principle is followed in 1663, c. 28; see 1690, c. 30.

There is strong evidence of the principle in the act 50. Geo. III, c. 84, fixing L.150 as minimum for stipends. This was exactly a case for the Legislature to consider the value of living in every point of view. Now, by this act, if any stipend falls below L.150 of stipend, the minister is entitled to draw difference from Exchequer, whatever be the value of glebe. Take the present case as illustrative. Many Highland parishes are in the same situation, with comparatively large glebes. The case could not have been out of view. The Act 5. Geo. IV, c. 72, confirms this view, by giving L.50 additional, if there be no glebe. The principle now contended for has been always observed. Connell gives details of numerous applications to Commission 1627 for stipends, of all reasonings pro and con, all circumstances of benefice stated, as well as the objections; (see *Connell's* text and App.); yet in not one is value of glebe ever mentioned as reason for not increasing stipend. Numerous cases of augmentation have been brought to light by him, not known in Prestonkirk case. As to the rule given by the King in instructions, October 1634, see *Connell*, iii. 219, App. 66.

As to the analogy from vicarage teinds, 1661, c. 61, 1663, c. 28, these were compounded by value being given in later cases. In first cases of augmentations after 1707, the value of the glebe would have been good ground for opposing augmentation if thought relevant; see history of that question in Connell, case of Lochbroom, c. 2. 108. The point did not pass without attention being called to it; case of Cairney and Bothny, *Connell*, ii. 135. There is great reason for the rule. 1st, If once departed from, excess above minimum must operate more or less. 2d, If not taken into account in original stipend, it would be very sharp to take it into account now. If taken into account then, you are only to augment in proportion to stipends of other parishes. 3d, The increase of values often arises from improvement by incumbents, just as land of heritors is improved. They may protect themselves by valuations, and in many instances have done so. Where there are large glebes, ministers have gone on improving, inclosing, &c. At first they may have been very little worth; but have been made more so by their exertions and expenditure. It would be very hard if such increased value should diminish stipend. 4th, It would be an arbitrary rule. Say that a valuable coal mine is found in a moderate-sized glebe as in Newton, or lead, or other mineral: Is that to be taken into account or not? If so, the minister must be held bound to work; else there would be no consistency in enforcing the rule. But

hese, like size of glebe, are accidental advantages. The glebe is eld to be part of the general advantage and provision for the cure, ndependent of stipend. In recent cases where the point has been nooted, those maintaining that glebe must be valued in fixing sti- end have uniformly admitted that mortifications cannot. There is o principle for distinction. If it is held to be a donation for each inister, then this applies to the present case of exchange.

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The ground on which plea has been put in other cases, is that lebe has been designated from heritors. This has been stated by udges in the recent cases; but this principle only holds in cases n which it can be proved that glebe has truly been designated out f lands belonging to heritors. If set apart out of old glebe, then hat could not be obtained except under that deduction. Hence, hen, on this principle, it would be necessary to investigate history f each glebe. See also the cases of St Madoes, 9. Dec. 1818; *Fac. Coll.*; and Beith, 23. Jan. 1822; and *Connell*, 2d edit. i. 419.

Keay, for Heritors.—The Court, in awarding augmentations, ex- reise a discretionary power; and there is no reason why they ought o overlook or discard a tangible or substantial element in the con- ideration of what is a suitable and adequate stipend. One great bject, in the exercise of this discretion, is to preserve equality mong the clergy; and accordingly men's situations, in point of con- enience and comfort, are urged in augmentations; and the tendency f the decisions is to assimilate their situations. The owner of the ithes has as good a right to them as any proprietor to his lands, urdened only by a competent provision to the clergyman. Glebes ere originally given out of the temporalities of the church; and hence, if the minister had a good support out of that patrimony, here ought to be no encroachment on the teinds. In the united arishes of Dunkeld and Dowally, by a grant of Queen Anne, nine halders were provided to the reader. This now goes to the mi- ister of the united parishes; and would the Court, in an augmenta- ion, overlook so important an element in the suitable provision of he clergyman? The argument on the statutes does not shew that his discretionary power has been limited in the manner contended or, either in reference to the provision of the glebe itself, or over nd above the provision of the grass glebe. The statutes as to sti- pend do not give right to any particular sum. Glebes vary in value.

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The statutes applicable to teinds are 1617, c. 3, as to the maxi- mum and minimum, and 1621, c. 5, which withdraws the minimum. The words 'by and attour' are important in reference to the power given to modify the stipend; but where so great a discretion is given, it does not follow that the glebe and manse were to be over-

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looked because the words by and attour are used in the statute. The Royal Commissions of 1627, and 1633, c. 8. and c. 19, may be referred to. The minimum of 1627 and 1633 was repeated, by putting it in the discretion of the Commissioners. The act 1707 gives a large discretion to take into consideration every circumstance.

By the 48. Geo. III, c. 138. § 7, augmentations may be refused when there is no fund for augmentation, or on account of the circumstances of the case; and it is open to the parties to state all objections. So if this be taken with the Act 1707, it is clear there is a large discretion, the exercise of which may depend on circumstances; but, at all events, there is the power.

The argument of inexpediency, founded upon the difficulties of a new inquiry, may be met by the answer, that there is no necessity for going strictly to work as to this, more than in regard to many of the other elements taken into computation. The Court does not merely augment, but modifies. The question always is, what is a fair and reasonable stipend for the next twenty years?—not, how much more shall he get? In the present case, it seems most likely that the large glebe has hitherto been taken into account. In 1796, the stipend was modified to three chalders and L.56 of money, and in 1813 to six chalders and L.52 : 10 : 4½ of money, i. e. nine chalders and five bolls. Had the glebe not been taken into account, the stipend must have been much larger.

In the cases referred to, there had been no deliberate decision of the point. In Cairney and Bothny, noticed by Connell, the question was scarcely touched on. In Lochbroom, the stipend was 800 merks, and 240 merks for glebe. It was a mortification by the Earl of Cromarty, but said to be poor land, and only fit for goats. (*Lord Justice-Clerk.* The minister of this parish has now 18 chalders.) Old Deer is an explicit decision that the glebe ought not to be thrown out of view. In the case of Buitle, noticed in a note to the Old Deer case, one Judge (Lord Robertson) certainly held that the glebe ought not to be taken into view. The case of Newhills, 23d Jan. 1811, recognised the principle, that the Court, acting in the exercise of a discretionary power, will take a quantity of land added to the benefice into view. In St Madoes, no opinion was expressed upon the point. In the case of Beith, in 1822, not reported, but which, on the authority of one of their Lordships, had been quoted, it was understood to have been held that the glebe must be thrown out of view; yet there had been no debate on the point. In the reclaiming petition for the heritors, the subject of the glebe is not resumed, so that the decision went on the circumstances generally. In Wilton, 21st Nov. 1827, the land occupied as a glebe was held to have been part of the benefice; and the de-

cision in that case demolished the argument, that no income except that derived from teinds ought to be taken into view.

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The *Dean of Faculty* was heard in reply, and the cause stood over. At the advising the following opinions were given:

Opinion of Court.

Lord Justice-Clerk.—The minister is stated to have effected an exchange with certain other lands of very considerable extent, admitted to be of the value of four glebes, and the amount of return is stated to be L.95, 10s. at least; and it is averred that it may be proved to be of still higher value. The question to be considered, in the first place, is, whether, when combined with his stipend, that return produces such a suitable maintenance as to bar all claim for augmentation; second, whether, if it is not a bar to augmentation, the value of that glebe is to be taken as an element in deciding what is a proper maintenance. The first point must be conceded, as the heritors do not plead it; but a case might arise for the consideration of such a question. We have to confine ourselves at present to the second question. Now, certainly, I am bound to say, that looking to the various cases, I do not think it can be said to have been authoritatively settled either one way or the other. There is strong indication of contrariety of opinion upon the point. What I have, however, humbly to state as my opinion, on a fair consideration of the whole train of decisions, is this, that where there is a proper glebe, the return which the minister may derive from it, is not to be taken as an element in a process of augmentation, so as to affect the amount of what shall be allotted to him out of the teinds. I wish to be understood as distinguishing between a proper glebe and such land as is possessed as part of the benefice, or where there has been an erection of a new parish, and lands are set apart for the express purpose of taking the burden off the teinds, as in the cases of Wilton and Newhills. I admit, in regard to lands situated as described, that the minister is not entitled to say, he is not adequately provided for independently of this source of income. But when it can be clearly shewn, as in this case, that the minister has merely a glebe of unusual size, either possessed by him for a length of time in a progressive state of improvement, or where, by means of a transaction such as that now before you, or where, from an extraordinary exercise of legislative authority, such as his being permitted to feu the glebe, I do not consider that the value of the glebe is to be taken into account.

In the first place, I beg leave to say, that keeping in view that the maintenance of the clergy is a proper burden on the teinds, I for one was greatly moved by the clear and able deduction of the Dean of Faculty. I think he shewed distinctly, that the fair conclusion to be drawn, from a careful examination of the different Com-

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missions, authorising us to award a proper maintenance to the clergy, is, that we are to do it in the very words of the Legislature, 'by 'and attour the manse and glebe.' The principle is plain: These glebes and these manses can be shewn to have been the appurtenances of the clergy before the Reformation, and to have been handed down to their successors, and uniformly possessed by them in a way quite independent of any contribution from the teinds. It therefore appears to me not surprising, that, in the acts of the Legislature, these qualifying words, 'by and attour,' were emphatically made use of. I might enlarge on this subject to a considerable extent, but I shall come at once to the decisions, in which it seems clearly proved that this principle has been acted upon. Not to say much of the cases of Old Deer and Buitle, in which the size and value of the glebe were disregarded, and a suitable augmentation granted, I come to the cases of St Madoes and Beith. From the statement in the case of St Madoes, it appears to be actually the smallest parish in Scotland; the minister could go over the whole of it in one forenoon. It was proved that he was possessed of a glebe of considerable extent, of the richest and best land in the Carse of Gowrie, yielding from L.4 to L.5 sterling an acre; yet this was disregarded, and you gave him fourteen chalders. Then there is the case of Stair, referred to in St Madoes, where the minister got fourteen chalders, although he had a glebe of 32½ acres adjoining the manse of Stair; as also the case of Langholm, and the Barony parish of Glasgow, and the later case of Newburgh. Did your Lordships take the glebes into consideration in these cases? I presume you did no such thing, and that on the plain principle, that you could not take them into consideration. I shall now only say a few words on the case of Beith: it was pleaded in the year 1822: I perfectly well recollect it: the papers are now before me. The circumstances of that case were very strongly brought forward, yet they were considered no bar to an augmentation. It was affirmed on the part of the heritors, that in consequence of an exchange, with the full consent and approbation of all parties, the old glebe of Beith was exchanged for lands which might have rendered L.200 per annum, reserving a full and legal glebe, and that was not denied on the part of the clergyman. Notwithstanding this, you, in the first instance, awarded a stipend of seventeen chalders. The heritors reclaimed, and in the petition they recalled to the recollection of the Court the circumstances which they had already urged as an objection to the augmentation; but your Lordships would not listen to their argument: You refused to take the merits into consideration; and on what ground? On the real ground, that the amount of the return derived from the glebe was not a proper element for consideration. You gave

the minister more by two chalders than any other parish in the presbytery,—within one chalder of the stipend of the presbytery seat. I observe a proportion were still of the same opinion as to the amount to be awarded: five of them were still for giving seventeen chalders; but, by a majority, the stipend was reduced to sixteen chalders. I cannot help saying, that the train of decisions upon this point goes completely to satisfy my mind; and after giving the fullest consideration to the arguments we have heard, I am still of opinion, that where there is a glebe, which is the proper glebe, and traced in its history and origin as such, we are not entitled to take it into consideration, but are bound to award a stipend suitable to the circumstances.

In one word, if we are at this time of day to declare the value of the glebe to be a legitimate subject of inquiry, it is difficult to say where we are to stop. The value of the glebe will become more or less a subject for consideration in every augmentation which we are required to grant.

Lord Balgray.—In most of the general principles laid down by the Lord Justice-Clerk I do not differ from his Lordship; but I come rather to a different conclusion. If the decisions of the Court had been uniform on the point now submitted to our consideration, I would have considered it highly injurious ever to distrust them; but on carefully examining them, there is no coming to that conclusion. On the one hand there are the cases of Old Deer, 23d Nov. 1808; Buitle, 22d Nov. 1809; College of Aberdeen, 23d Jan. 1811; Wilton, 27th Nov. 1827: and on the other, St Madoes, 9th Dec. 1818, and cases there quoted; and Beith, 23d Jan. 1822; so that we are left to search for some principle by which we must be guided in the present question. It is perfectly true, that the proper and legal fund for the maintenance and support of the clergyman is the teinds of the parish. It is the teind over which the Court has the legitimate jurisdiction for that purpose, and which it has been the practice of the Court to exercise in a discretionary manner, paying a due regard to all the circumstances of each case, and having in view the equality, which is the nature and spirit of our ecclesiastical establishment. There can be no doubt, therefore, that our law considered the teinds as the legal fund from which the maintenance of the clergy was to be taken.

The glebe, intended by the law to be a benefit to the minister, was bestowed for a quite different purpose. It never was intended as a source of revenue, or pecuniary emolument, but solely for his private convenience and accommodation; and the various acts of the Legislature relative to that matter point out the object which was in view. And when instructions were given as to the modi-

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fying of stipends, it was most properly declared that the stipend should be 'by and attour' the glebe. Accordingly, in the common and general case, the Court of Session, ever since its establishment as a Teind Commission, in 1707, never has paid any regard to the glebe as a source of emolument to the clergyman. In following out that view, the Court have never listened to the incidental circumstance of the glebe being a little more than the legal quantity, or the quality being superior to what commonly occurs; and in the same proper spirit of interpretation, no regard has been paid to mortifications of land in favour of the minister, where it does not distinctly appear that it is given to the minister, so as to constitute a part of his stipend.

From this it may be deduced as a general rule, as contended for by the pursuer, that the glebe should be thrown out of view by the Court when modifying a stipend; but, like every other general rule, it must, in extraordinary cases, be subject to exceptions. To maintain that no general rule is subject to exceptions, would be to maintain injustice. Where the reason and principle ceases, so must the rule. The question, therefore, in the present case, is, whether the extraordinary circumstances which here occur do not create an exception to the general rule? This materially leads to the consideration of the way and manner in which the pursuer has obtained the extraordinary benefit noticed by the defender. It is somewhat singular, that when a number of parishes are united, where nothing is said in the decree of union, all the glebes, wherever situated, are held to fall to the minister of the existing parish. There is no written regulation of any kind respecting this arrangement. It has been established by custom, and now confirmed by long practice; *Forbes*, 225; *Connell on Parishes*, 413; *Erskine*, ii. 10. 61; *Bankt.* ii. 8. 18; case of Boyne, 26th Nov. 1755, *Fac. Coll.* i. No. 165. In the present case, four parishes have been united. In the southern parts of Scotland, there are instances of even more parishes. Now, in such a case, the minister gets the accession jure beneficii, and by no other title.

Now, carrying into execution the reason of the thing, if any of these glebes are so situated that they can be added to the minister's own glebe retained by him, and if they so add to his personal convenience and family accommodation, then such addition should not be taken into account in fixing the stipend of the united parishes payable from the teinds. But if it so happens that any of the united glebes cannot add to the personal convenience or family accommodation of the minister, but, in order to be occupied with prudence, must be let to a tenant for a rent, and so thrown in commercio, there seems to be no reason why such income or revenue should

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not be held as part of the benefice, and so taken into account. It is somewhat absurd to say that it is an addition to the glebe, and so under that cloak held to be excluded. There is no injustice in this, because these united glebes must have been, in all probability, taken from the heritors; and if so, they should have been returned to those heritors from whom taken, when the purpose for which they were originally given no longer existed. Again, the minister himself obtains the advantage by a very peculiar right; for it is only by default of the decree of union not mentioning the appropriation. Indeed there are instances where the Court have ordered the glebes to be sold, and the price given to the heritor who furnished a new glebe, where that was necessary, from altering the situation of kirk and manse; and it is believed that, upon an investigation, it will be found that, in some instances, the Court have adjudged these glebes, although they would merely have contributed to the minister's sustentation. Under these circumstances, I humbly think that the present case is an exception from the general rule, and that the glebe in question should be taken into account in modifying the stipend of the parish; but in fixing the rent, it must be done in such a way as to secure, under all circumstances, sure payment; and an allowance must be made for repairs, bad debts and contingencies.

Lord President.—In all cases of this kind it is of advantage to recur to the original situation of matters. We know that at present an individual minister has right to a stipend to be modified out of the tithes; yet the church at large has right to the whole tithes; and if necessary in any individual case, the clergyman has right to the whole tithes, if there is not otherwise a sufficient provision. Though you give preference to some classes of teinds, yet, if necessary, the right of the minister carries off the tithes of bishops and of universities, those, in short, in the hands of every body, and of every person. In an old Act of Parliament, it is admitted that the tithes are the proper patrimony of the kirk, and that such provision is only given to the clergy till they are restored to their right in the tithe. It is true it is no longer taken in kind: it has been settled at a valuation by the intervention of the Legislature; but the tithe is the property of the church at large, and if it is possible to figure the case, the whole teinds of Scotland may yet be appropriated to the clergy. Let us consider the nature of this modified stipend. I ask if it is possible to conceive, that of old, when the minister drew the ipsa corpora of the tithes, if he possessed a glebe as large as this minister now has, the heritors could have said,—Very true; in general you have right to draw the whole teinds, but in consequence of the size of the glebe we will only give you a half or a fourth of them. Could such a plea have been listened to for a moment?

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In the next place, consider that, notwithstanding his arable glebe, the minister is entitled to a grass glebe for the maintenance of a horse and two cows. In no case I am aware of, although in many instances the arable glebe exceeds the limited amount, is this ever considered as a bar to his obtaining a grass glebe, and although in many of these cases there was strong ground of suspicion, that in reality there had been a grass glebe which had been joined to the original glebe and made arable. There is another consideration: The stipends to be modified were at one time fixed to a maximum and minimum. This was soon departed from in practice; but take it as the Act of Parliament stood, though the minister was to have a stipend not exceeding so much, and not less than so much, there is not one word in the act as to the glebe. It is not said, If the minister has a larger glebe, you may consider whether even the minimum is to be given. So that you must have given the minimum independent of the size of the glebe; which proves to demonstration that the amount was settled without reference to the glebe at all. In all parishes they shall have the minimum, let the glebe be what it will.

Concurring, as I do, in the view of the decisions, and thinking there is a clear principle for considering the glebe to be totally independent of the stipend, and that it has been so from the beginning of the establishment of the Church in Scotland, I am of opinion, in this case, that it is impossible to take the glebe into consideration.

There is another view, independent of the general point, which I cannot overlook. There is a personal exception here. This was a transaction gone into by the minister on the one hand, and the presbytery on the other, for the benefit of the benefice. A piece of land, of infinite consequence to the Duke of Atholl, is given in consideration of valuable land elsewhere. Would the presbytery have consented, or the minister, if they had been told,—Recollect, if you get this piece of land, it is to have an effect upon your stipend? In this view of the matter the question can only, with propriety, be considered as if he still retained the old glebe. I think this a sufficient personal exception. Suppose, instead of an additional quantity of land, an heritable bond had been given as a perpetual grant to the minister serving the cure, would you have taken that into consideration? As to what was stated by Lord Balgray, as to how it came to pass that the minister got possession of more than one glebe—how could it happen so, but just because there was nobody else to take them? To whom could they be given?

The only other thing I have to say is, that of all the duties imposed upon us, that of granting stipends is the most disagreeable: We

have no fixed rule to go by; and are we to add to our discretionary power, by making the glebe a further element for our consideration?

Lord Corehouse.—At first I had doubts about this case. I remember an idea floating in the profession—I have also heard it stated on the Bench without contradiction—that in the modification of stipends, the glebe is to be left entirely out of view. But, when called to examine this matter with all the care and attention in my power, and with the assistance of the very able pleading we have heard, I have come to be of opinion, and it is a very clear one, that in this case the glebe must be taken into account. I by no means think you are in all instances to scrutinise the annual revenue of the glebe, by proof from witnesses, or land valuators; and having so ascertained it, that you shall only make up the difference. I do not even say, that when two glebes are added together, which are distinctly proved to have been, and continued such, that you are to make this scrutiny. On the contrary, I think that this would tend in a manner to make the minister a farmer, or a grazier, or at least a person who would require a capital to undertake the pastoral office. I should be very sorry thus to secularize the habits of the clergy. All I mean to say is, that if the glebe be exceedingly large, its value ought to be considered.

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I shall now take the liberty of stating shortly the grounds on which I have formed this opinion. You know, as has just now been remarked, that we have very great discretionary powers, and that we are allowed to make a suitable, competent, and sufficient provision for the clergyman. These general powers are more particularly expressed in some of the Commissions than in others. In the Act 1621, it is stated, that the Commissioners shall have express power and warrant to determine such proportions as they shall find expedient. The Act 1627 directed a minimum, but not without exceptions.

In the exercise of this power, we are likewise in use to take into view every circumstance, however indirect, however remote. Now, it does appear an extraordinary proposition, and a startling one, that we are to lay out of view a circumstance which most directly affects the interest of the minister, viz. that he possesses a large tract of land, which largely increases his income, and which is attached to the benefice. Are we to lay entirely out of view this circumstance? If it has been so settled, either by Acts of Parliament, or by our own decisions, we must not disturb the rule. But this is matter of inquiry. I have gone over all the Acts of Parliament, and it certainly does not appear to me, so far as statute law is concerned, that there is any rule of this kind. Some phrases are used,

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from which an inference to this effect might be drawn; for instance, the words, 'by and attour;' but it is important to observe, that it is only in the early statutes these words are to be found. We know, that partly from the dilapidations of the Romish clergy, partly by the rapacity of the Crown, I should rather say of the Lords of Erection, almost the whole temporalities of the Church were seized; but suppose that, in any single instance, the glebe had been sufficient for the ample maintenance of the clergyman, I confess I cannot see why, notwithstanding these words, 'by and 'attour,' we should not have taken this into view, in considering whether the clergyman should have the maximum or minimum, or whether he should have any additional income. The words do not appear to afford any inference of this kind. With regard to the grass glebe, we have no discretion there at all. The act imposes on us the necessity of giving this quantity of grass. Whatever the charge—whatever the circumstances of the clergyman with regard to fuel, provisions, &c. we are imperatively directed to give this grass glebe for the comfort of the minister. Therefore, I cannot consider that any inference is afforded from that circumstance. Then the Dean of Faculty also referred to two modern statutes, the 48. Geo. III. and 5. Geo. IV. c. 72. There we are just in the same situation: we have no discretionary power whatever: we are simply to report the present amount of stipend; and the difference is to be made up, not at our discretion, but by the Exchequer. In short, whatever be the circumstances of the clergyman, the revenue is to be made up to a certain sum. Therefore, I do not think that, either expressly, or by inference from the statutes, we can say the glebe is in no case to be taken into consideration.

Then, in the second place, the practice was put to us strongly by the Dean of Faculty. Look to the early records, said he, and you will never find the glebe taken into consideration in granting augmentations. I do not think that avails much; because, these records being mere fragments, if it so happened that in a single case the glebe was mentioned, I conceive there would be an end to this branch of the argument. Now, on looking to these records, as they are collected by Sir John Connell, it does appear in one of the very earliest of these cases, (in 1630,) that the glebe was made an element for consideration. His Majesty himself put in minutes or missives, in which he states the grounds on which he thinks a liberal allowance should be given. We are there informed that the minister had neither a manse nor a glebe. If the circumstance, that there was no glebe, was made ground for a larger grant out of the teinds, must not the argument be good, e converso? But this is not the only case: Look at the very next case,

that of Restalrig, in 1632. Here there was a preliminary question, which it is unnecessary to mention. Then they came to the augmentation. At that time the clergyman was directed to condescend. He gives in a condescendence; and what is the answer, particularly of the titular? 'but in addition to that, you have also an allowance 'from the town of Leith.' That was met by the plea, that it is voluntary, and may be withdrawn; which was considered to be completely satisfactory. What is the next answer? 'You have also the feu-'duties of part of the old parsonage lands, yielding L.47 per an-'num.' It will, of course, be said, that these were not the profits of the glebe. But what is the next statement? 'In addition to 'these feu-duties, you have also a glebe.' The minister had also the very able assistance of Mr James Aikenhead. Does he say this is altogether irrelevant? No: He goes to issue with him, and avers that these feu-duties amount only to L.25; and he says nothing about the glebe. And what is the result? Although this parish is in the immediate vicinity of Edinburgh, and a populous district, what do the Commissioners do? They modify precisely the minimum. It appears from this action, that the glebe as well as the revenue of these lands were brought prominently forward; and whether the value of the glebe was actually considered or not, at all events the clergyman and his counsel do not state any thing against the relevancy of that ground of objection. In any view, this case establishes, in the clearest manner, that the temporalities were taken into view. Now, suppose an inquiry had been directed, with a view to ascertain what part of these temporal lands returned a revenue to the minister, as contradistinguished from the glebe, and that the minister had been unable to point out the precise limits of the original glebe, could they have allowed for more than the amount of a legal glebe? There are many ways in which an addition may have been made to a benefice; for example, there was a practice very common in the Highlands, when a stipend had been modified, of giving the clergyman a tract of territory, instead of making him an annual payment out of the teinds. How do we know but that originally, in this very case, a portion of the forest of Atholl had been thus given to the minister? There is no clear evidence of the mode in which this immense glebe was originally acquired. Had there been no better proof in the case of Wilton, would not the lands possessed by the clergyman have been at once taken into account? If the minister can prove that there has been a mortification, then I would say at once, that the mortified lands must be left out of view. We are not entitled so to invert the purposes of a mortification. But then I think the onus lies on the minister; and if he has failed to shew how he came to be possessed originally of lands

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so far exceeding an ordinary glebe or glebes, are we not bound to assume that the surplus over a legal glebe, or at least over what has been proved to have been truly acquired as glebe land, was originally a portion of the benefice? He tells you that, in consequence of circumstances, he had made a very favourable exchange. That the exchange was unequal, is negatived, to a certain extent, when it is said that there was a report of the presbytery, and that the exchange was a fair and equal one to all parties. It is scarcely possible that the glebes of both the parishes of Blair and Strowan could have been equal to a ten pound land. Suppose, however, that there had been just an ordinary glebe, and that, owing to its vicinity to pleasure grounds, a very unequal exchange had been made, at least in point of value, it was a fortunate circumstance for him that his glebe should have been so situated. Are we not required to examine into the circumstances of each particular case; and why should we omit to consider this circumstance, any more than the circumstance that a market or fishing town had been established, or a coal mine discovered in his neighbourhood? I admit that the case of St Madoes appears unfavourable to my view; but it is questionable if the point upon which the parties are at issue here was there sufficiently contested. The case of Beith was one in which I think we may fairly assume that the glebe was not altogether laid out of view. The same observation will apply to the Barony parish of Glasgow. The charge being unusually heavy, it might have been necessary to award a stipend, which might have appeared high to the heritors; but seeing he had this valuable glebe, the view they probably took was,—We may give him sixteen chalders, and let him take the glebe. I shall only make one other observation. It appears to me very clear, that in the former augmentation, in 1813, this glebe must have been taken into account. Notwithstanding that augmentation was so lately granted, it is not stated that there has been any material change of circumstances since; and it does appear to me, that the decision in 1813 cannot be justified, unless upon the supposition that the glebe was taken into account.

Not finding any thing in the statutes, or in the series rerum judicatarum, which appears to me to have definitively settled the point which is now agitated, I am of opinion that, upon principle, we cannot refuse to take the glebe, in the present instance, into our consideration.

Lord Moncreiff.—After stating that he concurred in the opinions delivered by the Lords President and Justice-Clerk, and observing that this was a most ungracious objection on the part of the Duke of Atholl, his Lordship proceeded to say, the origin of the right of the minister to the glebe and to the stipend is essentially different.

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The power of the Commissioners of Teinds is limited to an award of a sufficient stipend out of the teinds. In the old Commissions, we are directed, in express words, to give to the minister what appears a due proportion of the teinds, by and attour the manse and glebe. The manse and glebe were not put under the jurisdiction of this Court at all. They were derived from sources independent of the teinds—from the old temporalities of the church, or from the old glebes, which belonged to the Popish clergy. The order of the statute is to modify a stipend by and attour the manse and glebe. Is there any direction that we are to consider what these manses and glebes consisted of? I apprehend we have nothing to do with the manse and glebe; and that has been the principle of our decisions, with few exceptions, down to the present time. In the case of the grass glebe, undoubtedly we are left without any discretion: we are to give him a grass glebe by and attour the manse and glebe. I do not think even this statute is to be taken as confined to this particular point. I think it illustrates the general principle, that, in acting under the statutes, we are to take no account of the manse and glebe.

I cannot get over the modern statutes in the same way as Lord Corehouse has done. It is true these statutes fix our duty imperatively: it is true we have no discretion; but why have we no discretion? Why do they not make an exception of the case of a minister having a large glebe? Why are we not to take that large glebe into account, in order to see whether, by the whole produce of the benefice, he derives such an income as to render the application of the statute unnecessary in his case? A minister may have a glebe of such an extent as to make it unnecessary to give any addition to bring the stipend up to L.150. Suppose he has L.140 and a glebe: he has thus a great deal more than L.150; still the statute has made no exception. (His Lordship then went into a minute investigation of the various decisions before cited, the result of which he stated to be a complete confirmation of his opinion.) The question came to be solemnly tried in the case of St Madoes, which was an extremely strong case; because it was offered to be proved there, that the glebe was worth L.150 per annum. Upon that they were ready to go to proof. On full deliberation, however, the Court refused to take that into consideration. That was one decision: then came the case of Beith. It was also an extremely strong case, and had a resemblance to the present, in so far as there had been an excambion. The glebe was undoubtedly a large one. On full argument, the Court again refused to take the glebe into consideration. They treated the point as completely settled. Is there any thing to disturb these cases? I think, with deference, there is not.

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(His Lordship then referred to the case of Wilton, and concluded with this observation): How can I say that we are now to turn back, not only on our decisions, but on the course of practice, and adopt a rule which would have the effect of completely overturning them? I do not know on what principle this can be done. If we find, in this case of Blair-Athol, that the glebe ought to be taken into view, we shall unquestionably do great injustice, after what has been done in the augmentations of Stair, Langholm, Glasgow, Scone, Newburgh, Methven, St Madoes, Beith, St Cuthbert's, and North Leith. In the last augmentation of St Cuthbert's it was quite notorious that the minister intended to feu the glebe, which was thus of great value, and yet that circumstance was not taken into account. A glebe, even when possessed in such a way as that of Blair-Athol, does not come from the heritors at all: it comes from an entirely different source. The proper presumption, in the absence of proof, is, that if the glebe could be traced to its origin, it would be found to have been allotted to the incumbent, at the time of the Reformation, not out of the teinds, but out of the glebe of the Popish incumbent.

The *Lords President, Justice-Clerk, Moncreiff* and *Cockburn* held that the glebe ought not to be taken into account.

Lords Glenlee, Balgray, Gillies, Meadowbank, Mackenzie, Medwyn, Corehouse, Fullerton and *Jeffrey*, that it ought.

Judgment.

The *Court* accordingly found, that 'the extent and value of the 'lands possessed and enjoyed by the pursuer as glebe ought to be 'taken into consideration in awarding a sufficient and competent 'stipend of the cure out of the teinds of the parish;' and on next teind day their Lordships modified the stipend to thirteen chalders.

Act. *Dean of Fac. (Hope,)* and *More*. Alt. *Keay*. *Campbell & Mack*, W. S. *H. Graham*, W. S. Agents. Teind Clerk.

R.

FIRST DIVISION.

No. CII. 21*st May* 1835.

FYFFE
against
MILLER.

PROCESS.—*Held incompetent to produce or embody in a condescendence a correspondence between the agents of the parties, after the execu-*

tion of the summons, relative to an extrajudicial settlement of the pursuer's claim.

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Fyffe v. Miller.

The pursuer in this case, in order to elide a defence of prescription, had embodied in his condescendence certain correspondence which took place between the agents after the execution, but prior to the calling of the summons, with regard to a settlement of his claim, and the Lord Ordinary 'appointed the revised condescendence for 'the pursuer to be withdrawn from process, and a new condescen-'dence lodged, *keeping out those articles in reference to an extrajudi-'cial settlement of this cause,' &c.*

The pursuer *reclaimed*, but the *Court* adhered.

Judgment.

Lord Balgray.—It is a most salutary rule, which has been uniformly observed by the Court, that the moment judicial proceedings are commenced, correspondence, with a view to adjustment, is not to be alluded to, or produced.

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Lord Corehouse, Ordinary. Act. *Anderson, Forbes.* Alt. *Wilson.* *John Johnson*, and *John Ronald*, Agents.

C.

FIRST DIVISION.

No. CIII. 21*st May* 1835.

JOHN MURDOCH, Petitioner.

Process.—*Petition for authority to dispense with citation of the next of kin in an action for making up curatorial inventories, must be intimated on the walls and in the Minute-Book of Court.*

The petitioners and others, who were appointed curators to certain minors, proceeded to make up curatorial inventories before the Sheriff of Lanarkshire, under the act 1672, c. 2. Being unable to discover any relatives on the mother's side, the petition prayed for authority to the Sheriff to dispense with citation of those relatives, &c. Several authorities were referred to of a similar nature, in all of which (it was stated on moving the petition,) the Court had granted the application de plano.

The *Lord President* observed, that if such had been the practice,

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Murdoch, Petitioner.

The *Court* therefore appointed the usual intimation of eight days*.

Judgment.

For the Petitioner, *Monro.* *James Burness*, S. S. C. Agent.

C.

SECOND DIVISION.

No. CIV. 21*st May* 1835.

MISS ANNE REED
against
VISCOUNT STRATHALLAN.

CLAUSE.—WILL.—*Question as to the construction of a clause, bequeathing to the testator's wife's niece, who resided with him, 'the 'whole of the furniture in her own bed-room, and any other she may 'choose for furnishing her house.'*

GENERAL DRUMMOND, by settlement, conveyed to Lord Strathallan all his property, heritable and moveable, under the burden of certain legacies specified, and such others as he should direct by any writing under his hand. The General left the following among other directions in a letter to Lord Strathallan, in favour of the pursuer, Miss Reed, his wife's niece, who had long resided with him, and to whom besides he left a legacy of L.5000. 'The following 'articles are to be delivered to Miss Anne Reed after my decease, 'viz. the two portraits, in the small drawing-room, of myself and 'her late aunt, Mrs Drummond, with all the alabaster vases, china 'jars and other small ornaments, the Malaga figures, piano forte, '&c. The whole of the furniture in her own bed-room, and any 'other she may choose for furnishing her house; also my carriage 'and harness. Silver, one dozen and a-half table spoons, one dessert-fork, one soup ladle, two gravy spoons, two butter ladles, one 'dozen and half tea spoons, and sugar tongs; four plated dishes, 'covers and warmers or stands; the whole of my bed and table linen, 'towels and napkins, and two feather-beds, which she made herself, 'and all my books.'

In order to determine the import of this bequest, in so far as

* The prayer of the petition was granted on 2d June 1835.

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related to furniture, Miss Reed raised an action against Lord Strathallan, concluding, inter alia, to have it found, that, under the letter above quoted, 'she was entitled to the whole furniture which was 'in her own bed-room, and to any other furniture belonging to the 'deceased at the time of his decease, which she might have chosen, 'or may yet choose, for furnishing her house, or a house suitable to 'her means and condition; and that she is still entitled to make 'such choice or selection, for furnishing the same, out of the deceased's said furniture and articles at Culdees before mentioned.'

Lord Strathallan would not admit this construction. The Lord Ordinary (Mackenzie) pronounced this interlocutor: 'Finds, That 'the pursuer's right to furniture is not limited to the furniture of 'any particular room or rooms; and allows her to lodge a specification of the furniture which she claims, reserving the question 'as to whether she has already made a selection.'

Lord Strathallan *reclaimed*, when different constructions were put upon the bequest by each of the Judges present.

Lord Glenlee agreed with the Lord Ordinary, with this qualification, that Miss Reed was only entitled to such an extent of furniture as amounted to a reasonable furnishing of a house for her station.

Lord Meadowbank held that she was entitled only to the furniture in her own bed-room, and any other bed-room.

The Lord Justice-Clerk was of opinion, that she was entitled to the furniture of her own bed-room, and that of any other room she might choose, whether bed-room or not.

The *Court* thereupon recalled the finding of the Lord Ordinary, hoc statu, and suggested a compromise. Parties having failed to compromise the action, it came before Lord Moncreiff, when the pursuer lodged a specification of articles of furniture in various rooms at Culdees. His Lordship pronounced the following interlocutor and note:

'The Lord Ordinary having considered the closed record, the 'interlocutor of Lord Mackenzie of the 13th December 1833, and 'the interlocutor of the Court recalling the same, to a certain extent, and remitting to the Lord Ordinary to receive the specification allowed by that interlocutor, and to proceed farther in the 'cause; and having considered the specification since lodged by the 'pursuer, together with the objections for the defender, and answers 'thereto; and having heard parties' procurators, and made avisandum, finds, That from the nature of the specification now lodged, 'and the pleas of the parties regarding it, it clearly appears that 'they differ essentially as to the legal construction and effect of the 'particular clause in the letter or testamentary missive referred to 'and produced: finds, therefore, That before any judgment can be 'formed concerning the justice or reasonableness of the demand for

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'the particular articles now selected, it is necessary that the principle and limits of the power of choice given by the instrument should be in some manner laid down: finds, That attending to the form of the writing, the particular terms of the clause founded on, and the position and connection in which it stands in relation to what precedes and follows it, it cannot, either on general principles of construction, or on the particular nature and circumstances of the bequest, as indicating the testator's intention, be held that the words import a general and unlimited power to the pursuer to take all or any of the furniture in the house of Culdees, in her own free will; finds, That the power thereby given, being therefore not unlimited but qualified, there is no sufficient ground, either in the words or in the connection of the clause, to warrant the construction now maintained by the pursuer, that it gives power to her to select and take away from all parts of the said house such articles of furniture, of every description, as might be necessary for furnishing an entire house somewhere else: finds, That from the ambiguous form of the expression, it is difficult to determine whether the testator, in the use of the word 'other,' meant to indicate the furniture of *one other bed-room* or one other room of any kind, or whether he referred to articles of furniture, however situated in the house; and that, in this state of ambiguity, the pursuer, in the exercise of the option, may be entitled to the more liberal construction: but finds, That whether the choice be confined to one room, or extended to articles of furniture in other parts of the house generally, it cannot, according to the established rules of construction of such writings, be so construed, as to import a bequest essentially different in character and extent from the specific legacies with which it stands in connection: therefore finds, that the bequest, by the general words, 'and any other she may choose,' must be limited to a power of choosing, liberally but fairly, any other articles of furniture of similar extent and value with the furniture of her own bed-room: finds, That the specification now lodged is not made upon this principle, but on the principle of taking furniture sufficient for the furnishing of an entire house, arbitrarily assumed: and finds, That the said specification is not admissible as a fair exercise of the choice, according to the true meaning and legal effect of the bequest: finds, That the pursuer is not barred from still making a demand for additional articles of furniture, by any definitive choice already made, so far as there is any evidence at present in process, without prejudice to a just estimate of any articles admitted to have been given and received, to which she was not otherwise entitled by the terms of the letter or other testamentary writs: therefore, on the whole, finds, That the specification lodged is not of such a nature as to be awarded to the pur-

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'suer; and appoints her of new to give in a specification framed in 'conformity to the principles above laid down, and in the meantime 'reserves all questions of expenses.'

Note.—'The real question now at issue is a question of law. 'The pursuer's first plea in law in the record is expressed too gene-'rally; but taking it with reference to the second conclusion of 'the summons, and as explained in the debate, and by the specifi-'cation, her claim distinctly is, to a right of selection from all the 'furniture in Culdees house, of articles of every description *suffi-'cient to furnish an entire house*, which has been arbitrarily estimated 'as of the nature and dimensions of some one of the houses in Staf-'ford Street, Edinburgh. It was accordingly stated by the pursuer's 'counsel, that the specification now lodged was made up on this 'principle, by a person to whom a corresponding instruction was 'given. On the other hand, the defender's counsel seemed to ad-'mit, that if this principle of choice were sustained, the specifica-'tion would not be materially excessive. The parties are therefore 'at issue on the principle.

'It is a general principle of construction, which has been applied, 'in numerous adjudged cases, to deeds and writings of various de-'scriptions, assignations, discharges, submissions, legacies, that 'where there is a specification of particulars, and then some 'general words are added, especially if such general words would, 'without the connecting words, have comprehended the particulars 'specified, such general words must be understood not only as re-'ferring only to things ejusdem generis, but as not intended to carry 'rights, or impose obligations of greater extent and value than the 'specified articles with which they stand in connection. The first 'rule of all is, that the whole instrument must be considered toge-'ther; and the principle just mentioned is but an application of that 'rule. See *Dict. v. General Assignation, General Discharge, General 'Submission, Legacy, Implied Will, Presumption, Clause*; and par-'ticularly, *Mor.* 5021—5064, and Macnab *v.* Spittal, May 30. '1797, *M. v. Clause.*

'In looking at the missive here claimed upon, it will be seen that 'it first mentions a few articles of an ornamental kind, and a piano-'forte, which appear to have been *in the drawing-room.* Then it 'specifies the whole furniture in the pursuer's own bed-room, with 'the general clause added. That is followed by the carriage and 'harness; and then comes a very specific enumeration of silver and 'plated articles; and it concludes with the whole of the *bed and 'table linen, and two particular feather-beds* described as made by the 'pursuer, and all the books.

'Now, the first impression which the perusal of such a document 'must make, is, that it could not possibly be intended as a bequest

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'of the entire furniture in the house of Culdees. A legacy of that 'magnitude would scarcely have been left to stand on such a writ- 'ing, and it is very improbable that it should not have been allu- 'ded to in the regular deed of settlement subsequently executed, 'except under the general reference to memorandums, &c.; but 'the anxious specification of particulars demonstrates that this could 'not be meant. Some of the particular articles, no doubt, might 'have required specification; but this would have been done in a 'very different form, if such had been the intention. Accordingly 'the pursuer does not maintain that there is a bequest of the whole 'furniture.

'The point, then, on which the question turns, is, that the pur- 'suer insists that the words, 'and any other she may choose for fur- "nishing her house,' must be taken as proving that the object was 'to enable her, by means of this bequest, completely to furnish a 'house; and that, therefore, the meaning was, that she should have 'what would be sufficient for that purpose. The words, 'for fur- "nishing her house,' cannot be read simply as in connection with 'the words immediately preceding them. They are connected 'equally with the first part of the sentence, 'the whole of the fur- "niture of *her own bed-room, and any other*,' &c. When it is said, 'therefore, that the intention was to give her sufficient furniture for 'furnishing a house, and this *in her own selection*, it must be asked, 'what meaning there could be in first specifying the whole furni- 'ture of her own bed-room? 'Any furniture she may choose,' &c. 'would have comprehended all that in her own bed-room with the 'rest. Then a few trifling articles in the drawing-room, and the 'piano-forte are mentioned, most of which the general words would 'have comprehended. And, after putting in the general words, 'the testator goes on to enumerate particulars, some of which at 'least (the plated articles, perhaps the linen, *and certainly* the *two* '*feather-beds*) would have been carried as furniture. How, then, 'can a court of law or equity say, that by the two or three words 'put in the middle of the instrument, the testator meant to render 'superfluous and absurd the anxious specification of particulars, by 'a clause which would override nearly them all, and enable the 'party to take ten times as much, whether in one room, or of one 'kind or another?

'The Lord Ordinary can find no principle on which he can so 'construe this letter, and, particularly, he cannot so construe it as 'to render the specification of the furniture of the pursuer's bed- 'room absolutely nugatory. If the object of furnishing an entire 'house be assumed, and the words, 'any other she may choose,' be 'taken alone, no doubt they may bear that meaning. But then the 'previous words must be rejected as useless; and the question is,

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'whether, upon *the whole words*, giving effect to them all, it appears 'that that *was* the object. The Lord Ordinary thinks that it does 'not so appear; and that the principle already explained directly 'applies, that the general words can only be construed as giving a 'bequest of things of similar nature, extent and value, with the 'special legacy with which they stand inseparably connected. The 'case of M'Nab, above referred to, is in point to the application of 'the principle to such a case.

'Apart from legal discussions, the probability seems to be, that 'General Drummond meant to give the pursuer a number of par- 'ticular articles which he thought might be *useful to her* in furnish- 'ing a house; and that, having specified the furniture of her own 'room, without more minute definition, the idea had occurred to 'him, that he would not absolutely confine her to that, but give her 'a liberty of choosing something more. He may have meant any 'other *room;* but whether he did so or not, the addition cannot be 'supposed to have been intended to be of far greater extent and 'importance than the things specified; and, at all events, the Lord 'Ordinary has no conception that he intended in such a form to 'give the entire furniture of any house; or that he intended to give 'any thing like the extensive range of selection which is taken by 'this specification.'

The pursuer *reclaimed;* but the Court adhered.

Judgment. Opinion of Court.

Lord Medwyn.—I find that each of the three Judges before whom this case formerly came entertained a different opinion from Lord Mackenzie, Ordinary in the cause: And Lord Moncreiff has now stated his view of the proper construction of the clause, differing from any other previously stated.

In construing this bequest, and looking at the terms of the letter of instructions, I cannot adopt the construction contended for by this lady, as I cannot gather that it was meant to furnish a house for her in Stafford Street, or otherwise. If the meaning had been, that the complete furnishing for a house was to be allowed, there would not have been that anxious enumeration of the furniture in her own bed-room, 'and any other she may choose.' If I had been called on to interpret this bequest, when the case was formerly before the Court, I should have agreed with Lord Meadowbank. I do not think it can mean any other furniture in the house she may choose; for looking to the nature and size of some of the furniture in the principal rooms, it seems impossible that it could have been contemplated that she should have the option of selecting these for such a house as she could be expected to use for her own accommodation; looking also to the articles of silver plate, which have been thought sufficient for her future establishment. I therefore

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think the construction of Lord Moncreiff, which has not been objected to by Lord Strathallan, is even more liberal than I should have been inclined to put upon this bequest.

Opinion of Court.

The other *Judges* concurred in adhering.

Lords Ordinary, *Mackenzie, Moncreiff.* Act. *Rutherfurd* and *A. Anderson.* *Æneas Macbean*, W. S. Agent. Alt. *Dean of Fac. (Hope,) Sol.-General, (Cunninghame,) Moncreiff.* *Robertson & Spence*, W. S. Agents. *T.* Clerk.

R.

FIRST DIVISION.

No. CV. 22*d May* 1835.

WILLIAM PAUL, Trustee on the Sequestrated Estate of Edward Boyd, *against* WILLIAM TURNBULL and RICHARD CAMPBELL of Craigie, Competing.

Implied Conveyance.—Trust.—Heritable Bond.—Bankrupt.—(1.) *Held that the words, 'together with all right, title and 'interest,' &c. contained in the procuratory of resignation in an heritable bond, were sufficient to convey to the creditor the reversionary interest of the granter in a trust-deed of the lands contained in said heritable bond, executed by his predecessor.* (2.) *A bankrupt vasfeft, having granted an heritable bond prior to sequestration, held incompetent for the creditor to serve him heir on a claim of service signed by the bankrupt, with a view to obtain a preference over the trustee.*

On 31st May 1787, the late Dr Boyd executed an entail of his estate of Mertonhall; and of the same date, and referring to the entail, he executed a disposition, which was partly of the nature of a mortis causa settlement, by which he, inter alia, disponed his estate of Culbratton (reserving his own liferent) to his eldest son, John, (the institute in the entail,) 'or the other heir of tailzie who 'may happen to succeed either to him or me, in virtue of the said 'disposition or deed of tailzie, or to the heirs or assignees of the said 'John Boyd, as heir of entail.'

On 14th June 1794, Dr Boyd executed a trust-disposition to his wife and his second son, Edward Boyd, jointly, and, after her decease, to the said Edward Boyd; whom failing, by death or non-

acceptance, to William Boyd, his third son; whom failing, to James Boyd, his youngest son; containing, inter alia, the estate of Culbratton; and declaring, that on the expiration of the trust-right, his trustees should be bound to divest 'in favour of the heirs appointed 'to succeed to my said lands and estate, by the deed of entail and 'settlement before mentioned.' This trust-disposition was granted, inter alia, for payment of provisions already granted, and thereby granted, to his younger sons, &c.

Dr Boyd died soon after the date of this trust-deed, and his widow and Edward Boyd (the trustees named in the trust-disposition in the first instance) were infeft in the lands conveyed to them, in July 1794.

John Boyd, the eldest son, survived his father, but died soon after, without issue, and without making up titles, either as heir-at-law to his father, or under any of the deeds above mentioned.

Edward, the second son, thus stood infeft, as a joint trustee, under the above trust-deed, while the succession under the deed of entail, and the reversionary interest in the trust, opened to him. Intending to complete his titles, inter alia, to Culbratton, Edward Boyd expede a general service, as heir to his father, with a view to carry the unexecuted precept contained in the disposition of 1787; and having taken infeftment thereon, he afterwards granted bonds and other securities over the lands of Culbratton; and, in particular, he entered into the following transaction, out of which the present question arose.

Having, in 1791, married Miss Yule, who had a sum of L.3000 secured to her in the hands of trustees, he afterwards (22d April 1822) borrowed the money from them, for which he gave them an heritable bond over Culbratton.

As the terms of this bond are somewhat peculiar, it may be proper to notice it more particularly. After narrating Edward Boyd's marriage settlement, acknowledging payment of the L.3000, and an obligation of repayment, it proceeds in these terms: 'And for 'the said Mark Sprot and Sir William Douglas, (the then trus-'tees,) and the survivor of them, or his foresaids, their farther se-'curity of the foresaid sums of money, I, the said Edward Boyd, 'do by these presents bind and oblige me, my heirs and successors, 'upon my own proper charges and expenses, duly and lawfully to 'infeft and seize the said Mark Sprot and Sir William Douglas, 'and the survivor of them, and the heirs and successors and assig-'nees of each survivor, heritably, but under reversion always, in 'manner after mentioned, and in trust, for the uses and purposes 'foresaid, not only in all and whole an annualrent of L.150 ster-'ling, or such annualrent, less or more, as by law for the time

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'shall effeir and correspond to the said principal sum of L.3000 'sterling, to be uplifted and taken at the said two terms of the 'year,' &c. 'furth of all and whole that part of the lands of 'Culbratton, for some time set in tack to Thomas Hannay, both 'property and superiority, with the whole parts, pendicles and 'pertinents of the said lands, lying within the parish of Penning-'ham, lordship of Galloway, and sheriffdom of Wigton; and also 'all and whole' (certain other lands,) 'or furth of any part or por-'tion of the said lands and pertinents, first and readiest rents, maills, 'farms, profits and duties of the same, but also in all and whole 'the said lands, teinds and others before specified; and that by two 'several infeftments and distinct manners of holding, the one 'thereof, as well with respect to the infeftments of annualrent, as 'to that of property in security, to be holden of me and my fore-'saids in free blench, for payment of a penny Scots money, upon 'the ground of the said lands, at the term of Whitsunday yearly, 'if asked only; and the other of the said infeftments to be holden 'from me and my foresaids of our immediate lawful superiors of 'the said lands, in manner following, viz. the foresaid infeftment of 'annualrent in free blench, for payment of a penny Scots money, 'upon the ground of the said lands, at the term of Whitsunday 'yearly, if asked only, and the infeftment of property in the said 'lands and others themselves, in security, as aforesaid, by the same 'tenure, and as freely in all respects as I or my foresaids held, hold, 'or may hold the same ourselves; and that either by resignation or 'confirmation, or both, the one without prejudice of the other; but 'in trust always, for the uses, ends and purposes, and with and un-'der the special provisions and declarations foresaid; and for ex-'peding the said infeftment by resignation, I hereby make and 'constitute

'and each of them, my lawful and irrevocable procurators, to the ef-'fect after written; giving, granting and committing to them my full 'power, warrant and commission, for me, and in my name, to com-'pear before my immediate lawful superiors of the lands and others 'above recited, or their commissioners, in their names, having power 'to receive resignations, and thereupon to grant new infeftments, 'and with all due reverence and humility as becometh, purely and 'simply, by staff and baton, as use is, to resign and surrender; like-'as I hereby resign, surrender, simpliciter upgive, overgive and 'deliver, not only all and whole the foresaid annualrent of one 'hundred and fifty pounds sterling, or such an annualrent, less or 'more, as shall, by law, for the time effeir and correspond to the 'said principal sum of three thousand pounds sterling, to be uplift-'ed and taken at the terms, by the proportions, and with the term-

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'ly penalties before mentioned, furth of all and whole the lands, 'teinds and others before described, with the pertinents, lying as 'aforesaid, and here held as repeated brevitatis causa, or furth of 'any part or portion thereof, readiest rents, maills, farms, profits 'and duties of the same; but also all and whole the said lands, 'teinds, and others before specified themselves, *together with all 'right, title and interest which I have, or can pretend thereto, or to 'any portion thereof, in time coming*, in real security,' &c.

The clause of warrandice is in these terms: 'Which annualrent 'above written, upliftable furth of the lands and others above spe-'cified, and the said lands and others themselves, and infeftments 'to follow hereon, I, the said Edward Boyd, bind and oblige my-'self, and my foresaids, to warrant at all hands, and against all 'deadly, as law will,' &c. There is then an assignation to writs and rents, and the precept of sasine desires the bailie to 'pass to 'the ground of the said lands and others, respectively and succes-'sively after others, and there give and deliver heritable state and 'sasine, with actual, real and corporal possession, to the said Mark 'Sprot and Sir William Douglas, and the survivor of them, or 'his foresaids, not only of all and whole the foresaid annualrent of 'one hundred and fifty pounds sterling, or such an annualrent, less 'or more, as, by law for the time, shall effeir and correspond to 'the said principal sum of three thousand pounds sterling, to be 'uplifted and taken at the said two terms of the year, &c. furth 'of all and whole the lands, teinds and others, with the pertinents 'before described, lying as aforesaid, and here held as repeated 'brevitatis causa, or furth of any part or portion of the same, 'readiest rents, maills, farms, &c. but also of all and whole the 'said lands, teinds and others, with the pertinents themselves, in real 'security to the said Mark Sprot and Sir William Douglas, and 'the survivors of them, and his foresaids, of the before-mentioned 'principal sum of three thousand pounds sterling, annualrents 'thereof, liquidate expenses and termly failures before specified, if 'incurred; and that by delivery to the said Mark Sprot and Sir 'William Douglas, and the survivor of them, and his foresaids, or 'to his or their certain attorney or attorneys, in his or their names, 'bearers hereof, of earth and stone of the ground of the said respec-'tive lands, and a penny money for the said annualrent, and all 'other symbols usual and requisite, to be holden in manner before 'mentioned; but in trust always, for the uses, ends and purposes, 'and with and under the provisions and declarations contained in 'the said marriage settlement: Declaring always, that the said in-'feftment of annualrent, and the other infeftments of property in 'security, are and shall be consistent, and may be used jointly by

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'the said Mark Sprot and Sir William Douglas, and the survivor 'of them, or his foresaids, in their option,' &c.

By virtue of the above precept of sasine, the said Mark Sprot and Sir William Douglas were infeft in the said annualrents and lands, conform to instrument of sasine in their favour, dated 1st, and recorded in the Particular Register of Sasines kept at Wigton, the 12th June 1802.

Edward Boyd became bankrupt, and was sequestrated, (9th August 1827,) and Mr Paul was elected trustee; and he, assuming that the infeftment in favour of Mr Boyd, following on the disposition of 1787, was inept, in respect the service should have been to his elder brother, deceased, proceeded to make up titles to the estate, by charging him to enter heir in special to his father, Dr Boyd, and thereafter obtained a decree of adjudication, upon which he got a Crown charter, followed by infeftment.

On the other hand, Benjamin Boyd and Mark Boyd, sons of Edward Boyd, (who had been appointed trustees in the place of the original trustees under the marriage-contract of their parents,) having also discovered that their father's title was erroneous, attempted to cure the defect, by expeding a general service in his favour as heir of provision to his elder brother John. The claim for service was signed by Edward Boyd himself, and bore date 24th August 1829, (after the sequestration.) They then (21st December 1830) took infeftment in his favour, on the supposition that this general service would effectually carry the unexecuted precept in the disposition 1787, and that the title, thus made up in the person of Edward Boyd, would accresce to, and validate the foresaid heritable bond granted by him in 1802, notwithstanding Edward Boyd's sequestration.

Thereafter Mrs Edward Boyd's trustees assigned their right, as trustees under the bond, to Mr Turnbull and Mr Campbell, who, with a view to try their right, now claimed a portion of the price of the lands of Culbratton, corresponding to the sum in the said bond, as forming a part of the fund in medio, in a process of multiplepoinding brought in the name of Mr Paul, the trustee under Boyd's sequestration.

In the competition which thus arose, it was admitted, on all hands, that the original title made up by Edward Boyd was inept; but Paul, averring that the trust-disposition of 14th June 1794 was a latent right, contended, that the title made up by the adjudication, on the special charge against Edward Boyd, was the only subsisting title, in respect that the general service expede in the person of the bankrupt, after sequestration, was incompetent, as inferring an act done by him. Turnbull and Campbell at first went to

issue on these grounds; but they were afterwards allowed to add a new plea, (as mentioned in the Lord Ordinary's note,) to the effect that the words in the procuratory of resignation above quoted, taken in connection with the rest of the heritable bond, imported a conveyance of the reversionary right in Boyd, under the trust-deed. The Lord Ordinary ordered minutes of debate, and the substance of the argument for the parties was as follows:

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Pleaded for Mr Paul.—It is essential that the respondents should establish a valid and effectual preference, as the general adjudication in favour of Mr Paul, independent of his feudal title, entitled him to the whole estate of the bankrupt, freed from all securities or preferences which were not created or perfected prior to the date of his confirmation. The respondent has acquired no preference by means of the service of Edward Boyd after sequestration. No mandate for serving Edward Boyd can competently be implied in any act of his prior to sequestration. Indeed this is evident, from its being considered necessary to obtain his signature to the claim. But this being a positive act of the bankrupt, subsequent to sequestration, was plainly invalid, according to the doctrine admitted by the creditors, and recognised by the dissenting Judges in the late case as to the Dunearn securities; Mansfield *v.* Walker's Trustees, 28th June 1833. The doctrine of accretion can have no application. It is held to depend on the principle of warrandice, express or implied, the law doing what the granter is bound to do. If a bankrupt be prohibited from doing any act which can create a preference after sequestration, it seems to follow, upon the above principle, that no preference can be acquired by accretion after sequestration. The respondents have acquired no preference, by means of any implied assignation in the heritable bond, of the jus crediti or right to the reversion of Culbratton, supposed to be constituted in favour of Edward Boyd, under his father's trust-deed of 1794. This would evidently be to convert a deed or contract intended for one purpose, into another purpose entirely different. The contract which they or their authors made with Mr Edward Boyd was entered into with him qua feudal proprietor of Culbratton, under the apparent title which then stood in his person. The security stipulated for was an ordinary heritable bond over the lands of Culbratton. The deed which was granted was accordingly executed by Mr Boyd, qua feudal proprietor of Culbratton, and is in all its heads and clauses a simple heritable bond or warrant for infeftment in these lands, and nothing more. Neither he nor the creditors then knew of his supposed separate right to the lands as forming part of the reversion of the trust-estate under the trust-deed of 1794. Although

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that trust-deed has now been found valid to a certain effect, it was not in operation, and was totally unknown, in 1802. It was then in complete abeyance, Mr Boyd having previously completed his feudal title to Culbratton, in the evident assumption that no trust-right existed over these lands. Accordingly, the heritable bond of 1802 makes no mention of the trust-deed of 1794, and still less does it contain an assignation of any supposed jus crediti or right belonging to Mr Edward Boyd, as the heir of tailzie in the Mertonhall estates, to Culbratton, as a part of the future reversion of the trust-estate.

The fundamental principles of our conveyancing, more especially so far as regards securities over real estates, are certainty and publicity. One great object of that system is to enable those parties, either by inspection of the records, or examination of documents, to ascertain exactly the nature and extent of the security created by any particular conveyance or deed. Now, try the respondents' present construction of their security by this test. Is it possible for any person, learned or unlearned in law, reading the heritable bond of 1802, to know or suppose that it could be held as a valid assignation to the jus crediti supposed now to belong to Mr Edward Boyd, as the heir of entail in Mertonhall under the trust-deed of 1794? Neither the trust-deed, the right to the reversion, nor the Mertonhall entail, is so much as alluded to in the heritable bond. Supposing any third party to have seen the heritable bond, and discovered its invalidity, he would, with deference, have been quite entitled to attach Mr Boyd's supposed separate jus crediti under the trust-deed, holding the heritable bond totally ineffectual as an assignation thereto. In order to have constituted a valid assignation, the deed would have required to have been in a totally different form, and to have not only mentioned, but to have expressly assigned the right which the respondents now claim under it. For example, in the case of M'Dowall, infra, founded on by the respondents, the deed was framed for the very purpose of conveying, and did expressly convey, the jus crediti or right of reversion which formed the subject of that competition. Mr Boyd's supposed right to Culbratton, as part of the reversion of the trust-estate, was somewhat peculiar; and to have made a valid conveyance of that right, considerable statement in fact and deduction of title would have been necessary. But the heritable bond founded on contains none such, and, in short, has not the semblance of an assignation to that right.

There is no averment or evidence that Edward Boyd had right to Culbratton as part of the reversion of the trust-estate. In order to have supported the supposed assignation, it would have been

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necessary for the respondents to aver, and of course prove by competent evidence, that the trust was, in 1802, or at least has now been fully executed, that Culbratton forms part of the reversion of the trust-estate, and that Mr Boyd, as the heir under the Mertonhall entail, is or was entitled to Culbratton as part of that reversion. But there is not only no averment in all or any of these subjects on the record, but there is no evidence, or offer of evidence on the subject.

The alleged assignation was never completed by any intimation. Even if the respondents had held an express and valid assignation to Edward Boyd's supposed right to Culbratton, qua part of the reversion, that assignation behoved to be duly intimated prior to the sequestration, otherwise the right was transferred by the sequestration and act of confirmation to the claimant as trustee. The respondents do not aver that there was any intimation, or even attempt at intimation; and indeed this could not be expected, seeing that no assignation ever existed. All that they say is, that because Mr Edward Boyd was both the granter of the assignation, and the trustee holding the right conveyed, the granting of the deed was equivalent to intimation. But Mr Edward Boyd never was infeft in the lands as sole trustee, the trust-disposition being in favour of him and Mrs Boyd jointly. Consequently, in any view, the alleged assignation would have required intimation to Mrs Boyd, as one of the joint trustees.

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Answered by Turnbull and Campbell.—1. The title made up by Mr Paul is utterly void and null; whereas the heritable bond granted by Mr Boyd is effectual, in respect that a good title was subsequently made up in the person of Mr Boyd, which accresces to it. It was argued in support of the first of these positions, that the fee was in hæreditate jacente of Dr Boyd at the time when the respondent completed his titles. Dr Boyd having conveyed the fee, by a mortis causa disposition, to his trustees, who, in virtue of it, were infeft, and these trustees being bound to denude in favour of the heirs named in the deed of 1787, it is clear, that neither the actual fee, nor the reversionary interest under the trust, was in the person of Dr Boyd. The fee was in the trustees, and the reversionary interest was in Mr Edward Boyd.

In support of the second position it was argued, that whenever a bankrupt has granted a deed which has not been completed at the date of his sequestration, but which is capable of being completed by the creditor or disponee, such right may be rendered effectual after the sequestration, the general adjudication in favour of the

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trustee not operating as any bar to its being so completed. Thus, for instance, if a creditor or purchaser hold a disposition with an unexecuted precept of sasine, it is competent for him to take infeftment thereon after the date of the sequestration. And in like manner, if an heir or disponee, without being infeft, convey his right to a third party, it is competent for such third party to complete his author's title by service or infeftment, so that that title may accresce to the conveyance in his favour; Watsons *v.* Cramond, 31st July 1724, *M.* 1180; Earl of Selkirk *v.* Lidderdale's Creditors, 26th June 1752, *Elchies, voce Fraud*, No. 29; Mitchell *v.* Findlay, 12th Nov. 1799, *M. voce Bankrupt, App.* No. 10; M'Lagan *v.* M'Lagan, 21st May 1800, *M. App.* 1. *Bankrupt*, No. 10; Cormack *v.* Anderson, 8th July 1829, *S. & D.* vol. vii. p. 868.

In considering the application of these cases, it must be kept in view, that the original defect in the claimants' right does not arise out of the conveyance by Mr Edward Boyd to their authors, but out of a defect in the title of Mr Edward Boyd himself. Now, there were two ways in which this error might have been corrected. The trustees under the marriage-contract might either have proceeded to charge Mr Edward Boyd to enter heir to his brother, or otherwise, relying on the obligations contained in their bond, they might have presented a claim for service in his name, upon which a retour would have been expede in common form. The former mode, though more dilatory and expensive, might have been adopted against the will of Mr Edward Boyd, and the whole proceedings might have been carried through without his intervention. But the trustees resorted to the latter as the least expensive, and the claimants conceive that it cannot be held to be the less effectual from the claim of service being presented in the name and with the signature of Mr Boyd, seeing that the same object could have been attained without his actual interference, by means of another form of procedure which was equally open to them.

There is yet another principle in law, which seems wholly to neutralise the supposed effect of the sequestration; for, if it can be shewn that the respondent can in no way complete his title to the lands of Culbratton, so as to enable him to give a valid title to a purchaser, without, in the first instance, completing the title of Mr Edward Boyd, the claimants submit, that the claim under their heritable bond must be sustained, upon the plea of frustra petis quod mox est restituturus.

2. In regard to the new plea, already alluded to, it was *pleaded*— It is admitted on all hands, that the reversionary interest under the trust-deed was vested in Mr Boyd at the date of the bond. It

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is now a settled rule of law, that such a right is transmissible, that it may be made available as a fund of credit, and that it may be assigned in security for debt. It is likewise settled law, that conveyances of such rights, when duly completed, are preferable in a competition with a trustee on a sequestrated estate, where the sequestration has been awarded subsequently to the completion of the conveyance.

These points were solemnly decided in the case of Russell *v.* M'Dowall and Selkirk, 6th Feb. 1824, *F. C.* There was a difficulty in that case, arising from the circumstance that the funds were liferented by a widow at the date of the assignation, and that the reversionary right could not be made available to the creditors till after her death. But there is no such difficulty in the present instance, as the reversionary interest had fully vested in Mr Edward Boyd long prior to 1802.

It may be very true that the heritable bond was granted under the impression that Mr Boyd was the absolute proprietor of the lands, and that many of its clauses are framed with that view; but this is immaterial. The question is not, whether the bond was framed under an erroneous impression as to the nature of Mr Boyd's rights, but whether, as it now stands, it can embrace all right and interest which he had in the lands. Now, the terms of the bond are decisive on this point. It not only contains an obligation to infeft and seise the claimants' authors in an annualrent out of the lands, but likewise conveys to them the lands, teinds and others themselves, with all right, title and interest which he had in them; and it is repeatedly declared throughout the deed, that both securities shall be effectual to the grantees, and that the one shall be without prejudice to the other.

It is said that the claim cannot be sustained on the ground now under consideration, because it would be sustaining it on a different contract from that which was in the contemplation of the parties in 1802. There is, however, no soundness in this argument. The contract, under which the advance was made to Mr Boyd in 1802, was the ordinary contract of loan, qualified with the condition, that he should grant additional security for the repayment of it. The security, indeed, which was in the immediate view of the parties, was a proper heritable bond over his estates; but if, through a defect in his title, it cannot be made available in the precise form that was contemplated, yet if the deed nevertheless accomplishes the same object, by validly and effectually transferring to the claimants the same subject, though under the character of a reversionary interest, it never can be said that there is any variation in the sub-

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stance of the contract. The subjects affected by the security are the same; and so are the rights of the claimants to apply them in payment of their debt. In addition to which, the reversionary interest is truly the minor right which is involved in the larger and more important right of full proprietor; and a deed, though framed for the purpose of carrying the latter, may equally receive effect as a valid transference of the former, provided there is nothing in the technical phraseology employed, (and there is nothing of the kind in the present instance,) which, either in express terms, or by necessary implication, restricts its operation to the conveyance of the full right of the feudal property.

The argument founded on the danger of introducing uncertainty into the system of records, if such a deed were to be received as a conveyance of the jus crediti under the trust, is scarcely entitled to an answer. If any one wishing to transact with Mr Edward Boyd had consulted the records, he would have seen there the heritable security in favour of the claimants' authors; and it is difficult to see on what ground he could have complained of the uncertainty of the records, if, after receiving this information, he had chosen to make advances to him in reliance on his property being disencumbered. But, says the respondent, supposing the creditor to have discovered the invalidity of his bond, it would have been very hard to have deprived him of the benefit of those measures which he might have taken, calculating on this blunder, to make his own debt effectual. In truth, however, there is no hardship in the case; for he might have known that, at any time, the claimants might have charged Mr Edward Boyd to enter heir to his brother, and in this way to have completed his title, for the purpose of making it accresce in favour of their own title; and further, he could have had little reason to complain, if, in a competition such as is here supposed, it should turn out that the instrument granted by Mr Boyd, though not effectual as a proper heritable bond, was yet sufficiently comprehensive in its terms to convey an inferior right in the subjects, which would have the effect of preserving to the claimants a complete security over them.

Another objection is, that Mr Edward Boyd had no right to the reversion of the estate, because it does not appear that the trust has ever been executed. It must be obvious that any inquiry as to the execution of the trust is altogether unnecessary. If indeed any of the parties having a beneficial interest in the trust-estate were to come forward and state, that they were preferable to the claimants, inasmuch as their claims under the trust had never been settled, such a statement coming from them would require to be at-

tended to. But the respondent can state no such interest; he does not represent either the creditors of the late Dr Boyd, or the creditors of the trust; and, in truth, there are none such in existence. And it is therefore a sufficient answer, in a question with the respondent, to say, that the reversionary interest in the lands of Culbratton was vested in Mr Edward Boyd in 1802, and that it was conveyed by him to the authors of the claimants. If evidence of the execution of the trust were required, the proceedings in the present process of multiplepoinding afford it. The very object of this process is to divide the price of Culbratton among all concerned; and as all the claims upon it are disposed of, except the present one, the fact is proved beyond all dispute, that all the purposes of the trust have long since been fulfilled.

With regard to the objection, that the conveyance was never intimated, there are two very obvious answers; 1*st*, The conveyance was subsequently clothed with infeftment, and the infeftment, which was duly recorded, was sufficient intimation; and, 2*dly*, As the conveyance was granted by Mr Boyd himself, no special intimation was necessary, as he himself was the trustee; Turnbull *v.* Stewart and Inglis, 12th June 1751, *M.* 868.

The Lord Ordinary pronounced this interlocutor, adding the subjoined note:

'The Lord Ordinary having heard the counsel for the parties, 'allows the additional plea in law for William Turnbull and Richard 'Campbell to be added, and made part of the record; and having 'considered the revised minutes for the parties, productions and 'whole process, sustains the claim of the said William Turnbull and 'Richard Campbell, in right of the trustees of Mrs Boyd; ranks 'and prefers them upon the fund in medio in terms of their claim, 'and decerns in the preference accordingly, and finds no expenses 'due.'

Note.—'This case is attended with difficulty, and it is not without hesitation that the Lord Ordinary has preferred the claimants, 'Messrs Turnbull and Campbell, as in right of the trustees for Mrs 'Boyd. The interlocutor proceeds upon the following grounds:

'It is admitted that the title of Edward Boyd to the lands of 'Culbratton, made up by general service to his father, Dr Boyd, 'was inept, and, consequently, that the infeftment of the trustees 'on the heritable bond by Edward Boyd in their favour was inept 'also. The Lord Ordinary is clearly of opinion, that the attempt 'by the trustees to complete the title of Edward Boyd, after his 'sequestration, was ineffectual. The heritable bond contained no 'express mandate to infeft him as heir to his brother John, and it

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'cannot be held as an implied mandate to that effect. Again, he 'had no power after his sequestration to grant such a mandate, as 'he would thereby have bestowed a preference on the personal 'creditor, to the prejudice of all the rest.

'On the other hand, it is thought that Paul, the judicial trustee 'under Boyd's sequestration, has not completed a valid title to these 'lands, Dr Boyd being not only denuded of them for the purposes 'of the trust, but having conveyed away the reversionary right after 'the purposes of the trust had been fulfilled.

'The case in this view resolving into a competition of personal 'rights, it will be observed that the heritable bond in favour of Mrs 'Boyd's trustees contains a conveyance in general terms sufficiently broad to carry Mr Boyd's jus crediti, or right of reversion, to the estate of Culbratton. It not only binds Edward Boyd 'to infeft the trustees in the lands, teinds, &c., but procuratory is 'granted for resigning the lands, teinds, &c. together *with all right, title and interest* which the granter has, or can pretend thereto, 'or to any part or portion thereof in time coming, in real security 'and more sure payment of the principal, interest, expenses and 'penalties. But even if this bond were not to be construed as 'expressly assigning the jus crediti of Edward Boyd, it must be 'held as an implied assignation to that right, agreeably to the decision in the case of Dewar, March 1686, in which an appriser, 'uninfeft, having infeft his wife in an annualrent of the apprised 'lands, she was preferred to an adjudger of her husband's right, on 'the ground that her infeftment, though otherwise invalid, was to 'be held an implied assignation of the apprising. There are other 'decisions to the same effect.

'It has been objected by the judicial trustee, that, holding the 'heritable bond an assignation of the jus crediti, it is ineffectual, 'not being completed by intimation. But the answer appears 'satisfactory: 1*st*, That no intimation to Edward Boyd was necessary, as he was not only granter of the bond, but one of the trustees under his father's trust-disposition, and therefore not only 'the cedent, but a debtor in the right assigned. With regard to 'the other trustee, Mrs Boyd, the registered infeftment upon the 'bond, as an instrument of possession, may be held equivalent to 'intimation.

'There is no plea in law in the record, that the heritable bond 'is to be held an assignation of Edward Boyd's jus crediti under 'the trust; but the facts stated, and deeds referred to, raised that 'plea, and therefore the Lord Ordinary allowed it to be added.'

Mr Paul *reclaimed*, and at the advising, *Graham Bell*, for the trus-

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tee, confined his argument to the question, whether the heritable bond in 1802 could be held effectual to the respondents as a conveyance of the reversionary interest which Edward Boyd had under the trust-deed; and the *Court*, without hearing counsel for the respondents, unanimously *adhered*.

Judgment.

Opinion of Court.

Lord Balgray.—It is quite clear that both the heritable titles in the persons of the claimants have been erroneously made up; and the only question is, whether the general words of conveyance in the heritable bond are sufficient to carry the reversionary interest, which, at the date of it, was vested in the granter, under the trust-deed of 1794. I at first had some doubts upon the point, from the circumstance, that this right was evidently not in the contemplation of the parties at the time: But looking to the broad and general terms of the conveyance, whereby all right, title or interest which the granter had in the lands were expressly assigned, and to the cases and authorities, I am satisfied that the right in question was completely transferred to the granter. Besides the case of Dewar, referred to by the Lord Ordinary, the principle recognised in the cases of Erskine *v.* Hamilton, 19. Dec. 1710, *M.* 2846, and of Riddle *v.* Riddle, 4. Jan. 1766, *Kames's Sel. Dec.* p. 311, *M.* 13,019, are directly applicable.

The *Lord President* concurred, and in addition to the cases referred to by Lord Balgray, he called the attention of the Court to the later decisions in the case of Russell *v.* M'Dowall, supra, and more particularly to the case of Harper *v.* Gordon's Trustees, 4th Dec. 1821. (His Lordship here read from notes of the opinion which he had delivered in that case as follows): 'The question there was, 'whether a jus crediti under a trust-deed could be conveyed without 'making up a title; and the circumstances were, that Mr Tait being 'feudally vested in the lands of Craig and Corse, conveyed them, 'by a trust-deed, to two persons, whom failing, to such trustees as 'should be named by the Sheriff of Dumfries.

'Accordingly, the trustees having failed, the parties interested 'applied to the Sheriff, who named the Sheriff-clerk and another to 'be trustees. There were various purposes of the trust, but those 'on which the question turned were, '*5th*, That as soon after the "decease of the said Margaret Tait, my daughter, as the heir of "her body, if a male, shall arrive at majority, or female at that age, "or be married, the trustees shall denude in favour of such heirs. "*6th*, In case of the decease of my said daughter without leaving "issue descending of her body, the trustees to denude in favour of "the granter's heirs whatsoever.' Margaret Tait, however, left a 'son, Robert Gordon of Craig, who survived majority, and her 'many years. On his majority, the trustees appointed by the

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'Sheriff appear to have abandoned the subject to him; but they 'never were infeft, nor did he ever make up a feudal title to the 'estate. He conveyed, by disposition, all his property, heritable and 'personal, and especially these lands of Corse and Craig, in trust, 'for a variety of purposes, in favour of certain trustees, who raised 'an action of declarator and adjudication, to have it found, *first*, 'That the right to these lands, under Mr Tait's trust-deed, was vested in Robert Gordon; 2*dly*, That heirs not being mentioned, 'the trust had fallen by the non-acceptance of the trust, and the 'death of the trustees; and, 3*dly*, That the lands should be adjudged to belong to the respondents, as the trust-disponees of 'Robert Gordon. In this action, the heirs-at-law of Mr Tait appeared, and pleaded, that as Robert Gordon had never made up 'any title, he had no power to convey the lands, which therefore 'remained in hereditate jacente of old Tait, and necessarily fell to 'them, as his heirs-at-law. The Lord Ordinary preferred the 'trustees, in respect that the jus crediti under the trust-deed vested in Robert Gordon without a service, and could be validly 'conveyed by him; and in this interlocutor I concurred. It is quite 'settled law that such a right, under a trust-deed or marriage-contract, is not a right of succession, but a jus crediti, and that it 'vests and transmits without a service, to the person in the right of 'it at the time; and the very case of the mode of taking it up by 'the person interested, on failure of the trustees, was carefully considered by the Court, in the case of Drummond *v.* Mackenzie of 'Redcastle, 30th June 1758, *Kam. Sel. Dec.*, where the Court found, 'that where the trust-estate was thus left in medio, (and it was 'there also heritable,) the proper mode of making up a feudal title 'was, for the party having the interest under the trust-deed to 'bring such a declaratory adjudication: That as Tait, the original trustee, might have brought an action against the trustee to 'denude, so an assignee from him must have the same right; and 'if the trustee be dead, then such adjudication comes in place of it. 'The notion that Robert Gordon should have made up a title by 'service was quite wild. He was the creditor under the trust-deed, and had right to call the trustees to account; and so it had 'been found over and over again. And although such a jus crediti, 'as relating to an heritable subject, might descend to the heir, yet 'it was so far of a moveable nature, and so little the subject of 'a service, that it was found, that the interest and jus crediti of 'a truster to call the trustees to account for the proceeds of an 'heritable subject, was attachable by arrestment, and not by inhibition; Wilson *v.* Smart, 31st May 1809; but whether heritable 'or moveable, quoad succession, it was settled law, that it equally

vested without a service; and if it vested without a service, it might be assigned or disponed, as the case might be.'

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On the principles recognised in the above case, his Lordship thought that the interlocutor of the Lord Ordinary was well founded. Although this particular right may not have been in the contemplation of the parties at the time, the object and effect of the general clause in question is to carry all right which may at any time emerge in the person of the granter.

Opinion of Court.

Lord Mackenzie and *Lord Gillies* also concurred.

The *Court* therefore adhered.

Judgment.

Lord Corehouse, Ordinary. For the Trustees, *Graham Bell*. Alt. *Anderson*. *Wm. Stewart*, W. S. and *Tod & Hill*, W. S. Agents. *D.* Clerk.

C.

SECOND DIVISION.

No. CVI. 22*d May* 1835.

ROBERT ROBERTSON
against
ANDREW ANGUS.

POLICE.—STAT. 7. AND 8. GEO. IV. c. 112. — *Found that, by the terms of the Leith Police Act, the property of pig dung, within the bounds described in the statute, is vested in the Commissioners of Police, and may be appropriated by them towards the purposes of the act.*

By the 7. and 8. Geo. IV, c. 112, (THE LEITH POLICE ACT,) under sect. 14. it is enacted, 'That nothing in this act shall be construed to take away from, or to deprive any person of any power, title or interest, patrimonial or pecuniary, civil or feudal, or of any other description whatsoever; but all such powers, &c. are hereby reserved, as ample and entire as if this act had not been passed.'

By sect. 35. the commissioners are hereby authorised to appoint an intendant, and all other persons necessary towards the execution of the act, and to remove such officers at pleasure, to fix the number of watchmen, scavengers, &c. and the wages, and to in-

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crease or diminish their number, as they shall see cause; to make orders and regulations (not being contrary to law, or inconsistent with the provisions of this act,) relative to the widening or improving the streets, ways and passages within the district, causewaying and paving, and lighting, watching, cleansing, guarding and patrolling the same, constructing common sewers, purchasing and maintaining the fire-engines, and to exact penalties for enforcing such orders and regulations.

By sect. 62. it is enacted, 'That the moneys arising from the 'foresaid assessment, and the property of the lamps, lamp-posts and 'irons, and also all the dust, dung, ashes and fuilzie, and other ma- 'terials, (excepting always stable and byre dung, and the fuilzie 'and refuse of slaughter-houses,) within the bounds before descri- 'bed, and all and singular other matters and things acquired, &c. 'by the commissioners, in pursuance of the powers hereby granted, 'shall be, and the same are hereby vested in the commission- 'ers, for the uses and purposes before and after mentioned; and 'all such moneys shall be applied, laid out and expended in paving, 'causewaying, lighting, sweeping, cleansing, guarding, watching 'and patrolling the different streets, roads, lanes, wynds, closes 'and others, and in widening and improving the streets, &c. within 'the bounds of police, and in constructing proper sewers or drains 'in all places requiring the same, and in purchasing and maintain- 'ing fire-engines, and in defraying the expense of the police esta- 'blishment within the town and district aforesaid, in paying suit- 'able salaries to the assessors, clerk, collector and treasurer, and to 'the intendant, watchmen and other officers to be appointed in man- 'ner directed by this act, and in defraying the necessary expenses 'incurred by them in the execution of the duty of their respective 'offices, and the other necessary charges and expenses of the afore- 'said establishment.'

By sect. 84. the commissioners are authorised annually to appoint an intendant, and also from time to time, as they shall judge necessary, appoint such a number of watchmen and other officers as may appear to them to be requisite, or to order and direct the said intendant to appoint the said watchmen, for guarding, patrolling and watching the different streets within the bounds, in such a manner, and under such rules and regulations as to the commissioners shall appear proper.

By sect. 93. it is enacted, that the commissioners shall appoint paviors, scavengers, &c. for paving, causewaying, sweeping and cleansing the said streets, &c. or to contract with any person for these purposes, and to remove the dung and fuilzie thereof to such

place as they shall deem least offensive to the inhabitants; with power to rent or purchase depots for that purpose within or without the bounds, and to make and enact such rules and regulations as they shall from time to time consider necessary and proper for their order and government, for regulating the time and manner of paving, sweeping, and cleansing the different streets, &c. within the said district, and for prohibiting and preventing the inhabitants from throwing out and laying down upon the said streets, roads, lanes, closes, and other places, any dung, ashes, filth, rubbish, stones, or other nuisance, and generally for the enforcement and execution of this act.

By sect. 100. it is enacted, that every person who shall throw out or lay down upon, or cause to be thrown out or laid down upon any street, road, lane, wynd, close or passage within the district aforesaid, any stones, lime, rubbish, ashes, dung, filth, refuse of vegetables, or any thing else whatever which may be considered a nuisance or annoyance at any time or in any manner, or who shall shake or dust any carpet, rug, crumb cloth, or other article, either upon such street, road, lane, wynd, close or passage, or from any window, stair, or other place within the district, (except as shall be permitted by the regulations which may be made by the commissioners,) or who shall collect any dung, ashes or fuilzie, or any thing which may be considered a nuisance, either upon any of the said streets, roads, lanes, wynds, closes or passages, or upon any place within the limits of this act, shall, for every offence, forfeit a fine not exceeding twenty shillings sterling, and that besides being obliged, if required, to remove the articles so thrown or laid down, or to pay the expense incurred in removing the same.

By sect. 116. it is enacted, that every person who shall suffer any hogs or pigs belonging to them to stray loose within the said district, or any part thereof, such person or persons shall forfeit and pay the sum of five shillings for each offence.

Sect. 136. authorises the intendant to insist for the removal of all nuisance within the limits of the police, &c.

Sect. 150. authorises the commissioners to sue and be sued in name of their clerk.

In virtue of the powers in the act, the commissioners made bye-laws to this effect, viz. 6. That carts employed in carrying away soil being ordered to go through the whole bounds, every family will daily remove their ashes and other nuisance to the said carts at the ringing of the cart-bells: That no cattle, horses, swine or poultry shall be allowed to go at large; neither shall it be allowable to keep and rear swine within the bounds of police, where the same may

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be an annoyance in any manner of way to the neighbourhood, nor to collect and accumulate the dung and filth of pig-styes; but all such dung and filth shall be removed and delivered up daily to the carts employed in taking away the common refuse of the town.

In the tack of the police dung by the commissioners to their present tacksman there is this obligation: 'And moreover, the 'said James Waldie, the tacksman, binds and obliges himself, and 'his foresaids, to sweep, cart away, and keep at all times clean, 'to the satisfaction of the said commissioners, their committee, or 'any person or persons whom the said commissioners or committee 'may appoint, the whole streets, roads, pavements, gutters, lanes, 'closes, and other places belonging to or connected with the streets 'within the bounds of police; and for this purpose, and for the pur-'pose of collecting into heaps or huts, and carting away and clear-'ing the streets, roads, pavements, gutters, lanes, closes, and other 'places of the said dung and fuilzie, to keep a sufficient number of 'able-bodied men, furnished with brooms, wheel-barrows, and other 'necessary implements, and a sufficient number of good stout horses, 'carts, and carters to do the work,' &c.

On the 29th August 1834, Robertson, farmer at Woolmet, having purchased a cart load of pigs' dung from a person who kept some pigs in Coalhill, a densely peopled part of the town of Leith, his servants were conducting the cart containing the dung along Duke Street of Leith; and when on the Edinburgh side of that street, and beyond the bounds of the Leith police, (as was alleged,) the horse, cart and dung were seized, by order of Mr Angus, intendant of police, who claimed the dung as belonging to Waldie, contractor for the dung of Leith. The dung was forthwith delivered to Waldie.

Robertson presented a petition to the Magistrates, in which he prayed for instant delivery of the horse, cart and dung. The intendant, in answering the petition, admitted the seizure of the dung, but denied that the horse and cart had been withheld from the owner. It was afterwards agreed, in the course of the process, to pass from any question about the horse and cart, and to confine the pleas of the parties to the question of property in the dung seized; and the objection, that the seizure had been made beyond the bounds of the Leith police, was also waived.

The question upon the merits turned upon the construction of the act, and substantially was, whether pig dung, made upon the premises of individual inhabitants and not thrown out with the other fuilzie, was to be considered as private property, and might be disposed of as such.

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Robertson *pleaded*—That dung of this description, and collected in the manner alleged, is the undoubted property of the party who collects it, and that it was purchased by the petitioner at a fair price, from a person who was entitled to sell it.

The intendant *pleaded*—That the dung was the property of the commissioners of police, and their tacksman.

And the record having been closed, the Magistrates (Mr John Miller, advocate, assessor,) pronounced the following interlocutor:

'Having considered the petition and the answers, with the whole pleadings and productions in process, restricts the prayer of the petition, in terms of the minute, No. 16. of process, and finds, that the cart-load of dung in question was the lawful property of the contractor with the commissioners of police, by the terms of the Act of Parliament: finds, That under the circumstances stated and admitted on record, the said contractor was entitled to possess himself of the dung in question by means of the respondent's assistance: finds, That the respondent, in rendering such assistance, was acting in the lawful discharge of his duty, either as intendant of police, or as a servant of the commissioners, whose interests and property he is bound to protect: Therefore refuses the prayer of the petition, dismisses it, and decerns; finds the respondent entitled to expenses.'

Note.—'On the merits, the Court has little difficulty in disposing of the case. There appears to be little or no doubt that the statute invests the commissioners with the property of dung of this description. It is special, and guarded in the three exceptions it makes; and the clauses having reference to this subject can bear no other than a very strict interpretation. The objects and spirit of its provisions are manifestly obvious, and the primary one is the health and cleanliness of the town, that of providing funds for the commission being purely subsidiary, although at the same time necessary to secure the objects of the other; and it nowhere excepts, but in cases where the chances of nuisance are less, or the rights of property too great to be brought under the general provision, in which cases restrictive regulations are applied. With regard to the plea, that the dung in question is stable dung, it cannot be sustained for a moment. Pig dung is of an infinitely more offensive description; and the mode in which it is admitted to have been collected, instead of fortifying, makes the petitioner's case a great deal worse. Without arguing on the spirit, however, the Court is of opinion that the police commission has an indisputable right of property in the dung in question; and it holds it to be equally clear that the respondent, as a

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'servant of that commission, was quite entitled to take possession 'in the manner in which he did.'

Robertson having advocated, the Lord Ordinary pronounced the following interlocutor:

'The Lord Ordinary having resumed consideration of the debate, with the closed record, and whole process, advocates the cause, and finds that the statute regulating the police of the town of Leith does not vest in the commissioners therein appointed the property of any dung, fuilzie, or other manure which may be collected or retained within the private premises of any of the inhabitants, or deprive them of the right of retaining, using, selling, or disposing of the same, provided that by retaining or removing such manure no nuisance is created to the neighbourhood: and therefore alters the interlocutor of the Magistrates complained of, and finds the respondent liable to the advocator in the value of the cart-load of dung in question; and before farther answer, appoints the cause to be enrolled, that parties may be prepared to state in what way they propose that such value should be ascertained.'

Note.—'The *exceptions* in the 62d section of the act raise a considerable difficulty in this case; and the Lord Ordinary confesses that he is not perfectly satisfied with any solution that has been proposed. But at the same time it appears to him so very improbable that the Legislature should have intended to confiscate the lawful property of any of the subjects of the realm, while their continued enjoyment and disposal of it was in no way hurtful to their neighbours or the community, that he would adopt any *possible* construction of the act by which such a result might be avoided.

'The claim of the intendant is very broad indeed. He says, the commissioners have the full and exclusive property of all dung, soil, or manure of any description (under the exceptions already referred to) made or existing within the bounds of police. Now, it is manifest that there may be manufactories and other large establishments within these bounds, in which, partly from the refuse of the manufacture itself, (as in the case of brewers, curriers, &c.) partly from the ashes of fires and furnaces, and from the offal of kitchens, necessaries and cess-pools, a very valuable collection of manure may be daily accumulated in covered ash-pits or other proper receptacles, so as to be in no way offensive, even within the premises themselves, and much less to the vicinity, and sold to the extent, it may be, of many pounds at the end of every week. All this, however, according to the intendant, must now be interdicted. But take the case even of a private dwelling-

'Suppose a gentleman has a large family, with a suitable house and garden attached; and that he chooses to collect, in a concealed and well-secured place, at a distance from any neighbouring property, the ashes of his fires, with the refuse of his kitchen, poultry-yard, pig-stye or pigeon-house; and, from time to time, to carry out this compost, and lay it on his own garden: if the intendant's construction of the act is right, this is a fraud upon the commissioners, and would warrant his immediate interference; and between this, which may be thought an extreme case, and the present, there is really no room for a distinction. If the gentleman in question may apply his own manure to his own adjoining garden, may he not wheel a part of it into the garden of his next neighbour? may he not carry it out to his villa, half a mile distant? or to his farm, a little way farther? And if he is entitled to do this, is it conceivable that he should be prevented from selling it to a farmer beside him?

'If these be the unavoidable consequences of the intendant's doctrine, it would seem to require the sanction of a very special enactment, and ought not to be adopted on any *implication* from obscure or ambiguous expressions. If such was truly the purpose of the Legislature, it is natural to think that they would have distinctly enacted that it should no longer be lawful for any one within the bounds of police to collect any manure within his own premises, however completely all risk of annoyance was excluded, or to dispose of it, however valuable, for his own benefit.

'It is certain, however, that there is no such substantive or express enactment in the present police act; and that the clause relied on, viz. the 62d, is very far from coming up to this description. In the first place, its object plainly is, not so much to vest any property for the first time in the commissioners, as to set forth the uses and purposes for which the property already at their disposal should be applied; at least it is certain, that if the intendant's construction is right, the soil and manure here taken for the first time from the owners is *the only thing* mentioned in the clause that was not already in the commissioners, or that can be pretended to have been previously at the disposal of any other persons. The provision is, that the *moneys raised by assessment*, the *lamps* and lamp-posts, (to be purchased or contracted for by the commissioners,) and the dust, dung and fuilzie within the bounds specified, and all other things acquired, purchased, or made by the said commissioners, shall be vested in them for the purposes specified, and applied in paving, lighting, sweeping, watching, &c. and in making drains, and paying wages and salaries to the necessary officers, &c. Now, considering the nature of the other

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'things with which it is here classed and mixed up, it seems to the 'Lord Ordinary most natural to hold that the dust, dung and fuilzie 'so to be used and appropriated, along with the assessments, lamps, '&c. *was that which was found on or brought out to the street, areas 'and passages*, over which the powers of the commissioners clearly 'extended; and not that deposited (without nuisance) in those 'private premises, into which, under ordinary circumstances, they 'had no right to enter. If it had not been for *the exceptions* in the 'clause, the Lord Ordinary would have thought this too clear to 'be disputed; and the whole difficulty of the case therefore arises, 'in his view of it, from those exceptions. They are, 'excepting "always stable and byre dung, and the fuilzie and refuse of slaugh- "ter houses.' The inference from this in favour of the inten- 'dant's argument is sufficiently obvious, and there is no doubt that 'it is a little embarrassing. For the reasons already given, how- 'ever, the Lord Ordinary cannot adopt that inference; and holding 'that the only dung or fuilzie which is vested (or rather recognised 'as already vested) in the commissioners by the general words, was 'what was found on or brought out to the streets, and in which no 'party had or retained any property, he inclines to think that the 'exception was intended to save to the owner the property of the 'particular substances mentioned, *even when found on or brought out 'to the streets or lanes;* supposing always that they were those kept 'under such precautions as neither to obstruct the passage, or oc- 'casion an actual nuisance to the neighbourhood. Stable dung, it 'is well known, cannot be allowed to remain many hours in the 'place where it is produced without injury to the horses; and yet, 'valuable as it is, it could not generally defray the expense of re- 'moval to the fields, till a considerable quantity is collected. It is 'the universal practice, accordingly, to have a small dunghill at 'the door of the stable, and in every mewse lane in the city (all 'which are public passages) such a dunghill may be seen at the 'door of every stable, public or private, and has never been sup- 'posed liable to challenge, if not of a size to obstruct the passage, 'or kept so long as to be actually offensive to the vicinity. Now 'the Lord Ordinary is of opinion that the exception in this clause 'of the act was only intended to legalise such a practice in Leith, 'and that the reasonableness of that practice sufficiently explains 'the exception as to stable and byre dung, while with regard to 'slaughter houses, it probably had reference to the special regula- 'tions contemplated and authorised to be made as to those places 'by the 109th section of the statute.

'This construction appears to be countenanced by the terms of 'the 93d, and especially of the 100th section of the act, in which

'it is impossible to hold that the words, though most general and 'comprehensive, can be construed to apply to the private dwellings 'or premises of the inhabitants, unless it is meant to be contended 'that the commissioners have a right to fine a man for shaking a 'crumb-cloth from his own back window into his own garden, or 'to enter and cleanse, at their pleasure, all the slovenly sculleries, 'nurseries, or dressing-rooms of the district. In short, the Lord 'Ordinary is of opinion that the control and jurisdiction of the com-'missioners is limited to the public and open places which they are 'directed to keep in order; and that they are not to be counte-'nanced in any invasion of private property, when kept and used 'in such a way as to give no annoyance to the vicinity.'

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Judgment.

The intendant *reclaimed*, when the *Court* recalled the interlocutor of the Lord Ordinary, and remitted simpliciter to the Magistrates.

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Lord Justice-Clerk.—Considering the recentness of this statute we are bound to put a fair construction on it. Throwing aside the contrary averments of the parties, and without reference to the subtle distinction which has been alluded to, of pigs' dung being mixed up with stable dung, the case is this,—whether the produce of a solitary pig-stye is the dung which shall be the property of the commissioners of police, or is it the private property of the gentleman who chooses, either for emolument or pleasure, to keep pigs within the burgh? In the first place, in point of principle, I am not at all surprised at the demand made to get hold of this dung; because, when you remember the object of police regulations, which is to keep the town in the best possible order, and to prevent nuisance of every description, it is not surprising that it should be understood, that when an act was passed giving such powers, the whole was to be appropriated for the public benefit, in order to defray the general expense of a well-regulated police. I agree that we are not to fix any general rule on account of the practice, but must be regulated by the act itself. One clause may no doubt throw light on another, but the leading ground of decision must rest on the 62d clause. I think that clause is expressed in very plain terms, and does lay down a rule for me to go by. I say this not altogether without doubt, but that at least is the impression on my mind on attending to the words. We are all agreed that the provision as to lamps would not include private lamps, but only all lamps either before used for the public, or at least over which they have some control, and any new ones which may be erected by the public. After enumerating these, the words are, 'also all dust, dung, 'ashes, fuilzie, excepting,' &c. Now, in the first place, I must set out

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by noticing the comprehensive nature of the word 'all.' If there had been no exception, however extraordinary the proceeding might appear, I should consider that these words would have entitled the commissioners to go into the stable yards; and had I been one of them, I should not have hesitated to go into the yards, and take the dung, whether a large or a small quantity.

Say that I am correct in this, I must now look to the excepting words; and to these I am of course bound to give a fair interpretation equally as to the phraseology of the general clause. The words distinctly except all produce of stables or byres and slaughter-houses within the bounds, in the most unqualified manner. The exception seems clearly to meet the case of a stable or straw yard, or a place where a loose cow or two may be kept on turnips; and if there should happen to be a solitary pig, it certainly would be quite absurd to listen for a moment to any attempt at a discrimination between the different kinds of dung. I would just say, If this is bona fide the produce of a stable or byre, you cannot interfere with it. But then, on the other hand, it is equally clear that all the rest of the dung, ashes and fuilzie of the town is the property of the commissioners of police, and it does not of course vary the case whether a man keeps one pig or fifty pigs within the bounds of police. It is this very case which I conceive was clearly contemplated by another clause of the act, which gives the commissioners a power to make bye-laws. This case just falls under that provision, whether a pig is secreted in the corner of a dwelling-house, or is kept by a person who chooses to feed and rear pigs in a place for the purpose. It will not do for him to say that the dung is a commodity for which there is a particular demand, and that he is entitled to give it away, or dispose of it, even if he carries it out daily. It will not do for him to say that it is merely the refuse in the streets which is to go to the commissioners. I cannot agree in any such construction. This is not the species of dung which falls under the excepting clause, and every other kind of dung is to go to the commissioners. If I were to give effect to such construction, I must shut my eyes to the terms of the exception. I certainly consider this just to have been one of the cases provided for.

The only question which remains is, whether this clause is controlled by other clauses? Various sections have been founded on: these, so far from being contrary to, appear to confirm what I have said as to the 62d section. The 98d section does not admit of an interpretation which can in any degree affect the argument which I have adopted, (his Lordship quoted the section). This power to make bye-laws is just one of the things I found on. It is most important to the whole inhabitants not to allow such dung to be

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accumulated. This provision was properly calculated to prevent the evils of a contrary practice. (His Lordship then quoted sections 100 and 109, which his Lordship did not think in the least degree aided the case on the other side; and his Lordship concluded with this observation): I think, for one, that there can be no wiser regulation, than that no one in the heart of a large town should be allowed to keep pigs so as to dispose of the dung to his own advantage. I think he is bound to carry it out daily, that it may be taken off by the police. I am satisfied, according to the clear construction of the declaratory words of the 62d section, that no party has any right of private property in this dung, that no one is entitled to dispose of it to his own advantage, and, with great deference to the Lord Ordinary, I certainly do consider that the question of right is completely settled by this Act of Parliament.

Lord Meadowbank.—I am of the same opinion. I shall not enlarge upon the subject. The purpose of this act is plain: its very object was to abridge the right of the private party, and to confer a right on the community. The advantage of a uniform system of police is obvious. All these wild speculations about arbitrary power are quite out of the question. I cannot look on this as matter where there is room for the notion of the Lord Ordinary as to the confiscation of private property. The very object of the act was to create a regular system of police. There can be no such system without funds; and the chief question for consideration is, how are funds to be obtained with the greatest facility, and with reference to the rights previously enjoyed by those whose duty it was to assist in the object? The matter now in dispute may be said to have been settled previous to this enactment. All the burghs were bound to cleanse them to the best of their powers: how could they do this but by the exercise of the very right which is now attempted to be denied them? All the dung and fuilzie was uniformly appropriated before the police act in Edinburgh, and was annually advertised. It is very little more than consistent with my own recollection, when, instead of making profit of it, the magistrates had to pay for getting the dung carried away. The farmers in the neighbourhood would not use any thing but stable dung. At that time the duty of cleansing the town may be said to have been literally imposed upon the magistrates. The inhabitants were in the habit of carrying out their refuse, and placing it in the street, which, to a certain extent, compelled the magistrates to have it carried out. In progress of time it became a valuable commodity in the hands of the magistrates, and the Legislature had thus to deal with it as a fund already created. With a view to put matters on the best possible footing, and at the same time to conduct the cleansing of the

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town at the cheapest rate, this fund was placed in the hands of a new set of commissioners, and by means of the profits of this very article a fund was created which eased the inhabitants of assessment to a considerable extent. It is in vain to talk of confiscation: the inhabitants themselves no longer deemed it private property: instead of vindicating their right, they continued to indicate their wish to get quit of it. Now, taking the whole progress of the thing, and when you look to the purpose of the act, I conceive this was just a fund which it was most proper to appropriate. In considering the meaning of the words, you are bound to give a fair and full interpretation. When you find words of general import which will cover every species of dung and fuilzie, especially when there are specific exceptions, you must take it that every thing else is included. The plain meaning of the Legislature was to convey to the police magistrate every thing brought out of the door of a man's house applicable to this purpose.

Lord Glenlee.—It appears to me that the proper way of disposing of this case originally would have been to have ordered restitution of the dung as in a question with Waldie and Robertson, reserving power to Mr Angus to institute a declarator of the right. But all claim on the part of the advocators on account of the irregularity appears to have been abandoned, as well as their right to found the interpretation of the act upon the nature of the practice. (*Keay.*—We certainly gave every facility to the other party to have the general question tried, but still we have all along offered to prove that the practice has hitherto been for the tacksman regularly to purchase this dung). There can be no doubt that, at common law, every individual has a right to appropriate the dung made by himself. Now, it appears to me that this act is susceptible of a double interpretation: it may mean, on the one hand, that where the dung is abandoned by the proprietor, by being laid upon the street, the police shall have a preference to it over every other occupant; or, on the other hand, it may be interpreted so as to give a right of property in the dung of every inhabitant, whether abandoned by him or not. In reference to this latter interpretation, although an Act of Parliament may certainly take away the rights of a private party, where it enacts that it does so, and intends to do so, yet we must take care how we give it such an interpretatation by mere inference that such was its meaning: on the contrary, we are bound to preserve the common law right, where it cannot be shewn that this would be plainly and obviously giving it a construction in opposition to the express meaning and terms of the enactment. In the view which I take of this statute, I conceive that we are bound to presume in favour of the common law right, in the absence of suffi-

ciently qualifying words,—of words which would render it incapable of a double interpretation;—words, in short, to the effect that it shall not be in the power of any inhabitant to dispose of his dung, or of a similar import. I cannot draw any inference from the Edinburgh and Glasgow to the Leith police act, which may have originated in very different circumstances. The appropriation of dung in a pig-stye to the public may be a reasonable confiscation, but a confiscation it most infallibly is. The real object of this act, as I read it, is not so much the displacing of what is vested, as it is to shew how that which shall become property is to be applied. If it is really and truly necessary that the dung in private repositories is to be confiscated in this way, although nowise offensive, if it is expedient to impose this upon those who must otherwise be burdened with an additional assessment, that is a question proper to the Legislature, and with which we have little to do. It appears to me that the only thing which can be said to be properly vested in the commissioners by this act is the street dung. If a person throws a thing upon the street, it may very properly be said to have become the property of the police under this act; but where there is a continued act of possession, where you don't throw it into the street, but continue your possession, I can see nothing in this act which can be construed as depriving you of your right of property. And why should it remain private property? Just because it is retained by the simple act of possession, which shews that the party is not willing to part with it.

There is a regulation, and a special one, that this dung, if a nuisance, may be interfered with; and this is the only thing which, so far as I see, can give the slightest support to this claim. There is not any clause in the act specifically regulating this matter, but there was a regulation as to this made a few months before this question arose. I think it would be better to overlook this regulation altogether: indeed it rather operates against the construction which is put upon the act. If the dung was vested in the commissioners, they had nothing more to do than to go and take their own property. (His Lordship here quoted that part of the act which authorises bye-laws.) They may fine any person who does not observe the regulations; but I do not see that this clause confers a right of property. If there is any right of property conferred, it is not done by the act, but by the regulations of the commissioners, who, I take it, are disabled by the precise words of the statute from making any regulation contrary to the common law. I should wish that the real circumstances of this particular case were more fully investigated. I think it is essential that we should know what had been the practice up to the date of this act, and

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that that practice, in connection with the subsequent practice, should be thoroughly considered and explained.

Lord Medwyn.—Considering the Judges from whom I differ, it would be extremely improper in me to say that this is a clear case. At the same time when I read the record, before I knew who was the reclaimer, it did strike me to be a very simple case, and even yet I cannot discover where the difficulty lies. With regard to the practice, when it is considered that this statute was so lately passed, I do not think the practice for so short a period can be of much avail. It is no doubt true, that, in a state of nature, each individual might appropriate and dispose of his dung at pleasure. Society occasions, I do not say an invasion of the natural rights of individuals, but it controls them: it is the price which man pays for the protection he obtains by living in a community, that he must yield somewhat of his natural rights for the general good. I agree with what has been said by the majority, in regard to the construction of a general act such as this; and am rather surprised to hear it said that the 62d clause was not intended to vest the property of the dung, but rather to shew how it was to be disposed of when vested. When I look to the express terms of this clause, I think it is sufficient to vest the right in these commissioners, more especially when I look to the exception, which appears to me to fortify this interpretation; and a precise clause of this kind cannot be controlled by any subsequent clause. With regard to the fact, that a party who has accumulated a quantity of stones or rubbish is made to carry them off at his own expense, or to pay the contractors for doing so, I do not see how this bears upon the question. The contractors pay a price for the manure they carry off; and they object, if they are not paid for it, to carry away what will not serve the purposes of agriculture. Hence this clause was introduced. I think this vesting clause was a most reasonable one in an act of this kind, the object of which was to clean the streets, and to prevent nuisance, by means of a system, which even added to the police funds: thus making it the least burdensome to the inhabitants at large, by making each individual to contribute in this way to the general object. I think it was most unfair and unreasonable in the parties to oppose the demand of the police under such circumstances.

Lord Ordinary, *Jeffrey*. For Intendant, *Dean of Fac. (Hope,)* and *Marshall*. For Robertson, *Keay* and *J. S. More*. *John Harpey* and *Samuel Beveridge*, Solicitors. *F.* Clerk.

R.

FIRST DIVISION.

No. CVII. *23d May* 1835.

HAMILTON
against
BROWN.

ROAD ACT, 7. AND 8. OF GEO. IV. c. 109. — SUMMARY ACTION. —THIS was a petition and complaint, founded on the Ayrshire road act, 7. and 8. Geo. IV. c. 109, in respect the respondent had acted as trustee, although not possessed of the qualification which the said act required. The substantial pleas in defence were,— that the act did not authorise a summary form of procedure, that the petition did not sufficiently specify the acts of contravention, and that the respondent was truly possessed of the requisite qualification. On report of Lord Cockburn, the Court dismissed the complaint, with expenses.

Act. *Duncan M'Neill.* Alt. *Cowan.* *Bowie & Campbell*, W. S. *Patrick & Crawford*, W. S. Agents. *D.* Clerk.

C.

Note.—A similar petition, at the instance of Pearson against Brown, was also dismissed, unico contextu.

FIRST DIVISION.

No. CVIII. *26th May* 1835.

JANET MILL
against
JAMES DOWNIE.

PROOF.—DAMAGES.—DEFAMATION.—*Circumstances in which found not proved, that a party had falsely and maliciously slandered another, and an action of damages against said party dismissed, with expenses.*

THE advocator was the pursuer of an action of aliment against the respondent, as the alleged father of her bastard child. During the

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dependence of said action, the respondent raised the present action of damages against the advocator, the nature of which will sufficiently appear from the following interlocutor, pronounced by the Sheriff-substitute of Perthshire, and confirmed by the Sheriff-depute: 'Dumblane, 30th July 1833. The Sheriff-substitute,' &c. 'finds 'it admitted that Robert Macallan *, farm servant at Tenandry, 'after having been at the fair of Bannockburn, on or about the '26th June 1831, was seized suddenly with disease, and died next 'morning: finds it admitted that the pursuer and Macallan had 'some liquor together at said fair: finds it proved, that on the 'day of the death of the said Robert Macallan, the niece of the 'master of the said Robert Macallan mentioned to the brother of 'the deceased, that he, the deceased, had, on deathbed, said, that 'if it had not been for the drink he had got from the pursuer at 'Bannockburn fair, there would be nothing ailing him: finds, That 'at and previous to the funeral of the said Robert Macallan, and 'more especially immediately thereafter, there existed a very ge-'neral rumour in the district of country where he and his relations 'resided, that the said Robert Macallan had been poisoned, and 'that the pursuer was suspected to have been the person who had 'administered the said poison in drink which he had given him at 'said fair of Bannockburn: finds, in particular, that said report was 'in circulation on the 30th June said year: finds it proved that, 'on the 2d day of July that year, the defender, on the public road 'near the Bridge of Frew, did say to the witnesses, Boyd Park and 'his wife, that the pursuer had been carried away to jail in irons for 'poisoning the said Robert Macallan, and that the pursuer had put 'the poison in some whisky which he had given to Macallan at Ban-'nockburn fair, and that the pursuer would be hanged or banished: 'finds, That the said statement was not made with the mention of the 'name of the defender's informer, and the defender has not conde-'scended on, or adduced her authority, at least for her statement 'that the pursuer had been put in jail: finds, That her said state-'ments were not made on the leading of the witnesses, or in con-'fidence, and with any caution against repetition, nor accompanied 'with any expressions of disbelief; nor has the defender proved 'any previous report to the same extent as her statements to said 'witnesses: But finds, on the other hand, That the pursuer has 'failed to prove that the defender originated the statement, (which 'indeed appears to have originated with the deceased himself,) 'nor to have repeated the statements to other persons, as libel-

* This individual had been intended to have been adduced as a witness by the advocator, in support of the action of aliment. He had been a servant, along with the advocator, in the house of the respondent.

'led; and that he has failed to prove that the said statement of 26 May 1835.
'the pursuer (defender) led to the judicial and medical investi-
'gation of the cause of Macallan's death, as alleged in his conde- Mill v. Downie.
'scendence; or that he suffered any pecuniary loss or personal
'inconvenience from the defender's said statements to the two
'witnesses; and that it is proved that similar statements, though
'not to the same extent, were in previous general circulation:
'Therefore, on the whole, finds the circumstances not sufficient
'to justify the defender, and to free her from damages; but finds
'these circumstances sufficient greatly to modify the amount of da-
'mages; modifies the same to L.5, 5s. sterling, for which decerns
'against the defender: Finds the pursuer entitled to expenses of
'process, (with the exception of the expense relating to the witness
'Macleish,) subject also to modification, and decerns.'

To this interlocutor the following note was added: '*Note.*—
'Trusting that this case has been institnted only for the purpose of
'vindicating the pursuer's character, and with no vindictive feel-
'ing towards the defender, the Court thinks it expedient to record,
'that after a most minute investigation of evidence, and medical
'dissection, by three surgeons, of Macallan's body, which for that
'purpose was disinterred, as also a chemical analysis of the contents
'of the stomach by Professor Christison, the presence of any of
'the commonly used poisons could not be detected, so that the
'death might have been occasioned by a singularly rapid attack of
'inflammation, produced by the action of the spirits, joined to se-
'veral falls from horseback in the return home from the fair.'

The Lord Ordinary pronounced this interlocutor, adding the subjoined note:

'The Lord Ordinary having heard counsel for the parties, and
'considered the proof and whole process, finds it is not proved that
'the advocator was the author of the report, that the respondent
'poisoned Robert Macallan, the person mentioned in the plead-
'ings, but that the contrary is presumable from the evidence;
'finds it is not proved that the advocator maliciously and falsely
'slandered the respondent in any way, and therefore advocates
'the cause, alters the interlocutors of the Sheriff, assoilzies the ad-
'vocator from the conclusions of the action, and decerns: finds the
'respondent liable in the expenses incurred by the advocator in
'this and the inferior court.'

Note.—'From the peculiar circumstances of this case, it is ne-
'cessary that the evidence should be carefully examined.

'The interlocutor proceeds on the following grounds: With
'an exception to be immediately mentioned, there is a total failure
'of evidence on the part of the respondent. The report of the re-

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'spondent having poisoned Macallan, (which seems to have arisen 'from his sudden death, from what he said on his deathbed, and 'from the supposed interest which the respondent had in putting 'him out of the way,) is proved to have commenced as early as the '27th of June, the day after his death, to have been current over 'the country on the day of his funeral, and so prevalent a few days 'afterwards, that his body was disinterred, and subjected to medi-'cal examination. So far from the advocator having raised this re-'port, it is proved, to the Lord Ordinary's conviction, that she 'heard it, for the first time, from Macfarlane, a carrier, at some 'interval after the funeral; and it is also clearly proved that, on that 'occasion and afterwards, repeatedly and to various persons, she 'expressed her disbelief that the respondent had been guilty of 'the crime, and her sorrow that it was laid to his charge, 'not-"withstanding all the ill he had done to her.'

'The respondent's case, therefore, rests entirely on the testi-'mony of Park, his old servant, and his wife. These witnesses 'come to Glasgow to be cited; they admit that they were drink-'ing with the respondent in the course of the day previous to their 'examination, and that Macleish joined the party. Macleish, when 'examined, prevaricated so grossly, that the Court interfered, and 'the respondent withdrew him as a witness. Park and his wife 'tell the same story verbatim; but, not to mention the suspicious 'circumstances in which they appear, their evidence, on cross-exa-'mination, is sufficient to discredit them. Though they came to 'Glasgow to be cited in the morning, remained in town all day, 'during which they were examined in the aliment case; were with 'the respondent in the alehouse, and staid till the day when they 'were examined in this case, the woman depones that she has never 'spoken with her husband on the subject of this process. Both of 'them depone that they never heard the report of Macallan being 'poisoned till the advocator told them of it, in the end of July or 'beginning of August; and the woman adds, that she never heard 'of Macallan's death till that occasion. But it is proved that, at 'that time, they resided in Kippen, a village on the high road, near 'the respondent's residence, in the very heart of the country where 'the rumour is proved to have been general as early as the end of 'June,—a rumour which must have been widely propagated, from 'the unusual circumstance of the body being raised from the grave. 'The Lord Ordinary, therefore, does not give credit to the testi-'mony of these two witnesses. It is true there is the hearsay evi-'dence of William Macallan of his late sister Betty's conversation 'with the advocator. But though hearsay in such circumstances is 'not inadmissible, it is far inferior in weight to ordinary evidence,

particularly when it relates, not to things which the deceased saw, but to the import of words spoken. Betty Macallan, not being under the sanction of an oath, may have given a careless and inaccurate statement; she may have mistaken or misunderstood what the advocator said to her, and her brother may have misapprehended what she said to him. Where there is thus a double source of error, and in a matter where the omission or alteration of a single word might convert the most innocent statement into slander, no reliance can be placed on such testimony. For an illustration of this, one need only refer to the other sister Margaret's evidence, to whom Betty repeated her conversation with the advocator, which is totally different from William's account of it, and renders the words spoken quite harmless. It appears to the Lord Ordinary, therefore, that the respondent has not established his case by evidence worthy of credit, and that there is reason to believe, that this action was brought merely as a set off against the advocator's action of aliment.'

The respondent *reclaimed*, but the *Court* adhered, and found additional expenses due. Judgment.

Lord Ordinary, *Corehouse*. Act. *H. G. Bell*. *Ainslie, Macallan & Graham*, W. S. Agents. Alt. *Wilson*. *Dundas & Jamieson*, W. S. Agents.

C.

SECOND DIVISION.

No. CIX. *26th May* 1835.

THOMAS MANSFIELD, (CORRYMONY'S TRUSTEE,)
against
WILLIAM ROBERTSON JUNIOR, W. S. (COMMON AGENT IN RANKING AND SALE OF LAKEFIELD.)

TEINDS.—IMPLIED CONVEYANCE.—*Circumstances in which it was found that a right to teinds was carried along with lands, although there was no express conveyance of the teinds.*

JAMES GRANT possessed the estate of Corrymony, in which he was infeft in 1782. He had originally no right to the teinds of any of his lands. In 1796 a contract was entered into betwixt Sir James

26 May 1835. Mansfield v. Robertson.

Grant, titular of the parish, and Grant of Glenmoriston and Grant of Corrymony, the whole heritors of the parish, whereby Sir James sold to these proprietors the teinds of their respective properties, 'under the condition that the present and all future augmentations 'of stipend shall be allocated upon their respective properties.' No infeftment ever passed on this contract in favour of Corrymony, but it was admitted he had acquired a good personal right to the teinds of his estate. In the subsequent allocations of the stipend of the parish effect was given to this contract.

In 1823, Patrick Grant of Redcastle agreed to purchase from Corrymony part of his estate, called Lakefield. In the missive, dated 1st October 1823, which was agreed to by the seller, it was set forth: 'As I understand you are disposed to sell the half davoch lands of 'Meikly, comprising the farms of Lakefield, Braefield, Inchvalgan, 'Dalmore, with mosses, muirs, and all other parts and pendicles 'thereof, I make you an offer for them of L.12,000, including the 'woods growing upon the lands.' The agreement was carried into effect by a minute of sale, whereby (27th March 1824) Corrymony agreed to sell to Patrick Grant 'all and whole the lands of Easter 'and Wester Meikle, comprehending the farms of Lakefield, &c. 'with the mosses, muirs, and all other parts and pendicles thereof, 'together with the woods growing thereon, together with all right, 'title and interest, claim of possession,' &c. In the disposition which followed, there is no special conveyance to the teinds, but there is a clause relative to the payment of public burdens in these terms: 'And farther, I (Corrymony) bind and oblige myself, my 'heirs, &c. to free and relieve the said Patrick Grant and his 'foresaids of all cess, ministers' stipends, and all other public and 'parochial burdens exigible furth of the said subjects, at and pre-'ceding the term of Whitsunday 1824, which is hereby declared 'to have been the term of entry, they being bound to free and re-'lieve my foresaids of the same thereafter, and in all time coming.' Patrick Grant possessed the teinds of Lakefield along with the stock since his purchase, without any demand of teind-duties on the part of Corrymony.

Subsequently to the sale of Lakefield, Corrymony executed a trust-disposition in favour of Mr Mansfield of 'all and sundry lands, 'annualrents, tithes, woods, fishings, houses,' &c. Under this trust-deed Corrymony has been sold; and the purchaser having specially stipulated for the teinds, the disposition contains a special conveyance to them.

In 1832, a ranking and sale of Patrick Grant's estate of Lakefield was brought, and the respondent, Mr Robertson, was chosen common agent. Upon discovering that the disposition to Lakefield

contained no express conveyance to the teinds, he proposed, in virtue of the assignation to the writs and evidents contained in the disposition of Lakefield by Corrymony, to pass infeftment in Patrick Grant's favour upon the unexecuted precept in the contract 1796, and thus feudalise the teinds in his person. 26 May 1835. Mansfield v. Robertson.

The suspender brought a suspension in order to try the question of right, and the Lord Ordinary passed the bill for this purpose: but the parties agreed to take the opinion of the Court on the bill and answers.

Suspender's Pleas.

The suspender *pleaded*—1. The teinds of Corrymony, comprehending Lakefield, were a separate subject, held upon a separate title, and, not being conveyed by the disposition of the lands of Lakefield, remained the property of Corrymony. Teinds thus held by a seller require to be conveyed by a regular disposition, or, at all events, they should be included expressly by the seller, along with the lands conveyed; *Ersk.* ii. 10. 40; and there is no evidence from which it can be presumed that it was the intention of the parties that the teinds should be conveyed. The cases of Scott *v.* Muirhead, 27th Feb. 1762, 15,638, Callender *v.* Carruthers, 29th June 1698, 15,649, and Dunning *v.* Creditors of Tullibole, 5th July 1748, 15,659 and 6308, do not apply, particularly as in the last case the teinds were not held by the proprietor on a separate title, but were possessed by him along with the lands; and the case of Campbell *v.* The Earl of Moray, 9th July 1777, *M. Teinds, App.* Part 1. No. 4, is of no authority. No circumstance can be laid hold of by the respondent as raising the inference that the teinds were conveyed, except the obligation laid on the purchaser to relieve the seller of future stipends. The case of Graham *v.* Don, 15th Dec. 1814, *Fac. Coll.*, is important, in reference to the doctrine of implication founded on by the other party. It might be noticed also, that the assignation bears reference to the inventory of writs and evidents; whereas the inventory does not contain any notice of the teinds.

Defender's Pleas.

Answered—It has been admitted, upon the authority of a passage in Erskine, that a disposition of lands, without mentioning teinds, will nevertheless be sufficient to carry the teinds, if, from special circumstances, it shall be proved that a sale of both was intended. Upon the point generally, there were the cases above referred to, in which the Court had held certain circumstances to be sufficient to carry the teinds, viz. Scott, Callender, Creditors of Tullibole, and Earl of Moray. See also Session papers in case of Tullibole in Lord Dunmore's collection.

26 May 1835. Mansfield v. Robertson.

The special circumstances founded on, are, 1. The burden of the minister's stipend being thrown on the purchaser, while the seller is only bound to relieve him of the minister's stipend previous to that date. 2. The disposition of Lakefield contains an assignation of the full rents of the lands, without distinction of stock and teind, and no separate duty has ever been paid for the latter. 3. The high price paid for Lakefield, as is evident from the fact, that though L.4000 has been expended on the mansion-house, the upset price of Lakefield is now fixed at L.9891 : 13 : 4. 4. The purchaser of Lakefield has never been called upon to pay any thing as teind-duty to Corrymony since the purchase.

Judgment.

The *Court* refused the bill of suspension.

Opinion of Court.

Lord Justice-Clerk.—The passage referred to in Erskine contains a correct statement of the law applicable to this question. He states, (ii. 10. 40.) 'Though landholders may now in the general 'case compel titulars to sell them the tithes of their own lands, yet 'lands and tithes are to this day accounted separate tenements, 'and pass by different titles, insomuch that a right to lands, though 'granted by one who has also a right to the tithes, will not carry 'the tithes, unless it shall be presumed, from special circumstances, 'that a sale of both was intended by the parties.'

The question is, looking to the facts established, whether there is enough to warrant us in holding that the teinds were carried with the lands? Although there is no mention of teinds in the missive or disposition, it is admitted that the price paid was ample. The present estimated value shows that the price was ample. Then in the disposition there is the important clause, whereby the seller undertakes the burden of the bygone stipends, but lays the burden of the future stipends on the purchaser. It could never be intended to lay this burden on the purchaser, and yet retain the teinds. Again, from 1824, Patrick Grant had been in possession of the lands and teinds, and neither Corrymony nor his trustee ever demanded any of these teinds. The special circumstances appear to be sufficient, then, to bring the case under the rule stated by Erskine, and I am satisfied there is enough to warrant us in refusing this bill.

Lord Glenlee thought that a right to the teinds was implied in the nature and condition of the grant.

Lord Medwyn.—I confess I have some difficulty in this case. The question is, whether the teinds were conveyed to the purchaser along with the lands of Lakefield. The conveyance to the subjects carries right to the lands, and also expressly to woods, but does not mention teinds. The original letter of the purchaser, and the missives of sale, contain a specification of the wood along with the

lands, but are silent as to teinds. There may, however, be circumstances to imply that the teinds were also comprehended in the purchase. The payment of stipend and possession of the teinds are founded on in this case; and if I had been satisfied that the possession by the purchaser had been sufficiently long, there would have been less difficulty. In one case cited the possession had endured for thirty-seven years, and it was difficult to maintain that such a possession was not a sufficient indication of the contract between the parties. In Lord Moray's case there had been fifty-seven years' possession. The heritors and the granter of the disposition insisted that Lord Moray had no right to his teinds; but the Court properly held that the disposition did carry right to the teinds. In the case of Tullibole it has been observed, that the disposition says nothing as to future stipends. But as the purchaser paid the stipend, and never paid tithes to the titular, this I think was a pretty strong indication of the intention of the parties, in respect that the purchaser submitted to an obligation not specially imposed upon him, and at the same time, during so many years, possessed the subject out of which this was payable.

On the whole, the inclination of my opinion is, that the teinds were not conveyed to the purchaser; and that we are going farther than in any previous case. The title in this case was personal in the seller, and one year's possession would have been sufficient to validate an express conveyance; but where there is no express conveyance, the possession must be such as to imply the conveyance; and I do not think the possession here has been sufficient for that purpose.

Lord Meadowbank.—I think that the purport and intention of the bargain by the parties was, that the conveyance should carry the teinds. This sale took place in 1828, two years before the great rise in land, and when, therefore, the price would have been extravagant on any other supposition than that the teinds were included in the bargain.

Bill-Chamber, *Lord Gillies*, Ordinary. For Suspender, *Rutherfurd* and *Sandford*. *Wm. Mackenzie*, W. S. For Respondent, *Dean of Fac.* (*Hope*,) and *H. J. Robertson*. *Pearson & Robertson*, W. S. *F.* Clerk.

R.

SECOND DIVISION.

No. CX. *27th May* 1835.

MRS MARY BRAND OR GILLESPIE, (GEORGE GILLESPIE'S EXECUTRIX,)
against
JAMES BARBOUR, (FERGUSSON'S TRUSTEE.)

BANKRUPT.—TRUSTEE.—(1.) *Circumstances in which it was found, that a creditor had been duly ranked in a sequestration, and that the trustee was liable, after a considerable lapse of time, for the amount of the dividend on the debt ranked.* (2.) *Right of an individual creditor to sue the trustee for the statutory penalties, for not lodging the funds in a bank, recognised.*

IN 1803, the estate of William Fergusson was sequestrated, and James Barbour was elected trustee. On 21st May 1804, William Gillespie made affidavit to a debt of L.445 : 17 : 6; and his affidavit, along with the grounds of debt, was lodged with the trustee; and he was ranked as a creditor, in the manner, and under the circumstances stated in the subjoined note by the Lord Ordinary.

Mrs Gillespie, as executrix of George Gillespie, the representative of William Gillespie, presented a petition, concluding against the trustee for payment of L.133 : 15 : 3, as the dividend due on the debt ranked; and also concluding against him as liable, upon sections 43. and 45. of the 54th of Geo. III. c. 137, for L.20 per cent. per annum on the dividend, from the date of the scheme of division; or at least upon such part of the said sum as exceeds L.50, on the ground of his not having lodged it in a bank, in terms of the statute.

The trustee *pleaded*—1. No ranking. 2. Compensation.

The Lord Ordinary pronounced this interlocutor:

'The Lord Ordinary having considered the record and productions, and heard parties, finds, That the respondent, James Barbour, having ranked the deceased George Gillespie, as a creditor for L.445 : 17 : 6 sterling, on the sequestrated estate of William Fergusson, on which he was and is trustee, and this ranking not having been set aside, is bound to account to the petitioner for the dividend; and that having neither paid the said dividend, nor placed it in any bank, he is liable in penal interest, under the 43d and 45th sections of the 54th Geo. III. c. 137: finds the trus-

'tee liable personally in the expenses of this branch of the discus- 27 May 1835.
'sion; and, quoad ultra, appoints the case to be enrolled after this
'interlocutor shall become final.'

Brand or Gillespie v. Barbour.

Note.—'Certain objections are stated by the respondent to the 'debt, and, in particular, to the mode in which the bills, on which 'the ranking was claimed, were protested. The Lord Ordinary 'is of opinion that all this is excluded by the fact of the ranking.

'Compensation is pleaded. The interlocutor has been framed 'so as not to exclude this, or any thing of the kind which may be 'competently urged, after the liability is fixed.

'As to the liability, it is not free from difficulty, owing partly 'to the irregularities of the trustee, and partly to the long delay of 'the creditor in complaining. The case is rested in the petition 'on the fact, that the creditor *was ranked;* and if he was, the con- 'sequences follow of course, for it was admitted that the dividend 'has neither been paid, nor set aside in any bank. But the fact 'of the ranking is denied, and this constitutes the defence. If the 'trustee had acted with any regularity, there could scarcely be a 'doubt on this subject. But he has so managed as to leave it not 'at all clear. On the one hand, he says that the debt was not due, 'that no judgment was ever pronounced in its favour, and that it 'is not in the scheme of division. On the other hand, the facts 'are, 1*st*, That a regular claim and affidavit was lodged in 1803. '2*d*, That in 1807 the creditor's name and debt are marked in 'the sederunt-book, (p. 94,) in the list of debts claimed and oaths. '3*d*, That there was no judgment *rejecting* this claim. 4*th*, That '*in the scheme of division* made out in 1809, the name of the cre- 'ditor and the amount of the debt are set down; (Sederunt-book, 'p. 100.) 5*th*, That this scheme was *intimated to the claimant*, as 'the one that was to be acted upon by public advertisement. 6*th*, 'That there was never any objection. What the respondent re- 'lies on is, 1*st*, The want of any *formal* and *direct* approval of the 'claim. 2*d*, That in the scheme the sum, instead of being first 'inserted in a column meant to contain the original debts, with the 'amount of the dividend drawn out into another column, as in other 'cases, stands marked only once, and this in the wrong column, 'the *full* claim being marked in the *dividend* column.

'The Lord Ordinary does not think that these circumstances 'justify the creditor being now told that his claim was rejected. If 'this had been really meant, it is difficult to imagine how his name 'and debts should not only be entered among the list of debts and affi- 'davits lodged in 1807, (four years after the bankruptcy,) but should 'also be inserted *at all* in the scheme in 1809, which scheme was 'advertised as the one on which the creditors were to be paid, *and*

27 May 1835.

Brand or Gillespie *v.* Barbour.

'*was acted upon in all other cases, and forms the very last entry in* '*the sederunt-book.* If the creditor had then complained to the 'Court that his claim had been *rejected*, the trustee might fairly 'have referred to these circumstances to shew that it had been ad- 'mitted. He has brought himself within the reach of the case of 'Millar *v.* Ure, 27th Jan. 1824, (reversed, no doubt, but only on 'its facts, not its principles,) by misleading the claimant to believe 'that he was ranked.

'He attempts to deny the genuineness of the entry in the scheme; 'but his statement (answers to Art. 11. of condescendence) is very 'weak, and entitled to no credit. He says that the *sum* '*appears* 'to be a *late* entry. To the Lord Ordinary it has no such appear- 'ance. But is not the trustee responsible for such entries in the '*original* sederunt-book? It would have been desirable to see how 'it stood in the process copy, but no copy has ever been lodged. 'The *name of the creditor*, however, is admitted to be correct. And 'this is enough; for, if he was marked as an admitted claimant in 'the scheme, there could be no doubt about his debt.

'It is important to observe, too, that the total debts are under 'L.1800; that Gillespie's amounted to L.445, nearly a fourth of 'the whole; and that the dividend of 6s. per pound seems to be 'only arrived at by taking this claim into view.'

Trustee's Pleas.

The trustee *reclaimed*, and *pleaded*—1. Penalties due under the 54. Geo. III. cannot be made applicable to acts done previous to the existence of that Act, the sequestration having taken place under the 33d of Geo. III. 2. There was no proper evidence of ranking. 3. Not claiming for twenty years shewed acquiescence. The trustee principally founded on the first of these grounds.

Pursuer's Pleas.

The petitioner *answered*—1. She was willing to restrict her claim to penal interest since 1814. 2. On the merits, the grounds of the Lord Ordinary's judgment were established on the record.

Opinion of Court.

The *Court*, while they held that an individual creditor might pursue for penalties, as found in Black *v.* Kennedy, 7th Dec. 1824, were of opinion that that part of the Lord Ordinary's interlocutor which found the trustee liable in the penalties of the late statute ought to be recalled.

Judgment.

The *Court* recalled as to the decerniture for penal interest; but quoad ultra adhered, and remitted to the Lord Ordinary.

Lord Ordinary, *Cockburn.* Act. *Dean of Fac. (Hope,) G. Bell.* *Wm. Stewart*, W. S. Agent. Alt. *P. Robertson* and *Macdougal.* *William Kissock*, Agent. *T.* Clerk.

R.

FIRST DIVISION.

No. CXI. 29*th May* 1835.

JAMES MARTIN, PETITIONER.

EXPENSES.—A. S. 6TH FEB. 1806.—AGENT.—*An agent is, in the ordinary case, entitled to the expense of taxation under this A. S. Special objection to Auditor's report.*

THE petitioner, Mr Martin, had been confidential clerk of Mr Bristow Fraser; and after Mr Fraser had left the country, and become bankrupt, Mr Gibson, who had been appointed trustee on the Wilsonton estate, in room of Mr Fraser, applied to Martin to make out Mr Fraser's account from 1820 to 1828, that he might produce them in a multiplepoinding.

Thereafter Martin presented a petition to the Court to have his accounts taxed, in which was included a charge for making out these accounts; and the case was remitted to the Auditor, who struck off the items.

Martin, in a note of objections to the Court, *pleaded*, that he had made out these accounts at the solicitation of Gibson, to serve a specific purpose, which he was in no way bound to do, and was therefore entitled to the expense thereof.

It was *answered*, that he had acted as a sort of manager after Mr Fraser's absence, and that, at all events, this was a charge which should have been made against Mr Fraser's estate, as the object of obtaining these accounts was to rank them in the multiplepoinding for payment.

The *Court* sustained the objection, and allowed the charge. Judgment.

A discussion then arose as to payment of the expense of the application. The objector *contended*, that he had adopted this method to save the expense of an ordinary action, which he would have been entitled to bring, and that he had incurred considerable expense in citing the different creditors.

It was *answered*, that there had been no denial of liability, and that the taxing was a ceremony which an agent was obliged to go through to entitle him to payment.

The *Court*, on referring to the clerk, who stated that it was the custom to give the expense in such cases, awarded the expenses of the application, but not of the present discussion.

For the Petitioner, *P. Robertson.* Alt. *Keay.* *D.* Clerk.

C.

FIRST DIVISION.

No. CXII. *29th May* 1835.

Mrs E. MILLER and HUSBAND
against
FARQUHARSON.

Writ.—Stat. 1681, c. 5.—*Three individuals sign a document, written by one of them, there being no testing clause: such document found to be probative against the writer alone.* (See report of this case, ante, 4th Dec. 1834.)

The pursuers, as representatives of the late Mrs Margaret Miller, in whose favour the following obligation had been granted, on her advancing to the parties (as alleged by the pursuers) the sum of L.80 sterling, brought an action against the defender, Mr Farquharson, one of the parties who had signed the obligation, (the others having died or become insolvent,) for payment of the contents: '*Paisley, 4th Nov.* 1813. We hereby acknowledge to have 'received from Margaret Miller Eighty pounds sterling, for which 'we pay her interest, at the rate of 5 per cent. per annum; and we 'oblige ourselves to repay the principal at any time, on getting six 'months' notice.' (Signed) 'D. & J. Thompson, Robt Far-'quharson, Wm Angus.' This document was holograph of one of the Thomsons, and signed by the other parties, but was not tested in terms of the act 1681, nor was it stamped.

In defence, it was first pleaded that the document being of the nature of a promissory-note, and not being stamped, would not bear faith in judgment, and was not actionable.

The Lord Ordinary sustained the defences, and assoilzied the defender, &c.; but the Court (4th Dec. 1834) altered the interlocutor of the Lord Ordinary, and found that the document is not a promissory-note, and remitted to the Lord Ordinary to proceed further in the cause, reserving all questions of expenses. (Vide report.)

When the cause came again before his Lordship, the document was stamped as a bond; and it was next pleaded in defence, that the document in question not being holograph of the defender, or duly tested, in terms of the Act 1681, was improbative, and could not therefore be sustained as a ground of action against him. The Lord Ordinary pronounced the following interlocutor, adding the subjoined note:

29 May 1835.

Miller and Husband *v.* Farquharson.

'The Lord Ordinary, &c. in respect the written agreement libelled upon is neither holograph of the defender, Robert Farquharson, nor framed in conformity with the provisions of the Act 1681, c. 5, assoilzies the said defender from the conclusions of the action, and decerns; finds him entitled to expenses from the date of the remit, and to no other expenses.'

Note.—'The pursuers' plea, that if there are more than two obligants in a deed, they are to be held as witnesses to the subscription of each other, and the deed to that effect excepted from the operation of the Act 1685, appears to the Lord Ordinary ill-founded, and pregnant with danger. Mr Erskine has said, that a deed subscribed by the members of a corporate body, or even by a number of private persons, has been once and again adjudged effectual on that ground; and he refers to two cases, that of Forrest in 1676 *, and the Sea-box of Queensferry in 1732 †. In the first of these, the obligation was granted in re mercatoria, and was therefore a privileged writ. A very full report of the second case is given by R. Bell, in his lectures on the testing clause; and for the reasons which he there states, it is plainly no precedent on the general question. On the other hand, the doctrine was expressly disregarded by the Court in the case of Rankin in 1633 ‡, and in that of the Duke of Douglas in 1742 §, in both of which, though the writs were executed before the Act 1681, they are equally good authorities on this point under the Act 1579, which contains the same provision as to the witnessing of deeds. But if the exception is to be admitted at all, it must be confined to the case put by Mr Erskine, of a deed granted by a corporate body, or a numerous association. To extend it to every writing, where there are three or more obligants, would in a great measure defeat the object of the statute, and would be opposed to the uniform practice of more than a century.

'Another fatal defect is the want of the writer's name and designation.

'No authority is cited for holding that a deed, in the handwriting of one subscriber, is to be taken as holograph, and privileged in a question with the other subscribers.

'There is no rei interventus in this case admitted by the defender, Farquharson, or proved as in a question with him.'

The pursuers *reclaimed*, and in reference to the doctrine laid

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* Forrest *v.* Veitch, 19th July 1676, *St.* 2454, *M.* 16,970.

† Sea-Box of Queensferry *v.* Steuart, 7th Jan. 1732, *Fol. Dict.* 2539, *M.* 16,899.

‡ 14th Feb. 1733, *Durie*, 671, *M.* 16,881.

§ 22d and 23d Nov. 1742, *Elch. Writ*, No. 11; *Kilk.* 610, *M.* 17,033.

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down in the last paragraph but one of the note of the Lord Ordinary, viz. that 'no authority is cited for holding that a deed, in the 'handwriting of one subscriber, is to be taken as holograph, and 'privileged in a question with the other subscribers,' *pleaded*,

Pursuers' Pleas.

that where a party signed a document, already written and signed by another, that must be held as tantamount to the writing and subscription of himself, as it was impossible that two parties could both write and subscribe the same deed; at all events he was, in such circumstances, barred, personali exceptione, from objecting to its validity, as binding upon himself.

Defender's Pleas.

It was *answered*, that as this was a deed of importance in the sense of the statute, it was absolutely essential to its being probative that it should be tested or holograph, and that it was plainly impossible a deed could be holograph of more than one individual.

Opinion of Court.

Lord Mackenzie.—I cannot say that a doubt ever occurred to me upon this part of the case. Suppose a man writes out a bond for L.10,000, in name of himself and another, and signs it himself, can it be said that he would have nothing more to do than to get the other to sign it, to make it probative against him? I can see no authority of principle for such a proposition. If one party, in similar circumstances, had granted a holograph authority to the other, that might make the obligation, written by the other, good against him. I should doubt, however, if his subscription would give any additional weight to the obligation. But there is no allegation of this kind here: All that is said is, in substance, that this party signed a deed, knowing it to be written by the other, and that the signature, so appended to the deed, is his signature.

Judgment.

The other Judges unanimously concurred, and the *Court* therefore adhered, except as to expenses; found no expenses due, &c.

Lord Corehouse, Ordinary. Act. *Dean of Fac. (Hope,) Neaves.* Alt. *D. Clerk.*
A. M'Neill. *John Richardson*, W. S. and *Alex. Nairne*, Agents.

C.

SECOND DIVISION.

No. CXIII. *29th May* 1835.

Mrs JEAN DENNISTOUN or BUCHANAN & SPOUSE *against* GEORGE & ROBERT DENNISTOUN & Company and TRUSTEES.

Guarantee.—*Question as to the construction of a letter of guarantee.*

James Buchanan junior, merchant in Glasgow, granted to his mother, the pursuer, a promissory-note for L.5250, dated 11th November 1820, and payable one day after date, for value. The pursuers being anxious for security, James Buchanan got from the firm of George and Robert Dennistoun and Company, of which he himself was a partner, the following letter of guarantee: 'Glasgow, '3d January 1821. Mrs Jean Buchanan, Madam, As we under-'stand from our partner, Mr James Buchanan, that he owes you 'L.5250, on a promissory-note for that amount, dated Glasgow, '11th November 1820, and payable one day after date, we, at his 'request, hereby engage to guarantee said bill to the extent of the 'value of the stock which he may have in our house, subject to the 'liquidation of our debts and engagements. And we farther en-'gage, should the said stock be reduced in value to the sum of 'L.10,000, to apprise you of the same, at the time of doqueting our 'books. We are, Madam,' &c. 'Geo. & Rob. Dennistoun & Co.'

The letter is holograph of Alexander M'Gregor, one of the partners.

The books of the company were balanced on 30th April 1821, and various minutes were prepared by the partners at different periods, as the result of their investigations in regard to the state of their affairs; from a fair construction of which, it was alleged by the pursuers that James Buchanan's stock was, at and subsequent to April 1821, less in value than L.10,000, and that the company were aware of the fact. On 26th February 1824, a notarial protest was taken in name of the pursuers, demanding implement of the guarantee, and protesting 'that the company were and should be 'liable for the contents of the said missives,' &c. No answer was made to this protest, nor was any intimation ever given to the pursuers that their son's stock was below L.10,000. In 1824 the company made an advance to James Dennistoun, on getting collate-

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ral security over his lands in Dumbartonshire. The company became insolvent in February 1826, and the partners were sequestrated. The pursuers in this action concluded against the company for payment of the the bill of L.5250, for which the company became guarantees, or for a ranking of the amount of the said bill against the estates of the company, and the individual partners.

Defenders' Pleas.

It was *pleaded* in defence—1*st*, That the bill to which the letter of guarantee referred had prescribed, and the debt could not be proved by the oath of James Buchanan, who was inadmissible as a witness on the score of relationship. 2*d*, The letter was improbative. 3*d*, The letter inferred a mere cautionary obligation, to which no effect could be given, when the debt to which it was accessary was extinguished. The defenders are liberated from the cautionary obligation by the failure of the pursuers to negotiate the bill within the years of prescription, by which the defenders have lost their relief against the principal debtor. 4*th*, James Buchanan's stock was never reduced to L.10,000, and the engagment to apprise the pursuers never took effect. The letter did not bind the company under any penalty to inform the pursuers if the stock was below L.10,000; but supposing the stock was so reduced, the defenders are bound to instruct the actual loss sustained in consequence. 5*th*, The stock of James Buchanan was, according to the terms of the letter of guarantee, subject to the liquidation of the debts and engagements of the company, which eventually more than absorbed that stock. In claiming under the letter of guarantee, the pursuers are bound to instruct at what periods, subsequent to the date of the letter of guarantee, Mr Buchanan had any stock available, after deducting the company's debts and engagements.

Pursuers' Pleas.

The pursuers *pleaded*—1. By the obligation libelled, the defenders became bound to pay the bill out of James Buchanan's free stock, and at the same time to apprise the pursuers whenever the value of this should be found, at the periodical balances, to have fallen below L.10,000. 2. The obligation required to be fairly and strictly interpreted, the pursuers being tied up from farther proceeding, and there being an implied obligation to have the stock ascertained by periodical balances. 3. The amount of stock was never fairly ascertained, nor was the pursuer, Mrs Buchanan, informed of the great depreciation in its value. 4. The company distrusted the amount of James Buchanan's stock, when they required security for L.3000 over his lands before making advances to him. 5. Soon after 1821 the stock was reduced greatly below L.10,000, and any perplexity or difficulty in ascertaining the true state of matters, and

the failure to give notice to Mrs Buchanan, rests entirely with the defenders. 29 May 1835.

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The Lord Ordinary pronounced this interlocutor:

'The Lord Ordinary having heard parties' procurators, and thereafter considered the closed record, and whole process, finds, That the company of George and Robert Dennistoun and Company were validly bound, in terms of the letter of guarantee libelled, and repels the defences of want of statutory solemnity and prescription: finds it sufficiently proven, by the admissions and evidence in process, that as early as the 30th of April 1821, when a balance was struck in the said company's books, the stock of James Buchanan was not truly, and according to a fair and reasonable estimate, of the value of L.10,000, and that this was known to the said company; and finds, that nevertheless the said company did not apprise the pursuer, in terms of their obligation: finds no ground in law on which it can be inferred, that in consequence merely of the said failure to implement their obligation, the said company became directly and absolutely liable to pay to the pursuer the sum contained in the promissory-note to which the said guarantee related, or interest thereon; but finds that they did become liable to make payment to the pursuer of the said sum and interest, in so far as it may appear reasonable to believe that she would, in case of receiving due notice, in terms of the letter, on the said 30th of April, have been able to secure payment thereof, either out of James Buchanan's share in the company stock, or his other funds; but finds no sufficiently precise averments, or sufficient admissions in process, to enable the Lord Ordinary to decide on that subject, nor have the parties said that they were content to restrict themselves to the evidence in process; and therefore appoints the cause to be enrolled, that an order may be made for further procedure in relation to it.'

The defenders *reclaimed,* when the Court pronounced an interlocutor, 4th March 1831, adhering to the first finding.

'The Lords having considered this note, and the other proceedings, and heard counsel thereon, adhere to the first finding of the interlocutor of the Lord Ordinary, repelling the defences of want of statutory solemnity and prescription, and on that head refuse the desire of the note: Quoad ultra, before further answer, remit to James M'Clelland, accountant in Glasgow, to examine the books of George and Robert Dennistoun and Company, referred to in the proceedings, and to report the results of such examination in reference to the respective averments of the parties, more espe-

29 May 1835. 'cially as to the mode in which these books have been made up; 'the said report to be given in quamprimum.'

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A report and additional report having been lodged, the Court ordered cases on the whole cause; upon advising which, their Lordships adhered to the interlocutor of the Lord Ordinary.

Opinion of Court.

Lord Justice-Clerk.—I recommended this accountant, and I think the duty has been well performed. Most certainly the report instructs that the stock was, in 1821, and certainly in 1825, far below the amount of the debt. I wish to hear Lord Medwyn on this question.

Lord Medwyn.—The first question is, what is the meaning and extent of the obligation undertaken by the letter of 3d January 1821? It does not appear to me to be an unconditional guarantee, or promise to pay the promissory-note, but to guarantee to the extent of the stock belonging to the pursuer's son, subject to the debts and obligations of the firm; and to make this effectual, they farther engage, should the stock be reduced in value to L.10,000, to apprise the pursuer at the time of doqueting the books.

Now, the value of the stock in the latter part of the obligation must have the same meaning as in the first part of it. But it cannot import that, when it says, 'the value of the stock, subject to 'our debts and obligations.' It is a mere statement of the point of law, that such stock is 'subject to our debts;' id est, out of which they are payable. If there had been an action to compel payment from James Buchanan's stock, the defenders would have insisted for deduction of the company debts. The statement is, (defenders' case, page 2,) that it means any stock eventually payable to him. Any other meaning will not answer the object of both parties,—the relations to be free from anxiety to secure themselves, and the partners in their anxiety to support the credit of their partner.

They could not get rid of the obligation to give notice of the reduction of the stock, by continuing the stock account at the same nominal value to the last.

Having fixed the meaning of the obligation, two questions arise: 1*st*, If the value of James Buchanan's stock was reduced to L.10,000, so that the company ought to have apprised Mrs Buchanan; and as they never did so apprise her, 2*d*, How far, and to what extent they are liable? Much is founded, in the cases, upon a new contract of copartnery in August 1820, never before noticed, but which throws no new light of any consequence upon the cause. The stock of the company was raised to L.120,000, of which James Buchanan had L.29,000. Although two years were given to pay up this sum, it was clearly not intended, or expected at least, that it would be paid;

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and there is a clause in the contract, that the partners are only to draw out the interest of this stock.

There was no division of profits subsequent to the balance of 1821. Previous to this date, large sums, to the amount, it is said, of L.100,000, had been deducted on account of bad debts. Matters certainly cannot have improved when no estimate could be made, and therefore the bad debt account was closed. The Lord Ordinary has found, and the accountant reports, that at the balance on 30th April 1821, the value of James Buchanan's stock was reduced to L.10,000; and this view of the matter is verified by the details given in the report.

Opinion of Court.

The Lord Ordinary has found correctly that a claim of damages arises, and therefore it is of importance to fix the period. It will be seen that the pursuer protested in February 1824; the stock, independent of the debts and obligations of the company, then amounted in value only to L.9075 : 12 : 3. In November 1824, the company insisted for security for L.3000, to be drawn out by James Buchanan; thus admitting that his stock was in truth not considered worth L.3000. From the date of the protest then, at least, they were bound to have given notice; but perhaps from a year, or a year and a half after the non-payment of the two promissory-notes for L.5000 and L.3500, that is, from February 1822 or August 1822.

Lord Glenlee.—Down to 1824 no intimation was given. Then the pursuer protested. Why did the defenders not give notice to her then that the stock was below L.10,000? But they gave her no answer. From this I presume, that if she had brought her action she would have recovered to the extent his stock could meet the amount of the bill. On this letter she is a creditor, and is entitled to be ranked.

Lord Meadowbank.—I think the interlocutor ought to be adhered to.

Lord Ordinary, *Mackenzie.* Act. *Dean of Fac. (Hope,)* and *Neaves. D. Cleghorn,* W. S. Agent. Alt. *Rutherfurd, Ivory. Ro. Welsh,* S. S. C. Agent. *T.* Clerk.

R.

SECOND DIVISION.

No. CXIV. *30th May* 1835.

ALEXANDER MORRISON AND OTHERS *against* LORD PROVOST, MAGISTRATES AND COMMISSIONERS OF POLICE OF GLASGOW.

POLICE.—CLAUSE.—*The Commissioners of Police in Glasgow having resolved to apply part of the funds raised for the purposes of the police act in opposing a bill introduced into Parliament by certain joint-stock water companies, the provisions of which were supposed to be injurious to the interests of the police board—bill of suspension by certain rate-payers passed, but interdict refused.*

By the Glasgow police act, power is given 'to raise a fund for defraying the expense of guarding, &c. and other expenses of the police establishment, and for the other necessary purposes of the act;' and by § 32, the assessments recovered are vested in the Lord Provost, Magistrates, Dean of Guild, Deacon Convener, and other General Commissioners; and it is directed, that 'all such moneys shall be applied, &c. in watching, lighting and cleaning the streets, &c. and, in general, defraying the establishment of superintendent of police—fire engines, collector's clerks, &c. firemen and other servants, and for the other purposes herein directed, and for no other purposes whatever.' Two new proposed joint-stock water companies in Glasgow having united and brought a bill into Parliament, in the session of 1834, the Town-Council and other public bodies considered it their duty to oppose it, and did so successfully. After that opposition had been successful, a suspension and interdict, and summons of reduction and repetition were brought by some of the present complainers, in regard to the application of any part of the police funds to the expenses incurred in that opposition; and these actions are still in dependence.

The same water companies brought another bill into Parliament during the present session, which the commissioners of police considered more objectionable than the former. In particular, it contained no provision rendering it imperative on the company to have a constant supply of water in the pipes by night and by day; it contained a number of complex clauses in regard to laying gas and water pipes through the various streets and pavements; and it

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proposed to raise the maximum water rates higher than at present. The commissioners therefore resolved to oppose the bill.

Against that resolution this bill of suspension and interdict was brought by Morrison and other rate-payers, on the ground that such an application of the funds was ultra vires of the commissioners; while the commissioners, again, founded on the police act, and the expediency of opposing in the outset measures attended with palpable injury to the police establishment.

Lord Balgray, before answer, granted the interdict; but on advising the bill, with answers, *Lord Cockburn*, 16th May 1835, 'passed the bill, but recalled the interdict,' with this note: 'Whatever redress the suspenders may ultimately be found entitled to, is 'sufficiently secured to them by the bill being passed; and nothing 'has been stated to justify the summary suspending of the commissioners, in the exercise of their statutory discretion, by maintaining the interdict, which was granted in the first instance until 'answers could be lodged.'

The suspenders *reclaimed*, but the *Court* adhered.

Judgment.

Opinion of Court.

Lord Justice-Clerk.—Looking to the powers of these police commissioners, and to some of the proposed clauses in the new water bill, I am clear there is no violation of the police statutes, prima facie in applying part of the funds to oppose this bill. It is impossible to entertain a doubt that, under this proposed bill, the requisite supply of water would no longer be granted. I do not feel justified in altering the interlocutor.

Lord Meadowbank.—I am sorry I cannot concur, for I think the interdict ought not to have been recalled. The police act was passed for specific purposes. The commissioners may resist any infringement of their regulations, but they have no power to apply the funds in opposing every bill which any speculator chooses to bring forward. The rate payers ought to go to Parliament and give their opposition if necessary. They have a right to say, The commissioners shall not apply funds given for a specific purpose towards purposes not included in the provisions of the act. If the exercise of a power like this had been intended, Parliament would have introduced a clause permitting it. But the consequence is, that we see jobs got up, and committees of police commissioners sent year after year to London, to live at the public expense for weeks, under the pretence of opposing such bills.

Lord Glenlee.—I am so well satisfied with the grounds of the interlocutor I am not for interfering. The granting of an interim interdict might be serious.

Lord Medwyn.—I concur with the Lords Justice-Clerk and

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Glenlee. It will be quite open for the parties under the passed bill to discuss the views stated by Lord Meadowbank. I observe that important clauses are proposed to be left out of the new bill, and I think it was the duty of the commissioners to interfere. If the resistance to the bill be improper, there will be an opportunity of giving redress.

Lord Cockburn, Ordinary. Act. *Dean of Fac. (Hope,) H. J. Robertson. J. Maybray & A. Howden*, W. S. Agents. Alt. *Rutherfurd* and *G. Napier. Campbell & Macdowal*, S. S. C. Agents. *T.* Clerk.

R.

FIRST DIVISION.

No. CXV. 2d *June* 1835.

MAY
against
HILL.

ROYAL BURGH.—*The Provost, Magistrates and Town-Council of a burgh having, in their corporate capacity, in terms of the sett and a subsequent act of Council, fined a party for refusing to act as magistrate after being elected,—advocation against a decree of the burgh court, enforcing the penalty, dismissed, with expenses.*

By certain regulations relative to the burgh of Glasgow, passed in the year 1748, and confirmed by the authority of the Convention of Royal Burghs, it is, inter alia, provided, 'That every person who 'shall be hereafter elected Provost, one of the Bailies, Dean of 'Guild, Deacon Convener or Treasurer, shall, on his refusing or 'declining to accept or exercise any of the said offices, at the first 'meeting of the Council, after the election of the Dean of Guild, 'be fined and amerciated by the Magistrates and Town-Council 'in the sum of L.40 sterling, payable to the collector of the Mer-'chants' and Trades' Houses respective, for the behoof of the poor, 'according to the rank which the refusing or neglecting office-'bearer shall be of; with certification, that if the said respective 'collectors do not produce, within three months after, an extract of 'the sentence for the fines shall be put into their hands, a certificate 'from the Dean of Guild or Convener respective, of their having ac-'counted for the said several fines, the said respective collectors shall

'be obliged to pay the same, with one-fifth part more for their ne-
'glect in levying thereof, to the town treasurer for the use of the
'burgh; and this article, with the immediately preceding one, to
'be read annually in the Merchants' and Trades' Houses at their
'first meeting, after electing the Dean of Guild and Convener.'

On 10th July 1801, the Provost, Magistrates and Town-Council made an application to the Convention of Royal Burghs for an alteration of their sett in certain respects, and also to authorise an increase in the amount of fines. The Convention having complied with their request in the first particular, but having demurred as to the second, an act of council was passed, (2d October 1801,) whereby the amount of fines was doubled.

On the 4th of October 1831, John May, the complainer in the present advocation, was elected to bear office as second merchant bailie of the burgh of Glasgow. Having failed to appear and accept, he was duly cited by a council officer, under the authority of the provost's warrant, to attend a meeting of council, to be held on the 18th of October 1831, under certification, that if he failed to attend, he should be held to have refused office. He failed to attend, and the Magistrates and Town-Council accordingly, at their meeting of the above date, fined and amerciated the complainer in the sum of L.80 sterling, and disqualified him accordingly, and decerned and ordained him to make payment of that sum to the respondent, collector of the Merchants' House of Glasgow, and his successors in office, for behoof of the poor of that House; ordaining the collector, within three months after an extract of the sentence being put into his hands, to produce a certificate under the hand of the Dean of Guild for the time, that he had accounted for the fine to the House; ordaining the collector otherwise to pay the fine to the City-Treasurer, for the use of the burgh, with one-fifth part of penalty. The office of second merchant bailie was at the same time declared vacant.

Payment of the penalty having been ineffectually demanded from May, a summons was raised before the bailie court of Glasgow, at the instance of Lawrence Hill, collector of the Merchants' House of Glasgow, founding upon the act of council, and May's refusal to pay, and concluding in ordinary style for decree against him, with expenses of process. May pleaded to the action; and after a closed record, the following interlocutor was (February 15. 1833) pronounced: 'Having again considered this process, with the revised 'condescendences and answers for the parties, and that the record 'has been closed, finds it not competent for this court to set aside 'or open up for discussion on the merits the extracted decree 'founded on in the libel; but interpones the authority of this

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'court to the said decree, and decerns conform thereto; reserving 'to the defender any remedy competent to him in the competent 'court.'

Against this interlocutor both parties petitioned, Hill for expenses and May upon the merits; and the petition for the respondent having been ordered to be answered, the following interlocutor was, of this date, (May 3. 1833,) pronounced: 'Having again con-'sidered this process, with the petition for the pursuer, petition for 'the defender, and answers for the pursuer, refuses the defender's 'petition; adheres to the sentence of the 15th February last, and 'decerns: finds the pursuer entitled to expenses, and remits to the 'Auditor to tax the same.'

Against this procedure before the bailie court, and the above interlocutors, May brought the present advocation.

Additional pleas in law were put in by both parties, and the Lord Ordinary ordered cases.

Advocator's Pleas.

The advocator *pleaded* generally, that the summons was incompetently brought before the Magistrates in the burgh court, in respect that the object of the action was to enforce an act or decree of the Magistrates themselves; and that it was doubly incompetent, in respect that the Magistrates could not, by their own act of council, double the fine; and farther, that the Magistrates had an express interest in exacting the fine for the use of the burgh; Robertson *v.* Panton, 21st Nov. 1823; Edington and Sons *v.* Astley, 5th Dec. 1829; Adamson *v.* Masterton, 21st July 1731, *M.* 7484.

Respondent's Pleas.

Pleaded for the respondent—1. The respondent, as the collector of the Merchants' House, having acquired right, under the act of council, to demand the sum of L.80 concluded for from the advocator, was entitled to enforce this claim, like any other pecuniary demand competent to one individual against another, by application to the ordinary courts of law. 2. There was no incompetency in applying to the Magistrates of Glasgow, sitting as a judicial tribunal, to enforce this claim as a court of law, merely on account of the debt due to the pursuer having its origin under an act of the Town-Council, a totally different body, sitting in a mere ministerial or administrative capacity. 3. It formed no objection to the respondent's application for a decree to enforce the act of council, that it might not be competent for the Magistrates to open up or set aside the act of council. It is quite competent to apply to an inferior court to enforce a legal deed or document, even although that deed or document must be held unchallengeably valid, till set aside by a formal process of reduction. 4. Even supposing the act of council

to be of the nature of a decree of a court, it was not incompetent to apply to the burgh court to have a decree interponed to it, so as to enable the respondent to obtain an act of warding, or any other competent diligence. 5. The jurisdiction of the Magistrates could not be declined on the ground of their having any interest in the issue of the suit, inasmuch as there was no such interest in point of fact; the only interest in the action being that of the respondent, as collector of the Merchants' House, who was the only party by whom any thing could be taken under the decree. 6. The alleged interest of the burgh treasurer, founded on his right to demand the sum in question from the respondent, in the event of his not accounting for it, within three months, to the Merchants' House, formed no interest in the action itself, but resolved into a mere right of exacting a penalty from the respondent, in the event of his subsequently failing to discharge his duty, which it was irrelevant to state as an objection to the jurisdiction. 7. Even an interest in the issue of the suit on the part of the Magistrates, or of any of the city officers, where the interest alleged was merely that of trustees for the community, or public functionaries, was not sufficient to exclude the jurisdiction of the burgh court as a judicial tribunal.

Respondent's Pleas.

The following authorities were referred to by the respondent: Ferguson *v.* Magistrates of Kilmarnock, 30th July 1761, *Mor.* 1831; Manson *v.* Macdonald, 16th Dec. 1795, *Mor.* 2015; Blair *v.* Samson, 26th Jan. 1814, *Fac. Coll. App.* xviii. 501; Napier *v.* Magistrates of Glasgow, 24th Nov. 1821, 1. *Shaw*, 165; Harvie *v.* Ferguson, 17th Nov. 1826, 5. *Shaw*, 14; Mackintosh *v.* Guildry of Perth, 16th Jan. 1828, 6. *Shaw*, 358; Hill *v.* Hopkirk, 13th Jan. 1780, *Mor.* 1995; Duncan *v.* Magistrates of Aberdeen, 21st July 1786, *Mor.* 2003; Fleshers of Glasgow *v.* Watson, 20th Nov. 1824, 3. *Shaw*, 305; Porteous *v.* Cordiners of Glasgow, 11th June 1830, 8. *Shaw*, 909; Kennedy *v.* Hannay, 23d Nov. 1692, 4. *Brown's Supp.* 39; Calder *v.* Trotter, 8th June 1833, *Fac. Coll.*

The Lord Ordinary pronounced this interlocutor, adding the subjoined note: 'The Lord Ordinary having considered the revised 'cases for the parties, and whole process, remits the cause simpli- 'citer to the Magistrates, and decerns: finds the advocator liable 'in expenses, both in this and the inferior court; and remits to the 'Auditor to tax the account thereof when lodged, and to report.'

Note.—'At first sight it may appear inconsistent that a court 'should be competent to pronounce a decree in a cause, the merits 'of which it is not competent to try; but this is explained by the 'circumstance, that in such cases the decree is, in effect, only a 'step of diligence to enforce execution. It becomes necessary when

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'horning cannot proceed on the original sentence; for example, 'the decrees of the justices of peace in a certain description of 'causes, those of baron-bailies of dependent baronies, and the de- 'crees of arbiters, when the submission does not contain a clause of 'registration.

'The only difficulty in the present instance is, that the town- 'council of a royal burgh is not a court of law, for it has no judicial 'power whatever; and, correctly speaking, its orders are not judg- 'ments or decrees; from which it may be argued, that the court 'entitled to enforce them is entitled to try if they have been pro- 'nounced according to law. But that consequence does not follow, 'as appears from the decision in the case of Calder, referred to by 'the respondent; for the kirk-session and heritors of a country parish, 'in the administration of the poor laws, have no judicial function 'any more than the town-council of a burgh in imposing a stent on 'the inhabitants, or inflicting a fine on one of its members for re- 'fusing to accept an office. They are both public bodies, exercising 'powers conferred by statute or usage, and are in every respect in 'pari casu. The proper mode of redress by those aggrieved is by 'suspension or reduction in this Court, and no instance is cited in 'which any other proceeding has been resorted to. It would be a 'strange anomaly if the burgh court could review the order of the 'Town-Council, being themselves necessarily a constituent part of 'the Town-Council.

'The advocator's declinature of the burgh court, on the ground 'of interest, seems entirely unfounded.'

Judgment.

The advocator *reclaimed*, but the *Court*, without hearing counsel for the respondent, unanimously concurred in the rationes decidendi of the Lord Ordinary, and accordingly adhered, *Lord Balgray* observing, that it was still competent to suspend or reduce.

Lord Corehouse, Ordinary. For the Advocator, *Dean of Fac. (Hope,) H. J. Robertson.* Alt. *Rutherfurd, Penney.* *R. Welsh*, and *Hopkirk & Inch*, W. S. Agents. *D.* Clerk.

C.

FIRST DIVISION.

No. CXVI. 2d *June* 1835.

URQUHART
against
HALDEN.

SALE.—WARRANDICE.—*A party having sold lands, by minute of sale, which had been previously burdened with a restriction against building,—held, in an alternative action by the purchaser for relief from the restriction, or from the bargain, that he was not bound to go on with the sale, so as to be left to seek his remedy under the warrandice.*

THE pursuer and defender entered into a minute of sale, (Nov. 23. 1832,) by which the defender, in consideration of the price therein stipulated, bound and obliged himself, and his heirs and successors whatsoever, upon receiving payment of, or security for the said price, to execute and deliver, upon the proper charges and expenses of the defender, a valid and sufficient disposition to and in favour of the pursuer, and his heirs and assignees, of all and whole the lands of Efficscroft, with the whole houses and buildings erected thereon, extending to two acres, three roods, and twenty falls of ground, or thereby, as shown upon a plan drawn out by George Galt, land-surveyor, Hamilton, in 1831, and subscribed by the said James Halden and John Urquhart, as relative to the said agreement, bounded said ground by the Muir Street on the south, the Duke of Hamilton's stone wall and the garden ground belonging to Miss Paterson on the north-east, and by the hedge inclosing the gardens of Dr Charles Freebairn and Bailie Hamilton on the south, and by other small properties on the west, being the whole property belonging to, and occupied by the said James Halden and his tenants.'

This minute contained, inter alia, the following clause: 'And farther, the said James Halden binds and obliges himself, and his foresaids, to disburden the said lands and others of all debts and encumbrances whatever which may or can affect the same, contrary to the stipulations hereof, or to the prejudice of the said John Urquhart, or his foresaids, and that before settling the transaction; or it shall be in the option of the said John Urquhart, and his foresaids, to pay and discharge therefrom all real or heritable debts

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'affecting said lands and others; and the said James Halden binds 'and obliges himself to free and relieve the said John Urquhart of 'all ministers' stipends, and other public burdens, due previous to 'the term of Whitsunday next, which is hereby declared to be the 'term of the said John Urquhart's entry thereto.'

The pursuer now raised the present action, alleging, that when the title-deeds were sent to him to prepare the disposition, he discovered, for the first time, that a contract of excambion, which had been entered into between the Duke of Hamilton and the defender as to part of the land, in the year 1815, contained a clause, whereby the defender, for the sum of L.600, or other onerous considerations, bound up, restricted and restrained 'himself, 'and his heirs and successors whatsomever, from erecting any 'brewery, foundry, steam-engine, candlemaker's work, or any 'other nuisance whatsoever on the remainder of the said property 'of Effiescroft or Euphanscroft,' (being the property purchased by the pursuer,) 'herein before particularly described; and for that 'purpose consent that this restriction shall be inserted in all the 'renovations of the fee of the said lands of Euphanscroft.' And he concluded, that in consequence of the above clause in the minute of sale, the defender was bound to obtain a release from that servitude; and failing his doing so, that it should be found and declared 'that the pursuer is, and shall be free, and for ever relieved of all 'obligations incumbent on him by the said minute of sale and 'agreement,' &c.

Pursuer's Pleas.

In support of this conclusion the pursuer *pleaded*—1. The restriction or negative servitude in the contract of excambion limits or restrains the proprietor of Effiescroft in the use of the property, or at least must be held, in a question with the defender, and in the circumstances of this case, to constitute an effectual servitude against the property. 2. The seller of an heritable property for an adequate price is bound at common law to free the subject of all burdens and encumbrances, and more particularly of all servitudes materially lessening the value of the property, or restraining the purchaser in the use thereof. 3. The seller can only be free from this obligation where the servitude has been actually revealed prior to the purchase, or where the purchaser's knowledge of its existence may fairly be presumed from the nature or situation of the subject. 4. The defender, as the seller, is more particularly bound to relieve the pursuer, as the purchaser, from the servitude in question, in respect, 1*st*, The existence of the servitude was unduly concealed by the defender, although constituted by his own contract; 2*d*, There was nothing in the nature or situation of the pro-

perty which could lead the pursuer to know or suspect the existence of such a servitude; 3*d*, That servitude materially lessens the value of the property, and restrains the pursuer in the natural use thereof, more especially with reference to the general purposes for which it was purchased; and, 4*th*, The defender expressly bound himself, in the minute of sale, to disburden the subject of 'all encumbrances whatever which may or can affect the same.'

Pursuer's Pleas.

Pleaded for the defender—1. The defender is not bound, either by agreement or at common law, to purge or obtain discharges of the restrictions in the contract of excambion. 2. At most, the defender is only bound, on receiving payment of the price, or security for payment of it, to execute a valid disposition of the property as held by himself, and shewn upon the plan; and along with it to deliver a sufficient progress of writs, and a discharge of the heritable debt; or along with it to deliver a sufficient progress, and to allow the pursuer to apply a proportional part of the price in paying and obtaining a discharge of the heritable debt. 3. The restrictions do not lessen the value of the property, and they relate to erections which could not, in the situation of the grounds, be made, except in emulationem, and which the Duke, as the contiguous proprietor within burgh, would be entitled, independent of any contract, to prevent at common law, as nuisances injurious to his property. 4. The restrictions are not so constituted as to affect a singular successor; and the pursuer, as a purchaser, has therefore no interest to insist for a discharge of them.

Defender's Pleas.

The Lord Ordinary pronounced this interlocutor, adding the subjoined note: 'The Lord Ordinary having heard parties' procurators, and considered the closed record and process, finds, That 'by missives of sale, dated the 23d day of November 1832, the 'pursuer purchased from the defender, at the price of L.3000 sterling, a piece of ground, part of the lands of Effiescroft, adjoining 'the town of Hamilton: finds, That by the terms of the said missive, as well as the nature of the transaction, the defender, the 'seller, was bound in absolute warrandice: finds, That some time 'before the said sale, the defender had, in a contract of excambion 'with the Duke of Hamilton, bound himself, and his 'heirs and "successors, not to erect any brewery, foundry, steam-engine, "candlemaker's work, or any other nuisance whatever, on the re-"mainder of the said lands of Effiescroft;' which remainder forms 'the piece of ground sold to the pursuer: finds, That this obliga-'tion, or negative servitude, was not communicated by the defender 'to the pursuer at the time of the sale, and that the defender de-

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'clines to undertake a proof that it was known to the pursuer at 'that time: finds, That the clause of the missive, binding the seller 'to disburden the lands of 'all debts and encumbrances,' cannot, 'in sound construction, be held to apply to the negative servitude 'above mentioned: finds, That such obligation or servitude will, if 'enforced to the detriment of the subjects purchased, create an 'eviction covered by the clause of warrandice: but, in respect 'that no such eviction has yet taken place, and that there are no 'means of ascertaining, in the present action, whether or not it ever 'may take place, dismisses the action as now laid; reserving to the 'pursuer, in the event of distress or eviction, grounded on the ne-'gative servitude libelled, to raise such new action on the warran-'dice as he may be advised, and to the defender his defences against 'the same, unless in so far as disposed of by the preceding findings: 'Further, finds no expenses due to either party, and decerns.'

Note.—'The summons concludes alternatively, either that the 'defender shall disburden the lands of the negative servitude con-'stituted by the defender, or, in the event of his failure to do so, 'that the bargain shall be annulled, and the action as laid, both on 'the special clause in the missive, and on the warrandice. It does 'not appear to the Lord Ordinary that the action can be maintained 'on the clause of the missive relating to 'debts and encumbrances;' 'which expressions must, in sound construction, and by reference 'to the context, be held to apply to pecuniary, or other burdens 'admitting of being at once cleared off, by payment or performance. 'But, on the other hand, the Lord Ordinary does not concur in the 'argument of the defender, that the negative servitude is a burden 'of which the pursuer ought to have satisfied himself before enter-'ing into the transaction, and which therefore cannot give occasion 'to any claim on the warrandice. He thinks, that if the purchase 'is made in the ignorance, on the part of the purchaser, of such an 'obligation, and, a fortiori, when the burden was imposed by the 'act of the seller himself, and was not communicated to the pur-'chaser, there must be room for such claim, in the event of loss 'arising from the servitude taking effect. Now, in the present 'case, the negative servitude in question, though constituted by the 'defender himself, was not communicated to the pursuer; and al-'though the defender avers the pursuer's knowledge of it at the 'time of the transaction, he declined, upon the question being put 'to him by the Lord Ordinary, to undertake a proof of that aver-'ment. In these circumstances, if the negative servitude had been 'actually enforced against the pursuer to his loss, the Lord Ordi-'nary thinks that, on the score of eviction to the extent of such 'loss, he would have had a good claim. But as yet there is no ac-

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'tual eviction, nor even distress; and although it is laid down in 'some cases, (*Ersk.* ii. 3. 30,) 'that if a plain ground of eviction "shall appear from inconsistent deeds of the granter, he may be "sued, even before eviction, to purge all such encumbrances,' the 'present case certainly does not admit of dispensing with the usual 'requisites for sustaining such an action. For, in the *first* place, 'There is no averment, on the part of the pursuer, of any intention 'of erecting any buildings of the kind falling under the negative 'servitude. *2dly*, There is no specific averment that the buildings, 'of the nature struck at by the servitude, form a more valuable use 'of the property than those which the pursuer has unquestionably a 'right to build. *3dly*, There is no averment, and there are no means 'of knowing, in the present state of matters, whether any, or what 'sort of building, would be objected to, or could be competently 'objected to, by the party in whose favour the servitude is consti-'tuted: And, *lastly*, There are no means of ascertaining prospec-'tively, in the present action, whether any building proposed to 'be erected by the pursuer would be prevented by the proper ef-'fect of the servitude, or on the ground of nuisance at common law; 'in which last case no claim on the warrandice could lie. Upon 'these grounds, the Lord Ordinary, though holding that the war-'randice may in a particular event take effect, and finding accord-'ingly, thinks that the conclusions of the action, as now laid, cannot 'at present be sustained, and therefore he has dismissed it, under a 'reservation of the pursuer's right to bring a new action, in the 'event of a proper distress, or eviction.'

Pursuer's Pleas.

The pursuer *reclaimed*, and, in support of the reclaiming note, the *Dean of Faculty pleaded*—The defender seems to contend, that because this servitude has not been constituted a real burden, from its not being contained in the renewals of the investiture, it is not effectual against the pursuer, a singular successor, and that the pursuer is therefore bound to take the title, on the assumption that he may hereafter have relief from the Duke of Hamilton. This restriction is certainly not contained in a precept of clare constat, granted by the Duke to the defender; but still this contract was executed, not with his ancestor, but with himself, and was duly recorded; and is the Court, upon such grounds, to assume that this is not a good contract in favour of the Duke? Has the pursuer no ground to complain, seeing there is a perfect certainty, if he should resist this restriction imposed on the lands, that he would be involved in a law-suit with the Duke? The Lord Ordinary has applied a principle not applicable to the form of the action now before the Court. This is not the case of a party who has completed his title. The cause rests simply on an

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Pursuer's Pleas.

agreement on missives of sale, and the action on the part of the pursuer is for implement of that agreement, according to the understanding and good faith of the transaction. Something has been concealed from him, and he requires to be placed in the same situation as he would necessarily have insisted on if he had known the circumstance, otherwise he desires to be relieved of the bargain. As to the particular clause regarding encumbrances, the action is not rested exclusively on that. According to the first principles of the contract of sale, if there be a great defect, which the purchaser had no means of ascertaining, and which, although material to be known to him, was not made known to, or was concealed from him, and the seller cannot remedy or remove the defect, the latter cannot insist on going on with the sale. All this part of the case indeed has been decided by the Lord Ordinary in favour of the pursuer, his Lordship holding, that it is incumbent on a seller, at common law, to fulfil an agreement, according to the true intent of the bargain; but then he goes on to say, that although the Duke's interference with the property to be conveyed would create an eviction, yet, in respect no such eviction has taken place, and there is no certainty that it will take place, therefore he dismisses the action. I admit, that after a person has got a title he may have no other resource; but it does not follow from this, that he is, in such circumstances, bound to take such a title,—that he is bound, notwithstanding, to pay the price, and to be left to seek his relief as he best can. The case of Paton and Learmonth, 11th March 1825, is so far in point, only this is an infinitely stronger case. But there is another distinction, and a far more important one, that this defect arose out of a deed granted by the party himself; and this shews the importance of the passage in Erskine, referred to by the Lord Ordinary, although he is laying down the law, not with reference to the mode in which an agreement is to be implemented, but to the case where the title has been completed. If a party may be called on, without eviction, to remove a defect in such circumstances, is it possible to maintain that he is not bound to do so prior to the completion of the transaction? The Lord Ordinary seems to have overlooked entirely an express averment on our part, that this servitude will materially diminish the value of the property, and we are ready to go to proof upon this. It is in vain to say that the restriction is a mere prohibition of a nuisance, which the common law would prevent. There would have been no occasion for a contract, if this had been the intention of parties; neither is it of any consequence to say, there are no means of knowing what sort of buildings may be objected to. It is enough for the purchaser to say, that he does not choose to take a property, restricted in its

use, and which he is deprived of the means of turning to account in any lawful way he may think proper. The purchaser wishes to take the property, subject only to those restrictions which the law of the land may impose. Again, it is said that the clause founded on relates only to such burdens as are capable of being at once cleared off, by payment or performance. Where is the authority for this limitation? Besides, what is to prevent this party from clearing it off? He has nothing to do but to try the question with the Duke, or to purchase up the restriction from his Grace.

Pursuer's Pleas.

Answered by Rutherfurd.—Unquestionably, both as the facts stand, and according to the interlocutor, this cause must be taken on the footing that there was a servitude, (so far as it is a servitude,) introduced into a contract of excambion, and not communicated to the pursuer. But there is no admission of concealment; nor is it admitted, that, in the circumstances, there was any obligation to make such communication. This land was purchased expressly for feuing in streets or villas. This we are ready to prove. Besides, the ground itself was not adapted for works or manufactories. The contract of excambion shews the nature of the ground. It lay close to the Duke's wall, which would lead a purchaser at once to see that there was a presumption against the erection of such works, and that their legality might be questionable at common law. It is plain that this action, so far as it is laid on the clause against encumbrances, is utterly untenable. It is impossible to touch the judgment on that ground. It is equally plain, that it cannot be said that this party trusted to his power of erecting such works in making the purchase; nor is there any proper allegation of fraud here; but esto it were so said, and that there was such an allegation, this is not the action in which to try these questions. What is the substance of the averment on the other side? It is simply this, that there exists a power in a third party to disturb him in his possession,—neither more nor less than a latent burden, which may or may not be a servitude, and which, if it ever comes to be exercised, would open the way at once to relief under the clause of warrandice. There is the greatest possible relevancy in the ground of judgment, as expounded in the Lord Ordinary's note. To refuse to give effect to it, would be to establish a principle, according to which it would be impossible to enforce implement of any sale whatever. In every instance there is a possibility of some contingent interest arising to a third party, which it is just the object of the clause of warrandice to protect against.

Defender's Pleas.

Lord Balgray.—I think the judgment is contrary to the first

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principles of law. What is stated by the Lord Ordinary just leads me to an opposite conclusion. (His Lordship read the former part of the interlocutor.) Look at the terms of the agreement. This person pays a full price: he purchases from a person apparently unfettered in any respect, who becomes bound to sell him all and whole the land, and to deliver a valid and sufficient disposition. What is the import of this, but that the land should pass to the obligee totus et talis as it was originally? Does it so pass, when such a burden as this has been imposed? What is property when deprived of its uses? Do you not diminish the value, if you limit the proprietor in his exercise of the right of property?

Lord Mackenzie.—I am of the same opinion. I think it clear that the servitude has been effectually constituted by writing and possession; but, at all events, the Duke of Hamilton would have it in his power to come against this party, who is bound, under the circumstances, to hold the servitude as effectual. This matter appears to me to come to a very short issue. What has been done here? The defender first sells this servitude to the Duke, and then he sells the property to the pursuer at its full value, and as if unburdened with the servitude. He had sold the very life's blood—the very best quality the land had; and he then sells the property to the present pursuer, as if that quality still remained; and, upon being asked either to reacquire the right sold to the Duke, or give up the bargain, he refuses to do the one or the other, because there has been no eviction. I do not understand the meaning of eviction, as so applied. The Duke is in full possession of the servitude: He won't suffer his right to be touched. Can there be a doubt that the Duke would apply for an interdict, if the pursuer were to attempt to exercise any right opposed to this servitude? There is an eviction already, as much as well can be; but esto there is no de facto eviction, this party may soon cure that. He has only to set up one of the things prohibited, and then there will be an interdict. I think however there is sufficient eviction.

The *Lord President* and *Lord Gillies* concurred, and the following interlocutor was accordingly pronounced:

Judgment.

'The Lords having advised this reclaiming note, with the note 'for the defender, and heard the counsel for the parties, refuse the 'desire of the reclaiming note for the defender *, but alter the interlocutor as reclaimed against by the pursuer, in so far as it dismisses 'the action; and find and declare, that the defender is bound to 'purge and extinguish all burdens, encumbrances, restrictions and 'servitudes affecting the property in question, and, in particular, the

* The defender had reclaimed against that part of the interlocutor of the Lord Ordinary which found no expenses due to either party.

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Judgment.

'whole servitudes, burdens and restrictions expressed in the contract of excambion referred to, and that the pursuer is not bound 'to implement any part of the minute of sale and agreement with 'the defender, until the said servitudes, burdens and restrictions 'shall have been effectually purged, renounced and extinguished; 'and find and declare, that in the event of the defender failing, 'within twenty-five days from this date, to produce effectual discharges and renunciations of all encumbrances, burdens, restrictions and servitudes affecting the lands in question, and especially 'of the restrictions and servitudes expressed in the said contract of 'excambion, the pursuer shall be freed and for ever relieved of all 'obligations incumbent on him by the said minute of sale and agreement, and that the pursuers shall be entitled to repayment of the 'sum of L.100 libelled, with interest from the 23d day of November 1832, till payment; find the defender liable in the pursuer's 'expenses, appoint an account thereof to be put in, and remit it 'to the Auditor to tax and to report: Quoad ultra, remit to the 'Lord Ordinary to proceed in the cause.'

Lord Ordinary, *Fullerton.* *Rutherfurd, Paterson.* *Fraser*, W. S. Agents.

Act. *Dean of Fac. (Hope,) Graham Bell.* Alt. *Bowie & Campbell*, W. S. and *Jardine, Stodart & D.* Clerk.

C.

FIRST DIVISION.

No. CXVII. *4th June* 1835.

THOMAS FINLAYSON
against
WILLIAM KIDD.

LUNATIC.—CURATOR BONIS.—*Authority granted by the Court to sell the heritable property of a lunatic, in order to purchase an annuity, on a summary application by his curator bonis.*

ALEXANDER FINLAYSON, a lunatic, the son of a respectable farmer, was the eldest brother of a family of several children. His immediate younger brother William had become bankrupt, and the petitioner, his third brother, was appointed his curator bonis. He now presented an application, by petition, for authority to sell certain heritable property which was understood to belong to the lunatic, that he might purchase an annuity for his maintenance, as the lunatic

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had not an income sufficient for this purpose, and, in support of the competency and reasonableness of the application, the petitioner referred to the following authorities: Busby, 1st Feb. 1823, *S. & D.*, power granted to judicial factor to make up titles to heritable subjects; Meikle, 7th March 1823, *S. & D.*, authority to a factor loco tutoris to renounce an unfavourable lease; James Hoyes, curator to A. Bell, First Division, 20th Dec. 1828, (not reported,) authority to sell heritage by public roup for payment of debts; Mark, 5th Dec. 1829, *S. & D.*, authority granted to a factor loco tutoris to make up titles to an heritable bond, and discharge the same; Slade, 20th Dec. 1831, *S. & D.*, power granted to factor loco tutoris to let a farm; Drummond, 21st Jan. 1832, authority to curator bonis of a fatuous person to let a farm for seven years; Borthwick, 7th June 1832, power granted to curator bonis of a lunatic to borrow money on heritable security, for the purpose of protecting an important interest of the lunatic. In the application of Murray, factor loco tutoris and curator bonis to Donald Macgregor, Esq. of Balhadies, authority granted (8th March 1834, not reported) to the petitioner to borrow money on heritable security.

Shelford on the Law and Practice of Lunatics, 1833, 366–72; grounds upon which the Lord Chancellor (under statutory powers) will authorise sale of the lunatic's real estate for various purposes, including his better maintenance by new investment, as in the purchase of an annuity.

The application was opposed by the respondent, the trustee on William's estate, on the ground, first, that an application in this form was incompetent; and, secondly, that it was unnecessary, as his rents were sufficient to provide food and clothing for the lunatic.

The Court, before answer, ordered minutes, and also a report by the Sheriff of the county, stating the value of the lunatic's property and the amount of his debts. The property was therein estimated at L.1000, the free rental L.33 : 18 : 3, and the outstanding debt L.162 : 5 : 7½.

Judgment.

The *Court*, after proposing to the respondent to guarantee to the curator an income of L.40, which was declined on his part, pronounced this interlocutor: 'Repel the objection to the competency 'of this application; find, in the whole circumstances of the case, 'that the free produce of the estate belonging to Alexander Fin-'layson, under the petitioner's management, is inadequate for the 'payment of the debts, and the suitable maintenance, support and 'protection of said Alexander Finlayson, and therefore it is expe-'dient and necessary to sell the heritable property belonging to him; 'therefore grant full warrant, power and authority to the said

'Thomas Finlayson, curator bonis, to sell and dispose of the whole 'heritable subjects referred to in the petition, and that by public 'roup, after such advertisement as may be deemed necessary, and 'for that purpose to grant dispositions, and all such deeds as may 'be necessary for completing the title of the purchaser or purchasers, such deed or deeds containing all usual and requisite clauses, 'binding the said Alexander Finlayson and his heirs in the same 'manner as if granted by himself; declare, that the purchaser or 'purchasers shall have no concern with the application of the price 'or prices to be obtained for said subjects, but shall be sufficiently 'exonered by payment thereof to the curator bonis; ordain the said 'curator to lodge the said price or prices in one of the chartered 'banks, and to lodge the receipt therefor in the hands of the clerk 'of Court, after which their Lordships will resume consideration 'of the case: find the respondent not liable in expenses, but find 'that the expenses incurred by the petitioner in this case form a 'proper debt against the curatorial estate, and decern.'

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Act. *Dean of Fac. (Hope,) Monro.* Alt. *Sol.-Gen. (Cuninghame.)* *James Burness* and *Thos. Deuchar*, Agents.

C.

FIRST DIVISION.

No. CXVIII. *4th June* 1835.

JOHN FLEMING AND DAVID FLEMING
against
MRS ISOBEL BETHUNE MORRISON.

ADVOCATION OB CONTINGENTIAM.—REMOVING.—VIOLENT PROFITS.—*Circumstances in which, in an advocation ob contingentiam, the Court ordained a tenant in a removing to find security for violent profits.*

THE respondent had let certain parts of her lands in the Grange of Aberbothrie to the advocators for nineteen years. In January 1834 John Fleming was, from embarrassments, obliged to execute a trust-deed for behoof of creditors. At this time there were eight years of the lease to run, and, as it excluded assignees, the advocators agreed to renounce the lease, on condition that the creditors should have the benefit of a waygoing crop, which was accordingly done,

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and the respondent thereafter let the farm to another tenant from Martinmas 1834. On the 10th of October 1834, a summons was raised against the respondent, concluding that she should be ordained to execute a lease of the premises in favour of John Fleming junior, (the son of the advocator,) as tenant, and David Fleming, as his administrator-in-law, on the ground that this was pars contractus in granting the renunciation, according to certain letters which passed between the parties at the time. The respondent, on 3d November 1834, presented a petition to the Sheriff of Perthshire against John Fleming senior and his two surviving trustees, and David Fleming, the granters of the renunciation, praying for warrant of ejectment. Certain proceedings having taken place before the Sheriff, he ordained the advocators to find caution for violent profits. A bill of advocation ob contingentiam, founded on the above action of implement, was passed on 19th November. The respondent, in her answers, pleaded that there was no good ground of contingency between the removing against John and David Fleming, and the action for execution of a lease in favour of John Fleming junior. The interlocutor of the Lord Ordinary 'repels the preliminary objection stated by the respondent to the advocation ob contingentiam, and ordains the advocators to find caution for violent profits within three weeks from this date.'

Judgment.

The advocators *reclaimed*, in so far as they were ordained to find caution for violent profits, but the *Court* adhered, with expenses.

Lord Ordinary, *Fullerton*. Act. *Wilson*. *R. & A. Kennedy*, W. S. Agents. Alt. *Monro*. *Baxter & Macdougall*, W. S. Agents. *D.* Clerk.

C.

SECOND DIVISION.

No. CXIX. *4th June* 1835.

MRS JANET SMITH OR MAYNE AND CHILDREN *against* ANTHONY M'KEAND & ALEXANDER HASTIE, GAYWOOD'S TRUSTEES.

TRUST.—DILIGENCE.—*Trustees acting gratuitously under a family settlement, found liable in repetition of trust-funds lost by their cal-*

pable mismanagement in not timeously obtaining infeftment upon a bond.

4 June 1835.

Mayne and Children v. M'Keand and Hastie.

By trust-disposition and settlement, dated 2d June 1823, the late George Gaywood conveyed to the late Robert Hastie, (whom the defender, Alexander Hastie, represents,) and Anthony M'Keand, and another who did not accept, his heritable and moveable property, for the trust purposes therein mentioned. One of these purposes was, 'That my trustees shall, within twelve months after my death, 'lay out and invest, in proper heritable security, the sum of L.600 'sterling, and take the rights thereof in favour of Janet Smith, (the 'pursuer,) wife of William Mayne, writer in Glasgow, in liferent, 'for her liferent use allenarly, and exclusive of the jus mariti and 'right of administration of her said husband, or of any future husband, 'and to the children (the other pursuers) that may be procreated of 'her body, either in her present or in any future marriage into which 'she may enter, in fee.' It was declared, that the 'trustees shall 'not be liable for omissions or neglect of management, nor singuli 'in solidum, but only each for his own actual intromissions; nor for 'any factor to be named by them, provided he be reported solvent 'at the time of his appointment.'

In November 1825, William Mayne, (husband of Mrs Mayne,) purchased from Robert Pirrie certain heritable subjects in Old Wynd, Glasgow, for L.1820. Of the price, L.1200 was allowed to remain a burden on the property, and Gaywood's trustees advanced to Mayne, upon his and his wife's receipt, L.600, being the amount of her and her children's legacy, to be invested on the security of these subjects. The receipt or discharge, signed by Mrs Mayne and her husband, on 12th November 1825, set forth, that 'seeing that, of the date hereof,' the trustees 'have, at my re-'quest, and with my certain approbation, laid out and invested the 'said sum of L.600 on heritable security, by lending the same to 'William Mayne, and that the said William Mayne has, of the date 'hereof, executed in favour of me, the said Janet Smith, in liferent, 'and of the children I may have, in fee, an heritable bond and dis-'position in security over subjects in the Old Wynd, purchased by 'him from Robert Pirrie, exactly in terms of the said disposition 'and deed of settlement;' therefore she discharged and exonered the trustees, and declared the purposes of the trust fulfilled in so far as regarded the L.600.

Of the same date, Mayne got a disposition to the property, and granted an heritable bond to Pirrie for L.1200, on which infeftment was immediately taken. He also, upon 12th November 1825, under the employment, or with the knowledge of Gaywood's trustees, pur-

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pared an heritable bond in favour of the pursuers, for their respective rights of liferent and fee, of the legacy of L.600. No infeftment was then taken. The property, as was alleged for the pursuers, was ineligible as a security. On the other hand, it was stated that the value of the subject fell in consequence of the general depreciation of property in the neighbourhood from various causes. On the 17th November 1825, Mayne granted another heritable bond over the subjects for L.450, to Professor Cairns, upon which infeftment was taken on the following day. Infeftment was not taken on the L.600 bond till the 13th February 1826. The subjects, when sold, brought only L.1680, so that the security for the L.600 legacy proved totally worthless.

Pursuers' Pleas.

Mrs Mayne and children brought a reduction of the discharge, on the ground of a violation of the trust and gross negligence, and concluding that the trustees should be ordained to lay out and invest the sum of L.600 for behoof of the pursuers, and for payment of certain interests and expenses.

Defenders' Pleas.

The defenders *pleaded*—1. That with reference to the declaration in the trust-deed, they were not liable for the failure of the pursuers' security. 2. The property on which the advance was made afforded, at the date of the advance, a sufficient security, and the defenders are not liable for the consequences flowing from Cairns's infeftment on a posterior security. 3. At all events, the defenders cannot be liable farther than that the property should have afforded a sufficient security, at the date of the infeftment, in favour of the pursuers. 4. Mrs Mayne is not entitled to insist without her husband's concurrence, the transaction having been gone into with her approbation.

The Lord Ordinary pronounced this interlocutor: 'The Lord 'Ordinary having considered the record and productions, and heard 'parties, repels the defences, and decerns, in terms of the conclusions 'of the libel; finds the defenders liable in expenses.'

Note.—'There are some facts disputed by the parties; particularly, whether the houses were sufficient, or were reasonably believed to be sufficient, to have afforded due security; whether 'Mayne was or was not suspected to be embarrassed; and whether 'the consent of the wife was the result of impetration; but the Lord 'Ordinary has not thought it necessary to direct any inquiry, hoc 'statu, into these matters; because, assuming them all to be as the 'defenders state, still he conceives this to be a clear case of responsible mismanagement by trustees.

'*They* were bound to have invested the money, and this only on *heritable*, which means completed security; taking the rights to Mrs Mayne in liferent, excluding the jus mariti, and to her children in fee. They were trustees for the *wife against* the husband, and for the children *against* the parents. Notwithstanding this, (as the discharge bears,) they *advanced the money to this very husband*, and upon a mere discharge by him and his wife; *the wife never having ratified it*, and being left in the transaction unprotected, in the power of her husband, and no care being taken of the children whatever. The interests of the wife and of the children were thus entrusted entirely to the very person whom the granter of the legacy had utterly excluded. It is true, that soon after obtaining the money *he* pretended to secure it over certain real property, in terms of the deed; but *he* was allowed to interpose a security in favour of another creditor, which, with the burdens already on it, made the security of his wife and children a mere name. The sasine in their favour was allowed to be postponed for about three months, while the infeftment of the stranger creditor, whose debt was subsequent to theirs, was taken before it, without the loss of a day.

'The deed saves them from responsibility for mere omissions, and for factors reputed solvent. But Mayne was not acting as a factor, but as law-agent; and he was permitted to unite the character of agent for the lenders with the inconsistent one of borrower of the funds. He had a personal interest, as debtor to the trust, opposed to the interests of its true creditors; and yet he was relied on to invest the funds. This was no omission, but a direct and culpable devolution of the trust on the person least worthy of being trusted.

'The claim of the children against such trustees is irresistible; but even that of the wife is well founded. It is needless to inquire how far she might have renounced the exclusion of the jus mariti, because that question does not arise. It was the duty of the trustees to invest the money, in terms of the trust, in the first instance, whatever might have happened afterwards; and her consent to their not doing so, which is now founded on, ought only to have made them see more clearly the necessity of protecting her.

'The import of the various conclusions as sustained is, that the trustees must do now what they ought to have done at first.'

The defenders *reclaimed*.

The *Court* were unanimously and clearly of opinion, that, in so far as related to the children, there had been mismanagement, and consequent liability.

In regard to Mrs Mayne, the *Dean of Faculty*, for pursuers,

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pleaded, that the money had been paid away in a manner unauthorised by the trust. The trustees ought not to have paid the money to the husband and wife till they got an infeftment. The consent of the wife could be no bar to her raising an action against the trustees, when there was a plain deviation from the purposes of the trust. See Mrs Graham of Gartmore's case, 4th March 1831.

Rutherfurd, for defenders.—The case of Graham went on the liability of the agent not having searched for encumbrances.

Opinion of Court.

Lord Justice-Clerk.—At first it appeared to me that there was room for distinction betwixt the case of the children and that of Mrs Mayne; but I am satisfied, from the terms of this trust, and the whole train of decisions on this subject, that there was a complete neglect of the injunctions of the trust. The testator created the trustees guardians for the mother and children, and declared, as his will and purpose, that the L.600 bequeathed to them should be laid out and invested upon proper heritable security. The trustees were not entitled to relinquish that duty, and go through the ceremony of a bond, which was not followed up timeously by infeftment. After what we have heard, I see no room for distinction betwixt one part of the provision and the other. The defenders were trustees for Mrs Mayne as well as for the children. A different case would have arisen if,—after they had completed a security in terms of the will, by taking infeftment promptly, and not allowing another creditor to take prior infeftment on his bond,—the property had turned out of inferior value. Then, she could not have objected to the inadequacy of a security bona fide and validly obtained.

Lord Meadowbank agreed.

Lord Glenlee was for adhering, and held, that as there was vitium reale affecting the discharge, the trustees were not entitled to the benefit of it.

Lord Medwyn.—It is impossible to question the right of the children to obtain redress; and for this purpose there was no occasion for any reduction, as there is no discharge by them; but as the wife can succeed only by setting aside the discharge granted by herself, with concurrence of her husband, I must say I have doubts how far we can recognise the right of the wife to challenge this discharge, on such grounds of reduction as have been stated. When they act honestly and fairly in the discharge of their duties, I am averse to do any thing to deter voluntary trustees from undertaking the performance of a gratuitous trust.

Looking to the terms of the will, and the nature of the transaction, it appears to me, that if the security intended to be obtained by the trustees had been validly completed, they would have discharged themselves effectually, and granted a discharge accordingly.

ut the blame or fraud lay with the person employed as agent. he difficulty is,—as the lady said, that she and her husband con- rred as to laying out the money, and next day she might have ischarged her right in favour of her husband, with which the trus- es would have had no concern,—I am at a loss to discover how ou are to hold the trustees liable, unless on the footing that Mayne, ie agent employed, having misconducted the transaction, they are able for his mismanagement in the completion of the security, hich was his peculiar duty.

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The *Court* adhered.

Judgment.

ord Ordinary, *Cockburn.* Act. *Dean of Fac. (Hope,)* and *Greenshields* and *Turnbull.* Alt. *Rutherfurd* and *Ivory.* *Wotherspoon & Mack*, W. S. and *Wm. Miller*, Agents. *R.* Clerk.

R.

SECOND DIVISION.

No. CXX. *6th June* 1835.

JOHN LOUDEN MACADAM AND J. A. STEWART MACKENZIE *against* LAWRENCE, LORD DUNDAS.

TENOR.—*In proving the tenor of a bond,—found, that it is not a good objection that the pursuer cannot specify the names of the writer and witnesses to the bond.*

IN the proving of the tenor of a bond at the instance of Mr Macadam and Mr Stewart Mackenzie against Lord Dundas, it was *pleaded* among other defences, that the summons did not libel the tenor of a complete bond,—the names of the writer of the bond and witnesses were not specified.

Answered—Such an objection was sustained in one case, that of Blackwood, 17th July 1713, (15,819); but Erskine, iv. 1. 57, says, 'As the case of Blackwood, sustaining the objection, was reversed 'upon appeal, it is not likely it will be received for the future against 'a proof of the tenor.'

The *Court* repelled the objection.

Judgment.

Act. *Keay, Sandford.* *Ro. Rutherford*, W. S. Agent. Alt. *Rutherfurd, Speirs.* *Ker & Dickson*, W. S. Agents. *T.* Clerk.

R.

SECOND DIVISION.

No. CXXI. *6th June* 1835.

JOHN MACTAGGART Junior, Petitioner.

Process.—Expenses.—(1.) *Question raised as to the competency of entertaining an application for the expenses of an appeal, and for the previous expenses, where there has been a reversal by the House of Lords, and remit back, without any order by that House as to costs.* (2.) *The question of competency having been waived, expenses refused.*

The case of Mactaggart and others *v.* Watson, decided in this Court, 24th January 1834, (see ante, vol. ix. p. 202,) having been reversed on appeal by the House of Lords, the case was ordered to be 'remitted back, with instructions to decern against William 'Watson, in terms of the second conclusion of the summons, and 'to do further in the cause as shall be just, and consistent with this 'judgment.' There was no order as to costs. Mactaggart petitioned this Court to apply the judgment, and 'to find him entitled 'to the expenses incurred in the action prior to appeal, and of the 'said appeal itself and procedure therein, and of this application.'

Dean of Faculty, in support of the application.—Where nothing has been said in the judgment of the House of Lords as to expenses, but the case remitted back, the matter is open for the disposal of this Court. In a late case in the Court of Exchequer in England, (12. *Pryce's Rep.* 700,) where a cause had been remitted back by the House of Lords, and nothing said as to costs, it was held that the whole question of costs was subject to the disposal of the Court.

The *Court* were disposed to take the opinions of the other Judges, upon minutes of debate, as to the competency of the demand for expenses.

But *Rutherfurd*, for the respondents, waived the question of competency, and argued that, on the merits, no expenses ought to be found due.

Judgment. The cause stood over till their Lordships should reconsider the previous proceedings; and upon resuming consideration of the application, the *Court* found no previous expenses due.

Act. *Dean of Fac.* (*Hope,*) and *Penney.* Alt. *Rutherfurd* and *Neaves.* *Mowbray & Howden*, W. S. *Campbell & M'Dowal*, S. S. C. Agents. *R.* Clerk.

R.

FIRST DIVISION.

No. CXXII. *9th June* 1835.

MACKINTOSH
against
MACKINTOSH.

PROCESS.—SUMMONS.—*A summons, concluding for payment of rent of a farm, but without setting forth the lease or contract on which it proceeded, dismissed, as irrelevantly laid.*

THE pursuer raised a summons against the defender, setting forth, 'Whereas it is humbly shewn to us by our lovite, Alexander 'Mackintosh of Mackintosh, Esq. captain and chief of Clanchat-'tan, pursuer, That Mrs Amelia Colin Chisholm or Mackintosh of 'Balnespick, residing in Inverness, defender, is justly indebted and 'owing to the pursuer the sum of L.133, 10s. sterling, being the 'amount of the rent of the farm of Kincraig, and of the meadows 'and parks of Dunachton, with the houses, grazings, pertinents and 'privileges attached to the said farm and lands, all as occupied and 'possessed by the said Mrs Amelia Colin Chisholm or Mackintosh, 'or her subtenants, under the pursuer, for the crop and year 1833, 'of which rent one-half became payable at the term of Martinmas '1833, and the other half at the term of Whitsunday last, being 'the said crop and year: As also of the sum of L.66, 15s. sterling, 'being the half year's rent due to the pursuer by the said defender 'at the term of Martinmas last bypast,' &c.; and he concluded for payment in terminis.

In defence, it was *pleaded* in limine — That the summons was not laid relevantly, in so far as it omitted to specify the contract or obligation of lease under which the rent pursued for was demanded.

The Lord Ordinary sustained the defence, with expenses.

Judgment.

The pursuer *reclaimed*, but the *Court* unanimously *adhered*.

Opinion of Court.

Lord Mackenzie, after reading the words of 6. Geo. IV. c. 120, v. 2, &c. said, This provision of the act has not, in this case, been complied with. The summons does not say that the pursuer possesses an acre of land in the world. Not only does he not produce his sasine, but he does not even aver that he has any right to the estate. He merely states that the defender is justly indebted to

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Opinion of Court.

him, &c. in a certain sum; but he does not say in what character, whether as landlord, assignee or arrester. Although the extent of the claim is set forth, there is no statement, in terms of the statute, of the nature or grounds of the tenant's obligation to him,—no allegation of there being a lease, verbal or written. There is the greatest possible want of relevancy. As to what is said about an amendment, it would be a delicate matter to interfere, in this way, in the Inner-House, when it was not admitted by the Lord Ordinary.

Lord Gillies.—I am of the same opinion. Before the passing of the Judicature Act there might have been a great deal in the position of the defender, but now we are tied down by the terms of that act. The summons here may be said to set forth the extent, and, in some measure, the nature of the action; but what are the grounds? The ground on which the pursuer asserts he has right to raise the action we now discover is a lease; but can it be said that he has set forth this ground of action in his summons?

The other *Judges* concurred.

Lord Corehouse, Ordinary. Act. *Sol.-Gen. (Cuninghame.)* Alt. *Penney. John Anderson*, W. S. and *J. & W. Jollie*, W. S. Agents.

C.

FIRST DIVISION.

No. CXXIII. *9th June* 1835.

THOMSON AND BORROWMAN
against
ROSE, &c.

TRUST ASSIGNATION.—*A party substitute as trustee in a Scotch bond, after one who became a lunatic, and to whom a committee was appointed in England, having insisted that he was entitled, on the debtor in the bond intending to pay it up, to have his conditional right as trustee preserved in any new investment of the sum in the bond, in preference to the claim of the committee to the unconditional possession of the money, his claim, which he preferred in a multiplepoinding, raised by himself in the name of the debtor, dismissed, with expenses; and found, that he was not bound to concur in a discharge and assignation of the bond to the debtor.*

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On 9th and 12th January 1819, Mr Robert M'Millan, W. S. and Mr Robert Mundell of Wallace Hill, in Dumfriesshire, granted a personal bond, for L.600 sterling, to the late Miss Anne Balfour, residing in St John Street, Edinburgh. Miss Balfour was succeeded by General Robert Balfour of Balbirnie, her nephew; and he having acquired right, by a general service, to the said bond, which was conceived in favour of Miss Balfour's heirs, secluding executors, executed an assignation of the bond (10th May 1828) in favour of Mrs Mary Thomson or Rose, by whom the money contained in the bond was advanced.

By this assignation, General Balfour appointed Mrs Rose, and her assignees whomsoever, whom failing, Mr David Thomson, W. S. and Robert Borrowman, banker in Edinburgh, or the survivor of them, as her trustees or trustee, for such purposes as she should direct, by any deed or writing executed, or to be executed by her, whom all failing, her heirs and executors whomsoever, his the said General Robert Balfour's lawful cessioners and assignees in and to the principal sum of L.600, &c. and to the bond itself.

Some time after the date of the assignation, Mrs Thomson or Rose fell into a state of lunacy, and became incapable of managing her own affairs. A commission of lunacy, in the usual form, was issued by the Lord Chancellor; and Sir George Rose was, under that commission, appointed committee of Mrs Rose's estate. In virtue of his appointment, Sir George Rose entered into the possession and management of her estate.

Thereafter, Mr Dougal Grant, on behalf of the representatives of the debtor in the above bond, being desirous of paying it up on receiving a proper discharge and assignation thereto, a discussion arose as to the respective rights of the committee, and of Messrs Thomson and Borrowman; and to settle these, a multiplepoinding was brought by Messrs Thomson and Borrowman, in name of Mr Grant, in which they contended, that the substitution to them, as trustees, failing Mrs Rose, had become effectual, and the sum in the bond vested in them, at least to the effect of entitling them to uplift, discharge and assign the bond, and thereafter to see the principal sum reinvested, so that the right of Mrs Rose, and their rights as trustees, might be preserved entire, until the conditional trust in their persons was purified by fulfilment or otherwise. They further denied the existence of any right of interference on the part of the committee; but in the event of his being found to have such right, they maintained, that they were entitled to be joined with him in any deed which might be granted on receipt of the money.

The committee, on the other hand, maintained, that he had the sole right of uplifting, receiving and discharging any debts due to

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the estate of the lunatic, either in England or Scotland; and he denied Mr Grant's title to insist on an assignation of the bond in his own favour, or to make the granting of such an assignation a condition of his paying the bond. (This latter plea, which was admitted to be erroneous, was originally insisted in, in consequence of the advice of English counsel.)

The Lord Ordinary pronounced this interlocutor, adding the subjoined note:

'The Lord Ordinary having heard parties' procurators, finds the 'pursuer of the multiplepoinding liable in payment of the principal 'sum of L.600, contained in the bond in question, with interest at 'the rate of 5 per cent., from 22d May 1831, when the last interest 'was paid, to Martinmas 1831; and in respect of an offer having 'been made to the known agent of the creditor, to pay up the money 'at that term, finds the pursuer liable only in bank interest from 'Martinmas 1831 till paid: Ranks and prefers the claimant, Sir 'George Rose, as committee for Mrs Mary Thomson or Rose, and 'his mandatary, to the whole principal sum and interest due on the 'said bond, under deduction of the expenses afterwards found due, 'reserving action against him at the instance of all parties interested 'on account either of the non-application of the fund during Mrs 'Rose's life, or the misapplication thereof at her death: finds, That 'the claimant, Sir George Rose, and also the claimants, Messrs 'David Thomson and Robert Borrowman, for any contingent or 'eventual interest they may have in the said fund, are bound to de-'liver up the bond in question, and assignation thereof, and to con-'cur in an assignation of the said debt in favour of the pursuer of 'the multiplepoinding, upon his making payment thereof, under a 'reservation of any contingent trust which may be found to exist 'at Mrs Rose's death, and decerns: finds the claimant, Sir George 'Rose, and his mandatary, and also the pursuer of the multiple-'poinding, entitled to their expenses out of the said fund in medio: 'finds the claimants, Messrs Thomson and Borrowman, by whom 'the multiplepoinding was raised, entitled out of the said fund to 'the expense of raising and bringing the action into Court, but to 'no other expenses: allows accounts of the said expenses to be 'given in, and when lodged, remits to the Auditor to tax the same, 'and to report.'

Note.—'The fund in medio being assigned to Mrs Rose and her 'assignees whatsoever, by a simple destination, she is liar of the 'sum, and the persons substituted as her trustees for certain pur-'poses have only a spes successionis. As Mrs Rose herself, there-'fore, if of a sound mind, might have uplifted and discharged this

'sum, it follows that the committee of her person in England may 9 June 1835.
'do so likewise, being bound, however, to apply it agreeably to the
'powers conferred upon him by the Court of Chancery. Thom- Thomson and Borrowman v.
'son and Borrowman, as the substitutes, have neither title nor in- Rose, &c.
'terest to oppose the claim of the committee. If he do not so apply
'the money during Mrs Rose's life, or if he misapply, they will
'have action against him under their right, at present contingent,
'but which will then become vested, and may call him to account,
'and therefore action has been reserved to them.

'Payment of the bond being offered by Grant, the nominal raiser,
'at Martinmas 1831, to the known agents of Mrs Rose in Scotland,
'and that offer not being accepted, it is thought interest subse-
'quently cannot be demanded at a rate exceeding bank interest.

'Grant, who pays the bond, is entitled to an assignation from the
'committee, that he may operate his relief from M'Millan's repre-
'sentatives if necessary, and the committee has no interest to refuse.
'It is also his interest to have an assignation for his security from
'Thomson and Borrowman, in respect of their contingent right;
'and it is a mistake to suppose, that the assignation, being a joint
'one, will import any admission on the part of the committee, that
'Thomson and Borrowman have any right to prevent him from up-
'lifting the money, or to interfere in the management of it after it
'is uplifted.'

Both Borrowman and Thomson, and the committee, (Sir George Rose,) *reclaimed.* The *Court* had no doubt as to the primary find- Opinion of Court.
ing; but they dissented from the declaration of obligation on the part of Thomson and Borrowman to concur in the discharge and assignation. Their Lordships were clearly of opinion that no part of the expense of the present proceedings should fall upon the estate of the lunatic; and considering that it lay entirely between Grant, and Thomson and Borrowman, they proposed remitting the case to the Lord Ordinary to determine this point as between these parties; but they, having concurred in requesting an immediate decision by the Court, their Lordships pronounced this interlocutor: 'The Judgment.
'Lords having advised this reclaiming note, with the reclaiming
'note for Messrs Thomson and Borrowman, and heard the counsel
'for the parties, and also for Dougal Grant, the nominal raiser of
'the multiplepoinding, they recall the interlocutor of the Lord Or-
'dinary reclaimed against, in so far as it finds the claimants, Messrs
'Thomson and Borrowman, are bound to concur in an assignation
'of the debt in question in favour of the pursuer of the multiple-
'poinding: Quoad ultra, adhere to the interlocutor reclaimed against,
'and refuse the reclaiming note for Messrs Thomson and Borrow-

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'man, and decern: Further, find Messrs Thomson and Borrowman personally liable to Sir George Rose and his mandatary for the expenses incurred by them in the discussion with those parties, and remit the account thereof, when lodged, to the Auditor,' &c.

Lord Corehouse, Ordinary. For the Raisers, *Keay*. *Party*, Agent. For Thomson and Borrowman, *D. M'Neill, Baillie*. For the Committee, *Dean of Fac. (Hope,) Speirs*.

C.

FIRST DIVISION.

No. CXXIV. 10*th June* 1835.

JOHN MALCOLM, EXECUTOR-CREDITOR OF THE DECEASED HUGH BAIRD,
against
THE WEST-LOTHIAN RAILWAY COMPANY, AND GEORGE M'CALLUM, THOMAS BURNS, JAMES WADDELL AND WILLIAM HENDERSON, INDIVIDUAL PARTNERS THEREOF.

SOCIETY.—JOINT ADVENTURE.—*A party having, without authority, subscribed for certain shares in a joint adventure for two of his children, held thereby to have incurred the liability of a partner; and his executor-creditor having, after his death, raised action against the company, for a debt due to him,—found, that he was proportionably liable for a share of the debt along with the other partners, and that his claim must suffer a deduction to that extent.*

IN 1824 a variety of individuals (in number about eighty) formed an intention of making a railway from a place on the Union Canal, to communicate with certain places in the counties of Linlithgow and Lanark; and with this view they employed the late Mr Hugh Baird, civil engineer, to make the necessary surveys; and, upon report made by him, the above parties subscribed the undertaking, and Mr Baird himself also subscribed to the extent of eight shares, (each share amounting to L.50,) in his own name, four for his son, J. H. Baird, and four for his daughter, Miss C. H. Baird, though without their authority.

The company were incorporated by the Act of Parliament of

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6. Geo. IV. c. 49; by one clause of which it was enacted, that the partners should not be liable for debts 'beyond the extent of his, 'her, or their stock, or share or shares in the capital stock of the 'company;' and, by a subsequent clause, that if the railway should not be completed 'within the space of four years after the passing 'of this act, all the powers given by this act shall from thenceforth 'cease, and become void,' &c.

No steps were taken for completing the railway; but in obtaining the Act of Parliament, and in other matters connected with the undertaking, large accounts were incurred; and for the purpose of discharging these, two calls, of 2 per cent. each, were made upon the subscribers.

The late Mr Baird's claim against the company for surveys, &c. amounted to L.215 : 1 : 10; and upon his death, in 1827, the present pursuer, as his executor-creditor, expede a confirmation of the 'amount of account due by the West-Lothian Railway Company 'to the said defunct Hugh Baird,' &c. in virtue of which he raised the present action against the company, and the four individuals above mentioned, each of whom were subscribers to the undertaking to the amount of ten shares, or L.500 each, for payment thereof, with interest until paid, &c.

Defenders' Pleas.

In defence it was *pleaded*—1. That the pursuer is not entitled to single out four of the individual subscribers, and to conclude against them for the full sum claimed. The pursuer has not confirmed any sum as due to the deceased by these four individuals; and the only title he has produced is for a debt due by the West-Lothian Railway Company. The action ought to have been raised against this company alone, or, at all events, all the individual subscribers ought to have been called for their interest. The action, therefore, so far as directed against Messrs M'Callum, Burns, Waddell and Henderson, ought to be dismissed.

2. So far as the action is directed against the West Lothian Railway Company, it is maintained, that, as Miss C. H. Baird and Mr J. H. Baird deny that they gave any authority to the late Mr Hugh Baird to subscribe for them, and do not hold themselves liable by his subscription, the claim arising out of this subscription is available against Mr Baird himself, or any person in his right. As Mr Baird, by his subscription, bound himself to the company to the extent of L.400, and as that sum exceeds the amount of the account now claimed, it is submitted that the pursuer, as in Mr Baird's right, can obtain no decree for payment of the amount sued for till it shall be ascertained that Mr Baird's proportion of the debts of

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the company will not exceed, or be equal to, the amount of the account in question. At all events, credit must be given by the pursuer, as in Mr Baird's right, for the two calls upon the eight shares subscribed by him; and the pursuer must also give a valid obligation to pay whatever other sums may yet be found due by Mr Baird upon the eight shares for which he subscribed, as above mentioned.

The Lord Ordinary pronounced the following interlocutor, adding the subjoined note: 'The Lord Ordinary having heard counsel for the parties, and considered the whole process, finds, That the claim of the pursuer, as executor-creditor of the late Hugh Baird, against the West-Lothian Railway Company, is instructed to the extent of L.215 : 1 : 10, with interest as libelled, under deduction of L.60 paid to account since the present action was raised, and interest from the date of that payment: finds, That the defenders, M'Callum, Burns, Waddell and Henderson, as partners of the said company, are liable singuli in solidum for that sum, but each only to the extent of his share or shares of the capital stock of the company: finds it admitted that the said Hugh Baird became a subscriber to the company in the names and for behoof of Mr J. H. Baird and Miss C. H. Baird, to the extent of four shares each; and finds it admitted that he did so without authority from those persons, or that no authority from them can now be produced: finds, That two calls were made on the subscribers of 2 per cent. on each share, amounting to L.16 on the said eight shares, payable in January 1825 and September 1826; and for that sum, with interest from the terms of payment, sustains the defenders' plea of retention hoc statu; and for the said sum for which the defenders are now found liable, under the deductions, and subject to the right of retention above specified, decerns; reserving all questions quoad ultra between the parties, either as to a claim for farther payment on the part of the pursuer, or of compensation, or repetition, or on other grounds, on the part of the defenders, until the affairs of the company are winded up; and also all claims of relief at the instance of the defenders against each other, or against the other partners of the said company, or those who may be liable for its obligations: finds the said defenders liable in expenses; and remits to the Auditor to tax the account when lodged, and to report.'

Note.—'The defence, that all the parties have not been called, was, of consent, repelled as a preliminary plea, reserving its effects upon the merits of the question; but the only effect it can have upon the merits relates to the point, whether, if the defences are

'repelled, the defenders are liable singuli in solidum or pro rata; 10 June 1835.
'as to that the Lord Ordinary has no doubt that they must be lia-
'ble in solidum to the extent of their shares. Malcolm v. The West-Lothian Railway Co., &c.

'The amount of Mr Baird's claim for surveys and other work 'performed is instructed by the books of the company, and admit-'ted by the defenders. It is therefore a liquid claim.

'Doubts have been entertained as to the effect of a person sub-'scribing a contract of copartnery, in the name of another, without 'authority. The decisions in the cases of M'Aulay *v.* Renny, and 'Calder *v.* Downie, referred to in the pleadings, proceeded on spe-'cial circumstances; and neither these decisions, nor the opinion 'of Mr Bell, given with hesitation, set the point at rest. It may 'be admitted, that in a question with third parties, not partners of 'the company, (and both the cases referred to occurred with third 'parties,) the unauthorised subscriber subjects himself directly to 'the liabilities of a partner. But in a question with the other part-'ners, who had an opportunity, and were bound to examine his au-'thority before they admitted him to subscribe, the more correct 'view seems to be, that as he is unquestionably not a partner, so 'he should not be subject to liability farther than damage can be 'qualified, in consequence of his unauthorised subscription. If that 'be the case, while the pursuer's claim against the company is li-'quid, there is no liquid claim that can be set off against him, far-'ther, at least, than to the amount of the calls which were made upon 'the partners in terms of the Act of Parliament. Until the affairs 'of the company are winded up, and the calls upon the other sub-'scribers made good, it cannot appear, whether to any, or what 'extent, the assets of the company are insufficient to meet its ob-'ligations, or what damage has arisen from Mr J. H. Baird and 'Miss Baird being falsely represented to the company as subscri-'bers. On that ground the Lord Ordinary thinks that the pur-'suer's liquid claim ought not to be hung up until a claim of da-'mage against him—which, if it exists, is not yet liquid—shall be 'instructed by the final settlement of the affairs of the company.'

The defenders *reclaimed;* and at the advising the discussion came to be limited to the question, what was to be the effect, on the present claim, of the late Mr Baird having, without authority, subscribed for shares for his children.

On this point the defenders maintained, (*Keay,*) That the prin- Defenders' Pleas.
ciple recognised in the cases of Gartley *v.* Renny, 15th Feb. 1803, *N. R.*, and of Calder *v.* Downie, 11th Dec. 1811, *F. C.*, referred to by Mr Bell, ii. 624, was decisive; it being held in both of them, that a father who had subscribed a partnership contract

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for his son, thereby, to all intents and purposes, rendered himself liable for all the responsibilities of a partner; and on this principle, Mr Baird having, by his subscription, rendered himself liable for his proportion of this, as well as of the other debts of the company, the fair way of dealing with the claim on the part of his creditors was, to delay giving effect to it till the affairs of the company were wound up, when the relative claims of the parties would be ascertained.

Pursuer's Pleas.

It was *answered* (by the *Dean of Fac.*)—(in reference to the cases which had been cited,) that it appeared from the note-book of the Lord President, that the decision in these had not proceeded so much on the ground of subscription, as on various other circumstances, which evinced the intention of the party to become a partner. It was no doubt true, that if a party fraudulently subscribed the name of another, whereby the other partners ultimately sustained loss, he might be liable to them in damages; but this could not have the effect of rendering him a partner of the company, or be set up in defence against a liquid claim of debt. It was contrary to the first principles of the law of copartnery, in which a delectus personæ was implied, to hold that a person could, by any such proceeding, render himself a partner of a company; and if he was not a partner to all intents and purposes, then the interlocutor of the Lord Ordinary was right.

Opinion of Court.

At the first advising the Court had some difficulty, and the case stood over for consideration; and when it came again to be advised, *Lord Balgray* said, That he had now formed a clear opinion upon the case; for although, from the terms of the proposed undertaking, which was a joint adventure, and not a proper company, it was impossible to hold the late Mr Baird as a partner, his Lordship arrived at the same conclusion, from the circumstance of his having subscribed for shares for parties without their authority, for, by so doing, he came passive into their shoes, and rendered himself liable for all the consequences, in the same manner as if he had been a partner. He might not be entitled to claim active, but he was liable passive, for a share of all the debts of the company. He was in the same situation as if he had made a payment, and was seeking relief in an action of debt; and supposing him to do so, on the ground that the other subscribers were liable singuli in solidum, he would properly be met by the plea, that he was one himself, and must bear his proportion. His Lordship therefore held, that the result would be, that Mr Baird was liable for a proportional share of his own account, along with the four partners who were in the field, and that he

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was only entitled to decree against them, in proportion to the extent of their shares, as compared with those for which he had subscribed in name of his children.

Lord Gillies concurred.—Mr Baird was not, perhaps, properly speaking, a partner of the company, but he had incurred all the liabilities of a partner by subscribing for shares for parties who had not authorised him so to do. Though he might have no right to draw profits, he had subjected himself to responsibility for all the debts for which the other partners were liable. His executor had brought his action against four of these partners; and although the debt might be due, the answer was, that he was liable for his author's share of it; and therefore the claim on the part of his creditor must be subject to deduction of a proportional part. The proportion in which the different parties would be liable for the debts of the company were, that Mr Baird having subscribed for eight shares for his son and daughter, was liable to the extent of L.400, while the parties whom he called into the field as defenders, having ten shares each, were liable to the extent of L.500 each, i. e. in the proportion of L.400 to L.2000.

Opinion of Court.

The *Lord President* and *Lord Mackenzie* concurred. The latter observed, there was here nothing but loss. There was no gain, and no possibility of gain, since the undertaking had not been begun, and Mr Baird, or those coming in his right, must bear their proportion of the loss. When a partner of a company brings an action against a certain number of the partners for a company debt, he must hold himself cited as a defender, and be liable for his share of the debt.

Judgment.

The *Court* therefore 'recall the interlocutor reclaimed against: 'find, That as the deceased Hugh Baird, by his subscribing for J. 'H. and C. H. Baird without authority, became himself, as much 'as the defenders, according to the extent of their subscriptions, 'liable for the debt libelled, the pursuer, as his executor-creditor, 'is only entitled to five-sixths of the sum of L.215 : 1 : 10, with 'interest as libelled, under deduction from said sum of L.60 paid to 'account, with interest from this date, of that payment from the 'defenders; and sustain the defenders' plea of retention hoc statu, 'to the extent of the call of L.16, payable in January 1825 and 'September 1826, with interest from the terms of payment, and de-'cern and declare accordingly; reserving all questions quoad ultra 'between the parties, either as to a claim for a farther payment on 'the part of the pursuer, or of repetition, or on other grounds on 'the part of the defenders, until the affairs of the company are 'wound up; also all claims of relief at the instance of the defenders 'against each other, or at their instance, or the pursuers against the other partners of the said company, or those who may be

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'liable for its obligations: find no expenses due; and in respect of 'the joint minute now lodged for the parties, decern against the 'defenders for the sum of L.171 : 5 : 4, being the amount of principal 'and interest due under the foregoing findings, of this date, (the '10th,) and for interest on L.115 : 18 : 3, being the principal from 'the said 10th June.'

Lord Corehouse, Ordinary. Act. *Dean of Fac. (Hope,) Moir.* Alt. *Key, Whigham.* *H. Handyside*, W. S. and *Davidson & Syme*, W. S. Agents.

C.

SECOND DIVISION.

No. CXXV. 10*th June* 1835.

SIR JAMES GIBSON-CRAIG, AND J. T. GIBSON-CRAIG,
against
FRANCIS BURKE, (GARDNER'S TRUSTEE.)

COMPETITION.—IMPLIED TRUST.—BANKRUPT.—*Circumstances where a proprietor having entered into missives with feuars, upon an agreement that they should build, and that he should make advances to enable them to proceed with the work; and the feuars having accepted certain bills drawn by the proprietor, and discounted by him with third parties, and which bills were never retired by the feuars or the proprietor; and the proprietor having thereafter granted a disposition to the feuars, under the express burden of the advances made to them, including the bills discounted as above; and of the same date given the feuars a letter declaring his advances, including the bills discounted, to be a real burden on the conveyance, it being also declared that the feuars should grant the proprietor renewals of the bills if required, until the debt, consisting of the amount of the advances, should be paid,—it was found, in a question with the trustee for the creditors of the proprietor, that the third parties who discounted the bills were not entitled to be preferred on the produce of the security, or to claim the benefit of any latent equity or implied trust in their favour.*

Mr WILLIAM GARDNER, writer to the signet, feued, in January 1825, to Brown and Craig, builders, certain areas forming part of ground belonging to him. Missives of feu were exchanged, but no disposition was granted by Gardner till 8th September 1826. The

feuars, on the one hand, became bound to build, and Gardner, on the other hand, to make advances to enable them to proceed with the work; and advances were accordingly made by Gardner, and bills granted, to the extent of L.4100. The whole of the L.4100 had not been actually advanced by Gardner to Brown and Craig at the time when the feu-disposition was executed. L.2836 of it were contained in bills drawn by Gardner, and accepted by Brown and Craig. Gardner discounted with the pursuers' firm one of these bills for L.850, dated 16th September 1825, and payable 23d June 1826, being 'for value received in cash, advanced to you on account of the 'tenements erecting on the areas feued by me to you.' Another bill for L.330, dated 31st December 1826, and payable 5th April 1826, and bearing to be 'for value received in cash, advanced to you' by Mr Gardner. The L.850 bill was not retired, but was renewed by two bills for L.425 and L.435, both dated 22d June 1826, and falling due respectively on the 25th September and 25th October. The L.330 bill likewise was not retired, and no renewal of it was granted.

On 8th September 1826, Gardner granted a feu-disposition of the areas in favour of Brown and Craig, and James Dawson and John Barker, under the express burden of the L.4100 advanced to Brown and Craig; and these parties became bound to erect and finish a tenement of shops and dwelling-houses on each of the said four areas; and the disponees were infeft, under the burden of the L.4100 due to Gardner. Of same date, (8th September 1826,) Gardner addressed and delivered to the disponees an explanatory letter containing this declaration: 'I also acknowledge and declare, 'that the sum of L.4100, mentioned in the said feu-contract, as 'the amount of advances made by me, and which is declared a real 'burden on the conveyance, includes bills to the amount of L.2836, 'drawn by me upon and accepted by you, Messrs Robert Brown 'and Thomas Craig, and which bills I become bound to retire and 'relieve you thereof; it being understood, however, that you, 'Messrs Brown and Craig, shall grant me renewals thereof, if re-'quired, until the said debt of L.4100 shall be paid; which bills 'fall due of the dates, and are for the sums following, viz.

'1826. Sept. 25,	- - - -	L.430	0 0
'—— —	- - - -	195	0 0
'Oct. 15,	- - - -	130	0 0
'—— 25,	- - - -	440	0 0
'—— —	- - - -	36	11 5
Carry forward,		L.1231	11 5

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	Brought forward,				L.1231	11	5
'Oct. 27,	-	-	-	-	105	6	2
'Nov. 10,	-	-	-	-	185	0	0
'——— —	-	-	-	-	1315	0	0
					'L.2836	17	7

The pursuers averred that the bills for L.425, L.435 and L.330 formed part of Gardner's debt of L.4100, to which both the feu-contract and back letter had reference. On the other hand, this was denied. It was alleged that the pursuers were not parties to the arrangement under which the letter was granted, and they had got no assignation or conveyance to that letter, or to any right which it could be supposed to infer in favour of the parties to whom the letter was granted; that the pursuers were not made aware of the letter at the time it was granted; and that Gardner wrote the pursuers the following letter upon the 22d of August 1826: 'I beg 'to mention, that for some time past I have been under the ne-'cessity of making large advances to the feuars of my Crescent, 'near the canal basin, in consequence of which valuable buildings 'have been erected. I some time ago feued to Messrs Brown, 'Craig, Dawson and Barker, four areas for an annual feu-duty of 'L.105. In these areas, houses valued at L.9000 have been erect-'ed and completely finished. This property has been sold to the ex-'tent of L.1300, with a feu-duty of L.17, 5s. I am about to grant 'a feu-contract to the parties, under the express burden of L.4040, 'payable to me, being the amount of my advances to them. A copy 'of the feu-contract is herewith sent. It would be a great accom-'modation to me if I could procure a cash-credit from any of the 'banks to the extent of L.3000, in security of which I would grant 'an assignation to the L.4040 due to me by the feu-contract by 'Brown and others, and assign the feu-duties payable by it, amount-'ing to L.87, 15s. The credit would of course be gradually ex-'tinguished by the sales of the property. May I beg the favour of 'your assistance in endeavouring this object?'

Brown and Craig became bankrupt in 1827, and Gardner in September 1827. Gardner, in the examination under his sequestration, declared, in reference to the burden created by these deeds, that 'he considered himself as trustee, holding the said real burden 'for behoof of the advancers of the money on the said bills.'

The pursuers raised an action against Gardner's trustee, and against Brown and Craig, Dawson and Barker, the conclusions of which were (1.) That Brown, Craig, Dawson and Barker should be found to have been partners in the building speculation, and liable for advances

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made for their behoof, or on account of the speculation, and, in particular, for the three bills of L.330, L.425 and L.435: And, (2.) That it should be found, that as the advances were included in and formed a part of the sum of L.4100, declared a real burden in manner foresaid, the pursuers had an interest in the same to the extent of their advances, and that Francis Burke could only take up the real burden tantum et tale as it stood in the person of Gardner, the bankrupt, subject to the trust of paying the pursuers their advances out of the real burden. Gardner's trustee refused to give effect to any latent equity in the pursuers' favour. Barker disputed all liability in respect of the bills pursued for. No defences were given in for the other parties.

The pleas of the pursuers and of Gardner's trustee were fully stated in cases ordered by the Lord Ordinary, after hearing parties on the closed record.

With regard to the first conclusion of the summons, as the partnership in the building speculation was denied, no judgment could be given at this stage, without proof.

Trustee's Pleas.

In defence against the action, it was *pleaded* for Gardner's trustee—1*st*, The pursuers have no right or title to any share of the real security constituted in favour of Gardner by the feu-contract, they having got no conveyance to that security, and the documents founded on not conferring any jus quæsitum upon them. The letter founded on was granted exclusively in favour of Brown, Craig, Dawson and Barker. The pursuers are not mentioned in the feu-contract or letter, and the transaction was res inter alios quoad them. They would require to shew that the letter conferred a jus quæsitum, or that they had obtained an assignation to the obligation or right alleged to have been constituted in favour of Craig and Brown. None of the bill-holders had any right to, or even knowledge of that letter, the pursuers never having heard of or seen it till after Gardner's sequestration. If the original holders had even held a separate right or security, that security would not have passed to the pursuers by the mere discounting and indorsation of the bills. The mere indorsation of a bill, accompanied with the actual delivery of a separate letter of guarantee, does not transfer the guarantee to the indorsee; and a letter of guarantee or separate security cannot be transferred by implication, or without notice, delivery or conveyance. Bill discounters or holders cannot claim for any security, or against any party independently of the bill; 2. *Campb.* 308; 10. *Vesey jun.* 206; Wood *v.* James, 2. *Shaw, App.* 219. 2*d*, The real burden constituted by the feu-contract having become vested in the trustee upon Gardner's estate, by force of the statu-

835. tory adjudication and feudal title, free from all condition or quali-
fication, the trustee's right and title cannot be burdened with, or
affected by any separate declaration or personal obligation which
does not appear on the face of the deeds creating the burden, and
not entering the record; 1. *Bell*, 280-282, and vol. i. p. 26, and
cases cited. Wylie *v.* Duncan, Sommerville *v.* Redfearn, and Gor-
don *v.* Cheyne, referred to by the pursuers, do not alter the law.
3*d*, There are no relevant grounds stated, either to shew that Gard-
ner held the above security in trust, for payment of the bills claimed
on, or for declaring a right or preference in the proceeds of the
security, in favour of the pursuers, to any extent. 4*th*, Even if
Gardner could have been viewed as holding the security in trust,
he would have been entitled to apply the whole recoveries under this
security, primarily in payment by Brown and Craig of his actual
advances, and the same right is now competent to his trustee. 5*th*,
At least, the whole sum recovered under the security must be ap-
plied, equally and proportionally, in extinction of Gardner's own
advances, and the whole of the bills or debts enumerated in his ob-
ligations, without any preference in favour of the pursuers. 6*th*,
The pursuers have lost all claim upon such of the bills as were *not*
duly negotiated, in respect they are now making a claim against
the estate of Gardner, the drawer and indorser.

Pleaded in support of the action—Gardner's trustee being in-
vested in the reserved burden contained in the feu-contract, subject
to the trust declared in Gardner's back letter, and the pursuers having
a jus crediti under that trust, in respect of the bills pursued for, is
liable in payment of these bills to the pursuers, or at least is liable
to account to them for a rateable proportion of the proceeds of the
reserved burden, as the same were realised by him, and that along
with the other trust-creditors, if any, under the back letter.

There is a double fallacy in the trustee's argument: (1.) He does not
distinguish between the case of a general body of creditors and that
which arises out of the special right of a purchaser or onerous assig-
nee. Although a latent equity cannot prevail against the special
right of a purchaser, or of an onerous and bona fide assignee, it is
different in a question with general creditors, who 'are neither
'purchasers nor special assignees,' such creditors taking the right
of the bankrupt tantum et tale as it stood in his person; Redfearn,
as decided on appeal, 1st June 1813, 1. *Dow*, 50; Gordon, 5th Feb.
1824, *F. C.*; see also Mooney, 3d Dec. 1736, (12,471,) *Elchies on*
Stair, p. 69. (2.) He argues as if this reserved burden were a right
of property ex facie absolute and unconditional. When the ques-
tion occurs as here, not with a third party, an onerous assignee, but
with creditors adjudgers, can it be maintained that they can take a

real security,—a right qualified in its own nature,—otherwise than as the bankrupt held it? It is one thing to say, that where the record shewed a property in the bankrupt, ex facie absolute, creditors are entitled to rely upon it as such, and consequently to take it independently of any counter obligations not apparent, which, with reference to that property, may be incumbent on the bankrupt. But the case is different where the right is in its own nature conditional, where it is obviously subject to latent exceptions, and where the very nature of its constitution shews that it was acquired and held by the bankrupt under certain conditions. The same reasons which make a payment of the debt, or its extinction by intromission, effectual against creditors adjudgers, must operate equally if the security in the person of the bankrupt is exceptionable; as, for instance, if he has not made the advance in security or payment of which the real burden is taken. What Gardner had, in truth, was a security in trust in repayment of advances; and if these advances were not made, there was no security. The trust, in fact, was without object or purpose, and to that extent there was no right in the bankrupt which could be adjudged at all.

The back letter specifies a certain set of bills amounting to L.2836 : 17 : 7; and without regard to his advances aliunde, Gardner binds himself unqualifiedly to retire these bills. It is not declared to be operative merely in the event that there shall be a surplus after meeting Gardner's other advances, but a positive obligation to retire certain bills, and relieve Brown and Craig of them.

The Lord Ordinary pronounced this interlocutor: 'The Lord 'Ordinary having considered the closed record, and heard parties' 'procurators, and having thereafter considered the revised cases for 'the parties, decerns, *in absence*, in terms of the libel, against Ro- 'bert Brown and Thomas Craig, and John Wilkie, their trustee, 'and against Margaret Wilson or Dawson, Agnes Dawson, James 'Dawson and Thomas Wilson Dawson: finds, That the pursuers 'and the defender, John Barker, are at direct variance in their 'statements on the record, with regard to the essential facts on which 'the first conclusion of the summons depends; and therefore, before 'answer as to that conclusion, appoints the cause to be enrolled, in 'order that it may be put into proper shape, for the trial of the 'question or questions of fact which arise between these parties: 'finds, with reference to the second conclusion of the summons, 'That in so far as the sums expressed in the three bills for L.330, 'L.425 and L.435, mentioned in the summons, or any of them, can 'be shewn to have been comprehended in the sum of L.2836, 17s. '7d., consisting of bills, as set forth in the letter quoted in the 23d

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'article of the condescendence, whether the same were original bills, 'existing at the date of the said letter, or renewals of such bills, in 'terms of the stipulation therein expressed, and in so far as the said 'bills had been duly preserved as legal grounds of debt, the defender, 'Mr Burke, as in right of Mr Gardner and his creditors, must hold 'the security by real burden, reserved in the contract of feu pro- 'duced, and the subject thereof, or its price or produce, subject to 'a trust for payment to the pursuers of the sums in the said bills, 'or any of them, shewn to be so situated, so far as the proceeds of 'the said security may be sufficient for the payment of the whole 'sum of L.4100 covered by it, or otherwise, for payment to the 'pursuers of a rateable part or proportion of the said proceeds, cor- 'responding to the amount of such bills, in relation to any other 'advances which the defender can shew to have been made by Mr 'Gardner to Brown and Craig under his obligation, referred to in 'the said feu-contract and letter, and to have been comprehended 'in the said sum of L.4100, but no farther; and before further 'answer appoints the cause to be enrolled, and in the meantime 'reserves all questions of expenses.'

Note.—'The case between the pursuers and Mr Barker appears 'to the Lord Ordinary not to admit of any judgment without trial 'of the disputed facts. The averments in the pursuers' condescen- 'dence, in Articles 3. 4. and 5, and particularly 6. and 13, are dis- 'tinct and pointed, that Mr Barker and Mr Dawson entered into 'a *partnership* with Brown and Craig, with a full participation of 'profit and loss, and that the *business* of the *partnership* was mainly 'conducted *under a partnership firm* of *Brown and Craig*. Two of 'the bills sued on, viz. L.435 and L.425, are expressly *accepted* by '*that firm* of *Brown and Craig*. Assuming this as the state of the 'case, surely Mr Barker does not expect to convince the Court, that 'even an ordinary action will not lie upon a bill *accepted* by a com- 'pany *firm against a partner of that company*, merely because his 'name is not in the firm; see *Thomson on Bills*, p. 266, and the 'cases there quoted. If such a point could be maintained, the well- 'known case of M'Nair *v.* Fleming would have been simple indeed. 'There must therefore be a fallacy in regard to the cases quoted in 'Mr Barker's revised case, which were not alluded to in the debate, 'and appear to have been put in after the revisal of the pursuers' 'case, as they are not mentioned in it. One thing is evident, that 'in both the cases quoted, the recourse sought was against parties 'said to be liable as *drawers* of the bills, where they did not at all 'appear in that character, and there was *no partnership firm* adhi- 'bited. But it is unnecessary to consider any point which can be 'made on them till the facts are ascertained. The Lord Ordinary

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'would be indeed astonished, if it were held that a sleeping partner 'is not liable *by any form of action* for payment of a bill *accepted* by 'the firm of his company, and in the business of that company; 'for there is also a pointed averment in the record, that the bills 'were accepted in the business of the company, and were *applied* '*for its behoof.*

'The question between the pursuers and Mr Burke may also, to 'some extent, depend on matters of fact. It must be made out 'that the bills sued on, or some of them, are the bills referred to in 'Mr Gardner's letter, or renewals of those bills; and it must be 'made out that they were duly protested. But the facts necessary 'for the decision of the question of law, argued in these papers, 'seem to be sufficiently fixed. The question itself is of some diffi-'culty.

'When Gardner made his transaction with Brown and Craig, 'he became bound to make advances to them for completing the 'buildings, but retained the title to the property for his security. 'When he came to grant the feu-contract, it was made as a con-'veyance to Brown, Craig, Dawson and Barker, and the survivor, 'and their heirs, as trustees, in the terms set forth, the pursuers 'assuming that, before this time, Dawson and Barker had become 'partners in the concern. The conveyance is made under the real 'burden of L.4100, stated to have been *advanced* by Gardner to 'Brown and Craig, 'to assist them in erecting *the buildings in the* "*said areas,*' &c., and with a power of sale, in the event of that sum 'not being repaid. Then there is a back letter by Gardner, (Art. '23. Cond.) which bears, that that real burden included bills to the 'amount of L.2836 accepted by Robert Brown and Thomas Craig, 'which bills Gardner becomes bound to retire, under a stipulation, 'that *Brown and Craig* shall grant *renewals* if required, *until the* 'whole sum of L.4100 *shall be repaid.* And then the *particular bills,* 'as they then stood, are *enumerated.*

'Assuming that the bills sued on, or some of them, are *renewals* 'of *some* of the bills in the list, there can be no question that they 'are bills under which Brown and Craig had received the *advances* 'for the *particular buildings* in the conveyance, and that they are 'included in the L.4100 constituting the real burden. Supposing, 'therefore, that Gardner had paid the bills, he could certainly have 'made the real burden effectual, so far as the subject would go for 'that advance, as well as for his other advances.

'On the other hand, if Gardner did not pay these bills, and if 'Brown and Craig, the acceptors, had paid them, the real burden 'to that extent must have come *ineffectual,* because the advances 'which formed the value or consideration of it had not been made.

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'The actual case is, that Gardner has not paid the bills, and 'Brown and Craig have not yet paid them; but the *advance has* '*been made*, in the first instance, to Brown and Craig, by Gardner, 'with *the funds of the pursuers* obtained *upon these bills*. Both the 'parties are liable to the pursuers, by the bills themselves; and 'Gardner is primarily liable, in regard to Brown and Craig, by his 'obligation in the letter. And the question is, whether the pur-'suers, holding these bills, which are *expressly comprehended in the* '*real burden*, are, or are not entitled, as against Gardner's trustee, 'either to be preferred in toto on the produce of that security, or 'to participate in the benefit of it, pro rata, with the creditors, for 'Gardner's other advances.

'The Lord Ordinary can see no room for doubt that Gardner's 'letter must be taken as a substantive part of the contract by which 'the real burden was constituted. It is not a subsequent personal 'qualification or engagement. It was made unico contextu with 'the feu-contract; and it is at any rate legal proof, that, without 'taking in the bills to be retired, there was to that extent no real 'burden, because the advance had not been made. Mr Burke seems 'to lose sight of this in his argument.

'Gardner, then, holding the real burden to the full amount of 'L.4100, could only hold it for the amount of the bills while they 'remained unretired *as a trust*. It was a trust, in the first instance, 'for Brown and Craig, for their relief of the bills accepted by them; 'and if Gardner, using the power of sale, thereby made the real 'burden effectual, he must surely be liable to Brown and Craig 'under his obligation to make it effectual for *their relief of the bills*. 'But, as Gardner was the party who was bound to pay the bills, 'trusting to his real burden, it is thought, that *while they remained* '*unpaid*, he must be considered as holding the security *in trust for* '*the pursuers*, by means of whose money, under these bills, he made 'the advances to Brown and Craig.

'But if Gardner held the real burden in trust for the pursuers, 'could his trustee or creditors operate upon it by selling the sub-'ject, and refuse to impart the benefit of it to the pursuers? The 'Lord Ordinary is of opinion that they could not. It does not 'appear to him that any of the peculiarities with regard to real 'estates are involved; for the real burden, as held by Gardner, 'depends for its substance upon the advances made: And, as the 'proceeds of the bills form a part of those advances, the question 'seems to depend on the common principles of trust in a bankrupt. 'If the simple case be taken of a disposition, apparently absolute, 'with a back bond, declaring it to be a trust, though a *purchaser*, 'ignorant of the trust, might be safe, at least if the bond was not

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'registered, there cannot, it is thought, be any doubt, that *creditors adjudgers* could only take the title, subject to the trust. The 'Lord Ordinary cannot admit the doctrine of Wylie *v.* Duncan; '(which, indeed, the defender's counsel seemed to give up *in the debate*,) in the face of the cases of Redfearn and Gordon *v.* Cheyne, 'which he thinks directly applicable. But the case here is not so 'favourable for the creditors as that above supposed; for the *title*, 'namely, the reserved real burden, shews *on the face of it*, that it was 'only in security of money *advanced*; and the letter, taken along 'with it, shews that the *unpaid bills* were included in that money; and 'consequently, if that state of the bills did constitute a trust, *it was 'involved in the very nature of the title itself.*

'It is said that the pursuers, in transacting with Gardner, trusted 'to his personal security, and did not look to the real burden. 'There is a pointed averment of the *reverse* in the Record; see '*Ans.* to Burke's Statement, Art. 9; and Mr Gardner's declara-'tion seems to confirm it. But, at any rate, when the bills were 'first discounted, Gardner held the absolute title to the property in 'the register; and although he was under an obligation to grant 'the feu-right, that was under the qualification of his right to re-'serve a real security for his advances. The pursuers were entitled 'to look to that security; and as the original bill for L.850 bore *ex-'pressly* to be for value in *advances* to Brown and Craig, 'on ac-"count of *the tenements erecting on the areas feued by me to you*,' it 'must be presumed that they did look to it. Besides, it is a very 'possible case for a party to have, indirectly through the person with 'whom he deals, a right to the benefit of a security, though it may 'be unknown to him at the time, or subsequently acquired; as he 'may also have a good claim against a partner of a company, though 'he did not know he was a partner when he transacted.

'But, although the Lord Ordinary thinks that the case of the 'pursuers is made out in principle, he is of opinion that it can go 'no further than to entitle them to a rateable proportion of the pro-'duce of the real security, along with the creditors claiming for the 'other advances, making up the L.4100; for though Mr Gardner 'held the security in trust for the bills, it was only a trust for a pro-'portional benefit in its value, while, quoad ultra, it was held for 'his other advances, and must be so held by Mr Burke.'

The defender, Burke, *reclaimed* against the interlocutor in so far as unfavourable to him.

Judgment.

The *Court* unanimously altered the interlocutor of the Lord Ordinary, in so far as reclaimed against, and pronounced this judg-

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ment: 'Alter the interlocutor of the Lord Ordinary submitted to 'review; sustain the defences for Francis Burke; assoilzie him 'from the conclusions of the action, and find him entitled to ex-'penses.'

Lord Medwyn.—It would be an important case for bankers if your Lordships were to sustain this interlocutor, and I should be happy if I could concur in it, but truly I cannot find it consistent with the principles of law as applicable to such cases. By Gardner's bargain with Brown and Craig, he was to make advances to them. To enable him to raise money for this purpose, they granted acceptances to him. These he discounted with the pursuers as private bankers. Gardner had a security for these, because he had not yet executed any feu-right; but the pursuers plainly did not rely on any benefit from this security. There is no obligation to that effect, and Gardner's letter, 22d August 1826, negatives any such idea. When the feu-right is granted, Gardner's advances are made an heritable burden over it; but a back letter explains that a certain sum rests on bills of Brown and Craig, to be retired by Gardner, so that the security is to be good to the full extent, only on the bills being retired by him, so as not to come against Brown and Craig. I see nothing else than this in the letter. I see no trust in it; and if there be a trust, I think it is for none but Brown and Craig, and certainly not for the pursuers. They were ignorant of any such letter till it fell into their hands after Gardner's sequestration. It is not conveyed to, nor assigned to them in any manner of way; and when I recollect the difficulty there was in sustaining the right of a banker who had discounted a bill on the faith of a letter of guarantee deposited, but not assigned to them, a decision about which doubts have been entertained since, (Sir William Forbes and Company *v.* Macnab, 1816,) I cannot hold that the pursuers could operate on this security, even if they could shew that the bills in their hands were included under the heritable burden, which, however, is not very distinctly shewn. But supposing they did supply the money paid over to Brown and Craig, how does this advance their claim to share in the security, granted, not for their loan to Gardner, but for Gardner's advances to Brown and Craig? The security, in fact, is not effectual till the money is paid, and it is not paid while Brown and Craig's acceptances are taken for it; so that till these are paid up and withdrawn, so as never to operate against them, the security could not be available to Gardner, nor to the pursuers, even if they could state themselves as his assignees to it. On the contrary, the pursuers have actually claimed and ranked on Brown and Craig's estate for the bills, and taken decree. If Gardner had succeeded in getting a cash-credit for L.3000 from a

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bank, (as proposed, see letter, 26th August 1826,) and paid up the bills, would the bank have got the benefit of the real burden without an express assignation? I really think they would not; and yet they would have been in a much more favourable situation than the pursuers are, for there the payment of Brown and Craig's acceptances, by completing the advance to them, would have rendered the security effectual in Gardner's person, which at present it certainly is not, as he has not fulfilled the obligation of retiring the bills from being claims against them. The case of Duncan *v.* Wylie seems to me to have no application to this case, which is that of a real burden, which was meant to be temporary, and would cease on the debt being paid up, thus totally different from an ex facie absolute disposition, with a latent personal obligation de retrovendendo. Neither do I understand that the cases of Redfearn and Gordon are inconsistent with the case of Duncan, as they depend on totally different principles; *Bell*, i. 283, 285.

Lords Glenlee and *Meadowbank* were for altering the interlocutor.

Lord Justice-Clerk concurred in the opinion of Lord Medwyn, and considered that the trust had been for the benefit not of the pursuers, but of Brown and Craig. A trust is not to be established by implication. An assignation would have been necessary; and as there was no assignation, a trust cannot be inferred of what was neither directly nor indirectly conveyed.

Lord Ordinary, *Moncreiff.* Act. *Rutherfurd* and *Ivory.* *Gibson-Craigs, Wardlaw & Dalziel*, W. S. Agents. Alt. *Dean of Fac. (Hope,) G. Bell.* *John Forrester*, W. S. Agent. *F.* Clerk.

R.

SECOND DIVISION.

No. CXXVI. 10*th June* 1835.

THOMAS MACKENZIE
against
Rev. JOHN MACKENZIE.

Kirk.—Manse.—*A presbytery having decerned for extensive additions and repairs on a manse and offices,—found, (without deciding as to the power of the presbytery to order additions,) that there was no ground for further additions being made at the expense of the heritors, in respect that, ten years before, the manse had, to the satisfaction*

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of the minister and presbytery, been thoroughly repaired, and had received extensive additions.

Repairs, decerned for by the presbytery, and consented to by the heritors, authorised to be made.

By authority of the presbytery of Lochcarron, the manse of Lochcarron was, in 1822, thoroughly repaired, and increased accommodation provided for the minister, with all which the minister—the presbytery also approving—declared himself satisfied. In 1832 the reverend incumbent again applied to the presbytery for further repairs and additions to the manse and offices, which the presbytery, after obtaining reports, decerned for.

Mr Mackenzie of Applecross, the chief heritor, expressed his willingness to execute the repairs, but this the minister would not consent to unless the additions were also made. A suspension was consequently brought on these grounds, 1. That the presbytery had no power to decern for additions to a manse; and, 2d, That after what had taken place in 1822, the minister was barred from demanding farther accommodations.

To this it was answered, 1. That the manse not having been declared free, the minister was not barred, by the repairs and additions in 1822, from now demanding accommodation suited to the state of the parish and of his family; Botriphnie, 3d July 1805; Avondale, 5th Dec. 1810, affirmed 3d July 1813. The presbytery may decern for additions as well as repairs necessary for the proper accommodation of the minister; Cathcart, 1803; Kirkliston, 1808; Anworth, 1812; Strathblane, 10th July 1827.

The Lord Ordinary pronounced this interlocutor:

'The Lord Ordinary having resumed consideration of the debate, 'with the closed record and whole process, finds, That there is no 'evidence or relevant allegation that the manse of Lochcarron is at 'present in such a state of general disrepair or decay as to require 'any very extensive or thorough repairs; but that, on the contrary, 'it appears, with a few slight local exceptions, to be in perfectly 'sound and sufficient condition: And finds, That in these circumstances the minister has no right to demand, or the presbytery to 'ordain, any additions to be made to the said manse, at the expense of the heritors; and therefore, and to the extent of the sum 'charged for as the estimated expense of such additions, suspends 'the letters and charge simpliciter, and decerns: Of consent of the 'suspenders, finds the letters orderly proceeded as to the three last 'articles in the specification, amounting together to the sum of 'L.43, 14s.; and before answer as to the only remaining article,

'viz. the estimated expense of a new barn, appoints the cause to 10 June 1835.
'be enrolled, that parties may be prepared to state in what manner Mackenzie v. Mackenzie.
'they propose to establish their contradictory allegations as to this
'article respectively.'

Note.—'The Lord Ordinary was at one time inclined to report 'this case to the Court; but on the whole he has thought it his 'duty, having heard a very full argument, to give judgment on the 'only point very much questioned at the debate. The decisions 'of Court have no doubt varied considerably upon this point; 'though the Lord Ordinary believes there is no instance in which 'additions have been allowed, where extensive repairs had been 'made only ten years before, and where tradesmen of the presby- 'tery's own appointment had reported that all the repairs actually 'required for the existing fabric might be executed for L.14. In 'those respects the case comes nearer that of *Dalmeny* than any 'other. But the Lord Ordinary has been most moved by the 'views which appear to have been taken by the Court in the most 'recent case which has occurred, that of Strathblane, 10th July '1827, (5. *Shaw*, 913.) The report of the actual state of the 'manse, in that case, exhibited a strong contrast to the present; 'the result being, that the floors and joisting of that manse were 'rotten; that the levels of the different storeys required to be altered 'two or three feet; that one gable must be entirely rebuilt; and, 'in short, that the expense of making it sufficient would be nearly 'equal to that of building a new manse. Yet, even in that case, 'there were difficulties about allowing an addition; and, in point 'of fact, it ended by a new manse being built.

'It is impossible, too, to overlook the near and strong analogy 'of the rule now finally established as to additions to parish churches, 'by the cases of Methven, 14th May 1828, (6. *Shaw*, 791,) and 'of Neilson, 1st Feb. 1831, (9. *Shaw*, 370.) There had been 'a similar fluctuation in the earlier decisions upon that question to 'that which the chargers refer to in this; but the judgments of 'the Court in the two last-mentioned cases, and the affirmance of 'the latest of these, after a most elaborate discussion in the House 'of Lords, has at last finally settled the law, upon views and princi- 'ples which the Lord Ordinary feels to be directly applicable to, 'and, he humbly thinks, decisive of, the present case.'

The minister *reclaimed*, and craved that the letters might be found orderly proceeded; or at least a remit made with instructions to an architect or person of skill, to report as to the present state of the manse and offices. The suspender also *reclaimed*, and

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'craved an alteration of the interlocutor, in so far as it, 'of consent 'of the suspender, finds the letters orderly proceeded.'

At the moving of the reclaiming notes, the *Lord Justice-Clerk* read, from his notes, the opinions of the Judges of the Second Division in the case of Channelkirk, depending in 1817, and not decided when Connell's work was published, in which a majority had held that the presbytery had no power to decern for additions.

The *Dean of Faculty*, for the minister, contended—That the presbytery had the power of decerning for additions; and in addition to the cases cited for the chargers, referred particularly to the proceedings in the Strathblane case, and in the Kirkliston case, decided in 1808, from which last case it appeared that the Lord Ordinary, the late Lord Meadowbank, recognised the power of the presbytery so to decern; and as to the powers conferred by statute, and the latitude of interpretation that may be exercised by the Court, he founded on the judgment of the House of Lords in Gardner v. Dingwall of Brucklay.

The *Court*, without calling on the counsel for the charger to argue the general point, held, in the special circumstances, and after the manse had been made commodious and satisfactory to the minister in 1822, that no farther additions ought to be decerned for; and accordingly pronounced this interlocutor:

Judgment.

'Having advised the case, and heard counsel for the parties, in 'respect that the manse of Lochcarron, to which the question re- 'lates, was repaired in 1821, to the satisfaction both of the minis- 'ter of that parish and of the presbytery, find, That there is no 'ground to support an application for any addition thereto, at the 'expense of the heritors, and with this explanation, adhere to the 'interlocutor of the Lord Ordinary submitted to review upon this 'head, and decern; and with regard to repairs, allow a minute to 'be lodged for the suspender, to be seen for eight days, and an- 'swered, if necessary; and appoint the case to be then put in the 'rolls, superseding in the meantime with advising.'

Thereafter the *Court*, upon advising a minute for the heritors and answers for the minister, (30th June 1835,) authorised the repairs to be made on the manse and offices, as contained in the original specifications approved of by the presbytery.

Lord Ordinary, *Jeffrey*. For Suspender, *Ivory, Dunlop*. *Party*, Agent. For Charger, *Dean of Fac. (Hope,)* and *Maitland*. *Mackenzie & Macfarlane*, W. S. Agents. *T.* Clerk.

R.

FIRST DIVISION.

No. CXXVII. 11*th June* 1835.

THE TOWN-COUNCIL OF BRECHIN
against
GUTHRIE, MARTIN & COMPANY.

TENOR.—*Circumstances in which found that there were sufficient adminicles to prove the tenor of an act of thirlage.*

IN support of an action of declarator of thirlage by the pursuers against the defenders, (licensed distillers within the burgh of Brechin,) the pursuers raised the present summons of proving the tenor of an act of thirlage, and produced, as adminicles, a document, entitled, 'Coppy Act of Thirlage, Brechin, 1744,' and which bore to have been 'coppied from an extract of the records of Brechin, granted 'by Mr Spence, town-clerk,' and stated the said act as dated, 'Att 'Brechin, the fifteenth day of May, one thousand six hundred and 'thirty-seven years;' also a document, entitled, 'Double act anent 'mill multures off Brechine,' and bearing date, 'At Brechine, the 'fyfteein day of May Javji thretty-sex years,' similar in terms to the preceding. They also produced various extracts from the Council book, of tacks and minutes respecting the common mills of said burgh, and inter alia the following:

'*Brechin, the* 18*th Maij* 1674.

'The sd day the comon Mills sett for a year fra Whitsonday '1674 to Whitsonday Jajvic sevintie fyve to David Donaldsone 'yor Balyie for the sowme off nyne hundereth merks to be pd at 'three terms conforme to ye act of Counsell in Maij 1672 and the 'Taksman off the Mills to exact the multure conform to old use 'and wont and the old Act off Thirlage in anno . . . . . and under 'the paynes and with certificatne therein contained, and ordaines 'an Act in forme to be extracted to him under the Clerks hands for 'his warrand.'

The pursuers averred, in reference to the original act of thirlage, that the said act of thirlage, and the volume of the records of the town of Brechin, in which the same was engrossed, had been lost, or had gone amissing, along with some other parts of the town records, and sundry other deeds and documents belonging to the town, which they had good ground for believing were carried off and destroyed, or mislaid and lost during the Rebellion 1745, and that they

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had not, after the most careful search, been able to recover the said act of thirlage, or the volume in which it was engrossed or recorded.

It was pleaded, in defence, that the summons was not relevant, in respect that it did not libel, in terms sufficiently positive or special, a casus amissionis of the alleged act of thirlage, more particularly in the absence of any authentic writings relative thereto; *Stair*, iv. 32, 5; Harner or Harroway *v.* Heitly, 13th June 1667, *M.* 15,971.

Defenders' Pleas.

At the advising, *Currie*, for the defenders, argued,—That it was laid down by all the authorities, that there must either be a special casus amissionis, or, if there is no such special casus, there must be authentic adminicles. If they merely aver that the deed was lost, and do not shew that it was destroyed, they must produce authentic adminicles. This is not a copy from a record, but of an extract. Besides, the deed, the tenor of which is attempted to be proved, is not an ordinary deed, like a charter or instrument of sasine, or procuratory of resignation, as to which, if its existence is once proved, the general nature of it may be presumed. Here it was established that an extract existed. What is become of it? The question is not what is the effect of the proof, but whether there be sufficient ground to entitle the pursuer to go to proof.

Pursuers' Pleas.

Graham Bell, for pursuers.—It is only where a deed may be cancelled by redelivery, that a special casus is required to elide the presumption, that the party is attempting to revive a document already delivered up. Where a private individual is suing on his own rights, there may be some reason for calling on him to state precisely how they have come to be amissing; but here the pursuer is a moving and changing body. We give a very probable and natural cause for the loss of the document. As to the authenticity of the documents produced, the very first is authentic. It is of a date nearly coeval with the first act of council, to which it expressly refers. Is not an ancient copy the very best evidence of the tenor of a lost document?

Opinion of Court.

Lord Balgray.—The question just now is not whether the tenor be proved. I think the adminicles here are quite sufficient. The copy is evidently of an ancient date. As to the casus, I think a very reasonable one is assigned.

The *Lord President.*—The entry in the Council book of 16th May 1674 is authentic, and it refers to the old act of thirlage. Casus amissionis is a curious phrase. If a party can't tell how a deed was lost, is it not enough for him simply to say that it was lost?

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Lord Mackenzie.—The danger of that would be plain enough. The party might be keeping up in his own repositories a defective deed. There is no danger of that here: there is no reason to suppose the Bailies have any such motive. Perhaps the documents are not exactly authentic; but I think it is a safe case. One of them appears to have been a double given out at the time.

Judgment.

Their Lordships pronounced this interlocutor: 'Having advised the state of the process, repel the preliminary defence, and sustain the adminicles produced as sufficient for allowing a proof of the tenor of the writ sought to be proven as libelled; and allow the pursuers to prove the tenor of the writ sought to be proven as libelled; and allow the pursuers to prove the tenor and casus amissionis thereof; and allow the defenders a conjunct probation thereanent, and for that purpose grant commission,' &c.

Act. *Graham Bell.* Alt. *Currie.* *Graham Binning*, W. S. and *James Imrie*, Agents. *D.* Clerk.

C.

SECOND DIVISION.

No. CXXVIII. 11*th June* 1835.

Mrs BLAIR and Others
against
WILLIAM BRYSON.

SOCIETY.—*A bill having been signed by a company, and a letter also signed by the firm acknowledging that the bill had been accepted for the accommodation of the company;—circumstances in which it was held to be proved that the bill and letter of obligation had not been granted in the business, or for behoof of the company, but of one of the partners individually; and that the holder of the bill and letter must have been aware of these facts, and had therefore no right of action against the representatives of the other partner.*

Bryson raised an action before the Magistrates of Glasgow for £200, as contained in a bill to the company of Blair and Morrison, dated 12th March 1823, and payable four months after date,—stating, that although the said bill bears to have been granted for value, it was truly granted for the accommodation of Blair and Morrison, who in consequence gave the following letter: '*Glasgow*, 12*th*

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'*March* 1823. Mr William Bryson, Sir, We acknowledge to have 'received from you your acceptance for L.200, at four months, of 'this date, for which you have received no value, and which we pro- 'mise to retire when due, and return to you. We are, &c. BLAIR '& MORRISON.' He concluded against the representatives of the deceased John Blair, William Morrison, and of Robert Blair, formerly partners of Blair and Morrison.

In defence, it was stated for the representatives of the Blairs; (1.) That the representatives of the partners had never intromitted; (2.) That John Blair died in 1814; (3.) That the bill was not a company transaction; (4.) That the letter was not a probative document, and though apparently the signature of the firm of Blair and Morrison was adhibited by William Morrison, it was not granted by or for the company of Blair and Morrison, nor in or for any company transaction; (5.) That the bill had been discounted by Bryson at the Glasgow Bank, where it lay for years without any step having been taken against Robert Blair, or his representatives, till several years after his death. A proof was allowed, from which, in so far as relates to the merits, it appeared that the pursuer and William Morrison had for years carried on a series of bill transactions on their own private account, which had no connection with the company affairs, never entered the company books, but were entered in a book of cash transactions kept by Morrison, and of which series of bill transactions the bill in question was the last; that the signatures of Blair and Morrison to the bill and letter were not in the handwriting of Robert Blair, but were considered to be in the handwriting of Morrison.

The Magistrates decerned in terms of the libel, but the defenders, Mrs Blair and others, advocated, when the Lord Ordinary pronounced this interlocutor:

'The Lord Ordinary having considered the closed record, and 'heard parties' procurators thereon, and made avisandum, in respect 'that it is admitted that Mrs Mary Blair, spouse of James Rennie, 'one of the defenders called by the summons, was dead a consider- 'able time before the judgment of the Magistrates on the merits of 'the cause was pronounced, and that it is averred that Mrs Mar- 'garet Blair, spouse of William Balderston, another of the defend- 'ers, was also dead previous to the decree being pronounced, and 'that no step had been taken for sisting the representatives of these 'parties, finds, That the decree brought under advocation is null 'and void, in so far as it applies to such parties previously dead, or 'may affect their husbands or representatives; but in respect that 'the other parties, defenders, allowed the process to proceed with- 'out requiring that the representatives of the deceased defenders

'should be called, finds, That they cannot now state the omission to call them, as inferring a nullity in the decree against themselves; but, on the merits of the advocation, finds, That in so far as the summons concludes against certain of the defenders as representing John Blair, described therein as one of the partners of the company of Blair and Morrison, in whose name the bill was drawn, and obligation libelled on was granted, such conclusion was inept and groundless, in respect it is admitted that the said John Blair died many years before the date of the transaction, and could not then be a partner of any such company: finds, That notwithstanding this error, the summons is not altogether incompetent, in so far as it concludes against the advocators, as representing Robert Blair, who is stated to have been liable for the debt libelled, as a partner of the company of Blair and Morrison: finds it instructed, That at and previous to the date of the bill and obligation libelled on, there was a company carrying on business by the firm of Blair and Morrison, and that the said Robert Blair was a partner thereof: finds it also proved, That the defenders, or some of them, do represent the said Robert Blair; but finds it proved, that the subscriptions of the firm of 'Blair and Morrison' to the said bill as drawers, and to the obligation specially libelled on, are not of the handwriting of the said Robert Blair; and finds, That, in the circumstances of the case, the advocators have produced sufficient evidence that the said bill, accepted by the pursuer, and the said obligation referring to it, though bearing the firm of 'Blair "and Morrison,' were not made in the business of the said company, but formed part of a series of private transactions between the pursuer and William Morrison individually, which must have been known to the pursuer to be of that description; and finds no evidence, either that the transaction was known to Robert Blair at the time, or that the proceeds of the bill were in any manner applied for behoof of the said company: therefore finds, That neither the bill nor the obligation constitutes any valid ground of debt against Robert Blair or his representatives, however effectual they may be against William Morrison or his representatives: Therefore sustains the reasons of advocation, advocates the cause, recalls the interlocutors of the Magistrates, assoilzies the defenders advocating, and decerns: finds expenses due, both in this Court and in the inferior court.'

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Note.—'The bill of exchange referred to bears the *acceptance* of the *pursuer*, 'Blair and Morrison' being the drawers. The pursuer, therefore, never took *that* as a proper ground of debt against the company. He was himself the proper debtor in it, and of

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'course knew, that any claim arising to him in consequence of the 'transaction must be entirely out of the ordinary course of dealing, 'and not at all on the negociable instrument. His action must 'rest on the letter of obligation. That letter is not holograph even 'of Morrison, and not tested. Taking it, however, to be admis-'sible, as in re mercatoria, the question is, whether, in the circum-'stances proved, it will bind Robert Blair's representatives?

'It must be observed, that this action was not brought till Feb-'ruary 1830, nearly *seven years* after the bill became due, and *long* '*after* William Morrison, Robert Blair, and every one said to be 'connected with it, except the pursuer, *were dead.* There is there-'fore, even on the face of it, a strong presumption against the jus-'tice of the claim, and great allowance to be made for the difficul-'ties in which the parties here called as defenders are placed.

'Then, what are the facts upon the proof? Neither the bill nor 'the obligation is signed by Blair. The subscriptions of the firm 'must be taken as made by Morrison. But the bill, as *drawn* by 'the *firm*, is no ground of debt against the company, or against 'Blair as a partner; and the question is, whether the pursuer, in 'granting the bill to Morrison, was entitled to rely on the letter of 'obligation signed by the firm of 'Blair and Morrison,' as a good 'ground of guarantee or relief by the company? Now, it is on the 'one hand proved, that there is *no trace of such a transaction in the* '*books of the company, though* there *is* an account with the pursuer '*coming down to May* 1823, two months after the date of the bill. 'Not merely the bill is not mentioned, but *the proceeds of it, when* '*discounted, are not brought into the account at all.* This might go 'far to shew that in fact it was a private transaction of Morrison's. 'But there is much more; for a private cash, or other book, kept by 'Morrison, was exhibited to the commissioner, and excerpts made 'from it, which shew a long series of bill transactions between 'Morrison himself and the pursuer, extending from 1817 down-'wards, *in which this very bill in March* 1823 *is entered as the last* '*article.* Mr Douglas, the holder of that book, declined to put it 'into process; but though he also declines exactly to swear that it 'is a private cash book of William Morrison, he does swear that "he *infers that it is*, from the character of the entries which it "contains, *and from sets of entries of bills of various persons there* "*appearing.*' It appears, therefore, that the pursuer had, for a 'course of years, been engaged in a series of transactions with 'Morrison individually, specially by bills and counter bills passing 'between them; that the bill in question, accepted by the pursuer, 'was of this description, and was so treated; that neither it nor the

'proceeds of it, in any form, entered the books of the company, and it has not been shewn that it ever was known to Robert Blair previous to the death of Morrison in a state of bankruptcy. 11 June 1835. Blair and Others v. Bryson.

'In these circumstances, the Lord Ordinary is of opinion that it has been very sufficiently proved that the letter of obligation was not granted in the business, or for the behoof of the company; and that the pursuer must have been fully aware at the time that it was not, as indeed he has farther evinced by the delay in bringing the action; and, coming to this conclusion on the facts, he holds the law applicable to them to be clear. See *Bell*, ii. 616, 617, 618, and the cases there referred to.

'The pursuer has got decree cognitionis causa, to attach any estate or funds of Morrison.'

Respondent's Pleas.

Bryson *reclaimed*, and contended, that there was no ground for the presumption that this was a private transaction with Morrison. The bill and letter had the subscription of the company adhibited by one of the partners, and, unless done fraudulently, this had hitherto been held binding on the firm. Although not stated on the record, it had been instructed to the Lord Ordinary that an act of warding had been taken out by the bank, and a personal charge given to Robert Blair in 1823; yet he did not suspend: farther, that a third party, a creditor, ought not to be a loser from the omission by the partners to enter the transaction in the books of the company. The last entry in Morrison's book was not in his handwriting.

Advocators' Pleas.

Answered—The act of warding makes against the pursuer, for the bank did not follow it up. Robert Blair did not pay, neither was he forced to bring an action of relief, though Robert Bryson ranked on Morrison's estate in 1826.

Judgment.

The *Court* adhered, and found additional expenses due.

Opinion of Court.

Lord Medwyn.—This is the case of an obligation by a company, granted by one of the partners to a friend, in such circumstances as makes it necessary to shew that it was truly a company debt, applied for the use of the company.

There can be no doubt, that where a partner raises money by using the company firm, and misapplies the same, the party transacting with him, and ignorant of this, will have a claim against the company. Now, the evidence shews that this bill was applied to Morrison's own private transactions, and not to those of the company; and the pursuer's conduct also in regard to this bill, since it fell due, is adverse to the bona fides of his pleas. He allows the bill to lie over for years, till the death of all the parties but him-

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self, and after proceedings had been commenced by the banker with whom it had been discounted. The act of warding was not followed up against Blair. The pursuer ranked on Morrison's estate, thereby admitting that he was the proper party liable, as the writer of the letter libelled on. Then, there can be no doubt that the book exhibited is the private cash book of Morrison; and the long list of bills of the pursuers shews the course of dealing between him and Morrison on his own account, and leaves no room for doubt that the pursuer must have known that this last, like all the others, was to raise money for his own private concerns.

In these circumstances, then, I think we cannot allow Bryson to say that he did not know that this was just one of the series of bills arising out of his transactions with Morrison, or that Morrison concealed from him the fact, that the bill was not applied in the business of the company. I think it would require evidence on Bryson's part to take off the presumption that he knew that this was not a company transaction.

Lord Justice-Clerk.—It is entirely a question of evidence, and it has been demonstrated that this was the private debt of Morrison.

The *other Judges* concurred.

Lord Ordinary, *Moncreiff.* For Bryson, *Sol.-Gen. (Cuninghame,) Penney.* For Mrs Blair, *Rutherfurd, Russell.* *Wm. Young*, W. S. and *Campbell & M'Dowal*, S. S. C. Agents. *T.* Clerk.

R.

FIRST DIVISION.

No. CXXIX. 12*th June* 1835.

ROBERT CUNNINGHAME BONTINE AND HIS CHILDREN
against
WILLIAM CUNNINGHAME CUNNINGHAME GRAHAM OF GARTMORE AND HIS TRUSTEES.

TAILZIE.—*Two deeds of entail were inserted in the same charter, the clauses verbatim the same in each entail not being repeated, the charter at the same time setting forth the fact that there were two separate entails;—held, that although, ex figura verborum, the construction of the charter might raise the inference, that a contravention of the one entail would induce a forfeiture of both estates, still a possession under*

said charter was not a possession adverse to either of the original entails; that this was therefore no ground for annulling either entail, but that the charter must be construed applicando singula singulis, agreeably to the obvious meaning and intent thereof.

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Nicol Graham of Gartmore, the grandfather of the defender, Mr Graham, was proprietor of a variety of lands, a large proportion of which, both property and superiority, was held immediately of the Crown, and to these he had made up a complete feudal title.

In 1767, Nicol Graham executed a deed of entail, in the form of a procuratory of resignation, by which he bound himself, his heirs, &c. to resign, in the hands of his superiors, his estate of Gartmore, &c. in favour and for new infeftment to be granted to himself in liferent, and to William Graham, his eldest lawful son, and to the heirs-male of his body; whom failing, to Robert Graham, his second lawful son, and the heirs-male of his body; whom failing, to John Graham, his third lawful, &c. but with and under, &c. This deed, which contained all the usual clauses of a strict entail, was recorded in the register of tailzies, 30th July 1768.

In 1774, Mr Graham executed a second deed of entail of the lands of Wester Culbowie and others, held of the Crown, which he had in the meanwhile acquired by purchase.

The destination in this deed was in terminis the same as that in the previous entail of 1767, with this exception, that the entailer's wife was introduced as a liferentrix along with himself.

Nicol Graham died in 1775, without having put on record the entail of 1774. His eldest son William having predeceased him, without leaving issue, Robert, the second son, in order to acquire right to the procuratories of resignation, executed by his father in 1767, and in which William was institute, expede a general service as 'heir-male of tailzie and provision of the said William 'Graham, his brother,' &c. and he also made up titles under the entail 1774.

Robert Graham then proceeded to execute the procuratories contained in the two deeds of entail, and obtained a charter from the Crown, (23d Feb. 1776,) comprehending all the lands contained in both entails, which were held immediately of the Crown, omitting certain lands held of a subject superior, and also certain substitutions which had become inoperative.

The charter, in the usual terms, gives, grants and dispones the lands contained in the entail 1767, and, by a separate dispositive clause, it dispones the lands contained in the entail 1774, in favour of the parties called by said deeds respectively. And at the end of these dispositive clauses the charter proceeds thus: 'But with and

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'under the particular reservations, provisions, declarations, exceptions and clauses, irritant and resolutive, after expressed, and no otherwise, contained in the two deeds of tailzie after mentioned.' The charter then goes on to enumerate the various conditions and provisions contained in the two deeds of entail; and these conditions, &c. being, with one or two exceptions, the same in both, they were not, except in these instances, repeated.

The quæquidem clause bears, that the lands of Gartmore, and others, were contained in a deed of entail, executed by the said Nicol Graham, on 2d March 1767, by the procuratory in which deed the lands were resigned, for new infeftment, to be granted to Nicol Graham himself in liferent, and William Graham, his eldest son, and the heirs-male of his body, &c. The charter then narrates the whole subsisting destination, as contained in the original entail. The quæquidem then explains the state of the titles to the lands contained in the entail 1774, and in reference to that entail narrates also verbatim the subsisting destination contained in that deed. Upon this charter Robert Graham was infeft, (7th March 1778). He afterwards (1st Dec. 1779) executed a procuratory of resignation of the whole lands contained in both entails, for new infeftment, to be granted to himself and the other heirs of tailzie. This procuratory, like the charter 1776, contained the whole conditions and clauses, irritant and resolutive, contained in the original entails. Upon that procuratory Robert Graham obtained a charter from the Crown, (20th Dec. 1779,) but he died before infeftment was passed upon it. Upon his death in 1799, the succession opened to his eldest son, William Cunninghame Cunninghame Graham, (the defender in the present action,) who expede a general service, as nearest lawful heir-male of tailzie and provision to Robert Graham, his father, conform to, and in terms of the aforesaid deeds of entail, by the deceased Nicol Graham of Gartmore, his grandfather, &c.

In virtue of this service, and of the unexecuted precept contained in the crown charter, expede by Robert Graham in 1779, the defender was infeft in the lands therein contained, under the fetters of the entail, conform to instrument of sasine, dated 6th November 1799, and recorded 1st January 1800.

Soon after his succession, the defender, Mr Graham, availing himself of the omission to record the entail 1774, sold all the lands contained in that entail. He also committed various acts, which, supposing him to be bound by the conditions of the entail of 1767, were confessedly acts of contravention of that entail, by making up titles in fee-simple to some of the entailed lands, and thereafter selling the same, granting bonds in security over them, &c.

Founding upon these acts, the pursuer, the eldest son of Mr

Graham, and substitute under the entail, raised the present action of declarator of irritancy against him, in which the trustees for his creditors sisted themselves as parties. 12 June 1835. Bontine, &c. v. Graham, &c.

In defence, the following plea, inter alia, was raised out of the construction of the charter as above stated, viz. the two entails, of separate and distinct estates, being amalgamated in the charter 1776, the charter in truth conveys the estate of Gartmore and the estate of Culbowie as one single estate, to which the irritant and resolutive clauses are made to apply indiscriminately, and a contravention upon any part of either estate operates a forfeiture of the whole of both. The investiture under the charter 1776 is therefore not an investiture under both or either of the procuratories, but forms a totally different entail from both or either, varying from them essentially in the provisions of entail, and in their application. The estates have thus been possessed upon a title adverse to both entails since the date of said investiture.

The Lord Ordinary, after closing the record, ordered cases, with which he made avisandum to the Court, subjoining the following note, which will also sufficiently explain the other pleas:

Note.—'Some of the points raised in this case do not seem to 'be attended with difficulty. The entail 1767 being an irrevo- 'cable deed, in so far as the interest of William Graham was con- 'cerned, the granter having reserved his own liferent, and the deed 'itself having been recorded by him in the register of tailzies, it 'must be held as having been delivered; and therefore the service 'of Robert Graham to his brother William was an effectual and 'proper mode of completing his title, and the defender, having 'connected himself with this entail by service to his father, is bound 'by its conditions.

'With regard to prescription, as the pursuer was the next sub- 'stitute to the defender, and entitled by his contravention to take 'the estate, it is thought that, agreeably to the principle adopted by 'House of Lords in the Bargany case, the minority of the pursuer 'must be deducted in counting the years of prescription.

'There were two entails, one of Gartmore and the other of Cul- 'bowie, &c. which, mutatis mutandis, were identical in every im- 'portant clause, and they were both duly recorded. Robert 'Graham, in expeding a charter upon these entails, did not keep 'the conditions of the one separate from those of the other, but 'combined them as if there had been but one estate and one entail; 'and this charter was not recorded in the register of tailzies. Hence, 'ex figura verborum, a contravention of the entail of Gartmore 'would, under the charter, forfeit not only that estate, but the 'estate of Culbowie also; and in like manner a contravention of

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'the entail of Culbowie would forfeit the estate of Gartmore. In 'an ordinary deed these conditions would be construed, applicando 'singula singulis, agreeably to the obvious meaning of the granter, '—a rule arising out of the usual forms of expression, and generally 'adopted with regard to every species of writing. But whether 'this rule obtains in the case of an entail is more doubtful, as that 'instrument is construed with a strictness and rigour unknown in 'every other case. If the ordinary licence is not to be allowed, 'the entail in the charter of 1776 is different from those executed 'in 1767 and 1774; and as the entail in the charter enters the 'register of sasines only, while the two entails are recorded in the 'register of tailzies only, the estates are not protected against the 'diligence of the defender's creditors, some of whom are parties to 'this action. As the point is new, and the interest at stake con-'siderable, the Lord Ordinary has thought it right to report the 'cause.'

The Lords, after considering the cases, remitted the same for consideration to the Lords of the Second Division, and the Permanent Lords Ordinary, requesting their answer in writing to the following questions: Whether the titles completed by Robert Graham, the father of the defender, W. C. C. Graham, by the crown charter in 1776, and the sasine following thereon, were framed in conformity to the deeds of entail executed by Nicol Graham in 1767 and 1774? Or whether the entail contained in the said charter and sasine is the same with, or different from, both or either of the entails contained in both or either of the said deeds of entail of 1767 and 1774: and if different, what is the legal effect and consequence of such difference? And whether, by the titles so completed by the said Robert Graham, and by those completed by his son, W. C. C. Graham, the lands contained in the entail 1767, (which entail had been previously recorded in the register of tailzies,) are effectually secured against the debts and deeds of the said W. C. C. Graham? And whether the said entail is binding and effectual against him in questions with the substitute heirs of tailzie?

A hearing in presence of the whole Court then took place, after which the following opinions were returned:

Opinion of Consulted Judges.

Lords Justice-Clerk, Glenlee, Meadowbank, Medwyn and Corehouse.—The first question on which the opinions of the Consulted Judges are required is, whether the titles, completed by Robert Graham by the crown charter 1776, and the sasine following theron, were framed in conformity with the deeds of entail 1767 and 1774; or,

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whether the entail, contained in that charter and sasine, is the same with, or different from, both or either of the entails contained in both or either of these deeds?

The defenders have specified various particulars, in which they say, that the entail in the charter and sasine is different from the entails in the deeds. In our opinion, the pursuers have, with one exception, satisfactorily accounted for all those differences, and have shewn that, either necessarily, or in strict conformity with the correct principles and usual practice of conveyancing, they took place in the preparation of the investiture. Thus, although there are lands contained in the deeds of entail which do not appear in the investiture, the lands so omitted held of a subject superior, and were therefore necessarily excluded from a charter granted by the Crown. Thus also, certain substitutions in the entails do not occur in the charter; but as those substitutions were extinct or inoperative before the charter was expeded, they were omitted with perfect propriety, and agreeably to ordinary practice.

But the exception to which we allude, and upon which the defenders seem now exclusively to rely, relates to the structure of the irritant and resolutive clauses in the investiture. In framing the charter 1776, the entails 1767 and 1774, instead of being kept separate, as they ought to have been, were combined; so that if the charter, with the sasine upon it, is alone considered, a contravention of the provisions in the entail of Gartmore would apparently infer a forfeiture, not only of that estate, but of the estate of Culbowie also; and vice versa, a contravention of the entail of Culbowie would apparently infer a forfeiture of the estate of Gartmore. To that extent, it is clear that the entail, as it stands in the investiture, is not in form absolutely identical with the entails in the deeds 1767 and 1774; and this the pursuers do not dispute.

We come, therefore, to the second point to which our attention is directed, namely, what is the legal effect and consequence of this difference? which, reversing the order suggested, we think may best be considered, 1*st*, as in a question between the pursuers and W. C. C. Graham, that is, between the substitute heirs and the heir in possession; and, 2*dly*, between the pursuers and the other defenders, who appear in the character of third parties or creditors.

In a question between the substitute heirs and the heir in possession, it will be observed, that the estates contained in the two deeds of entail are conveyed separately in the charter; and it is declared, that they are conveyed under the conditions and provisions, and under the irritant and resolutive clauses in *two* deeds of tailzie; that Robert Graham and the other heirs of tailzie shall enjoy and possess the estates by virtue of the said *two* deeds of tailzie; that he

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shall insert the conditions of the said tailzies in the charters and infeftments which are to follow on these tailzies; that no acts of contravention shall prejudice the heirs destined to succeed by the deeds of tailzie, and so forth, keeping both deeds constantly in view; and in the clause of Quæquidem, the progress of the separate estates contained in each tailzie is set forth, and both tailzies are specially described by the respective dates of their execution, and of their registration in the books of Session. In answering this first question, which arises between the substitutes and the heir in possession alone, and in which, therefore, the provisions of the act 1685 do not enter into the case, it is necessary to consider upon what principle the charter 1776 is to be construed. We conceived that the special references in that charter to the two entails, under which it is declared that the two estates shall be held and enjoyed, are sufficient authority for taking into view both those entails, for the purpose of ascertaining its import. If that be granted, it makes way for the rule, quod singula singulis sunt applicanda, for materials are given upon which that rule can operate. We do not mean to say, that, in every case, an investiture may be construed by reference either to prior investitures, or to the warrants on which it proceeds. But when, in the investiture to be construed, express reference is made to these warrants, as explaining or authorising the rights which it confers, we think that this is a legitimate mode of construction. Nor is this opinion at variance with the recent decisions in Hope Vere's case, because there the destination in the old entail 1708 could not possibly be reconciled with the destination in the new entail 1733, and it was manifest that those who framed the latter laboured under the mistake that the two destinations were the same. If they had been informed of their mistake, there was no reason to conclude that they would have been induced to depart from the new destination. That destination, therefore, which neither required nor admitted of construction, was necessarily adopted, though its author, the Countess of Hopetoun, was in error either as to its effect, or as to the effect of the preceding entail, to which she referred; but whether as to the one or the other did not appear. Here the case is reversed: Whenever the rule singula singulis is admitted, the charter 1776 is not only not irreconcileable with the entails upon which it proceeds, but is in exact conformity with them.

If, instead of the present action, a declarator of irritancy had been brought against the defender, W. C. C. Graham, to forfeit Culbowie, on the ground that he had contravened the entail of Gartmore, we do not think that he could have been precluded, by the form of his investiture, from shewing that he had violated no con-

dition of the entail, under which that very investiture provided that he should exclusively possess and enjoy that estate; and so, vice versa, if a contravention as to Culbowie were pleaded as a forfeiture of Gartmore. But if a plea, which necessarily infers that the entails are still in force, would have been available in his favour in that action, it must be so against him in this action, in which he maintains that the same entails are extinguished.

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The question assumes a different shape when it occurs with third parties, and when the provisions of the act 1685 come into operation. A purchaser or creditor is entitled to look for the conditions and fetters of an entail, either in the register of tailzies, or in the record of sasines exclusively. He is not bound to compare the one with the other; nor can he be referred to any deed, not part of the registered entail, or recorded sasine, to explain either of them. In his case, therefore, it may be plausibly argued, that there is no place for the rule singula singulis; because the recorded investiture contains nothing to shew that the conditions and fetters of each of the deeds of entail are not identical with the conditions and fetters of the entail set forth in that investiture, and, if they are not the same, that he is entitled to hold that the entails are not duly recorded in the register of sasines.

We are of opinion that this argument is not conclusive. The object of the act 1685 plainly is, that all the conditions and fetters of entails, by which purchasers or creditors can be endangered, should be disclosed by means of two records, on either of which they may rely for information. But while they are secured that no restriction can exist unless it be so recorded, they are not secured, nor are they entitled to infer, that every restriction which is recorded must therefore be operative. On consulting the register of tailzies, the irritant and resolutive clauses in a deed may appear impregnable, while a defect in the record of sasines may render them utterly ineffectual; and so, on the contrary, a defect in the register of tailzies may defeat the most accurately recorded investiture. And as all the restrictions in a tailzie may thus become inoperative, so may any one restriction in whole or in part. This can be of no prejudice to third parties: They are certiorated fully of all dangers to which they can be exposed; but they are not informed whether, or to what extent, those dangers may be avoided. Thus, if part of an estate, which is placed under an entail, be sold by the entailer, or evicted from him before the entail is recorded, the register will shew all the prohibitions and irritancies as if they affected that subject, although it has been withdrawn from their operation. On that principle, in one case, (Nov. 28. 1821, *More*,) the Court refused to allow a tenement to be omitted in recording an

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entail, which the entailer had disposed of before his death. In similar circumstances the heir, in making up his titles, may safely omit that tenement withdrawn from the entail, and that omission will not affect the validity of the entail as to the remainder of the estate. Thus also, if an entailer, under a reserved power to alter, were, by a subsequent deed, to relax the fetters, by granting permission to feu, or lease, or burden, or the like, an omission to insert that subsequent deed in the register of tailzies, or in the investiture, would not render the entail, in so far as it was unaltered, ineffectual against purchasers or creditors, on the ground that the provisions of the act 1685 had not been complied with: Or, suppose a permission to the same effect were inserted in the entail itself, as an exception to the prohibitory clause, and that exception was omitted in the record by the negligence of the transcriber, it clearly could not be maintained that the record was inoperative quoad ultra, and the whole estate laid open to the diligence of creditors. It follows, therefore, that if all existing conditions and fetters appear in both records, the appearance in either record, of others which do not exist, is immaterial. We think that this is not only the sound construction of the statute, but that it admits of no other construction; for while it is indispensable that each record shall shew how far the fetters it exhibits may bind, it is impossible that either of them can shew how far those fetters may not bind. To ascertain this, other sources of information must be resorted to.

Let the statute, so construed, be applied to the present case. On the one hand, it is admitted that the entail 1767 is recorded in the register of tailzies with perfect accuracy; and, on the other hand, it is incontestable that the record of sasines exhibits every prohibition and fetter in that entail, by which the estate can be affected to the prejudice of purchasers or creditors. The only objection to the record of sasines is, that the forfeitures under both entails, inserted in a combined form, are more extensive in appearance than they are in reality,—an objection which, on the grounds now stated, we consider of no validity. Thus it appears, that when the heir in possession pleads prescription on the entail 1776, against the entails 1767 and 1774, the pursuers can shew that, by a rule of construction legitimate in that question, the import of the former is identical with that of the latter; and when the creditors plead, that the fetters of the entail 1767 do not enter the investiture in terms of the statute 1685, it is a good answer that the provisions of that statute are fully complied with.

The entail 1774 was not recorded, and in consequence of that neglect the estate was sold. But this circumstance does not in any respect affect the argument in so far as the entail 1767 is concerned.

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We are of opinion, therefore, that by the titles completed by Robert Graham, and his son W. C. C. Graham, the lands contained in the entail 1767 are effectually secured against the debts and deeds of the said W. C. C. Graham, and that the said entail is binding and effectual against him in questions with the subsequent heirs of entail.

Addition by Lord Moncreiff.—This case has appeared to me to be attended with very considerable difficulty. But after giving all the attention in my power to the argument in the papers and from the bar, and considering deliberately the views taken in the above opinion, I am inclined to concur in it, being on the whole satisfied that the investitures completed under the charter 1776 are consistent with the strictest application of the rule of the statute 1685. I only think it necessary to add, that I could not have come to this result on some of the grounds of law maintained by the pursuers, and that it is only on the principle of giving the strictest construction to the deeds framed in execution of the statute that I now do so.

Addition by Lords Fullerton and Jeffrey.—We concur in the conclusion arrived at in the preceding opinion, viz. that under the titles completed by Robert Graham and his son William Cunninghame Cunninghame Graham, the lands contained in the entail 1767 did, and still do remain subject to the fetters of that entail; and we also concur in the greater part of the reasoning by which that conclusion is supported. The entail 1767 contains all the prohibitions and restrictions necessary for the protection of the estate against the acts and deeds of the heirs in possession. To render such conditions effectual against third parties, it is necessary that they should appear in the titles by which the heirs possess; it being provided by the act 1685, 'that such tailzies shall only be allowed 'in which the foresaid irritant and resolutive clauses are insert in 'the procuratories of resignation, charters, precepts and instruments 'of seasing.' In regard to creditors then, the only question here is, whether the irritant and resolutive clauses of the entail 1767 can be held to be 'insert' in the charter and infeftment of 1776?

For the reasons assigned in the preceding opinion, and even upon the view there taken, viz. that the resolutive clause, as expressed in the charter, embraces certain other lands in addition to those contained in the entail 1767, and may therefore have a more extensive operation, we think that the question ought to be answered in the affirmative.

But, further, we must be permitted to question whether that view be correct, and whether there is any necessity for resorting, in the present case, to those grounds of decision. It rather appears to us, that the resolutive clause in the charter, the only clause which

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raises any difficulty, has not, according to the legitimate construction of the charter itself, any more extensive meaning in regard to the lands of Gartmore than the original entail 1767.

The entailer, Nicol Graham, executed two procuratories of resignation, each forming a deed of entail. The first, that of 1767, included various lands which shall be termed the lands of Gartmore; and the other, that of 1774, contained the lands which may be designed the lands of Wester Culbowie. Robert Graham, the entailer's second son, executed both procuratories, and expede the crown charter 1776, obviously for the purpose of making up titles under those entails to both sets of lands, in so far as they held of the Crown. Accordingly, the charter distinguishes the two estates and the two entails with the greatest precision. There is a separate dispositive clause, *first*, of the lands of Gartmore, &c.; and, *2dly*, of the lands of Wester Culbowie, Broich, Broichmiln, &c.; and these dispositive clauses bear to be granted, 'cum et sub particula-'ribus, reservationibus, provisionibus, declarationibus, exceptioni-'bus, et clausulis irritantibus et resolutivis *postea express.* et non 'aliter, *in duabus syngraphis talliae postea mentionat., content.*,' &c.

By the expression '*postea mentionat.*,' reference is clearly made to the quaequidem clause, which is also a double clause, distinguishing the entail of 1767 from that of 1774. There is, *first*, the mention of the entail 1767: 'Quaequidem integrae terrae, 'baroniae, molendina, terrae molendinariae, decimae, aliaq. predict. '(*antedict. terris de Wester Culbowie, Broich, et molendino de Broich,* 'decimisq. ejusd. exceptis,) contentae fuere in syngrapha talliae per 'dict. Nicolaum Graham, execut. *de data secundo die Martij, anno* '*millesimo septingentesimo sexagesimo septimo.*' Here the first entail 1767 is described as containing all the lands in the charter, with the exception of Wester Culbowie; and then follows the other part of the quaequidem: 'Et quaequidem praedict. terrae de Wester 'Culbowie, Broich, et Broichmiln, cum decimis partibus, privi-'legiis et pertinen. perprius haereditarie pertinuerunt,' &c.; 'et '(inter alia) in *alia syngrapha talliae* contentae fuere per dict. 'Nicolaum Graham, execut. *duodecimo die Decembris anno millesimo* '*septingentesimo septuagesimo quarto.*' And the clause concludes with a statement of the resignation of both sets of lands, but still accurately distinguishing between the two different entails, as the sources from which the fetters, in regard to each estate, are respectively derived: 'Quae integrae terrae, baroniae, molendina, 'decimae aliaq. praedict. per virtutem dict. *duarum procuratoriarum* '*resignationis in duabus respectivis syngraphis talliae* supramentionat. 'content. et duorum generalium servitiorum dict. Roberti Graham,' &c. 'legitime resignatae et redditae fuerunt in manibus dict. Jacobi 'Montgomery,' &c. 'cum et sub conditionibus, provisionibus, re-

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'servationibus, potestatibus, declarationibus, clausulis irritantibus 'et resolutivis supra expressis, *in duabus talliae syngraphis supra re-* '*citatis contentis*,' &c.

Combining, then, the descriptions of the entails in the quaequidem with the close of the dispositive clause, expressly referring to those descriptions, the two sets of lands bear, ex facie of the dispositive clause, to be disponed under the provisions and restrictions, and clauses irritant and resolutive after expressed, contained in two deeds of entail, the one dated 1767, of the lands of Gartmore, and the other dated in 1774, of the lands of Wester Culbowie. The charter then enumerates, in detail, the prohibitions and restrictions; and it is of some importance to observe, that in the clause immediately preceding that which raises the present question, there is a clear reference to both entails. It is there provided, that Robert Graham, and the other heirs, shall possess the entailed estate 'virtute dict. duarum syngrapharum talliæ et infeofamentorum desuper 'consecutorum,' &c. and shall be bound to insert in the instruments of resignation and infeftments, &c. 'totas provisiones, declarationes 'et irritantias dict. talliarum.' Then follows the combined irritant and resolutive clause, which declares, that if the said Robert Graham, and the other heirs, shall fail to assume the name and arms prescribed, or shall fail to perform the other provisions and conditions, then, and in any of those cases, not only shall all the acts and deeds of omission, commission, &c. be void and of no effect against the said lands, and no part of the same shall be affected or burdened by those acts, &c. 'in prejudicio haeredum talliae et 'provisionis supra specificat. destinat. succedere virtute *dict. talliae* '*syngrapharum*, cum et sub provisionibus supra specificat., sed etiam 'persona vel personae ita contravenien. vel deficien. implere con-'ditiones et provisiones suprascript. vel quamlibet earundem, pro 'seipsis, ipso facto, amittent, perdent et forisfacient eorum jura et 'interesse in dict. terrar. et statum,' &c.

Considering the form and general tenor of this charter, it appears to us, that in reading this clause, as well as the other clauses in the deed, the construction, applicando singula singulis, is not only legitimate, but is the only construction which can be reasonably admitted. When, as in the present case, a charter conveys two separate parcels of lands, each described as contained in a separate entail, and under the clauses irritant and resolutive in those two entails, and proceeds to enumerate the special clauses irritant and resolutive, it seems to follow that each provision and restriction, in regard to each parcel of lands respectively, is referable to the entail in which each parcel is contained. Thus, although the prohibitory clause against selling or contracting debt is in this charter generally ex-

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pressed, and without distinguishing, in terms, the lands of Gartmore from the lands of Culbowie, for the obvious reason that the clause is the same in both entails, the meaning of the clause is as unambiguous, as if it had been expressly declared, that the prohibition in regard to the lands of Gartmore is referable to the entail of Gartmore, and the prohibition in regard to Culbowie to that of Culbowie. There is still less doubt as to the construction of the clause binding the heirs to hold the entailed lands and estate in virtue of the two deeds of entail; as it can hardly be contended that it imports a provision, not that each estate is to be held by each entail respectively, but that each estate is to be held by both entails. Such being clearly, then, the true reading of the preceding clauses, we humbly conceive that we are offering no violence to the terms of the deed, when, in the immediately succeeding passage, being the combined irritant and resolutive clause, we follow the same course, and hold, applicando singula singulis, that the clause does not import more than that contained in the original entails, viz. a forfeiture of Gartmore in the event of a contravention of the entail of that estate, and a forfeiture of Culbowie in the event of the contravention of the entail of Culbowie. Neither are we aware of countenancing, by the adoption of this construction, any relaxation of those rules by which the rights of third parties are understood to be protected; for although the law unquestionably is, that fetters or restrictions shall not be raised, by implications unwarranted by the express terms of the deed, it never has been held, that, in construing a clause admitting by bare possibility of two meanings, that which is favourable to the heir and the creditors must necessarily be adopted, although in itself the most inconsistent with the context and general structure of the deed. But the case is attended with still less difficulty when the true nature of the point in dispute is kept distinctly in view. The whole question arises on the resolutive clause in the charter,—a clause which, though of great importance in relation to the rights of third parties, operates only through the medium of its effect against the heir in possession who contravenes. But again, the only question of construction on this clause is, whether it imposes the penalty of a limited forfeiture on a limited contravention, agreeably to each entail respectively, or declares a forfeiture of the whole lands contained in both entails, in the event of a contravention of only one? The former is truly the lenient construction, operating against the extension of fetters; and the question is, not that which has usually occurred, whether a strict construction shall be enforced in favour of freedom from fetters, but whether a strict, or rather, as it appears to us, a strained interpretation shall be adopted, in order to extend the fetters beyond what the natural reading of the deed would authorise?

Upon these grounds, and in addition to the opinion already expressed on the subsistence of the entail 1767, we are of opinion that the titles made up by Robert Graham, by the crown charter 1776, involve no disconformity to the deeds of entail executed by Nicol Graham in 1767 and 1774.

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The cause was put out for judgment, when their Lordships intimated their acquiescence, generally, in the opinion of the majority of the consulted Judges.

The *Court* therefore 'find, in terms of the opinions of the consulted 'Judges, that the titles completed by Robert Graham, the father of 'the defender, by the crown charter in 1776, and the sasine following thereon, were framed in conformity to the deeds of entail executed by Nicol Graham in 1767 and 1774, and that the entail contained in the said charter and sasine is the same with each of these 'entails; and that by the titles completed by the said Robert Graham, 'and those completed by the defender, the lands contained in the 'entail 1767 are effectually secured against the debts and deeds 'of the said defender, and that the said entail is binding and effectual against him in questions with the substitute heirs of tailzie, 'and decern: Quoad ultra, remit to the Lord Ordinary to hear 'parties on the remaining points of the cause.' Judgment.

Lord Corehouse, Ordinary. Act. *Keay, Jameson.* Alt. *Dean of Fac. (Hope,) Shene.* *Ker & Dickson*, W. S. and *Edward M'Millan*, Agents.

C.

FIRST DIVISION.

No. CXXX. 12*th June* 1835.

WILLIAM BELL
against
ANNE, LADY ASHBURTON.

TITLE.—TRANSFERENCE.—CLAUSE.—*Found, that a party holding a key to the Queen Street Gardens cannot avoid payment of assessments by resigning his share. Question as to the mode of completing a party's right to said share, and transferring the same.*

IN 1822, a private act of Parliament was obtained, for regulating, maintaining and improving the premises in the city of Edinburgh termed Queen Street Gardens, and for effecting certain other im-

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Bontine, &c. v. Graham, &c.

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FIRST DIVISION.

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WILLIAM BELL
against
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IN 1822, a private act of Parliament was obtained, for regulating, maintaining and improving the premises in the city of Edinburgh termed Queen Street Gardens, and for effecting certain other im-

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provements in the vicinity thereof, and connected therewith, which contained, inter alia, the following clause: 'And be it further enacted, That the transfers of shares in Queen Street Gardens aforesaid, 'shall be completed in the form and in the way and manner following: videlicet, the shares shall constantly remain and be transferable, each share whole and undivided, and so that only one proprietor, and his or her family, shall be entitled to the benefit of 'access to the said gardens, in respect of each share, at one time; 'and a transfer book shall be kept by the clerk, in which shall be 'inserted the names of the persons to whom the said shares of the 'said premises do or shall belong, and the number and description 'of shares belonging to each of them respectively; and the transfer 'of shares shall be effected by the seller subscribing a transfer in 'the form following, or some form to the like effect:

"I, *A. B.*, in consideration of the sum of , do "hereby transfer and make over to and in favour of *C. D.*, one share "of the premises called [*as the case may be,*] "from and after the of .'

'And a copy of such transfer shall be inserted in the transfer book, 'and the purchaser shall subscribe a declaration of his acceptance of 'such share, subjoined to the said copy in the transfer book, in the 'form following, or some form to the like effect:

"I, *C. D.*, having previously accepted of the above share, bind "and oblige myself, and my heirs and assignees, to be bound and "regulated by the whole rules and regulations with respect to "the said property now in force, or that may in future be esta- "blished in regard to the same, in conformity to the provisions "in that behalf contained in an act of Parliament passed in the "third year of the reign of his Majesty King George the Fourth, "chapter,' &c.

'And the subscription to such acceptance shall be made by the 'party, in presence of the clerk and two witnesses, all of whom shall 'subscribe the same; and such transfer and acceptance are hereby 'declared to be equivalent to a formal conveyance of the right to 'each share in favour of the purchaser; and the shares of persons 'deceasing shall be held to be heritable property, and shall pass by 'a general service, or disposition inter vivos, or any legal diligence 'and procedure equivalent thereto, but so only as that each share 'shall constantly remain whole and undivided, the eldest heir-female 'always succeeding alone and without division; and the clerk shall, 'upon production of any such titles, enter in the transfer book the 'title on which, and the person to whom the share or shares shall 'be so transferred, and upon the said person signing an acceptance 'as above, he shall be put in the right of the said share; and in each 'of the aforesaid cases the person acquiring right to such share

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'shall also receive from the clerk a copy of the entries in the trans- 'fer book, which shall be a good title of possession; and which whole 'form of proceeding shall be held and deemed, and the same is 'hereby declared to be valid and effectual in all respects, and to all 'intents and purposes, to the effect of transferring a share or shares 'in the gardens aforesaid from one person to another, of vesting 'such share or shares in the said assignee or assignees, and of ren- 'dering all persons who may so acquire shares subject and liable, in 'respect of such share or shares, to the provisions of this act, and to 'make all the payments due in respect of such share or shares, and 'subject and liable to all the rules and regulations agreed to by the 'proprietors thereof.'

Under this act the pursuer was appointed clerk and cashier or collector for the commissioners for the eastern district of said premises. The late Lord Ashburton held two keys of the said gardens; and at the time of receiving them, the following obligation was inter alia subscribed by Mr Mowbray, writer to the signet, on behalf of his Lordship:

'We, the parties subscribers hereto, proprietors of shares of Queen 'Street Gardens, acknowledge that we have received the keys of the 'said gardens, specified by us in our subscription hereto, and we 'farther express our approbation of and concurrence in the proceed- 'ings and resolutions of the meetings of the proprietors, as record- 'ed in their sederunt book, particularly those of 12th July 1816 'years, as relative to the general arrangements of the gardens; and '24th September and 3d December 1821 years, as relative to the 'purchase of Mr Rolland's garden. In witness whereof, these 'presents, written upon this sheet of parchment by John Batty 'Shand, apprentice to William Bell, W. S. are subscribed by the 'proprietors of the said gardens, and by persons authorised by them, 'all at Edinburgh, as follows, viz. * * *

'John Mowbray, W. S. for Lord Ashburton, the 4th day of 'February and year foresaid, (1822,) before George Dunbar Hen- 'derson, apprentice to the said William Bell, and the said John 'Batty Shand.

(Signed) 'JOHN MOWBRAY,
'For Lord Ashburton, two keys.

'*Geo. D. Henderson*, witness.
'*John B. Shand*, witness.

On the death of Lord Ashburton the keys came into the possession of the defender, and her ladyship, during her absence, gave them to certain friends, who, being prevented from using them, in

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consequence of the regulations, her ladyship sent to the pursuer a resignation of her share, and declined having any further concern with the said gardens. Upon this the pursuer raised the present action, for payment of arrears of assessment arising since the death of Lord Ashburton, amounting, with interest, to the sum of L.31 : 13 : 6; to which it was pleaded, in defence, (1.) That as the assessments sued for are said to have been incurred after Lord Ashburton's death, the present action against the defender, as his representative, is not competent against her in that character. (2.) Supposing the defender had a share in the gardens, the pursuer is barred from making the present claim against her, in respect that the gardener acting, as must be presumed, under instructions from him, or from the commissioners or proprietors, took away her keys, which he still retains, and in respect that her agent thereupon renounced all interest in the gardens. (3.) The defender is not liable for any part of the present claim, 1*st*, Because the party from whom the late Lord Ashburton agreed to purchase the share never had a valid right or title to that share in terms of the statute, and consequently could not give such right or title to his Lordship; 2*d*, Supposing there had originally existed a valid title, it was never effectually conveyed to Lord Ashburton, according to the provisions of the statute; and, 3*d*, Supposing his Lordship had a title, it has never been validly transferred to the defender, so as to place her in his right, or to subject her to any assessments in respect of said share.

The Lord Ordinary repelled the defences, and decerned in terms of the conclusions of the libel, and found expenses due.

The defender *reclaimed*, and insisted in the above pleas. The pursuer, admitting that the share had not been transferred according to the provisions of the statute, contended, that the said provisions were made for the benefit of parties transferring shares, and to point out a method of effectually relieving themselves of future liability, but were not intended to operate to the prejudice of the general body of proprietors, who were entitled to sue any party in possession of keys, and who had been permitted, so far as consistent with regulations, to exercise the privileges attached thereto, more especially, as in this case, where the party represented by the defender had granted a formal obligation in the terms above quoted.

Opinion of Court.

Lord President.—Lady Ashburton accepts by taking the key, and making use of the privilege of the gardens.

Lord Balgray.—After the actings of the parties, and that acceptance, I have not the smallest doubt the share must be held as transferred. It is clear the pursuer has made out such a title as will be sufficient to enable him to demand payment of these assessments.

Lord Mackenzie.—I am of the same opinion.
The *Court* therefore adhered, with expenses.

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Judgment.

Lord Ordinary, *Fullerton.* Act. *Robert Bell.* Alt. *Dean of Fac. (Hope,) Robert Thomson.* *William Bell*, W. S. Pursuer's Agent. *Mowbray & Howden*, W. S. Defender's Agents. *B.* Clerk.

C.

SECOND DIVISION.

No. CXXXI. 12*th June* 1835.

JOHN HOOD AND SPOUSE
against
SIR WILLIAM FORBES & CO. (MARTIN'S CREDITORS.)

COMPETITION.—SEQUESTRATION.—POINDING THE GROUND.—HERITABLE CREDITOR.—(1.) *Found that an heritable creditor, who had merely used sequestration of his debtor's moveables, situated on the subject of his security, and did not execute a poinding of the ground, was not entitled to a preference over the moveables, in a competition with personal creditors.* (2.) *Circumstances in which found, that the personal creditors were not individually liable to the heritable creditor for the defalcation in the produce of his security to satisfy his debt.*

THE late William A. Martin, W. S. granted a bond and disposition in security over his house in Melville Street, Edinburgh, to the pursuers, for L.1200 borrowed from them. Martin died in 1828, leaving property, heritable and moveable, particularly the house in Melville Street, containing furniture and books of considerable value. The pursuers, on 4th November 1828, executed a sequestration of the moveables in the house, for payment of the principal, interest, penalty and expenses due on the bond.

Meetings of Martin's creditors took place soon after his death; and it was agreed by his creditors, that as the debt due to the pursuer, Mr Hood, was liquid, and as the use of his name would be the means of saving expense to the estate, he should be requested to allow an application to be made in his name for his appointment as executor qua creditor to Mr Martin. Accordingly, by the direction of the creditors, and with the consent and approbation of all of them, various applications were made to Hood by Mr Archi-

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bald Swinton, W. S. and he was induced to allow his name to be used, Mr Swinton, on the behalf, and at the desire of the creditors, granting to him this letter: 'SIR, As it was at my suggestion and 'request that you agreed to expede a confirmation as executor-cre-'ditor to the late Mr Martin, W. S., in order that the debts due 'to him, and other outstanding funds, might be called in and re-'ceived under that title, to be deposited by your agent, Mr Walter 'Finlayson, in the bank of Sir William Forbes and Company, to 'remain there till divided among those who shall be found to have 'right thereto at the final winding up of the business, for the pur-'pose of saving expense to the body of the creditors in general, and 'for superseding all judicial measures, as was fully set forth and 'approved at the general meeting of creditors, held 14th Novem-'ber last; and as, in conformity thereto, you have executed a factory, 'authorising him to receive payment *at my sight* of these accounts, 'which I am now engaged in settling, and all other funds which 'may be found due to him; therefore, I hereby engage to guarantee 'you against all consequences of your having done so, and to stand 'between you and all trouble on that account; it being hereby un-'derstood, that your own claims, if you have any, upon the proceeds 'of the household furniture or other moveable effects, are to be re-'served equally entire as if there had been a sequestration of the 'estate, and the funds collected by a judicial factor.' (Signed) 'ARCHD SWINTON.' A meeting was held on the 14th November 1828, the minute of which bears, 'That it shall be signified to Mr 'Hood, that in thus allowing the realising and disposing of the 'effects to be conducted in his name, as executor-creditor, by his 'agent, Mr Finlayson, he does a piece of essential service to the 'other creditors, as well as Mr Martin's family, whose only chance 'of deriving any benefit from their father's funds depends on those 'funds being realised and divided, without having recourse to ju-'dicial authority, by sequestration or other judicial procedure, the 'expense necessarily attendant on which would very soon amount to 'a considerable sum, which, in the state of affairs, it was most de-'sirable should, if possible, be saved. They therefore recommend 'to Mr Finlayson to have the books sold by auction, and the house-'hold furniture as soon thereafter as Mr Swinton and he shall 'judge expedient.'

Hood was confirmed, and acted as executor-creditor. His agent, Mr Finlayson, in virtue of a factory, intromitted with Martin's funds. Finlayson, in 1830, rendered an account of charge and discharge, bearing that he had received L.798 : 3 : 5, and disbursed L.729 : 17 : 0½, leaving a balance in his hands of L.68 : 6 : 4½. But as a set-off to this balance, he had a business account of L.101 : 6 : 3,

leaving him a creditor for the sum of L.33 : 0 : 3½. The disbursements in his account consist of the interest paid to the heritable creditors, amounting annually to L.116 : 14 : 3, and other preferable debts, such as deathbed and funeral charges, mournings, servants' wages, law charges, clerks' salaries, &c. This the pursuers did not admit to contain a correct view of Martin's funds.

The pursuer being dissatisfied with the delay in winding up Martin's affairs, a general meeting of the creditors was called, at which Mr Finlayson submitted a letter from Hood, requesting them to appoint some proper person to take the management of the estate; and the meeting accordingly appointed Mr Michael Linning, W. S. to be their agent and factor. They likewise appointed four gentlemen, of whom Mr Finlayson was one, to be a committee to advise with him. They also recommended to Mr Linning to apply to Mr Hood, for permission to allow the outstanding debts to be collected in his name, as executor-creditor; and declared, that if Mr Hood should merely allow his name to be used, he should not be held responsible in any way for what might take place in consequence. Hood consented on these conditions.

The committee being of opinion that the sale of the house in Melville Street would tend materially to extricate the affairs of the deceased, recommended that it should be exposed at the upset price of L.2100. The house was advertised by the pursuer for sale on 17th August 1831.

Upon 1st August 1831, Mr Finlayson addressed a letter to Mr Linning, desiring him to call a meeting of the committee together, in order that a lower upset price might be fixed, in compliance with the wishes of the pursuer.

A meeting of the committee was held on 13th August, the minute of which bears: 'Mr Finlayson having communicated to the 'committee a letter received from Mr Hood, dated the 1st day of 'August current, the committee, in consequence of Mr Linning's 'absence, deferred taking Mr Hood's letter into consideration at 'present; and with regard to the upset price of the house in Mel-'ville Street, the committee were of opinion that, at the approach-'ing sale on the 17th instant, the price of L.1950 might be tried, 'leaving it, however, to Mr Hood to act under the terms of the 'bond, and to fix any upset price which he himself might think 'proper.'

No offers were made for the house on 17th August, and it was again advertised by the pursuer for sale on 26th October. The house was sold by the pursuer, on 26th October 1831, for L.1700. Of this sum, the purchaser retained L.119, for payment of arrears of feu-duty due on the property; and after paying a preferable

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debt, and interest thereon, due to Sir William Forbes and Company, and the necessary expenses of the sale, and after paying L.730 : 8 : 5 to the pursuer, to account of his heritable bond, there remained a balance due to him, of principal and interest, at Martinmas 1831, of L.559 : 11 : 7.

It was stated by the defenders—The whole sum realised by Mr Linning, acting under the appointment of the creditors, amounts to about L.200. Of this sum, about L.40 has been paid away in debts, and to account of debts due by the late Mr Martin; and there is an account due to the creditors' agent, Mr Linning, for business, in managing the affairs, of about L.170, including in that sum, however, the expense of the present process. Besides the above sum of L.200, there is a sum of L.250 consigned in bank, being the share of a property which lately accrued to the late Mr Martin, and which now belongs to his creditors. No dividend was paid to the personal creditors not preferable. The pursuer did not admit the accuracy of this statement.

The pursuer lodged a claim with Mr Linning for the balance due on the bond, and thereafter, in his own and his wife's name, brought an action against the other creditors of Martin for L.559 : 11 : 7, or whatever sum the deficiency of principal and interest might amount to, and for L.30 of travelling expenses incurred by him. And in the event of it being found that the defenders were not personally liable for the whole of the said sums, it ought and should be found and declared, that as much of the funds belonging to the estate of the said William Alexander Martin, including the price of the foresaid furniture, and at present in the hands of the said defenders, or their agent, or which may hereafter come into their hands, ought to be paid to the complainers, as will pay the several sums before mentioned, with interest: And for that purpose, the said defenders ought and should be decerned and ordained to exhibit and produce a full account of the funds, and to pay as much thereof to the complainers as would satisfy and pay the sums of money, and interest due, and to become due to them: And should the funds of the said estate realised, or to be realised, not be sufficient to pay the several sums, and should the defenders not be found liable personally in payment of the whole thereof; they, at least, ought and should be decerned and ordained, jointly and severally, to pay to the complainers the difference between the sums due to them, and interest thereof, and the sums which they may receive from the said defenders, as holders of said funds: Or, at least, they ought and should be decerned and ordained, by decree foresaid, jointly and severally, to pay to the complainers the said sum of L.309 : 11 : 7, if the dif-

ference should amount to so much, being the amount of the feu-duties, interest and expenses contained in the state before referred to, and interest thereof from the term of Martinmas 1831, and till paid. 12 June 1835. Hood and Spouse v. Sir William Forbes & Co.

The personal creditors contended that no liability could attach to them. The letter of guarantee by Mr Swinton merely protected the pursuer against expense and trouble, by allowing his name to be used, and reserved to him his claim of preference, if any such he had, on the furniture; that the pursuer had no legal preference over the proceeds of these moveables, and that the creditors had done nothing to create such a preference.

A record was completed, and thereafter cases ordered.

Pursuers' Pleas.

It was *pleaded* for the pursuers—I. The pursuers, as heritable creditors of Mr Martin, under the bond and disposition above mentioned, were entitled, in virtue of their heritable rights, more especially when followed up by sequestration of the furniture, books and effects in the house in Melville Street, over which their heritable security extends, to a preference, not only over the heritable subject itself, but also over the whole furniture and effects therein, and were entitled at once to have brought both to sale for payment of their debts, interest and expenses. As a right to moveables, though only general, did exist from the first, it did not require completed diligence to render it effectual; a sequestration, a summons of poinding the ground, or any course by which the landlord asserted his right over the particular subjects, was sufficient to put a stop to the bona fides with which the sale or diligence of the other party could be carried into effect; *Ersk.* ii. 8. 32; Parker *v.* Douglas, Heron and Company, 5th Feb. 1783, *M.* 2868; confirmed by Kelhead, (*Kames's Rem. Dec.* No. 94,) 2785; Webster *v.* Hay; Donaldson, 13th July 1780, 2902; and Tullis, 18th June 1817; the Court thus holding, 1. That an heritable creditor's preference does not depend on completed diligence; and, 2. That it may as competently be established by sequestration as by poinding of the ground. The case of Hay *v.* Marshall did not establish the doctrine contended for on the other side; see Bell *v.* Bank of Scotland, 3d Dec. 1831; and Lord Mackenzie's note in the case.

II. The defenders are bound, by the arrangement entered into for their behoof, by their agent, Mr Swinton, as having either personally sanctioned that arrangement, or given him power to enter into it, or having subsequently homologated and taken benefit from it, by uplifting the sums collected in the pursuer's name as executor-creditor, and by bringing to sale, and receiving the proceeds of the

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Pursuers' Pleas.

sale of the house, the furniture and effects, over which the pursuers' security extended, and that in virtue of the arrangement entered into by Mr Swinton for their behoof.

III. The pursuers having agreed to supersede the sale of the house, and effects therein, both of which were liable to them for payment of their preferable debt, and which would have been more than sufficient for payment of the said debt, at the request of the creditors, through their agent, and on the express condition that the preference which they held was to be reserved to them entire; and also, that they were to be recompensed for all expenses which might be incurred by them in consequence of their agreeing to allow the creditors the use of their names as executors-creditors; and the defenders having, in virtue of that agreement alone, sold the sequestrated furniture and effects, and uplifted the proceeds, the pursuers are now entitled to payment from the defenders of the balance remaining unpaid of their heritable debt, interest and expenses, to the extent of the full amount of the proceeds of the house, after deducting the preferable securities, and of the proceeds of the said books, furniture and effects.

IV. The defenders, as having taken possession of the house, over which the pursuers' heritable security extended, and sold the same, not only without the consent of the pursuers, but in direct opposition to the written remonstrance of the pursuer, Mr Hood, and in the full knowledge that, in the event of such sale, he held them responsible for any deficiency in the price, to pay the amount of his debt, with interest and expenses, are bound to pay to the pursuers the full balance of the heritable debt due to them, as well as the interest and expenses above mentioned; or, at all events, they are bound to do so to the extent of any funds or effects which may have been uplifted, or which may be received by them from the estate of Mr Martin.

V. In any view, the defenders, never having abandoned the house in question to the heritable creditors, but, on the contrary, having taken possession of, let and managed the same, down to the date of the sale, intromitted with the proceeds, and derived the benefits thereof, were bound to pay off the whole feu-duties, public burdens and other preferable claims, prior to and during the period of their possession, and, consequently, are bound to relieve the pursuers of the whole preferable claims paid off by them, or out of the purchase price of the subjects, as well as of the expense of the sale itself, which, if the pursuers had not entered into the agreement above mentioned, might have been superseded by their entering into possession as heritable creditors, and letting the same for their own benefit.

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Defenders' Pleas.

It was *pleaded* for the defenders—I. The pursuers could only attach, in virtue of their heritable bond, the house in Melville Street, subject to the preferable claims of the superior, and of the preferable heritable creditors. Without the aid of some sort of personal diligence, it is very clear that the right of an heritable creditor cannot be made effectual against the moveables situated on the subject of his security; Hay *v.* Marshall, 7th July 1824, affirmed, House of Lords, 22d March 1826, in which the cases relied on by pursuers were discussed.

II. As the pursuers never proceeded to execute a poinding of the ground, the books and furniture in the house in Melville Street were never validly attached by it. But, even supposing that such a poinding had been executed, or that the sequestrations were effectual, they could only have attached the personal property, subject to the preferable debts for which such property is primarily liable; 2 *Ross's Lect.* 439; 2. *Bell*, 58; Campbell's Trustees *v.* Paul, 13th January 1835, *F. C.*

III. The circumstances connected with the winding up of the affairs of the deceased do not give any room to the pursuer for claiming a preference on the personal funds for the balance of his heritable debt; nor are they such as to infer any personal responsibility against the defenders for payment of it.

IV. The letter of guarantee by Mr Swinton is merely binding on himself, and not on the defenders; and farther, it merely guarantees the pursuers against the expenses which he might incur from allowing himself to be confirmed as executor-creditor; but it does not import, and cannot be construed to be a guarantee to him for full payment of the sum contained in his heritable bond.

V. The defenders have always been ready to pay to the pursuer the expenses which he might have incurred from allowing his name to be used as executor-creditor, as soon as the same shall be legally instructed. And they have also been ready to account to the pursuer for their intromissions with the affairs of the deceased, and to pay him a dividend therefrom along with the other creditors. With reference to these objects, the action was wholly unnecessary.

The Lord Ordinary pronounced the following interlocutor:

'The Lord Ordinary having considered the closed record, and 'heard parties' procurators thereon, and having thereafter considered 'the revised minutes of debate now lodged, sustains the defences, except as after expressed, assoilzies the defenders, and decerns: finds 'the pursuer liable in the expenses hitherto incurred, and allows an 'account to be given in, and when lodged, remits the same to the 'Auditor to be taxed: finds the pursuer entitled to payment of any

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'sum not exceeding L.30 sterling, as concluded for in the summons, 'and set forth in the 12th article of the condescendence, which he 'can shew to have been fairly expended by him in expeding confir- 'mation, or in travelling, or otherwise by the desire or for the benefit 'of the personal creditors of Mr Martin, the said claim being ge- 'nerally admitted in the defences and answers to the condescen- 'dence; and appoints the pursuer to lodge a particular note of the 'expenses alleged to have been so incurred.'

Note.—'The case of Hay *v.* Marshall, July 7. 1824, and House 'of Lords, 2. *W.* and *S.* 77, settles the point, that the pursuer had 'not, *by his heritable bond*, any preference over the *moveable* effects 'of his deceased debtor; and the express terms of the interlocutor 'of the Court in the case of Campbell's Trustees *v.* Paul, Jan. 13. '1835, seem farther to determine, that he could get no such prefe- 'rence by means of a *sequestration*. The Lord Ordinary had occa- 'sion to consider that case very particularly; and, with all defe- 'rence, his opinion, if he had been to give judgment on the main 'point, viz. the effect of an *inchoate* process of poinding the 'ground without decree to give a preference against the *confirma- 'tion* of the trustee in a mercantile sequestration, would have coin- 'cided with that indicated by Lord Jeffrey in reporting the cause. 'But the judgment actually pronounced by the Court excludes the 'idea of the heritable creditor having any title to obtain a prefe- 'rence by the diligence of *sequestration* as landlord.

'If there was no preference by the heritable bond, and none was 'obtained by the sequestration, the Lord Ordinary can discover 'no other ground, in the facts of the case, on which the defenders, 'as individual creditors of the deceased, who are not alleged to have 'received payment of one farthing of their debts, should be made 'liable to the pursuer for the defalcation in the produce of his se- 'curity to satisfy his debt. As to the funds recovered, they appear 'to be sufficiently accounted for; and the only tangible part of 'them passed through the hands of the pursuer's own agent. But 'if he had no preference over them, it is not obvious how he should 'be in a better situation, with regard to any part of them, than the 'other creditors.

'The Lord Ordinary thinks that expenses follow of course, the 'claim really resolving into a claim of damages.'

The pursuers *reclaimed*. *Rutherfurd* founded on the cases of Tullis and the York-Buildings Company. It was now held, that where an heritable creditor has begun by poinding the ground, he can secure his preference. Now, sequestration is equiparate with poinding, and so held in Tullis.

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Judgment. Opinion of Court.

The *Court adhered.*

Lord Glenlee considered the case toto coelo different from that of Tullis. Sequestration could not create a preference. Even a landlord has no hypothec except for current year's rent, and not for bygones. This was a sequestration for bygones, the debtor being dead. By what earthly means could he thus secure a preference? The last case of Campbell's Trustees *v.* Paul seems consistent with previous cases. Upon the subsidiary point also, I am satisfied that Hood giving his name was a mere accommodation, under reservation of any private right; but that he had no preference.

The other Judges *concurred*, Lord Medwyn declining to judge, but afterwards stating his acquiescence.

Lord Ordinary, *Moncreiff.* Act. *Rutherfurd, G. Moir.* *C. F. Davidson*, W. S. Agent. Alt. *P. Robertson* and *Anderson.* *J. S. Robertson*, W. S. Agent. *T.* Clerk.

R.

SECOND DIVISION.

No. CXXXII. 12*th June* 1835.

SIR JAMES GARDINER BAIRD AND HIS CURATORS *against* PATRICK NEILL.

PUBLIC BURDEN. — LAND-TAX, REDEMPTION OF. — STAT. 42. GEO. III. c. 116.—ENTAIL.—FRAUD.—*Found, in an action of reduction of a sale of part of an entailed estate for redemption of the land-tax, that the circumstance of its not having been stated in the original petition to the Court, either that the lands proposed to be sold (which exceeded the value of the land-tax) could not be divided without loss, or that the sale of the whole would be more eligible than of an adequate part only, did not create an objection fatal to the sale, in respect it was to be inferred, from the circumstances set forth in the petition, that the facts were so, and that this was also deducible from the proof adduced.*

Found by the Lord Ordinary and by the Court, that the defender, the representative of an onerous purchaser, could not be affected by any allegations of fraud in the application for a warrant to sell the lands, or in the proceedings under it, whereby the Court, in granting the warrant, may have been deceived or misled. (2.) *That it is suffi-*

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cient intimation of the petition to the Court for a warrant to sell the lands, if it is made to the nearest substitute heir of entail who is of lawful age, and resident in Great Britain, it not being alleged that there was any nearer substitute heir then of lawful age, and resident in Great Britain. (3.) *That it is not a relevant ground of reduction, that, at the date of the warrant of sale, the upset price was not fixed by the Court, but left blank in the articles of roup; the Court having authorised a trustee to fix the upset price, of whose nomination they had previously approved.* (4.) *That the omission to pay the price into the Bank of England, before a disposition was granted to the purchaser, affords no sufficient ground of reduction in a question with an onerous purchaser.* (5.) *That the sale never having been reported to the Court, or approved of by the Court, does not constitute a statutory nullity, where the proceedings are otherwise regular.* (6.) *That the provisions of the statutes* 54. *Geo. III. c.* 173, § 12, *and* 57. *Geo. III. c.* 100, § 25, *do not apply to the case of a fundamental error in the execution of the act* 42. *Geo. III. c.* 116. *Important distinction between Elliot's case and the present.*

By the 42d Geo. III. c. 116, which consolidates the several acts relating to the redemption and sale of the land-tax, it is enacted, under sect. 61, 'That where any heir of entail in possession of an 'entailed estate in Scotland, or his or her tutor or tutors, or where 'he or she is an idiot or lunatic, his or her curator or curators mean 'to sell part of the said estate, to purchase the land-tax of the estate 'in terms of this act, it shall be competent and requisite for him, 'her or them, to apply by petition to the Court of Session, stating 'the amount of the land-tax payable out of the said estate, which 'part of the estate it is proposed to sell, and the rent or annual va-'lue of that part of the estate; and praying the Court, upon the 'allegations on these points being proved to the satisfaction of the 'Court, and it being shewn that the sale of the part of the estate 'proposed to be sold will not materially injure the residue of the 'estate remaining unsold, and that the part so proposed to be sold 'is proper (considering all circumstances) to be sold for the pur-'pose aforesaid, to authorise such sale to proceed, in manner herein 'after enacted; and the Judges of the said Court are hereby au-'thorised and required to order such petitions to be intimated upon 'the walls of the Outer and Inner House of the said Court, in 'common form, for ten sederunt days, and also to be advertised 'weekly, for two weeks successively, in the Edinburgh Gazette; 'which intimation and advertisement shall be a valid and effectual 'intimation, advertisement and service, to all intents and purposes, 'as much as if the said petition had been personally intimated to,

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'or served upon all persons having or pretending to have any interest with regard to the said estate, as substitute heirs of entail, creditors on the said estate, or in any other way or character whatever; and such intimation being duly made, the Court shall proceed summarily in the matter, and shall authorise the sale of that part of the estate which the petitioner or petitioners are willing to sell, which the Court thinks ought to be sold for the purpose above mentioned, and against the sale of which no sufficient reason is stated by any person having interest; and the extract of the decree of the Court authorising the sale shall be sufficient authority to the Commissioners acting under this act to carry on the sale in the manner herein directed.'

Sect. 63, 'That if any farm, lands or tenements usually possessed together, shall be proposed to be sold under the provisions of this act, which shall be more than sufficient for that purpose; and it shall appear to the Court of Session, either from the detached situation of such farm, lands or tenements, or from any other circumstances, that such farm, lands or tenements cannot be divided, in order that an adequate part thereof may be sold without loss to the parties interested, or that the sale of the whole of such farm, lands or tenements would be more eligible or advantageous to the said entailed estate, and to the successive substitute heirs of entail in their order, it shall be competent and lawful for the said Court of Session, in like manner as it is authorised to proceed in other cases by this act, (due notice having been given to the next substitute heir of entail, being of lawful age, and resident within Great Britain, of such proposal to sell and dispose of such farm, lands or tenements,) to direct and authorise the sale of the whole of such farms, lands or tenements; and the surplus money, after purchasing stock sufficient to redeem such land-tax, and paying and discharging the costs and expenses attending the sale thereof, shall, with the interest and annual produce thereof, be applied and disposed of under the direction, and with the approbation of the said Court, in the same manner as herein is directed with respect to the eventual surplus arising from sales, when no more has been exposed to sale than is judged adequate to the redemption of such land-tax.'

And under sect. 65, 'That where any such sale shall be authorised by the Court of Session, the same shall be carried on by public auction, at such time, and on such notices as the said Court shall from time to time direct: And farther, that previous to any sale to be made in the terms, and by virtue of the powers required and given by this act, the Court of Session shall cause articles of sale to be drawn in the usual forms required by the law of Scot-

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'land, for making such sale effectual, and whereby the purchaser 'shall be taken bound to pay the price to a trustee, to be named 'by the person or persons, in whose name, and for whose behoof, 'the sale or sales is or are carried on; and which trustee shall be 'approved of by the said Court, and shall find security, to their 'satisfaction, that the sum or sums of money to be paid to him by 'the said purchaser or purchasers shall be duly and faithfully ap- 'plied in the manner, and for the purposes herein enjoined and di- 'rected: And farther, that the said trustee, upon receipt of the said 'price or prices, shall be furthwith bound to pay the said money 'into the Bank of England, to be there placed to the account of the 'Commissioners for the Reduction of the National Debt, to be by 'them applied in the manner and for the purposes directed and spe- 'cified by this act; and the receipt of the cashier or the cashiers of 'the bank shall be a full and a sufficient discharge to the said trustee, 'and to the said purchaser or purchasers, for the sum or sums of mo- 'ney so agreed to be paid by him, her or them, in manner foresaid; 'and which purchaser or purchasers, upon payment of the sum or 'sums by the said trustee into the Bank of England as aforesaid, 'shall be entitled to demand and obtain from the said heir of en- 'tail, or other person or persons, in whose name, or at whose in- 'stance, or for whose behoof the sale or sales is or are carried on, 'such disposition, conveyance, or other title to the subjects so sold, 'containing all usual and necessary clauses for rendering complete 'the right to the same, in favour of the said purchaser or purchasers, 'under the direction of the said Court.'

In February 1804, Sir James Gardiner Baird, the grandfather of the pursuer, presented a petition to the Court of Session, narrating the above clauses in the statute, for warrant to sell the lands of Damside and Factorspark, part of the entailed estate of Saughton-hall, for reduction of the land-tax. The petition stated the amount of the land-tax payable out of the estate; the rental of the lands proposed to be sold; that they were then, and usually let together; that they were detached from the rest of the estate; that they were the most proper part to be sold; and that the sale of them would not injure the remainder of the estate; but did not state either that these lands could not be divided without loss, or that the sale of the whole would be more eligible than of such part only as might be adequate to the redemption of the land-tax. The petition was accompanied with a certificate of intimation by Robert Baird, Esq. of Newbyth, as nearest substitute heir of entail of lawful age. The petition having been intimated in the usual way, the Court, on 2d June 1804, 'allow the petitioner to prove, prout de jure, the amount of the 'land-tax payable to the public for the year 1798, out of the en-

'tailed estate mentioned in the petition, the rent or annual value of 'the lands proposed to be sold for redeeming the said land-tax, if 'these lands can be sold without injury to the remainder of the en- 'tailed estate, and if they are the most proper part of the estate to 'be sold for the above purpose, all circumstances considered, all in 'terms of the statutes made in that behalf.'

A proof having been accordingly led, and reported along with prepared articles of roup, and a trustee with a cautioner nominated by the petitioner, for executing the purposes of the act, the Court, on 11th July 1804, 'find it sufficiently instructed that the land- 'tax, payable out of the lands and estate of Saughtonhall, in pos- 'session of the petitioner as heir of entail thereof, amounts to 'L.277 : 18 : 8 Scots, or L.23 : 3 : $2\frac{8}{12}$ sterling: find it proven 'that the yearly rent of the lands of Damside and Factorspark, the 'part of the estate of Saughtonhall proposed to be sold, and at 'present under lease to Mr William Inglis, writer to the signet, 'for nineteen years after Martinmas 1801, amounts (after con- 'verting the articles of rent payable in kind at the rates, and de- 'ducting the public burdens as specified in the foresaid state,) to 'L.40 : 16 : $1\frac{7}{12}$ sterling: find it instructed that these lands can 'be sold without injury to the remaining part of the estate; and 'that, considering all circumstances, they are the most proper parts 'of the said estate to be sold for redemption of the land-tax there- 'of: approve of the Honourable Henry Erskine, advocate, to be 'trustee, and of Mr Henry David Inglis, advocate, as his cautioner 'for the due execution of the trust; and likewise approve of the 'proposed articles and conditions of roup, and appoint them to be 'identified by the said trustee, and by the clerk to the process; 'and grant warrant to and authorise the petitioner and his said trus- 'tee to sell the foresaid lands of Damside and Factorspark, by 'public auction, in terms of the statute founded on in the petition, 'and of the foresaid articles and conditions of roup, and to fix the 'upset price thereof: appoint the sale to proceed,' &c.

The lands were purchased by Mr William Inglis, writer to the signet, for L.1420, who, besides being the tenant of the lands, and the only witness to their value, was alleged to be the confidential agent of Sir James Gardiner Baird at the date of the sale. Mr Inglis shortly afterwards sold the lands for L.3000 to Mr William Laing, from whose trustee they were purchased by the defender's father for L.3526, 5s., from whom they descended to the defender, in whose possession they now are.

In August 1831, the present action of reduction-improbation was brought to set aside the sale in 1804, and subsequent titles, on the grounds, I. That the petition to the Court for warrant to sell

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the lands in question, and the proceedings under it, were devised and carried through by collusion between the original seller and purchaser, for their own advantage, and to the prejudice of the succeeding heirs of entail; and, II. That the proceedings were not in compliance with the provisions and conditions of the act of Parliament, in respect, 1. That the sale, which was a sale of more land than was necessary for the redemption of the land-tax affecting the estate, was not authorised by the 63d section of the statute, the condition of such sale being, that the next substitute heir of entail should be of lawful age, and resident in Great Britain; whereas, in the present case, the next substitute heir of entail to the proprietor in possession was, at the time of the sale, a minor, and resident in France. 2. That it was not stated in the petition, or offered to be established by proof, that the lands proposed to be sold could not be divided without loss, or that the sale of the whole was more eligible than the sale of a part only adequate to the redemption of the land-tax. 3. That the upset price of the lands was not fixed by the Court when they granted warrant of sale, but was left blank in the articles of roup. 4. That the price was not paid to the statutory trustee, nor by him into the Bank of England, before granting a disposition to the purchaser, nor otherwise applied in terms of the statute. 5. That the sale and subsequent procedure were never reported to nor approved of by the Court.

In defence against the action Mr Neill *pleaded*—That, with the exception of the allegation of fraud, the whole grounds of reduction resolved into an averment, that the Court had committed an error in judgment in the application of the statute; which however was not true, the whole statutory requirements having been duly observed, but even if true, was irrelevant to set aside the defender's title as feudal proprietor of the lands in question, as successor to an onerous purchaser; that the allegation of fraud was not competent against him; and, moreover, that the grounds of reduction, so far as proceeding upon supposed errors imputed to the Court, were excluded by the statutes 54. Geo. III, c. 173, sec. 12, and 57. Geo. III, c. 100, sec. 25.

On 17th December 1833, the Lord Ordinary pronounced this interlocutor:

'The Lord Ordinary having considered the closed record, and 'heard parties' procurators thereon, and thereafter made avisandum, 'and particularly considered the proceedings under which the sale 'sought to be reduced took place, and the statutes and other autho-'rities referred to by the parties, finds, 1*mo*, That the defender, 'Patrick Neill, cannot be affected by any allegations of fraud in 'the application for a warrant to sell the lands in question, or in

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'the proceedings under it, whereby the Court of Session, in granting 'the warrant, may have been deceived or misled; and sustains the 'defences of the said Patrick Neill, in so far as the conclusions of 'the summons, as directed against him, are laid on any such ground: 'finds, 2*do*, That, according to a sound construction of the statute '42. Geo. III. c. 116, § 63, the notice to Robert Baird, Esq. of 'Newbyth, 'as nearest substitute heir of entail of lawful age,' 'of which evidence was produced in the Court, was due notice, in 'terms of the statute, 'to the next substitute heir of entail, being of "lawful age, and resident within Great Britain,' it not being alleged 'that there was any nearer substitute heir then of lawful age, and 'resident in Great Britain; and repels the plea of the pursuer, that 'the statute does not authorise any sale to be made under the 63d 'section, in the case of the heir next in succession to the proprie-'tor in possession not being of lawful age, or not being resident in 'Great Britain: finds, 3*tio*, That as the interlocutor of the Court 'granting warrant of sale appointed the late Honourable Henry 'Erskine to be trustee, as required by the statute, and expressly 'authorised him to fix the upset price to be inserted in the articles 'of roup, and as the statute contains no injunction that the upset 'price shall be fixed by the Court itself, no relevant ground of re-'duction arises in a question with the defender as an onerous pur-'chaser, from the fact, that, at the date of the warrant of sale, the 'upset price had not been determined, but stood blank in the arti-'cles of roup: finds, 4*to*, That the petition for obtaining the war-'rant, though it stated that the lands had been usually let together, 'and were detached and separated from the other parts of the es-'tate, did not set forth, either that 'they could not be divided, in "order that an adequate part thereof might be sold without loss to "the parties interested,' or that the sale of the whole 'would be "more eligible and advantageous to the said entailed estates, and "to the successive substitute heirs of entail, in their order;' that 'the proof allowed by the Court bore no distinct reference to 'this point, as in a sale under the 63d section of the statute, but 'simply referred to the question, 'if these lands can be sold with-"out injury to the remainder of the entailed estate; and if they are "the most proper parts of the estate to be sold for that purpose, all "circumstances considered,' apparently in reference to a sale un-'der the 61st section only: That the proof adduced bore only, that "the lands can be sold without prejudice to the remainder of the "petitioner's entailed estate; and further, that, all circumstances "considered, particularly the detached situation of these lands from "the other parts of the estate, they are the most proper parts of "the petitioner's estate to be sold for the purpose,' &c.; and that

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'the interlocutor of the Court, granting warrant of sale, merely "finds it instructed, that these lands can be sold without injury "to the remaining part of the estate; and that, considering all cir-"cumstances, they are the most proper parts of the said estate to "be sold for redemption of the land-tax thereof:' Therefore finds, 'that, according to the record of the judgment, and under the pro-'ceedings as raised by the petitioner, the Court, before pronoun-'cing the interlocutor, had not before them any evidence that the 'farms, lands or tenements thereby appointed to be sold, could not 'be divided, so that an adequate part only might be sold, nor any 'evidence that the sale of the whole of any such farms, lands or 'tenements, would be more eligible and advantageous to the en-'tailed estate, and to the successive substitute heirs of entail, than 'the sale of a part thereof only: finds, 5*to*, That the residue of the 'price, as well as the sum necessary for relieving the land-tax, 'ought to have been paid into the Bank of England before a dis-'position was granted to the purchaser, and that it was not so paid in 'this case; but, in respect of the decision of the House of Lords, 'in the case of the Earl of Wemyss against Montgomery, finds, 'that no sufficient ground of reduction arises on that omission in 'a question with an onerous purchaser: finds, 6*to*, That the sale 'in question never was reported to the Court, or approved of by 'them; and that, though no statutory nullity might arise on that 'ground, if the proceedings had otherwise been regular, it forms a 'material defect in the title of the purchaser, where the statutory 'provisions in other respects have not been observed: finds, That 'neither the provision of the act of the 54th Geo. III. c. 173, § 12, 'nor that of 57th Geo. III. c. 100, § 25, applies to the case of a 'fundamental error in the execution of the statute: Therefore, and 'specially, in respect of the matters set forth in the fourth finding 'above expressed, repels the defences, and reduces, decerns and 'declares, in terms of the reductive conclusions of the libel; re-'serving to the defenders their claims for repetition of the price 'from the pursuer, in so far as any part of it was applied to redeem 'the land-tax, or to discharge burdens which affected, or might 'have been made to affect, the entailed estate, or the pursuer, 'reserving also to the defender any claims for ameliorations made 'on the lands, and to the pursuer his objections, as accords; and, 'finally, reserving to the pursuer his claim for repetition of the 'rents, and to the defenders their objections thereto, as accords; 'and appoints parties' procurators to be farther heard on all these 'and any other points of the cause: Finds no expenses due to either 'party.'

Note.—'Some of the points in the interlocutor may require a

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'little explanation. 1. The pursuer endeavoured to make out, by 'a deduction from the series of statutes for the redemption of the 'land-tax, particularly 38th Geo. III. c. 60, § 26, 32d and 39th 'Geo. III. c. 6, § 29, 39th Geo. III. c. 40, § 6, and the material 'act, 42d Geo. III. c. 116, § 63, that the words, 'the next substi-"tute heir of entail *being of lawful age*,' were meant to designate 'specifically the next existing heir, whether of age or not, and to 'impose it as a *condition*, without which no sale of such lands, (under 'the 63d section,) beyond what was necessary for redemption of 'the land-tax, could be made at all; that the next heir should be 'of lawful age, and resident in Great Britian. He urged, that, 'by 38th Geo. III, no sale of that kind was allowed; that by 'the 39th Geo. III. c. 6, such sales were permitted, but only '*with the consent* of the next heir interested; that this still remains 'the rule for England; and that it being a great stretch to allow 'the same thing in Scotland, *on notice only*, the clauses in the 39th 'Geo. III. c. 40, and 42d Geo. III. c. 116, must be construed to 'mean, that no sale of the kind shall take place, unless the next 'immediate heir himself is of age, resident in Britain, and receives 'notice. There is a good deal of plausibility in this, but the Lord 'Ordinary cannot enter into it. He thinks it very clear, that, 'whether the act 39th Geo. III. c. 6, may in any sense be a sta-'tute for the empire or not, its provisions, and particularly the 29th 'section, do not at all apply to entailed estates in Scotland. The 'Court of Session is not mentioned in it; and no sale in Scotland 'could possibly have taken place under it, consistently with the 38th 'Geo. III. Then the act c. 40. of the *same Session* was passed, 'specially for *extending* and *enlarging* that act of 38th Geo. III, as 'to estates in *Scotland;* and in it the provision as to notice to the 'next heir of entail is essentially different in principle from that 'with regard to rights of *remainder and reversion* in England, as ex-'pressed in c. 6. The reason of the difference probably is, that 'there is a *vested estate* in the next remainder man, which it was 'thought impossible to affect beyond the necessity of the case, with-'out his consent; and on the other hand, no heir of entail in 'Scotland, having a vested estate, but all the heirs having equally 'a *jus crediti*, notice to the next heir, who might be of lawful age, 'and resident in Britain, was thought sufficient. The Lord 'Ordinary, therefore, construes the words, '*being* of lawful age,' &c. 'as equivalent to '*who is*,' &c. and not as importing '*if* he is,' or "*provided* he is;' and he comes to this conclusion the more readily, 'because, though the point occurred in the case of Elliot, it is evi-'dent that the Court did not go into the pursuer's view of it. The 'act 10. Geo. III. c. 51, has a different principle. It certainly

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'does designate the *next substitute* absolutely if in Britain; but if 'he is abroad, it allows notice to the nearest male relation by his 'father.

'2. In the case of *Elliot*, the Court thought it a blot that the 'upset price had been filled up in a particular manner, having been 'blank when the articles were approved of. But the interlocutor 'is laid expressly on the ground, that that thing was done 'by some "private authority, *without any warrant from the Court.*' The fact 'is otherwise in this case.

'3. In the fourth finding, the Lord Ordinary has proceeded en- 'tirely on the judgments of the Court and the House of Lords in 'the case of Elliot; and he has adopted the very words of the latter. 'He cannot distinguish the cases. The points in the petition, in 'the interlocutor allowing the proof, in the proof, and in the inter- 'locutor authorising the sale, were substantially, (and in the inter- 'locutors nearly verbatim,) the same as in this case. The essential 'error in both is, that the points to which the proof and interlocutor 'apply, are those belonging to a sale under the 61st section, even 'the detached situation of the farm (not alluded to in either interlo- 'cutor) being only stated as a *circumstance* to shew, according to '*that section*, that the sale would be without injury to the estate, 'and, on the whole, the most eligible. But there is no application 'of that, or any thing else, to the specific point of the 63d section, 'that the lands *cannot be divided*, or that it is *more* eligible to sell 'the whole than a part. The Lord Ordinary, therefore, finds him- 'self bound to follow implicitly so precise a precedent as that of 'Elliot.

'The other points require little particular notice. It might be 'proper to state, that in the case Sir James Montgomery, there is 'no doubt that the price was not paid into the Bank of England 'according to the terms of the statute, and that this point was strong- 'ly urged in the House of Lords, though the report does not bring 'it out. With regard to the acts 54. and 57. Geo. III, the pro- 'vision of the 54th is much the strongest, and the nearest to the 'point here sought by the defenders. But that act was fully before 'the House of Lords in deciding the case of Elliot; and neither 'could they be ignorant of that of the 57th, which has fully more 'relation to England than Scotland.

'The Lord Ordinary has thought it his duty to decide on all 'points put in issue, though he is aware that a more general form 'of interlocutor is more convenient. But when the cause is to go 'to review, it is impossible to waive points as unnecessary to be 'decided without leading to a double discussion.'

Both parties having *reclaimed*, the Court (6th Feb. 1834) ordered cases. The pursuer, in his case, argued the whole of the points found both for and against him in the Lord Ordinary's interlocutor. The argument in the defender's case was confined to the fourth finding in that interlocutor, upon which alone it was understood that the Court entertained doubts. Thereafter, on 3d July 1834, their Lordships directed the cases and whole record to be laid before the other Judges, for their opinion, whether the interlocutor of the Lord Ordinary ought to be adhered to. The following opinion was returned by *Lords President, Gillies, Mackenzie and Corehouse:*

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The Court of Session being entrusted by the Legislature with the duty of superintending sales of entailed property for redemption of the land-tax, it is clear, that if the proceedings are not conducted in the manner prescribed by the statute, the Court exceed their powers, and the sale must be null, even in a question with a bona fide purchaser. On the other hand, if, in the exercise of the powers conferred upon them, the Court commit an error of judgment in a matter on which they are directed to judge, a purchaser, if not in mala fide, is in safety to rely on the decree. This principle is distinctly explained by Lord Eldon, in a passage cited by the defender from his Lordship's judgment in the case of the Earl of Wemyss against Montgomery.

The procedure in the sale under challenge appears to us to have been in conformity with the injunctions of the statute 42. Geo. III. c. 116. By the 61st section of that statute, the Court are authorised to direct a sale of a part of the estate that may be judged adequate to the redemption of the land-tax. By the 63d section they are authorised, in certain circumstances, to direct a sale of a part more than sufficient for that purpose; and the mode is pointed out in which the surplus money, after redemption of the tax, is to be disposed of. In neither alternative does the statute prescribe the form in which the petition of the heir of entail shall be drawn, or the words in which the judgment of the Court shall be expressed.

In this case, which was a sale of a part of the estate more than adequate to the redemption of the land-tax, the petition properly recites both the 61st and 63d section of the statute; certain provisions in the former being applicable to the latter also. Further, it sets forth the amount of the land-tax to be redeemed, and the rent of the lands proposed to be sold.

If any farm, lands or tenements usually possessed together are proposed to be sold, under the 63d section, the Court are empowered to authorise the sale, if it appears, either from the detached situation of such farm, lands or tenements, or any other circumstance,

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that they cannot be divided without loss, or that a sale of the whole is more eligible to the parties interested than the sale of a part. In Sir James Gardiner Baird's petition, it is set forth, that the lands proposed to be sold were usually let together, and that they were then under a lease of nineteen years' endurance, sixteen years of which were unexpired; that they were detached and separated from the other parts of the estate by the Water of Leith; that the sale would in no respect injure the remainder of the estate; that they were the most proper part to be disposed of; and that the surplus money, after redeeming the tax, might be employed in extinction, pro tanto, of a considerable debt affecting the estate. The petition farther sets forth, that intimation had been made to the next substitute in terms of the 63d section, an intimation unnecessary in the case of a sale under the 61st section.

Satisfactory evidence of all these averments, written and parole, was laid before the Court; in particular, a plan was produced, exhibiting the extent of the farm proposed to be sold, its detached situation, and the mode in which it was inclosed and intersected; and judgment was finally pronounced in terms of the prayer of the petition.

It is true that neither the petition nor the judgment bears, in express terms, that the lands could not be divided without loss. But the statute does not require that in either the one or the other this should be expressed. The petition, however, sets forth circumstances from which the statute declares that this may be inferred; these circumstances are satisfactorily proved, and the Court 'find 'it instructed, that these lands can be sold without injury to the 'remaining part of the estate; and that, considering all circum-'stances, they are the most proper parts of the said estate to be 'sold.' This finding necessarily implies, reference being had to the facts stated in the petition, and to the proof adduced, that it appeared to the Court that the lands could not be divided, or sold separately, without loss. Further, on carefully considering the proof at the present time, we have arrived at the same conclusion; and we are of opinion that the proceedings were not only correct in point of form, but that the judgment of the Court was well founded on the merits.

The Lord Ordinary's interlocutor, in all the findings of which, except the *fourth*, we entirely concur, seems, from his Lordship's note, to rest chiefly, if not exclusively, on the judgment of the House of Lords in the case of Elliot. We are of opinion that that case is distinguished from the present in many important particulars. The petition of Sir William Elliot did not recite the 63d section of the statute, or refer to it expressly in any way; and it did not

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specify the amount of the land-tax to be redeemed. The intimations given of the intention to sell related to the 61st section only; and the interlocutor of the Court refers to those intimations and to no other. It appears that a notice was given to the next substitute, but in a manner altogether informal and inept; and that that notice was not before the Court at the time the proof was allowed. The Court therefore were led to believe that the sale was to proceed under the 61st section; and no proof was either asked or allowed of any circumstance necessary to warrant a sale under the 63d section. It was not set forth by the petitioner that the lands proposed to be sold were detached; no plan was produced to shew their relative situation, and in fact it is stated, in subsequent proceedings, that they lay in the heart of the barony of Halrule, and cut the barony in two. It was not set forth, nor was it proved, that they were usually let together; in fact none of them had been let together previously to the then subsisting lease, and part of them were at the time subset and possessed separately. The duration of the lease was not stated or proved; and it was concealed from the Court that a large grassum had been paid to the landlord. Thus it appears that there was no evidence before the Court that the lands could not be divided; that an adequate part might not have been sold; or that a sale of the whole was more eligible; and the interlocutor cannot be accounted for, except on the supposition that the Court had been entirely misled, and were proceeding on the erroneous supposition that the sale was to be made under the 61st section of the statute. If an investigation had been instituted in that case similar to the investigation which took place in the present, it would have appeared at once that the proposed sale was a palpable and gross fraud against the substitute heirs, and utterly unjustifiable under the statute. In all these respects the case of Elliot is contradistinguished from the present. The judgment of the House of Lords did not rest on the circumstance, that it was not set forth in the petition, or found in the interlocutor, that the lands could not be sold separately, or that the sale of the whole would be more eligible; but expressly on the circumstance that the Court, when they pronounced their interlocutor, *had not evidence before them to that effect.* But, in the present case, we think that there was evidence before the Court, on which their judgment proceeded, and by which it was fully justified. We are therefore of opinion, that the interlocutor of the Lord Ordinary should be altered, and the defender assoilzied from the conclusions of the action.

Lord Balgray.—I concur entirely in the foregoing opinion.

Lord Jeffrey.—I concur, on the whole, in this opinion, though with very great difficulty. Looking merely to *the terms* of the judg-

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ment of the House of Lords in the case of Elliot, and to the substantial identity of *the evidence* in that case and the present, it seems scarcely possible to distinguish between them. But considering the judgment in Elliot's case to have gone to the full extent of justifiable strictness, even on the assumption that *the evidence* was there viewed with reference to the terms of *the application* it was brought to support, I think it reasonable to suppose that it did proceed on such a reference, and is not therefore of binding authority in any case where the terms of the application are different. The points of difference in the present case are well brought out in the preceding opinion, and they amount to no less than this,—that whereas it is here perfectly clear that the application was for a warrant to sell under the 63d section, this was so far from being clear in Elliot's case, that the natural inference from the whole procedure is, that a sale under the 61st section only was intended. Now, it appears to me that the House of Lords might very well have decided that the general evidence produced in that case was not sufficient to fix or correct the ambiguity of the application and previous procedure, so as to warrant an actual sale under the 63d section; and yet that the Court of Session might, without contravening that authority, find similar evidence sufficient to support an application, in no respect ambiguous, but plainly under that 63d section. In the former case, the Court may be held never to have actually sanctioned, or intended to sanction, the sale under the 63d section, which was actually made; and that it was therefore without legal warrant, and consequently null; while, in the latter, all that could be said was, that they were too easily satisfied that the facts required to justify such a sale were established, or had fallen into an error of judgment in estimating the sufficiency of the proof, which would by no means infer such a consequence: and it is upon this distinction that, regretting and disapproving the vagueness of the evidence actually produced, I still think myself warranted in concurring in the opinion that the defender is entitled to absolvitor.

Opinion of Lord Moncreiff.—The opinion expressed in my interlocutor and note of the 17th December 1833 was formed after very full hearing of counsel, and careful consideration of the cause at avisandum. I have seen no ground to alter that opinion. I am still altogether unable to distinguish the case in principle from that of Elliot.

The petition, in the present case, recites the 61st, and also the 63d sections of the statute. The petition in Elliot's case recited *no* particular section, but referred to the statute generally. But as it is clear that no particular form of petition is prescribed, and that it was not necessary to recite the sections of a public statute, I can-

not discover any fatal error in Sir William Elliot's petition in that point. The sale was made as under the 63d section; and the judgment was, that it was null, because there had been *no evidence* before the Court that the lands proposed to be sold *could not be divided*, so that an adequate part might be sold without loss, or that the sale of the whole *would be more advantageous to the estate and the heirs of entail.*

The question is, whether it can be held that there *was* such evidence in the present case, consistently with the judgment in the case of Elliot. But the interlocutors *allowing the proof are expressed in the identical same words in both cases.* See case for pursuers, p. 12, and Appendix, p. 7. Those words are the *words of the 61st section* of the statute, not the words of the 63d.

The proof in Elliot's case was, 'that said lands *lie entirely de-* 'tached from the remainder of the estate of Stobbs, and are about 'six miles distant from the mansion-house: That considering the 'local and relative situation of these lands, *and all other circum-* 'stances, they are the most proper parts of the estate to be sold for 'the purposes above mentioned, and that the sale thereof *will not* 'materially injure the remainder of the estate.' This may have been incorrect evidence, and the Court may have been deceived by it; but it is the evidence which was before the Court, and it bears expressly that the lands *lay entirely detached from the remainder of the estate.*

The proof in the present case was, that 'these lands can be 'sold *without prejudice to the remainder of the estate;* and further, 'that, *all circumstances considered,* particularly the *detached situation* 'of these lands from the other parts of the estate, they are the *most* 'proper parts of the petitioner's estate to be sold, for the payment,' &c. There was no other evidence produced, except a current tack, dated in 1793, and which had sixteen years to run, and a plan. The latter might shew the detached situation of the lands—the fact *sworn to* in Elliot's case. It could shew no more. And the lease only shewed, as matter of fact, what might occur in any case, that the lands had been possessed as one farm.

The *only* evidence upon oath being, in my apprehension, the very same in both cases, I am entirely unable to draw the present case out of the force of a judgment, which expressly finds the sale in the other null, *because* there was not *before the Court any evidence* that the farms, &c. '*could not be divided,*' &c. or that the sale of the whole 'would be *more eligible or advantageous* to the said entailed 'estate, and to successive substitute heirs of entail, than the sale 'of a part thereof only.' Whether the Court could have so found in the present case, on evidence substantially the very same which

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was held insufficient in Elliot's case, is not the question. I can only say, that I could not do so now, if the point were presented to me.

But the Court *did not find any such fact proved.* See the interlocutor, App. p. 17, which simply 'finds it *instructed* that these 'lands can be sold *without injury to the remaining part of the estate,* 'and that, considering all circumstances, they are *the most proper* 'parts of the said estate to be sold for redemption of the land-tax;' thus following the words of the 61st section of the statute, and the proof as referable to them, and not even taking any notice of the detached situation of the lands.

Opinion of Consulted Judges.

I humbly think that the truth of the matter is, that in both cases alike there was an entire omission, whether intentional in either or not, to direct the proof to *the particular points required to be proved by the 63d section;* and I am altogether unable to distinguish the one from the other in that point.

Whether, in the substance of the thing, the one sale might be fair and the other unfair, I am not called upon, and am not enabled, to form any opinion. Without more explanation than is now before me, I own I should hesitate in the proposition. But the case of Elliot was decided on a single point. In that point I think that the present case is the same.

Opinion of Court.

At the final advising, *Lord Glenlee*—No case can be more like the present than that of Elliot.

Lord Medwyn.—I agree in the main with Lord Jeffrey, that there is a sufficient distinction between this and the case of Elliot, and am happy to think that it has been possible to find a distinction between the two cases.

Judgment.

The *Court* accordingly assoilzied the defender, with expenses.

Lord Ordinary, *Moncreiff.* Act. *Rutherfurd* and *A. Davidson.* Alt. *Dean of Fac. (Hope,) J. S. More,* and *Monteith. Gibson-Craigs, Wardlaw & Dalziel,* W. S. and *W. A. G. & R. Ellis,* W. S. Agents. *T.* Clerk.

R.

SECOND DIVISION.

No. CXXXIII. 16*th June* 1835.

HOUSTON AND OTHERS *against* SPEIRS AND OTHERS.

GUARANTEE.—RANKING.—TRUST.—*Two persons having granted a letter of guarantee for drafts by a third party, and one of said persons having granted another letter of guarantee to commence at a date subsequent to the first: the party for whom said letters were granted having become insolvent,—held,* (1.) *That, in the circumstances, the second letter did not supersede the first, and that, after the date of the second letter, both guarantees were jointly liable.* (2.) *That the mode of ranking under a voluntary trust did not, after a considerable lapse of time, prevent a legal adjustment of the respective rights of the creditors; and accordingly, notwithstanding the mode of ranking which had taken place under said voluntary trust, the creditors under said letters of guarantee were entitled to draw a dividend from the insolvent's estate corresponding to the full amount due to them, and to claim the deficiency thence arising from the granters of said letters.*

IN this case, (see ante, vol. viii. page 468,) the Lord Ordinary (Medwyn) appointed the state to be given in, as formerly ordered by his Lordship's interlocutor, adhered to 3d July 1834. Thereafter the succeeding Lord Ordinary (Jeffrey) ordered minutes upon the points at issue. His Lordship then pronounced the following interlocutor, which, with the accompanying note, fully brings out the pleas of the parties upon the question of ranking:

Lord Ordinary's Interlocutor.

'The Lord Ordinary having considered the revised minutes for 'the parties, with the final interlocutors of the former Lord Ordi- 'nary and the Court, and whole process, finds, 1*mo*, That the letter 'of guarantee of the 9th and 13th November 1810, by which Archi- 'bald Speirs and Archibald Macnab and Company bound them- 'selves jointly to see the drafts of Walter Logan paid, to the ex- 'tent of L.2500, was not superseded by the subsequent and addi- 'tional letter of guarantee, of 24th December following, by the 'said Archibald Speirs alone, whereby he bound himself to pay such 'drafts to the extent (as now settled by final interlocutors) of L.2000 'more; but that both letters were operative and available to the

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'creditors, from the date last mentioned, up to the final close of the 'account; and that Messrs Speirs and Macnab and Company were 'answerable, under the letter of November 1810, for unretired 'drafts of Walter Logan dated subsequent to the 24th of December 'following, (when the additional guarantee was granted by Archi- 'bald Speirs,) as well as prior to that date: finds, 2*do*, That as it 'is admitted by the defenders, that when the account was closed, 'on the bankruptcy of Walter Logan, there were unretired drafts, 'dated between the 13th of November and the 24th December '1810, to the amount of L.1911: 6: 9, for which the granters of 'the first letter were exclusively answerable, and similar drafts, 'dated subsequent to the said 24th December, to the amount of 'L.2731: 14: 6, for which (upon the principle of the preceding 'finding) the granters of *both* letters were liable jointly, the said 'granters were liable to the pursuers, at the said period of Walter 'Logan's bankruptcy, in the full sum of L.4500, being that to 'which their liability was limited, though smaller than what was 'then due on bills of the description to which it applied: finds, 3*tio*, 'That at this period the pursuers were creditors of Walter Logan 'for a gross sum of L.9144, 19s., including what was covered by 'the guarantees above mentioned, as well as what was not so co- 'vered: finds, 4*to*, That in this situation it was the clear legal right 'of the pursuers to have ranked and claimed on the bankrupt estate 'of Walter Logan for the said full sum of L.9144: 19: 9, and after 'drawing from it whatever dividend it could yield, to have enforced 'payment from the said guarantees of the sums necessary to extin- 'guish their whole debt, provided such deficiency did not exceed 'the sum to which their liability was limited: finds, 5*to*, That it 'is admitted that the estate of Walter Logan yielded a dividend 'of 10s. in the pound to all his creditors; and that the pursuers 'were therefore entitled to have drawn from that estate the sum of 'L.4572, 10s., being one equal moiety of the said L.9144: 19: 9, 'and to have recovered the other moiety of L.4572, 10s., to the 'extent of L.4500, from the defenders, as representing the granters 'of the said guarantees: finds, 6*to*, That this legal right of the pur- 'suers cannot be held to have been renounced or forfeited, or the 'liability of the defenders to have been varied or discharged, as in 'a question between those parties, and previous to any final settle- 'ment of their accounts, by the way in which they respectively 'claimed, and drew dividends from the estate of Walter Logan, 'under the voluntary trust which he had granted; and in respect that 'the defenders have truly paid no more than L.1500 to account of 'their original debt of L.4500, and that the pursuers will not have 'received the whole sums due to them from the estate of Walter

'Logan, even after the balance of the said L.4500 is paid to them 16 June 1835.
'by the defenders, finds the said defenders liable in the sum of
'L.3000, as the said balance, with interest thereof from the 5th Houston and Others v. Speirs and Others.
'of May 1811, and decerns: finds the defenders liable in expenses
'since the date of the interlocutor of Court of 3d July 1834; al-
'lows an account thereof to be given in, and remits the same, when
'lodged, to the Auditor, for his taxation and report.'

Note.—'There are, in substance, but two points now in dispute Lord Ordinary's Note.
'in this action: *First*, What was the true *charge* against the defend-
'ers, under these guarantees, at the period of Logan's bankruptcy?
'and, *second*, Whether, and to what extent, they have been *dis-*
'*charged* by any thing which afterwards took place?

'Upon the *first* point, the defenders maintain, that, at the date
'referred to, they were not liable for the whole L.4500, which might
'confessedly have been covered by the two letters of guarantee;
'because the first letter, dated in November 1810, which guaran-
'teed drafts to the amount of L.2500, applied only to such drafts
'as were issued between its date and that of the second letter of
'24th December, and that these amounted to no more than L.1911,
'6s. 9d. But the Lord Ordinary thinks this limitation of the first
'guarantee quite inadmissible. Even if the second had been grant-
'ed by the same party as the first, he would still have been of this
'opinion, and must have held it to be, (as its words express,) not
'a *surrogatum for*, but *an addition to*, the current and unretracted
'suretiship constituted by the former. But being by a different
'party, the idea that its execution could in any way supersede, li-
'mit, or stop the operation of the former, seems altogether extrava-
'gant. He takes it to be clear, therefore, that the unretired drafts,
'made after 24th December 1810, were covered by *both* guarantees;
'and as these are admitted to have exceeded L.2700, so the L.700
'which remained, after exhausting the second credit of L.2000, is
'to be added to the L.1911, which was outstanding before that date,
'and will, in this way, more than exhaust the credit of L.2500, also
'contained in the first or original obligation.

'The pursuers have endeavoured to represent the amount of un-
'retired drafts, falling under those guarantees, as still larger than
'here stated, by holding that the remittances, made generally to
'account after their dates, must be applied, in the first place, to a
'large balance which stood against Logan *before* that time; and that
'it is only after this is extinguished that they can be set against
'the drafts covered by the guarantees; and this, they contend, is
'merely following out the principle established by the House of
'Lords in the case with the Banton Coal Company, and recog-
'nised, in this very process, as to an anterior guarantee, dated in

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'1808. The Lord Ordinary, however, has not adopted this view, 'and he gives no judgment upon it, partly because he conceives 'the liability of the defenders, to the full extent of their engage- 'ment, is made out altogether independently of it, and partly be- 'cause it appears to him to involve a point of very great difficulty. 'The inclination of his opinion, indeed, is pretty strongly *against* 'this view of the pursuers.

'His chief difficulty was as to the *second* point, or the effect of 'the actual payment by the defenders, and the rankings and recove- 'ries of the parties on Logan's estate, in limiting or reducing the 'original liability of the defenders. He has no doubt that their re- 'spective rights and liabilities, at the time of the bankruptcy, were 'as he has stated in the fourth finding of the preceding interlocutor, 'and he rather thinks that this is not seriously disputed by the de- 'fenders. But they say that a different mode of settling, and one 'not in itself unreasonable or unconscientious, was voluntarily adopt- 'ed and acted upon by the parties; and that, after the lapse of so 'many years, it is incompetent to go back upon this settlement, 'though a different and more advantageous one might probably 'have been insisted on by the pursuers, while matters were still 'entire.

'The facts alluded to are, that after Logan's sequestration, and 'the execution of his voluntary trust, the defenders actually paid 'over the sum of L.3000 on account of those guarantees to the 'pursuers; and that the pursuers accordingly only claimed and drew 'dividends from Logan's estate *on the balance* of their debt, or on 'L.6144, instead of L.9144, while the defenders, as creditors for 'relief, were allowed to claim and draw dividends for the L.3000 'they had thus advanced on Logan's account.

'Those admitted facts, which took place upwards of twenty years 'ago, no doubt make a plausible case for the defenders; but con- 'sidering the result to be contrary to the clear legal rights of the 'pursuers, and finding that it has obtained no *judicial* sanction, and 'cannot be set forward as any thing like a res judicata, and that 'there is no evidence or ground for presuming that the parties ever '*intended* to sacrifice or discharge any part of their lawful claims, 'the Lord Ordinary, while there is confessedly no final settlement, 'and a large sum at all events due by the defenders, does not think 'it too late to make that settlement, conformable to the just rights 'of the parties, and to do substantial justice between them.

'If the claims and rankings on Logan's estate had taken place 'in a judicial sequestration, there might have been room for the 'plea of res judicata, even though the points now agitated had not 'been discussed, since they might fairly be held to have been com-

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'petent and omitted; but all that was done in this case was under 'a private and voluntary trust, where it is not alleged that there 'was either the form or the substance of a judicial determination. 'It is sufficiently explained, too, that the pursuers, so far from ever 'intending to limit the responsibility of the defenders in the way 'now contended for, were at that time impressed with the belief 'that the second guarantee, instead of being restricted to L.2000, 'was in reality unlimited; and they have accordingly sought, though 'unsuccessfully, to subject them to a much greater extent than is 'now in question, upon this and other grounds.

'It is scarcely necessary to say, that though the defenders ac- 'tually paid over L.3000 at one time to the pursuers, they yet only 'made up the pursuers' loss to the extent of L.1500 by that pay- 'ment, and were themselves out of pocket by no more than that 'sum in consequence of it, in as much as they instantly drew back 'the other L.1500 from Logan's estate, and prevented the pursuers 'from making that recovery for themselves. In short, they justly 'owed the pursuers L.4500 on Logan's bankruptcy; and having 'truly paid no more than L.1500, they are now bound to pay up 'the remaining L.3000, and are not entitled to a discharge on any 'other terms.

'If this be the just view of the case, it is plain that the defenders 'can never be allowed to relieve themselves of half the balance for 'which they may be found liable, on the ground that, paying as 'cautioners, they would have been entitled to an assignation of the 'claim against the principal debtor, and enabled, under such assig- 'nation, to draw a dividend of 10s. from his estate. This is true 'only in the case of cautioners for *the whole debt*, or when the sum 'paid by the cautioner, together with that recoverable from the 'principal debtor, would be *more than full payment*. But neither 'of these is the case here; and this is merely a repetition of the 'fallacy on which the whole case of the defenders is bottomed.'

The defenders *reclaimed*, and craved that it might be found, 'that 'the sum for which they were originally liable, under the letters of 'guarantee, did not exceed the sum of L.3911 : 6 : 9; and that from 'the said sum, or whatever other sum may be found to have been 'due by the defenders under the guarantee, there falls to be de- 'ducted the sum of L.3000, paid by the defenders to account of 'the guarantee debt, and also whatever sum was received by the 'pursuers, as a dividend from the bankrupt estate of Walter Logan, 'effeiring to the balance of the guarantee debt.'

Reclaimers' Pleas.

The reclaimers contended, 1. That the pursuers were not entitled to go back upon the transaction and ranking twenty years

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ago. 2. That the mode of ranking now sanctioned is incorrect; Macnee *v.* Balmanno, 24th Feb. 1826, *Sh. Appeal Cases.*

Respondents' Pleas.

The respondents maintained that they were not foreclosed by the former inaccurate ranking under a voluntary trust; and that the mode of ranking adopted by the Lord Ordinary was sanctioned by the following authorities, particularly the case of Mein *v.* Sanders, 6th March 1824, *Fac. Coll.*, where, just as here, there was a limited guarantee; and it was found, that 'payment by a surety of the full 'amount of the guarantee after the debtor's sequestration, but 'immediately on the debt becoming exigible, will not prevent the 'creditor from ranking for the whole debt, or entitle the surety to 'claim relief;' Bank of Scotland *v.* Robertson, 3d July 1823, *Fac. Coll.*; Farquharson *v.* Thomson, 15th May 1832, 10. *Sh.* 526; Maxton *v.* Macintosh's Creditors, 17th Jan. 1777, *Fac. Coll.*; 1. *Bell*, 366; Balfour *v.* Borthwick, 19th Jan. 1819, *Fac. Coll.*, affirmed 27th March 1822, 1. *Sh. App.* 131.

Opinion of Court.

Lord Justice-Clerk.—I have no doubt of the correctness of the principle of the Lord Ordinary's interlocutor. As to the delay that has occurred, the pursuers are, in the circumstances, not bound by what formerly took place as to the ranking, but are still entitled to have matters placed on a just and legal footing.

Lord Medwyn.—From the consideration I have now been enabled to give to this case, as well as formerly when it was before me as Ordinary, it appears to me that the pursuers are not foreclosed by what had previously taken place in the ranking on Logan's estate; and that it was mere matter of arrangement at the time, and not conclusive against the parties in coming to a proper adjustment of their claims at the final winding up.

As to the mode of ranking, there can be no doubt that the creditor was entitled to rank for the full sum. It has been said there were two separate debts; but that clearly was not the true state of matters. It was the ordinary case of a current account, with an obligation by a party to guarantee the debt to a limited extent. If there had been two separate accounts, one consisting of a guaranteed, and the other of an unguaranteed debt, there might have been something in the plea of the defenders. In that case the cautioner might have been entitled to draw the dividend, corresponding to the debt he had previously paid up. The case of an obligant for a cash-credit is in this respect different, that the understanding of parties is, that the account is not to be overdrawn beyond the credit; and on the obligant paying up the amount, he is entitled to rank and draw the dividend from the principal's estate;

and if the account has been overdrawn, the banker must rank for the surplus as an ordinary creditor, and cannot draw from the co-obligant any part of the dividend on the debt which he has paid up in full, to make up the loss upon the overdrafts.

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But this is not the case of a guarantee under a cash-credit bond, nor any thing like it. It is just the ordinary case of a party indebted in an account where there is a guarantee to a limited extent; and the case of Mein and Sanders is quite in point. Any person granting a guarantee to a certain limited extent, knows that the only way of obtaining any benefit in the ranking of the debtor's estate, is to stipulate that the account shall not be overdrawn beyond that amount. I never heard of a cautioner claiming to rank, so as to exclude the principal from deriving the full benefit of the ranking for the amount of the debt due to him, till he obtains his full payment.

Opinion of Court.

The other *Judges* concurred.

The *Court* adhered.

Judgment.

Lord Ordinary, *Jeffrey.* Act. *Keay* and *Penney.* Alt. *Rutherfurd* and *Speirs.* *John Court*, S. S. C. and *Ker & Dickson*, W. S. Agents. *F.* Clerk.

R.

SECOND DIVISION.

No. CXXXIV. 18*th June* 1835.

ELIZABETH BYRES
against
JAMES SHANKLAND.

PROOF. — SEMIPLENA PROBATIO. — *Circumstances where slight grounds of suspicion, coupled with interference by the defender, in procuring a letter from an intended witness for the pursuer before the kirk-session, were held to amount to a semiplena probatio.*

THE pursuer was, upon the 7th February 1833, delivered of a natural child. She raised an action before the Sheriff of Ayr against the defender, as the alleged father.

The pursuer was a servant at Aldinna with the defender's father, and the defender also lived in family with his father, and worked as a farm-servant. Aldinna is within a few miles of the village of Barr, where there is a parish-church. It farther appeared from the proof, that George M'Crone was a servant at Aldinna while the

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pursuer was there, and she remained after he left that. She came at Candlemas 1832, and he went away at Whitsunday 1832. About four o'clock one morning, while M'Crone was in this service, the defender called on him, and he went into the kitchen, and found the defender eating a piece at the side of the dresser, and the pursuer was standing at the side of her bed with her clothes on; and when M'Crone went into the kitchen the pursuer ran out of it; and at this time it was before Whitsunday, and 'gloaming-wise.' The family was not up, and no person was in the kitchen but themselves. The defender and M'Crone slept in the same bed, in an apartment above the kitchen; and when the defender rose out of bed M'Crone was asleep. He never missed the defender out of bed on other occasions, except when he was going to the smiddy, where he was going that morning. He did not recollect to have seen the defender rise so early as four o'clock either when going to the smiddy or any where else. M'Crone, after being called out of bed by the defender, received some instructions from the defender about the farm, and then returned to bed, leaving the defender in the kitchen; and M'Crone fell asleep, and did not know when the pursuer returned to the kitchen. When the defender went away he gave M'Crone a cry while he was half sleeping; but M'Crone did not know how long this was after he had gone to bed. No person slept with the pursuer in the kitchen at the above time, and M'Crone was the only man-servant about the house. The usual time for the pursuer to rise to her work was about six o'clock. M'Crone never saw the parties together by themselves in the kitchen in the morning except on the above occasion, and never saw the parties by themselves in the outhouses. After M'Crone left Aldinna, and after the parties were before the session, M'Crone was at Cumnock fair, where the defender mentioned to him that he was to appear, the Sabbath following, before the session at Barr, and wished M'Crone to give him a letter that he knew nothing of his being the father of the child; and M'Crone was taken to Archibald M'Cowan, messenger in Cumnock, and the defender told M'Cowan what to write in the letter, which M'Crone signed. The letter was addressed to the minister of Barr, and was delivered to the defender. M'Cowan charged 2s. 6d. for the letter, which the defender was to pay. On the interrogatory of the defender, M'Crone said, the defender mentioned to him that the kirk-officer at Barr told him he should get such a letter, and which would save M'Crone the trouble of going to Barr. While M'Crone was serving at Aldinna he never saw any familiarities between the parties. The pursuer was the only female in the house.

M'Cowan, the messenger, said, the defender called on him in October 1832, and stated that a woman, who had been servant about

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the house, accused the defender of being father of a child with which she was pregnant; and that his object in calling was to get M'Cowan to write a letter for a man of the name of M'Crone to the kirk-session of Barr, as the defender had been summoned, or was to be. M'Cowan wrote the letter at the defender's desire, as he had mentioned that the minister of Barr had said, that a letter from M'Crone would save him the trouble of attending the kirk-session. M'Cowan wrote the letter from the instructions of the defender, and before he had seen M'Crone; but when M'Crone came into the office, M'Cowan read over the letter, and he approved of it, and signed it. After giving M'Cowan instructions to write the letter, the defender went to seek for M'Crone, to bring him to sign it. The defender took away the letter, for which M'Cowan charged in his day-book; and which is not yet paid, and which was no claim against M'Crone.

M'Kinnon, kirk-officer at Barr, remembered, when the pursuer was before the session, there was some conversation as to one M'Crone being a witness; and as he lived at a distance, M'Kinnon said that a letter from him would probably satisfy the session; and the defender was very anxious to get the letter; and brought to the session, before he was desired, the following letter from M'Crone:

'SIR, In consequence of Elizabeth Byres having referred to me, 'when in the kirk-session of Barr, that I was a witness in her 'favour in the claim against James Shankland, I hereby declare that 'I never saw any improper familiarity between the parties, or in the 'private company of each other, nor did I ever understand them to 'be so; and therefore the woman need not refer to me to bear testi-'mony in her favour. I may be allowed to mention, from my obser-'vation of the woman's conduct while I was servant at Aldinna, that 'James Shankland was at all times anxious to avoid her company.'

(Signed) 'GEO. his + mark M'CRONE.'

(Signed) '*Arch^d M'Cowan*, witness.

'REV^D MR WALLACE, Barr.'

Janet Wilson lived on the road side, between Barr and Balloch, and near the village of Barr;—knew the pursuer had a child, after which she saw her attending the kirk-session in Barr. Some time before the child was born, and while the pursuer was in Aldinna, she saw the pursuer coming with the defender in a cart; and before they came as far as the deponent's house, they stopped the cart, and the pursuer walked on the road to Barr before the defender.

The Sheriff-substitute found the proof sufficient to entitle the pursuer to depone in supplement; and the Sheriff adhered, adding

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this note: 'In judging of this case as a case of semiplena probatio, '(the facts of intercourse and familiarity being no doubt slight,) 'the Sheriff cannot help laying a good deal of weight on the re- 'mote and solitary situation of the place, and there being no alle- 'gation or probability of the pursuer having had connection with 'any other person.' The pursuer thereafter deponed, in supple- ment, that 'the defender is really and truly the father of the child.'

Lord Ordinary's Interlocutor.

The defender then *advocated*, and the Lord Ordinary pronounced this interlocutor: 'The Lord Ordinary having resumed considera- 'tion of the debate, with the closed record, proof adduced, and whole 'process, advocates the cause, alters the interlocutors of the Sheriff 'complained of; finds the respondent (original pursuer) has not 'proved such facts and circumstances as can be held to amount to 'a semiplena probatio, or to entitle her to her oath in supplement; 'and therefore assoilzies the advocator from the conclusions of the 'action, and decerns.'

Note.—'The Lord Ordinary is not aware of any case in which 'the woman's oath in supplement has ever been admitted on ground 'so slender as here. The Sheriff, accordingly, has been obliged 'to go out of the record and the evidence for reasons for his judg- 'ment; and even if this were allowable, it seems impossible to give 'much weight to those he has assigned. His local knowledge may 'entitle him to represent the place as remote and solitary; but 'these are very vague words. It is proved to be but a few miles 'from a populous village, to which its inmates resorted, and in that 'village is a parish-church, where they must have met many neigh- 'bours; and as to there being 'no probability of the pursuer hav- "ing had intercourse with any other person,' it does seem rather 'strange that he should have overlooked the witness M'Crone, 'who had exactly the same opportunities for such intercourse as the 'defender; and indeed still better, as he seems to have staid in the 'house after the defender had gone, before day-light, to the distant 'smithy, on the very morning when it is alleged the child was be- 'gotten.

'It is, no doubt, disagreeable to alter a judgment of this kind, 'after the oath has been actually taken; but this was not regarded 'in the case of Durham *v.* Guthrie, 19th May 1827, (5. *Shaw*, 685); 'and if the oath was improperly taken, its import cannot be looked 'at.'

Pursuer and Defender's Pleas.

The pursuer *reclaimed;* and *D. Mure*, for the reclaimer, founded on the cases of Mackenzie, 22d Dec. 1826; Hunter, 15th Jan. 1811; and Glendinning, Jan. 1835, 2d Div.

Cowan, in answer, referred to Lord President Blair's dictum in

Craig v. Crichton, 14th June 1809, that there must be a reasonable belief.

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Opinion of Court.

Lord Justice-Clerk.—I cannot concur in this interlocutor, and very much on the same ground on which I proceeded in the late case of Glendinning. There seems sufficient evidence that there has been a dealing with the proof on the part of the accused.

As to the evidence itself, no doubt there is slight proof of any personal familiarity betwixt the parties. The time of the delivery corresponds with the begetting of the child, at the period when the parties were proved to have been seen together. On the morning in question, it is not ascertained when the defender rose, M'Crone not being then awake; but he never saw him rise at so early an hour before, and the usual time for the girl to rise was six o'clock. Then, upon M'Crone coming into the kitchen, the pursuer ran away, which there seemed to be no occasion for her doing. M'Crone goes to bed, and knows nothing of what happened after.

A Sheriff is certainly entitled to found upon his knowledge of local circumstances, more especially when, as in this case, it is not denied that Aldinna is a remote and solitary place.

The evidence of M'Crone is important when taken along with his letter to the minister of Barr; for if he is to be believed on oath, his evidence contradicts what he is made to state in the letter. But that document was written by the defender's instructions, and prepared by the messenger behind the back of M'Crone. The letter had been written so as to tie down M'Crone in the evidence he would give, for he is made to say that he never saw the parties 'in 'the private company of each other;' but when he comes to be examined, he proved that the parties had been seen together—solus cum sola. There was clearly tampering, then, with the evidence; and enough appears on the face of this proof to satisfy my mind that the oath was properly allowed.

Lord Meadowbank.—While I concur in what has been just observed, I may farther notice, that when the defender referred to M'Crone as one who could be a witness, there could be no reason at the time for the defender wishing to save him the trouble of coming forward. On the contrary, if the statement in the letter be true, he ought rather to have desired his testimony to the fact of there having been no familiarity. In this fabricated letter it is stated that M'Crone never saw them alone. The defender must have been aware that M'Crone knew the contrary, and that the fact would be brought out. Instead of allowing the woman to bring her witness, the defender goes and impetrates this letter, and brings it before it is asked. This impetration—the subsequent evidence—and

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the fact, known to the defender, that M'Crone must say, upon oath, that he had seen them alone, induce me to think that here there were grounds for legal suspicion.

Opinion of Court.

As to the cases, the decision in that of Craig, by Lord President Blair, was in 1809, and this Division must have been aware of that case in 1811, when deciding Hunter's case, and held the law as rightly laid down. Yet in Hunter's case the facts were not more flagrant than the present. Here there was tampering with, or an attempt to keep back a witness. There, there was the single circumstance of the pursuer being called up for a candle, and another day that she was heard to say, 'Haud away, Hugh.'

Lord Medwyn concurred as to recalling the interlocutor. On questions of this kind different opinions would be formed. Semiplena probatio was defined as something less than proof, and more than suspicion. Men's minds differ as to full proof, and much more as to half proof.

Lord Glenlee was understood to agree with the Lord Ordinary, but said he need not express any opinion, as three Judges concurred.

Judgment.

The *Court* recalled the Lord Ordinary's interlocutor, and remitted the cause simpliciter.

Lord Ordinary, *Jeffrey*. Act. *D. Mure*. *John Robertson*, W. S. Agent.
Alt. *Cowan*. *D. J. M'Brair*, S. S. C. Agent. *R.* Clerk.

R.

FIRST DIVISION.

No. CXXXV. 19*th June* 1835.

MISS JANE MACDOUGLE
against
JOHN STRACHAN AND OTHERS, CLAIMANTS IN MULTIPLEPOINDING AT THE INSTANCE OF THE SCOTTISH WIDOWS' FUND AND LIFE ASSURANCE SOCIETY.

ASSURANCE, POLICY OF.—ASSIGNATION.—ARRESTMENT.—*Found competent to attach the interest of a debtor under a subsisting policy of insurance upon his own life, by arrestment in the hands of the insurers, and such arrestment held preferable in competition with another creditor to whom the policy of insurance had previously been delivered in security of a debt, but without a formal assignation, and*

without intimation to the insurance company till after the arrestment.

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THE late Mr Strachan, writer to the signet, borrowed from the claimant, Miss Macdougle, the sum of L.1000, for which he gave her his promissory-note, and at the same time handed over to her a policy of insurance on his life for L.1000, which he had effected with the Scottish Widows' Fund and Life Assurance Society in 1825, accompanied by the following letter: 'Miss Jane Macdougle, 'Berwick-upon-Tweed.—*Edinburgh, 20th Feb.* 1830. MADAM, 'I now send you herewith my promissory-note, of this date, for 'L.1000 to your order, payable at Whitsunday the 15th May next, 'and to bear interest from that date at 5 per cent., in return for which 'you will be so good as return my former note for the same amount. 'I also herewith send you a policy of insurance on my life for 'L.1000 sterling by the Scottish Insurance Office, the premium of 'which has been paid in advance up to the 13th of May next, and 'which policy is to remain deposited with you, as a further security, 'until my said promissory-note shall be paid. And I hereby engage 'not only to continue to pay the premium regularly as it becomes 'due, and to report to you the receipts for the same, but also, when-'ever required, to grant in your favour a regular conveyance of said 'policy; but declaring, in the meantime, that in the event of my 'death, you shall be entitled to receive the whole sums thereby due, 'so far as sufficient to pay my said promissory-note, and interest 'due thereon at the time. I am,' (Signed) 'ROBT STRACHAN.'

No formal assignation of the policy was executed, nor was intimation then made to the company of the transaction. Mr Strachan died 23d April 1832, in insolvent circumstances; but the policy had been regularly kept up by him, and the premium paid for the current year. Shortly before his death, viz. 13th March 1832, he granted a promissory-note for L.1621, payable one day after date, to his son John Strachan, for behoof of himself and his brothers and sisters, in security, as alleged by them, of a sum of money to that amount which had been left to them by their grandmother in 1825, and which had been allowed to remain in his hands, and in further security of which, as was also alleged by them, the policy of insurance had been effected. The promissory-note being protested, (5th April,) and letters of horning raised, arrestment was, of the same date, used by these parties in the hands of the assurance company. After the death of Mr Strachan, Miss Macdougle claimed the sum contained in the policy; and in order to settle the rights of the parties, the assurance company raised the present multiplepoinding.

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In the competition which thus arose, Miss Macdougle *contended*, that, supposing the other claimants to be onerous creditors * of their late father, the arrestment used by them, during his life, was ineffectual to attach any thing which might become due to his executors under the policy of insurance after his death. Unless there be a subsisting debt due to the common debtor, there is nothing which can be the subject of arrestment. It has been questioned whether annualrent is liable to arrestment; but although the diligence has in that case been found competent, it has properly been restricted to the current term; *Dirl., voce Arrestment*, p. 7. Neither can future debts, or alimentary funds, be affected by arrestment; *Stair*, iii. 1. 29; *Bankton*, iii. 1. 35; *Ersk.* iii. 6. 8. There are various decisions to support the same doctrine; Horn *v.* Pow, 1st Feb. 1634, *Br. Supp.* i. 3, *Durie;* Menzies *v.* Graham, 25th Jan. 1711, *M.* 770; Clunie's Creditors *v.* Sinclair and Husband, 19th Jan. 1739, *M.* 713.

Pursuer's Pleas.

In the present case, the arrestment used 5th April 1832 was of all sums due by the assurance company to Robert Strachan, either under a policy of insurance, or otherwise. No such sum was due, or could be due to the said Robert Strachan; and it depended upon a variety of circumstances, e. g. upon the regular payment of the premium, and upon the other conditions of the policy being complied with, whether the insurance company should ever have any sum to pay to any body. There was therefore nothing certain in the existence of any debt, even de futuro; and even if any debt should thereafter become due under the policy, it would not be to Mr Strachan, but to his executor or assignee, after his death. Until there be a fund or debt in existence, the use of the diligence is wholly incompetent.

Defenders' Pleas.

It was *answered*—That during the currency of a policy of insurance, and after payment of the premium has been made, the contingent interest, which the person insured has in the policy, may be validly attached by arrestment. While the contract of insurance is current, and has been validly completed on both sides, any benefit which may arise under the policy may be validly arrested. In practice, nothing has been more common than to arrest the interest payable under marine policies of insurance during their subsistence, and before the emerging of the contingency insured against. In like manner there seems no more incompetency in arresting the

* It was alleged by Miss Macdougle that no debt was truly due to the other claimants by their deceased father, and that her rights could not be defeated by any arrangement on his part with them; but the present argument proceeded on the assumption that they were his onerous creditors.

sum payable, under a policy of insurance, in the event of a house being destroyed by fire, than there would be in using inhibition or adjudication, whereby the house itself might be attached, if it stood; and it can make no difference in principle, that the contingency insured against is that of human life, and not that of seahazard or fire.

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The right of assigning by the debtor, and that of arresting by the creditor, is understood in general to be correlative. No evidence can be pointed out of any vested personal claim or right which may be assigned by the debtor, and which cannot be arrested by the creditor. It would be a strange anomaly if a debtor could, by means of life assurance, place all his personal funds beyond the reach of his creditors, while he himself retained the power of disposing of them as he pleased. Although the authority of Erskine is referred to, as shewing that future debts are not arrestable, it is laid down by the same author, that arrestment is competent where the debt is conditional; and there cannot be a better example of a conditional or contingent debt, than the sum falling due under a policy of insurance. The doctrine, that conditional debts may be arrested, has been confirmed by various decisions of the Court; as, for instance, a claim of damages, than which no debt can be more contingent; Wardrop *v.* Fairholm, Feb. 1744, *Clk. Home, M.* 1025; see also Gordon *v.* Innes, 13th Feb. 1740, *Elch. Arrest.* 14, *M.* 715; Grierson *v.* Ramsay, 25th Feb. 1780, *M.* 759; Kyle's Trustees *v.* White, 14th Nov. 1827. The arrestment of rents also, during the currency of a term, and before they are payable, is another example of the arrestment of a contingent debt; as to which see Corse *v.* Masterton, 31st Jan. 1705, *Fount. M.* 767. Various other instances of the competency of arresting contingent claims might be quoted, e. g. Sinclair *v.* Sommerville, 21st Jan. 1730, *Fol. Dict.* ii. 80, *M.* 10,424; Sinclair *v.* Shaw, 17th Jan. 1739, *Monboddo.*

Lord Ordinary's Opinion.

The Lord Ordinary reported the cause to the Inner-House on cases, with the following note: 'The Lord Ordinary is inclined to 'think that the claim of John Strachan is well founded, for the reasons 'assigned in his case. The sum contained in the policy of insurance, 'though not payable to Robert Strachan himself, but to his heirs 'and assignees after his death, was constituted by an obligation 'in his favour, and it was placed at his absolute disposal. Though 'a contingent debt, it was not the less liable on that account to be 'attached by arrestment. In consequence of the payment of the 'premium for one year, dies accesserat; that is, the sum insured had 'become exigible, if the life dropped within the year.

'At the same time, as the point raised does not appear to have

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'received the judgment of the Court, and as life assurance has of 'late become a very common, as well as an important contract, the 'Lord Ordinary has thought it right to report the case.'

On advising these cases, a difficulty was suggested by the Court, as to the effect of the transference and delivery of the policy by the late Mr Strachan into the hands of the claimant, Miss Macdougle, and how far her right was thereby rendered complete, previous to the arrestment used by the other claimants; and on this point supplementary cases were ordered, in which

Pursuer's Argument.

It was *pleaded* for Miss Macdougle, that as the insurance company, upon the sum insured falling due, could not be compelled to pay without the production of the policy, or the want of it being duly accounted for, there was nothing to prevent the insured from raising money, or giving security to his creditor, by the actual delivery of the instrument. The obligation by the company was clearly an assignable one; *Bell*, i. 630, 631; but the formal intimation of the assignation could be attended with no beneficial consequences. Until the death of the party insured, there was no debt due, and consequently no risk of payment being made to any other party different from the assignee or depositary; and when the death did occur, the company would not pay, either to the executors of the deceased, or to any subsequent assignee with an intimated assignation, who was not in a condition to deliver up the policy, by which the debt was constituted. No second assignee, therefore, with his assignation first intimated, and no arresting creditor, could reasonably claim a preference over the first assignee retaining possession of the policy.

The possession of the instrument, which forms the title to the sum insured, especially when accompanied by written evidence, that this instrument was transferred and delivered in security of a true debt, is quite sufficient to put the holder in the right of that sum, when it becomes due. There are many cases in which a formal intimated assignation is not necessary. Thus, the transference of a cargo of goods at sea, by delivery of the bill of lading, is of itself complete; and this bears a strong analogy to the present case; *Bell*, i. 198; see also *Ersk.* iii. 5. 3, and 4; *Stair*, iii. 1. 15. Although it be true, generally speaking, that intimation is now considered requisite to the validity of an assignation, this rule has no higher sanction than custom; and when it is proposed to be extended to a new species of contract, the reason of the rule must necessarily be attended to; *Stair*, iii. 1. 8. and 12; *Ersk.* iii. 5. 3. and 4. The reason of the rule does not apply to the case of a life insurance,

there being no risk of the debtor making payment, ad interim, of the future and contingent debt.

By the law of England, from which this, and other contracts falling under the law merchant, have been borrowed, the transference and delivery of a life policy, in the manner which took place here, would have been quite sufficient to complete the right of the claimant, without the necessity of any notice to the pursuers; and unless there be some peculiarity in the law of Scotland as to intimation, the English rule should prevail here.

Defenders' Argument.

It was *answered*—That it has been long fixed by the law of Scotland, that the mere possession or custody of documents of debt, or of the title-deeds of an estate, confers no right to the debt, or to the estate, to which these documents or title-deeds relate. Even a law agent's hypothec over title-deeds or other documents is strictly applicable to his business account, and will not cover advances of cash made for his client; Skinner *v.* Paterson, 31st May 1823; Grant's Representatives *v.* Robertson, 28th Feb. 1801, *App.* 1. *Hyp.* 1. The doctrine contended for amounts to this, that the mere possession of the certificate or policy of insurance is equivalent to an assignation of the debt of which it is the voucher, a doctrine which has been productive of much inconvenience in England, and been much regretted by English lawyers, and particularly by Lord Eldon; Whitebread, 1. *Rose*, 299; Montford, 14. *Vesey*, 606; Coombe, 17. *Vesey*, 370. If the mere possession or custody of title-deeds or documents of debt could give any claim to the subjects or debts to which these deeds or documents related, there would be no use in intimating assignations, or taking any other steps for completing the right of an assignee; and accordingly the principles of the law on this point, as laid down by Mr Bell, ii. 23, clearly shew, that the mere possession of the policy of insurance cannot, in the present competition, give any right to Miss Macdougle to make any claim upon the fund in medio.

Even if there had been a formal conveyance of the policy in favour of Miss Macdougle, this, if not intimated before the arrestment was used by the claimants, would have been of no avail in competition with such arrestment. The whole doctrine of the law of Scotland, in regard to assignations and arrestment, must be overturned before the pleas on the other side can for a moment be listened to.

When the case came again to be advised with the additional cases, their Lordships expressed themselves as follows:

Lord Gillies.—The Lord Ordinary has stated, that although the

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sum was not payable to Robert Strachan himself, but to his heirs and assignees after his death, yet the sum was constituted by an obligation in his favour, and it was placed at his absolute disposal. It was a contingent debt, but not the less liable on that account to be attached by arrestment.

Lord Balgray.—I perfectly agree with what is stated by the Lord Ordinary, provided the ordinary rules of the law of Scotland are to regulate this case. The arrestment, I think, must be preferred as in competition with the mere possession or delivery of the policy; or even taking it as an assignation of the policy, still that assignation was not intimated; and, by the law of Scotland, an assignation can have no effect as a mode of transference until it has been intimated. There was no intimation in this case; and therefore there can be no doubt that the arrestment was preferable, provided this case was to be decided by the ordinary rules of the law of Scotland.

But I confess I am somewhat moved by the peculiar nature of the contract of insurance. It is comparatively only of late years that life insurance has been introduced, or at least become so common among us; and I have some doubt whether we can apply to it the ordinary rules of our own law, or whether it will not fall to be regulated by the general mercantile law; and, with that view, I confess I would wish farther light on the subject, particularly how cases of that description are disposed of in England, where such contracts are much more common, and what is the practice of the different insurance companies.

Suppose it should be the rule in all insurance companies that the sum insured shall not be paid except upon production of the policy, and that the insurance company has a right to demand production and delivery of the policy before they pay the sum insured. Suppose this to be the universal practice; then, in that case, could an insurance company depart from that practice, for the purpose of favouring a particular creditor, and say to the arresting creditor, we will not, in your case, insist on our right to demand the policy? This would not do. They must act in a proper, fair and correct manner, and according to established rules. I should therefore wish to consider more deliberately the import and effect in the mercantile world of the delivery and possession of the policy.

Lord President.—Mr Strachan deposited this policy with Miss Macdougle. She was no doubt the depositary, but then she was the depositary in rem suam. It was for her own benefit and for her own security that it was placed in her hands, and expressly with the intention of her making use of it, if found necessary, in security of the debt due to her by Mr Strachan. Now, is she not entitled to retain what was thus deposited in her hands, and for her

security, as against these assignees of Strachan? She resides in England; and if she chooses to retain the policy, we cannot compel her to give it up. She may keep possession of it if she chooses; we cannot force it out of her hands if she insists upon retaining it. What may be the effect, as regards the insurance company, of her so retaining it, I cannot say.

Opinion of Court.

Lord Gillies.—I consider that the letter and the depositation of the policy amounts to an assignation; but then it has not been intimated. Can you make any thing more of it than an assignation; and if so, without intimation, the arrestment is preferable. Here is not even an indorsation of the policy. There is nothing more than the mere possession of the document, which is given as it stood in Strachan's person. I do not know what would have been the effect even of indorsation, if not intimated to the insurance company. I am not prepared to say that a policy of insurance is in the same situation as a bill of exchange, payable to the bearer, which gives the holder, by the mere possession of the document, a right to recover the amount. I am not prepared to say that a policy of insurance stands in the same situation, or is entitled to the same privileges as a bill of exchange. A bill of exchange may be indorsed; and the mere indorsation, without intimation, gives the party holding it a right to recover. But to give effect to Miss Macdougle's plea, you would carry the principle so far as to say, that not only the indorsation of a policy gives a right to the holder to recover, but that the same effect would attach to a policy which is not indorsed. I certainly am not prepared to carry the principle so far. I conceive that a policy of insurance requires a regular assignation in the same way as any other document of debt; and to give effect to that assignation the ordinary rules of law must be applied. It must be duly intimated, and it is only from the time of intimation that the transfer becomes complete. I do not know of any principle or reason why a different rule should be applied to a policy of insurance from what is applied to any other document of debt. It is said the lady may retain the policy, and, being abroad, we cannot force her to give it up. If the insurance office were to say, we will not pay without the policy, I conceive that we would receive aid from the courts of law of the country to whose jurisdiction the holder is subjected.

Lord Mackenzie.—My opinion is the same with that last delivered. I see no objection to the competency of arrestment in the circumstances of the case. Two views are taken; *first*, That what was done here was equivalent to an assignation. It may be so, but then there has been no intimation. The *second* view respects the possession of the policy; but the mere delivery of an instrument

19 June 1835.

Macdougle v. Strachan and Others.

Opinion of Court.

confers no right. The debt is not transferred by merely handing over the document of debt: something more is required to be done to make the transference complete. By the law of Scotland this is clear. It seems to be argued, however, that in a matter of this kind the law of Scotland is to be excluded by the mercantile law of England or Europe. Before considering that question, I should ask, what is said to be the law mercantile upon the subject? Is it said that a life policy can be passed with indorsation or without it? If the law be that it may pass by indorsation, there is none here. Then I do not see it averred that such a document would pass any where by mere delivery, like a bank-note payable to the bearer. I do not think it is alleged that this is warranted by the law of England or other countries. Even if it were, however, I scarcely think we could admit such a practice, which could be no proper point of mercantile law. A policy of insurance is a document of a very different description from those that pass by mere delivery from hand to hand; and I do not see any reason why, in Scotland, it should be allowed to be transferred in any other way than according to those rules of law which regulate the transference of other rights.

The Lord President then put it to the Court whether they should prefer the arrester; to which their Lordships assented, and they pronounced this interlocutor: 'The Lords having advised the re-'vised cases for both parties, and whole cause, and heard counsel, 'find, That the arrestment at the instance of the claimant, John 'Strachan, was a competent diligence to affect the sum due under 'the policy of insurance in question, and that the same is prefer-'able to the right contended to be conferred on the claimant, Miss 'Macdougle, by the letter of 20th February 1830, accompanied by 'delivery and possession of the policy of insurance; and remit to 'the Lord Ordinary to proceed farther in the cause, and do therein 'as shall be just.'

Lord Corehouse, Ordinary. For Miss Macdougle, *P. Robertson*. Alt. *Mure*. *James S. Robertson* and *Daniel Fisher*, W. S. Agents. *B.* Clerk.

C.

SECOND DIVISION.

No. CXXXVI. *20th June* 1835

GEORGE NAPIER
against
Miss MARGARET BALFOUR.

REFERENCE TO OATH.—ANNUALRENT.—*Circumstances in which,* (1.) *An oath on reference was found to prove resting owing;* (2.) *Interest disallowed on professional charges for agency and trouble in a writer's account;* (3.) *Interest on professional outlays allowed.*

MR NAPIER brought an action against Miss Balfour, as representing her mother, Mrs Dr Balfour, for L.52, 6s., being the balance or third part of an account, with interest at 4 per cent., incurred in 1806 in completing the titles of Mrs Balfour and other heirs-portioners of Mr Donald M'Gilchrist of Northbar.

Prescription was pleaded in defence, and there was a reference to the oath of the defender that the debt was resting owing. The Lord Ordinary held the constitution of the debt and resting owing to be proved, for the reasons stated in the following interlocutor and note:

Lord Ordinary's Interlocutor.

'The Lord Ordinary having considered the closed record and 'deposition of the defender on the reference to her oath, and heard 'parties' procurators thereon, finds the constitution of the debt 'sued for sufficiently instructed by the said deposition, inasmuch 'as the defender has therein deponed, that she believes the business 'comprehended in the account to have been performed by the pur-'suer, and that she has obtained the benefit thereof in the titles 'made up by her mother, whom she represents as co-heiress, with 'the other heirs-portioners in the property referred to: finds it 'also proved by the said deposition, 'That the deponent has no "reason to think that any part of the said account was paid by the "deponent's parents,' and that it has not been paid by the depo-'nent herself: finds it further proved, That, according to the de-'fender's belief, the business was performed on the employment 'of Mr Thomas Gloag, the husband of one of the co-heiresses, 'and that Mr James Balfour, the husband of another, who at that 'time, or soon after, took charge of the property, concurred with 'Mr Gloag in employing the pursuer: finds, therefore, That when 'the defender, in answer to the general question, whether she be-

20 June 1835. Napier v. Balfour.

'lieves the debt to be resting owing, depones, 'That she does not, "*because* the pursuer was not employed *by the deponent's parents or* "*herself*;' such deposition, taken in connection with the matters 'previously sworn to, must be considered as merely the statement 'of an opinion in law, implying an admission of the facts in all 'other respects: finds, That such an opinion in law is erroneous, 'seeing that the defender's parents having taken benefit by the 'title made up in the person of her mother, it must be presumed 'that they did authorise, or at all events homologate, the employ-'ment of the pursuer by Mr Gloag: Therefore, in respect of the 'deposition, repels the plea of prescription: finds it proved that 'the debt is resting owing; decerns in terms of the libel: finds 'expenses due,' &c.

Note.—'The Lord Ordinary thinks that it was very wrong to let 'this claim lie over for so very long a period, without apparently any 'claim having been ever made against Dr Balfour, though he lived 'till 1820. It is not wonderful that, in such circumstances, a lady 'should be very unwilling to acknowledge a debt which she must sup-'pose would have been demanded of her father, if it had been held 'to be due by him; but, on the facts admitted in the deposition, 'the Lord Ordinary must hold *resting owing* to be proved. The 'single ground for the least doubt is, that it does not appear, from 'the deposition positively, that Mr Gloag might not have paid the 'debt; but as it does appear from it that Mr Balfour had only 'recently paid his share, the Lord Ordinary thinks that no real 'doubt is left on that point, and that it would be too great a refine-'ment to hold a bare possibility so evidently contrary to the truth 'appearing on the face of the deposition, to render the oath ne-'gative.

'The Lord Ordinary has had some hesitation as to the *interest* 'as charged against the defender, because no account was rendered 'either to her or to her parents. It is stated in the defences, that 'the pursuer, in his letters to Mr Duncan, the defender's brother-in-'law, stated that the account was rendered to Mr Gloag, by whom 'he was employed; and this is not denied either there or in the 'deposition. Although, therefore, the pursuer has obtained no ex-'press admission of this fact, the Lord Ordinary is inclined to think, 'that if the debt is proved to be resting owing, there may be suffi-'cient ground in the circumstances for presuming that the account 'for such special business was rendered when the business was finish-'ed. Without that assumption, the Lord Ordinary would have 'hesitated in subjecting this lady to the interest here charged for 'twenty-seven years. It is charged at four per cent.'

The defender *reclaimed.*

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Napier v. Balfour.

Lord Medwyn.—There must be proof both of the constitution and of the subsistence of the debt. Now, there is room for doubt if the constitution has been proved by this oath; and I rather think questions have been put which ought not to have been allowed. The only part of it on which the Lord Ordinary rests the proof of the constitution of the libel, is where he finds that it is 'also proved 'by the said deposition, 'that the deponent has no reason to think "that any part of the said account was paid by the deponent's pa- "rents:" And she gives this as her reason, because they never employed the pursuer; and then adds, 'that it has not been paid by 'herself.' Now, does this prove the constitution of the debt? Suppose that she had said she knew nothing about the account, would that have proved the debt? I apprehend not. Yet this is the effect of her deposition. My impression is that the lady truly knows nothing about it, and meant so to say by her deposition.

Opinion of Court.

On another point I am for altering, as I think interest is not due. The pursuer was not entitled to keep back this account till 1834. I do not know that it is fully established that interest on writers' accounts is due, especially under such circumstances. Here we have an illustration of the mischief that may be done. There is an account of L.76, with L.79 of interest charged on it. It is so far well for the pursuer that two portions of it have been paid with interest.

Lord Glenlee.—Upon the whole I agree as to the proof of resting owing. If the principal sum be due, interest follows. She has had the benefit of the interest by not paying the debt. She will not be more out of pocket than if she had paid it at the time. But as to interest on this particular account, I would make a distinction betwixt interest on professional charges and interest on outlay.

Lord Meadowbank. — I think, upon a fair interpretation of the oath, that the debt is due; but I am against allowing interest. This would be holding out a premium to parties to hold back accounts.

Lord Justice-Clerk.—Taking the whole of the oath, I think the debt is proved. This was a commune negotium, and possession followed.

I think that interest ought not to be allowed on professional charges; but outlays are different. These were necessary advances, and I am for giving interest on these.

The *Court* (2d June) *adhered* to the Lord Ordinary's interlocutor as to the subsistence of the debt, but recalled it in so far as interest is allowed on that part of the account which consists of professional charges for agency and trouble.

Judgment.

The question of interest on outlays on the account stood over.

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Napier v. Balfour.

Opinion of Court.

Upon resuming consideration of the note, the Court decerned, and allowed interest on professional outlays.

Lord Medwyn.—Upon considering the claim for interest, I find we agreed as to disallowing interest on professional charges; and now, in the circumstances of this case, I am inclined to defer to the opinion of your Lordships, and allow interest on professional outlays. If the defender had had no acquaintance with this account except from her own personal knowledge, the case might have been different; but when it is observed, that the two other parties settled their shares of the account, this shews that the pursuer was not to blame in entertaining the expectation that this part also would be settled without litigation. Cases of this kind, where there has been such mora in the demand, must depend on their own circumstances.

Lord Meadowbank.—I am also disposed to allow interest on professional outlays. Lord Glenlee refers us to a case, Henry v. Sutherland, Feb. 1801, in which interest was allowed on professional outlays, and charges also.

Lord Ordinary, *Moncreiff.* Act. *Dean of Fac. (Hope,) G. Napier.* *G. & W. Napier*, W. S. Agents. Alt. *Sol.-Gen. (Cuninghame,)* and *A. Davidson. Gibson-Craigs, Wardlaw & Dalziel*, W. S. Agents.

R.

SECOND DIVISION.

No. CXXXVII. 20*th June* 1835.

WILLIAM HOME LIZARS
against
FRANCIS BURKE.

SEQUESTRATION.—TRUSTEE. — COMPETITION.—*In the election of a trustee on a sequestrated estate, vote of alleged creditor rejected, in respect of the uncertainty of the amount of the claim, and the want of vouchers.*

LIZARS was chosen interim factor on the sequestrated estate of Stirling and Kenney, booksellers in Edinburgh. At the meeting for election of a trustee, Burke was also put in nomination. Lizars had the majority in number and value of the ascertained and admitted debts. Among the votes for Burke, was that of the trustee on the sequestrated estate of Alexander Robertson. The claim

and affidavit by Robertson's trustee rested upon a depending action. He deponed, that, as trustee, he raised a summons against the bankrupts in October 1834, which summons narrated, that the bankrupts were indebted 'to the pursuer, as trustee, in the sum of 'L.8880 : 17 : 7, being the balance due by the defenders to Alex-'ander Robertson, as at 14th February 1834, on an account-cur-'rent between the firm of Stirling and Kenney and Robertson, 'deducting therefrom any sums which the defenders should be able 'to instruct were due to them by the said Alexander Robertson.' It farther narrated, that Kenney had died in September 1834, and was represented by trustees; and concluded, that Stirling and Kenney as a company, and the said Andrew Stirling, and the trustees of Kenney, the individual partners, at least two of the individual partners of the firm of Stirling and Kenney, should be decerned to make payment of L.8880 : 17 : 7, under the deductions already mentioned. The affidavit proceeds: 'Further depones, That the 'firm of Stirling and Kenney, and the individual partners thereof, 'before mentioned, were jointly indebted and resting owing to the 'deponent, at the date of their sequestration, the said sum.'

20 June 1835. Lizars v. Burke.

The Reverend George H. Robertson, a brother of Alexander Robertson, was a partner of Stirling and Kenney. He had large counter claims against his brother, and was not called as a defender in the action at the instance of Alexander's trustee.

Lizars objected to this vote on the ground of uncertainty, want of vouchers, compensation, &c. The answer to the objection of the want of vouchers was, that legal evidence of the debt was not required at this stage, and that this was not one of the requisites to entitle a claimant to vote; 2. *Bell*, 336, 343; Finlay, 1st Feb. 1809, *F. C.*; Williamson, 4th Dec. 1818, *F. C.*; Blyth, 8th July 1825; Paul *v.* Gibson, House of Lords, 14th June 1834.

The *Court*, upon the report of the Lord Ordinary, found that it was unnecessary to go into the question of compensation, and rejected the vote on the ground of uncertainty and want of vouchers, and confirmed Lizars as trustee.

Judgment.

Lord Glenlee.—The claim may be good to enable the party to rank; but in the election of a trustee, a party is precluded from voting, unless his claim be accompanied with the grounds of debt. How can we judge where the majority lies, unless some definite sum be given as to the amount of the claim?

Opinion of Court.

Lord Medwyn.—There is enough to entitle us to reject this claim, without going into the question of compensation. The whole summons is embodied in the affidavit, where the amount of the demand is stated, but under deduction of the claims on the other side,

20 June 1835.

Lizars v. Burke.

Opinion of Court.

thereby admitting that such counter claims existed. Hence the amount of the debt on which the claim rests cannot be ascertained No minute investigation of claims takes place at this time. They are given under the sanction of a charge for perjury. But it would not do to tie down the claimant here to a debt different from what is stated in the summons.

But further, the claim has been given in without vouchers. In a claim where there are no vouchers the case is different. But if there be vouchers, and I observe there must be in the present instance, the non-production of these is a sufficient reason for rejecting the claim in the election of a trustee.

Lord Justice-Clerk.—It is unnecessary to go into the plea of compensation; but the claim must be rejected, 1*st*, on the score of vagueness and uncertainty; and, 2*dly*, the want of vouchers.

Lord Ordinary, *Cockburn*. Act. *Dean of Fac. (Hope,)* and *Russell*. Alt. *Kay*, and *Christison*. *Ja. Stuart*, S. S. C. *W. Renney*, W. S. Agents. *T.* Clerk.

R.

SECOND DIVISION.

No. CXXXVIII. 23*d June* 1835.

JAMES AMOS GRIEVE
against
WILLIAM M'CALL AND OTHERS, (AMOS'S EXECUTORS.)

TRUST.—EXECUTOR.—LEGACY.—DILIGENCE.—*Executors, entrusted with the distribution of funds, in payment, in the first place, of certain special bequests, and thereafter in payment of the residue equally among four persons, having drawn out of bank part of the funds intended to be afterwards applied in extinction of special legacies not then become payable; and having placed the same, without any security or obligatory document, in the hands of one of their co-executors, under a general instruction to him to look out for an eligible investment for the said sum; and no such investment having been made, whereby the funds in the hands of the co-executor were not accessible when demanded; and large payments having in the meantime been made by the executors to the residuary legatees, while payment had not been made of some of the special legacies;—found, in a question with one of the special legatees, that the executors were not entitled, in accounting with him, to take credit for the payments*

to the residuary legatees, and that he was entitled to recover the amount of the special legacy bequeathed to him.

23 June 1835.

Grieve v. M'Call and Others.

Amos, by deed of settlement, appointed the defenders his executors, with the usual powers, the majority accepting and surviving to be a quorum. The purposes of the trust were for payment of the testator's debts, and of various legacies, chiefly to relations. The executors were directed thereafter to distribute the residue equally among four persons, of whom M'Call, one of the executors, was one. Each of the executors, in common with M'Call, was left a legacy of L.50; and he was left, in addition to that bequest, and the residuary interest given to him, a farther legacy of L.500.

By codicil, dated 31st January 1829, Amos bequeathed a legacy of L.400 to the pursuer, to be paid on his attaining majority, (viz. 6th February 1832.) Amos died 17th January 1832, and the defenders, including Alexander Greig, W. S. were confirmed executors. Amos had placed his whole funds, with the exception of L.200, lent to one of the legatees, in the Bank of Scotland at Dumfries. He left no debts. The funds left were sufficient to provide for the whole primary legacies, and leave a surplus of more than L.3000, to be divided among the residuary legatees.

The confirmation was expede 20th February 1832. Upon the 23d March the whole executors held a meeting at Moffat. They there authorised part of the funds to be drawn from the bank, for the payment of funeral and other small expenses, and for making a partial payment to some of the legatees. The minutes further bear, that 'the meeting direct Mr Greig to look out for a proper security for the sum necessary to secure the annuity payable to James Donaldson, as well as the provision to Mrs Campbell's children, and to Mr Grieve's children.' Next day three of the executors, M'Call, M'Millan and Greig, went to Dumfries and uplifted the whole funds, nearly L.8000, having previously subscribed a discharge, and acknowledged payment to the bank, bearing that the deposit receipts had been delivered up.

It was stated by the defenders in the present action, that Mr Greig, being the active and intromitting executor, alone received the money from the bank, the other defenders merely subscribing the discharge at the request of Greig.

They immediately redeposited L.5000 upon a new receipt, in the names of the four executors. They disposed of the remainder, by paying about L.200 as the expenses of confirmation, and L.900 to various legatees. The sum of L.1500 was given to Mr Greig, W. S., not upon a personal loan, but for the special purpose of being lent out on good security, until the deferred legacies be-

23 June 1835. Grieve v. M'Call and Others.

came payable; and L.300 were given to Mr M'Millan, to be lodged in the branch bank at Moffat, in the names of all the executors; and the sum was deposited accordingly.

The other executors were led to suppose that the L.1500 given to Greig had been safely invested. Greig, in writing to the defenders in regard to the executry funds, on 18th May 1832, stated, that 'the sums drawn from the bank, you know, have all been disposed of, with the exception of about L.1500, for securing the annuity to Mr Donaldson, to Mrs Grieve's children and Mrs Campbell's children. For these I have now got a very desirable security, yielding an interest of 4 per cent., which is the ordinary rate of interest at the present time. I shall bring out the documents the first time I come out, which will be soon.'

A second meeting of the whole executors took place on 12th November 1832. The L.5000 deposited in the bank was uplifted, all the executors indorsing the deposit-receipt. The whole primary legacies, including L.50 to each of the executors, were then paid off, and L.2800 were divided among the residuary legatees. The documents relative to the L.1500 were not brought out by Greig; but he again led the other defenders to believe at this meeting that the sum was duly invested, and repeated this assurance at a subsequent meeting with them in the spring 1833.

A third meeting of the whole executors took place on 1st February 1833. The L.300 deposited by M'Millan and some other balances were uplifted, and L.480 were distributed among the residuary legatees, the receipts on this and the former occasion bearing, that the money was paid by the four executors specially named. The residuary legatees had thus received L.3280, of which M'Call had got L.820. No communication was made to the pursuer, a primary legatee, in regard to those payments to the residuary legatees.

In April 1833, the other executors took alarm as to the L.1500, and raised an action and inhibition against Greig, which led to his executing a trust for behoof of his creditors.

Defenders' Pleas.

The pursuer raised an action against the whole executors for payment of the special legacy of L.400 due to him, when it was *pleaded*, in defence, by three of these executors, (Greig not appearing,) that they had not intromitted with the funds, that they lent their names to enable Greig to uplift the money from the bank, and that although the receipts by creditors and legatees bear that the money had come from them, yet that truly it came from Greig's hands; and that not being liable singuli in solidum, they were not liable for funds intromitted with by Greig alone, more especially as they had used due diligence for recovering the same.

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The pursuer, independently of the general plea of the personal liability of the executors, added an additional special plea, to the effect that, 'in accounting with the pursuer, the defenders are not 'entitled to take credit for any sums paid by them to Mr Amos's 'residuary legatees, whose right to draw any thing under his settle- 'ment was necessarily postponed to that of his special legatees.'

Pursuer's Pleas.

Lord Ordinary's Interlocutor.

The Lord Ordinary pronounced this interlocutor: 'The Lord 'Ordinary having resumed consideration of the debate, with the 'closed record, additional plea in law lately made part thereof, and 'whole process, decerns against the defender, Alexander Greig, (for 'whom no appearance was made at the debate,) in terms of the con- 'clusions of the libel; and as to the other defenders, finds, That 'they having, on the 24th day of March 1832, needlessly uplifted 'and drawn out of the bank at Dumfries a sum of L.1500, for 'which they were fully aware that there was no immediate occasion 'or means of investment, and placed the same, without any security 'or obligatory document, in the hands of their co-executor, the said 'Alexander Greig, under a general instruction to him to look out 'for an eligible investment for the said sum, and no such invest- 'ment having been made, and the said sum not being now accessible 'in the hands of the said Alexander Greig, the said defenders are 'not entitled, in accounting to the pursuer for their intromissions 'with the said sum, to take credit for, or discharge themselves by, 'the payment or delivery over of the said sum to the said Alexander 'Greig; and therefore repels the defences maintained for the said 'other defenders, and decerns against them also in terms of the con- 'clusions of the libel: finds the whole defenders liable in expen- 'ses.'

Lord Ordinary's Note.

Note.—'The Lord Ordinary has no doubt that the defenders are 'all liable as *actual intromitters*, since, after being made aware that 'there was no immediate means of applying the L.1500 in question, 'they all go personally to Dumfries, and there indorse the deposit 'receipt, and draw out the money; and this being all that the pur- 'suer had any occasion to know, or to look to, when his legacy be- 'came payable, he was perfectly justified in bringing his action in 'the way he has done. Being liable in the first instance as actual 'intromitters, it was no doubt competent (and even necessary) for 'the defenders to meet the action, by shewing that they had after- 'wards discharged themselves, either by payment of preferable 'claims, or, at all events by such a prudent or reasonable applica- 'tion of the money as might bring them under the protection to 'which they were entitled by their character of executors, or by 'the special terms of the settlement under which they acted. This

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'accordingly they have attempted to do; and, in the discussion of 'their defence, the question has no doubt come to be, whether they 'have not conducted themselves with such palpable and active im- 'prudence as to be personally liable to the pursuer in spite of such 'protection. They say now, that this question and ground of lia- 'bility ought to have been raised in the summons, and that the form 'of action is therefore incompetent; but the Lord Ordinary is of 'opinion that there is no ground for this objection, in as much as they 'were primarily liable as *intromitters*, and properly convened as such 'accordingly, and that the subsequent discussion *has arisen altogether* 'on their defences, and as to the sufficiency of their discharge, of 'which the pursuer had no occasion to be previously cognizant.

'On the merits, the Lord Ordinary has proceeded altogether on 'the terms of the minute of 23d March 1832, and the voluntary and 'deliberate *act* of drawing out the money, and placing it, without 'security, in Greig's hands, the very day after. From the minute it 'appears that they were then perfectly informed that there was 'L.1500 more in the bank than was then wanted, and they (very 'properly) instructed Greig to look out for a safe investment, in 'which it might yield more than bank interest. All this was not 'only within their power, but according to their duty. But what 'imaginable apology can be made for their not letting this sum re- 'main in the bank till such investment was obtained? Their need- 'lessly drawing it out, and placing it for an indefinite time in the 'hands of one of their number, was not an *omission*, but *an act* and 'intromission of the most unaccountable, and, it appears to the Lord 'Ordinary, the most indefensible character; and it is for this, ac- 'cordingly, that he has found them liable. Their long subsequent 'neglect to ascertain whether it had ever been invested, might per- 'haps be covered by their exemption from the consequence of 'omissions; and accordingly the Lord Ordinary does not rest his 'judgment upon it, farther than as shewing, that in trusting the 'pursuer's money with Greig, they were utterly careless of the in- 'terests which had been confided to them.

'There is a near resemblance in many points between this case 'and that of Moffat and Robertson, 31st Jan. 1834, (12. *Shaw*, 369.) 'That was a stronger case against the trustee in one respect, as the 'deed directed *security* to be taken for all funds lent out. But it 'was greatly weaker in another, viz. that there was in fact no new 'lending out or change of investment whatever, but a mere conti- 'nuance of that which the truster himself had made, and allowed for 'years to continue. The neglect of the trustees to alter or strengthen 'it was therefore very plausibly represented as a *mere omission*, for 'which they were declared not to be answerable, by a clause iden-

'tical with what occurs in this case. Here the ground of liability, 23 June 1835.
'as already explained, was a *positive act*, changing a most safe and
'unquestionable investment, not only without necessity, but without Grieve v. M'Call and Others.
'any assignable pretext, for one which is now admitted to have been
'most ineligible.'

The defenders *reclaimed*. The *Court*, at the first advising, entertained difficulties; and, as the recent cases of Moffat and Henderson's trustees were much founded on, cases were ordered.

The pursuer, in his case, founded on the case of Moffat *v.* Robertson, where the defender was found liable, although he had a protecting clause much stronger than in the present case.

The defenders rested on the case of Murray *v.* Cheape and Others, (Henderson's Trustees,) 6th Feb. 1835, *F. C.*; and *pleaded*, that they were not liable as intromitters, or on the ground of negligence.

The *Court*, on advising the cases, held, without disposing of the question of personal liability, that the pursuer ought to prevail in his second plea, and accordingly decerned in terms of the libel. Judgment.

Lord Medwyn.—I have a good deal of difficulty in assenting to this interlocutor. As executors hold their office pro indiviso, have but one office, are but one body, and represent the defunct as one person, (*Kilk.* 171,) all must concur in suing a debtor, or granting a discharge. While all do so, one only can actually receive payment; and hence the protecting clause has been introduced, making those only liable to account who actually intromit. It is of importance that just effect should be given to such clauses, otherwise voluntary trustees or executors would be deterred from executing the trust devolved upon them, and an expensive management by a factor, or curator bonis, would in all cases be necessary. What was done here was to lay aside a sum of L.1500 for payment of some special legacies. It was right to lay it out at better interest than bank interest; and Mr Greig, the co-executor and agent for the rest, was of course to find such a security. In all such operations the personal responsibility of the agent must to a certain degree be trusted. Till the money is paid the security cannot be completed; and the agent must have had the money in his hands for this purpose. If it was to be lent in Edinburgh, would it have been reasonable for them, or were the executors acting against their duty, and liable personally, although with a protecting clause, to insist upon the money being lent out in the country, that they might all be present at the completion of the security, and the drawing the money from the bank, or ought they to have insisted upon coming to Edinburgh with the money, on hearing that the security was completed there? The case is very different from that of Moffat, where the one trus- Opinion of Court.

23 June 1835.

Grieve v. M'Call and Others.

Opinion of Court.

tee distinctly neglected an injunction of the truster in favour of his sole co-trustee, his brother-in-law. I would rather incline to hold here, that granting the discharge to the bank was only a virtual, and not actual intromission, so as to fall within the scope of the protecting clause.

But it seems unnecessary to dispose of that view of the case, as on another, and a safe ground, I think the pursuer is entitled to decree. Large sums have been distributed among the residuary legatees, while, as yet, payment has not been made of the special legacy or bequest to the pursuer. A residuary legatee can only draw what remains after all the special purposes of the trust are fulfilled, and any loss or shortcoming of the funds must fall upon him. It is impossible for the defenders to say there are no trust-funds in their hands, and that this claim is defeated, because the fund they had set apart for it has been lost or endangered. If they are not liable personally, they must be entitled to draw it back from the residuary legatees, and on that ground I am for sustaining the decerniture in favour of the pursuer.

The *other Judges* concurred in the propriety of decerning.

Lord Glenlee was of opinion, in reference to the mode of investing the money, and the payments made to the residuary legatees, that the money must be held as being still in the hands of the trustees, and that, in point of fact, some of it was in the hands of one of their own number; at all events, that decree might safely be given on the ground stated in the pursuer's second plea in law.

Lord Ordinary, *Jeffrey*. Act. *Keay, Coventry*. Alt. *Dean of Fac. (Hope,)* and *G. Bell*. *Brodies & Kennedy*, W. S. and *W. Horsburgh*, W. S. Agents. *F.* Clerk.

R.

SECOND DIVISION.

No. CXXXIX. 23*d June* 1835.

PATRICK AULD
against
HIS CREDITORS.

CESSIO BONORUM.—*A half-pay adjutant of militia, with L.*73 *a-year, being old, and, as alleged, unfit for carrying on trade, found entitled to the benefit of the process of cessio bonorum, on assigning L.*10 *a-year to his creditors.*

23 June 1835.

Auld v. His Creditors.

THE pursuer had L.73 a-year as adjutant, on half-pay, of the Lanarkshire militia. He was sixty-four years of age,—had been unfortunate,—had been three times married, having families by each marriage. His children were incapable of giving, or, at least, did not give him any assistance, while some of them were dependent on him. The opposing creditors did not admit this statement of his situation and incapability to work, but withdrew their opposition, under reservation of their right to such part of his half-pay of L.73 as the Court should ordain him to assign.

Ja. Anderson founded on a variety of cases in which the Court had sanctioned large deductions from half-pay; Scobie, 4th March 1825, L.100 out of L.250 assigned; Macalpine, L.20 assigned out of L.89; and a late case, 7th March 1835, where a pursuer had a wife and five daughters, and L.40 out of L.120 were assigned.

Paterson referred to cases in which the Court had shewn their unwillingness to interfere with half-pay.

The *Court* decerned, under deduction of L.10 per annum from the pursuer's half-pay. Judgment.

Act. *Dean of Fac. (Hope,)* and *Paterson*. Alt. *Ja. Anderson*. *John Cullen*, W.S. *John Livingstone*, W. S. Agents. *T.* Clerk.

R.

FIRST DIVISION.

No. CXL. *25th June* 1835.

MUIR
against
GODDARD.

PROCESS.—On an application, of consent, being made to take the deposition of a witness at Londonderry, to lie in retentis till an ensuing trial, it was observed on the Bench, that there was no affidavit to the effect that the witness could not, or would not attend at the trial. It was then stated, in support of the application, that the motion being of consent, such affidavit had not been considered requisite.

The *Court*, however, superseded the application till the affidavit should be produced.

For Applicant, *Marshall*.

C.

SECOND DIVISION.

No. CXLI. *25th June* 1835.

PETER HILL AND PETER M'CRAW
against
CHARLES CUNINGHAM, (FACTOR FOR PROPRIETORS OF WATERLOO HOTEL).

LOCAL BURDEN.—STATUTE 54. GEO. III. c. 170.—POOR'S-RATES.—PARISH.—BURGH.—*In a multiplepoinding by proprietors of houses over which the royalty of the city of Edinburgh was extended, by 54. Geo. III. c. 170, (as distinguished from 7. Geo. III. c. 27,) against the collector of poor's-rates for South Leith, and collector of poor's-rates for the city of Edinburgh,—found,* (1.) *That said proprietors are not liable in payment of poor's-rates both to the city of Edinburgh and the parish of South Leith.* (2.) *That the Magistrates and Town-Council of Edinburgh have acquired, vi statuti, right to assess the proprietors and occupiers of houses built, or to be built on the lands to which the royalty was extended, in an equal portion of poor's-money, at the same rate as they do in the rest of the extended royalty, but that the foresaid statute does not direct in what manner the sums so assessed by the Magistrates and Council shall be applied.* (3.) *That as the property has not been disjoined from the parish of South Leith, nor annexed to any parish in the city of Edinburgh, the said Magistrates and Council are bound to pay to the parish of South Leith, or apply to the maintenance of the poor thereof, a part of the assessment so to be levied by them, corresponding to the amount of the assessment for the poor of the parish of South Leith payable for said property, along with the other portion of that parish, and that they may apply the remainder of that assessment, if any, after satisfying the primary claim of the parish of South Leith, in maintaining the poor of Edinburgh, or to any purpose to which the poor's-money of the rest of the extended royalty may lawfully be applied.*

IN 1761, an Act of Parliament was passed, (7. Geo. III. c. 27,) for extending the royalty of the city of Edinburgh, which provided, That the Magistrates and Town-Council of the city of Edinburgh 'shall have full power to appoint stent-masters, to levy from the 'proprietors and possessors of all such houses as are built, or shall

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'hereafter be built upon the foresaid grounds, hereby annexed to 'and comprehended within the said royalty, an equal portion of 'the cess, annuity, poor's-money and watch money payable by the 'city of Edinburgh, in the same way and manner as the same are 'here levied within the ancient royalty.' By section 12. it was provided, 'That the several lands thereby annexed to the royalty 'of the city of Edinburgh, shall, besides the cess to be levied by 'the collector of the town, for and in respect of the houses and 'buildings, remain liable, and be subjected to the payment of a 'rateable proportion of the cess and land tax, and other public taxes 'imposed, or to be imposed on the shire of Edinburgh, for and in 'respect of the ground, to be levied in the same manner as formerly.' It was farther provided, 'That the foresaid ground hereby annexed 'to, and comprehended within the royalty of the city of Edinburgh, 'shall be, and they are hereby for ever after, disjoined from the 'parish of St Cuthbert, or West Kirk, and South Leith, and are 'hereby annexed to the parish of St Giles, within the city of Edin-'burgh; provided always, that the lands hereby disjoined from the 'parishes of St Cuthbert and South Leith, and the heritors thereof, 'shall remain liable, and be subjected to the ministers' stipends 'and other parochial burdens, and that the tithes payable out of 'the lands hereby annexed shall be, and the same are hereby saved 'and reserved to the true owners thereof, in the same manner as if 'this act had never been passed; saving also and reserving to his 'Majesty, and all other person or persons concerned, all rights and 'interests (other than the present extension of the said royalty,) 'which they had, have, or may have in the lands hereby annexed.'

In 1814 another statute was passed, (54. Geo. III. c. 170,) whereby certain commissioners were appointed for erecting a new jail on the Calton hill, and opening up a communication with the east end of Prince's Street; and for that purpose they were empowered to acquire ground, not merely for a roadway, but of a certain breadth on each side for feuing.

The 18th section of that statute provides, 'That when the lands, 'grounds and tenements situated betwixt the east end of Prince's 'Street and the Calton hill shall have been acquired by the said 'commissioners, the royalty of the city of Edinburgh shall be ex-'tended over the same, and over the said new jail; and the said 'Provost and Magistrates and Council of the said city, and their 'successors in office, shall have and enjoy the same rights, privi-'leges and jurisdictions over the same, as they at present have and 'enjoy over and within the limits of the extended royalty, by any 'law, statute, or established custom; and from thenceforth the 'Lord Provost, Magistrates and Council of the said city, and their

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'successors in office, shall, and they are hereby authorised and empowered to stent or assess and levy from the proprietors and occupiers of all such houses as are at present on the said property, or shall be hereafter built and erected thereon, an equal proportion of the cess, annuity, poor's-money and other duties, with that stented or assessed or levied by the Lord Provost, Magistrates and Council of the said city, from proprietors or occupiers of houses in the extended royalty, in the same way and manner, and with such and the same remedies in law, in case of non-payment, as are practised, or competent, by any law, statute or custom within the said extended royalty; provided always, that the extension of the royalty over the lands, grounds and tenements aforesaid, is hereby made under all the clauses, provisions, declarations, exemptions and reservations in favour of his Majesty and others, which are specified and contained in an act passed in the seventh year of the reign of his present Majesty, (1761,) entitled, an act for extending the royalty of the city of Edinburgh over certain adjoining lands; as also saving and reserving entire to the Society of Incorporated Trades of Calton the whole rights, privileges and immunities presently enjoyed by them as a corporate society.'

The Waterloo Hotel is built on part of the ground acquired by the commissioners under the authority of this last statute. From the year 1821, when the building was completed and possessed, it was assessed for poor's-rates to the city of Edinburgh; and these were accordingly paid to the collector of the city, no demand having been made by any other party.

In 1829 an action was raised before the Sheriff, at the instance of M'Craw, collector of poor's-rates for the parish of South Leith, against Cuningham, as factor for the proprietors of the Waterloo Hotel, concluding for L.19, 10s. as the amount of the assessment laid on the Waterloo Hotel for the poor of the parish of South Leith, for the year 1827-28.

In defence against that action it was *pleaded*—That poor's-rates for the Waterloo Hotel had always been paid to the city of Edinburgh: That that property could not be liable to be assessed for poor's-rates both to the parish of South Leith and to the city of Edinburgh; but in order to ascertain which of these parties had right to the assessment, a summons of multiplepoinding had been raised, in which both the collector for the city and the collector for South Leith were called. Claims in the multiplepoinding were lodged for these parties, in which each claimed a preference; and they farther objected to the competency of the multiplepoinding, as there was here no double distress, the property being liable to

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both parties in poor's-rates. This process of multiplepoinding was conjoined with the ordinary action at the instance of M'Craw.

The Sheriff-depute first found, 'In respect the claimant Hill 'only alleges he has collected poor's-money from the property in 'question for six years, finds him not entitled to a possessory 'judgment: In respect of the 5th section of the statute 7. Geo. 'III. c. 57, finds, That the ground on which the premises in ques- 'tion have been erected are not disjoined from the parish of South 'Leith, nor annexed to the royalty of the city of Edinburgh by 'the said statute: finds, That by the 8th section of the statute '54. Geo. III. c. 170, the Jail Commissioners were empowered to 'acquire lands, tenements, &c. for the bridge, road and communi- 'cation specified in said statute, and the areas on each side thereof, 'not exceeding in whole 195 feet in breadth: finds, That in case 'only a part of any house or other building were comprehended 'within the said space of 195 feet, the said commissioners were, by 'the 15th section of the said statute 54. Geo. III, bound and obliged, 'if required by the owner or owners of any such house or building, 'to purchase the whole thereof: finds, That by the 18th section of 'said statute 54. Geo. III. the royalty of the city of Edinburgh was 'extended over the lands, grounds and houses acquired under the '8th and 15th sections of said statute, subject, however, to all the 'clauses, provisions, declarations, exceptions and reservations in 'the statute 7. Geo. III. c. 27, and in particular to the provision 'in the 12th section of the said statute 7. Geo. III, that the several 'lands annexed to the royalty of the city of Edinburgh shall, besides 'the cess to be levied by the collector of the town for and in re- 'spect of the houses and buildings, remain liable, and be subjected 'to the payment of a rateable proportion of the cess, land-tax, and 'other public duties imposed or to be imposed on the shire of Edin- 'burgh, for and in respect of the grounds; and also to the provi- 'sion in the 16th section, that the said lands disjoined from the 'parishes of St Cuthbert and South Leith, and the heritors there- 'of, shall remain liable and be subjected to the minister's stipend, 'and other parochial burdens: finds, therefore, that the premises 'in question, in so far as the grounds on which they are erected 'have been acquired under the 8th and 15th sections of the statute '54. Geo. III, are liable in poor's-rates to the claimant M'Craw, 'in respect of the value of the ground on which the premises are 'built—and to the claimant Hill, in respect of the value of the pre- 'mises or houses built on said ground; and that any part of the said 'premises which may have been acquired by the commissioners, but 'not in terms of the said 8th and 15th sections, are liable in poor's- 'rates to the claimant M'Craw, in so far as respects the value both

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'of the ground and of the premises built on the ground: Before 'farther procedure, grants diligence, at the instance of the claimant 'Hill, for production of any of the documents mentioned in the 'notes annexed to the 4th and 5th articles of his condescendence, 'No. 14, which are not already produced in process; and grants 'commission to the clerk of court, or to Mr Wilson, Mr Cameron, 'Mr Mitchell, or Mr Cairns, solicitors-at-law, to examine havers, 'receive exhibits, and report within three weeks.'

Both sets of defenders *reclaimed* against this interlocutor, and, while they pleaded their respective preferences, they both insisted in their objection to the competency of the multiplepoinding, that there was here no double distress. The claim of the parish of South Leith was independent of any claim made by the city of Edinburgh, and therefore, although, in the ordinary action, it was found that the property was liable in poor-rates to the parish of South Leith, the property might also be liable, under the peculiar provisions of the statute of 1814, for poor-rates to the city of Edinburgh. The collector for the poor-rates for the city was therefore irregularly brought into Court in a question which alone regarded the liability of that property for poor-rates to the parish of South Leith.

Answered—There was here a double claim for poor-rates against the same property. No property could be liable in poor-rates to two parishes for the full value of the property, and the statute of 1814 would not bear such a construction. The original defender and raiser was quite willing to pay to either party, but could not be called on to pay to both; and the only competent process for ascertaining which of the claimants ought to be preferred, and for securing the safety of payment to the one or the other, was the process of multiplepoinding, there being in fact here a double demand for the same rate.

The Sheriff-depute declined judging farther in the case, being proprietor of some shares in the Waterloo Hotel; that he had previously proceeded to judge of the case, 'on the supposition that the 'nominal pursuers were only liable in once and single payment, 'and that therefore any decision to be pronounced was a matter of 'indifference to them. But the case is different, if the nominal 'pursuers are to be liable in full payment to both parties.'

The Sheriff-substitute, after of new closing the record, pronounced the following interlocutor:

Judgment of Sheriff-substitute.

'The Sheriff-substitute having considered the conjoined processes, 'finds, That the Act of Parliament 54. Geo. III. c. 170, which extends 'the royalty over the whole or part of the ground on which the 'Waterloo Hotel has now been built, does not disjoin that ground 'from the parish of South Leith, and does not expressly provide

'that the ground shall not be liable to the poor-rates of that parish; 25 June 1835.
'and therefore finds, that that ground, with the houses built or to be
'built upon it, must be liable to those poor-rates in the same man- Hill and M'Craw v.
'ner as any other ground in that parish: finds, That by that act of Cuningham.
'Parliament it is expressly provided, in section 18, that the Magis-
'trates of the city of Edinburgh may levy from the proprietors and
'occupiers of all houses built or to be built on the ground over
'which the royalty is so extended, the same proportion of cess, an-
'nuity, poor's-money, and other duties, as within the extended
'royalty; and finds, that that right to poor-money is not affected by
'the reservation contained in the concluding part of the same sec-
'tion; and therefore finds, that houses built or to be built on that
'ground are liable to poor-rates, as fully as any other houses within
'the extended royalty: Therefore ordains the defender Cuning-
'ham to pay to the pursuer M'Craw the sum of L.19, 10s. conclu-
'ded for in his action, with the lawful interest thereon from Mar-
'tinmas 1827 till payment; dismisses the process of multiplepoind-
'ing as inapplicable to this case, where both claimants are entitled
'to full payment; reserving to the claimant Hill to institute such
'action as he may be advised against the pursuer Cuningham for
'payment; and reserving to him his defences with regard to the
'extent of ground included within the royalty, the amount of the
'sum which may be demanded from him, or otherwise as he may
'be advised: finds the pursuer Cuningham liable in the expenses
'incurred by the other parties in the conjoined processes; allows
'accounts thereof to be given in, and decerns.'

Cuningham *advocated*, and the Lord Ordinary repelled the reasons of advocation. He then *reclaimed*, and the Court ordered cases, which, when lodged, were submitted for the opinions of the other Judges.

The following opinion was returned by *Lords Balgray, Gillies,* Opinion of Consulted Judges.
Mackenzie, Corehouse and Moncreiff.—By the ordinary rules of the law of Scotland, lands or tenements may be in one parish quoad sacra, and in another parish quoad civilia; but they cannot at one and the same time be in two parishes both quoad sacra and quoad civilia, or in two parishes quoad sacra, or in two parishes quoad civilia. Every parish is bound to maintain its own poor, and the poor of lands or tenements united to it quoad civilia, but it is not bound to maintain the poor of another parish, or of any part of another parish not united to it quoad civilia. An act of Parliament may expressly direct, that a parish, or any part of a parish, shall be assessed towards the maintenance of the poor of

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two parishes; but it is not to be presumed in dubio that this is the intention of the Legislature; 1*st*, Because it is contrary to the ordinary rules of law; 2*dly*, Because, with only one exception, it has not been hitherto done; and, 3*dly*, Because it would neither be necessary, nor equitable, nor expedient.

With regard to the maintenance of the poor, parishes are in three situations; they are either landward or burghal, or partly landward and partly burghal. In landward parishes the assessment is made by the heritors and elders; in burghal parishes by the magistrates and council; and in parishes partly landward and partly burghal, by the heritors and elders in the one part, and the magistrates and council in the other, or in a joint meeting of both, or otherwise, as usage may have sanctioned.

Previous to the 54. Geo. III. c. 170, the parish of South Leith was a landward parish, that is, no part of it lay within a royal burgh, and the assessment for the poor was imposed accordingly. By that statute, part of it was brought within the royalty of the city of Edinburgh, and it thus became partly landward and partly burghal; for that part, over which the royalty was extended, was not disjoined from the parish of South Leith to be united to the parish of St Giles or any other parish within the royalty.

By the 18th section of the statute, the Magistrates and Council of Edinburgh were empowered to assess the proprietors and occupiers of houses built, or to be built, on the lands to which the royalty was then extended, in an equal proportion of cess, annuity, *poor's-money*, and other duties, with that assessed by them on proprietors and occupiers of houses in the remainder of the extended royalty. But the statute does not direct in what manner the sum so assessed shall be applied. Now, it appears to us, that the Magistrates and Council of Edinburgh are bound, in the first place, to pay to the parish of South Leith, or apply to the maintenance of the poor of that parish, a part of this assessment, corresponding to the proportion between what is now the burghal and what remains the landward part of the parish; and that the burghal part, so assessed by the Magistrates and Council, cannot be assessed a second time by the heritors and kirk-session, because it has been already burdened with its proper share of the expense necessary for maintaining the poor of the whole parish. It rather appears to us, that the Magistrates and Council having acquired right vi statuti to assess, at the same rate as they do in the rest of the extended royalty, may apply the remainder, if any, after satisfying the primary claim of the parish of South Leith, in maintaining the poor of Edinburgh, or for any purpose to which the poor's money of the rest of the extended royalty may lawfully be applied. On this point, however, it is not

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necessary at present to inquire, because the proprietors of the Waterloo Hotel, the advocators in this process, do not object to a proportional assessment equal to that levied in the rest of the extended royalty.

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The most plausible argument, in our opinion, against this view of the case, is, that when the royalty was extended by the 7. Geo. III. c. 27, over part of the parish of St Cuthbert, there was a provision in the statute imposing a double assessment on it, by which it pays poor's-rates both in the parish of St Giles and in the parish of St Cuthbert. But there is this material difference between the cases, namely, that by the 7. Geo. III. the lands to which it refers were expressly disjoined from the parish of St Cuthbert and united to the parish of St Giles, by which they became primarily, and indeed expressly, liable to be assessed in the latter parish for the poor of that parish. But further, by a positive and anxious clause in the statute it is declared, that notwithstanding that liability, they shall remain liable for parochial burdens in the parish of St Cuthbert. In that case, therefore, no room is left to argue from presumption or inference, from the analogy of law, or from the hardship and injustice of a double assessment, for the will of the Legislature is expressed in terms which do not admit of dispute. But in this case there is no disjunction of the lands from the parish of South Leith,—no annexation, either quoad sacra or civilia, to the parish of St Giles, or any other parish,—no direction to the Magistrates and Council how they are to apply the sum which they are empowered to assess, and above all, no provision that the subjects shall be twice assessed; therefore the ordinary rule of law is let in, by which the burghal part of the parish of South Leith must pay its share of the poor's-rates of that parish before any part of an assessment on it for the poor can be applied to any other purpose. It may be true that the framers of the act of the 54. Geo. III. might have had a different object in view, and might have wished to impose as heavy a burden on the subjects in question as was imposed by the 7. Geo. III. on another part of the extended royalty. If this were their object, we cannot regret that they failed to carry it into effect.

On these grounds we are of opinion, that the interlocutor of the Sheriff should be altered, and that the poor's-rates levied by the Magistrates of Edinburgh, from the tenements in question, should be applied in the manner we have pointed out, by which a double assessment will be avoided.

Opinion of Lord Medwyn.—The question here depends entirely upon the construction to be put upon the statute 54. Geo. III.

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necessary at present to inquire, because the proprietors of the Waterloo Hotel, the advocators in this process, do not object to a proportional assessment equal to that levied in the rest of the extended royalty.

Opinion of Consulted Judges.

The most plausible argument, in our opinion, against this view of the case, is, that when the royalty was extended by the 7. Geo. III. c. 27, over part of the parish of St Cuthbert, there was a provision in the statute imposing a double assessment on it, by which it pays poor's-rates both in the parish of St Giles and in the parish of St Cuthbert. But there is this material difference between the cases, namely, that by the 7. Geo. III. the lands to which it refers were expressly disjoined from the parish of St Cuthbert and united to the parish of St Giles, by which they became primarily, and indeed expressly, liable to be assessed in the latter parish for the poor of that parish. But further, by a positive and anxious clause in the statute it is declared, that notwithstanding that liability, they shall remain liable for parochial burdens in the parish of St Cuthbert. In that case, therefore, no room is left to argue from presumption or inference, from the analogy of law, or from the hardship and injustice of a double assessment, for the will of the Legislature is expressed in terms which do not admit of dispute. But in this case there is no disjunction of the lands from the parish of South Leith,—no annexation, either quoad sacra or civilia, to the parish of St Giles, or any other parish,—no direction to the Magistrates and Council how they are to apply the sum which they are empowered to assess, and above all, no provision that the subjects shall be twice assessed; therefore the ordinary rule of law is let in, by which the burghal part of the parish of South Leith must pay its share of the poor's-rates of that parish before any part of an assessment on it for the poor can be applied to any other purpose. It may be true that the framers of the act of the 54. Geo. III. might have had a different object in view, and might have wished to impose as heavy a burden on the subjects in question as was imposed by the 7. Geo. III. on another part of the extended royalty. If this were their object, we cannot regret that they failed to carry it into effect.

On these grounds we are of opinion, that the interlocutor of the Sheriff should be altered, and that the poor's-rates levied by the Magistrates of Edinburgh, from the tenements in question, should be applied in the manner we have pointed out, by which a double assessment will be avoided.

Opinion of Lord Medwyn.—The question here depends entirely upon the construction to be put upon the statute 54. Geo. III.

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c. 170, which, so far as regards the grounds in question, has superseded the common law relative to the support of the poor.

This act empowered commissioners to acquire certain portions of ground between the east end of Prince's Street and the Calton hill; and when so acquired, 'the royalty of the city of Edinburgh 'shall be extended over the same;' and the Lord Provost, Magistrates and Council 'shall, and they are hereby authorised and empowered to stent or assess, and levy from the proprietors, &c. an 'equal proportion of the cess, annuity, poor's-money and other 'duties, with that stented or assessed in the extended royalty, 'provided that the extension, &c. is hereby made under all the 'clauses, &c. in favour of his Majesty or others,' in 7. Geo. III.

Now, when this act was passed, these lands belonged to the parish of South Leith; and how does it affect them as to this matter? They are not expressly disjoined from the parish of South Leith, neither are they annexed to any parish within the city. All that is done is, that the royalty and jurisdiction of the Magistrates of Edinburgh is extended over them.

Every portion of land or tenement of houses in this country must be situated within some parish or other; and the inhabitants have certain rights, and are subject to certain duties, in respect of this ecclesiastical division of the country. This is quite distinct from the civil jurisdiction, to which every such inhabitant is also subject; and it is quite conceivable that there may be a change in the one without any change in the other. If, for instance, a village, forming part of a landward parish, is constituted a burgh of barony, the civil jurisdiction is changed, while the ecclesiastical will remain as before; or if a burgh of barony is erected into a royal burgh, the powers vested by law in the magistrates of a royal burgh will modify the civil rights of the burghers, while the ecclesiastical jurisdiction over them continues as before. Now, I cannot understand how the extension of the royalty of Edinburgh over the grounds in question should withdraw them from the jurisdiction of the minister and kirk-session of South Leith, as to every ecclesiastical matter falling under the cognisance of that court, or from the jurisdiction of the heritors and kirk-session, as to any thing which is to be regulated by that body. A disjunction from one parish and annexation to another cannot be made by implication. Such can only take place by a decree of the competent court, or the special enactment of Parliament. I have no doubt that the heritors occupying the ground which originally belonged to the parish of South Leith still continue to belong to that parish, and remain liable for parochial burdens there, such as keeping up the church and manse of South Leith; that their bans for marriage must be proclaimed there;

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that in any case of scandal the occupiers would be convened before the kirk-session of that parish; and that a pauper would be entitled to claim relief from the heritors and kirk-session, and that he would have no claim against the funds for maintenance of the poor of Edinburgh, because he does not reside within any parish within the city. No doubt there is no express declaration in this act, as there was in the previous one referred to, (7. Geo. III, c. 49,) that these lands were to remain liable to the parochial burdens of the parish of South Leith. But it was necessary to insert this declaration in that previous act, because *there* the lands were expressly disjoined from the parish to which they formerly belonged, and were annexed to a different parish; and this must have relieved them of their former burden, if it had not been otherwise declared.

The provisions of that act as to this matter are quite unambiguous. It was enacted on a narrative, that those whose property was to be brought within its operation had 'either consented, or are 'bound by their titles to consent;' so that, for the advantages of having their grounds brought within the royalty, and streets built upon them, they consented to pay burghal taxes, continuing at the same time liable to the burdens formerly payable by them as a landward parish. While it was necessary in that case to be thus explicit in expressing the agreement of parties, there was no such necessity in the present instance, since the grounds remain as before a portion of the parish of South Leith, although the royalty of Edinburgh is extended over them, and the proprietors and occupiers must remain subject to the same ecclesiastical jurisdiction as the rest of the parish, and also be liable to legal parochial burdens as before.

The extension of the royalty over the grounds in question brings them within the civil jurisdiction of the Magistrates, rendering them subject to the burgh courts, and confers upon the proprietors and occupiers the privileges of trade and other rights competent to the citizens of Edinburgh as a royal burgh. But the act does not stop there: it further gives the Magistrates and Council express authority and power to levy an equal proportion of cess, annuity, poor's-money, and other duties, as in the previously extended royalty. Now, this express power leaves no room for doubt as to the power to levy; and it seems impossible to hold that this can mean that they are to levy poor's-money, but not to employ it in support of the poor of the city, but are to pay it over to the kirk-session of South Leith. This would be such an anomaly in the law,—as great at least, as that of assessing the same lands for the poor of two different parishes,—that it would require an express enactment to that effect. There is, however, no such enactment. Besides poor's-

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money, the Magistrates are empowered to levy annuity from the houses on these lands; but neither is it said that they are to employ this in paying the stipends of the ministers of the city. This is left to the operation of law, which appropriates the annuity leviable within the royalty to that special purpose. Now, could it be maintained, that when the Magistrates levy this annuity they must pay it over to the minister of South Leith? This certainly would not do, even were this a sum levied out of teinds. Yet it is difficult to see any distinction between this and the levy of poor's-money. The same is true as to the cess which the Magistrates are authorised to levy; and it must further be remembered, that the cess, annuity and poor's-money are not to be levied in the proportions payable by the rest of the parish, which would have been the case if the right to levy had merely been transferred, but is to be in an equal proportion with that levied from the other proprietors and occupiers of houses in the extended royalty. Now, when the right to levy a fund, which is legally appropriated to a special purpose, is given to the legal administrators of that fund, no special directions are necessary as to its appropriation. They are to apply it according to law; and accordingly, as in the case of the annuity which must go to the ministers of Edinburgh, and the cess to the proportion of that burden upon the city, the poor's-money which the Magistrates are empowered to levy must be applied to the discharge of the burden imposed on them of maintaining the parochial poor of the city. There is no warrant for any other application of it.

It may at first sight appear a hardship that these lands, and the houses since erected on them, should pay assessment for supporting the poor of their own parish, and also the poor of the city to which they are annexed quoad the civil jurisdiction; but in a matter of contract or agreement and special enactment, such a consideration must not influence the interpretation of an act of Parliament; and considering the advantages to be derived by the original owners of these grounds by the circumstance which occasioned the extension of the royalty over them, they might well consent to this addition to their parochial burdens; and those who acquired the property since, cannot object to hold it under all the burdens of an act of Parliament which is specially referred to in their titles.

It may be noticed, that the 40. Geo. III. c. 88, extended the royalty of Glasgow over certain lands belonging to the Barony parish, from which 'they are for ever separated, and hereby annexed to 'parishes within the said city.' The Magistrates have express power to levy 'an equal proportion of the cess, trades' stent, poor's 'rates, conversion of statute labour and other taxes,' within the annexed grounds, as they levy within the present royalty; and then

they are expressly taken bound to pay the cess to the county, and the statute labour and poor's rates to the Barony parish, effeiring to the annexed lands, out of the funds of the city. It would have been easy to have followed this example, and introduced such an enactment in the present case, if such had been the meaning and agreement between the parties.

Upon the whole, I still entertain the opinion I had when this case was before me in the Outer-House.

Opinion of Lords Fullerton and Cockburn. — By the act of 54. Geo. III. c. 170, the grounds in question were brought within the royalty of the city of Edinburgh. They were not, however, disjoined from the parish of South Leith; so that although they still remained a part, they became a burghal part of that parish. It is expressly provided by the statute, that the Magistrates of Edinburgh should assess and levy from the proprietors and occupiers of the houses built on these grounds, poor's money in the same proportion as that assessed and levied from other proprietors and occupiers within the extended royalty. In virtue of this clause, there can be no question that this now burghal part of the parish of South Leith is subjected in payment to the Magistrates of Edinburgh of the rates generally leviable within the extended royalty of Edinburgh, and without reference to the necessities of the poor within the parish of South Leith. But the question raised in these actions is, whether the advocators, the proprietors or occupiers of a burghal part of South Leith, shall, in addition to these burghal rates of assessment, also assessed to the full amount of the rates leviable in the remaining, or what may be termed the landward part of the parish. My opinion is, that they are not so liable. It would require some clear enactment to subject them to a double burden so very unreasonable and unusual; and it does not appear to me that the statutes contain any provision which either expressly, or even by a fair implication, warrant this conclusion.

If it could be held, that in consequence of these grounds still forming part of the parish of South Leith, the heritors and kirk-session of that parish could claim an interest in the funds levied from them for the general support of the poor of the parish, I should rather be disposed to concur in the opinion expressed by some of the consulted Judges, that this claim must be made good, not in the form of a double or additional assessment upon the advocators, but in that of a demand against the Magistrates for a proportion of the assessment levied by them under the statute. But, in the *first* place, I doubt whether the claim in this form is admissible in the present procedure; and, 2*dly*, It does not appear to me that the parish of South Leith can, consistently with the principle laid down

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as applicable to parishes partly landward and partly burghal, have any claim for, or interest in the assessment for the support of the poor leviable from grounds now forming a burgal part of the parish. The very question raised and determined in the late cases of the landward heritors of Lanark and Dunbar against the Magistrates of those burghs, was, whether, in parishes partly landward and partly burghal, the administration of the poor laws should include the whole parish, or should be split into two, the one applicable to the burghal, and the other to the landward part of the parish. The latter view was adopted by the majority of the Court, after full consultation; and accordingly decree was pronounced, in terms of the first conclusion of the libel, in the action at the instance of the landward heritors of Dunbar against the Magistrates, 'finding and 'declaring that the management and maintenance of the poor of the 'landward district and of the burgh are separate and distinct, and 'that the pursuers, as heritors of the landward district, with their 'tenants, and other inhabitants thereof, are not liable for the sup-'port of the poor of the burgh, but for that of the poor resident 'within the landward district allenarly;' and 'that the Magistrates 'should be bound to sustain and manage the poor of the said burgh 'according to law.' According to the principle of this judgment, then, a burgh and landward district, though included in one parish, are necessarily separated in regard to the administration of the poor law, and liability for poor's rates. It appears to me that the same principle must be applied to the present case, in which one part of a parish, originally all landward, has been made burghal by the operation of a statute. From the moment of that annexation, the management and maintenance of the poor of the remaining landward district came to be, in terms of the above-quoted judgment, separate and distinct. The heritors are only liable for the support of the poor resident within that landward district; and at this moment, if the grounds in question came, from some unfortunate vicissitude, to be peopled by paupers, the whole burden of their support would fall on the poor's-rates of the city of Edinburgh, while nothing could be claimed on that score from the remaining landward heritors of the parish of South Leith. In these circumstances, it seems to me to follow, that the annexation of the grounds in dispute to the burgh of Edinburgh did, by necessary legal implication, disjoin them, if not from the parish, at least from the landward parish of South Leith, and placed them, in regard to poor's-rates, precisely on the same footing as if they had originally formed, or had been recently erected into a separate royal burgh; and that while the landward heritors are thus relieved from the burden of supporting the poor within the district so detached, the proprietors and occu-

piers in that district are become burghal, and subject to the special liabilities of their new character, must be equally relieved from that liability which attached to them as landward heritors of the parish.

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At the final advising *Lord Glenlee* agreed with the minority, *Lord Meadowbank* with the majority. The *other Judges*, who did not give any opinions, were proprietors of the Waterloo Hotel. The following interlocutor was pronounced: Judgment.

'The Lords having resumed consideration of the cases for the 'parties, with the opinions of the consulted Judges, find, in con- 'formity with the majority of these opinions, That the property of 'the Waterloo Hotel, over which the royalty of the city of Edin- 'burgh was extended by the statute 54. Geo. III. cap. 170, is not 'liable in payment of poor's-rates both to the city of Edinburgh 'and the parish of South Leith: Therefore recall the interlocutor 'of the Lord Ordinary, advocate the conjoined causes, alter the in- 'terlocutor of the Sheriff, and assoilzie the advocator from the con- 'clusions of the action at the instance of Peter M'Craw, collector 'for South Leith, and decern: find, That the Magistrates and Town- 'Council of Edinburgh have acquired, vi statuti, right to assess the 'proprietors and occupiers of houses built, or to be built on the 'lands to which the royalty was extended, in an equal portion of 'poor's-money, at the same rate as they do in the rest of the extend- 'ed royalty; but that the foresaid statute does not direct in what 'manner the sums so assessed by the Magistrates and Council shall 'be applied: find, as the property has not been disjoined from the 'parish of South Leith, nor annexed to any parish in the city of 'Edinburgh, That the said Magistrates and Council are bound to 'pay to the parish of South Leith, or apply to the maintenance of 'the poor thereof, a part of the assessment so to be levied by them, 'corresponding to the amount of the assessment for the poor of the 'parish of South Leith, payable for said property, along with the 'other portion of that parish, and that they may apply the remainder 'of that assessment, if any, after satisfying the primary claim of the 'parish of South Leith, in maintaining the poor of Edinburgh, or 'to any purpose to which the poor's-money of the rest of the ex- 'tended royalty may lawfully be applied: Therefore rank and 'prefer the claimant, the collector of the poor's-rates for the city of 'Edinburgh, to the fund in medio, being L.21 : 13 : 4, assessed by 'the said Magistrates on the said Waterloo Hotel, from Whitsun- 'day 1827 to Whitsunday 1828, and rank and prefer the said 'Peter M'Craw, collector of poor's-rates for South Leith, as a rider 'on the claim of the said collector for the Magistrates and Council 'of Edinburgh, to the extent of L.19, 10s. as the proportion of the 'said assessment falling to South Leith, and decern accordingly:

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'find the claimants, Peter Hill and Peter M'Craw, conjunctly 'and severally, liable to the advocator in the expenses of process, 'allows an account to be given in, and remit to the Auditor to tax 'the same, and report: Quoad ultra, find no expenses due to either 'of the claimants; reserving entire all questions as to any claim at 'the instance of the parish of South Leith upon that part of the 'property in question over which the royalty is not extended, and 'to the proprietors their defences as accords.'

Lord Ordinary, *Medwyn.* Alt. *Keay, Tawse.* W. S. Agents.

Act. *Dean of Fac. (Hope,) Currie, Forsyth* and *Boswell.* *A. Hutchison, Ross & Scott,* W. S. *Cuningham & Bell,* *T.* Clerk.

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FIRST DIVISION.

No. CXLII. *26th June* 1835.

LYON
against
REID.

PROCESS.—DAMAGES.—*Circumstances under which it was found that there was no sufficient allegation of mala fides to infer damages.*

IN this cause, which was an action of damages against the trustees of Reid, who had obtained an assignation to a lease of certain lands, ex facie absolute, but which was found, after considerable litigation, both here and in the House of Lords, to have been truly in security, on the ground that Reid had carried on the litigation in the knowledge of the conveyance having been in security only, and was therefore in mala fide, the Lord Ordinary pronounced this interlocutor: 'Finds, That the first thirteen articles of the conde-'scendence, and the first, second, fifth and sixth numbers of the 'fourteenth article *, are not stated in a manner sufficiently speci-

* The articles here alluded to contained simply a narrative of the proceedings which led to the previous action, with this farther allegation contained in article nine: 'On that day Peter Lyon died suddenly, whereupon Reid caused his son, on the very 'same evening, to call on Mr Grant and insist on the papers being instantly delivered 'up to him. Mr Grant being desirous to preserve copies of them, wrote Reid's son, 'requesting him to give him time to do so; but, on the following day, Reid's son 'again called on Mr Grant, and peremptorily demanded that they should forthwith be delivered up to him. In making this urgent demand, the object of Reid and his son

'fic and relevant to infer a conclusion for damages, and to that extent 'dismisses the action; and with regard to the third and fourth num- 'bers of the fourteenth articles of the condescendence *, remits the 'case to the jury roll.' 26 June 1835. Lyon v. Reid.

Note.—'On the supposition that the disposition and assignation 'of the lands at Comely Garden to the defender was an absolute 'right, and not a right in security, all the proceedings, both in the 'process of sequestration and in the subsequent action, were car- 'ried on with perfect accuracy and propriety. And whether it was 'a right in security or not, the proceedings in the sequestration 'were warrantable; and accordingly the pursuer expressly with- 'drew his opposition to that process. The disposition was ultimately 'found to be a right in security in this Court, but not without dif- 'ficulty, and with still greater difficulty in the House of Lords, in 'which, although the interlocutors of this Court were affirmed, the 'pursuer was refused the costs of opposing the appeal. But it is 'no relevant ground for an action of damages that a party has been 'unsuccessful in a law-suit. It is true, the pursuer avers, in his 'condescendence, that the defender carried on the litigation mala 'fide and fraudulently, knowing that the disposition was a right in 'security; but to render a charge of that nature specific and re- 'levant, so as to warrant its being sent to a jury, it is necessary to 'state the facts from which mala fides and fraud are inferred, and 'there is no such statement in the present case. Lord Ordinary's Note.

'The averment, that the defender has not ceded possession of the 'subject, or that it is still under sequestration, is also irrelevant, 'for the pursuer does not say that he has paid or tendered the sum 'ascertained in the action to be the amount for which the disposi- 'tion still remains a security.

'The only points, therefore, which, in the Lord Ordinary's opi- 'nion, are proper to be sent to trial, are those which relate to the 'deterioration of the subject while in the defender's possession.'

The pursuer *reclaimed*, but the *Court* unanimously *adhered*. Judgment.

Lord Corehouse, Ordinary. Act. *Shaw*. Alt. *More*. *Chas. Fisher* and *Alex. Hutchison*, Agents. *S.* Clerk.

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'was fraudulently to take advantage of the death of Peter Lyon, and to pretend, 'contrary to the fact, that the assignation was an irredeemable and absolute right, 'and exclude the pursuer from the possession.'

* The articles here referred to are substantive allegations of damage done during Reid's possession.

SECOND DIVISION.

No. CXLIII. *26th June* 1835.

HUGH FRASER AND DR THOMAS FRASER,
(INCHBERRY'S EXECUTOR AND LEGATEE,)
against
A. T. F. FRASER OF ABERTARFF.

TACK.—MELIORATIONS.—CLAUSE.—*A stipulation regarding payment of meliorations in a renewed tack to this effect, 'It is here-'by agreed upon between the parties, that at, or as soon after the 'execution of this lease as possible, the whole houses, dikes and in-'closures upon the possession shall be comprised by one judicious 'person, to be named by each of the parties contractors, agreeably 'to the terms of the lease, and that one or more schedules of the 'appreciations shall be made up, to be signed by the appreciators, 'and by the parties contractors, and reference made therein to this 'tack, whereof they shall be considered a part; and the tenant 'agrees to defer all demands, on account of meliorations, until the 'expiry of this tack;'—found to be a mutual stipulation, and the omission by both parties to have an appreciation taken held to be no bar to the claim of the tenant, at the expiry of the lease, for the worth and value of the subjects to be established.*

PROOF.—*Circumstances in which a proof was allowed of the value, at the expiry of the tack, of the houses and fences which actually existed on the farm at the commencement of the tack, and had remained unaltered, and also of such of the same character as might have since been substituted therefor.*

EXPENSES.—*Remit made to the Sheriff to dispose of the question of expenses in this Court, as well as in his own.*

Narrative. HUGH FRASER, Abersky, as executor, and Dr Thomas Fraser, as residuary legatee of William Fraser, Inchberry, raised an action before the Sheriff of Inverness against Abertarff, as the late Lovat's representative, for sums due as meliorations on the farm of Inchberry. The claim stood in this situation:

By tack dated the 27th, and recorded the 29th December 1802, entered into between the late Honourable Archibald Fraser of Lovat, on the one part, and the late William Fraser on the other, proceeding on the narrative, inter alia, That, whereas a quorum of the trustees of the deceased Lieutenant-General Simon Fraser of Lovat, did, by lease, bearing date the 15th day of November 1785, and

7th day of September following, entered into between them, as trustees foresaid, and Major James Fraser of Belladrum, in name and behalf of his brother, let to Alexander Fraser, (Belladrum's brother,) and his heirs and subtenants, the lands of Inchberry, with the houses, as then possessed, in two equal divisions, by Major James Fraser, and John Fraser, tenant in the easter half of the lands, for nineteen years from Whitsunday 1785, to which lease, and all right and allowances therein contained, the said William Fraser had obtained right by two different subleases thereof; and whereas the said William Fraser had agreed to renounce his right of possession of the foresaid lands, held in virtue of the foresaid lease, from and after the term of Whitsunday 1802, on condition of the said Honourable Archibald Fraser entering into the said tack first above mentioned, and he having accordingly renounced and delivered up to the said Honourable Archibald Fraser the said lease and subleases thereof in his favour, to be cancelled or disposed of as Archibald Fraser should see cause: Therefore the said Honourable Archibald Fraser, in consideration of the tack-duty and other prestations, and with and under the conditions and declarations therein expressed, let to William Fraser and his heirs the said lands of Inchberry, with the whole parts, &c. as then possessed by him, for nineteen years from Whitsunday 1802, with a clause of absolute warrandice.

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Frasers v. Fraser.

Narrative.

The lease contained the following clause respecting meliorations: 'And whereas, by the foresaid renunciation, the lease granted by 'the said trustees on the estate of Lovat is considered as having 'expired at the term of Whitsunday last, whereby the said William 'Fraser is entitled to meliorations, in terms thereof, to the extent of 'three years' rent of the lands thereby let, (the said yearly rent being 'L.18 : 1 : 2 of money rent, and forty bolls of barley of victual 'rent,) and is entitled to the further sum of L.122 : 19 : 1 sterling, 'being the appreciated value of biggings and dikes on the said 'farm, as allowed in a minute of tack granted by the commissioners 'of annexed estates in favour of the said James Fraser of Bella-'drum, and allowed also by the lease now renounced, to which sum, 'as also the three years' rent for meliorations, the said William 'Fraser acquired right; therefore, it is hereby agreed upon between 'the parties, that at or as soon after the execution of this lease as 'possible, the whole houses, biggings, dikes and inclosures upon 'the foresaid possession shall be comprised by one judicious person, 'to be named by each of the parties contractors, agreeably to the 'terms of the said lease, and that one or more schedules of the 'appreciations of the said houses, biggings, dikes and inclosures 'shall be made up, to be signed by the appreciators and by the 'parties contractors, and reference made therein to this tack, whereof 'they shall be considered as part; and the said William Fraser agrees

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'to defer all demands on the said Honourable Archibald Fraser, or 'his foresaids, on account of the said meliorations, until the expiry 'of this present tack.'

By the lease William Fraser further bound and obliged 'himself, 'and his foresaids, to keep, maintain and uphold the said houses, 'biggings, dikes and inclosures contained in the said states and 'schedules, in equally good repair and condition as shall be therein 'expressed, during the whole currency of this lease, and to leave 'the whole in the like good condition at the expiry thereof; it being 'hereby declared, that the said William Fraser and his foresaids 'shall then, and not otherwise, be entitled to receive from the said 'Honourable Archibald Fraser, or his foresaids, or the succeeding 'tenant, the sums mentioned in the said schedules or estimates, or 'the value of the said meliorations, provided the same shall not ex-'ceed the said three years' rent, and the further sum of L.122, 19s. '1d. sterling, being the whole meliorations allowed by the said lease, 'granted by the said trustees;' 'provided always the said houses, 'biggings, dikes and inclosures shall be found, in the manner above 'expressed, to be worth that sum, and also provided they shall be 'found, at the expiration of this tack, to be in equally good condi-'tion and repair, and worth as much as they shall be found and stated 'to be in the said schedules and estimates made at the commence-'ment thereof.'

No appraisement was made of the buildings and inclosures on Inchberry at or after the commencement of the lease in 1802. Neither landlord nor tenant made any application for having that done.

William Fraser's executor and legatees brought this action against Abertarff, as Lovat's representative, for, 1*st*, the amount of the three years' rent of L.58 : 1 : 2 yearly, amounting to L.174 : 3 : 6; and, 2*d*, the sum of L. 122 : 19 : 1, making in all L. 297 : 2 : 7, with interest. In the proceedings which ensued, it was stated by the pursuers, that the subjects were kept in due and proper repair, and that Lovat never complained on this subject, nor applied to the Sheriff on account of want of due repair, as he was entitled to do; and besides, that the pursuers were ready to prove that the subjects are still of more value than the sums claimed; to ascertain which fact, if denied by Abertarff, they craved the Sheriff to order an inspection and valuation by tradesmen.

The defender, Abertarff, on the other hand, stated that it was now impossible to ascertain, in a habile manner, what was the value of the buildings at that time, and denied that they were worth the sum claimed by the pursuers, or that their value to the extent of the present claim, or to any other specific extent, was 'admitted and 'recognised' by the lease of 1802. The allowance for meliorations made by that lease had reference to an appraisement to be made.

The pursuers again maintained that it was Lovat's duty, as much as it was their constituents, if he thought it necessary, to have the valuations taken and completed; but he was aware that they were unnecessary, and, for the reasons already mentioned, he did not get the valuations extended and signed. Besides, that the defender could not qualify any loss or damage by this alleged omission. 26 June 1835. Frasers v. Fraser.

The Sheriff pronounced this interlocutor: 'The Sheriff-substitute 'having considered this process, in respect it is not denied that the 'houses, biggings, dikes and inclosures on the farm in question were 'worth a sum equal to the three years' rent, and to the further sum 'of L.122 : 19 : 1 sterling, specified in the lease of 1802, at the 'expiry of that lease in 1821, repels the defences: decerns against 'the defender, in terms of the libel, with interest from three months 'after the termination of said lease: finds him liable in expenses.' Sheriff's Judgment.

Abertarff advocated, and *pleaded*—1. There is truly no question at issue between the parties as to the worth or value of the houses, biggings, dikes and inclosures on the farm of Inchberry in 1821, when the lease of 1802 expired, and consequently, that there is no relevancy in the only ratio assigned by the Sheriff as the ground of his judgment, repelling the defences, and decerning against the defender in terms of the libel, and for expenses of process. 2. The claims of the pursuers, under the lease of 1802, arise as at the commencement of that lease, and that they have neither produced nor tendered any legal evidence of the worth or value of the houses, biggings, dikes and inclosures on the farm of Inchberry at that period. 3. The claims of the pursuers are barred by the failure of their constituent, the deceased William Fraser, to procure a valuation of the subjects in question, in terms of the lease of 1802, being the condition of his right to recover their worth or value at the termination of the lease. 4. That the only legal or admissible evidence of the extent of the claims of the pursuers would be a valuation under the lease of 1802, obtained in terms of that lease de recenti, after its commencement; and that no such valuation having been made at the time, it is incompetent, at the distance of upwards of thirty years, to supply the want of it by parole evidence, either of the worth or value of the subjects in 1802, or at any later period. Advocate's Pleas.

The respondents (pursuers in the inferior court) *pleaded*—1. The true construction of the lease imports or implies an acknowledgment by the landlord, that the houses and biggings on the farm were, when the old lease was renounced, of the value (at least) stipulated to be paid to the tenant under his former titles of possession. 2. The claim for meliorations, to the extent conditioned in the lease, was not contingent on a valuation or schedule being made, Respondents Pleas.

26 June 1835. Frasers v. Fraser.

and existed independently. 3. The provision for having a valuation made was not laid on the tenant alone, but was a mutual obligation, to be carried into effect only by common consent of landlord and tenant; and the neglect to have the valuation made, (if not made, or not now to be found,) affords no ground for discharging the tenant's claim, if otherwise established. 4. Upon a fair consideration of the terms and different clauses of the lease, the admitted value and condition of the buildings, &c. at the expiry of it in 1821, furnish sufficient evidence, in the absence of the valuation and schedules, to establish the claims of the tenant for payment of the meliorations insisted on in this action.

The cause having been debated before the Lord Ordinary, upon the record closed in the Sheriff-court, with additional pleas for the parties, his Lordship pronounced this interlocutor:

Lord Ordinary's Interlocutor.

'The Lord Ordinary having resumed consideration of the debate, 'with the closed record and whole process, finds, That the lease of '1802 establishes conclusively that, at the time of entering into it, 'there was due by the landlord, for meliorations previously made 'and ascertained by appreciation or otherwise, to the satisfaction of 'all parties, the sum of L.122:19:1, and the amount of three years' 'rent under the preceding lease, such rent being, for each such 'year, L.18:1:2 in money, and forty bolls of sufficient barley, 'the growth of the farm; and finds, That the true object and design 'of the other provisions and stipulations in the said lease of 1802, 'touching those previous meliorations, and the sum then due there-'for, was merely to fix the conditions upon which the ultimate pay-'ment of the sums so specified was to depend; those conditions be-'ing, in substance, 1*st*, That the houses and fences then on the 'farm should be kept up, till the issue of the new lease, in as good 'a condition as they were at its commencement; and, 2*d*, That 'they should *then* be actually worth the sums specified in the for-'mer appreciations; and with these findings, remits the cause to 'the Sheriff, with the following instructions: 1*st*, That he allow 'the parties a proof of their respective allegations, as to what was 'truly the value, in 1821, of the fences and buildings which were 'on the farm at the commencement of the lease in 1802; and, 2*d*, 'That he allow the pursuer, if so advised, to bring a supplementary 'action to ascertain and recover the value of any fences or build-'ings made during the currency of the said lease, which expired in '1821, and for which, in terms of that lease, he may be entitled to 'compensation; and that he conjoin such action, if brought within 'two months from this date, with the process now remitted; finds 'neither party entitled to any expenses incurred in this Court, but 'reserving to the Sheriff full power to dispose of all claims for ex-

'penses incurred in his court, both before and subsequent to the 26 June 1835.
'advocation.'

Frasers v. Fraser.

Note.

Note.—'It seems quite impossible to adopt the defender's con-
'struction of the clause relied on in the lease 1802, viz. that it
'merely *recites* the stipulations of a former lease, thereby renounced,
'and fixes the maximum to which the tenant might be entitled,
'upon proving, *by future appreciations*, that meliorations to that
'amount had been made. The whole structure and conception of
'the clause seem to be exclusive of such a construction; inasmuch
'as the right to the L.122: 19: 1, there mentioned, is put upon the
'very same footing with the right of the three years' rents; while,
'with respect to the L.122: 19: 1, it is expressly stated to be '*the*
"*appreciated value* of biggings and dikes, *allowed* in a minute by the
"commissioners of annexed estates, and also by the lease now re-
"nounced,' &c. It is perfectly plain, therefore, that, as to this sum,
'there had been a regular appreciation at a former period, and that
'the amount had been finally liquidated to the satisfaction of all
'parties concerned; and though no mention is made of any such ap-
'preciation having been formally made, as to the three years' rents,
'it is impossible to read the clause without seeing that it also is re-
'cognised as confessedly due, and in all respects in the same situa-
'tion with the sum already specified. The case, therefore, has
'really no resemblance to that of Macra, 7th June 1828, (6. *Shaw*,
'935,) referred to by the defender, in which there was no liquida-
'tion of the claim, by acknowledgment or otherwise, but a mere
'offer to prove its amount, at the distance of twenty years.

'The defender rested a good deal on the stipulation, that a new
'appreciation should be made as soon after the lease was executed
'as possible, and on the apparent neglect of this stipulation. It is
'to be regretted certainly that it was neglected, though the neglect
'is not to be imputed to *one* of the contracting parties more than
'to the other; but the Lord Ordinary is not only satisfied that its
'insertion in the lease gives no countenance to the defender's con-
'struction of the leading clause already noticed, but that, accord-
'ing to the defender's own admissions on the record, its neglect is
'truly of no consequence, or at least can be of no prejudice *to him*.
'The Lord Ordinary conceives its object to have been this: The
'appreciation of the L.122: 19: 1 had been made many years be-
'fore, and the buildings then valued might have fallen off or in-
'creased in value. Then the subsequent meliorations, though *ad-*
'*mitted* to have been *at least* equal to the three years' rent acknow-
'ledged to be due, and to which the tenant's claim was limited,
'might have been worth *a great deal more*. But it was the bargain
'of the parties in 1802, that these liquidated sums should not be

26 June 1835. Frasers v. Fraser.

'paid in 1821, unless it was then shewn, not only that meliorations 'to *that amount* were still extant on the farm, but that *any additional* 'meliorations that might have been made before 1802 had also been 'kept up to their value at that time; and it was with a view to fix 'the actual, and possibly the *excrescent* value at that time, that a re-'gular appreciation, as of that date, is provided for. If it shewed 'a greater value than that previously liquidated, the landlord was 'still to be excused from paying, unless the whole of *that* value 'had been kept up till the end of the lease, while, in no case, could 'he be made to pay more than the specified amount. If the de-'fender, therefore, had averred, in this case, that in 1802 the actual 'value of the meliorations was *much greater* than the specified sums 'now sued for, but had been afterwards greatly reduced, he might 'then have resisted the pursuer's claim, even though he admitted 'that, in 1821, there was value still left to the amount now claimed. 'But, instead of this, he has *distinctly averred*, (defender's state-'ments of facts, Art. 4,) that, at the date of the lease in 1802, the 'buildings and fences on the farm 'were *not* worth the sum claimed "now by the pursuer;' so that, upon *this* view of the object of the 'appreciation, it stands admitted that he can suffer no prejudice.

'He contends, however, no doubt, that on this assumption of 'the subjects being of *less* value in 1802, he ought not now to pay 'the sums sued for, even though they might have been worth these 'sums in 1821; because the additional value must then have been 'added *during the lease*, for which he cannot be made liable under 'the terms of this summons. Substantially it appears to the Lord 'Ordinary that the defender has no fair interest to maintain this 'objection, since, by the lease 1802, he is separately bound to pay 'for meliorations made during its currency, and the pursuer offered 'judicially to discharge all claims on this account, on receiving 'payment of the sums now sued for. But the defender having re-'jected this offer, and refused to admit (though he does not directly '*deny*) that the meliorations extant in 1821 (whensoever executed) 'were truly worth more than the sums now claimed, the Lord Or-'dinary has remitted to allow a proof of the fact, and also to allow 'a supplementary action for the later meliorations, in case, after 'proving the requisite value to have been extant in 1821, it should 'not be clearly made out that it had all been created prior to 1802. 'In this way, and in this way only, full and final justice will be 'done to the parties.

'No expenses have been found due to either party, because, 'while the Lord Ordinary adopts generally the pursuer's construc-'tion of the lease, he cannot possibly approve of the Sheriff decid-'ing without proof.'

Abertarff *reclaimed*, craving absolvitor. The respondents also *reclaimed*, craving a simple remit and expenses, or, at least, decree for the L.122 : 19 : 1, with interest from three months after the termination of the lease of 1802. 26 June 1835. Frasers v. Fraser.

The *Court* held the Lord Ordinary right in his construction of the clause relative to the appreciation of the subjects; and that Abertarff could found nothing on that, as it was the landlord's duty, as much as the tenant's, to have a valuation taken. Opinion of Court.

The *Court* pronounced the following interlocutor:

'The Lords having considered this note, and other proceedings, and also another reclaiming note against the same interlocutor, and heard counsel thereon, in respect it is now explicitly denied by the advocator that the houses and fences on the farm, at the expiry of the lease in 1821, were worth the sum of L.122 : 19 : 1, and the amount of three years' rent under the former lease, adhere to the interlocutor of the Lord Ordinary, with these variations, that the proof to be allowed to the parties, under the first instruction to the Sheriff, shall apply not only to the houses and fences which actually existed on the farm at the commencement of the lease in 1802, and have remained unaltered, but also to such of the same character as have since been substituted therefor; and further, remit to the Sheriff, with power to dispose of the question of expenses in this Court as well as in his own: *Quoad ultra*, refuse the desires of both reclaiming notes.' Judgment.

Lord Ordinary, *Jeffrey*. For Advocator, *Maitland*. For Respondents, *Sol.-Gen. (Cuninghame,)* and *Handyside*. *Æneas Macbean*, W. S. *A. D. Fraser*, W. S. Agents. *R.* Clerk.

R.

SECOND DIVISION.

No. CXLIV. 26*th June* 1835.

GREIG AND MORTON, W. S. AND ALEXANDER WEBSTER, *against* WILLIAM DUTCH.

PROCESS.—AGENT AND CLIENT.—*A party having got decree, with expenses, which, when taxed, were decerned for in name of his agent, and the unsuccessful party having brought a suspension of diligence by the agent for payment of the expenses, and also a reduction of the*

26 June 1835. Greig & Morton, &c. v. Dutch.

principal decree, in both of which actions he called the agent as a party defender, and the agent having, in the meantime, got payment of his expenses from his own client, — found, that the agent, upon lodging a minute in both processes, was entitled to withdraw as a party, under reservation of any question as to expenses up to that stage.

Narrative. In an advocation at the instance of Alexander Webster against William Dutch, decreet was obtained, 4th and 27th February 1834, against Dutch, with expenses, which expenses were decerned for in the name of Greig and Morton, as Webster's agents in the advocation. Upon this decreet diligence having been raised for payment of the expenses decerned for, Dutch brought a reduction of the decreet and charge, as also a process of suspension. In both of these processes Greig and Morton were called as defenders, in so far as they might have any interest in the decerniture of expenses in their favour. The decreet for expenses, in the name of Greig and Morton, was obtained merely to facilitate their getting payment of their account of professional charges, and they had no further interest in the process. Webster, who was primarily liable to Greig and Morton for payment of their account, had recently paid it, and they had no longer any interest in the finding of expenses in their favour, or in the process otherwise. In these circumstances a minute was given into the processes of reduction and suspension for Greig and Morton, stating it would be unnecessary to continue these actions against them as defenders, more especially as Webster, at whose instance the advocation was brought, and decreet in it obtained, was a defender in these actions, and was willing to sist himself in their place, and to defend the legality of the said decreet in all respects, including the decerniture against the said William Dutch for expenses.

The Lord Ordinary pronounced this interlocutor in both actions: 'Having heard the counsel for the parties on the motion contained 'in the foregoing minute, finds, that it is incompetent, at this stage 'of the cause, for the chargers, Messrs Greig and Morton, to with-'draw from this process, but that the same must proceed against 'them, as parties chargers.'

Judgment. Greig and Morton *reclaimed;* and the *Court* recalled the interlocutor, and allowed them to withdraw from the processes, reserving any question as to expenses up to the time of the giving in of the minute.

Lord Ordinary, *Jeffrey.* Act. *Sol.-Gen. (Cuninghame.)* *Greig & Morton*, W. S. Agents. Alt. *Rutherfurd* and *Semple.* *J. L. Woodman*, W. S. Agent. *F.* Clerk.

R.

FIRST DIVISION.

No. CXLV. *27th June* 1835.

ALEXANDER MARJORIBANKS
against
THOMAS MANSFIELD.

BANKRUPT.—*No allowance due to the bankrupt on sums realised out of the heritable estate, and paid over to preferable heritable creditors, this not being part of the nett produce of the estate in the sense of the act.*

THE pursuer was sequestrated 6th March 1828. He subsequently obtained an arrangement with his creditors, who agreed to discharge him on certain conditions, and inter alia they agreed 'to pay to the 'pursuer an allowance, according to the highest rate permitted by 'the bankrupt act, from the date of the sequestration to the date 'of his getting the discharge.' A dispute having arisen as to the amount of the allowance, the pursuer, after obtaining his discharge, raised the present action, the grounds of which will sufficiently appear from the following interlocutor and note of the Lord Ordinary: Narrative.

'The Lord Ordinary having considered the minutes of debate, 'accountant's report, and whole process, approves of the report; 'finds, that the pursuer is entitled to an allowance from the date of 'the sequestration to the date of his getting his discharge, equal to '5 per cent. on two thousand one hundred and seventy-seven pounds 'and sevenpence and nine-twelfths of a penny, under the deduc- 'tion of the trustee's commission, and the expense of winding up 'the sequestration; and in respect the payments made to the pur- 'suer, being one hundred and one pounds eighteen shillings, ex- 'ceeds that sum, assoilzies the defender from the conclusions of the 'libel, and decerns; finds the pursuer liable in expenses, subject 'to modification by the Lord Ordinary; and remits to the Auditor 'to tax the account thereof when lodged, and to report.' Lord Ordinary's Interlocutor.

Note.—'It is a new question, and not without difficulty, what, 'in the sense of the statute, is the nett produce of a sequestrated 'estate, 5 per cent. on which is the maximum of the allowance 'which can be given by the creditors to the bankrupt. Note.

'By the operation of the 54. Geo. III, c. 137, real creditors must 'deduct the value of their securities from their claims. They may 'settle with the purchasers of the subjects without the intervention

27 June 1835.

Marjoribanks v. Mansfield.

Lord Ordinary's Note.

'of the trustee, and he has no concern with the price, except in so 'far as the security proves deficient, and they are compelled to 'rank on the divisible fund: they are no parties to the sequestra- 'tion. It is thought, therefore, that no part of the price of heri- 'table subjects over which heritable securities extend, even though 'sold by the trustee, can be taken into account in this question, ex- 'cept the balance after deducting the security. If this be correct, 'it disposes of the principal objection made by the pursuer to the 'accountant's report.

'There is more difficulty with regard to the crown debt, which 'the trustee paid partly out of the moveable estate, at the date of 'the sequestration, and partly out of his subsequent recoveries, a 'measure adopted that the rents of the heritable property might be 'set free from the operation of the writ of extent. But, in conse- 'quence of this measure, which was for the benefit of the creditors, 'and in which they acquiesced, the divisible fund was larger and 'sooner realised than it would otherwise have been. It does not 'appear, therefore, that both the sum paid to the Crown, and all the 'rents subsequently recovered, can be taken into account. The busi- 'ness accounts of Mr Pedie, as agent in the sequestration, must 'clearly be deducted, and they have been audited in the usual man- 'ner. It is thought that the pursuer is not entitled to demand that 'they shall be audited again, on the ground that he was not a party 'to the first audit. The proceedings of the trustee and commis- 'sioners, if not objected to by the creditors, must be final as to this 'and every other matter entrusted to them by the statute; and to 'these proceedings, as the only legitimate mode of ascertaining the 'nett produce of the estate, reference must have been had when the 'agreement libelled on was entered into. If the pursuer could al- 'lege collusion or fraud on the part of the trustee and creditors, 'with a view to defeat the agreement, it might be a relevant ob- 'jection; but there is no specific charge in the condescendence to 'that effect.

'With regard again to Mr Pedie's account incurred prior to the 'sequestration, he held the title-deeds of the heritable property 'hypothecated to him for the amount. In obtaining payment, he 'was virtually exercising a right of retention, and stood on the same 'footing as an heritable creditor. There is no other objection 'which seems to require notice.

'The Lord Ordinary has awarded expenses, subject to modifica- 'tion, not only because some points of the case seem doubtful, but 'because the trustee did not proceed in all respects in terms of the 'statute, and because the report of an accountant became necessary 'to ascertain the nett produce of the estate.'

The pursuer *reclaimed*, and though the parties differed as to the precise extent to which the trustee had intromitted with the burdened heritable subjects, it seemed ultimately to be admitted, that the trustee had sold them, but had allowed the price to be drawn from the purchasers by the heritable creditors. 27 June 1835. Marjoribanks v. Mansfield.

Lords Balgray and Mackenzie delivered opinions in substance precisely similar to that of the Lord Ordinary. Opinion of Court.

Lord President.—The doubt I had on the subject arises from this, that the heritable and personal creditors did not keep their interests distinct. They allowed the trustee to manage for both. When he comes to sell the heritable subjects, and pays the price to the creditors, or allows them to take it, I don't see any difference between this case and where he pays debts preferably secured by diligence. The heritable creditors may refuse to take the benefit of the sequestration, and to stand to their action of maills and duties, or the personal creditors may decline interfering with the heritable estate, and may confine themselves to such funds only as are available to them; but here both were massed under one management: That is the difficulty I have.

(*Lord Gillies* was absent.)

The *Court* adhered. Judgment.

Lord Corehouse, Ordinary. Act. *Dean of Fac. (Hope,) Marshall. Buchanan. And. Clason*, W. S. *Jas. Pedie*, W. S. Agents. Alt. *Keay, D.* Clerk.

C.

FIRST DIVISION.

No. CXLVI. *27th June* 1835.

ALEXANDER SMITH
against
MRS ANNE MACBETH OR LAUDER.

PROOF.—OATH ON REFERENCE,—*Circumstances in which held negative.*

THE defender in this case having alleged that a certain sum had been given to the pursuer, in loan, by a party deceased, whom the defender represented, the matter was referred to the pursuer's oath, when he admitted a payment to his wife of a sum (considerably within Narrative.

27 June 1835. Christie v. Allan's Executor.

swered, that the said Robert Allan had virtually become the sole next of kin of his father, by the renunciation of the younger children in his favour; that, in this way, the confirmation was expede in his own right, and, accordingly, the funds thus vested in him were embraced by the 31st section of the Bankrupt Act, which gave the trustee power to complete the bankrupt's titles to such moveable or personal estate as he might have succeeded to as nearest in kin; in other words, vested such moveable estate in the trustee, where, as in this case, the title of the bankrupt had been already completed; that the cautioner in the confirmation was ready to confirm this right of the trustee, and that it would be a saving of expense, and for the benefit of those interested, to have the whole estate under one management.

Opinion of Court.

The *Court* were of opinion, that, in the whole circumstances of the case, it would be most expedient not to interfere, but to allow the multiplepoinding to proceed. They accordingly pronounced the

Judgment.

following interlocutor: 'In respect that Robert Allan, the raiser of 'the multiplepoinding, was confirmed as executor of his father, under 'the usual obligation to account to all concerned, find, That there 'are no valid grounds on which Robert Christie, the trustee on the 'sequestrated estate, is entitled to oppose this multiplepoinding 'proceeding in the name of the said Robert Allan, and to insist on 'the funds in medio being administered and distributed under the 'sequestration: Therefore repel the objections stated for the said 'Robert Christie, and remit to the Lord Ordinary to proceed in the 'process as shall be just, reserving all questions of expenses.'

For the Trustee, *Wood*. Alt. *Dean of Fac. (Hope,) Anderson, W. Bell.* John *Wight*, W. S. *Smith & Kinnear*, W. S. Agents. *S.* Clerk.

C.

SECOND DIVISION.

No. CXLVIII. 27*th June* 1835.

HENRY SWAYNE AND MANDATARY *against* THE FIFE BANKING COMPANY.

PROCESS.—DAMAGES.—ISSUES.—(1.) *In an action of damages for wrongous apprehension and detention under a formal judicial war-*

rant,—found, that an express allegation of malice is not necessary. 27 June 1835.
(2.) *Question as to the proper form of the admissions and issue for the trial of such cases generally.*

Swayne and Mandatary v. The Fife Banking Company.

Narrative.

THE Cashiers of the Fife Banking Company applied to the Sheriff for a warrant of apprehension against Henry Swayne, the alleged debtor of James Swayne, formerly the bank's agent at Kirkcaldy, and whom the petitioners represented as in meditatione fugæ; and having caused Swayne to be apprehended, obtained an obligation that he would appear before the Sheriff; and Swayne having appeared before the Sheriff, another obligation was granted in his behalf, in consequence of a warrant for incarceration, until he should find caution de judicio sisti, in any action to be brought for payment of the alleged debt.

In an action of constitution of the alleged debt afterwards brought by the Fife Bank, Swayne was assoilzied by the Lord Ordinary and the Court.

Swayne thereupon raised an action for damages against the Fife Bank, on account of wrongous apprehension, &c.

In defence, it was stated, that the proceedings were adopted on fair and reasonable grounds.

Malice was alleged in the summons, but omitted in the condescendence. The relevancy of the condescendence in this respect having been objected to, the Lord Ordinary pronounced this interlocutor:

Lord Ordinary's Interlocutor.

'The Lord Ordinary having heard parties very fully, on the 'motion of the defender to have the condescendence for the pur- 'suer found not relevant, in respect that the averment of malice 'contained in the summons is omitted in the said condescendence, 'and having made avisandum, finds that it is not necessary, in this 'case, to have an allegation of express malice on the record; and 'therefore refuses the motion of the defender; and ordains the par- 'ties to proceed with the preparation of the cause.'

Note.

Note.—'The Lord Ordinary cannot find any authority for hold- 'ing that an express allegation of malice is necessary in any case, 'either for wrongful arrest and imprisonment on a meditatio fugæ 'warrant, or in any analogous case where injury has been done to 'person or property, under a warrant (however legal and regular) 'issued without any judicial cognisance of the merits, and at the 'mere will and discretion of the party who applies for and puts it 'to execution.

'In the case of Clark and Thomson, in 1816, (reported in '1. *Murray*, 161 and 180,) the Court of Session found damages due, '(remitting to the Jury Court merely to assess the quantum,) inter

27 June 1835.

Swayne and Mandatary *v.* The Fife Banking Company.

'alia, for an arrest and detention on a meditatio fugæ warrant, 'without any proof, or even allegation of malice or irregularity in 'the procedure; and in the case of O'Reilly, (2. *Murray*, 414,) 'which was also one of meditatio fugæ, the issue was merely, 'whether the warrant was *wrongfully* applied for and executed. In 'the case of Battersbey, again, 1st March 1828, which was very de- 'liberately considered in this Court, (6. *Shaw*, 667,) it was expressly 'found, 'that the pursuer was *not* bound specially to allege malice "against the defender, or that the charge against her was preferred "without probable cause,' the action having been laid mainly on 'the ground that, upon a false allegation of having violated a par- 'ticular statute, she had been arrested and detained in custody, 'under a warrant obtained from certain Justices of the Peace.

'There is plainly a near analogy between this case and those of 'wrongful *interdicts*, *arrestments* or *sequestrations*, which frequently 'issue in initio litis, and without any discussion of the merits; and 'being taken at the discretion of the party, are commonly held to 'be executed periculo petentis, and consequently infer liability for 'damages, if injury is actually sustained without any allegation of 'malice. The case of *interdict*, it may be observed, has more ap- 'parent claim to be considered as *privileged* than the present, as no 'interdict is granted without *some* judicial investigation, and the es- 'tablishment of at least a prima facie case for the application, while, 'though this may be said to be the case as to that part of the pro- 'ceedings against persons in meditatione fugæ, which relates to the 'alleged purpose to leave the country, there is no such prima facie 'investigation as to the fact of *a debt being truly owing*, the mere 'oath of the applicant, if distinct and positive, making it imperative 'on the magistrate to make the necessary order. Yet, in the case 'of Robarts against Lord Rosebery (4. *Murray*, 1,) damages were 'awarded for the wrongful imposition of an interdict on the tenant 'of a lime quarry, without the slightest imputation of malice; and, 'in the later case of M'Arthur More and Hunter, 16th Nov. 1832, '(11. *Shaw*, 32,) though the ultimate decision was in favour of the 'defender, on the special ground, 'that the interdict had been ap- "plied for not to *invert* but to *continue* the previous state of pos- "session,' the doctrine was generally laid down by the Court, "that interdicts are obtained periculo petentis, and the party using "them is liable to indemnify the other party, if he be wrongously "interdicted;' and it does not appear that the slightest countenance 'was there given to the notion, that special malice must be esta- 'blished.

'Damages were awarded for the *arrestment* of a vessel, on an 'Admiralty precept, in Clark and Thomson's case, already referred 'to; and for *sequestrations* laid on for more rent than was due, in that

'of M'Leod *v.* M'Leod, 11th Feb. 1829, (7. *Shaw*, 396,) though 'no malice was alleged in either case; and in like manner, relevancy was found as for damages, in a case of summary *ejection* on 'a Sheriff's decree, there being no such arrear of rent as to justify 'the proceeding, though there was no imputation of malice or mala 'fides; Urquhart, 20th May 1824, (3. *Shaw*, 84.)

'The case of Arbrukle, referred to on the other hand, (3. *Dow*, '180,) as well as that of Richardson, 1st June 1833, (10. *Shaw*, '607,) where it was held necessary to libel malice, were cases of '*criminal* prosecutions, and went upon the principle of encouraging 'good citizens to bring public delinquents to justice; while that 'of Nairne, 18th July 1832, (10. *Shaw*, 844,) was decided entirely 'on the words of the Police Act, out of which it arose. An issue, 'no doubt, was taken on malice, in Clyne *v.* Duffus, (4. *Murray*, '558,) for improper use of diligence, and in Watt *v.* Blair, (4. *Murray*, 571,) for an alleged malicious seisure of lint seed, but under 'very peculiar circumstances in both cases; while in that of Duff '*v.* Bradberry, 19th May 1826, (4. *Shaw*, 22,) it is manifest that 'the action of damages was ultimately dismissed, not so much be'cause malice was not averred, as because no *relevant* grounds 'either were or *could be* libelled consistently with the facts admitted 'on the record; the action, on the dependence of which the arrest'ment had been executed, and the meditatio fugæ warrant applied 'for, having been decided with expenses *against* the pursuer of the 'damages.

'In deciding that it is not necessary in this case to aver express 'malice, and appointing the preparation of the case to proceed, the 'Lord Ordinary does not mean to prejudge the right of the parties 'to suggest, or of the issue clerks to report, such issues as may seem 'fit consistently with this particular finding; and in whatever terms 'the issues may be reported, he thinks it right to say, that he con'ceives the substantial question for the jury must be, whether, on 'the one hand, the defender acted (if not maliciously) at least with 'blameable rashness or negligence; or, on the other hand, had rea'sonable grounds and probable cause for all he asserted? When it is 'said that a party sues out and executes a precautionary warrant of 'this kind *at his peril*, this does not mean that he must always pay 'damages, unless he shall actually succeed in the action he is about 'to raise, but only that he must shew that he had fair and reason'able grounds for raising it, and that his failure in such action will 'place the onus of so shewing upon him. This is well explained 'in the opinions of Lords Balgray and Gillies in the case of Mac'Arthur More and Hunter, already referred to, (11. *Shaw*, 32,) 'and by Lord Gillies in Bradberry's case, (4. *Shaw*, 24,) and

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'seems to have been in view in framing the second issue in that of 'O'Reilly, (2. *Murray*, 414.) Upon the strength of that last pre-'cedent, indeed, the Lord Ordinary did suggest to the parties in 'this case, whether there would be any objection to one issue, 'whether the defender deponed to the debt, &c. without probable 'cause? But the pursuer, while he did not seriously dispute that 'this would be the true question for the jury, contended that the 'onus should not be on him, since he already held a final decree, 'establishing that there was no debt, and consequently raising a 'presumption against the bona fides or discretion of the defender, 'to which there was nothing parallel in the case of O'Reilly. Per-'haps the defender might take a counter issue, and undertake to 'prove that he acted without malice and with probable cause. He 'might prove this, indeed, without an issue; but probably nothing 'short of putting it formally in issue would satisfactorily settle the 'sufficiency of such proof to entitle him to a verdict.

'In the meantime the Lord Ordinary leaves all this open. He 'only means to decide that *this* is not properly a *privileged* case, 'merely because the wrong was done through the instrumentality 'of a formal judicial warrant. When such a warrant can be had 'for the asking, and imports no judicial sanction or cognisance of 'the grounds on which it is sought, there seems no reason for re-'garding it as other than the private act of a party, for the con-'sequences of which he must answer as for his other private acts; 'and the course of practice in cases of this description, as well as 'in the analogous cases of interdict, arrestment, sequestration, &c. 'seems sufficiently to warrant this conclusion. He does not think 'that the rules of law as to injurious words used in the course of 'litigation have any true bearing on the present question, and would 'not think himself justified in borrowing any thing from the law 'or practice of *England*, as to arrest in civil suits, which seem to 'rest on principles fundamentally repugnant to those which we 'acknowledge.'

The defender acquiesced in the interlocutor, finding it unnecessary to allege malice; but in the adjusting of the issues difficulties having occurred, the Lord Ordinary reported the point to the Court, and stated, that the Jury Clerks had viewed it as a case, where a party applying for a warrant of apprehension incurred periculum of the highest kind, and that if he were unsuccessful in constituting his debt, no bona fides would save him from damages. For his own opinion his Lordship referred to his note; at the same time, as this related to an important part of the procedure in the incubation of issues, it was proper that the opinion of the Court should be taken.

The following issues had been proposed by the parties:

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Issues.

'It being admitted by the defenders, that Messrs Cheyne and Mackersy having, as cashiers of the Fife Banking Company, in whose right the defenders now stand, presented an application to the Sheriff of Edinburgh, against the pursuer, as in meditatione fugæ, to answer to a claim to the amount of L.100 : 11 : 11½, or thereby, and interest, and obtained a warrant thereon to bring him before the said Sheriff for examination, caused the said pursuer to be apprehended in Glasgow, on or about the 3d September 1828, when an obligation, that the pursuer should appear before the Sheriff of Edinburgh, for examination, was granted in his behalf; it being also admitted, that the pursuer having appeared before the said Sheriff on or about the 5th day of the said month of September, another obligation was, in consequence of a warrant for incarceration, until the pursuer should find caution, de judicio sisti, in any action to be brought for payment of the said sum, granted in his behalf; and it being also admitted, that in an action afterwards instituted for payment of the said sum, decree of absolvitor was pronounced by Lord Corehouse, Ordinary, on the 13th December 1833, and subsequently adhered to by the First Division of the Court:

'1. Whether at Glasgow, on or about the 3d or 4th days of September 1828, the defenders, by themselves or others, wrongfully apprehended the pursuer, or wrongfully caused him to be apprehended, and wrongfully detained the pursuer, or wrongfully caused him to be detained, to the loss, injury and damage of the pursuer?

'2. Whether, on or about the said 3d or 4th days of September, the defenders, by themselves or others, wrongfully caused the pursuer to grant a letter of presentation by George Reid, merchant or manufacturer in Glasgow, binding him to produce the pursuer in Edinburgh within one or two days, to the loss, injury and damage of the pursuer?

'3. Whether at Edinburgh, on or about the 5th day of September 1828, the defenders, by themselves or others, wrongfully apprehended the pursuer, or wrongfully caused him to be apprehended, or wrongfully detained the pursuer, or wrongfully caused him to be detained, to the loss, injury and damage of the pursuer?

'4. Whether, on or about the said 5th day of September, the defenders, by themselves or others, wrongfully caused the pursuer to grant the letter of presentation by his agent, Mr Andrew Scott, W.S., binding him to produce the pursuer in Edinburgh, within one or two days, to the loss, injury and damage of the pursuer?

'Damages laid at L.2000.'

The pursuer objected to the prefatory admissions, while the de-

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fenders held them to be necessary, leaving the whole question of probable cause open for trial.

Opinion of Court.

The *Court* thought that the admissions should stand, and that it would be open to the defenders to shew that they acted on reasonable grounds, and with probable cause.

Judgment.

Lord Glenlee proposed to insert, instead of 'wrongfully,' as in the issue, the words 'wrongfully, injuriously and oppressively.' The other *Judges* concurred, and the issue was adjusted accordingly.

Lord Ordinary, *Jeffrey.* Act. *Dean of Fac. (Hope,) Marshall.* *Andrew Scott,* W. S. Agent. Alt. *P. Robertson* and *Shand.* *John Shand,* W. S. Agent. *Mr Russell,* Clerk.

R.

FIRST DIVISION.

No. CXLIX. 30*th June* 1835.

GRANT
against
SIR GEORGE ROSE AND OTHERS.

PROCESS.—EXPENSES.—*Rule, that expenses must always be moved in the Inner-House, confirmed.*

WHEN this cause (reported ante, 9th June,) went before the Auditor, under the remit from the Court, the Auditor stated the expenses of the discussion in the Inner-House to the credit of Mr Grant.

To this the *Dean of Faculty*, on the part of Sir George Rose, (the committee,) objected, on the ground that there had been no special finding of expenses in the interlocutor: That it had been decided in a variety of cases, that the judgment of the Inner-House, where this was intended, should repeat the finding of expenses, and on this principle, that the statute declares, that the Inner-House shall also decide the question of expenses when the cause comes before them; and accordingly the practice was to repeat the finding of expenses in every interlocutor.

It was *answered*, that when the Lord Ordinary gave expenses, and his interlocutor was adhered to, that manifestly implied an adherence to the decerniture throughout; and such had been the understanding of the act in this Division of the Court; Lyon *v.* Reid, 20th Jan. 1831.

30 June 1835.

Grant v. Sir G. Rose and Others.

Lord Balgray observed, that since the cases referred to, there had been a consultation with the other Judges, by which he understood the rule to have been settled, as contended for by the Dean of Faculty.

Opinion of Court.

Lord Gillies observed, that there was a peculiarity in a multiplepoinding. In such a case, it was not exactly a finding of one party liable to the expenses of the other; it was somewhat different from an ordinary action, in which the pursuer is found liable in the expenses of the defender, or vice versa.

The *Lord President* said, that the words of the statute, requiring the Inner-House to decide the question of expenses, at the same time that it disposed of the merits of the case, were express, and that any other understanding must be erroneous.

The *Dean of Faculty*.—Are we then to understand that your Lordships, in this Division of the Court, will require us in all cases to move for expenses?

The *Lord President*.—Certainly.

Judgment.

The *Court*, accordingly, sustained the objection to the Auditor's report.

For Sir George Rose, *Dean of Fac. (Hope,)* and *M'Millan & Grant*, Agents. Alt. *Keay*. *Thomson & Elder*,

C.

FIRST DIVISION.

No. CL. 30*th June* 1835.

CLYNE'S TRUSTEES
against
SCLATER.

PROCESS.—EXPENSES.—*A party appealed against a judgment of this Court: he opposed an application for interim execution, in which he was unsuccessful: he then presented a bill of suspension of a charge on the interim decree, which was refused: and he afterwards entered an appeal against the award and refusal. There having been a reversal under the original appeal, the subsidiary appeal was remitted here in toto. In these circumstances the expenses of opposing interim execution granted, but not the expenses of the suspension and second appeal, and the expenses of the application to apply the judgment awarded, so far as the applicant had been successful.*

30 June 1835. Clyne's Trustees v. Sclater.

In this cause a petition was presented to apply a judgment of the House of Lords, the prayer of which was: 'May it therefore please 'your Lordships, to apply the judgment of the House of Lords; 'and, in terms thereof, to alter and recall the interlocutor appealed 'against under the second appeal; to find the petitioners entitled 'to all the expenses incurred by Mr Clyne, in consequence of the 'application by the respondents (pursuers) in the appeal for interim execution pending his original appeal, from the 22d day of November 1831, being the date of the application to your Lordships 'for interim execution, (including the expense of the second appeal,) 'and subsequent expenses, to the present date; and further, to find 'the petitioners entitled to the expenses of the present application, 'with procedure to follow thereon, and the dues of extract.'

The Court having remitted the petition to the Lord Ordinary, (Fullerton,) his Lordship 'found, that the interlocutor of the 5th 'of March 1831, granting warrant for interim execution, and the 'charge following on it, have fallen by the reversal in the House 'of Lords of the decree pronounced in the original cause; therefore found, that, under the remit, there does not remain any question on the merits requiring further discussion; found no expenses due to either party, and decerned.'

On a reclaiming note by Clyne's trustees, the Court again 'remitted to the Lord Ordinary, with power to recall the interlocutor reclaimed against, and to proceed in the cause as shall be just.'

Under this remit the cause came before Lord Cockburn, who pronounced the following interlocutor:

Lord Ordinary's Interlocutor.

'The Lord Ordinary having considered this case, (1.) Recalls 'the interlocutor of the Second Division of the Court, 5th March '1831, awarding interim execution, and finds the petitioners, the 'trustees of the late David Clyne, entitled to the expenses of opposing that application. (2.) In the suspension of the charge given 'to Mr Clyne, for payment of the sums for which interim execution was awarded, *of consent* suspends the letters, but finds no expenses due to the petitioners in that process. (3.) Finds the petitioners entitled to no expenses under the second appeal at the 'said David's Clyne's instance: And, (4.) Finds them entitled to 'their expenses under the present application, in so far as they 'have been successful, and decerns; appoints an account thereof to 'be given in, and when lodged, remits the same to the Auditor to 'tax and report.'

To this interlocutor Lord Cockburn added the following note, which fully explains the subject matter of his own, and the preceding interlocutor of Lord Fullerton:

Note.—'This is rather a peculiar case.

30 June 1835.

Clyne's Trustees v. Sclater.

Lord Ordinary's Note.

'The Court decided a cause against the late David Clyne, with 'expenses. On this he appealed. The successful party, Robert 'Sclater and others, applied for interim execution. This Mr Clyne 'resisted on various grounds, one of which was, that the applica- 'tion was not by the whole seventy-five pursuers, but only by sixty- 'six of them. The Court granted interim execution in the usual 'terms. Mr Clyne declined to pay the sum decerned for. On 'this he was charged. He suspended the charge, partly on the 'same grounds on which he had resisted the decree for interim exe- 'cution, but also on this one, that the bond had not been granted 'by the whole of the sixty-six persons who had petitioned for this 'decree, but only by nine persons acting for them, and that it was 'otherwise defective. Lord Moncreiff, as Ordinary, refused this 'bill, with expenses; stating in a note, that he held it to be incom- 'petent, and the objections to the bond 'quite untenable.' The 'Court adhered to this interlocutor, on advising a reclaiming note. 'Mr Clyne now presented a *second* appeal; 1. Against the inter- 'locutor awarding execution; 2. Against the refusal of the bill of 'suspension by Lord Moncreiff; and, 3, Against the adherence of 'the Court to that refusal.

'On hearing the first appeal, the House of Lords *reversed* the 'interlocutor. This judgment has been applied, and that branch of 'the case is finally disposed of.

'As soon as the reversal took place, it was plain that there was 'no need of hearing the second appeal. Accordingly Mr Clyne 'himself petitioned the House of Lords to reverse the three inter- 'locutors, and to give him his expenses without a hearing. This 'the House of Lords did not do; but pronounced a judgment, re- 'mitting not only the '*cause*,' but the said second '*appeal*,' to the 'Court of Session, to be dealt with according to justice, keeping 'the reversal in the principal cause in view *.

'In applying this remit, the petitioners, at the debate before the 'Lord Ordinary, insisted on the following claims:

'I. That the interlocutor awarding execution should be recalled, 'and with costs. This the preceding interlocutor grants.

II. That, in the suspension, the reasons of suspension should be 'sustained, and the costs of the suspender paid.

'The Lord Ordinary is of opinion that the petitioners are not

* The words of the remit, after detailing the proceedings which had taken place, are: 'It is ordered and adjudged, &c. That the said second appeal be remitted to 'the Court of Session in Scotland, with instructions to the said Court to proceed far- 'ther in the said cause second appealed from, as may be just and consistent with the 'judgment of reversal pronounced by this House in the said first appeal, and referred 'to in the said petition.'

30 June 1835. Clyne's Trustees v. Sclater.

'entitled to this. The suspension must be looked at *as at the period of the charge*, and of the interlocutor refusing the bill. Had Mr Clyne reason for suspending *then?* Lord Moncreiff thought not; the Court concurred in this; and, acting under the remit from the House of Lords of the whole second appeal, the Lord Ordinary is of the same opinion. The only alleged difference of circumstance is, *that since these judgments*, the interlocutor in the principal cause has been reversed. This would clearly entitle the petitioners to present a second bill on the ground of a supervening objection; but it cannot affect the first one. They argued that the attempt to enforce the order for execution was made, like an application for an interdict, periculo petentis. But if a petition for interdict had been fully considered, and its prayer granted by the Court, would the party applying be responsible, not only for all the consequences truly flowing from that application, but for all the costs incurred by his adversary in any collateral means which he might choose to resort to for trying the same point over again? The charge being given in due conformity with the interlocutor, Mr Clyne ought to have obeyed it in the interim, and the Court was bound to assume its own judgment to be correct till it was actually set aside. What if, besides a suspension, Mr Clyne had tried an interdict, and a declarator, and a reduction? Would the reversal oblige his opponent to pay for all these? The Lord Ordinary would not even have suspended the charge except for the *consent* of the respondents, who stated at the debate, that in order to simplify matters, or to relieve the fears of the petitioners, they had no objection to this matter being disposed of any how. But *quoad* expenses, they stood upon their right. And in determining the measure of this right, it does appear to the Lord Ordinary, that any obvious attempt to defeat an interlocutor awarding interim execution by a bill of suspension, ought to be strongly discouraged.

'III. That the expenses of the second appeal should be paid. This claim has not been granted, and for two reasons; *first*, Because the Lord Ordinary agrees with the Court in the propriety of awarding interim execution, and in supporting Lord Moncreiff's interlocutor refusing the bill of suspension; and therefore thinks the appeal groundless. *Secondly*, Because even though the appeal had been just, there was nothing in the case to warrant laying these expenses on the party who had the judgment of the Court of Session in his favour,—a thing almost never done in the Lords.

'The Lord Ordinary, moreover, has the greatest doubt whether it be *competent* for the petitioners to claim either the expenses of the suspension, or of the appeal, *under the existing application* by them-

'selves for applying the judgment. The prayer of the petition 'specifies how they wish it to be applied; but it asks none of these 'expenses, nor has it any general words to reach them.'

30 June 1835. Clyne's Trustees v. Sclater.

Clyne's trustees *reclaimed*, but the *Court* unanimously *adhered*. Judgment.

Lord Cockburn, Ordinary. Alt. *Rutherfurd*. Clerk.

For the Petitioner, *Dean of Fac. (Hope,) Boswell. David Manson* and *John Kennedy*, W. S. Agents. B. C.

FIRST DIVISION.

No. CLI. *30th June* 1835.

ANDREW DUNCAN
against
CREDITORS OF JOHN HUGHSON.

STATUTE 1696, c. 5.—FUTURE DEBT.—*Bond and disposition in security, granted to secure payment of rent, found to fall under the act.*

Narrative.

BY missive of tack, dated 3d and 23d of October 1820, the claimant, Mr Bruce, let to the common debtor, John Hughson, and his heirs, all his lands and estate in the united parishes of Dunrossness, Sandwick and Cunningbey, together with the whole parts, pertinents and privileges thereto belonging, with the whole kelp shores, wrecks and whales of every description that might be drifted, or happen to be thrown upon the said lands, and that for the space of five years from and after Martinmas 1820; for which causes, and on the other part, Mr Hughson bound himself to pay to the claimant the whole gross land-rents payable by the tenants from the said estate, as contained in a rental thereof subscribed by the parties, together also with the sum of L.100 sterling, in lieu and name of fishing profits, and also the proportion of the rents derived from the seating in the kirk of Dunrossness, corresponding to the claimant's interest therein; and also some feu-duties; all which sums were to be payable by Mr Hughson to the claimant at Martinmas yearly, till the year 1825, when the lease expired.

Hughson, after possessing some time under this tack, fell considerably in arrear, when it was arranged, that he should give security for the past and future rents, by granting bond and disposition in se-

30 June 1835. Duncan v. Creditors of Hughson.

curity, for the sum of L.1500, over some property in Lerwick which belonged to him; which was done 18th August 1823, and infeftment followed. A considerable time after the expiration of the lease, Bruce raised a process of adjudication against Hughson, in which he obtained decree, adjudging and declaring the subjects in Lerwick to pertain to him, in payment and satisfaction of the said sum of L.1500, with the legal interest, and liquidate penalty, which was stated to be then due, and to amount, when accumulated, to L.1998 sterling. Bruce then obtained a decree of mailla and duties, and entered into possession, and intromitted with the rents. On 13th June 1831, Hughson executed a trust-deed for behoof of his creditors, conveying to the trustee the said subjects, with a power of sale.

With a view to try the validity of the above right in security, the pursuer, Hughson's trustee, raised a summons of multiplepoinding, in which the claim for Mr Bruce was met by the plea, that the above bond and disposition in security, upon which the said adjudication rested, was struck at by the act 1696, c. 5; at all events, in so far as it exceeded arrears actually due at its date.

Lord Ordinary's Interlocutor.

The Lord Ordinary pronounced this interlocutor: 'The Lord 'Ordinary having heard counsel for the parties on the closed re- 'cord, finds the heritable bond of 18th August 1823, mentioned in 'the record, is ineffectual, except to the extent of the sum due and 'payable at its date, in respect it was granted for a future, contin- 'gent and indefinite debt: finds the adjudication of 22d May 1827 'ineffectual, in respect it was led exclusively on the bond, the debt 'alleged to be due under it not being duly constituted, and the ab- 'breviate not being duly recorded; and before further answer, re- 'mits to the common agent to ascertain the sum due at the date of 'the bond, and to report.'

Mr Bruce *reclaimed*, and argued, that the obligation in the lease, though not for a sum immediately prestable, was properly an equivalent for the conveyance in security; that it was the same as a bill or a bond, which, though not immediately due, must be held as value; that it was still more similar to a bond of annuity, which would be a sufficient consideration for a bond and disposition in security for the value of the annuity; and that, at all events, the claim must be sustained for such rents as were current at the date of said bond.

Judgment.

The *Court*, however, unanimously *adhered* to the interlocutor.

Lord Corehouse, Ordinary. Act. *Keay, More.* Alt. *Dean of Fac.* (*Hope,*) *Marshall. Gibson & Donaldson*, W. S. and *C. Spence*, Common Agent. *B.* Clerk.

C.

FIRST DIVISION.

No. CLII. 30*th June* 1835.

SHERIFF
against
SHERIFF'S TRUSTEES.

PROCESS.—DILIGENCE.—*Moir* moved for a diligence to obtain the books, receipts and prescriptions of a medical man, who had attended a person deceased, as evidence in a question of deathbed. *Walker* opposed the motion, on the ground that the party, whose books, &c. were wanted, was alive; and the only proper way to get information in this respect, was to call the party as a witness, and ask him to refer to his books or receipts, &c.

The *Court* refused the application.

Note.—The cause of the application was stated by Mr Walker to be, that the medical gentleman had married one of the legatees, and so disqualified himself as a witness.

Act. *Moir.* Alt. *Walker.* *James Knox*, S. S. C. *Walker, Richardson & Melville*, W. S. Agents.

C.

FIRST DIVISION.

No. CLIII. 2*d July* 1835.

ALEXANDER WATSON
against
ANN AND ISOBEL WATSON, ET E CONTRA.

SERVICE.—COMPETITION.—PROOF.—CAVEAT.—*In a competition of brieves, where two parties had served to the same ancestor, and afterwards each respectively brought a reduction of the other's service, and additional evidence having been allowed to be taken, by commission from this Court, in support of both services,—found, on advising the action of reduction by the party first served, (the action of reduction at the instance of the other party having been sisted of consent,) that the defenders had established their relationship in a nearer degree.*

2 July 1835.

Watson v. Watsons.

Question, whether a party who intends to serve in the knowledge of a previous service to the same ancestor, is bound to intimate his intention to the party so served.

Practice in Chancery in respect to caveats.

Narrative.

In the above causes, a reclaiming note was presented for Alexander Watson, praying that an interlocutor of Lord Cockburn, (by which his Lordship, in respect of a judgment of the Court of 25th February last, repelled his defences to an action of reduction, raised by Ann and Isobel Watson against him,) might be altered, or that at least the cause might be sisted till the issue of an appeal by said Alexander Watson against said judgment, and the alternative prayer of the reclaiming note was granted. The subject of litigation between the parties arose out of a competition for the heritable succession of Alexander Watson, town-clerk of Port-Glasgow, who died intestate on 11th September 1825. Each party to the cause claimed the representation of the deceased, Alexander Watson as the descendant of a granduncle by the father's side, Ann and Isobel Watson as descendants of an uncle also on the father's side. Alexander Watson was served, according to the above line of propinquity, as heir to the deceased, before the magistrates of Renfrew, on 17th November 1827; Ann and Isobel Watson, as heirs-portioners of the deceased, before the Sheriff of Perthshire, on 29th April 1829. Ann and Isobel Watson, founding on their service, raised an action of reduction of Alexander Watson's service, and Alexander Watson, shortly thereafter, raised an action of reduction of Ann and Isobel Watson's service. The pursuers in the first action founded on their nearer relationship, and stated various technical objections to the service of the defender. The defender denied the relationship of the pursuers, and justified the proceedings under his service. Alexander Watson, in the action at his instance, pleaded, that his service and retour afforded a good and sufficient title to insist; that the fact, that the service of the defenders was expede ex parte, without notice to a person whom the parties knew to have been previously served, and who had lodged a caveat in Chancery, afforded good ground for setting aside the proceedings under it; that it was incompetent to examine the aunts of the defenders as witnesses, on account both of their propinquity to the claimants, and of their eventual interest in the claim; and he denied the title of the defenders. The defenders justified their proceedings and relationship. On 10th March 1832, the Lord Ordinary (Moncreiff) pronounced this interlocutor in the second action:

Lord Ordinary's Interlocutor.

'The Lord Ordinary having heard counsel for the parties upon 'the closed record and whole process, before answer as to any

'points in the cause, in respect that the defenders offer to support 2 July 1833.
'the proof of their propinquity, as set forth in their claim in the
'service under reduction, by other and supplementary evidence, Watson v. Watsons.
'finds, That it is competent for them to lead such additional proof
'in this reduction; allows them a proof accordingly, and to the
'pursuer a conjunct probation, and grants commission, &c. reser-
'ving all questions as to the other grounds of reduction, and reser-
'ving all questions as to the competency and effect of the evidence
'already adduced.'

Of same date, on motion by Alexander Watson, his Lordship pronounced this finding, in regard to the action for reduction of his service, which action was the subject of the present reclaiming note: 'In respect of the interlocutor pronounced of this date, sists further 'procedure in this process, hoc statu.'

On 30th November 1832, a dispute having arisen as to the line of proof to be adopted, his Lordship pronounced this interlocutor, adding a note: 'The Lord Ordinary having heard parties' procurators, Lord Ordi-
'and thereafter made avisandum, and considered the whole state of nary's Inter-locutor.
'the cause, and particularly of the proof, finds, That, in the circum-
'stances, and from the nature of the case, and also in respect of the
'course of probation entered, and insisted upon by the defenders,
'and ultimately acquiesced in by the pursuer, it is competent for
'the pursuer, under the conjunct proof allowed to him, to prove all
'facts embraced by the condescendence tending to shew that the
'alleged pedigree, or line of propinquity founded on by the de-
'fenders, is false, and was got up by fraudulent contrivance and
'collusion with other persons, or that their service was prepared
'and carried through by them, or their agents, in the knowledge
'that the pursuer had been previously served heir to the deceased,
'and with the design of concealing the proceedings from him, in
'order that he might have no opportunity of appearing to investi-
'gate the proof, or oppose the claim: finds, That the proof now
'proposed to be adduced by the pursuer, as explained in the first
'part of his minute, though it may have a particular application to
'other substantive grounds of reduction libelled, has yet a sufficient
'pertinency and relevancy to the question, as to the truth or false-
'hood of the pedigree put forward by the defenders, and to the
'credit and value of the proof adduced in support of it, and has
'also a further relevancy to meet the inference deducible from the
'proof already led, and admitted on the part of the defenders;
'therefore finds the course of proof proposed generally competent,
'and remits to the commissioner to proceed accordingly, and re-
'news the commission and diligence till the third sederunt-day in
'January; but without prejudice to all relevant objections to par-

2 July 1835.
Watson v. Watsons.
Lord Ordinary's Note.

'ticular questions that may be put, consistent to this interlocutor, 'to be judged of by the commissioner.'

Note.—'This cause has got into an apparent state of perplexity, 'chiefly from over anxiety in framing the interlocutor of 10th March '1832, and the course of examination with which the defenders be-'gan their proof; but there is no real difficulty. There is no de-'nying that the facts averred have a certain relevancy to the whole 'complexion, weight and credit of the proof, whether they afford 'any substantive ground of reduction or not. They may not be of 'very great value in the question, if the proof should appear other-'wise satisfactory; but the Lord Ordinary cannot doubt, that, ab-'stractly, they are relevant circumstances in a doubtful case, which 'this may or may not be. As the cause stood on the closed record, 'various courses might have been taken; 1*st*, The effect of the pur-'suer's previous service, and all the facts averred as to the conceal-'ment of the proceedings of the defenders, might have been taken 'up first, and a proof, if necessary, allowed. But this was embar-'rassed with the separate reduction of that service, which must then 'have been discussed on form and merits. 2*d*, A proof on all the 'grounds of reduction, before answer, might have been allowed; 'but that also would have involved the merits of the other reduc-'tion. It might have been done, however, and might perhaps have 'saved the present discussion. 3*d*, It is conceivable that the whole 'case could have been sent to one jury, in both reductions, so as 'to effect an open competition. But the Lord Ordinary has the 'greatest difficulty in this. The verdict on the brieve of inquest 'remains untouched by any of the statutes; it is subject to the re-'view of this Court and of the House of Lords, not merely on error 'of law, or such gross error of fact as to make it in law contrary to 'evidence, but on the merits of the proof itself, as if it were to be 'judged of prima instantia. The proof therefore must be all ta-'ken in writing, and it may be supported or contradicted by other 'proof. There are also other objections arising from the constitu-'tion of the jury, and there would, perhaps, in this case, have been 'difficulties created by the particular nature of it: But, 4*th*, It ap-'peared pretty clear, on the face of the proof taken in the service 'of the defenders, that it was extremely meagre, and liable to many 'objections, besides being ex parte. If they had been content to 'put their case on it, the pursuer probably expected to bring the 'cause to a short issue, without any proof; and as the Lord Ordi-'nary held this to be competent, and believed, that whether they 'succeeded or failed in proving their propinquity, it would probably 'put an end to the cause, he thought it the best course, with the 'concurrence of the parties, to allow such a proof, but, though not

'particularly thinking of the points which have arisen, he certainly understood that all competent evidence material for estimating the credit and value of the proof should be admitted. He has not read the proof with the view of forming any opinion on the effect of it. If the pursuer were to waive his demand to go now into the matter to which the interlocutor refers, the merits of the case might be immediately discussed; but it is very doubtful whether that would, in the end, shorten the proceedings. If it is taken now, it is very probable that no more proof will ever be necessary.'

2 July 1835. Watson v. Watsons.

On 7th June 1834, having circumduced the term for proof, Lord Moncreiff pronounced the following interlocutor, adding a note: 'The Lord Ordinary having considered the state of the process as a concluded cause, and heard parties' procurators at great length on the merits of the process, appoints them to prepare and lodge cases for the consideration of the succeeding Lord Ordinary, or to be reported to the Court as he may determine.'

Lord Ordinary's Interlocutor.

Note.—'The Lord Ordinary has not been able, since the debate was concluded, to consider the proof, and the various points of arguments applicable to it, in such a manner as to form an opinion on the merits of it. It may be necessary, however, to call the attention of the parties particularly to one point, on which the ultimate extrication of the case may, in a certain event, very much depend. The record was prepared, and the additional proof allowed in this reduction, at the instance of Alexander Watson, while the counter action at the instance of the defenders stood sisted mainly on this principle, that if it should appear that the propinquity of the defenders, Ann and Isobel Watson, was made out, there would be an end of the cause, and it would be unnecessary to discuss the merits of the pursuer's claim or service, seeing that the former claim in a nearer degree. But if it should be the opinion of the Lord Ordinary or the Court that the propinquity of the defenders is *not* proved, it may not necessarily follow that their service is to be reduced *at the instance of the pursuer*, without trial of the merits of his service, and allowing him, if he desires it, in the other action, to lead additional proof, or the pursuers in that action to impeach his propinquity by evidence. The Lord Ordinary does not mean to give any opinion on that question; he only thinks that it is very material that it should be attended to in preparing the cases. The Lord Ordinary would also suggest, that the point urged, on the part of the pursuer, concerning the ages of old William Watson and his sons, has appeared to him to be of great importance, and he doubts whether it was sufficiently obviated in the able argument for the defenders.'

Note.

2 July 1835.

Watson v. Watsons.

Cases having been lodged in terms of the above interlocutor, Lord Cockburn, as successor to Lord Moncreiff in the causes, made avisandum therewith to the Court.

The question, as decided by the Court, was entirely a question of evidence, proceeding on the assumption of the competency of the additional proof adduced. The facts, so far as admitted on both sides, were, that the intestate was the son of a ship-carpenter in Port-Glasgow, named John Watson; that this John Watson had a brother, James, who was a messenger in Edinburgh, and died without issue in 1789. It was further admitted by the pursuer of the present action, that the father of this John Watson, Alexander Watson, who also resided in Port-Glasgow, had by his wife, Mary Marshall, another son, William, according to an extract from the register of baptisms, thus: '*Port-Glasgow, 29th June* 1708. Alexander Watson 'and Mary Marshall had a child baptized, called William.' The defenders claimed their descent in the fourth degree from the said Alexander Watson and Mary Marshall, through this child William, who, they averred, had survived for a considerable period, and had migrated from Port-Glasgow to Moneydie in Perthshire, where he had settled previous to 1729, was married, and had children. It appeared by the session records of the parish of Moneydie, that a person of that name was so resident in the parish at said period, the name of residence alone being added to his designation. The defenders rested their case, not upon direct proof who this William Watson was, or where he came from, but their object was to shew, that James Watson, the messenger in Edinburgh, had acknowledged his descendents as relations, and that they, on the other hand, were aware of their relationship to him. There did not appear to be any dispute as to the fact, that the defenders were descended from a person of the name of William Watson, who so resided at Moneydie at the period above mentioned. The pursuer adduced no evidence to shew what had become of said William Watson, born at Port-Glasgow in 1708. James Watson, the messenger, left a settlement in favour of the intestate, his nephew; but in that settlement he took no notice whatever of his having any other blood relations, although their grandfather, by their account, was his nephew by another brother, and he, ex concessis, survived the messenger, and died a pauper. It farther appeared, in the evidence of both parties, that, so far as was known, the intestate was not aware of his having any blood relations. An excerpt from the register of burials for the parish of Perth was also produced, shewing that a person of the name of Robert Watson, who was understood to be the son of said William of Moneydie, had died at the age of eighty; which excerpt bore date 16th June 1800. Supposing the dates in these respective records to be correct, Wil-

liam of Port-Glasgow would have been twelve years of age at the birth of Robert. 2 July 1835. Watson v. Watsons.

The pursuer *contended*—That the defenders, being in the knowledge of his previous service, were bound to intimate to him their intention to serve, and to have made him a party to their service; and not having done so, the subsequent service of the defenders must, on that ground alone, be set aside. He alleged that there was a combination and conspiracy between the defenders, their agents, and some of the witnesses, to defraud the pursuer; and he led evidence in support of this averment. He impeached the evidence of the defenders, both under the service and subsequently, pointing out a variety of contradictions in point of date and otherwise, and because the testimony of the witnesses individually was not only inconsistent with the general averment of the defenders, but with itself, and with that of the others severally. Pursuer's Pleas.

The defenders *contended*—That they were not bound to take notice of the previous service; that it was the pursuer's own fault if he did not appear to oppose their service; and that although he had lodged two successive caveats in Chancery, he had allowed them to expire, and in consequence had not received notice from the clerk *. He denied that there was any real contradiction of testimony; and contended, that any contradiction which might be made to appear, naturally arose out of the circumstances. He denied the conspiracy; and farther contended, that esto there had been such conspiracy, there was no proof of the witnesses having been tampered with; that the united testimony of the witnesses, independent of the testimony of the aunts of the defenders, which, however, it was competent to rest upon, was sufficient to establish their relationship in a nearer degree than that of the pursuer; and accordingly, on that ground, his service must be set aside, independently of any other objection to which his service was liable. Defenders' Pleas.

When the cause was finally put out for advising, their Lordships, without hearing argument, intimated, that they were all of opinion the defenders had made out their propinquity, and that independent- Opinion of Court.

* The Clerk in Chancery deponed, 'that there is no official record kept of such 'caveats; that there is no publication of such caveats; that when the brieve is applied 'for after a caveat has been lodged, the deponent does not inform the party making 'the application that a caveat has been lodged, unless such party puts the question; 'but the deponent informs the party who lodged the caveat, that an application has 'been made for a brieve, provided the application for the brieve has been made within 'six months after the lodging of the caveat, but not otherwise.'

2 July 1835.

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Judgment.

ly of the testimony of the aunts; that it was impossible to suppose all the witnesses had perjured themselves, and there must have been an error in the record of burials as to the age of Robert Watson.

The *Court* therefore (26th February) repelled the reasons of reduction, assoilzied the defenders, and decerned; but found no expenses due.

Lords Ordinary *Moncreiff* and *Cockburn*: Act. *Dean of Fac. (Hope,) Shaw.* Alt. *Rutherfurd, Pyper.* *Patrick & Crawford*, W. S. and *Mackenzie & Macfarlane*, W. S. Agents. *S.* Clerk.

C.

FIRST DIVISION.

No. CLIV. 2d *July* 1835.

HEPBURN, &c.
against
JOHN BROADFOOT, &c.

CHARTER-PARTY.—BILL OF LADING.—BANKRUPT. — *The master and owner of a vessel freighted her, with special instructions from the affreighter to receive from his agent abroad a homeward cargo: The affreighter entered into a subcharter-party with certain merchants: The agents abroad were understood to be the ordinary agents of both affreighters: On loading the homeward cargo, the master granted the bill of lading in name of the sub-affreighters; but there was no evidence of his having done so from a knowledge of their possessing that character: On arrival he delivered the cargo to the said sub-affreighters; but even then it did not appear that the master knew whether they acted as agents, or in their proper character: A larger balance of freight was due by the sub-affreighters to the affreighter than was due to the master: The affreighter was sequestrated: In a multiplepoinding, brought in name of the sub-affreighters, a claim of preference by the master for his balance of the original freight, on the fund in medio, being said balance due to the said affreighter, sustained.*

KIRK was master and owner of a brig, called the Diligence of Leith. Broadfoot, merchant and ship-broker in Leith, was the affreighter; Hepburn and Company, merchants in Perth, the sub-affreighters. The whole question at issue is fully explained in the

very luminous note of the Lord Ordinary, subjoined to his interlocutor, whereby his Lordship 'sustained the claim of Robert Kirk, 'ranked and preferred him primo loco upon the fund in medio, '&c., and found him entitled to expenses.'

2 July 1835.

Hepburn, &c. v. Broadfoot, &c.

Lord Ordinary's Note.

Note.—'The claimant, Kirk, master and owner of the ship Dili- 'gence, chartered her to the other claimant, Broadfoot, for a voyage 'to Quebec and Montreal, and home to Newburgh, in the Tay, at 'a gross freight of L.500. By another charter-party, dated a few 'days afterwards, entered into between Broadfoot and Hepburn and 'Company, the latter took the vessel to freight from Broadfoot for 'the voyage home, binding themselves to load her with timber, '(which was also the return cargo contemplated by the original 'charter-party,) and to pay freight to Broadfoot at certain rates. 'It does not appear on the record whether Kirk, the owner, was 'cognisant of this second contract between Hepburn and Company 'or not. On the arrival of the vessel at Montreal, Kirk, who had 'then got certain instalments of the freight, in terms of the origi- 'nal charter-party, received a cargo of timber from Le Mesurier, 'Tilston and Company, merchants in Quebec. Those persons are, 'in the instructions from Broadfoot to Kirk, described as the agents 'of Broadfoot, the original freighter; and it is said by Kirk that they 'were also the agents of Hepburn and Company, the sub-freighters. 'The bill of lading granted by Kirk on getting the timber on 'board is granted directly to Hepburn and Company. On the 'arrival of the vessel at Newburgh, the cargo was delivered to 'Hepburn and Company, who, agreeably to instructions from 'Broadfoot, paid to Kirk the sum of L.100 to account. Shortly 'afterwards, by letter of the 14th November 1833, Broadfoot inti- 'mated to Hepburn and Company his wish that they 'should delay "settling for the balance until I see what quantity he (Kirk) de- "livers, and what money he received in Quebec, of which I have "yet got no account.' Kirk then, under the impression, as he 'states, that Broadfoot meant to dispute the amount of the balance 'of freight due, brought an action against him for that balance, and 'used arrestments in the hands of Hepburn and Company, intima- 'ting at the same time that it was done 'to guard them against "payment of the balance to Broadfoot, without prejudice to their "personal liability to himself for that balance, in terms of the bill "of lading, and relative charter-party.'

'Upon the summons being raised, Broadfoot wrote to Kirk's 'agent, expressing his surprise, and concluding, 'I merely wrote "Messrs Hepburn of Perth to delay settling with him, until the "correct balance he had to receive was ascertained; and to satisfy "you on this point, I annex a copy of my letter to those gentlemen

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" on the subject. I presume the freight of the return cargo will " amount to considerably more than Captain Kirk has to receive. " I consequently wished them to grant him a bill for no more than " the balance I was due him, and this they shall be instructed to " do whenever that balance is ascertained.' The action proceeded, ' and Kirk ultimately obtained decree against Broadfoot for the sum ' of L.174, as the balance due to him under the original charter-' party; which sum, it must be kept in view, is considerably less ' than the amount remaining due by Hepburn and Company, under ' the sub-charter-party and bill of lading. Hepburn and Company ' raised a multiplepoinding, in which the balance of freight due by ' them formed the fund in medio; and the only competitors now are, ' Kirk, the master and owner of the vessel, and Broadfoot, who, ' having been sequestrated, and discharged on a composition-contract, ' claims the fund in medio as in right of his creditors, and maintains ' that Kirk has no right of preference on the freight due by the ' raisers, and has only a claim, like any other personal creditor, ' against him, Broadfoot, for the composition due on the balance of ' freight under the original charter-party. As the arrestment used ' by Kirk was deprived of effect by Broadfoot's sequestration, the ' question turns entirely on the right held by Kirk, as the owner ' of the ship, to the freight due by Hepburn and Company, the sub-' freighters, in competition with Broadfoot, or rather with Broad-' foot's creditors.

' The Lord Ordinary is of opinion that Kirk is entitled to a pre-' ference. There is here, it will be observed, no question involv-' ing the interest of Hepburn and Company; a question which ' might have been attended with considerable difficulty, if, for in-' stance, Kirk, the owner and master, had been cognisant of the ' sub-contract, and had waived his right of lien by delivery of the ' cargo, and if Hepburn and Company had bona fide paid the whole ' freight due under their sub-contract to Broadfoot. Here it is ad-' mitted that the balance of sub-freight still due by Hepburn and ' Company is more than sufficient to pay that due under the origi-' nal contract to Kirk; and it appears to the Lord Ordinary that ' to the amount of the latter balance Kirk's claim must be sustain-' ed. It is true that Hepburn and Company were not directly ' bound to him by charter-party; but by the ordinary principles of ' mercantile law they were, by taking delivery of the goods, bound ' to him under the bill of lading for freight; which, in a case like ' the present, would probably be limited to the freight stipulated by ' them in their sub-contract with Broadfoot, the original freighter. ' The Lord Ordinary thinks that this would have enabled Kirk to ' raise action directly against Hepburn and Company for the amount,

'and a fortiori must it sustain Kirk's claim of preference in a question with the creditors of the party, or, as it happens here, the party himself, by whom under the original charter-party freight was due. There seems to be a most exact analogy between this case and that of a landlord claiming in the hands of a subtacksman sub-rents yet unpaid, in a competition with the creditors of the principal tacksman, in which circumstances the landlord's right of preference is unquestionable; and in confirmation of this it is to be observed, that from the correspondence, and particularly from the letter last quoted from Broadfoot to Kirk's agent, Broadfoot himself seems expressly to have recognised Kirk's interest in the balance of sub-freight due by Hepburn and Company to the extent of the balance due by him, Broadfoot, to Kirk, as soon as the latter balance should be ascertained.'

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Broadfoot *reclaimed;* but the *Court*, without hearing counsel for the respondent, unanimously adhered. Judgment.

Lord Fullerton, Ordinary. For Broadfoot, *Rutherfurd, Milne.* Alt. *Sol.-Gen. (Cuninghame,) Thomson.* *Alex. Simson*, S. S. C. and *Hotchkis & Meiklejohn*, W. S. Agents. *D.* Clerk.

C.

FIRST DIVISION.

No. CLV. 2d *July* 1835.

ANDREW M'CULLOCH AND JOHN MONTEITH *against* DAVID LAURIE.

FEU-CONTRACT.—CLAUSE.—*Construction of a feu-contract to the effect that the superior was bound to give access from the feu by a road formed in a particular manner.*

THE defender was the vassal of Hutchison's Hospital, in a part of the lands and barony of Gorbals. He refeued a portion of the same to John Christie, the author of the pursuers, for building, in lots marked Nos. V, VI, and VII, and the pursuers became possessors of No. V. These lots were described by measurement and boundaries. On the east, the houses built on them were to form part of the front of a street in Glasgow, called Portland Street; and on the west they Narrative.

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were bounded by the remaining property of the defender. Lot V. was situated to the north of VI. and VII. It was inter alia provided by the feu-contract between the defender and Christie, that 'the said David Laurie should be bound to make and form a cart 'entry, of not less than fifteen feet wide, leading from Eglinton 'Street to the steadings thereby feued, and through his grounds on 'the west of the said steadings, and that as nearly opposite the 'centre as possible of steading Number VI. above described, for the 'removal of dung, fuilzie or ashes from the said three steadings;' and it was further stipulated, 'That none of the dung or fuilzie 'shall be carried out by or through Portland Street, but by the 'back lane or entry aforesaid connected therewith, leading into 'Eglinton Street.' The defender being required by the pursuers to form said cart-road, to enable them to comply with the terms of the contract, he proceeded to form a cart-road of the prescribed breadth, in a straight line, directly up to the centre of the boundary of Lot VI, which lot, being between V. and VII, and eighty-two feet in extent, it was of course impossible for the pursuers to obtain access to the road except through Lot VI, or by a continuation of the road northwards on the defender's lands, along the boundary of Lot VI. The question, therefore, was, whether the defender was bound so to continue the road, he having declined to comply with the request of the pursuers.

Lord Ordinary's Interlocutor.

The Lord Ordinary pronounced this interlocutor, adding the subjoined note: 'The Lord Ordinary having heard counsel for the 'parties, and considered the productions, plan of the subjects, and 'whole process, finds and declares, That the defender is bound to 'form immediately, at his own expense, a cart entry from Eglinton 'Street through his grounds, to a point opposite the centre of the 'steading or plot of ground No. VI, of the dimensions and for the 'purposes specified in the libel, in so far as that has not been already 'done; and further, that he is bound to connect that entry, by a 'passage on his own ground, with the plot, No. V, belonging to the 'pursuer, in such a manner as to afford free ish and entry to both 'the tenements built, or to be built on that plot, for the removal of 'dung, fuilzie and ashes from these tenements, by the said entry 'to Eglinton Street, and for any other lawful purpose; and that the 'said connecting passage shall be of the breadth of fifteen feet, or 'at least of a breadth sufficient to admit the access and return of a 'cart; and, before answer as to the claim of the pursuers for damages, 'appoints the counsel for the parties to be further heard.'

Note.

Note.—'It appears from the feu-contract, that the three steadings or plots, Nos. V, VI, and VII, are feued as separate tenements, separate feu-duties and casualties being stipulated for each;

'and it is expressly agreed, that free ish and entry shall be given 'to the said *several* plots by Portland Street on the east, and by the 'passage or lane on the west to Eglinton Street. The buildings 'on all the plots are required to be similar in height, plan and de- 'sign, and not inferior in elegance to the houses on the opposite 'side of Portland Street. The owners or occupants of these houses 'are prohibited to carry out their dung or fuilzie by or through 'Portland Street; and they are bound to do so by the back lane or 'entry leading to Eglinton Street. It appears to the Lord Ordi- 'nary, from these and other provisions in the feu-contract, that it 'was the intention of the parties that the houses on the Plots V, 'VI, and VII, should have each a cart access afforded by the de- 'fender through his own ground, to connect them with Eglinton 'Street, or to the lane which runs from the centre of Plot VI. to 'Eglinton Street. It is quite clear, and is admitted, that it was in 'the contemplation of parties, that Christie, the first feuar, who is a 'builder, should dispose of the three plots separately; and if, as the 'defender maintains, the proprietor of Plots V. and VII. were to 'carry out their ashes, &c. by a cart-road, made through Plot VI, 'it is presumable, that a servitude of so severe and disagreeable a 'nature would have been alluded to in the contract, that the pur- 'chaser of Plot VI. might have been put upon his guard. The feu- 'duties of Plots VI. and VII, which are precisely of the same 'dimensions, are the same; and the feu-duty of Plot V, which is a 'foot in front larger, is a few shillings more; but if Plot VI. was 'to be burdened with a servitude of this nature, by which its avail- 'able extent and value would have been so much diminished, it can- 'not well be doubted that there would have been a proportional 'deduction of the feu-duty, more especially as the buildings on each 'plot were required to be such as would yield a rent double the 'feu-duty of each.

'The defender relies on the clause by which he is restricted from 'erecting houses on his ground, 'to the west of the plots or stead- "ings disponed, of a greater height than twenty feet, within twenty "feet of the said steadings.' But, looking at the whole tenor of 'the contract, that prohibition does not infer a permission to erect 'buildings of a less height, within fifteen feet, and up to the west 'boundary of the steadings.

'The defender refers to the feu-contract of the houses on the east 'side of Portland Street; but they do not seem to have any bearing 'on the question, the conditions being entirely different. The 'feuars there stipulate for a meuse lane on the east of their feus, 'and agree to pay feu-duty for half the ground necessary to form 'it; but, on the other hand, the feu-duties for each plot are lower

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'than those on the west side. Reference has also been made to a 'letter written by the defender to Christie and the pursuers since 'the present action commenced, to which no answer was returned 'by either; but it does not appear that Christie at that time had 'any interest in the question; and the pursuers had no knowledge 'of the communing to which it relates, even if the communing could 'be competently taken into view.

'In the Lord Ordinary's opinion, the defender's construction of 'the feu-contract is equally at variance with its words and its spirit.'

Judgment. The defender *reclaimed*, but the *Court* adhered.

Lord Ordinary, *Corehouse.* Act. *Dean of Fac. (Hope,)* and *James Anderson. Wotherspoon & Mack*, W. S. Pursuers' Agents. Alt. *J. S. More. W. A. G. & R. Ellis*, W. S. Defender's Agents. *D.* Clerk.

C.

FIRST DIVISION.

No. CLVI. 3*d July* 1835.

EDWARD RAILTON
against
ALEXANDER GRAY.

PROCESS.—JURISDICTION.—POINDING.—INTERDICT.—*Found to be consistent with the ministerial powers of a Sheriff in a poinding, after granting warrant of sale, to interdict a poinder from proceeding to sell, who set up as his title an implied mandate from the creditor, arising out of the possession of a promissory-note, of which said creditor was payee, the party applying to the Sheriff for interdict having obtained an assignation by said creditor in his favour, which was held to include the debt due by said promissory-note.*

THE respondent, Gray, presented a petition to the Sheriff of Lanarkshire, setting forth, 'That in the month of August last, Henry 'Jacques, boot and shoe maker in Glasgow, stopped payment, and 'at a meeting of his creditors, held on the 11th day of that month, 'he offered them a composition of 7s. per pound upon the amount 'of their debts, payable by bills, in equal instalments, at six, twelve 'and eighteen months, from the 1st day of September last: That 'the offer was subsequently accepted of by his creditors, and,

'amongst others, by Robert Pullman, merchant, Greek Street, 'London, and three composition promissory-notes for L.26:10:4 'each, payable as aforesaid, were granted by the said Henry Jacques 'to the said Robert Pullman: That, in the month of January there-'after, the said Henry Jacques left this country, and a meeting of 'his creditors was held, when it was resolved by those present, that 'joint measures should be followed by them for winding up the es-'tate, and the meeting named the petitioner as a proper person to 'whom they should make over their claims, that the necessary steps 'for recovery of the estate might proceed in his name, to prevent 'separate diligence; and the meeting recommended to the absent 'creditors to accede to these measures: That, as no person attended 'on behalf of the said Robert Pullman, he was written to; and on 'the 16th day of February last, the petitioner's agent received an 'answer from him, inclosing his account against the said Henry 'Jacques, amounting to L.229:6:5, with a letter or indorsation to 'said account, making over the said debt to the petitioner, with 'power to sue therefor in his own name, and discharge the same, 'and inclosing the three promissory-notes before mentioned, which 'are specially indorsed to the petitioner; for which debt the peti-'tioner obtained decree before your Lordship upon the 27th day 'of February last, alongst with other sums due to other creditors 'of the said Henry Jacques, and made over to him: That at the 'time the foresaid composition promissory-notes were granted, the 'said Robert Pullman held a promissory-note, granted by the said 'Henry Jacques to him, for L.102, 10s. sterling, part of the origi-'nal debt, but which the said Henry Jacques neglected to get up; 'and upon the latter leaving Glasgow, diligence was raised thereon 'in name of the said Robert Pullman and Edward Railton, agent 'in Glasgow, as his alleged mandatary; and certain effects which 'were then situated in the said Henry Jacques' shop in Ingram 'Street were sold on said diligence, on the very day that the said 'Robert Pullman made over his claim to the petitioner: That the 'petitioner's agent, Robert Muir, writer in Glasgow, on receiving 'the account with the letter or indorsation, waited on the said Ed-'ward Railton, and expressed his astonishment at what he had done, 'seeing that the said Robert Pullman had never granted the said 'Edward Railton a mandate for that or any other purpose connected 'with the said debt: That the promissory-note on which the poind-'ing had proceeded had been settled for, as aforesaid, by composi-'tion notes, and that the debt due Pullman had been made over to 'the petitioner, and intimated to Railton that the matter would be 'further investigated: That notwithstanding of this, and of the said 'Edward Railton's being perfectly aware of the petitioner holding

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'right to the said debt, due the said Robert Pullman, he, the said 'Edward Railton, and without any mandate as aforesaid, on the '20th day of March last, executed another poinding of the said 'Henry Jacques' household effects, proceeding on the foresaid pro-'missory-note of L.102, 10s. and diligence thereon, and has inti-'mated a sale thereof to take place to-morrow at twelve o'clock, in 'consequence of a warrant said to be granted by your Lordship, 'as the schedule of poinding, with the intimation of sale herewith 'produced, more fully bear; and as the said Edward Railton re-'fuses to desist from carrying the said sale into effect, although he 'was again certiorated of the above facts, by a protest taken in his 'office this day, when the foresaid indorsation or assignment of 'the account, with the composition promissory-notes and decree 'at the petitioner's instance, all before narrated, were exhibited 'and produced. May it therefore please your Lordship to consi-'sider the premises, to grant warrant, interdicting and discharging 'the said Edward Railton, defender, from proceeding with the fore-'said sale, till the future orders of Court; and, in the meantime, 'to appoint a copy of this petition, and deliverance to follow hereon, 'to be served upon him, and him to lodge answers thereto, within 'twenty-four hours thereafter; and upon again advising this com-'plaint, with or without answers, to find that the said defender has 'no mandate or authority from the said Robert Pullman to proceed 'with the said diligence, and with the sale of the said effects so 'poinded: That the promissory-note on which the diligence pro-'ceeds was long ago settled by the foresaid composition promissory-'notes, and that the debts due by Henry Jacques to the said Ro-'bert Pullman have been made over to the petitioner, and diligence 'raised in his name against Jacques for the amount; and to prohibit 'and discharge the defender, in all time coming, from carrying the 'foresaid diligence, on which the poinding has proceeded, into effect, 'by a sale of the poinded effects or otherwise; to find the defender 'liable to the petitioner in the expenses,' &c.

Sheriff's Judgment.

The Sheriff, on advising this petition, ordered answers, &c.; 'and in the meantime, and in respect of the productions made with 'the petition, interdicted, prohibited and discharged, as craved,' &c.; and thereafter, on advising answers, replies and duplies, pronounced the following interlocutor: 'Finds it admitted, That upon 'the failure of Henry Jacques, referred to in the process, a meet-'ing of the creditors was held on the 11th August 1832, to consi-'der of an offer of composition, at which meeting Daniel Macniell 'attended on behalf of Robert Pullman, the defender's alleged con-'stituent, as appears from the minutes of said meeting, (No. 10. 'of process,) which meeting was adjourned for eight days, and on

'which occasion the said Daniel Macniell agreed to supersede dili- 3 July 1835.
'gence against Jacques till the 20th of August 1832: finds, That,
'at a subsequent meeting of Jacques' creditors, held on the 28th Railton v. Gray.
'January 1833, it was resolved that Jacques should be rendered
'notour bankrupt, on a bill held by the pursuer, (one of his credi-
'tors,) to prevent preferences, and that his books should be depo-
'sited with the pursuer, as chosen by the meeting, to prepare a
'state of the bankrupt's affairs; and further, that the whole credi-
'tors should assign their claims to the pursuer, for the purpose of
'following joint measures, to prevent separate diligences and con-
'sequent expenses to the estate: finds it admitted, That although
'no person attended said meeting for behoof of said Robert Pull-
'man, a copy of the minute of said meeting was sent to him, and
'that an answer was returned, dated 14th February 1833, in which
'Pullman makes over to the pursuer the accounts due to him 'by
"Henry Jacques, amounting to L.229: 6: 5, with power to sue
"therefor in your name, and discharge the same;' and at same
'time inclosing three promissory-notes granted to him by Jacques,
'and indorsed to the pursuer, which forms No. 13. of process:
'finds it instructed by the extract decree, (No. 21. of process,)
'that the pursuer constituted and obtained right in his own name
'to said debt of L.229: 6: 5: finds, That, at the date of the said
'promissory-notes, the said Robert Pullman held a promissory-
'note, granted by the said Henry Jacques, for L.102, 10s., upon
'which diligence had been raised in name of Pullman, and the
'defender, as his mandatary, after intimation of the composition
'settlement, and indorsation of the account and promissory-notes
'in favour of the pursuer: finds, That neither Pullman nor the
'defender had any right to follow up said diligence on the promis-
'sory-note for L.102, 10s., after having indorsed the account and
'notes for the composition to the pursuer, in the full knowledge of
'the resolution of the creditors of Jacques, expressed in the minute
'of 28th January 1833; and that the correspondence subsequent
'to the service of the present action cannot affect or impair the
'pursuer's right to proceed in realising the estate, in terms of said
'resolution: Therefore repels the defences, continues and makes
'perpetual the interdict formerly granted; finds the defender liable
'in expenses,' &c.

Railton advocated, and *pleaded*, as an objection to the competency of the proceedings before the Sheriff, that as his powers were merely ministerial in respect to a poinding, he was not entitled to judge of the right or title of the party to the diligence, or the justness the debt; that the possession of a promissory-note is sufficient evidence of the holder's title to protest the same, and use diligence

Advocator's Pleas.

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against the granter; and it is also sufficient authority for a party to appear and act in the execution of diligence, as mandatary of the payee or creditor; that as there was no ex facie irregularity in the diligence, and as it was not disputed that the goods poinded were the property of the debtor, the grounds set forth in the petition were incompetently urged in a summary application to stop the poinding.

Respondent's Pleas.

It was *answered*—That as the respondent was fully vested with the right to the whole debt due to Robert Pullman by the bankrupt, Jacques, by the deliberate assignment thereof by the said Robert Pullman, granted for the purpose of following up the accession of the said Robert Pullman to the resolution of the creditors, by which they agreed to make over their claims to the respondent, with the view of taking joint measures for the general behoof, the respondent was entitled to interfere to prevent any steps, either of diligence, or of any other kind, in the way and manner set forth in the petition, the prayer of which was properly granted.

(There were allegations in the advocation to the effect that Pullman had assented to indorse the composition bills on account of misrepresentation; but these were not embraced by the present judgment of the Court.)

Lord Ordinary's Interlocutor.

The Lord Ordinary pronounced this interlocutor: Finds, That 'the petition to the Sheriff of Glasgow, at the instance of the respondent, was presented for the purpose of preventing the sale of 'certain goods belonging to Henry Jacques, shoemaker there: 'finds, That this sale was insisted in by the advocator, in the alleged character of mandatary of Robert Pullman, merchant in 'London, and in virtue of a poinding executed by him in that 'character, on a promissory-note for L.102, 10s. sterling, granted 'by Jacques to Pullman: finds it not proved that the advocator 'held any other mandate from Pullman, than what might be presumed from the circumstance of the promissory-note having been 'placed in his hands: finds, That any implied mandate which could 'be supposed to arise from that circumstance, was effectually recalled and extinguished by the subsequent assignation by Pull'man to the respondent of the whole debt due to the former by 'Jacques, of which debt this promissory-note formed a part: finds, 'That, at the date of the said poinding, and subsequent proceed'ings, the advocator held no mandate from Robert Pullman to ap'ply for and proceed with the said diligence; and therefore repels 'the reasons of advocation; remits the case simpliciter to the She'riff of Lanarkshire, and decerns: finds the advocator liable in ex'penses,' &c.

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Advocator's Argument.

The advocator *reclaimed*, when the *Dean of Faculty*, confining himself to the question of competency, *argued*—That if any point was settled, it was, that if a party came forward to demand a sale under a poinding, the judge had no right to inquire into his title. This was established in the case of Clarke; *Shaw*, iii. 96; 2d edit. Here Railton, having a bill transmitted to him by the payee, obtains a decree on a registered protest, and then proceeds to execute his poinding. He is in possession of a warrant of sale. Then a party comes forward, praying for an interdict; and without even hearing him, the Sheriff prohibited Railton from carrying the sale into effect. The applicant does not deny Railton's right to the bill; he merely avers, that, by a subsequent composition, the right has been extinguished. This is no ground for stopping a poinding, and the reason is plain: Railton is still liable to account for the proceeds of the goods; and if any party wishes to make him account, his remedy is a suspension. The powers of the Sheriff are merely ministerial. He cannot, in this way, impugn a title of this kind. If the Sheriff could interfere at all, it would only be where there is an ex facie defect in the title.

Respondent's Argument.

Keay, for the respondent, *answered*—This is not a question of competition of titles: it is a personal objection to the poinder. Here, Gray, the accredited mandatary of Pullman, appears, and asks the Sheriff to stop the poinding used in his name, he being unwilling that it should proceed. It is just the same thing as if Pullman had himself come to Glasgow, and asked the Sheriff to stop the proceedings. The decision of the Court, in Clark, was never intended to touch the previous decision in Mitchell, 14th June 1822, *F. C.*, the principle of which completely tallies with what is contended for here.

Opinion of Court.

Lord Balgray.—Suppose Pullman had granted a discharge, could you say the Sheriff was not entitled to interfere? I cannot view the party who executed the poinding in any other light than the common mandatary of Pullman. It is impossible to consider him as an onerous assignee. He was not entitled to put the money in his own pocket.

Lord Gillies.—Suppose Pullman had written a letter expressly declaring that he did not wish the poinding to proceed, and that letter had been produced to the Sheriff, would he not have been entitled to stop the poinding? Railton's mandate to proceed with poinding on the bill had unquestionably ceased. I don't care how. Are you then to sustain a poinding, at the instance of a person who had no mandate, when opposed by a person who had his authority

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to stop the proceedings? If a man should be imprisoned in virtue of a mandate granted by a creditor, but which had been recalled, that would amount to wrongous imprisonment.

On these grounds, the *Court* unanimously concurred in repelling the objection to the Sheriff's jurisdiction.

The *Dean of Faculty* having then proceeded to argue, that the allegations above alluded to were proved by the evidence in process, and *Mr Keay* having answered, it appeared to their Lordships that Pullman ought to be made a party to the proceedings, and the following interlocutor was accordingly pronounced:

Judgment. 'The Lords repel the preliminary objection stated to the Sheriff's jurisdiction, and, before further answer, remit to the Lord Ordinary to allow Robert Pullman to be sisted as a party to this process, and thereafter to hear parties further; with power to his Lordship, if he shall see cause, to recall his former interlocutor reclaimed against, and to do in the cause as shall be just; and the Lords reserve all questions as to expenses.'

Lord Fullerton, Ordinary. Act. *Dean of Fac. (Hope,) Paterson.* Alt. *Keay, Penney.* *John Cullen*, W. S. and *Henry Todd*, W. S. Agents. S. Clerk. C.

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SECOND DIVISION.

No. CLVII. 3*d July* 1835.

JOHN WALLACE
against
ALEXANDER HUME.

PROCESS.—JURISDICTION.—STATUTE, 10. GEO. IV. c. 58.—*Citation of a defender under the above statute found to be irregular, in respect, that while the complaint proceeded upon an account, it was not*

* This day the Lord President stated, that he wished to intimate to practitioners generally, that the Court experienced very great inconvenience from the manner in which appendices to records were printed; that one party asked to print documents, and then the other; that they accordingly printed them separately, and that the Court had thus great difficulty in finding them for reference; that it would be much better if agents would concert before printing, and put the documents together in one paper, in the order of time, with proper titles. For example, if a letter were printed, the answer should follow it, and be stated to be so; and that every appendix should be properly lettered. That due attention to an arrangement of this nature would be of great advantage to the parties themselves.

stated that 'a copy of the account' was therewith served, and the decree accordingly suspended, notwithstanding the clause in the act, declaring that the proceedings under it shall not be subject to review on the ground of informality.

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Wallace v. Hume.

Narrative.

By statute 10. Geo. IV. c. 55, (Small Debt Act,) it is enacted under sect. 3, that all causes and prosecutions shall proceed 'upon summons or complaint, agreeably to the form in schedule A subjoined 'to the act, stating shortly the origin of the debt or ground of action,' &c.; 'and a copy of the said summons or complaint, with the 'citation annexed, and also a copy of the account, if any, shall be 'served at the same time by the Sheriff-officer on the defender.'

Schedule A contains this form of citation:

'*Citation for defender.*

' defender, above designed, you are 'hereby summoned to appear and answer before the Sheriff in the 'matter, and at the time and place, and under the certification set 'forth in the above copy of the summons or complaint against you. 'This notice * served upon the day 'of 183 by me,

Sheriff-officer.'

The word notice has an asterisk, referring to an addition on the margin in these words: '* (If there is an account, the officer must 'serve a copy of it along with the copy of the summons or com-'plaint, and add here, 'with a copy of the account.')'

It is further enacted under sect. 18, that no 'decree given by 'any Sheriff, in any cause or prosecution raised under the autho-'rity of this act, when the Sheriff shall not have ordered any plead-'ings, arguments, minutes or evidence to be reduced to writing, 'shall be subject to advocation, suspension or appeal, or any other 'form of review or stay of execution other than herein-before pro-'vided, either on the merits, or on account of any omission in the 'proceedings, or of any irregularity or informality, or any ground 'or reason whatever, excepting only an appeal on the ground of cor-'ruption, or malice and oppression on the part of the Sheriff, to the 'next Circuit Court of Justiciary, or where there is no Circuit 'Court, to the High Court of Justiciary at Edinburgh.'

Alexander Hume summoned John Wallace before the Sheriff of Orkney under the above act, the copy of the summons or complaint served setting forth, 'That John Wallace, defender, is owing to the 'complainer the sum of L.3: 7: 8 sterling, per account produced.' The messenger's execution, after stating that the defender had been duly summoned, bore, 'This I did by leaving a full copy of the

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'above summons or complaint, with a citation thereto annexed, and 'a copy of the account for the said defender, personally appre- 'hended.'

Decree having passed in absence, the proceedings were brought under review of this Court by two successive bills of suspension. In the first bill it was stated, that although the summons served on the complainer appeared to have for its ground of action an account, yet no copy of the account was ever served upon the suspender. The only paper served, besides the copy of the summons, was a small slip of paper, containing the gross amount of the sum pursued for, and referring to an account alleged to be due by the suspender, and said to have been handed to him upwards of twelve years ago.

The Lord Ordinary having considered the first bill, with answers, 'refused the bill,' with expenses; observing, in a note, 'The only 'averment on which the suspension can be rested, viz. that no copy 'of the account was served on the suspender, is refuted, partly by 'his own admission, and utterly by the execution of the messenger.'

In a second bill, Wallace founded on the reduction of the messenger's execution recently brought, and stated as an objection to the citation served on him, that the copy citation served on him did not bear, in terms of the formula in schedule A, that this notice, 'with a copy of the account,' had been served. The citation left was therefore defective in the statutory requisites, as the officer had omitted to state in the citation that a copy of the account was therewith delivered.

Pursuer's Pleas.

The suspender, in support of his objection, and of the powers of this Court to take cognisance of and correct any deviation from the provisions of the statute, referred to the case of Brown *v.* Richmond and Co. 16th Feb. 1833, *Fac. Coll.*; where the Court held, that when a citation under the Small Debt Act is irregular, and contrary to the provisions of the act, the decree may be suspended; and pleaded further, that though the execution was ex facie correct, he was not precluded from objecting to the citation; Holmes *v.* Reid, 4th March 1829.

Respondent's Pleas.

Answered—1*st*, The objection is one of informality, and barred by section 18. of the act. 2*d*, It was obviated by the suspender's admission and the execution. 3*d*, The statute itself does not enjoin that the citation shall bear that a copy of the account was left. 4*th*, In the case of Brown, an account had been libelled; but no account was mentioned in the citation or execution as having been left, and no account was delivered to the defender, or produced in process. 5*th*, The execution here did bear that a copy of the account had been left, and that was probatio probata till set aside;

Ersk. Princip. iv. 2. 2; and no suspension can pass on the ground of error in the citation copy of a summons, until the execution has been reduced; Holmes *v.* Reid.

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The Lord Ordinary reported the bill and answers to the Court, with this note: 'The Lord Ordinary reports this case, partly because it concerns the practical administration of a statute as to which it is very desirable that the rules should be authoritatively fixed, and partly because the suspender, who is on the poor's roll, submits that he ought to be allowed to have the opinion of the Court as speedily as possible.

Lord Ordinary's Note.

'There are only two particulars as to which this bill differs from the first one. 1. A *reduction* has been instituted of the execution and decree. 2. It is now stated that the citation given to the defender, which is said to be produced, does not bear that a copy of the account was served upon him. It is not supposed that these circumstances are of much importance in a suspension. The suspender's remedy under the reduction will be reserved to him; and though the paper produced be assumed to be the copy of the citation left for the defender, and says nothing as to any account, *it is contradicted by the execution*, which bears that a copy of the account was served.'

The Lords passed the bill, upon juratory caution.

Judgment.

Lord Medwyn.—This case differs materially from the case of Brown. There, the claim had been stated to be contained in an account; and the complainer should have had the account written upon a separate slip, and served on the defender, and this should have been stated in the execution. The Court were correct in holding that the provisions of the act had not been complied with. Here, the account was served along with the claim, and it is so stated in the execution. The only objection is, that it is not also mentioned in the copy citation on the defender. Now, as to this alleged informality in the copy served, it is important to observe, that, in the statute, there is a clause declaring, that no decree shall be null in respect of any informality; and if effect be given to that clause, it should seem that the omission to notice the account in the citation, (it having been actually served, and so stated in the formal execution,) is a mere informality, which is covered by that clause.

Opinion of Court.

It is true there is a schedule annexed to this act, pointing out that when an account is served upon the defenders, it should be mentioned in the copy citation; but it is not said in this, as it is in many acts, that the schedule shall form part of the enactment; and although it is enacted that the complaint shall be conform to sche-

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dule A, it is not said that the copy citation shall be conform to said schedule.

Opinion of Court.

Upon the whole I am of opinion that the provisions of the act have been fully complied with, by service of an account, although this was not noticed in the copy citation.

Lord Justice-Clerk.—The view now taken would run counter to our decision in the case of Brown and Richmond, where we held that the parties must be brought formally into Court. Now, I doubt if this objection has been removed, or if the defender was brought properly before the Court. The proviso in the act is, that a copy of the complaint shall be left, with a copy of the citation annexed. The form of the citation is given in the schedule, and it demands the same attention as the execution. The act, of which schedule A, and all contained in it, forms a part, points out, that if there be an account, the officer must, in the copy of citation left, set forth the service of the notice, 'with a copy of the account.' The execution may be correct, but the citation is defective; and the objection is thus clearly within the principle of Brown and Richmond. As the Sheriff acts in this matter as the creature of statute, the provisions of that statute must not be evaded, but strictly complied with.

Lord Meadowbank.—From the decision in the case of Brown v. Richmond, I was satisfied that this party had not been brought formally into Court. Lord Moncreiff agreed with the majority in that case. The statute specially provides and refers to a schedule, which schedule contains words, shewing that something must be done—a form complied with—which was not attended to in this citation; and therefore this citation was informal, not being the sort of citation which the act expressly, and as we must hold, imperatively, enjoins.

Lord Glenlee agreed with the Lords Justice-Clerk and Meadowbank.

Lord Ordinary, *Cockburn*. For Suspender, *Benj. R. Bell*. For Respondent, *A. Lothian*. *John Ross*, S. S. C. and *William Murray*, S. S. C. Agents. *T.* Clerk.

R.

FIRST DIVISION.

No. CLVIII. *4th July* 1835.

SANDEMAN
against
SHEPPARD AND MACANDREW.

PROCESS.—BANKRUPT.—EXPENSES.—*Where a party to a cause has been sequestrated pendente lite, his trustee, in sisting himself, is not entitled to stipulate that the sequestrated estate shall not be liable in full payment of the expenses previously incurred.*

SANDEMAN, having reclaimed against a judgment of the Lord Ordinary, became bankrupt, and his estates were sequestrated. Mr Low was chosen trustee, and his appointment confirmed. The Court thereafter appointed Mr Low to state, within fourteen days, whether he intended to sist himself in the action. A minute for Mr Low was this day moved, in which he stated, that, in obedience to the above order, 'he now begged leave to sist himself as 'pursuer in the present action, but with and under this stipulation, 'that neither the trustee, nor the sequestrated estate which he re-'presents, should be liable in full payment of the expenses incur-'red by the defenders previous to the date of the sequestration, in 'the event of the action being dismissed, and of the defenders being 'found entitled to expenses.'

Rutherfurd, for the defenders, objected to the terms of the minute.

The *Court*, holding that Mr Low was not entitled to adject the stipulation therein contained, but must sist himself without qualification, or not at all, unanimously agreed in ordering the minute to be withdrawn. Judgment.

Act. *Russell.* Alt. *Rutherfurd.* *James Bennet* and *Æneas M'Bean*, Agents.
D. Clerk.

C.

SECOND DIVISION.

No. CLIX. *4th July* 1835.

ARTHUR GIFFORD OF THE ROYAL NAVY, AND MANDATARY,
against
ARTHUR GIFFORD OF BUSTA.

SERVICE.—COMPETITION OF BRIEVES.—PROOF.—1. & 2. GEO. IV. c. 38.—*A party to a service before the Junior Lord Ordinary, under the above statute, brought a reduction of the verdict, on the ground that it was contrary to evidence; and further pleaded that there was not sufficient evidence before the jury to instruct the claim of the other party, while there was sufficient evidence before the jury to instruct his own claim; the record was closed upon this plea, when he moved for leave to adduce further evidence,—motion refused hoc statu.*

Narrative. IN April 1831 the pursuer purchased a brieve from Chancery for serving himself heir in general to Thomas Gifford of Busta, addressed to the Sheriff of Orkney and Zetland. The brieve was executed edictally in January 1832. The defender having heard of the intended proceeding, appeared, by his agent, at the court of service at Lerwick, on 3d February 1832, and gave in objections, whereupon the court was adjourned till the first Tuesday of April. The pursuer, without notice to the defender, took out, and executed edictally, a second brieve of the same description, addressed to the Magistrates of Canongate, dated 24th, and executed 25th February 1832. The pursuer's agent, on being applied to, refused to abide by one or other of these brieves.

The defender took out and executed a competing brieve, addressed to the Magistrates of Edinburgh, dated and executed 7th March 1832, and instantly thereafter presented an advocation of all the three brieves, for the purpose of having them tried before the Junior Lord Ordinary of the Court of Session, in terms of the 1st and 2d Geo. IV. c. 38. The advocation was opposed in the Bill-Chamber, but the bill was passed; and the letters having been expede, and called in Court, the advocation was remitted to Lord Moncreiff. The parties obtained a general diligence for recovery of writings, and a commission to examine old and infirm witnesses in Zetland, under which a number of old witnesses were examined.

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A court of service, for trial of the competing brieves, was constituted, on 9th November 1832, before Lord Moncreiff, and the trial proceeded before his Lordship and a jury of fifteen professional men. After various adjournments and diets of proof, the proceedings of the Court terminated by a verdict in favour of the defender, and serving him nearest and lawful heir in general to his great-grandfather, Thomas Gifford of Busta.

The pursuer thereafter brought a reduction of the defender's service, on the ground of alleged informalities, and of the verdict being contrary to evidence. Among other pleas, the pursuer stated the following: 'The verdict and service now challenged are erroneous, and ought to be reduced, in respect there was not sufficient evidence before the jury to instruct the claim of the defender, or prove that he was the nearest lawful heir in general of the late Thomas Gifford: the defender's claim was disproved, while there was sufficient evidence before the jury instructing the claim of the pursuer, and proving that he was the nearest heir in general of Thomas Gifford.'

After the record had been closed, the pursuer moved the Lord Ordinary that he might be allowed to adduce new and further evidence in addition to that laid before the jury. The Lord Ordinary reported the point to the Second Division, pronouncing this interlocutor, with the subjoined note:

Lord Ordinary's Interlocutor.

'The Lord Ordinary having considered this case, in reference to a motion by the pursuers to be allowed to adduce new evidence at once, and independently of the import of the proof already taken, appoints both parties to print the record, and lodge the same in the Lords' boxes of the Second Division of the Court, with a view to reporting the same on Tuesday next; and grants warrant accordingly for enrolling the same in the Inner-House Rolls.'

Note.

Note.—'If the Lord Ordinary had disposed of this case himself, he would, in all probability, have considered the motion for additional evidence as he would a motion for a new trial, and would not have acceded to it at once, or until he had been satisfied that the verdict could not be maintained upon the evidence on which it rests. It surely deserves great consideration whether such a verdict,—in a competition,—before a fair jury,—directed by a Supreme Judge, is to be so little regarded as that new evidence is to be let in against it, and the whole case thrown loose again, as a matter of course, at the pleasure of either party; especially if it be the fact, (as is sometimes said, though not without strong contradiction,) that the case of Anderson, 13th June 1834, was in-

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'tended to establish that such new evidence must always be taken 'on commission, and can never be submitted to another jury.

'But, though the Lord Ordinary states these views as explana-'tory of his reason for reporting, he must add, that this point was 'not regularly debated before him.'

Pursuer's Pleas.

The pursuer, in support of the demand, *pleaded*—That he was in the same situation as in the review of a decision of an inferior court, in which he would be entitled to new proof to bear out a new plea. In the case of services the rules of the Jury Court cannot apply. In reductions proof has always been allowed; Galbreath, 4. *S.* & *D.* 734, in which there were counter brieves; and 12. *S. D.* & *B.* 421.

Defender's Pleas.

The defender *pleaded*, that he was entitled to have the case considered on the pursuer's first plea in law, previous to his being allowed new proof. He had a jus quæsitum in the verdict; and it was not averred that the pursuer had evidence now which he could not have adduced before the jury.

Opinion of Court.

Lord Justice-Clerk.—So long as the pursuer does not abandon his first plea, I cannot, hoc statu, entertain this proposal. The verdict was pronounced after a long investigation, in the course of which ample opportunity was afforded for the parties to see what proof they would require; and they must then have been satisfied with the evidence adduced, else a demand would have been made for time to bring forward further evidence; but the proof being closed, a verdict was returned in this competition. I think we cannot disregard that verdict, and allow additional evidence; and I shall reserve my opinion as to the competency of adducing additional evidence, until we have an application for such brought forward in a proper shape. The Lord Ordinary's note, in the case of Anderson, 13th June 1834, embraces a clear view of the law on this point. We considered the course there pointed out, in regard to taking additional evidence, most consonant with sound discretion.

Lord Glenlee.—I am most clearly of the same opinion. The competition of brieves is the proper and true process for trying the right to an estate. The service is the most solemn of all res judicatæ. Can you then, upon a general assertion that new evidence is desired, allow a proof at large? If a party offered to instruct that a certificate founded on was false or forged, or if he could shew any important fact noviter veniens ad notitiam, I do not mean to say he ought to be excluded from that.

4 July 1835.

Gifford and Mandatary *v.* Gifford.

Lord Meadowbank.—I am against the motion hoc statu.

Lord Medwyn.—The chief difficulty I have in the case is, that I do not see distinctly what the offer of proof is, and therefore I cannot accede to the demand hoc statu. Every verdict of an inquest must, I think, be subject to challenge. Neither the act of Geo. IV, nor the act establishing jury trial, make any change upon the original form of that peculiar process; and by the recent act abolishing the court of macers, there is an express reservation of the former power of review. It is no doubt true that the defender has a jus quæsitum in the verdict and retour till it is set aside; but that does not advance the matter much; for the question still is, by what procedure is it to be reviewed? Upon the original evidence alone, or may additional evidence be adduced to establish the pursuer's claim, and disprove his opponents? Before yielding to the request, however, I would require to be informed what the new proof is, and why it had not been adduced. It is important, however, in considering the present demand for leave to adduce further evidence, that there has been no instance in the reduction of any service, upon a competition of brieves, of new evidence having been received, and that it is only in the reduction of services in absence that additional proof has been allowed. At the same time, I cannot say that I am satisfied that it would be incompetent, in a reduction of a service, even upon a competition, to exclude additional proof, if it could be shewn that it had not been improperly withheld before. The object ought to be, to ascertain who truly is the right heir; and if it be competent at any time to adduce additional proof, I think it would be a hardship to compel the pursuer to go into his first plea, if he is unwilling to rest upon it.

Opinion of Court.

The *Court*, hoc statu, refused the motion for additional proof.

Judgment.

Lord Ordinary, *Cockburn.* Act. *Rutherfurd, G. Bell.* Alt. *Dean of Fac.*
(Hope,) G. Napier. *Thos. Ranken*, S. S. C. *G. & W. Napier*, W. S.
Agents. *R.* Clerk.

R.

SECOND DIVISION.

No. CLX. *4th July* 1835.

OFFICERS OF STATE
against
EARL OF STIRLING.

SERVICE.—PROOF.—COMMISSION.—*Held, that where additional evidence is allowed in support of, or with a view to impugn a service, the proof ought to be taken by commission.*

THE Officers of State brought a reduction of a service in absence, in favour of the Earl of Stirling, and both parties applied for leave to adduce further evidence.

Lord Ordinary's Interlocutor.

The Lord Ordinary pronounced this interlocutor, adding the subjoined note: 'Having considered this record, in reference to a 'motion made by each party for farther evidence, before deter-'mining in what form the evidence is to be taken, appoints both 'parties to print the record, and lodge the same in the Lords' boxes 'of the Second Division of the Court, with a view to reporting the 'same on Tuesday next, and grants warrant accordingly for en-'rolling the same in the Inner-House Rolls.

Note.

Note.—'The case of Anderson, 13th June 1834, is reported so 'as to convey the impression that the Second Division of the Court 'intended to lay it down *as a general rule*, that whenever additional 'evidence should be brought forward in the reduction of a service, 'it should be taken on commission, and not before a jury. On the 'other hand, it has been stated, that no such general rule was meant 'to be established. This is a point on which the Lord Ordinary 'thinks it his duty to consult the Court, especially as the expe-'diency of such a rule has, since the report of the case of Tushie-'law, been much questioned. It will be observed, that, in the pre-'sent case, there is a charge of forgery or fabrication of writings, '—a proper jury question.'

At the advising, the defender referred to Bell, 14th April 1819, 2. *Murr.*

Opinion of Court.

Lord Justice-Clerk.—The Lord Ordinary has not found whether new proof ought to be allowed; but it will be observed that this was a service in absence. He merely reports the cause as to the mode of proof; and my opinion is, that if further proof be allowed, it ought to be by commission.

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Lord Glenlee was understood to agree.

Lord Meadowbank.—I think that the circumstance of the service having been in absence makes a difference as to the mode in which the new proof may be taken. In the reduction of a service upon a competition, tried before a special jury and the Lord Ordinary, I would be against any trial by a jury.

Opinion of Court.

Lord Medwyn.—If further proof is to be adduced, I agree that it ought to be taken by commission. It would be strange, as, for instance, in the case of Gifford, tried by Lord Moncreiff and an intelligent jury of professional men, and decided after months of deliberation, and involving such a chain of evidence, nice and intricate, to send such a case to be tried before a jury of twelve men selected by ballot, who might probably, at one sitting, be called upon to dispose of the case, and under the direction of a judge with little time to consider the difficult questions which might arise in the course of the trial. How could such a case as that of Polmood, where the pedigree of the claimant was to be traced for two centuries, of course to be deduced chiefly from written evidence, have been reviewed by a jury trial in the modern fashion? The ancient assize, which reviewed a verdict of assize, was constituted in a very different manner.

The *Court* remitted to the Lord Ordinary, with a finding, that if further proof be allowed it ought to be taken by commission.

Judgment.

Lord Ordinary, *Cockburn.* Act. *Sol.-Gen. (Cuninghame,) Ivory.* Alt. *Rutherfurd, A. Anderson.* *Rod. M'Kenzie,* W. S. *Eph. Lockhart,* W. S. Agents.
T. Clerk.

R.

FIRST DIVISION.

No. CLXI. *7th July* 1835.

JAFFRAY
against
CARSWELL

PROCESS.—DECREE IN ABSENCE.—EXPENSES.—ACT OF SEDERUNT 12TH NOV. 1825.—*The Sheriff-clerk has not power to refuse to receive a petition to be reponed against a decree in absence, on the ground that the sum offered to be consigned is insufficient, but must leave the same to be judged of by the Sheriff.*

7 July 1835. Jaffray v. Carswell.

In an action brought before the Sheriff of Lanarkshire, at the instance of the respondent, Carswell, against the suspender, Jaffray, decree was pronounced against the defender, in absence, (25th March 1835,) the amount decerned for being L.22 : 15 : 6 of principal, and L.1 : 1 : 8 of expenses. Before extract, Jaffray applied to the Sheriff to be reponed against the said decree, 'on consignation of such a small sum as will be sufficient to cover the pursuer's agent's account of expenses attending the Court at taking the decree,' &c. which, it was alleged, in such a case as the present, amounted to 3s. This petition, with the defences, was lodged by Jaffray in the hands of the Sheriff-clerk, who refused to accept less than the whole expense of process; and thereafter (28th April) the decree was extracted, the dues of extract, in addition to the sums decerned for, amounting to 6s. 6d.

Jaffray brought a suspension of a charge on this decree, when the Lord Ordinary pronounced this interlocutor, adding a note:

Lord Ordinary's Interlocutor.

'The Lord Ordinary, having considered the bill and answers, 'remits to the Sheriff to repone the suspender, on his paying to 'the respondent the sum of L.3, 3s. of expenses of raising diligence and of answering the bill, and consigning with the clerk 'the sum due under the act of Sederunt, and decerns.'

Note.

Note.—'Since the clerk is said to have claimed too much, it was 'the duty of the suspender to have applied to the Sheriff, instead 'of obliging the charger to do diligence, and then attempting to 'take the opinion of this Court at once on the clerk's demand; (see '*Murray*, 22d Dec. 1826.) What the sum to be consigned is, the 'Lord Ordinary, who does not know the table of fees for the county of Lanarkshire, cannot say; and even though he could, he 'would not, because he thinks that this is a matter which, in the 'first instance, is peculiarly for the Sheriff, especially as the general practice of his Court is challenged, and the complaint is professed to be made on public grounds. The Lord Ordinary will 'only observe, that when the suspender quotes the last part of section 2. of cap. 5, he stops at the word *decree*, whereas the clause 'directs consignation of the expense of the *decree or procedure*.'

Suspender's Plea.

Jaffray reclaimed, and *pleaded*—That by the Act of Sederunt referred to, two remedies were provided in regard to decrees in absence, viz. 1. That in the case of a decree in absence, which has been extracted, the whole expenses should be consigned before reponing; and, 2. That in the case of an unextracted decree, the intention of the act was to allow the same to be recalled, on consignation of the expense of such decree, that is, of the pursuer's agent's fee for attending at taking out the decree, amounting to 3s.

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The words of the enactment, applicable to unextracted decrees, are, (c. 5, sect. 2,) 'If the defender be absent at the calling of the 'cause, the defender will not be reponed against the decree in ab- 'sence, until he has consigned, in the hands of the Clerk of Court, 'the expense of such decree or procedure, as the same has been 'modified, such consignation being subject to the future orders of 'the Sheriff.' In regard to extracted decrees, the words are, (c. 18, sect. 3.) 'When a decree has passed in absence, and has been ex- 'tracted, but has neither been in whole or in part implemented, 'it shall be competent to apply to the Sheriff to have the decree 'recalled; and on consignation, in the hands of the Clerk of Court, 'of the expenses incurred, the Sheriff shall have power to stop 'execution, and to repone the defender, as if decree had not been 'pronounced or extracted.'

That the present case was regulated by the first of these alternative provisions, and it had been so understood in all the other counties in Scotland. In the only analogous case which had occurred in the Court of Session, that of Eyre *v.* Skinner's Trustees, 22d Dec. 1825, *S. & D.* iv. 332, the Court reponed the defenders against a decree in absence, on producing defences and paying the expenses incurred subsequent to the summons, their Lordships holding, that as the summons remained an useful and available document to the pursuer, the defender could not be required to pay the expense of it.

Opinion of Court.

The *Court* expressed an opinion, that the course followed had been irregular, and that it was incompetent for the Sheriff-clerk to refuse receiving the petition, but should have left the matter to the determination of the Sheriff.

Lord Gillies, after reading the words of the act above quoted, said —Is it the Sheriff-clerk, or the Sheriff, who is to have the power of reponing a party, under the words of this clause? If it is the Sheriff-clerk, then perhaps he was right in refusing the petition, and giving out extract; but if this power was, by the act, vested in the Sheriff, then the Sheriff-clerk had no right to dispose of the case as he has done, but ought to have laid the petition before the Sheriff, so as to have enabled him to dispose of the case. If the provision had been that the petition should not be received without consignation of the expenses, the case would have been different. This was the only difficulty which his Lordship felt in the case.

Judgment.

The *Court* ultimately, on the suggestion of Lord Balgray, recalled the interlocutor of the Lord Ordinary, and remitted the cause to his Lordship to remit to the Sheriff, with power to take into consideration the petition, of date 15th April 1835, and to dispose

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thereof, and determine what sum of expenses shall be consigned by the petitioner before being reponed, and with power also to the Sheriff to determine the matter of expenses in this Court between the parties.

Lord Cockburn, Ordinary. Alt. *Rutherfurd.* *S.* Clerk.

For the Advocator, *Dean of Fac. (Hope,) A. M'Neil.* *Chas. Fisher*, S. S. C. and *Jas. C. Peddie*, W. S. Agents.

C.

FIRST DIVISION.

No. CLXII. *7th July* 1835.

MRS CAMERON AND MANDATARY *against* JAMES CHAPMAN AND MANDATARY.

PROCESS. — DECREE IN ABSENCE. — EDICTAL CITATION.—EXPENSES.—*Where a decree has been obtained against a party abroad and edictally cited, such party is not required, as a preliminary step in a reduction reductive, to pay the previous expenses.*

THE pursuer having brought the present action of reduction of certain decrees of constitution, &c. in which, as she was resident in London, she had been cited edictally, it was stated as a preliminary defence, that the said decrees having been pronounced after regular citations, and after the pursuer had made appearance and borrowed up the summons, it was not competent to entertain the present process of reduction of those decreets, until the pursuer has, in the first instance, paid the whole expenses incurred in the different processes in which the decreets challenged have been pronounced.

The Lord Ordinary repelled the defence, and found the defender liable in expenses, adding to his interlocutor the subjoined note:

Lord Ordinary's Note.

Note.—'Both parties declined any further examination of the 'books of Mr Clyne or Mr Manson, and rested on the excerpts al-'ready obtained *.

'The case of Smith, 9th March 1826, does not apply to this one, 'for there the party was cited personally. Neither does that of

* The excerpts consisted of charges for entering appearance in these processes, under this title: 'Clyne, David's trustees, or Rose, R. M. S. London, or Cameron, Mrs, 'London.'

'Brackenridge, 30th May 1834, for there, though the citation, like 'the present one, was edictal, the Court had no occasion to consi- 'der the effect of such a citation, in obliging the party who was 'absent to pay the cost before he could proceed *with a new action.* 'He was reponed in the original action, and the conditions of being 'so were regulated by act of Sederunt. 7 July 1835. Cameron and Mandatary v. Chapman and Mandatary.

'Here the citation was edictal, and the party decerned against 'in absence is seeking redress in a process of reduction. The de- 'fender objects that she must first pay the costs of the former pro- 'cess. In order to sustain this objection, he must prove that the 'pursuer, or some one acting, or authorised to act, as her agent, 'was aware of the action in which the decree in absence was pro- 'nounced. But the Lord Ordinary does not think that he has done 'so by the excerpts, which are his only evidence; for the articles 'are entered in such a way that the interference of the agent may 'be ascribed to his acting for other persons as well as for the pur- 'suer.'

The defender *reclaimed,* but the *Court* unanimously adhered. Judgment.

Lord Cockburn, Ordinary. Act. *Sol.-Gen. (Cuninghame.)* Alt. *Christison.*
David Manson, S. S. C. and *Wm. Renny,* W. S. Agents. *B.* Clerk.

C.

FIRST DIVISION.

No. CLXIII. *7th July* 1835.

WARREN HASTINGS SANDS
against
DAME ANNA MARIA MAKDOUGALL BRISBANE, AND THOMAS AUSTRALIA BRISBANE, ESQ.

TRUST.—ENTAIL.—CODICIL.—CLAUSE.—*Words in a codicil to a trust-settlement held to import a special legacy.* (2.) *Circumstances in which, according to the construction of a series of deeds of settlement by an entailer, certain bequests were found to be burdens on the entailed estate.* (3.) *Annuities bequeathed by an entailer being held a burden on the entailed estate, found, that said annuities were payable out of the rents de anno in annum, and could not be kept up as a burden against the entailed estate by any heir in possession who had paid them.* (4.) *Found that the heir of entail in posses-*

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sion was bound to pay the interest of sums found a burden on the entailed estate, without relief from the succeeding heirs.

Narrative.

THE late Sir Henry Hay Makdougall of Makerston, Bart. executed (20th July 1811) a bond of provision in favour of his two younger daughters, whereby he bound himself to pay to each the principal sum of L.2300, and also to each an annuity of L.200, so long as they remained unmarried. On 10th April 1812, Sir Henry executed a strict entail of his estate on his eldest daughter, Anna Maria, now Lady Brisbane, and the heirs whatsoever of her body, whom failing, to his other daughters in succession, with powers of alteration and revocation. On the 20th August 1823, Sir Henry executed a trust-settlement in favour of Warren Hastings Sands, writer to the signet, proceeding on the narrative of the powers reserved by the entail, and further narrating, that 'whereas, since executing 'the said disposition and deed of tailzie, I have expended large sums 'of money in making considerable additions to my mansion-house 'of Makerston, and in purchasing new furniture for the same, and 'in otherwise improving my residence, whereby I have been obli-'ged to contract various debts; and in order the better to secure my 'creditors, and for answering the other purposes herein after men-'tioned, I, in terms of my before-recited reserved powers, hereby 'declare, that in so far as my separate means and estate, hereafter 'disponed, may fall short of answering my purposes, as hereafter 'specified, that then, and in that case, all and each of my heirs 'of tailzie, as they shall succeed to my said entailed estate, shall 'be bound and obliged, as I hereby bind and oblige them, by the 'acceptation of the said entailed estate, to make good any defi-'ciency that may arise of my separate means and estate, and to 'implement and fulfil all the purposes hereafter mentioned, in so 'far as the same may remain unsettled, out of the trust hereafter 'granted.'

By this trust-settlement Sir Henry assigned, alienated and disponed, to and in favour 'of the said Warren Hastings Sands, but 'always in trust, for the ends, uses and purposes after mentioned, all 'debts and sums of money which shall be due and addebted to me 'by whatever persons, at the time of my death, by bonds, heritable 'or moveable, bills, decreets, accounts, or any other manner of way, 'together with the said bonds, bills and other writs, and all action, 'diligence and execution following, or competent to follow thereon, 'and all bygone rents, maills and duties of my lands, due or exi-'gible by me, or my heirs or executors, with the corns, cattle and 'all other goods and effects whatsoever, that shall belong to me 'at my death; excepting herefrom all my household-furniture of

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'every kind and denomination, silver plate, linens, wines, pictures, 'books, and the work-horses and labouring utensils necessary for 'the farm that may be in my own natural possession, and all the 'tools belonging to the garden, which I leave and bequeath to the 'heir first succeeding to me in my said entailed lands and estate; 'dispensing with the generality hereof, and declaring the same to 'be as valid and effectual a conveyance of the premises generally 'above disponed, as if the same were all herein particularly express-'ed: And further, I do hereby assign, alienate and dispone to 'the said Warren Hastings Sands, but in trust always, as aforesaid, 'all and whole what may remain undivided and unpaid of my fourth 'share of the real and personal estate of the deceased John, Duke 'of Roxburghe, which his Grace was pleased to leave to me, with 'the whole vouchers and instructions of my right to the said fourth 'share, with full power, warrant and commission to my said trustee 'to uplift, receive and discharge the same, and, in general, to act 'and do in that business as fully and freely as I could have done 'myself, if in life; and I do hereby nominate and appoint the said 'Warren Hastings Sands to be my sole executor and intromitter 'with the means and estate before conveyed to him; but that al-'ways in trust, for the ends, uses and purposes after mentioned, viz. 'In the first place, that my said trustee shall, in so far as the pro-'duce of my means and estate, before conveyed to him, will admit, 'pay all my just and lawful debts presently due and owing by me, 'or which shall be due and owing by me at the time of my death, 'with my servants' wages and funeral expenses, and his expenses 'in executing this trust, with a reasonable gratification for his own 'trouble: In the second place, that he shall pay all such legacies, 'gifts, donations or annuities, as I have already left, or may here-'after leave and bequeath, by any codicil hereto, or by any writing 'or memorandum clearly expressive of my will, though not formal-'ly executed: And, lastly, in case the foresaid means and estate 'shall be sufficient for the purpose, that he shall relieve the fore-'said entailed estate, by paying the whole or part of the provisions 'which I have already granted, or may hereafter grant, to Henrietta 'and Elizabeth Makdougall, my two younger daughters: But de-'claring always, as it is hereby expressly provided and declared, 'that in case the produce of the means and estate, before conveyed 'to my said trustee, shall fall short of answering any part of the 'foresaid purposes, then I hereby declare and appoint the same to 'be held as real burdens upon my foresaid entailed estate, and the 'heirs of entail in succession succeeding thereto: But if, on the 'other hand, the said means and estate shall be found sufficient for 'answering all the foresaid purposes, and that there may be a re-

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'mainder, then I will and direct my said trustee to convey and 'make over what part thereof may remain in his hands to the heir 'of entail in possession of my said entailed estate for the time; or, 'in case of the death of my said trustee, then I hereby declare that 'the whole of the means and estate before disponed, that may re-'main in his person, shall fall, belong and accresce to the said heir 'of entail who may be in possession for the time, but with and 'under the burdens as aforesaid.'

On the 28th October 1823, Sir Henry executed a holograph codicil, which, after stating that he had executed the entail, the bond of provision to his younger daughters, and the trust-settlement, proceeded thus: 'I now give and bequeath to my friend, John 'Wauchope, Esq. W. S. one hundred guineas for a mourning ring, 'in token of my regard: I give and bequeath to George Hogarth, 'in Haymount, my tenant, L.1000 sterling, to be paid as his rent 'falls due: To my servant, Robert Watt, on account of his long 'service in my family, an annuity of L.20 sterling, during his life, 'to be paid half-yearly, commencing at the Whitsunday or Mar-'tinmas after my death, with all my wearing apparel, dogs and guns: 'I give and bequeath to my excellent servant, Robert Anderson, who 'has lived with me nearly fifteen years with the utmost fidelity, 'sobriety and attachment to me, a legacy of L.500 sterling, free of 'the tax, which, if required, must be paid out of the residue of my 'property within two months after my death; as also to the said 'Robert Anderson an annuity of L.40 sterling, to be paid at 'Whitsunday and Martinmas, half-yearly, the first payment to 'commence at the term after my death: I bequeath an annuity 'of L.16 sterling yearly to my house-servant, William Thomson, 'to be paid in like manner, half-yearly. With regard to what I 'may succeed to by the will of John, third Duke of Roxburghe, 'I declare my intention to be as follows: That out of this sum my 'debts due by bond, bill or account-current, and my funeral ex-'penses, shall be paid, making the estate free; and the residue, if 'any, to go to Lady Brisbane, burdened as I may afterwards direct, 'when the amount is ascertained: And I hereby declare this holo-'graph writing as relative to my other settlements; and that the 'legacies, annuities and donations herein left by me shall be pay-'able by, and a burden on, those succeeding in virtue of said en-'tail and settlements.'

Upon Sir Henry's death, (April 1825,) Mr Sands entered upon the management of the trust; and with a view to settle certain doubts which had occurred to him as to the execution of the trust, he raised a multiplepoinding, in which he stated, that he had paid all Sir Henry's special legacies, and all his debts, from the rents of Mak-

erston, falling due to him as executor, and other personality of the trust-estate, and also from interim payments received from the residue of the Roxburghe trust-estate: That from the year 1826 until 1832, the annuities left by Sir Henry to his daughters were, with the interest of their provisions, paid from the entailed estate by Sir Thomas and Lady Brisbane: That although it was up to this period uncertain whether any thing further would be drawn from the Roxburghe succession, a compromise had lately been entered into, by which there would accrue to the representatives of Sir Henry a further sum of about L.10,000. The first question submitted to the determination of the Court was, what was the precise interest which Lady Brisbane had acquired in this sum by the codicil above mentioned?

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The Court, 29th January 1834, preferred 'Lady Brisbane to the 'share of the residue of the succession of the late John, Duke of 'Roxburghe, left and bequeathed by him to the now deceased Sir 'Henry Hay Makdougall, after deducting Sir Henry's debts, due 'by bond, bill or account-current, and his funeral expenses: found, 'That under the debts to be deducted as aforesaid, there are not 'comprehended the provisions granted by Sir Henry to his younger 'children, either by his contract of marriage, or by the bond exe-'cuted by him in their favour on the 20th day of July 1811: found 'the expenses incurred by the parties, in disposing of the point sub-'mitted to the Court, to be a burden upon the share of the residue 'found to belong to Lady Brisbane as aforesaid, and remitted to the 'Lord Ordinary to proceed further in the cause as to him shall ap-'pear just.'

Judgment.

In the further competition which arose between Mr Sands and Lady Brisbane on the one hand, and her Ladyship and her eldest son, Thomas Australia Brisbane, Esq. who appeared by his tutor ad litem, on the other, Mr Sands contended, that as he had paid out of the general funds of the trust the legacies, &c. due under the codicil, as far as they would go, he was to that extent entitled to claim retention against Lady Brisbane out of her said share of the Roxburghe succession. He further stated, that it appeared to him doubtful, whether, under the latter purpose of the trust in his favour, relative to the provisions to Misses Makdougall, he was bound to apply the annual proceeds of any surplus of the trust-funds which might exist to extinguish pro tanto the annuities due to them; or whether he was bound, in the first place, to apply the principal sum of the surplus to extinguish pro tanto the money provisions payable to these ladies.

Upon these points, the Lord Ordinary, after ordering minutes of debate, found, (11th March,) 'That the trustee is not entitled to

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Lord Ordinary's Interlocutor.

'retain from Lady Brisbane's share of the residue of the succession 'of John, Duke of Roxburghe, any sum which he has paid to ac- 'count of legacies, annuities or donations, left by a codicil to the 'late Sir Henry Hay Makdougall's settlement: finds, That the an- 'nuities to the Misses Makdougall are a burden upon the entail- 'ed estate; and with these findings, before further answer, remits 'to the clerk of process to prepare a scheme of accounting.'

As between Lady Brisbane and her son, it was contended for Mr T. A. Brisbane, that, as it was clearly Sir Henry's intention that his entailed estate should be kept free from any burden, the whole moveable funds left by him must be exhausted before any claim could be made either by Lady Brisbane, or those interested in the respective settlements in their favour, against the entailed estate; that as the trust-funds, including the excepted articles bequeathed to Lady Brisbane, were more than sufficient to pay both the legacies in the codicil, and the provisions to the daughters, Lady Brisbane must relieve the entailed estate of the whole of these legacies and provisions, and that she must pay the life annuities annually out of the rents, keeping the entailed estate free of any arrear or accumulation.

Lord Ordinary's Interlocutor.

The Lord Ordinary found, 'That from the trust-estate of Sir 'Henry Hay Makdougall are to be deducted, *first*, His debts, if any, 'not affecting Lady Brisbane's share of the Duke of Roxburghe's 'succession, in terms of the interlocutor of the 29th January 1834; '*secondly*, The legacies and annuities left by his settlements to 'others, exclusive of his younger daughters; *thirdly*, The provisions 'to his younger daughters; and finds, That the deficiency, together 'with the annuities left to the younger daughters, while they con- 'tinue unmarried, form a burden upon the entailed estate, for which 'the said Lady Makdougall Brisbane, as heir of entail in possession, 'is liable: finds, That the said Lady Makdougall Brisbane is bound 'to pay the interest of the sums found to be a burden on the en- 'tailed estate, and also the annuities that fall due to the younger 'daughters de anno in annum, while she continues in possession, 'without relief from the succeeding heirs of entail; but if she pay 'any part of the principal sums found to be a burden on the estate, 'she is entitled to demand an assignation from the creditors, that 'it may be kept up as a debt against the estate: And before further 'answer, remits to the clerk of the process to prepare a scheme of 'accounting, in terms of these findings.'

Judgment.

Mr Sands *reclaimed;* when their Lordships, in respect the legacies and annuities bequeathed by Sir Henry Hay Makdougall to others, exclusive of his younger daughters, were burdens on the trust-estate,

adhered to the interlocutor reclaimed against, and refused the desire of the note; and remitted to the Lord Ordinary to proceed further in the multiplepoinding as shall be just. 7 July 1835. Sands v. Brisbanes.

Mr T. A. Brisbane also *reclaimed*, and prayed their Lordships to find, 1*st*, That the legacies and annuities contained in the codicil, or at least the legacy of L.1000 to Thomas Hogarth, (which formed in reality a portion of the rents of his farm,) were payable by the heir of entail without relief, and cannot be made a charge either on the trust-fund or on the entailed estate; and, 2*dly*, That not only the trust-estate, but also the furniture, stock on the farm, &c. bequeathed to Lady Brisbane by the trust-deed, must be exhausted, before any of the legacies, annuities or provisions can be charged against, or form a burden upon the entailed estate.

Their Lordships refused the desire of the note, but 'found the 'expenses incurred in disposing of the point submitted to the Court 'to be a burden on the trust-estate of the deceased Sir Henry Hay 'Makdougall, and remitted to the Lord Ordinary to proceed further 'in the cause as to him shall appear just.' Judgment.

Lord Ordinary, *Corehouse*. For Mr Sands, *Dean of Fac. (Hope,) Baillie*. For Lady Brisbane, *Sandford*. For T. A. Brisbane, Esq. *J. S. Stewart*. *W. H. Sands*, W. S. *A. Scott*, W. S. and *Wm. Patrick*, W. S. Agents. *D.* Clerk.

C.

FIRST DIVISION.

No. CLXIV. *7th July* 1835.

ROGERS, &c.
against
INNES, &c.

MARRIAGE. — LEGITIMATION. — WITNESS. — (1.) *Circumstances found relevant to infer marriage.*

(2.) *Circumstances in which such marriage was held not to legitimate a child born subsequent to cohabitation between the parties.*

(3.) *A witness having, in the course of her examination, stated herself to be the wife of an individual,—held that the subsequent discovery, that she had no title to such character, was not a good objection to her testimony.*

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Narrative.

THIS was an action of declarator of marriage and legitimacy, in which the female pursuer designed herself Janet Rogers or Innes, eldest daughter of the deceased William Rogers, cabinet-maker in Edinburgh, and relict of the deceased John Innes of Cowie, Esq. W. S., and the male pursuer was designed William Innes, the lawful and only son procreated between said female pursuer and the said John Innes. The late Mr Innes had cohabited with the said Janet Rogers prior to the month of June 1826, at which time she was generally known by the name of Mrs Morrison. This designation arose from cohabitation with a person of that name, to whom she had two children; but whether she had been regularly married to him or not did not appear. It was admitted by the pursuers, 'That 'on the morning of the 17th day of June 1826, the deceased John 'Innes, Esq. of Cowie, sailed from Newhaven, on board the Soho 'steam vessel, for London, where he arrived on the 19th day of said 'month of June: That he remained in and about London till the '26th day of said month and year, when he sailed from Greenwich, 'on board the Lord Melville or Attwood packet, for France: That 'he remained in Paris and other parts of France till about the mid-'dle of the following month of July: That on or about the 16th 'day of that month he landed at Brighton, accompanied by two of 'his daughters, who had been at Paris for their education: That 'thereafter they proceeded to London, in and about which city Mr 'Innes resided till the 16th day of September following, when he 'sailed from London to Edinburgh in the Soho steam vessel, and 'arrived in the latter city on the 19th day of said month of Sep-'tember.' Three letters were produced, written by Mr Innes from London to the pursuer, dated 22d July, 12th August, and 11th September 1826, and addressed, 'For Mrs Morrison, 9. Greenside 'Place, Edinburgh.' Mr Innes, on his return, renewed his intercourse with the pursuer, and, on the 14th April 1827, she was delivered of a male child, the other pursuer, at Greenside Place aforesaid. The further facts of the case will appear from the following excerpts from the proof:

The first witness examined for the pursuer was a person called Ann Spence, who had been a kept mistress of Mr Innes prior to his intercourse with the pursuer, and who appeared to have resided with the pursuer previous to Mr Innes's visit to London, and also at the time of the birth of the other pursuer, and who, inter alia, deponed to the following effect: 'That she re-'turned to Edinburgh in the following April, 1827, and went to 'the pursuer's house in Greenside Place: That this was about a 'fortnight before the pursuer got her bed: That during this fort-

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'night the deponent saw Mr Innes two or three times in the 'house: That he was in the house the night before the child 'was born, and that he saw Janet Rogers that night in presence of 'the deponent: That they both seemed to be quite happy at this 'time: That the pursuer was delivered of a male child on the fol-'lowing morning by Dr Thomson of Leopold Place, and that the 'deponent was present at the delivery: That when Mr Innes came 'about the house at this time he wore a velvet shooting coat: That 'no other man came about the house at this time, except Mr Innes 'and two of the pursuer's brothers, William and James Rogers, who 'resided there: That Mr Innes came to the pursuer's house on the 'evening of the same day the child was born, and that on this oc-'casion the deponent saw him in the same room with the child and 'Janet Rogers, who was in bed: That Dr Thomson was present 'when Mr Innes came into the room: That the Doctor and Mr 'Innes did not seem to have been previously acquainted: That the 'deponent herself had known the Doctor a little formerly: That 'the deponent said to the Doctor, this was Mr Innes, and that the 'pursuer called to him to come in over, for he was the child's 'father: That this was said in Mr Innes' hearing, and that he 'remained in the room till the Doctor went away: That Mr 'Innes remained in the room a good while after the Doctor went 'away, and got some refreshment: That, on this occasion, Mr Innes 'asked the pursuer whether the child was a girl or a boy? That she 'said it was a boy, and Mr Innes said, it would be his heir, and that 'the pursuer would be his wife: That the deponent remained for some 'months in the pursuer's house in Greenside Place after the birth of 'the child. Interrogated, If she knows that there was a person of the 'name of Morrison who used to be about Janet Rogers' house? de-'pones, That she never saw him, but she has heard of him as the fa-'ther of Janet Rogers' two first children, Mary Ann and Thomas. 'Depones, That Janet Rogers used to call this man her husband, 'and that the deponent, when she knew Janet first, always under-'stood her to be the wife of Morrison; but that this was all before 'the birth of William. Interrogated, Whether, when the third child 'William was born, and for some time thereafter, this boy was called 'William Morrison? depones, That he was not, but that he was 'always called William Innes. Interrogated, If she ever heard the 'boy called Morrison at all? depones, That she never did.'

The next witness was designed 'Mrs Helen Ballantyne, widow 'of the deceased Alexander Morrison, architect in Leith, now re-'siding in No. 1. Cannon Street, Leith, (North,)' whose testimony was to the following effect: 'That on the 2d of September 1819, 'she was married to the deceased Alexander Morrison, architect in

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'Leith, by the Reverend Dr Buchanan, one of the ministers of 'Canongate: That she had five children by the said Alexander 'Morrison after her marriage, and that she lived very happily with 'her husband till his death, which took place in 1827: That the 'deponent's husband told her, that previous to his marriage he had 'been in terms of intimacy with a person of the name of Janet 'Rogers, by whom he seemed to admit that he had one child, a girl: 'That he told the deponent that he had done what he could for 'that child, and that she, the deponent, would never be troubled 'on that account: That the deponent never afterwards returned to 'that subject with her husband: That the deponent never sus-'pected, nor had any cause to suspect, that her husband visited 'Janet Rogers after his marriage with the deponent. Depones, 'That her husband had enough to do to support his own children: 'That her husband generally wore a black coat and vest, and du-'ring all the time the deponent lived with him, he never had a 'coat and vest of any other description, although he might change 'the colour of his trowsers: That the coat which her husband com-'monly wore was of the ordinary shape, with long skirts: That 'she is quite certain that her husband never wore, on any occasion, 'after she knew him, a shooting jacket. Interrogated for the de-'fenders, depones, That soon after her marriage, old Mrs Rogers, 'the mother of Janet, called on the deponent and stated, that she 'conceived that her daughter had a prior claim to Mr Morrison as 'his lawful wife: That the deponent mentioned this to her husband, 'on which he made the explanation to her above mentioned.'

In connection with the testimony of the preceding witness, 'Thomas Scotland, schoolmaster and session-clerk, North Leith,' was called by the defenders. He deponed, 'That he is session-clerk 'of North Leith, and has been so since Whitsunday 1826. And the 'certificate of the burial of Alexander Morrison being exhibited to 'the witness, depones, That it is in his handwriting, and was extract-'ed from the register of funerals among the session records kept by 'the deponent, and the same is marked by the deponent and com-'missary-examinator of this date, as relative hereto. Depones, 'That the particulars contained in the certificate are given in by 'the undertaker who conducts the funeral at the time, to the ses-'sion-clerk, to be recorded; and depones, That he was not per-'sonally acquainted himself with Alexander Morrison, there refer-'red to. Depones, That the undertaker who conducted this fune-'ral was Alexander Gray, wright, Citadel, North Leith, and from 'him the deponent received the information which he entered in 'the register.'

Alexander Gray, above named, was also examined by the defend-

ers. He deponed, 'That he carries on business as a wright and 'undertaker, and that he conducted the funeral of Alexander Mor- 'rison, builder in Cannon Street, Leith, and produces and sees from 'the book, containing entries of his charges for conducting funerals, 'that Morrison's took place on the 28th of August 1828, and he re- 'members that he was buried in North Leith, and he gave the usual 'notice after the funeral to the session-clerk, of the name and age 'of the person buried, for insertion in the record, and also of the 'day of death; and he generally, indeed always, at the same time 'informs the session-clerk of his business or profession, and of the 'disease of which he died: That he knows that Morrison died sud- 'denly, and his book bears that his age was about forty-three. De- 'pones, That he was acquainted with Morrison before his death a 'little, and that he left a widow in Leith, whose name was Ballan- 'tyne, and who lived in the same street in which he died. The de- 'ponent is not sure but that she lived in the same house: That the 'widow was married to a person of the name of Cowan, a tide-waiter 'in Leith, some time in the course of the present year: That Mor- 'rison was a middle-sized man, with lightish hair—stout, and pretty 'well-looking. Interrogated for the pursuers, depones, That Mor- 'rison left three children by his wife, who is now married to Mr 'Cowan, aforesaid, but he is not exactly certain of the number of 'children.'

An extract of the entry of the burial was produced by the defenders, in these terms:

'Alexander Morrison, builder, Cannon Street, North Leith, died 'the 23d, and was buried the 28th August 1828.'

'Extracted from the register of funerals belonging to No. Leith, 'by (Signed) THO. SCOTLAND, *Sess.-Clerk.*

'*No. Leith, 7th November* 1832.'

The testimony of Spence, the first witness, was in substance corroborated by two witnesses, called by the pursuers, Margaret Gow and Margaret Miller; the latter of whom being interrogated, 'If she 'knew a person of the name of Morrison? depones, That she did 'not; but on one occasion, when the deponent was sitting in the 'kitchen with the child, a person whom the deponent never saw be- 'fore came in the worse of liquor, and said, 'That is my bairn;' up- 'on which the two brothers of Janet Rogers, one of whom is since 'dead, fell a-laughing, and the person went away: That Janet Ro- 'gers was not in the kitchen on that occasion.'

The next witness called by the pursuers was Dr Thomas Thomson, surgeon in Edinburgh, who deponed, 'That he was called up- 'on by a person of the name of Mrs Morrison, then residing in

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'Little King Street, on the occasion of her confinement, on 19th 'March 1823; and he was afterwards called upon by the same 'person, then residing in No. 9. Greenside Place, to attend upon 'her on a similar occasion, in April 1827: That on the 14th of 'that month, in the morning, Mrs Morrison was delivered of a male 'child: That after breakfast of the same day, the deponent visited 'Mrs Morrison a second time; and while in the room inquiring af-'ter Mrs Morrison's health, a stoutish man, not wearing genteel 'clothes, but dressed, according to his recollection, in a short coat 'or frock of a lightish colour, and made so as to come round his 'thighs, made his appearance at the door of the room, and seeing 'the deponent, appeared inclined to withdraw, when the deponent 'said to him, 'Come in, Sir, there are no secrets here;' upon which 'Mrs Morrison said, 'Dr Thomson, that is Mr Morrison, the fa-"ther of the child:' That the deponent had never seen that man 'before, nor would he know him now, either in a room or on the 'street: That the deponent never, to his knowledge, saw the late 'Mr Innes of Cowie: That the deponent, when he was called to at-'tend Mrs Morrison, believed her to be a married woman, whose hus-'band's name was Morrison. Depones, That the man whom the de-'ponent saw at Mrs Morrison's was a tall, stout man, not much under 'six feet, if at all so. Depones, That on the occasion alluded to, 'a female was living with Mrs Morrison, whose name he does not 'know. Interrogated by the commissary-examinator, depones, 'That the child of which the deponent delivered Janet Rogers, on 'the 14th day of April 1827, was a full-grown child, and was the 'finest he ever saw delivered. Interrogated for the defenders, de-'pones, That there is a charge in his books for attending Mrs Mor-'rison, a copy of which he will send to the commissary-examina-'tor: That when the patient on such occasions is unmarried, the 'entry bears to be for attending 'you;' but that when it bears to 'be for attending 'your wife,' this denotes that the attendant be-'lieved the woman to be married. Depones, That the account is 'not yet paid: That many apologies have been made for this, the 'import of which was, that it was not convenient for Mr Morrison 'to pay. Depones, That the woman always spoke of Mr Morrison 'as her husband. Interrogated, Whether, from his appearance, he 'took the person who came into the room, as above mentioned, to 'be a gentleman or a mechanic? depones, That he took him to be 'a mechanic.'

The next witness called by the pursuers was designed Euphemia Stobie, wife of the late Charles Stobie, residing in Edinburgh. Her testimony was to the following effect: 'That she has a niece mar-'ried to Mr David Johnston, a gardener and spirit-dealer, who for-

'merly resided at Eastfield, near Fisherrow: That the deponent 'lived the greater part of a year with Mr and Mrs Johnston at East- 'field: That this was about the year 1830. And being particularly 'interrogated, depones, That she so resided at Eastfield in the 'month of December 1830: That at this period the late Mr Innes 'of Cowie lived next door to Mr Johnston: That the pursuer of 'the present action, who at first bore the name of Mrs Morrison, 'resided with Mr Innes at this time, and that the deponent became 'acquainted with the parties from being occasionally in the house: 'That the pursuer's mother, Mrs Rogers, and her sister, May Ro- 'gers, also lived in Mr Innes' house at this period: That after the 'deponent had been in the way of going into Mr Innes' for some 'time, she observed that he and the pursuer lived upon the footing 'of man and wife: That Mr Innes stated to the deponent, about 'the month of December 1830, that he was going to marry the pur- 'suer, and that he requested the deponent to bring the pursuer's 'mother and sister, who were absent from Eastfield at the time, 'along with her brothers, to be witnesses of his declaration of mar- 'riage with the pursuer: That the deponent accordingly went and 'brought these parties to Mr Innes' house, when he asked the de- 'ponent whether she thought they would be suitable witnesses? 'That the deponent said she thought they would not, as they were 'all near relations: That the deponent then proposed to bring in 'Mr and Mrs Johnston as witnesses: That Mr Innes desired her 'to do so; and that she did accordingly go and bring Mr and Mrs 'Johnston to Mr Innes' house. Depones, That Mr Innes and Janet 'Rogers were present along with Mr and Mrs Johnston on this 'occasion: That the pursuer was sitting on a sofa at this time, and 'that Mr Innes desired her to rise, and then stated, in the hearing 'of all the persons present, that she was his lawful wife, Mrs Innes 'of Cowie, and desired them ever after to address her by that name: 'That Mr Innes took a ring off his finger, and put it upon the pur- 'suer's finger, who thereupon took the whole company as witnesses 'to the declaration of marriage which Mr Innes had just made. 'Depones, That some short time after this the deponent heard the 'banns of marriage between Mr Innes and the pursuer, with a view 'to a regular marriage ceremony, proclaimed in Duddingston church: 'That on this occasion the deponent was accompanied by her nephew, 'Mr Johnston, and the pursuer's brother, William Rogers, and that 'the deponent was present on the same evening, when a regular cer- 'tificate was got. Depones, That Mr Innes stated to the deponent, 'after this, that he could not regularly marry the pursuer until he 'had made some arrangement for his family; but that she, the pur- 'suer, was safe enough, as she was already his lawful wife by the

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'laws of Scotland: That Mr Innes made this statement to the deponent frequently, as the pursuer was always teasing him to have a regular marriage: That, subsequent to this, Mr Innes intimated to the deponent an intention regularly to marry the pursuer; and he asked the deponent's daughter, Mrs Barry, who was a dressmaker, to be best maid on the occasion: That Mrs Barry was also employed, as the deponent rather thinks, by the pursuer, to make a marriage dress for her, which Mrs Barry accordingly did: That Mr Innes desired the deponent to get gloves, or whatever might be required for the marriage, and that she would be supplied with money: That the deponent accordingly bought several pairs of marriage gloves, and among others a pair for the minister of Duddingston, who, she understood, was to perform the ceremony, as Mr Innes stated to her that he would have no other person: That many days were fixed for the celebration of the marriage; and particularly there was a meeting one night, near to the new year 1831, in Mr Johnston's house, when the deponent understood that it was to have taken place: That the deponent was present on this occasion, as also Mr and Mrs Johnston, Mr Innes, the pursuer, and two of her brothers; and the deponent thinks a lodger of Mr Johnston's, of the name of Cameron, and the deponent's daughter, Mrs Barry, were also present: That the deponent thinks this was on the Monday after the Sunday on which the aforesaid proclamation of banns took place: That on this occasion the pursuer was dressed in the marriage gown which had been made for her by Mrs Barry, and that she came into Mr Johnston's house accompanied by Mr Innes. Depones, That after the company were all assembled, however, Mr Innes renewed his objection to a regular marriage on the ground formerly stated, till he had made an arrangement for his family. Interrogated, Whether any thing was said at this time by Mr Innes about expecting the minister of Duddingston to come and perform the ceremony? depones, That so far as she recollects he did not, and she thinks he could not, as he never proposed to send for him: That on this occasion, and in presence of the company assembled at Mr Johnston's, Mr Innes repeated what he had said on the former occasion, that the pursuer was his lawful wife, although he could not celebrate a regular marriage with her until he had made certain arrangements for his family: That the pursuer seemed to acquiesce in this declaration, but did not say any thing: That the deponent and the rest of the company then wished the pursuer and Mr Innes much joy as married persons, and addressed the former as Mrs Innes: That the deponent continued acquainted with Mr Innes for a twelvemonth after this time, and that she occasionally visited in their house: That she

'has dined with them, and that she has often seen the pursuer sit 'at table as Mr Innes' wife: That the pursuer was also occasion- 'ally unwell and absent from table when the deponent was dining 'with Mr Innes, and that she never was present at table when any 'other person was there except the pursuer: That Mr Innes was 'sometimes very kind to the pursuer, and at other times not so 'much so: That he was uncertain, and not equal in his temper: 'That the deponent knows the pursuer's youngest son, William: 'That among the last times the deponent saw Mr Innes, he stated 'to the deponent that he thought the boy was his. Depones, That 'at one time he would say it was his own child, and at another 'time he would say it was Morrison's child. Depones, That Mr 'Innes was not at all times equal in his mind: That she means by 'this, he was uncertain in his temper, sometimes speaking one way 'one time, and another at another: That in the month of October '1830, when Mr Innes was absent in the north country, the depo- 'nent was present in his house at Eastfield with the pursuer, when 'she had, as the deponent believes, a miscarriage: That Mrs Rogers 'was present on this occasion: That from what the deponent ac- 'tually saw, she had not the least doubt the pursuer miscarried on 'the foresaid occasion: That after the aforesaid declarations by 'Mr Innes, she always considered that he and the pursuer were 'married persons. Depones, That she has been in their bed-room, 'and has seen them in bed together. Interrogated for the defend- 'ers, depones, That some time, and often after the date of the de- 'claration of marriage above deponed to, Mr Innes said to the de- 'ponent that he was not married to the pursuer; but that this was 'in his cross temper. Depones, That Mr Innes told the deponent 'that his object in marrying the pursuer was to have an heir to his 'estate. Depones, That when Mr Innes called the child Morrison's, 'she understood him to mean that Alexander Morrison was the father 'of it: That the pursuer was always called Mrs Morrison until the 'date of the declaration above deponed to. Depones, That she 'never heard the pursuer's son, William, called by any other name 'than that of William Morrison, either before or after the date of 'the declaration. Interrogated, If she ever heard the pursuer her- 'self say that this boy was Morrison's child? depones and answers, 'That she rather thinks she has heard the pursuer call him Alex- 'ander Morrison's child. Depones, That as she thinks, on the oc- 'casion when the pursuer came to have her wedding dress ordered, 'or about that time, the deponent was present when her daughter, 'Mrs Captain Barry, asked the pursuer whether her son, William, 'was the child of Alexander Morrison, as her other children were? 'And the pursuer answered, that all her children were by the same

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'father, viz. the said Alexander Morrison. Being specially interrogated, whether her impression, from all she saw and heard in 'the family of the pursuer, was that the said William Morrison 'was truly the son of Alexander Morrison, or of Mr Innes? depones, 'That as the deponent never heard of the boy's being called by Mr 'Innes' name until after she had ceased to visit in the family, her 'impression and belief is, that his being so called was entirely to 'make matters better; by which she means, that the boy should 'be enabled to come to the estate; and further, she has heard 'Mr Innes say, that his brother would be obliged to bring up the 'boy, although he, this boy, could not be heir to the estate. De-'pones, That the children, including the boy William, all resem-'bled their mother very much; and further depones, That Mr 'Innes had expressed great grief to the deponent on account of 'the pursuer's miscarriage above deponed to, because he was thus 'deprived of an heir. Depones, That Mr Innes told the depo-'nent, that the first occasion when he had carnal connexion with 'the pursuer, was when she was at Cowie, making dresses for his 'daughters, but he did not say when this was. Depones, That 'when she went to visit in the pursuer's family, as above deponed 'to, she very often saw great intemperance. Depones, That the 'pursuer was less intemperate than the other members of the 'family; and further depones, That the pursuer had the appearance 'of a woman with child at the time of the declaration of marriage 'above deponed to. Re-interrogated for the pursuers, and desired 'to explain, as she has already deponed that she was present when 'the pursuer miscarried in October 1830, she had the appearance 'of being a woman with child when the declarations of marriage 'aforesaid were made within two months thereafter, in December '1830? depones, That she judged from her having had the ap-'pearance of a woman with child; and adds, that Mr Innes told 'her she was with child, and that he would not have married 'her, unless he thought her a woman to have boys, as she had 'two already. Desired again to say what were the appearances 'about the pursuer's person which led the deponent to believe 'that she was with child at the time of the above declarations of 'marriage? depones, That she was sickly and poorly, like any 'other woman in that state, and kept her bed a good deal: That 'the deponent was given to understand by Mr Innes and Mrs 'Rogers that the pursuer miscarried a second time some time after-'wards. Interrogated, Whether, as above deponed to, Mr Innes 'said that his brother would have to maintain the boy William, 'although he could not heir the estate, he, Mr Innes, gave any 'explanation as to this statement, or said why the boy could not

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'heir the estate? depones, That Mr Innes said it was because the 'marriage he had made was not a legal one. Depones, That Mr 'Innes added, that he wished to bring his wife down to L.300 a-'year, so that his daughters might have L.200 each a-year. In-'terrogated, By what name Mr Innes called the boy on the occa-'sions above deponed to, when he stated to the deponent that he 'was his son? depones, That he gave him no name whatever on 'these occasions: That he sometimes gave him a very bad name, 'as he was a cross boy. Interrogated, Who was present when the 'pursuer, as above deponed to, stated to Mrs Barry that the boy 'was Alexander Morrison's son, and where this took place? de-'pones, That she thinks that it was in Mrs Barry's house at Stock-'bridge, and that no others were present on the occasion but Mrs 'Barry and the deponent. Interrogated, What led the deponent, 'after Mr Innes had told her, as above deponed to, that the boy 'could not heir his estate, to form the opinion that he was said to 'be Mr Innes' son just to make matters better, and that he might 'heir the estate as above deponed to? depones and answers, That 'Mr Innes would just say one thing at one time and another in 'ten minutes after. Re-interrogated for the defenders, depones, 'That Mr Innes, on different occasions after the declaration of mar-'riage, turned the boy and the other children of the pursuer out of 'the house, along with old Mrs Rogers, and sent them to live in 'Edinburgh: That he did so on account of the noise the children 'made in the house. Depones, That she never heard the boy call-'ed Mr Innes' child till after the date of the second miscarriage 'above deponed to; and it was long after the time when Mr Innes 'expressed grief on account of the miscarriages that the deponent 'first heard the boy called his son. Re-interrogated for the pur-'suers, When and where she first heard the boy said to be Mr Innes' 'son? depones, That she heard it first from her niece, Mrs Johnston, 'in summer 1832, as she thinks: That Mrs Johnston then stated to 'her, that the boy had been sent to school with his name written on 'a satchel, and the deponent asked Mrs Johnston who had written 'it, but she said she could not tell. Depones, That it was in the 'winter of 1832, as she thinks, that Mr Innes said that the boy 'William was his son: That on this occasion the deponent had 'merely gone out to tell Mr Innes that her husband could not com-'ply with a request contained in a letter sent to him by Mr Innes. 'Depones, on recollection, That it was the summer before the 'time of Mr Innes' death, that Mrs Johnston told her of the boy 'having been sent to school with his satchel, as above deponed to.'

Several other witnesses were called by the pursuers, who, in substance, corroborated the testimony of the preceding witness, in par-

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ticular, David Johnston and his wife, mentioned by her, and John M'Gillivray, teacher, Fisherrow, to whose school the boy was sent. A variety of witnesses were also called by the defenders; but their testimony, with slight variations, corresponded with that of Spence and others. Euphemia Stobie or Barry, daughter of the preceding witness Stobie, was called by the defenders. Her testimony also in substance corresponded with that of her mother; but as it formed subject-matter for an incidental plea, to be immediately noticed, it is given at length.

'Compeared Euphemia Stobie or Barry, residing in Scotland 'Street, Edinburgh; who being solemnly sworn, &c. examined in 'initialibus, for the pursuers, depones, That she is the daughter of 'Mrs Stobie, a witness formerly examined for the pursuers. De-'pones, That she has had no conversation with her mother touch-'ing this cause since she, Mrs Stobie, was herself examined. In-'terrogated specially, Whether, after Mrs Stobie was examined, she 'returned to the witnesses' room, in which the deponent was then 'inclosed; and whether Mrs Stobie did not, on that occasion, state 'to the deponent the import of the evidence which she, Mrs Stobie, 'had given? depones, That the deponent did not see Mrs Stobie 'in the witnesses' room after she was examined, but that, while the 'deponent was there, Mrs Stobie sent John Ferrier, the macer, to 'desire the deponent to come and speak with her in the clerk's 'room: That the deponent went there accordingly, when Mrs Sto-'bie stated to her that she was not going straight home, but that 'she had been very much harassed by their asking her what she 'knew nothing about; but that if she had known she would not 'have been present at all: That no third party was present but the 'macer when this conversation took place. Interrogated, depones, 'That she never was in company with her mother and Mr M'Gil-'livray, teacher in Fisherrow, after her mother's examination. In-'terrogated in causa, depones, That she was cited as a witness to 'appear for the pursuers in this cause, and attended for that pur-'pose on the day referred to in her examination in initialibus, but 'was not called on to give her evidence. Depones, That Mrs John-'ston, the wife of David Johnston, at Eastfield, a witness for the 'pursuers, is a niece of the deponent's mother. Depones, That 'the deponent's mother lived at Eastfield for a few months towards 'the end of the year 1830, and that the deponent went out occa-'sionally to see her mother. Depones, That she has seen the late 'Mr Innes of Cowie, first, at Mr Johnston's, when her mother, 'Mrs Stobie, first introduced him to the deponent, and afterwards 'in his own house at Eastfield. Depones, That she has seen the 'pursuer, Mrs Morrison, and saw her for the first time in Mrs John-

'ston's, where she frequently came. Depones, That she had some 'conversation with Mr Innes on one occasion when she saw him, 'but it was not the first time, regarding Mrs Morrison, in which 'he made some apologies for thinking of marrying her, as she was 'a low woman, but that, as she had had a family by her former 'husband, he thought she was likely to have children: That Mr 'Innes said his brother and he did not agree very well, and that 'he did not wish him to get his estate. Depones, That she does not 'know whether it was at this time, but she remembers of his having 'said that he had wrote to his daughters about marrying her, and "that they were agreeable to it:' That he further said, if he had 'a boy, they would remain at Cowie until he was one-and-twenty 'years of age. Depones, That the deponent understood him to 'mean, that he was going to marry for the purpose of getting a boy; 'and he mentioned something, but she does not remember whether 'it was at this time or afterwards, of her having been in that way, 'but 'that she had lost it.' Depones, That about this time the 'deponent remembers seeing Mrs Morrison's children playing 'about Mrs Johnston's, and observing to Mr Innes that the young-'est boy was a good-looking boy; this was the pursuer; when Mr 'Innes said that the people thereabouts were saying that it was 'his boy, but that he was not: that he belonged to her former hus-'band: That this was after Mr Innes had told the deponent that 'he had thoughts of marrying Mrs Morrison, as deponed to, 'and that he was anxious for a boy. Depones, That after this, Mrs 'Morrison spoke about getting a dress for her marriage; and the 'deponent promised to make it for her: That she was not properly 'a dressmaker, but that she had been taught dressmaking, and 'sometimes made dresses for her own relations and friends: That 'Mrs Morrison had told the deponent that Mr Innes kept her bare, 'by which she meant, that she was ill-off for money from him. 'Depones, That Mrs Morrison afterwards called upon the depo-'nent to get her dress fitted. Depones, That at this time the depo-'nent remembers a conversation betwixt her and Mrs Morrison 'regarding the boy William, when she, Mrs Morrison, said that 'the people would have it that he was Mr Innes'; but she said he 'was not, and that Mr Innes was in France at the time the child 'was begot. The deponent adds of herself, 'Mrs Morrison said "to me regarding the boy, that Mr Innes had nothing to do with it;" 'and Mrs Morrison seemed to the deponent to be offended at its 'being supposed that the child William was Mr Innes'. Interro-'gated, depones, That the deponent was present at Mr Johnston's 'on a subsequent occasion, when Mrs Morrison wore the dress 'which the deponent made to her. Depones, That at this time

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'Mr Innes was unwell, and said that he had got some unsatisfactory letter from his daughters; and that it might be ten days or a fortnight before he got another; and that he would drop the deponent a note to be present again when the clergyman was there; but the deponent never received such note: That at this time the deponent was present, as she understood Mr Innes was to marry Mrs Morrison; and there were present assembled, the deponent's mother, Mrs Stobie, Mr and Mrs Johnston, and some of the pursuer's relations, her two brothers and her sister. Depones, That Mr Innes made an apology to those assembled, and declared, that as he did not wish to behave improperly to the pursuer, he would declare her to be his wife; and accordingly Mr Innes, in presence of the deponent and the others who were assembled, took the pursuer by the hand, and used these words, 'This is my wife, Mrs Innes.' The deponent is certain these were the words used by Mr Innes in her hearing. Depones, That none of the children were present on this occasion, and she never saw any of them in the room with Mr Innes. Depones, That she heard Mr Innes say that Mr Morrison was a mechanic; and she remembers of Mrs Morrison's sister saying, in the pursuer's presence, that Morrison had another wife that he lived with at the time Mrs Morrison had these children to him: That Mrs Morrison made no answer to her sister when she said so. The deponent adds of herself, 'her sister was in the custom of speaking very improperly "to Mrs Morrison at all times, and so she, Mrs Morrison, was "accustomed to it.' Depones, That the deponent was not frequently there, but she has seen them quarrelling together, and using improper language to one another, but the sister more so. Depones, That she has known them on one occasion have a quarrel together, and it was about Mr Innes, when the sister said to Mrs Morrison, 'That she had as much right to Mr Innes as the pur"suer had.' Depones, That this was after the declaration of marriage as above deponed to, and when the deponent was dining at Mr Innes; and that this speech of the sister's was made in presence of Mr Innes, but not at the dining table: That the deponent and a Mr Gibbs dined with Mr Innes, and Mrs Stobie, the deponent's mother, was asked but could not go. Depones, That the deponent has not seen Mr Gibbs for a year, and understands he is now in Russia. Depones, That Mrs Morrison did not sit at table that day: That she came in to do so, but Mr Innes would not allow her; and it appeared to the deponent, by the way he spoke, that they had had a quarrel together. Depones, That the deponent spoke of Mrs Morrison to Mr Innes

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'that day by the name of Mrs Innes, when he quarrelled the deponent and said that she was not to call her Mrs Innes any more, but Mrs Morrison. Depones, That after the declaration of marriage above deponed to, the deponent has seen the pursuer William playing about, and heard him called 'Willie Morrison,' and never heard him called William Innes. *Interrogated for the pursuers*, depones, That, to the best of her recollection, it was in the month of December 1830 that Mrs Morrison called to try on the marriage-dress, and had the conversation with the deponent above deponed to: That Mrs Stobie was present on this occasion, and the deponent's servant was also going and coming in, but she does not think she was attending to what was said: That this happened a few days, perhaps five or six, before the declaration above deponed to: That it was a few days after new year's day of 1831, that the deponent dined with Mr Gibbs at Mr Innes' as above deponed to: That this dinner took place at Mr Innes' house at Eastfield, next door to Mr Johnston's. Depones, That she thinks it was not so many as eight days after the first of January 1831: That there were just two apartments in the house, and that when May Rogers made the remark above deponed to, that she had as much right to Mr Innes as Mrs Morrison, she was just coming into the room, and at the same time Mr Innes was desiring Mrs Morrison to leave the room: That her sister then said, 'You "deserve that, as I have as much right to Mr Innes as you.' Depones, That Mrs Morrison said her sister was the worse of drink on this occasion, and she appeared to the deponent to be so: That the deponent herself slept that night in Mr Innes' house, as there was no room in Mr Johnston's. Depones, That she slept in the kitchen with the boy William, the pursuer: That the boy William appeared to the deponent to be living in Mr Innes' house at this time: That the deponent only saw Mr Innes once after the foresaid occasion, and this was in the same house, being a few days after the aforesaid dinner; and that on this occasion, Mr Innes was still living in the same house at Eastfield: That prior to the date of the declaration of marriage above deponed to, the deponent never saw him in any other place but Mr Johnston's, and that all the conversations between him and the deponent above deponed to took place there: That these conversations took place on from four to six different occasions; to the best of her recollection, not more: That she sometimes saw Mr Innes two or three times in a day in Mr Johnston's house: That the above conversations did not take place always with the deponent herself alone: That Mrs Stobie was often present, and Mr and Mrs Johnston occasionally: That on the occasion above

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'deponed to, when Mr Innes stated to the deponent that he had 'made known his intention of marrying the pursuer to his daughters, 'and that they were agreeable to it, he threw down a letter to the 'deponent which he said was from his youngest daughter upon the 'subject, and desired the deponent to read it, which, however, she 'did not do. Depones, That the deponent never followed the re- 'gular business of a dressmaker. Depones, That the boy Wil- 'liam was in the room with Mr Innes at Mr Johnston's house on 'the occasion above deponed to, when the deponent remarked that 'he was a fine boy; and that this took place in Mrs Johnston's 'presence. Interrogated by the commissary-examinator, how she 'reconciles this with what she has deponed to in the previous part of 'her deposition, that she never saw any of the children in the room 'with Mr Innes? depones and answers, 'I think I said that on "one occasion I saw William, the pursuer, in the room with Mr "Innes, at least I certainly meant to say so.' Depones, *That she 'is a married woman: That her husband is a captain in the 77th re- 'giment, at present in Jamaica: That it is three years since she saw 'him: That she corresponds with him.* Depones, That she never 'was all night in Mr Innes' house, except on the occasion above 'deponed to, and that on that night Mrs Morrison's other children, 'as also her mother, were in the house: That Mrs Morrison's mother 'and two children slept that night on a sofa in the room where they 'had dined, in order to give the deponent room in the kitchen: That 'she understood that Mr Innes and the pursuer slept together that 'night in a bed in the same room with her mother. Depones, That 'except on this night she never was all night in the same house with 'Mr Innes. Depones, That Mr Innes, when he first spoke of his in- 'tended marriage with the pursuer, asked the deponent to be bride's- 'maid on the occasion, to which the deponent agreed, provided her 'mother, Mrs Stobie, agreed to it. Depones, That this was in 'Mrs Johnston's house, and that Mr Innes was never in the de- 'ponent's house in his existence: That the deponent and her 'mother lived together.'

George Brown, session-clerk of Duddingston, was called by the pursuer, who deponed, 'That he was session-clerk of Duddingston 'in the end of the year 1830; and that during the week preceding 'the 19th of December in that year, he was applied to by a brother 'of the pursuer, and Mr David Johnston, a witness in causa, to get 'the banns of marriage proclaimed in Duddingston church between 'the late Mr Innes of Cowie and the pursuer, Janet Rogers: That 'they paid the fees of proclamation, amounting to one guinea: That 'the deponent did accordingly proclaim the banns of marriage be- 'tween Mr Innes and Janet Rogers, in Duddingston church, on

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'Sunday, the 19th December: That on the following day an extract of the proclamation was furnished to Johnston by the deponent, which is marked by the deponent and commissary-examinator of this date, as relative hereto: That the deponent knew that Mr Innes lived at Portobello at this time, having previously had some business with him there: That about the spring or first month of summer of 1831, while the deponent was engaged in taking up the population of the parish of Duddingston, he called upon Mr Innes, who was then residing at Wellington Place, near Fisherrow: That the deponent saw Mr Innes on that occasion, and had some conversation with him regarding the aforesaid proclamation of banns: That the pursuer was present on this occasion, and seemed very anxious to be regularly married by a clergyman: That the deponent had a long conversation with Mr Innes regarding the Scotch law of marriage. Depones, That Mr Innes seemed to think a regular marriage unnecessary, as he had already declared the pursuer his lawful wife: That Mr Innes referred to the famous case of Macadam of Craigengillan in Ayrshire: That when the deponent and Mr Innes were taking a tumbler of toddy together, the pursuer brought in a little boy, and said to the witness, 'I'll shew you our boy, Mr Brown:' That the deponent was given to understand that the boy was Mr Innes' son, by his having negatively assented to this statement of the pursuer: That Mr Innes and the pursuer appeared to be living as man and wife at this time, and that he invariably addressed her in the style of a wife: That on this occasion the pursuer asked the question, whether it was necessary that she should appear with the child wrapped up in a cloak, and make a public confession? That the deponent said he thought this unnecessary by the law of Scotland; and Mr Innes repeated, that it was enough for the child, that he had declared the pursuer his wife before witnesses. Depones, That the certificate was written out and given to Johnston, as aforesaid, before the deponent made any entry in the regular proclamation book, and that the deponent will excerpt and transmit to the commissary-examinator an exact transcript as it now stands in the proclamation book. Interrogated for the defenders, depones, That the pursuer was proclaimed as 'Janet "Morrison,' and that this was done because the two people who called upon him, as above deponed to, gave him to understand that this was the wish of Mr Innes. Interrogated, How and when it was that the words, 'or Rogers,' which now stand in the book interlined after Morrison, was inserted? depones, That this was done about a week afterwards, and the deponent has a strong impression that it was done at his own suggestion.

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'Interrogated, Whether he is certain that the certificate was written out before he entered the proclamation in the register-book? 'depones, That he is not.'

An extract from the register of proclamation of banns, kept for the parish of Duddingston, was produced.

'*December* 19*th* 1830.—On this day the banns of marriage between John Innes, W. S. Esq. of Cowie, and Janet Morrison or Rogers, eldest daughter of William Rogers, late joiner in Edinburgh, both residing in this parish, have been three times publicly proclaimed in the parish church.'

'*Duddingston, July* 26*th* 1833.

'The above is an exact transcript of the entry in the register book of the proclamation of the banns of marriage, between the late John Innes, Esq. of Cowie, and Janet Morrison or Rogers, referred to in my deposition of the 26th June last. (Signed) GEORGE BROWN.'

The following medical evidence was adduced, (on the part of the pursuers): 1. Dr James Hamilton junior, physician in Edinburgh, professor of Midwifery in the University of Edinburgh, who deponed, 'That he thinks that ten calendar months is an unusually 'long period of gestation, but not by any means without precedent. 'Depones, That in the course of his practice he has had occasion 'to know a very few cases of such protracted gestation, with regard 'to which he could entertain no doubt. Depones, That he has 'known one case of a patient passing eleven menstrual periods by 'seven days. Depones, That by calendar months the deponent 'means consecutive months, beginning at any one month in the 'year. Interrogated for the defenders, Whether the number of 'cases which he has known in which the gestation was protracted 'to ten calendar months has, in his experience, been so great as 'one in a thousand? depones, Certainly not. Interrogated, Whether it may have been one out of two thousand, or three, or four, 'or five thousand? depones, That it is impossible to answer this, 'because a person does not think of keeping a list. Interrogated, 'Whether, in computing the period of gestation, a medical man 'must not necessarily depend on the statements of the woman, as 'to the period from which conception is supposed to commence? 'depones, That the information obtained from the patient relates 'to the date of her last menstruation.'

2. John Moir, surgeon to the Lying-in-Hospital, Edinburgh,

and physician in Edinburgh, who deponed, 'That he has seen three 'or four cases in which, and particularly in one of them, he consi- 'dered that gestation had been protracted beyond the usual period: 'That with regard to that one case he had no doubt: That there 'are few cases of the kind in which there is not room for doubt: 'That in the one case, as to which he was sure, the gestation was 'protracted a fortnight beyond the nine months, and in the others 'eight or ten days. Interrogated, What is the opinion entertained 'by the profession with regard to cases of protracted gestation? 'depones, That it is the opinion of some medical men that gesta- 'tion cannot be protracted beyond the nine months; but he believes 'that the prevailing opinion of the majority, both in number and 'authority, is, that it may be protracted. Interrogated for the de- 'fenders, depones, That he has acted as one of the medical officers 'of the Lying-in-Hospital for about five or six years, and is aged 'about twenty-six. Depones, That the above case is the only one 'in which he is certain of the protraction, of his own knowledge. 'Depones, That, in this case, he took the period from which the 'time was to be computed from the information of the woman. 'Depones, That the prevailing opinion of the majority is in favour 'of a possible protraction to the extent of even a fortnight beyond 'the usual period. Interrogated, How far this prevailing opinion 'extends,—in particular, whether it goes the length of a possible 'protraction of three weeks or a month? depones, That he thinks 'it extends to three or four weeks after the usual time. Interro- 'gated, Whether, in these cases of protracted gestation, the woman 'must not know, or have an opinion, as to whether she is beyond 'the usual time or not? depones, That he thinks she must sus- 'pect it.'

On the part of the defenders, 1. Dr Thomas Thomson, afore- said; who being interrogated, depones, 'That he is the Dr Thom- 'son who was examined in June 1833 for the pursuers. Depones, 'That Janet Rogers, when he delivered her, as formerly mention- 'ed, was a stout, healthy woman. Interrogated, Whether either 'then, or at any other time, any thing ever passed which led him to 'believe or suspect that the woman had gone more than the usual 'period with child? depones, Nothing whatever. Depones, That 'nothing of the kind was stated either by her or by any body else, 'and nothing of the kind was hinted by any body. Depones, That 'it is usual for women who believe that they have gone with child, 'especially if it be for any long period, to mention this to their me- 'dical attendants. Depones, That he has been in practice as an 'accoucheur in Edinburgh upwards of fifteen years. Interrogated, 'Whether it be usual for women to go beyond the ordinary period,

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'or whether this ever occurs? depones, That it occurs very seldom, 'if it ever occurs at all: That they may go for a few days longer 'or shorter, but nothing beyond eight or ten days. Depones, That 'he thinks the addition of a month totally out of the question, and 'thinks so decidedly: That in judging of the period of supposed 'gestation, one is obliged to proceed entirely on the statement of 'the female. Depones, That there are various causes which may 'make the female mistake, and which may give them an interest to 'mislead. Interrogated for the pursuers, depones, That he was a 'muslin weaver from his sixteenth to his eighteenth year, having 'previously received a good education: That the deponent com-'menced his medical education after his eighteenth year, and com-'pleted it in Edinburgh: That he received his diploma from Aber-'deen. Depones, That he is aware many cases are recorded in 'the books of medical jurisprudence of females having gone ten 'calendar months with child; but that he believes, and is of opi-'nion, that no such cases ever truly occurred. Being shewn the 'certificate, depones, That it is in his handwriting; and the same 'is signed by the deponent and commissary-examinator as relative 'hereto. Re-interrogated for the defenders, depones, That he does 'not practise as an apothecary, but as an accoucheur and general 'practitioner. Being shewn an unsigned certificate, which is now 'produced, and marked as relative hereto, under an objection against 'its being produced stated by the pursuers' counsel, upon the ground 'that it was within the power of the defenders, but neither re-'covered nor produced by them before the record was closed, which 'the commissary-examinator repelled, depones, That a clerk of Mr 'Rutherford, the pursuers' agent, came to him one evening long after 'this cause began, with this certificate written out as it now is, and 'wished the deponent to make out another in his own handwriting, 'in the same terms, and to sign it: That this the deponent refused 'to do, because it set forth that he had delivered 'Mrs Janet "Rogers or Innes;' whereas he had never known this woman as 'Mrs Innes, or as any thing but Mrs Morrison. Depones, That 'he has kept this certificate ever since. Depones, That the said 'clerk called on him for this purpose shortly before the 6th of De-'cember 1832 *.

John Thatcher, physician in Edinburgh; who being interrogated,

* The certificate referred to by this witness ran thus:

'I, Dr Thomas Thomson, residing at 32. Gayfield Square, Edinburgh, do hereby 'certify, that I delivered Mrs Janet Rogers or Morrison, as she was then called, of a 'male child, upon the 14th day of April 1827, having attended her upon that occasion 'at her residence at No. 9. Greenside Place, Edinburgh. Given under my hand at 'Edinburgh, this 6th day of December 1832.

(Signed) 'THOMAS THOMSON, M. D.'

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'depones, That he has been in practice as an accoucheur for nearly 'thirty years, during which he has delivered above 10,000 patients. 'Depones, That gestation protracted beyond nine calendar months 'is a possible but not a very probable circumstance. Interrogated, 'Whether he believes in a gestation of ten months? depones, That 'two such cases, perhaps three, have been reported to him, but that 'he considered these, and considers such cases generally, as founded 'solely on miscalculation or misapprehension. Depones, That 'wherever the woman is of bad character, or has an interest to de-'ceive, he would most assuredly ascribe the statement, that she 'had gone long beyond the ordinary period, to these circumstances. 'Interrogated, Whether, in judging accurately of the exact period of 'gestation, he is not obliged to depend entirely upon the statements 'of the woman, or at least to depend so much upon these statements 'that no certain conclusion can be drawn independently of them? 'depones, That in general, in respectable practice, certainly he 'does rely upon the statement of the woman; but that, in the later 'months of pregnancy, if required, accurate and scientific exami-'nation could be made correctly, or nearly so, to ascertain its state 'of advancement, independent of any statement on the part of the 'mother; but that if no such examination be made, the woman's state-'ments are the only guide: That women without any motive of de-'ception are frequently mistaken as to the period of gestation. In-'terrogated, Whether the woman, when there is any unusual pro-'traction, must not be aware of this fact? depones, 'I think she "unquestionably must.'

Pursuers' Pleas.

The pleas in law for the parties respectively were thus stated: *For the pursuers*—The facts set forth are relevant to establish the status of the pursuer, Janet Rogers or Innes, as the relict, and of the pursuer, William Innes, as the lawful son and heir of the late John Innes of Cowie, Esq.

Defenders' Pleas.

For the defenders—The marriage betwixt Mr Innes of Cowie and the pursuer being denied, this marriage must be legally established by evidence, before she can be entitled to claim the status of his widow. 2. Even if facts and circumstances relevant to infer the marriage could be proved, the other pursuer, calling himself William Innes, not having been begotten by Mr Innes of Cowie, can have no right to claim the character of his heir.

After the record was closed, the pursuers presented a note to the Lord Ordinary during vacation, of the following import: The pursuers 'are under the necessity of applying to your Lordship to post-'pone the decision in this case till they shall have an opportunity

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'of duly establishing by proof certain very material facts connected 'with the evidence of three of the principal witnesses for the de- 'fenders, tending to shew that their case has been endeavoured to 'be made out by a system of wilful and deliberate perjury. The 'pursuers are in a situation to shew that the extraordinary facts now 'to be mentioned could not possibly be within their knowledge du- 'ring the period when the proof was taken, and that therefore they 'are entitled to the full benefit of the rule of res noviter veniens 'ad notitiam.

'It will be in the recollection of your Lordship that the case of the 'defenders was mainly rested upon the evidence of a person represent- 'ing herself to be a Mrs Captain Barry, a natural daughter of Mrs 'Stobie, residing in Fairlie's Close, Cowgate, who swore, '*that she is "a married woman: That her husband is a captain in the 77th regi- "ment, at present in Jamaica: That it is three years since she saw him: "That she corresponds with him,*' &c. The apparant respectability of 'this person, judging from her dress and general deportment when 'examined, was such that no suspicion was entertained as to her 'being actually what she represented herself to be; and although 'the pursuers certainly were greatly surprised at some parts of her 'deposition, they were not prepared for the discovery which they 'have since made, and which the recent return of Captain Barry 'from the West Indies now enables them to set forth with the most 'perfect confidence, viz. That she is a mere impostor, who never 'was married to him, and was formerly a common prostitute and a 'person of the most infamous character, who has assumed his name 'in his absence from this country, for no other purpose but that of 'fraud and imposition.

'The evidence of this '*respectable lady*' as she was called, in so 'far as it was contradictory of the evidence of the pursuers, was 'particularly pressed upon the attention of your Lordship at the 'debate in the end of the summer session, by the counsel for the 'defenders, as particularly worthy of regard, when contrasted with 'that of the individuals in a lower rank of life, who bore testimony 'for the pursuers; and they dwelt in the strongest manner upon 'the credit due to her, as occupying the status of a respectable 'married lady, the wife of a captain in the British army.

'Various circumstances in her deposition, which greatly surprised 'the agent for the pursuers, had led him, so far back as the month of 'August 1833, to write to Captain Barry, requesting informa- 'tion on the subject. He understood that the regiment was in 'Jamaica, and addressed his letter to that island; but owing to the 'regiment having changed its station, and having been ordered to 'the British dominions in North America, it now appears that the

'letter had never reached him, and the pursuers' agent not having 'any answer to his communications, was left to suppose, either that 'the letter had not reached its destination, or that Captain Barry 'was disinclined to answer any inquiries made on the subject. But 'in the beginning of August last, having perceived in the news-'papers that the captain had returned to this country with his 'regiment, he transmitted a copy of the former letter, accompa-'nied with a request that Captain Barry would answer it; and in 'course of post he received the following note: 'Captain Barry "has received Mr Rutherford's letter of the 11th instant; in reply "to which he begs to refer him to A. Nairne, Esquire, W. S. and "to Captain Raims, 77th regiment, his friend and brother officer, "who are aware of the system of annoyance adopted towards him "by the woman, Euphemia Inglis. Captain Barry will be detained "in London for some weeks after the regiment, which embarked "this day on board his M. ship Romney, for Leith, but he will "not fail, on reaching Edinburgh, to adopt legal measures to pu-"nish the said woman for her impudent assertion and assumption "of his name (if really she has done so,) in itself so truly absurd "that he does not think it requires refutation.—*Portsea, 15th August* "1834.'

'It further appears that Captain Barry has been for years married 'to a lady of the highest respectability, and that he never corre-'sponded with this impostor Inglis, who has assumed his name, and 'deliberately swears that she is his wife, and that she corresponded 'with him when abroad. He utterly disclaims all connection with 'her; and as he is now quartered in Edinburgh Castle, and feels very 'deeply the injury done to him by so impudent an imposture, it is 'understood that he is resolved to have the woman prosecuted for 'perjury.

'Your Lordship, referring to the evidence in the present case, 'will further be pleased to observe, that this witness was connected 'with several others, who concurred in representing her as Mrs 'Captain Barry, although they must have known that she had no 'pretensions to that character, and could not fail to be intimately 'acquainted with her real history. The very greatest weight was 'naturally given to such apparently respectable testimony in stat-'ing the case for the defenders; while the pursuers, owing to the 'circumstances which have now been explained, and which they 'are fully ready to substantiate, had it not in their power even to 'state, far less to prove.

'It is humbly trusted that your Lordship will still afford them 'an opportunity of doing so before disposing of the case, which 'they mean to enrol for that purpose at the meeting of the Court.'

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The Lord Ordinary, on motion, allowed an additional record to be prepared. The condescendence was in substance similar to the above note; and the pursuers further produced a decerniture of the Commissary Court, (which they alleged they had only discovered on applying to Captain Barry's agent,) in these words: 'At Edinburgh, the 15th day of September 1826 years—Sitting in judgment, the Commissaries of Edinburgh. Their Lordships, in the action of declarator of marriage, adherence, legitimation and aliment, raised and pursued before them, at the instance of Mrs Euphemia Inglis or Barry, residing in Edinburgh, and designing herself wife of Charles Barry, captain in his Majesty's 77th Regiment of Foot, presently residing in Paisley, and Charles Barry, their son, against the said Captain Charles Barry, assoilzied, and hereby assoilzie the said Charles Barry, defender, from said action; but found, and hereby find, no expenses due, and decerned and hereby decern. Extracted by me, depute commissary-clerk of Edinburgh.' (Signed) 'G. CARPHIN Jun.'

The defenders, inter alia, averred, in reply, that the pursuers were themselves the authors of the disignation in question; that they took it as they got it from them, and that they had examined the witness after she had been rejected by the pursuers.

Incidental pleas for pursuers.

The pursuers' pleas, in respect to the above objection, were these: 1. The facts now stated by the pursuers, being wholly unexpected till after the deposition of the witness, Euphemia Stobie alias Inglis, was emitted, and the pursuers being unable to obtain more early information regarding them, these facts are truly res noviter venientes ad notitiam, and as such afford sufficient ground for opening up the record, and entitling the pursuers to a proof of their averments.

2. The averments now brought forward by the pursuers against the testimony of Euphemia Inglis alias Barry, are relevant to convict her of perjury, and consequently to destroy, or at all events greatly to impair the effect of her deposition in causa.

Incidental pleas for defender.

Those of the defender: 1. Where a witness has been cross-examined on a matter irrelevant to the cause itself, it is incompetent to lead evidence to contradict what she has sworn to on that matter, in order to discredit her testimony on other points; Spencely *v.* De Willot, 7. *East.*, 108; Harris *v.* Tippot, 2. *Campbell*, 637; *Philips' Law of Evidence*, i. 272, last edition; *Peake's Law of Evidence*, 134.

2. Where a witness, on cross-examination, has been asked a question intended to degrade or disparage her character, the party examining is bound by the answer, and is not entitled to discredit

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the answer by counter evidence; Harris *v.* Tippot, 2. *Campbell*, 637; Rex *v.* Watson, 2. *Starkie*, 151; *Philips' Law of Evidence*, i. 272, 284, last edition.

3. The proof proposed to be adduced by the pursuers regarding the status of the witness, Stobie, is inadmissible in this cause, as it involves the trial of an issue collateral to the cause; Whish and Wollat *v.* Hessie, 3. *Haggard*, 682.

4. Supposing a proof in contradiction of the witness' answer had been admissible, it is in the present stage of the proceedings now too late to bring it forward; Wright *v.* Din, Jan. 5. 1737, *Mor. Dict.* 12,119; Glas *v.* Christison, May 15. 1819, *Fac. Coll.*

5. The facts admitted or averred are inconsistent with the allegation of res noviter, as regards the status of the witness, Stobie, and presume the contrary; or at least they establish that the pursuers have not used due diligence to obtain before circumduction the evidence within their power, of that status which they now ask leave to prove; Dundas *v.* Aitkin, 9th March 1810, *Fac. Coll.*

His Lordship ordered minutes of debate on the above point, in which the pursuer urged the above pleas by various illustrations; and the defender in substance contended, that the doctrine of res noviter veniens was confined to the introduction of matter pertinent to the cause; that reprobatory proof, when competently adduced, can only be applied, in accordance with the authorities, to the initialia testimonii; that independently of the doctrine of res noviter veniens, and of protest for reprobators, it must be acknowledged as an established rule of evidence, and one which it would lead to inextricable confusion to deviate from, that no evidence can, at any time, be led with a view to contradict matter collateral to the issue, which may be elicited from a witness on cross-examination. To shew that the consistorial practice in England was similar on this point to that of the courts of common law, he cited a recent judgment of Dr Lushington, in the cause Sargeaunt *v.* Sargeaunt, decided 18th Nov. 1834.

Interlocutor of Court.

The Lord Ordinary, (6th March,) having pronounced an interlocutor, reporting the whole cause, the Court, in the first place, (16th June,) disposed of this incidental point by refusing the application.

Lord Balgray.—The incidental question which has occurred, relative to the witness, Mrs Barry, does not appear to me to be of much consequence to either of the parties, but it appears to be of considerable importance to the law of Scotland, and on that ground alone deserves attention.

In all consistorial cases, it has been the practice to give in a list

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of witnesses, with their designations, previous to the entering upon the examination of the witness. This is done for the purpose of enabling the parties respectively to inquire into the situation and character of the persons who are to be adduced against them. If objections occur, then the party objecting should come prepared with his evidence to support them; and if this be not in his power, which often happens, then he ought to protest for reprobators, in order to enable him to examine evidence afterwards. Accordingly, de praxi, whenever a witness is brought forward, the judge-examinator demands of the opposite party if there are any objections to the witness. If he says there are, these objections must be stated instanter, and proved. If that be not attainable, then the party protests for reprobators, and the examination proceeds. This practice is founded on manifest utility; because, when reprobators are protested for, it puts the party on his guard, so that he may either withdraw the witness, and substitute another in his place, or he may direct his attention to the future evidence to be adduced, and so guide it, that it may corroborate what may be stated by the witness objected to. But when there is no protest, it naturally induces acquiescence in the admissibility and validity of the testimony of the witness.

The law is well laid down by Mr Erskine. He explains the reason of the thing, and mentions the adoption of the modern practice: 'Where one offers a relevant objection against a witness, of 'which he cannot bring instant proof, it can be no bar to his exa-'mination; but, in such case, the party objecting may, immedi-'ately before the party makes oath, protest for a reprobator; i. e. 'protest that he may be allowed afterwards to bring evidence of 'the witness's enmity to him, or of his partial counsel in some other 'articles. Actions of reprobator were admitted by our former prac-'tice, though no such previous protestation had been entered so 'long as sentence was not pronounced in the principal cause, in 'which the witness had deposed. But in the case of the intermediate 'death of other witnesses who could have sworn to the same facts, 'that action was not admitted without such previous protestation, 'even when the principal cause was still pendent; for there the 'producer of the witness, who saw no objection offered to his tes-'timony, had reason to rest upon his evidence, whereas, had the 'protestation been entered by the adverse party, he might have 'brought others then alive in support of his allegation. But by 'the present practice, which is not so favourable to actions of re-'probator, they are received in no case where they have not been 'previously protested for, even though he who produced the wit-'ness cannot shew that he has suffered any prejudice by the inter-

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'mediate death of others, from a presumption that the party who 'insists for the reprobator, if he truly has a sufficient objection 'against the witness, would have entered the usual protestation be- 'fore his making oath;' *Ersk.* iv. 2. 29.

The same law is also laid down by Lord Stair, iv. 43. 11, who specifically states, that if parties do not protest for reprobators, 'parties are held as acquiescing.'

What is stated by these authors has been followed by the Court in a series of decisions; 22d June 1676, Irvine *v.* Ross and Irvine; 6th Feb. 1679, Irving *v.* Irving; *Harcarse*, No. 847, Newton *v.* Paip; 5th Jan. 1737, Wright *v.* Din; 10th Feb. 1810, Robertson *v.* Duke of Athole; 15th May 1819, Glass *v.* Christison.

From these authorities it is perfectly clear, that it is contrary to law and practice to allow the pursuer in this case, who never protested for reprobators, to adduce evidence to affect the admissibility of Mrs Barry. The general rule is laid down most distinctly and accurately by the authorities referred to. It is very true that Lord Stair mentions an exception from the general rule. His words are, 'Except they can give competent evidence that the 'grounds of their inability came to their knowledge after their tes- 'timony, and were of the nature of those for which witnesses might 'be simply rejected.' In this opinion Lord Stair is borne out by two cases, Gooden *v.* Murray, 13th July 1700, and Glass *v.* Christison, 15th May 1819; but, in these cases, it must be made out by competent evidence that the matter truly came noviter ad notitiam. But that will not apply, if the party could have obtained more early information, by reasonable diligence and attention.

Now, in this case, Mrs Barry was originally summoned as a witness for the pursuer, and therefore he must be supposed to have known every thing of her situation and status before he included her in his own list. Besides, the fact upon which the pursuer founds his demand happened no less than seven years before Mrs Barry's examination, and that alone takes it out of the exception.

In the second place, the demand of the pursuers seems objectionable on another ground. It will be observed from the proof that each of the parties gave in a judicial minute, declaring the proof to be closed. The judge, accordingly, in pursuance of his duty, circumduces the term, and by a regular interlocutor declares the proof concluded, and he reports the evidence, as he was bound to do, and as taken by him, to the proper authority. Now, after all this is done, nothing could be more dangerous than to allow a party to challenge the witnesses of his opponent, because, by investigation posterior to the proof, he has found out, that the witnesses have committed some mistakes as to their age, profession, or resi-

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dence, or other matters of that kind. If one party is allowed to do this, the other party must be entitled to redargue it. In that way there could be no termination to a proof, and to listen to such a demand would give rise to the most dangerous consequences.

In the third place, the present demand ought to be refused, because what is stated is not relevant in itself, for although the deed, upon which the objection to Mrs Barry is founded, was produced, yet it would never affect her admissibility or credibility. Notwithstanding of the decree of the Commissaries against her, she may conscientiously believe that she was the wife of Captain Barry, and it would be impossible for any court, on this ground, to convict her of perjury.

It appears to me, therefore, that the demand of the pursuer ought to be refused.

Lords President, Gillies and *Mackenzie* substantially concurred.

The cause having been continued for debate on the merits, their Lordships this day delivered their opinions as follows:

Opinion of Court on merits.

Lord President.—I do not agree with Mr Robertson, that the question here is, whether this was the child of Morrison or Innes. I should not wish to be obliged to say who was the father of it. What we have to decide here is, on the one hand, whether there is proof that this was the child of Innes, and, on the other, whether there is proof of a marriage. The proof as to the marriage appears to me sufficient; but when you come to talk of the paternity, it is a different matter. If you couple the whole circumstances with the fact, that Innes left this country 301 days before the birth, and when you consider that for a long time after that, the pursuer held out Morrison as her husband, and bore his name,—that she even gave that name to the father at the time of the birth, I do not see how it is possible to say that Innes was the person who begat it.

Lord Mackenzie.—This is quite different from a question of aliment. This is not a case for a semiplena probatio: there must be full proof. The question is, whether there is such proof here. According to the admitted facts, this child must have been begotten, if Innes was the father of it, ten months before the birth. This is a primary consideration. There has been an argument as to the possibility of the thing; but there can be no doubt of the extreme improbability of such lengthened gestation: that is a notorious fact: there can be no doubt about it, and that improbability must be overruled by the clearest evidence. There is no sound evidence, in point of fact, to establish that Innes was the father; and are we, in such circumstances, to decide in favour of this pursuer, to the prejudice of the acknowledged relations of Mr Innes, to the effect of ousting

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them from their present possession of this estate. There is just as good ground for legitimating every child this woman ever had, as there is in respect to this pursuer. I can very well understand, where a man and woman have lived in a state of concubinage—where they are quasi man and wife, and neither having intercourse with any body else—why the doctrine of legitimation per subsequens matrimonium may legally operate in favour of their children, and that, in such case, there would be great reason for presuming paternity; but this case fails in this respect in every particular: there is no good evidence of continued intercourse before the child was born; on the contrary, they did not live together: he had two other mistresses, and one of them her own sister: he had no kind of fidelity to her: he did not make her his concubine. The best that can be made of the matter is, that there is an averment, not well proved, that, on certain occasions, she had yielded to this man, as she would have done to any other body; for it is not pretended he had particular allurements, or that it was on account of any seduction of his. There are other circumstances which tell in the same way. It is certain she claimed as her husband another man: if he was not her real husband, she continued to claim him as such: he begat two children by her at a time when she kept his name and company; and are we to take it for certain she could not have another by him, merely because there is no evidence of continued intercourse? It would appear that he came in once when drunk, and claimed the child as his,—in vino veritas. I think there cannot be the least doubt as to the propriety of rejecting this claim of paternity. As to the question of marriage, I certainly have some misgivings; yet I cannot set aside so much evidence: there is no proof of perjury, and on the whole I think it is made out; but I have no absolute confidence even as to this.

Lord President.—The rule, pater est quem nuptiæ demonstrant, is strictly applicable only to children born in wedlock. In the noted case of Savage, Parliament acted contrary to this rule; but this was always considered a very iniquitous piece of legislation, and the understanding has been that it would never be repeated.

Lord Gillies.—It will not do for either the man or the woman to say that such a child was begot between them, unless there are proper extrinsic circumstances. This certainly will not do per se, and I do not think there is sufficient proof aliunde. As to the marriage, I would have great doubts about it but for the case of Macadam.

Lord Balgray concurred.

Judgment.

The *Court*, therefore, pronounced this interlocutor: 'The Lords 'having advised this cause, with the proof for both parties, and

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'heard counsel in their own presence, find, *first*, As to the conclusion of declarator of marriage in the libel, that sufficient evidence has been given of facts and circumstances to establish a marriage between the pursuer, Janet Rogers, and the late John Innes, Esq. of Cowie; and decern and declare in terms of that conclusion of the libel accordingly; and find her entitled to expenses in so far as relates to this branch of the case; and remit the account of that expense to the Auditor of Court to tax the same, and report: As to the conclusion of legitimacy at the instance of the other pursuer, calling himself William Innes, find, That no sufficient evidence has been adduced of his birth as a lawful child of the said marriage, or otherwise of his being the lawful son of the said John Innes; therefore, find the said pursuer not entitled to the character, or to any of the rights of the lawful son of the said John Innes, and decern and declare accordingly; assoilzie the defenders from the conclusion of the libel at the instance of the said William Innes, but find the said defenders not entitled to expenses.'

Lord Ordinary, *Corehouse.* Act. *Robertson, Maitland, Handyside.* Alt. *Dean of Fac. (Hope,) Rutherfurd, Lumsden, A. A. Maconochie.* *Jas. Rutherford,* W. S. Pursuers' Agent. *Peter Crooks,* W. S. Defenders' Agent. *B.* Clerk.

C.

SECOND DIVISION.

No. CLXV. *7th July* 1835.

JOHN SIMPSON, TEACHER IN KELSO,
against
THE DUKE OF BUCCLEUGH AND OTHERS, (HERITORS OF SPROUSTON,) AND PRESBYTERY OF KELSO.

PAROCHIAL SCHOOLMASTER. — STAT. 43. GEO. III. c. 54. — *Found, that it is not required by the above statute, that a majority of heritors and the minister shall fix on the branches of literature on which they require examination, at the meeting at which the schoolmaster is elected, or at any other particular meeting, but that their resolution to this effect may be taken at any meeting regularly called and intimated for the purpose, subsequent to the vacancy, and previous to the meeting of presbytery at which the examination is to proceed.*

Question as to the meaning and effect of the 16th clause of said statute, in respect to the powers of said majority of heritors and the minister to examine the presentee in every branch of literature they may deem necessary.

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Narrative.

THE office of schoolmaster in the parish of Sprouston having become vacant, in spring 1833, intimation was made from the pulpit, on Sunday, the 3d of March of that year, 'that a meeting of the heri-'tors of the parish will be held in the parish-church, on Thursday, 'the 14th day of March current, at 12 o'clock noon, to arrange 'matters previous to the election of a successor to Mr Robertson; 'and that, on the 17th day of April thereafter, another meeting of 'the said heritors will be held in the same place, and at the hour 'aforesaid, for the purpose of electing a fit and proper person to 'succeed to the said vacant office.' Intimation of the vacancy, and of both the above meetings, was also sent to all the heritors, by circular letters, the same letter containing the notice of both meetings. It was stated by the suspender, (Simpson,) that the heritors had not authorised this intimation.

The first meeting took place on the 14th March, and was attended by Mr Darling, for the Duchess of Roxburghe and Mr Tollemache; Mr Walker, for Sir John Scott Douglas; and Mr Brodie, for Sir William Eliott of Stobbs and Wells. These gentlemen represented the whole heritors of the parish, with the exception of the Duke of Buccleugh, and are the ordinary and recognised factors of the parties for whom they respectively appeared, and usually act and attend such meetings in that character. Mr Simpson, in the after proceedings, denied the authority of these mandataries. Sir William Eliott was informed, by letter from Mr Darling to him, dated 19th March 1833, that the above meeting had been attended by Mr Brodie on his behalf, and that it had been resolved that the schoolmaster should be qualified to teach English, writing, arithmetic and Latin.

At this meeting on 14th March, 'it was resolved, that the new 'schoolmaster of this parish should be qualified to teach English, 'writing, arithmetic and Latin, and that it is necessary to require 'certificates of character, and previous success in teaching, from the 'several candidates. The meeting further resolve, that an advertise-'ment, in the above terms, shall be weekly inserted in the Kelso 'Mail, and Edinburgh and Leith Advertiser, and that, in said adver-'tisement, the candidates shall be required to lodge the certificates 'before mentioned with Robert Darling, Esq. Kelso, on or before 'Thursday, the 11th day of April next. The meeting further re-'solve, that an examination of the several candidates shall take place

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'on the 17th April previous to the election, and that one or two of 'the members of the presbytery be requested to attend upon that 'occasion.' The resolutions contained in this minute were not rescinded, recalled or altered by any subsequent meeting of heritors.

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In pursuance of these resolutions, the following advertisement was inserted in the newspapers named in the minute: 'Wanted, 'A schoolmaster for the parish school of Sprouston. He must be 'qualified to teach English, writing, arithmetic and Latin. The 'salary is L.30; and as the parish is populous, an efficient teacher 'will be sure to obtain a numerous school. Certificates of charac-'ter, and of success in teaching, are required to be lodged with 'Robert Darling, Bank of Scotland's office, Kelso, on or before 'Thursday, the 11th of April next, that they may be examined 'by the heritors previous to the election, which will take place in 'the school room, at Sprouston, on Wednesday the 17th of April, 'at eleven o'clock forenoon, after the examination of the several 'candidates.'

The heritors, including Sir William Eliott, were written to by Mr Darling, that the above advertisement had been inserted in the papers fixed on by the meeting of 14th March, and Sir William never stated any objection to it.

The meeting for election was accordingly held on the 17th April, and was attended by Sir William Eliott, Mr Darling, mandatary and factor of the Duchess of Roxburghe, and her husband; Mr James Elliot, for the Duke of Buccleugh; and Mr Walker, for Sir John Scott Douglas. At this meeting, Sir William Eliott was chosen preses, and a list of twenty-seven candidates for the vacant office was laid before them, most or all of whom were in attendance. The preses then protested against the factors and mandataries of the Duchess of Roxburghe and Sir John Scott Douglas being allowed to vote. These gentlemen, at the same time, protested against the refusal of their votes. Mr Darling then protested against the vote of Sir William Eliott, who claimed for himself a deliberative vote, and the casting vote as preses; and he proposed the suspender, Mr Simpson, as the person who should be elected. Mr Eliott, for the Duke of Buccleugh, proposed Mr James Brown, who was also supported by the mandataries for the other heritors. The minutes bear, 'The meeting therefore declared Mr Brown 'schoolmaster of this parish, and to enter upon his office at Whit-'sunday 1833, and to be entitled to all its emoluments, upon being 'found by the presbytery qualified to teach English, writing, arith-'metic and Latin, which the meeting considers necessary qualifica-'tions for this parish, and they direct the clerk to furnish him with 'a copy of the minute. Sir William Eliott protests against the

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'decision just come to, in respect of the illegality of the votes of 'Messrs Darling and Walker; and protests that Mr John Simpson 'is duly elected schoolmaster of the parish of Sprouston, by a ma- 'jority of legal votes; and declares the said Mr John Simpson 'schoolmaster accordingly, and to enter upon his office at Whit- 'sunday 1833, and to be entitled to all its emoluments, upon being 'found qualified, by the presbytery of Kelso, to teach English, 'writing and arithmetic, and direct the clerk to furnish him with 'a copy of this minute.'

A meeting of the heritors and minister was held within the parish-church, on 19th September 1833, when there were present Sir William Eliott, the Reverend John Sym, minister, John Smith, for Sir John Scott Douglas, Mr Darling for Duchess of Roxburghe, and Mr Elliot for the Duke of Buccleugh. Mr Sym was chosen preses. Mr Smith moved that the resolutions of the meeting of the 14th March last, requiring a knowledge of the Latin language as one of the qualifications of candidates for the vacant parish-school of Sprouston, being still a standing and valid resolution, to the effect of forming the rule by which the presbytery must conduct themselves in their examination of the schoolmaster elect; and never having been specially altered by any competent meeting, the presbytery shall be respectfully craved, in their examination and trial of the candidate elect, to give effect to the said resolution, and to make a knowledge of the Latin tongue an essential requisite before confirming any person in the office of schoolmaster of this parish; and as Mr Simpson does not possess this requisite qualification, and besides was not duly elected by a majority of the heritors present, that the said venerable body shall take upon trial Mr James Brown; and upon his being found duly qualified, in terms of the resolution of 14th March last, confirm him in his said office; which motion was agreed to by the meeting, with exception of Sir William Eliott, who protested, 'That it is not competent to the present meeting to alter the deci- 'sion of the meeting of the 17th April last, which was specially 'called for the purpose of electing a schoolmaster, and which meet- 'ing, by a majority of legal votes, did elect Mr John Simpson, as 'schoolmaster, to enter upon his office at Whitsunday 1833, and 'to be entitled to all its emoluments, upon being found qualified, by 'the presbytery of Kelso, to teach English, writing and arithmetic.'

Both candidates claimed the appointment, and made application to the presbytery to take the trial of their sufficiency.

The presbytery, unwilling to be involved in a litigation, refused to proceed, and referred the whole case to the General Assembly for instructions. As the matter involved questions of civil law, the

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Assembly remitted to the presbytery, with a recommendation to be guided by the opinion of the procurator of the church.

The opinion of the procurator was accordingly taken; and a special meeting of the presbytery was held on the 16th July 1834, at which the presbytery having taken 'into consideration the Assembly's deliverance, recommending them to follow the advice of the 'procurator; and further, considering his opinion to be in these terms, "I have no difficulty in saying that Mr Simpson is the candidate "legally elected,' they found accordingly.' To this proceeding the respondents, the heritors of the parish, were not parties, and they did not acquiesce in or homologate the finding of the presbytery. 'The presbytery next proceeded to judge of the qualifications in 'which they are required to examine the schoolmaster, and unanimously agreed to follow the procurator's opinion, which is in these 'terms: 'I think the qualifications required are Latin, English, "writing and arithmetic;' and they hereby find accordingly.

'Mr Simpson was then called in for examination, who compearing, presented a certificate of his having qualified to Government, 'and offered to be examined in the branches required in the minutes of election, but declined to be examined by the court on his 'knowledge of Latin.'

The presbytery thereupon unanimously found, that Mr Simpson having declined to be examined as to his knowledge of Latin, is not duly qualified for the office of parochial schoolmaster of Sprouston, and they appointed Mr Sym to make the legal intimations, with a view to the filling up of the vacancy.

Interdict applied for.

Intimation of the vacancy having been made from the pulpit of the parish-church, and Tuesday, the 26th of August last, fixed for the new election, Simpson presented a bill of suspension, and obtained an interdict against said election.

A record was made up upon re-re-revised reasons of suspension and answers. It was *pleaded* for the suspender—

Suspender's Pleas.

1. The suspender having been legally elected parochial schoolmaster of Sprouston, and so found by the deliverance of the presbytery, of date the 16. of July last, no challenge of the validity of his election is competent in this process. 2. Being so elected, and declared duly elected, and having presented to the presbytery a certificate of his having taken the oath to his Majesty, and having otherwise complied with the requisites of the statute, the presbytery was bound (sect. 16. of act) thereupon to examine him as to his knowledge of English, writing and arithmetic, these being the sole branches of literature, a competent knowledge of which was required of him by the minute of the said election. 3. Under

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Suspender's Pleas.

the act, the heritors and minister, and where the ministry is vacant, the heritors alone, have the power of prescribing what branches of literature shall be taught. Such power can be exercised by them only at a meeting legally summoned to elect a schoolmaster to supply the vacancy, or at an adjourned meeting; and in this case the majority of legal votes of the heritors present, at a meeting duly summoned to supply the existing vacancy in the parish of Sprouston, having been given in favour of a candidate who was only required to teach English, writing and arithmetic, it was altogether incompetent and ultra vires of the presbytery to prescribe Latin as an additional branch of literature, without a knowledge of which they would not find the candidate duly qualified for the office. 4. The presbytery having exceeded the powers conferred on them by the statute, this Court can control their proceedings; and therefore the suspender is entitled to have the heritors and the presbytery interdicted from taking any step towards a new election or induction of any other: And further, he is entitled to have the presbytery interdicted from examining him in other matters and branches of instruction than those required by the heritors and the statute, and from refusing to induct him to his office, in the event of his passing his examination on these, and refusing him the necessary extracts; Heritors of Corstorphine, 10th March 1810, *F. C.;* Young, 28th June 1814, *F. C.;* Brown *v.* The Heritors of Kilberry, 15th Nov. 1825, 4. *S. & D.*, 174; affirmed on appeal, 12th June 1829, *Wilson & Shaw*, iii. 441; Ross *v.* Findlater, 2d March 1826, 8. *S. & D.*, 514; Mathieson *v.* Dunsmore, 16th Dec. 1829, 8. *S. & D.*, 252. 5. The resolutions of the meeting of 14th March could have no legal effect in limiting the powers conferred on the meeting of election by the statute; and it was quite competent to dispense with any of the qualifications fixed upon by the meeting of 14th March, which the electors might not consider as necessary and important for the parish.

Respondents' Pleas.

To which it was *answered*—1. The suspender was not elected schoolmaster of the parish of Sprouston, and has no interest nor title to insist in this process. 2. The Latin language was one of the branches of learning required to be taught in the school, by a majority of minister and heritors, in terms of the statute; and the presbytery were bound to take trial of the qualifications therein of any party elected. 3. Even if this had not been duly required by the heritors, it would have been no violation of the statute, on the part of the presbytery, to have required a knowledge of Latin, as indispensable in the parochial schoolmaster of this parish; and, except in case of

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violation of the statute, all review by this Court is expressly excluded, so that the present suspension is incompetent.

Lord Ordinary's Interlocutor.

The Lord Ordinary pronounced this interlocutor: 'The Lord 'Ordinary having resumed consideration of the debate, with the 'closed record, and whole process, finds, 1*mo*, That the power of 'judging of the qualifications of parochial schoolmasters belonged 'exclusively to the church courts, prior to the act 43. of Geo. III. 'c. 54, and that this power not being expressly taken away by the 'said act, does still remain with those courts, under the qualifica-'tions and modifications by the said act provided: finds, 2*do*, That 'the true meaning and effect of the provisions as to this matter in 'the 16th clause of the said act, is merely to make it imperative on 'the presbytery to examine the presentee on all the branches of 'literature deemed necessary by the majority of the heritors and 'minister, even though the presbytery would not of themselves 'have gone into such examination; but not to restrain them from 'examining upon such *other* branches as they may think necessary 'for the due performance of the duties of the office: finds, 3*tio*, 'That it is not required by the said act, that the majority of the 'heritors and ministers shall fix on the branches of literature on 'which they require examination, at the meeting at which the 'schoolmaster is elected, or at any other particular meeting, but 'that their resolution to this effect may be taken at any meeting 'regularly called and intimated for the purpose, subsequent to the 'vacancy, and previous to the meeting of the presbytery at which 'the examination is to proceed; and finds, that the resolution to 'require an examination on the presentee's knowledge of Latin, 'which was adopted on the 14th of March 1833, and announced 'in the advertisements subsequently issued for the information of 'intending candidates, and again adopted at another meeting held 'on the 19th of September thereafter, was entitled to greater 'weight, as evidence of the wish and opinion of the heritors, than 'the resolution to require no examination in Latin, adopted at the 'intermediate meeting of the 17th of April: finds, 4*to*, That the 'presbytery, in requiring the presentee to submit to an examina-'tion as to his knowledge of Latin, and in finding that he was not 'qualified in respect that he refused to submit to such examination, 'did not exceed their powers, or violate or disobey any of the pro-'visions of the said act; and that this being the case, their determi-'nation is final, and not liable to be reviewed by this Court; and 'therefore repels the reasons of suspension, recalls the interdict, 'finds the letters and charge orderly proceeded, and decerns: finds 'the suspender liable in expenses.'

7 July 1835.

Simpson v. Duke of Buccleugh and Others.

Note.—'The two first findings rest on the principle to which 'effect was given in the recent case of Murray, 5th December '1834, (13. *Shaw*, 128,) and are alone sufficient to support the 'judgment. The third finding is also separatim conclusive. The 'chargers maintained, as an additional plea, that the suspender was 'not duly elected on the 17th April, and the Lord Ordinary is in- Note. 'clined to think that he was not; but conceiving it to be very 'doubtful whether this could now be established, except by a pro- 'cess of reduction, he has not rested any thing on the questionable 'nature of that election.'

The suspender *reclaimed*, but the Court, 'in respect of the mat- Judgment. 'ter set forth in the third finding in the Lord Ordinary's interlocu- 'tor, adhere thereto, and refuse the desire of the note,' with additional expenses.

Lord Ordinary, *Jeffrey.* Act. *Dean of Fac. (Hope,)* and *James Weir.* Alt. *Rutherfurd* and *J. F. Ferrier.* *Ferguson & Thomson*, S. S. C. *James S. Darling*, W. S. Agents. *T.* Clerk.

R.

SECOND DIVISION.

No. CLXVI. *7th July* 1835.

W. S. ROBINSON AND R. VERNON AND MANDATARY *against* MISSES PENELOPE AND ANN JEUDWINE AND MANDATARY.

PROCESS.—SUMMONS.—*Found incompetent, after revised condescendence and answers had been lodged, to state the objection of no process, in respect of an erasure in the date of the summons.*

THE pursuers raised a summons of constitution in 1823, when defences on the merits were lodged. The cause fell asleep, but was wakened and proceeded in, in 1830, when additional defences, also confined to the merits, were given in. The parties proceeded with the preparation of the record, revised condescendence and answers, with relative pleas in law having been lodged.

The defenders then stated the preliminary objection of no process, in respect the original summons was erased in its date. The

7 July 1835.

Robinson, Vernon and Mandatary *v.* Jeudwine and Mandatary.

Judgment.

Lord Ordinary found, 'that it is incompetent, at this stage of the 'cause, for the defenders to state any objection to the regularity of 'the summons.'

The defenders *reclaimed*, but the *Court* adhered.

Lord Ordinary, *Moncreiff*. Act. *Pyper*. Alt. *Christison*. *A. Stevenson*, S.S.C. and *Wm. Renny*, W. S. Agents.

R.

SECOND DIVISION.

No. CLXVII. *7th July* 1835.

ROBERT POLLOCK
against
ARCHIBALD HARKNESS AND OTHERS.

PROCESS.—RECLAIMING NOTE.—*A reclaiming note against an interlocutor of the Lord Ordinary, pronounced after defences lodged, refused as irregular, in respect that six copies of the note had not been delivered to the agent of the opposite parties.*

Narrative. THE pursuer, Pollock, raised this action, while an undischarged bankrupt under sequestration. Defences having been lodged, in which he was required, before further proceeding, to find caution for expenses, the Lord Ordinary, upon hearing counsel, appointed Pollock to lodge in process a bond, with a sufficient cautioner, to that effect. This order having been repeatedly renewed, but not obtempered by the pursuer, the defenders were assoilzied.

The period for reclaiming elapsed on 23d June, and on the day following a reclaiming note having come out on the roll of single bills, it was objected for the defenders, that the note was irregular, and ought not to be received, in respect of their not having had notice of its presentment, by delivery of six copies to their agent.

The *Court*, considering the point of importance, ordered printed minutes of the authorities to be given in on each side.

A minute was accordingly put in by the defenders, but none by the pursuers.

It was stated in the defenders' minute, that, by the Judicature Act, (6. Geo. IV. c. 120, § 18,) it was expressly required that the party reclaiming 'shall, along with his note, as above directed, put into the 'boxes printed copies of the record, authenticated as before, and

'shall, at the same time, give notice of his application for review, 7 July 1835.
'by delivery of six copies of the note to the known agent of the
'opposite party.' That a failure in such delivery would be fatal Pollock v. Harkness and Others.
to the note had been held by the Second Division in the case of Bell, 2d July 1830, (8. *Shaw*, 1007,) where it was found, that 'when copies of a reclaiming note have not been furnished to 'the opposite agent, before it comes out in the roll, the note can-'not be received.' In a later case of Williams, 2d Feb. 1832, (10. *Shaw*, 283,) it had been held by the First Division, that delivery of copies was not necessary where the reclaiming note was presented against a decree pronounced in respect 'of no defences' being lodged to the summons. But where defences had been actually put in, and issue joined by the parties, although no record had been closed, the provision as to the delivery of copies had been repeatedly held, by each Division of the Court, to be imperative upon the party reclaiming; A against B, 5th July 1833, (5. *Jurist*, 522); Farquharson against Sim, 14th Nov. 1833, (6. *Jurist*, 48); Roberts against Roberts, same date, (6. *Jurist*, 51.)

The *Court* dismissed the reclaiming note as irregular, and found additional expenses due to the defenders. Judgment.

Lord Jeffrey, *Ordinary*. For Defenders, *Macdougal*. *Andrew Fraser*, W. S. Agent. For Pursuer, *Moir*. *James Bennet*, W. S. Agent.

R.

SECOND DIVISION.

No. CLXVIII. *7th July* 1835.

JOHN REID
against
ISAAC BAXTER AND OTHERS, (REID'S TRUSTEES.)

WRIT.—PROCESS.—PROOF.—*Circumstances where, in a reduction of deeds executed by notaries, while the party, as alleged, was capable himself of executing the deeds,—an issue was directed to try certain special facts before having a general issue, or settling any question of law.*

THE pursuer brought a reduction of a trust-settlement and two relative codicils, executed by his father, John Reid, deceased, on

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the ground that they were executed by the aid of notaries, although the deceased was himself capable and in the practice of signing deeds.

The pursuer admitted, that at the time of the execution of the deeds challenged his father's sight had been somewhat affected, in consequence of inflammation in his eyes, but averred that he was not blind, on the contrary, had the use of his eyes so completely, as to be able not only to walk about without the least assistance, but to transact all manner of business for himself. He was quite able both to read and write, and was in the constant habit of amusing himself by playing cards and backgammon. After the execution of the above deed, he went a tour, and transacted business. He was in the constant habit of subscribing deeds and papers, writing letters and orders on bankers, doqueting accounts, and drawing and indorsing bills. The defenders, in answer, admitted that Mr Reid was occasionally in the practice of adhibiting his subscription to receipts and other documents of minor importance, but this, they averred, was done not by the aid of sight, he being unable to read what was written: he trusted entirely to others as to the contents of the papers laid before him for subscription, and was guided to the portion of the paper where his name was to be written. He was so blind as to be totally unable to read either print or writing. When he executed the original trust-deed, he was little more than able to distinguish between light and darkness. His sight became afterwards gradually more and more impaired; and at the date of the two codicils, he was incapable of distinguishing between one object and another.

The defenders moved for a remit to the Jury Roll, which the pursuer opposed, on the grounds stated by the Lord Ordinary in the following interlocutor and note:

Lord Ordinary's Interlocutor.

'The Lord Ordinary having considered this case, and heard the 'parties on a motion for a remit to the Jury Roll, makes avisandum 'to the Court with the prepared record in reference to this motion, 'and appoints the prepared record to be printed and boxed to the 'Second Division of the Court within ten days, and grants warrant 'to enrol the cause in the Inner-House Rolls.'

Note.

Note.—'The Lord Ordinary reports this matter, because a remit 'to the Jury Roll might prevent the parties from obtaining the opi-'nion of the Court by a note in the usual way, and because it is 'important for them to get it settled, as soon as possible, what course 'the case is to take.

'If the Lord Ordinary had disposed of the case, he was inclined 'to have sent the whole matter to a jury, on a general issue, 'whether the deed was or was not the deed of the deceased, leaving

'the facts to be settled either by a general or a special verdict, and 7 July 1835.
'the necessary law to be laid down, or to be reserved, at the
'trial; or, at least, upon an issue or issues framed, so as to deter- Reid v. Baxter and Others.
'mine special facts.

Lord Ordinary's Note.

'The pursuer, however, objects to any trial of fact, and holding 'the defenders to have admitted (chiefly in their answers to Article '15. of the condescendence,) that the deceased *could* sign, he 'insists that the case shall be determined upon his legal plea, 'viz. That mere capacity of signing makes subscription by no-'taries an inept mode of execution. But it will be observed 'that he never takes this ground *purely* and *exclusively*, but com-'bines it with the averment, that the deceased not only could sign, 'but was in the practice of doing so, and that he was enabled to 'do so partly by his eye-sight, which is said to have been good; '(Cond. 14. and 15.) These averments are denied (answers to 'Article 15. of condescendence, and statement for defenders, Ar-'ticle 2).

'Now, in this state of the record, there are two objections to 'the course which the pursuer insists for. In the *first* place, if the 'fact shall be, as averred by him, viz. That at the date of this deed 'the pursuer saw, and could sign quite well, then the whole case is 'disposed of, and the legal discussion, if gone into, may turn out to 'have been useless and hypothetical. In the *second* place, the ca-'pacity or incapacity of seeing may form a material element in decid-'ing whether a person *can* write; for, in the *statutory sense*, this, to 'a certain degree, may be a legal question. The law *may* relieve, 'by notaries, a person who, though not, perhaps, utterly and abso-'lutely incapable, cannot sign his name without a straining of nature, 'or who believes that he is not safe in writing feebly, or that he cannot 'see; and it *may* withhold this relief from one for whom it is plainly 'totally useless. To meet such possible views, it would apparently 'be very convenient to have the facts settled before discussing the 'law; whereas the pursuer, *though he expressly refuses to restrict 'himself merely to his general legal proposition*, insists that the pre-'cise condition of the man shall remain unascertained till that pro-'position be disposed of; and that failing this, he shall then be at 'liberty to proceed next to his case on the facts.'

The Court pronounced the following interlocutor:

Judgment.

'The Lords, on report of Lord Cockburn, having advised the 'state of the record of this process, and heard counsel thereon, 'in respect that the Court is of opinion that this case is not in a 'proper state for trial by a jury, under a general issue, remit to the 'Lord Ordinary to remit the process to the roll of jury causes, 'with instructions that the clerks do prepare the draft of an issue

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'or issues relative to the special facts in dispute between the parties, and to proceed further thereanent as to his Lordship may seem proper.'

Judgment.

Lord Ordinary *Cockburn*. Act. *Penney*. *William Grierson*, W. S. Agent. Alt. *Ivory*. *H. Inglis & Donald*, W. S. Agents. *T.* Clerk.

R.

FIRST DIVISION.

No. CLXIX. 8*th July* 1835.

M'GOWAN
against
HIS CREDITORS.

CESSIO BONORUM.—THE pursuer was a writer in Peebles, and held the situation of surveyor of taxes, at a salary of L.120, from which it was stated that there fell to be deducted L.30 as travelling expenses. His wife was possessed of a considerable income. He was opposed on the ground of extravagance, and of his being in receipt of a large income. The Court, at the suggestion of the counsel for the creditors, made it a condition of a decerniture in his favour, that he should grant an obligation to pay his creditors L.100 a-year, as in all probability he would either be deprived of his office, or resign it, in the event of their ordaining him to pay over the whole proceeds of his salary, which they were otherwise inclined to do.

Act. *Maitland, E. S. Gordon*. Alt. *Sol.-Gen. (Cuninghame.)* *Baxter & M'Dougall*, W. S. and *J. & W. Dymock*, W. S. Agents. *D.* Clerk.

C.

FIRST DIVISION.

No. CLXX. *8th July* 1835.

MRS DELVINA MILLER AND OTHERS
against
JAMES WRIGHT.

INTERDICT.—ADJUDICATION.—BANKRUPT. — TITLE. — *A bankrupt's father had executed a deed of settlement of his estate in his favour, under burden of provisions: the bankrupt possessed the estate, and paid an annuity to his mother and interest of provisions for some time after his father's death, and till he became insolvent: the trustee on his sequestrated estate being about to make up titles by charge and adjudication, the other parties interested in the settlement raised a suspension and interdict, on the ground that this would defeat their rights:—Interim interdict granted by the Lord Ordinary recalled, and decree of adjudication afterwards pronounced, reserving to said parties their whole rights in said lands.*

Narrative.

THE pursuers were the wife and daughters of a person of the name of James Miller, who died, leaving a settlement, inter alia, of certain landed property, in favour of his son, James Miller, now a bankrupt, under burden of paying certain provisions in favour of the pursuers, which the testator declared 'must be inserted in the infeftment to follow on' said deed of settlement; and he thereby 'declared said provisions to be real burdens affecting the lands, 'mill, &c. and as such to be insert in the instrument of sasine to 'follow hereon.' The bankrupt had entered to possession of his father's estate, and had paid annuities due to his mother under the settlement, and the interest of his sisters' provisions. The pursuers alleging that the defender, the trustee on the bankrupt's sequestrated estate, was about to complete titles in the person of the bankrupt, without reference to the said deed of settlement, and, with a view to defeat their preferable claims, that he had raised and executed letters of special charge against the bankrupt, proceeding upon the statement, that the said James Miller, in defraud, and to the hurt and prejudice of the defender, as trustee foresaid, wilfully lies forth, and will not enter himself heir in special to his deceased father in the said estate, and therefore charging him to enter in special as heir to his said father in the said lands; that upon the expiry of the days of charge, the trustee intended to apply for a

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special adjudication of the said estate in his own favour, upon which charter and sasine might follow, and a title be granted to a purchaser, altogether exclusive of the real burdens and provisions in favour of the pursuers, contained in their father's settlement; that such a proceeding was contrary to justice, and the established rules of law, and inconsistent with the enactments in the sequestration statutes, which require the trustee to complete the bankrupt's title in such way and manner as the law would require the bankrupt himself to complete it; that the trustee cannot legally do that which it would have been a fraud in the bankrupt himself to attempt; and they prayed for letters of suspension and interdict ad interim. The Lord Ordinary granted interim interdict as craved, and ordered answers.

Respondent's Pleas.

The respondent contended, that it was settled in practice, that a trustee may, at his own discretion, either make up titles in the bankrupt's person, or in the person of the trustee himself: That the latter mode was attended with many advantages; in particular, it prevented accretion of preferences, which of course would interfere materially with the interest of the general body of creditors; and as the principle of the law is equality among the whole creditors, it was the duty of the trustee, in making up titles, to guard against the possibility of validating, either deeds of the bankrupt bestowing a preference, or real diligences which might have been used by particular creditors to obtain any exclusive advantage over the other creditors; but that, at all events, if the pretended right of preference was proposed to be put in opposition to the rights of the trustee, the proper time to make an application upon the subject, was when the trustee presented his petition for adjudication. According to the case of Paul *v.* Boyd, 19th May 1829, it is clear that this is the utmost which can be pretended to on the other side, that the Court would then be in a situation to judge whether the decree to be pronounced should or should not be accompanied with a reservation of all claims competent to the suspenders over the estate, in virtue of Mr Miller's settlement, and to the trustee his answers thereto: That the effect of the interdict now granted was nothing less than to prohibit an officer of court from presenting a petition to the Court itself.

His Lordship then intimated his intention to report the bill and answers, and at the same time issued the following note:

Note.—'The Lord Ordinary reports this case, because the business of the sequestration is said to be threatened by the interdict being kept up; and, on the other hand, the rights of the parties would, it is said, be imminently endangered by its being recalled.

'The power of the Lord Ordinary, besides, to interfere with such a case, is disputed; and, on the whole, it is fitter for the Court than for the Bill-Chamber.'

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At the advising their Lordships pronounced this interlocutor:

'The Lords having considered this bill, with the answers and productions, and heard counsel for the parties, on the report of Lord Cockburn, Ordinary, of consent pass the bill to the effect of trying the question, but recall the interdict, reserving all questions as to the rights of parties.'

Judgment.

The trustee then presented a petition for adjudication, when their Lordships pronounced this interlocutor:

'The Lords having considered this petition, and heard counsel, adjudge, decern and declare in terms of the prayer of the petition; but in respect appearance is made for Mr Miller and others, founding on a disposition and settlement of the bankrupt's father, which is said to convey the said lands to him under the burden of real rights in their favour, reserve to them their whole rights in the said lands now adjudged, as the same shall be ascertained in a process of declarator * which has been raised against the petitioner, and the bankrupt at their instance, and in a process of suspension also at their instance.'

Judgment.

Lord Ordinary, *Cockburn.* Act. *H. J. Robertson.* Alt. *Handyside.* *Miller & Forbes*, W. S. *John Christie*, S. S. C. Agents. *D.* Clerk.

C.

FIRST DIVISION.

No. CLXXI. *8th July* 1835.

NEIL CAMPBELL M'LAREN, EDWARD RAILTON,

COMPETING.

SEQUESTRATION.—TRUSTEE.—COMPETITION.—*Circumstances in which the Court refused to confirm the election of either of two competitors for the trusteeship of a sequestrated estate.*

IN a competition for the office of trustee on the sequestrated estate

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* The declarator was raised 12th June 1835.

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M'Laren and Railton competing.

of John Love, merchant in Glasgow, the competitors, M'Laren and Railton, respectively presented petitions for confirmation. Maclaren objected to the confirmation of Railton on various grounds, which, he contended, were sufficient to disqualify him, if he otherwise had a majority of votes. A record was made up and closed, and the Lord Ordinary made avisandum to the Court. His Lordship at the same time issued the following note, which gives an outline of the different objections stated:

Lord Ordinary's Note.

Note.—'This is a competition by two petitioners for the trustee-'ship on the sequestrated estate of John Love.

'Nine creditors voted at the election, of whom seven voted for 'the petitioner, Edward Railton, and two for the other, Neil 'M'Laren. These two were M'Laren himself and a brother of the 'bankrupt.

'Votes on both sides are objected to; but there has been no 'scrutiny, because the parties wish certain personal objections that 'have been taken to Railton to be disposed of first, as his rejection 'on this ground might of itself lead to the confirmation of his com-'petitor.

'If these objections are repelled, the scrutiny must be gone into. 'But though they be sustained, this wont imply the immediate suc-'cess of M'Laren; because the minutes shew that *no objection was 'stated till after the vote had been taken*, and till after Railton had de-'clared his acceptance, and had named his cautioner, and had been 'declared duly elected; so that his being now found disqualified 'would only lead to a new election. I cannot help considering 'the fact of these objections, several of which were unquestionably 'known at the time, being kept back from the meeting, as justifying 'rather an unfavourable impression of them. They cannot be ap-'preciated, and scarcely even understood, without taking into view 'the fact, (not disputed on either side,) that Love is not a very cre-'ditable bankrupt. There are two sequestrations subsisting against 'him; the benefit of the cessio was twice refused to him; and it seems 'impossible to hear almost any statement touching his affairs, with-'out discovering suspicious appearances.

'If it were necessary to have every circumstance regularly esta-'blished, the case would be very little advanced in without a te-'dious proof. But in these competitions this is not necessary; and 'I have thought that there is enough already in process on the 'record to warrant my reporting the case as it stands. The material 'objections are these:

'1*st*, That Railton is a defender in two actions of damages which 'the bankrupt has instituted against him, one for libel, and one for 'oppression, in these very matters. This is almost the only fact

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Lord Ordinary's Note.

'which led me at one time to hesitate about his eligibility; be-
'cause it would undoubtedly be hard to interfere with the justice due
'between two parties by unnecessarily putting them in the position
'of bankrupt and trustee. But, on the other hand, nothing could
'be more dangerous than to enable a creditor to deprive his credi-
'tors of the trustee they wish, by bringing an action of damages
'against him, and therefore the circumstances must be looked to.

'The first action is founded solely on the fact, that in writing to
'a creditor after the sequestration, Railton, who is also a mandatary
'for a creditor, described Love as a 'practised swindler.' Now,
'assuming this expression to have been rash, it will be observed,
'1*st*, That in the case of Torrance, 21st Nov. 1834, the Court de-
'cided that such statements among creditors were *privileged*, and
'are therefore not actionable, unless when proceeding from malice.
'Malice is averred here, but nothing is stated to make its existence
'probable. 2*d*, The *action was instituted just three days before the*
'*meeting for election, but was not mentioned till the election was over.*
'Does not this make it savour of an election trick?

'The other action rests on the statement that Railton incarcera-
'ted the bankrupt in the face of a personal protection, and under
'the pretence of acting for Hunter, a creditor, his employer. *This*
'*action was raised about ten or eleven days after the election.* The
'answer to it is, 1*st*, That Railton held the papers of Hunter, which
'was a sufficient authority to act for him. 2*d*, That no lawful
'protection had been obtained, and that, therefore, though libera-
'tion was granted by the Lord Ordinary, the imprisonment could
'easily have been defended and continued if it had been insisted on,
'but that the diligence was withdrawn; and that the resolution of
'a pretended meeting to concur in the protection was a mere trick.
'There is some confusion in the statements; but I am inclined to
'think both of these answers good. The meeting which is said to
'have concurred in the protection seems to have consisted only of
'the bankrupt's *brother and a Mrs Kelly;* and at the election of
'trustee, all the creditors present, except this brother and the now
'competing candidate, resolved that the bankrupt '*is not entitled*
"*to personal protection.*' It is for the Court to say whether such
'action, raised at a time calculated to affect this competition, ought
'to interfere with the creditors' choice.

'2*d*, That Railton lodged an information of fraud against the
'bankrupt with the procurator-fiscal, who, after inquiry, abandoned
'the proceedings. In answer to this, it is said that the informer
'was Goold, mandatary for a creditor, and not Railton. But let
'it be Railton. The lodging of the information was not only a
'right, but a duty. The answer to that article is entirely evasive.

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Lord Ordinary's Note.

'According to the *bankrupt's own letters*, his being referred to the 'procurator-fiscal was not an unreasonable step.

'3*d*, That Railton instituted certain proceedings against the bank-'rupt in the names of creditors without their authority, and which 'they disclaimed. The answer is, that their letters of disclamation 'are produced, and these shew, 1*st*, That none of the creditors deny 'their having originally given authority; 2*d*, That they only dis-'claim *de futuro*. *The bankrupt had begun his actions of damages.*

'4*th*, That after the meeting for electing an interim factor was 'over, Railton pretended to hold a second meeting, and irregularly 'made out a minute of what took place. The true circumstances 'are set forth in Statement 2. Their import seems to be, that 'Railton adopted a mode of defeating *a manœuvre by the bankrupt 'or his friends*, which was perhaps inept, but which could not be 'very unfair, since the result and the object was, that so far as he 'could, he put the estate under the care of the Sheriff-clerk.

'5*th*, That in consequence of this proceeding, the bankrupt ac-'cused Railton of fraud to the procurator-fiscal, who took a pre-'cognition, under which he was committed for trial, but was libe-'rated on the act 1701.

'The explanation is contained in Stat. Art. 16. I was satisfied 'that the proceedings under this precognition were influenced by 'the bankrupt and his associates, and that the charge was ground-'less. But, at any rate, being discharged under the act 1701, the 'accused is judicially clear of that imputation.

'6*th*, That he fraudulently imposed on the creditors by altering 'an account claimed on by one Mahon, after it had been sworn to. 'The facts are, that the creditor, who was in Dublin, though he 'was correct as to the amount of the debt to which he swore, in 'setting down the items, made a trifling mistake, and that Railton, 'who was in Glasgow, where the voucher was, corrected this error. 'Very possibly this was an improper way of proceeding; but it is 'said to be common for agents on the spot to correct such accounts, 'provided the affidavits and the sums be untouched; and, at any 'rate, the charge endeavoured to be made out of it seems quite 'extravagant. The creditor adopts the correction, and still claims 'on this affidavit and account.

'These objections cannot be disposed of correctly by concluding 'in general, that, upon the whole, it may be expedient to dispense 'with Mr Railton. The creditors have a right to have him, if he 'be eligible; and since charges have been made against him, he has 'a right to have them considered articulately. Their accumulation, 'instead of increasing, diminishes any plausibility they may have; 'and the reported case, M'Laren and Love *v.* Railton, 21st Feb.

'1835, shews the unnecessary complexity of proceedings to which 8 July 1835.
'he has been exposed. Enmity to the bankrupt has been decided
'to be an objection to a trustee, (Lowe, 14th Feb. 1835); but im- M'Laren and Railton competing.
'putation and litigation, to which any man is liable, is no proof of
'enmity.

'If I had disposed of the case, I would have repelled the objec- Lord Ordinary's Note.
'tions, with expenses.'

The objection on which the judgment of the Court rested was thus stated in the re-revised condescendence for M'Laren, and re-revised answers for Railton: 'Cond. Art. 9. After William Hunter 'had sworn to the debt on which he claims, and the affidavit had 'been signed by the justice before whom it was emitted, Mr 'Railton, with the view of obviating the objection to which it was 'exposed, added the words, 'and sole partner of said concern.' 'The effect of these words was to alter the claim to which Mr 'Hunter had sworn, and to make Mr Hunter appear to swear to 'what he did not know to be the fact. *Answer* 9. Denied, with 'the exception that the words, 'and sole partner of said concern,' 'were written by the respondent. Reference is made to the re-'spondent's statement of facts. *Cond. Art.* 10. On the 26th of July 'last Mr Railton caused his clerk to fill up the printed form of an 'affidavit for the signature of Mr Nicholas Mahon, and to annex to 'it an account or state of debt, said to be due by John Love to Mr 'Mahon. This affidavit and account was transmitted to Mr Mahon, 'but that gentleman declined to swear to it, and made up a diffe-'rent account, to which he made oath. This affidavit and account 'was transmitted to Mr Mahon's correspondents in Glasgow; but 'after it came into the possession of Mr Railton, he tore away the 'account which had been sworn to by Mr Mahon, and made out a 'totally different account in his own handwriting on the back of the 'affidavit, so as, according to the terms used in the affidavit, to make 'it appear that this account was sworn to by Mr Mahon, though 'he had never seen it, and could not have sworn to it,—it being 'incorrect in every item. Mr Railton founded upon this account 'in the sequestration as that which was actually sworn to by Mr 'Mahon, and succeeded in imposing upon the creditors, and making 'them believe that the account had been sworn to. The fraud was 'not discovered for some time afterwards. The counter statements 'are denied. *Answer* 10. Admitted that a printed form of an affi-'davit was filled up by John Roy, the respondent's clerk, who an-'nexed to it a state of the debt made out from Mr Mahon's claim 'in the first sequestration. Admitted that the affidavit and account 'were (by Messrs Ewing, May and Company, to whom they were Ground of Judgment.

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'sent) transmitted to Mr Mahon, inclosed in a sheet of paper, on 'which there were written two letters, addressed to Mr Mahon, of 'date 26th of July 1834, the one by Ewing, May and Company, 'and the other by the respondent. Admitted also that the affidavit 'and account were retransmitted to Ewing, May and Company by 'post, and that Ewing, May and Company sent the same to the 'office of the respondent, who, seeing certain words of the affidavit 'and account erased, wrote the account on the back of the affidavit, 'with reference to the bill which was then in his possession. The 'bill claimed by Mr Mahon in the first sequestration was a bill for 'L.88 : 17 : 2; and it was with reference to this bill, and the claim 'made upon it by Mr Mahon in the first sequestration, that the affi-'davit was sent to Mr Mahon, accompanied by the letters of 26th 'July, *which both refer to the first sequestration*, and the prospect of 'obtaining a small dividend by making affidavit of new to the debt. 'The bill was produced in the meeting for the election of trustee, 'and is entered in the minutes as produced. Mr Mahon held no 'other bill; and the account rewritten by the respondent truly ex-'pressed the state of the debt. In other respects the article is de-'nied.'

Opinion of Court.

Lord President.—There cannot be the least doubt of impropriety on the part of Railton. I think the best course we can adopt is to send it back again to the creditors, who are the best judges.

Lord Gillies.—The question is, whether he is disqualified or no. As to this I have no difficulty. Are your Lordships, in a case where every step must be taken with purity and regularity, to overlook the circumstance, that documents have been altered in this way? He says the documents could not be made available in the state in which they were received from the creditors; and to obviate that, he alters them; and this is done merely to secure the particular vote. This makes the proceeding very irregular, and, as I think, disqualifies him.

Lord Mackenzie.—I concur in the opinion last given. I should have thought nothing at all of it, if he had come forward at the meeting, and said, Gentlemen, Here are certain documents, to which you may object. Had he stated the ground of objection, and then made the alteration fairly and openly, the meeting could either have rejected the vote, or allowed him to make the alteration. My understanding of the case is, that, instead of doing the thing openly, he did it at his own hand, so as to make the vote pass for a good one, and without saying he had made any alteration at all. Undoubtedly he offered to the meeting a document, which they might believe to be free from any objection. No man is entitled to alter

a document to serve his own purpose, by getting a vote on it. I cannot get over this. I rather think we might get over the other objections. This matter, however, stands entirely clear of the others. I am of opinion that he is disqualified. 8 July 1835. M'Laren and Railton competing.

Lord President.—I am of the same opinion. It is impossible to get over the irregularity, whatever his motives were. If there had been a small mistake in the items of the original account annexed to the affidavit, and this had been corrected with the concurrence of all parties, I do not know that that would have disqualified him. What he did was improper, whatever use was to be made of it. I agree that we are only to find him disqualified, but not to sustain the election of the other, because the objection was not made known specifically to the Court. Opinion of Court.

The *Court*, therefore, refused both petitions. Judgment.

Lord Ordinary, *Cockburn.* Act. *Rutherfurd, A. M'Neill.* Alt. *Dean of Fac. (Hope,) D. M'Neill. C. F. Davidson*, W. S. and *John Cullen*, W. S. Agents. *B.* Clerk.

C.

FIRST DIVISION.

No. CLXXII. *9th July* 1835.

ROY
against
PATTON.

AGENT'S EXPENSES.—The case of Martin, (29th June,) confirmed, in so far as an agent was again found entitled to the expense of having his account taxed where the overcharge was trifling.

Act. *Penney.*

C.

FIRST DIVISION.

No. CLXXIII. *9th July* 1835.

JOHN YOUNG, SUSPENDER,
against
JOHN JAMES CHARLES SHERIDAN, CHARGER.

SUSPENSION.—*Circumstances in which the Court recalled the interlocutor of the Lord Ordinary refusing a bill of suspension of a charge on two bills of exchange, and remitted to pass on caution.*

Narrative. CHARGE on two bills of exchange, one dated 13th January last, for L.50, payable three months after date, and the other, dated 16th February last, for L.25, payable two months after date, both drawn upon the suspender by Peter Young of London, accepted by the suspender, and indorsed to the charger, who had been erroneously designed in the charge 'James' instead of Joseph.' The reasons of suspension were, inter alia, that the charger was a foreigner, being a native of Belgium, although he has at present a temporary residence in London; that he had no funds or property of any description in Scotland, and no mandatary; and that he was not a bona fide onerous indorsee, which the suspender offered to refer to oath. The charger met the first plea by stating, that it was a settled point, that the insertion of a mandatary, in letters of horning proceeding on a registered protest, at the instance of a person who resides out of this country, is not at all necessary to validate a charge of payment, and he further produced along with his answers a mandate in favour of his agent. In respect to the second plea he accepted the reference. A commission was then granted to John Richardson, solicitor, London, the result of which was as follows: 'Interrogated, Whether or not he is an onerous 'holder of the bills in question? depones, That he is. Interrogated, 'If he ever gave any value for the bills to the said Peter Young? 'depones, That he did. Interrogated, Whether or not he holds 'the said bills under an arrangement with the said Peter Young, 'for the purpose of trying to obtain payment, and thus to defeat 'the just claims of the said John Young, the complainer? de-'pones, That he does not. Depones, on the interrogatories of 'the commissioner, suggested by letter from the said complainer, 'which the commissioner exhibited to the agent for the charger, 'that he has known the said Peter Young long, and has seen him

'a great deal: That he received two bills from Peter Young, the 'one for L.50, and the other L.25, payable in London: That he 'cannot exactly state, without reference to his bill-book, when he 'received them, but he thinks it was about ten weeks ago: That 'the said Peter Young did not intimate to him, at any time, that 'the said bills would not be paid by the acceptor, in consequence 'of counter claims which he had against the said Peter Young; 'on the contrary, he assured him that they would be paid: That 'the deponent did not apply to the said Peter Young for payment 'when either of the bills fell due, though he gave him notice, nor 'did he return the said bills to the said Peter Young, and afterwards 'get them back: That the deponent has never instituted any legal 'measures against the said Peter Young, in relation to both or either 'of the said bills: That the deponent was informed that Peter 'Young had a transaction with Robert Liddell, of Leith, in conse-'quence of which he received a sum of money from the said Robert 'Liddell, but whether before or after the bills became payable the 'deponent does not know: That the deponent never gave value to 'the acceptor, John Young, for both or either of the said bills, but 'he gave value to the indorser, Peter Young: That the deponent 'gave value, partly in money, partly in professional services, in 'aiding him to complete the patent taken out by Peter Young, 'and partly in a licence agreed to be granted to Peter Young, for 'an invention of the deponent's for an improvement in the manu-'facture of malt, for which invention the deponent holds a patent: 'That the deponent has not received any security from the said 'Peter Young, in relation to the bills: That the deponent has no 'connection with Peter Young, directly or indirectly, in any of 'his concerns or business; and in particular, he has no interest in 'the patent obtained by Peter Young, for the manufacture of spirits 'or other article from the root called mangel wurzel: That the de-'ponent believes that Peter Young is not in possession of any funds, 'or that he is able to pay the bills: That the deponent has not re-'ceived from Peter Young, or any other person on his account, any 'money or effects since he received the aforesaid bills: That the 'deponent is not in the practice of acting as a banker or bill-broker, 'or of discounting bills, though he has occasionally discounted bills: 'That Peter Young is indebted to the deponent to a considerable 'amount beyond the amount of the said bills: That the deponent 'has not adopted any legal proceedings against Peter Young, for 'recovery of any of the sums due by him to the deponent, because 'the deponent knows that Peter Young has not at present the means 'of paying him any thing.'

9 July 1835. The Lord Ordinary, (22d June,) refused the bill, and found the suspender liable in expenses.

Young *v.* Sheridan.

Judgment. The suspender *reclaimed*, when the *Court* recalled the interlocutor, and remitted to pass on caution.

Lord Ordinary, *Cockburn*. *John Young*, S. S. C. Suspender's Agent. *James Imrie*, Respondent's Agent. *S.* Clerk.

C.

FIRST DIVISION.

No. CLXXIV. *9th July* 1835.

JAMES GILLESPIE DAVIDSON, AND ROBERT SYM WILSON, TRUSTEES OF THE LATE JAMES M'KINNON CAMPBELL,

against

JOHN MACKENZIE.

TRUST.—*A person deceased named three trustees; the first declined acceptance, the third accepted and assumed the management of the trust; the second was consulted by him, and allowed his name to be used by him in matters respecting the trust; being afterwards called upon to act, he declined; upon this the acting trustee, on the ground that both the others had declined to accept, executed a deed of assumption in favour of two other persons, and then renounced the trust: In an action at the instance of the persons so assumed as trustees under the original trust-deed, a preliminary objection of want of title to pursue sustained.*

Facts and circumstances held sufficient to infer acceptance of a trust.

Question, whether a person having once accepted a trust can renounce.

Narrative. BY trust-deed and settlement, dated 26th October 1822, the late James M'Kinnon Campbell conveyed his whole estate, heritable and moveable, to 'Major Alexander Mackay of Laggan, Neil 'Malcolm, Esq. of Poltallock, and Hugh James Rollo, W. S. and 'to the survivors or survivor, acceptors or acceptor of them, the

'major number surviving and accepting from time to time being a 'quorum, and to the heirs of the survivor and acceptor of them, as 'trustees.' In the trust-deed there was the following clause: 'And in 'regard it may be necessary to assume some person or persons into 'the management of this trust, in the room of any of my said dis- 'ponees deceasing, or not accepting, therefore I do hereby give and 'commit full power and authority to my said trustees, or their quo- 'rum aforesaid, to assume any person or persons, from time to time, 'to act along with them in the said trust-executry, and which per- 'son or persons so appointed shall be as fully vested in the sub- 'jects hereby conveyed, and have the same powers and privileges, 'in all respects, as if he or they were specially nominated hereby.'

Mr Campbell died in November 1822. Mr Malcolm declined to accept the trust. Mr Rollo accepted, and took the active management of the trust-estate. Major Mackay, although he did not formally declare acceptance, was consulted by Rollo, and corresponded with him, for a considerable time, on matters connected with the trust. He also allowed his name to be used by Mr Rollo as his co-trustee, in his correspondence with parties connected with the trust, and appearance was entered in his name, in an action brought against Mr Rollo and himself, as Mr Campbell's trustees.

Thereafter, in October 1823, in answer to an application by Mr Rollo, requesting him to sign a draft for money to be received on account of the trust, Major Mackay refused to interfere in the matter. After some correspondence on the subject, in which Mr Rollo called upon Major Mackay formally to decline to act, and to resign the trust, a letter was written by Mr D. Maclean, W. S. on the part of Major Mackay, dated 26th November 1824, to this effect: 'In answer to your favour of yesterday, which I received very late 'last night, I beg to say, that I had a meeting this day with Major 'Mackay on the subject of it; and he, after giving it all due con- 'sideration, declines to act as executor of the late James M'Kinnon 'Campbell, and therefore his name is not to be used in the answers 'to the condescendence, or in any other manner of way.' In June 1825, Mr Rollo, without receiving a formal renunciation from Major Mackay, executed a deed of assumption, whereby he, on the narrative that Major Mackay and Mr Malcolm had declined to accept, assumed the pursuers into the management of the trust-estate, and of the same date he executed a renunciation of his own office and powers under the trust-deed. The defenders had large claims against the truster, which had formed the subject of much correspondence, and various communings between Mr Rollo and Major Mackay and them, and others; and these claims remaining still unadjusted, the pursuers brought the present action, 'as trustees under

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'the settlements of James M'Kinnon Campbell, Esq. deceased,' whereby they called for reduction of certain obligations, promissory-notes, and powers of attorney granted by Mr Campbell in favour of the defenders, which formed the groundwork of their said claims; and they alleged that these had been obtained from him by fraud and circumvention, when he was in a state of imbecility.

Defenders' Pleas.

The defenders objected to the action in limine, that it was incompetent, in respect the pursuers had not been legally assumed as trustees by the late Mr Campbell, and *pleaded* specially—That acceptance of a trust or executry may be inferred from facts and circumstances, and having once accepted, it is out of the power of a trustee to resign; Lyndoch *v.* Ouchterlony, 15th Feb. 1827: That Major Mackay having accepted and acted as trustee and executor, the deed of nomination and assumption of the present pursuers, executed by Mr Rollo alone, during Major Mackay's lifetime, is void and null: That on Mr Rollo's death Major Mackay became sole trustee and executor, and the trust has now devolved, in terms of the settlement of James M'Kinnon Campbell, on Major Mackay's heirs, (he being now also dead.)

Pursuers' Pleas.

The pursuers denied the acceptance, justified the deed of assumption, and *pleaded*—That even though Major Mackay had accepted the office of trustee, he would have been entitled to renounce it; and it would be jus tertii to the defender to object to such renunciation, or that after such renunciation, and a nomination of additional trustees by the sole acceptor, the trust is not validly represented by such assumed trustees.

Lord Ordinary's Interlocutor.

The Lord Ordinary pronounced this interlocutor, adding a note:

'The Lord Ordinary having considered the record closed upon 'the preliminary defence, productions, and whole process, sustains 'the preliminary defence, that the pursuers of the reduction were 'not legally assumed as trustees by the acting and surviving trus-'tees of the deceased James M'Kinnon Campbell, or by a quorum 'of these trustees; and therefore sustains the objection to the title 'of the pursuers, dismisses the action, and decerns: finds the pur-'suers liable in expenses, and remits to the Auditor to tax the ac-'count thereof, when lodged, and to report.'

Note.—'James M'Kinnon Campbell granted a trust-conveyance 'in favour of Major Alexander Mackay, Neil Malcolm, Esq. and 'Hugh James Rollo, W. S., and to the survivors or survivor, ac-'ceptors or acceptor of them, the major number surviving and ac-

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'cepting, from time to time, being a quorum, and to the heirs of 'the survivor and acceptor. A power of assumption is given to 'the trustees and their quorum, but no power to resign or withdraw 'from the office. Mr Malcolm declined to accept, and Mr Rollo 'expressly accepted. There is no express written acceptance by 'Major Mackay; but, in the Lord Ordinary's opinion, sufficient 'written evidence is produced that he virtually accepted, and that 'he continued to act as a trustee for a considerable time. After-'wards, on a misunderstanding with his co-trustee, Mr Rollo, he 'declined to act any longer; upon which Mr Rollo, holding him-'self as sole trustee, executed the power of assumption in favour 'of the pursuers. It is thought that in doing so he acted ultra 'vires, as he was neither sole trustee, nor a quorum of the trustees. 'Major Mackay having accepted, was not entitled to resign when 'he thought fit, and Mr Rollo might have compelled him to act, 'at least to the effect of validating an assumption of new trustees; 'or if there were grounds for it, he might have had Major Mac-'kay exauctorated by the Court. Without any measure of that 'kind, Mr Rollo proceeded to assume the pursuers, upon the sup-'position that Major Mackay never had accepted, contrary, it is 'thought, to evidence.

'The pursuers have pleaded, that it is jus tertii to the defender 'whether Major Mackay accepted or not, and whether the assump-'tion is regular. There is evidently no foundation for that plea. 'Every defender in a suit has an interest that a pursuer shall have 'a good title to insist in it, otherwise a decree of absolvitor, after 'a long and expensive litigation, might be altogether inept.

Pursuers' Argument.

The pursuers *reclaimed*, when it was argued by *Keay*—That the whole question was, whether, in terms of the original trust-deed, Mr Rollo had power to execute the deed of assumption. Major Mackay could not be considered as an acting trustee. It was not pretended that he had had any intromission with the funds of the trust, or that there had been a confirmation or other legal title in his person. Mere statements in the correspondence of others afforded no ground for inferring that he did accept; and in such circumstances it was still competent for him to decline to act. Two questions were made to arise; *first*, Whether there was evidence of acceptance; and, *second*, Supposing such evidence, whether it was competent to renounce? If such equivocal evidence of acceptance was to be received, it would follow, that Major Mackay would become liable as a trustee from the date of the death of the truster, and his representatives would be responsible at the present moment although, by the tacit consent of all concerned, others had been

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Pursuers' Argument.

hitherto in the full and uncontrolled management of the estate. Supposing the question to arise between Major Mackay's representatives and a person really interested in the estate, would these representatives be subjected in liability for acts of gross omission, although the estate had been, with the consent of the parties interested, conducted by and transferred to others? There is no express authority for saying, that a trustee who has once accepted is not entitled to renounce. Mr Erskine, in speaking of tutors and curators, says, that as acceptance may draw severe consequences, it is not to be inferred by implication. The present defender is least entitled to make objections on this ground, as he admits that he was conversant with the whole transactions which have taken place. Are you to infer acceptance against this party, merely because he gave information, and took an interest in the affairs of the truster; while he, the moment he was called on to do an act which would infer intromission, declares he will incur no responsibility, and, instead of intromitting, will not act at all? The deed of assumption bore to be in terms of the trust-deed; and the present pursuers have accepted and acted under it, with the concurrence of all parties. It would be a very serious thing to disturb, at a distance of ten years, the state of possession which has been permitted to go on. The Lord Ordinary has misunderstood the plea of jus tertii. We never maintained that it is jus tertii to a defender to inquire into the title of the pursuer; but what we say is, that the defender here has precluded himself from objecting to the title of the pursuer on the grounds stated.

Opinion of Court.

Lord President.—The difficulty lies in this, that there was an assumption made by Mr Rollo alone, when the trust-deed bears that it is only to be made by a quorum.

Lord Gillies.—And on that ground they say that the pursuers have no title.

Lord Balgray.—The only question as to which there appears to be much difficulty is, whether a trustee has power to resign after he has accepted.

Lord President.—The defenders found on the case of Lyndoch.

Keay.—That is an important decision, where an immediate injury would arise to the trust by the resignation. In that case the effectof refusal to act would have been, to deprive the trust-estate of a sum of money, which could not be got but by the signature of Mr Ouchterlony. The question is raised here, after the parties beneficially interested are satisfied with the arrangement, and when no prejudice appears to have thereby arisen. This is quite a different case from that of Lyndoch: no embarrassment has been created to the

trust. The question here is, whether, when a party has declined to act, retires without intromission, and rebus integris, and with the sanction of all parties, you are to transfer the whole responsibilities against his representatives, from parties who have for so long a period been in the sole possession and management of this estate?

Defenders' Argument.

Solicitor-General, for defenders—The plea of the pursuer here was, that Major Mackay had never accepted. He now turns round and contends, that even if there was an acceptance, there was a resignation. I scarcely think this question is raised. It is hardly possible to conceive a stronger case of continued advisal and interference in the business of a trust. We are here in a question as to the assumption by Rollo; and the question is, was this a valid deed of assumption, while there existed another party who had thus interfered in the management of the trust, after having been expressly named a co-trustee. But it is said, esto he accepted and acted, he renounced. There is no proper evidence of renunciation; but if there were, could he renounce? We found on the case of Lyndoch and also on Carstairs, *Hales*, ii. 678.

Keay, in reply.—That Mr Rollo represented to others that Major Mackay had accepted, and that he used his name no one can dispute; but beyond this there is no evidence of acceptance. The dicta in the case in Hales, as well as in that of Lyndoch, only go to this, that a party is not entitled to renounce, if the effect of his renunciation should be to defeat the trust. The trust here will be effectually defeated by sustaining this preliminary objection, the consequence of which will be, that there will now be no trustee in existence, although this deed of assumption has stood unchallenged for a period of ten years.

Opinion of Court.

Lord Mackenzie.—There is one point on which I entertain some doubt. Holding that there may be acceptance by acts, may there not be a joining in this assumption by acts, supposing a co-trustee agrees to allow his partner to assume, whether that does not amount to a virtual assumption by him?

Lord Gillies.—The acceptance is clear; esto there was an acceptance, could he renounce? I would have very great difficulty in giving effect to a plea of acquiescence, particularly as regards the defender. The moment the action was brought against him he made the objection. Is it any answer to him to say, that there has been a tacit sanction given to an invalid act? This does not benefit or profit him. The important thing in such a case is to look at the trust-deed, and see what it provides. Does it give power to resign? But whether or not, there is no provision for assumption in case of re-

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signation. The power of assumption is given in case of trustees 'deceasing or not accepting.' There was no decease, and there was an acceptance.

Opinion of Court.

Lord Mackenzie.—I have no doubt the acceptance was complete. The observation of Lord Gillies in a great measure removes my difficulty. Even if there was a resignation or declinature after acceptance, that would not warrant an assumption.

Judgment.

The *Court* adhered, but found no expenses due since the date of the Lord Ordinary's interlocutor.

Lord Ordinary, *Corehouse.* Act. *Keay, Whigham.* Alt. *Sol.-Gen. (Cuninghame,) Dick.* *Davidson & Syme*, W. S. Pursuers' Agents. *James Peddie jun.* W. S. Defender's Agent. *D.* Clerk.

C.

SECOND DIVISION.

No. CLXXV. *9th July* 1835.

FRANCIS, LORD GRAY, AND OTHERS, *against* THOMAS SIME AND WILLIAM JOHNSTON.

SALMON FISHING.—*Fishing for salmon in a river or estuary, by means of stented nets fastened to the shore, and moored and remaining stationary in the water, so as to obstruct the passage of the salmon, and to force or decoy them into courts or inclosures of netting, within which they are caught, or by means of fixed machinery, or any other mode of fishing than the ordinary mode by net and coble,—found to be illegal.*

Narrative.

LORD GRAY and others, proprietors of salmon fishings in the Tay, complained, by bill of suspension, against Sime and Johnston, tacksmen of fisheries in that river, for having recently, and in contempt of repeated judgments of the Court, introduced upon the shores of that river an apparatus for catching salmon altogether illegal; and after describing the machinery and mode of fishing complained of, prayed for an interdict against them from using sole-nets, pock-nets or any fixed machinery for catching salmon, or any other mode of fishing than the ordinary way by net and coble, upon any of the fishing stations occupied by them within the river or estuary of the Tay.

On advising the bill of suspension, the Lord Ordinary (Jeffrey)

granted a sist and interdict. But afterwards, on advising the bill, with answers, and having heard the counsel for the parties, his Lordship granted the following interdict: 'The Lord Ordinary having 'considered this bill, with the answers and productions, passes the 'bill upon caution, but recalls the interdict formerly granted, in so 'far as it is specially directed against fishing by sole-nets, and con- 'tinues it quoad ultra.' His Lordship subjoined this note: 'This 'is the course which appears to have been followed in all the re- 'cent cases; and till it be ascertained, by the verdict of a jury, or 'some other competent mode of probation, whether fishing by sole- 'nets is fishing by fixed machinery, or only a variety of fishing by 'net and coble, it would evidently be premature to grant any in- 'terdict against the use of such nets, eo nomine. To avoid evasions 'by a mere change of *name*, perhaps the better way would be to 'raise an issue on a complaint for *breach of interdict*, and take a ver- 'dict whether the particular mode of fishing complained of, and 'proved to be actually practised, by whatever name it was called, 'fell within the fair meaning of that interdict.'

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Narrative.

In this interlocutor both parties acquiesced. The letters of suspension were expede, and a record made up on revised reasons of suspension, and revised answers. On the motion of the suspenders the cause was remitted to the jury roll.

The parties proceeded to adjust the issues, when it was stated for the complainer, that as the interdict formerly granted had been entirely disregarded by the respondents, in consequence of the general terms in which it was expressed, the complainers intended to apply to the Lord Ordinary for a more definite and precise interdict, without prejudice to that already granted.

A minute was given in, in which the Lord Ordinary was moved to grant an interdict against the respondents, prohibiting them from fishing with the machinery described in Articles 6. and 7. of the revised reasons of suspension; or otherwise, to grant an interdict prohibiting them from fishing by means of nets stretched or stented in the river, having one end made fast to the shore, and the other fixed by a mooring in the water, and remaining stationary in the water, so as to obstruct the passage of the salmon, and force or decoy them into courts or inclosures of netting, within which they are caught; and further, to grant an interdict, in terms of the former judgment of the Court, prohibiting them from using any fixed machinery for catching salmon, or any other mode of fishing than the ordinary mode by net and coble.

The machinery in question is thus described in Articles 6. and 7. of the revised reasons: The apparatus commonly known by the name of a pock-net consists of a long line of netting or leader,

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Narrative.

stretched or stented in the river, varying from 60 to 300 yards from one extremity to the other, having the one end made fast on shore by means of a strong mooring, and the other fixed in the water by stakes or anchors, and kept in a perpendicular position in the water by buoys, placed along and on the upper side, and by heavy sinkers on and along the lower side. To the outer extremity of this leader there is attached a court or inclosure of netting having a narrow aperture on one side to allow the fish to enter. A portion of the net is turned in a direction towards the land, and extends a few yards beyond the side of the court, at an obtuse angle with the main leader. In this way a court or inclosure is formed, which varies in its form and dimensions according to the size of the net, or the station where it is placed. Sometimes the court consists only of one chamber; but generally it contains two or more inclosures, rendered intricate by partitions of netting, and kept distended by wooden poles, the lower part of the sides being kept down by weights, while the upper is supported by corks.

The object of the leader is to interrupt the progress of the salmon in going up the river, and to compel them to enter into the court or inclosure placed at the outer extremity of the net. After the fish enter the mouth of the court, they generally pass from one chamber to another, and, from the narrowness of the entrance, and the intricacy of the passages, they become completely entangled within the inclosure, so that it is scarcely possible for them to escape. This net is frequently left in the water by itself, and catches salmon without the aid of fishermen, the fish being taken out after the tide has receded, as in the case of stake-nets. Sometimes a boat is anchored at the outer extremity of the net, in which a man is stationed, who lifts the fish out of the court into the coble, by means of a hand-net, or otherwise. During the operation of fishing, the whole net remains completely stationary in the water, and the fish are taken out without altering its position in any respect. This apparatus remains fixed in the water during the whole flowing and ebbing of the tide, and as effectually obstructs the passage of the salmon up the river as stake-nets.

The pock-net, as above described, was first introduced into the Tay about the year 1820, and the use of it was prohibited by the Court in July 1820, and on other occasions.

The apparatus commonly known by the name of a sole-net, in its general outline, resembles the pock-net. It consists of a long line of netting or leader, stretched or stented in the river, having the one end made fast to the shore, while the other is fixed in the water by anchors or stakes. The object of this leader is to obstruct the progress of the fish up the river, and to force or decoy them

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into a court or inclosure at its extremity. At the outer extremity of the net a boat is anchored, and the court is fastened to a pole laid transversely on the stern of the boat. A piece of net is placed at an obtuse angle to this pole, turning inwards to the land, and kept in its position by a long rope carried to and fixed on the shore. In this way a court or inclosure is formed, composed of netting, and having a bottom or sole also of netting, from which the apparatus derives its name. The side of the court formed by the leader is constantly fixed, but the other two sides are moveable, and kept upright by sinkers and corks. There is an aperture on one side of the court by which the fish enter, with a sort of apron or door of netting, which is made to contract like the mouth of a net-purse, when a man, stationed in a boat for the purpose, pulls a rope attached to the apron. By this operation the entrance is closed, and the fish are detained within the inclosure.

The apparatus is usually worked by two or three men. One man is stationed in the boat, at the extremity of the net, to watch the progress of the fish. This boat is called the Sight-boat. Sometimes another man is stationed in another boat, called the Haul-boat, placed near the outer extremity of the net, for the purpose of drawing the rope which contracts the entrance of the court. When the man in the sight-boat perceives the fish enter the court, he gives a signal, whereupon a person, who is stationed on the shore, loosens the rope which kept the outer side of the court in its distended position, and the man in the boat then draws the rope or line attached to it towards himself, and thus completely incloses the fish within the court, and they are thereupon taken out of it, and lifted into the coble by a hand-net or otherwise. On this being done, the person on shore again tightens the rope, and the court is again set or restored to its former position in a few minutes. During this operation, the main-net or leader, which forces or decoys the fish into the court, is completely fixed and stationary from the one extremity to the other, and remains so during the whole flowing of the tide; all that is operated upon being the court or inclosure above described, at the outer extremity.

The sole-net, as above described, is of very recent invention, having been introduced about the year 1826, after the pock-nets were prohibited; and it has been repeatedly interdicted by the Court.

These statements were denied by the respondents, who maintained that the machinery used by them was not of the fixed nature or character described; and that they had not fished contrary to law, or to the terms of their lease, and *pleaded*—

1*st*, That it was incompetent, at this stage, to grant the interdict

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craved; and, 2*dly*, Even if it were competent to grant it, there are no grounds, in the circumstances of the case, for deviating from the former practice of the Court.

The Lord Ordinary reported the cause, in respect to this application, with the following interlocutor and note:

Lord Ordinary's Interlocutor.

'The Lord Ordinary having considered the minute for the suspenders, with these answers thereto, and whole process, appoints the minute and answers to be printed and boxed to the Lords of the Second Division, in order to be reported; and grants warrant to the keeper of the Inner-House Rolls to enrol the cause.'

Note.

Note.—'The Lord Ordinary is not of opinion that the application for a more special interdict is *incompetent*, or that he would be reviewing or altering his former interlocutor in the Bill-Chamber by granting it. The Bill-Chamber is, quoad hoc, a separate court, and its preparatory functions were concluded by expeding the letters of suspension; and the cause being now in the Court of Session on the expede letters, it is conceived to be clearly *competent* to grant (or to recall) any interdict which the justice of the case may require. That there has been no change of circumstances since the general interdict was granted, may be a good reason for refusing the application on its merits, but does not affect its competency.

'On the merits, the Lord Ordinary is rather inclined to grant the special interdict suggested, not, however, by a mere reference to articles six and seven of the reasons, which he thinks would be too vague and comprehensive, but in such terms as are mentioned immediately after in the minute, or, in substance, against using any net stented and fixed in the water during the whole time of fishing, and used merely to obstruct or decoy the fish, as a permanent or stationary bulwark, and not to catch or drag them ashore, by being hauled or drawn to the bank. Such a net, he humbly thinks, comes so clearly within the description of '*fixed machinery*,' and is so little like '*the ordinary way of fishing by net and coble*,' that he does not see what fair interest a party who has submitted to the more general interdict has to oppose this farther specification, and more especially a party who, like the respondent, positively denies that he ever does fish with nets so fixed and stented.

'As the Court, however, has, for a considerable time back, declined to grant any other interdict than the more general one which is now in force between those parties, the Lord Ordinary is unwilling, on his own authority, in any respect to vary the terms of the deliverance, and has therefore reported the case, that their Lordships may settle the matter by their superior authority.

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'If this more special interdict is granted, the suspenders have 'intimated their purpose to proceed no further with the case, which, 'even after a verdict in their favour, could only issue in some inter- 'dict of the same description; and if they are entitled to this *now*, 'they have a clear, and, the Lord Ordinary thinks, a fair interest 'to avoid the expense and delay of a trial.'

At the advising the Court considered as illegal the modes of fishing here said to have been practised, and the fishing by means of any similar apparatus and machinery, or otherwise than the usual mode by net and coble.

The following interlocutor was pronounced:

Judgment.

'The Lords having, on report of Lord Jeffrey, advised this pro- 'cess of suspension and interdict, interdict and discharge the respon- 'dents, Thomas Sime and William Johnston, from fishing by means 'of nets stretched or stented in the river Tay, having the one end 'made fast to the shore, and the other fixed by a mooring in the 'water, and remaining stationary in the water, so as to obstruct the 'passage of the salmon, and force or decoy them into courts or in- 'closures of netting, within which they are caught; and further, in- 'terdict and prohibit the respondents from using any fixed machi- 'nery for catching salmon, or any other mode of fishing than the 'ordinary mode by net or coble, and decern accordingly; allow 'this decree prohibitory to go out and be extracted ad interim, to 'the effect that all due execution may pass thereon as effeirs; quoad 'ultra, reserve all question of expenses, and remit to the Lord Or- 'dinary to proceed in the cause as to his Lordship may seem just.'

Lord Ordinary, *Jeffrey.* Act. *Dean of Fac. (Hope,) Keay, T. M'Kenzie.* Alt. *Rutherfurd, Whigham. Bowie & Campbell,* W. S. *Wm. Martin,* S. S. C. Agents. *T.* Clerk.

R.

FIRST DIVISION.

No. CLXXVI. 10*th July* 1835.

JOHN CORSON, Petitioner.

Curator Bonis. — Arbitration.—*A petition by a curator bonis for authority to enter into a submission, refused 'as unnecessary.'*

10 July 1835. Corson, Petitioner.

Corson was appointed curator bonis to Thomas M'Michael, a person of unsound mind. Certain differences having arisen as to the succession to the moveable property left by M'Michael's father, it was stated, that all the parties interested were willing to refer the whole matters to arbitration; but the petitioner, entertaining doubts as to his power as a curator bonis to enter into any reference, now prayed the Court to authorise him 'to enter into a submission, on 'the said Thomas M'Michael's part, of all claims and disputes be-'tween him and his brothers, William, Robert and John M'Mi-'chael, to any respectable arbiter to be chosen by the parties.'

Judgment. The *Court* unanimously refused the petition as unnecessary.

Opinion of Court. *Lord Balgray.*—There cannot be the smallest doubt that a curator bonis has power to enter into submissions as to claims of a moveable nature. If ever a doubt was entertained, the point has been set at rest upwards of forty years ago.

Act. *Whigham.* *David Whigham*, W. S. Agent. *D.* Clerk.

C.

FIRST DIVISION.

No. CLXXVII. 10*th July* 1835.

WILLIAM DAVIDSON
against
THE UNION CANAL COMPANY.

Arbitration.—Diligence.—The petitioner having agreed to a submission of certain claims against the Union Canal Company, on account of the canal having passed through a quarry belonging to him, and that submission having been allowed to expire, and a new submission having been executed in favour of a single arbiter, the petitioner, with consent of the arbiter, applied to the Court for a commission and diligence to obtain certain notes of the prior arbiters, founded on an examination of witnesses as to the value of stones removed, and which had been made the basis of a finding by them. In this application he was opposed on the ground of these notes being private, and not now binding upon the parties, and that the new arbiter should rest his judgment upon his own calculations as to value.

The *Court*, after allowing the Canal Company to give in answers to the petition, granted its prayer. 10 July 1835. Davidson v. The Union Canal Co.

Act. *Macdowall.* Alt. *J. S. More.* *J. & W. Dymock*, W. S. *A. G. & R. Ellis*, W. S. Agents. *D.* Clerk.

C.

FIRST DIVISION.

No. CLXXVIII. 10*th July* 1835.

WILLIAM CUNNINGHAME CUNNINGHAME GRAHAM AND HIS TRUSTEES
against
ROBERT CUNNINGHAME BONTINE.

PROCESS.—APPEAL.—*Circumstances in which the Court refused leave to appeal.*

THE defender in this cause, (reported ante, 12th June,) petitioned for leave to appeal. He was opposed by the pursuer, on the ground that the sole object of the defender was to delay the discussion of the proper merits of the question, to which the point now settled formed merely an intervening bar; that the cause had been put down for debate in Lord Corehouse's roll, and that the proper time to appeal was when the cause was finally disposed of; that the granting of the petition was, of course, in the discretion of the Court, who would act as would best accord with justice; that the Court would see at once, that the attempt to appeal was a mere manoeuvre to prevent the pursuer from obtaining possession, during as large a portion of the life of the present incumbent as possible; that by allowing matters to be hung up, by such an expedient, the greatest injustice would be done to the pursuer, as it was by no means improbable, although he was now on the point of obtaining a judgment on the merits, he might be excluded from this during the life of the present possessor, and thus the pending proceedings would be rendered utterly nugatory; that the very circumstance of resorting to such an expedient was a strong presumption against the belief of the respondent in the justice of his opposition to the declarator of irritancy. The Court would also look a little to the improbability of a reversal, considering that this point had been de-

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Graham and his Trustees v. Bontine.

cided after cases were reported to the Court, and a subsequent hearing before the whole Judges, whose opinions were unanimous.

Rutherfurd, for petitioners, *replied*—That this was not at all a mere preliminary point; that it was of the very essence of the cause; it involved the question, entail or no entail, which he had a right to have disposed of by the Court of last resort, before he was called upon to discuss the effect of a declarator proceeding on the assumption of there being an effectual entail; that the very circumstance of an application to the whole Judges shewed this to be a grave question, and one of considerable difficulty; and that the discussion of the subsidiary point was not the less so, and might, if it was disposed of in the same way, occupy more time than an appeal.

The *Court* had great difficulty in determining how to exercise their discretionary powers in this instance. After considerable discussion, and different suggestions from the bench and bar, it was at last agreed, (3d July,) that they should ad interim order answers to the petition.

The petition and answers were this day moved. The answers contained in substance the argument formerly stated; and the respondent further offered to consent to the granting of the prayer of the petition, on condition that the rents of the entailed estate should be sequestrated during the future discussion of the questions between the parties, or on condition of these rents being consigned, as they became due, in the hands of the Clerk of Court, to be made furthcoming to the party who should be ultimately successful.

Judgment.

The *Court* unanimously refused the petition, on the ground that the application was manifestly a mere pretext for delay.

Act. *Rutherfurd, Sandford.* Alt. *Keay.* *E. & A. M'Millan*, Petitioners, Agents. *Ker & Dickson*, W. S. Respondent's Agents. *B.* Clerk.

C.

FIRST DIVISION.

No. CLXXIX. 10*th July* 1835.

JOHN GILMOUR
against
THOMAS DARLING.

PROCESS.—SUSPENSION.—*Circumstances in which the Court recalled the Lord Ordinary's interlocutor, refusing a bill of suspension, and passed on caution.*

IN a bill of suspension by Gilmour, of a charge upon a decreet, obtained from the Sheriff-substitute of Berwick, for L.18 : 3 : 8, and L.12 : 16 : 2 expenses and dues of extract, the ground of suspension was, that arrestment had previously been used in his hands, at the instance of two creditors of the respondent, to a considerably larger amount; and that he had accordingly raised a summons of multiplepoinding. The bill was ordered to be answered on 29th May. The respondent, in answer, produced a letter from the first arrester to this effect: 'Dunse, 3*d June* 1835.—SIR, I have been 'served with a summons of multiplepoinding before the Court of 'Session, at the instance of John Gilmour, gardener, residing in 'Chirnside, against you, as common debtor, and Thomas Cockburn, 'merchant in Berwick, and myself, as arresting creditors. I do not 'think it advisable, in the circumstances of the case, to make ap-'pearance in the action, and therefore I beg to intimate to you, that 'the arrestment used at my instance in the hands of the pursuer is 'loosed and discharged. I have written to Gilmour and his agent 'to the same effect.' Addressed, 'Mr Thomas Darling.' Also a letter from the second arrester to the respondent's agent, to this effect: 'Berwick, *June* 5. 1835.—SIR, I have just seen a letter 'from you to Mr Marshall, respecting a debt due by T. Dar-'ling to the estate of my late brother. I never intended to pro-'ceed against Darling, as I sold my interest to Gilmour months 'ago. I received a note from Mr Watson on the 1st instant, re-'garding the business. I immediately replied to do nothing on my 'account, as I had no interest in the concern. I certainly autho-'rised Watson to summon Darling, but at the time I only consi-'dered it to give Gilmour a claim to the debt. I am,' &c. 'P. S. 'I may add, that I have been completely deceived in the busi-'ness.' Also a letter from Mr Watson, therein mentioned, to the

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same party, to this effect: 'DEAR SIR, Mr Cockburn, wine merchant in Berwick, administrator of the late John Cockburn, merchant there, does not mean to follow out the action at his instance before the Sheriff of Berwickshire against Thomas Darling, weaver in Chirnside, and the same is hereby abandoned.—*Dunse, June* 15. 1835.'

The Lord Ordinary refused the bill, and found the suspender liable in expenses. The suspender reclaimed.

Judgment.

The *Court* altered and passed the bill on caution, as originally offered by the suspender.

Greig & Morton, W. S. Suspender's Agents. *Joseph Grant*, W. S. Charger's Agent.

C.

SECOND DIVISION.

No. CLXXX. 10*th July* 1835.

CHARLES FERRIER, (WHITE'S TRUSTEE,) *against* SCOTTISH UNION INSURANCE COMPANY.

WRIT.—SASINE.—VITIATION.—*Erasures in an instrument of sasine, not specially noticed in the notary's doquet,—found not to be in substantialibus.*

Question of difficulty, whether, where words in substantialibus are on erasures, the nullity would be obviated, if the notary merely stated in the doquet that a certain number of words were written on erasures, without specifying what the words so written were.

Narrative.

THE Scottish Union Insurance Company were heritable creditors infeft in the lands of Gartmore and others, the rents of which had been sequestrated. An application by the company for a warrant on the judicial factor to make payment of arrears of certain annuities due to them out of the rents in the factor's hands was resisted by Ferrier, trustee for White, a creditor of Graham of Gartmore, on this ground, among others, that the sasine was null, there being about forty erasures in the instrument, many of them in substantialibus, and of which erasures there was no particular specification in the notary's doquet, but merely a general notice, that a word,

or so many words, were erased upon a particular page. It was answered, that the erasures were not in substantialibus, and therefore only affected the particular word erased, or neutralised the meaning of the sentence in which the words occurred. If the objection applied to the names of certain parcels of the lands, as, 'Gartinstarry' and 'Hole,' the answer was, (1.) That these words were not erased throughout the instrument, and that they were generally correct in the bond; and, (2.) That the validity of the sasine was, at all events, only affected to the extent of these two parcels of lands, which might competently be struck out of the company's security.

The following are examples of the erasures referred to: An erasure where the word 'health' appears on the second page of the sasine, is thus noticed in the doquet, 'uno verbo super pagina se-'cunda:' it occurs in the narrative of an obligation by Graham, in reference to insuring his life. On the tenth page, the word 'his' is on erasure, noticed thus in the doquet, 'uno super pagina de-'cima:' it occurs in the statement, that Graham stood infeft, 'con-'form to instrument of sasine in 'his' favour, dated,' &c. On the eleventh page, the words, 'Gartinstarry' and 'his' are on erasures; and it was stated by the company that the word stood originally 'Shirgartan' in the bond, and that it had been altered into 'Gar-'tinstarry,' after the bond was extended, and the instrument of sasine having been prepared from the draft of the bond when the alteration was made on the bond, the same alteration was required in the sasine. On page fourteen, the word 'Gartinstarry,' in the quotation of the precept of sasine, is on erasure, and is thus noticed in the doquet, 'uno super pagina decima quarta.' On page twenty, there are thirty-one erasures, thirty of these occur in the quotation of the testing clause of the bond; and on same page, 'necessary,' in the words, 'all other symbols usual and necessary,' is apparently on erasure; these erasures are thus noticed, 'una et triginta super 'pagina vigesima.' In the next page, 'Gartinstarry' is on erasure, and also in the last page, thus noticed in the doquet, 'uno super 'pagina vigesima prima, et uno super pagina hac dict. manu aliena 'in loco erasa superinductis.'

The Court ordered inquiry as to the practice of notaries and others, in reference to erasures in instruments of sasine. The more general practice seems to be, when several words are written on erasures, to notice them in the doquet, by stating merely, that so many words on such a page are written on erasures, without mentioning the special words which are so written.

The Court also remitted to the depute-clerk register, to ascertain how notices of erasure had been made in the doquets of instruments of sasine for the last twenty years. From his report it ap-

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peared, that out of 25,313 sasines, there are only 196 in which any notice is taken of the existence of erasures; and out of the whole number of deeds in which the words on erasures are specified, there are only six cases in which this has been done, where the erasures exceed ten in number.

Minutes of debate were ordered, more especially as to the import of the decision in Rose Innes *v.* the Earl of Fife, 10th March 1827, where the word Coblehouse, part of the lands enumerated in a sasine, in virtue of which a party claimed enrolment as a freeholder, was partially erased throughout the deed, and where the Court rejected the claim of enrolment. The respondents, in their minute, shewed that the erasure of Coblehouse did not necessarily annul the whole sasine, or affect Rose Innes's infeftment in the other lands; but that that parcel of lands falling to be struck out of the instrument, by consequence of the erasure, and the remaining lands not affording the requisite valuation, the sasine was thus null and void as a warrant for enrolment.

Respondents' Pleas.

Objector's Pleas.

The objector, in his minute, *pleaded*—That the particular words erased ought to have been specified in the doquet, just as they must be in the testing clause of a disposition; 1. *Juridical Styles*, 24. 3*d edit.*; Anderson *v.* Thomson, 31st Jan. 1828, where an objection to an erasure in a sasine was repelled, because the word erased was specified in the doquet. Upon the effect of erasures generally, he referred to *Bell on Testing of Deeds*, 104; *Stair*, iv. 42. 19; *Ersk.* iii. 2. 20, and Innes *v.* Lord Fife; *Thomson on Bills*, 206.

The Court, (as in the case of Rankin *v.* Smith,) ordered the papers to be submitted for the opinions of the other Judges. In the meantime the company lodged a minute, agreeing that the lands of Gartinstarry and Hole should be struck out of their security.

The following opinion was returned by the whole of the Consulted Judges:

Opinion of Consulted Judges.

Lord President, Lords Balgray, Gillies, Mackenzie, Corehouse, Fullerton, Moncreiff, Jeffrey and Cockburn.—We are of opinion that none of the erasures in the instrument of sasine referred to (as to which alone we understand there is now any question) can be considered as in substantialibus of that instrument, except those on which the word 'Gartinstarry,' and the word 'Hole,' have been respectively written.

These erasures, we are of opinion, would (if not protected by the general notice in the doquet of the notary) render the sasine null

and void, as to the lands of Gartinstarry and Hole respectively; but we are of opinion that they would not affect its validity as to any of the other lands:—The words in question not being (like words expressing the date, or the name of the disponee, &c.) in substantialibus of the whole instrument, or of its general tenor, but only of that part of it which relates to those particular lands; and therefore, both upon principle, and in conformity to the true import of the decision as to the lands of Coblehouse in Lord Fife's case, we are of opinion, that the nullity arising from those erasures could, in no view, have gone farther.

Whether this nullity would be obviated by the general notice in the doquet of a certain number of words being written on erasures on particular pages, without specifying what the words so written were, is a question (considering the evidence as to practice) of some difficulty. But, as the petitioners have given in a minute passing from all claim to the said lands of Gartinstarry and Hole, and agreeing to their being struck out of their security, as completely as if they had never been included in the sasine at all, we do not now think it necessary to give any opinion on that question.

The *Court* thereupon, in terms of this opinion, repelled the objections to the bond and infeftment. Judgment.

For Mr Ferrier, *Forsyth, Neaves.* *H. Inglis & Donald*, W. S. Agents. For Insurance Company, *Dean of Fac. (Hope,) H. Bruce.* *W. A. G. & R. Ellis*, W. S. and *James Knox*, S. S. C. Agents. *T.* Clerk.

R.

FIRST DIVISION.

No. CLXXXI. 11*th July* 1835.

THOMAS PHILP AND ALEXANDER JARVIS, PETITIONERS.

BURGH.—*Interim appointment of a manager for the burgh of Dysart, in room of one of three previously appointed managers deceased.*

THE petitioners, in an application to the Court, set forth that they, along with George Beveridge, merchant in Dysart, were appointed by their Lordships, November 26. 1833, managers for the burgh of Dysart, in consequence of its having been found

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Philp and Jarvis, Petitioners.

impracticable to carry into effect the provisions of the act 3d and 4th William IV. cap. 76, (commonly called the Burgh Reform Act,) as regards the election of Magistrates: That the said George Beveridge had died lately, and though possibly the two petitioners, as a majority of the managers named, might still be enabled to act, and to discharge the whole duties incumbent on such functionaries, yet as their nomination did not specially authorise a majority to act, it might be proper to supply the vacancy occasioned by the death of Beveridge, they therefore prayed their Lordships, either with or without intimation, to nominate and appoint the petitioners, and Andrew Gray jun. merchant in Dysart, or any two of them, to act as managers for the affairs of the burgh of Dysart, until the corporate rights and privileges of the burgh shall be restored, for the special purposes of receiving resignations, or giving sasines in any lands held burgage of the said burgh: appointing taxers or stent-masters to collect King's subsidy, regulating the weights and measures within the said burgh, and taking charge in the meantime of such funds and patrimonial interests as fall under the management of the different office-bearers of the burgh; and, generally, to exercise the whole functions of the Magistracy and Town-Council of the said burgh; or otherwise, in case of intimation being thought necessary, to allow an interim appointment to go out in favour of the petitioners, and the said Andrew Gray jun. and the majority foresaid, authorising them to act till the third sederunt-day in November; and quoad ultra, to order intimation of this application on the walls of the Inner and Outer Houses, the doors of the court-house of Dysart, and in the minute-book; and on resuming consideration thereof, after intimation, to renew the appointment of the petitioners and the said Andrew Gray jun. and the majority, as managers foresaid, &c.

The *Court* granted the alternative prayer, and allowed extract to go out ad interim.

For Petitioners, *Sol.-Gen. (Cuninghame.)* *Mackenzie & Macfarlane*, W. S. Agents.

C.

FIRST DIVISION.

No. CLXXXII. 11*th July* 1835.

PATRICK DALMAHOY, PETITIONER.

SUMMARY APPLICATION. — CURATOR BONIS.—CAUTIONER.—*A party had been appointed curator bonis to a lunatic, in room of a prior curator, whose appointment had been recalled; the accounts of the prior curator had not been audited, but in states of intromissions given in by him he admitted a certain balance,—interim execution granted to obtain said balance against the prior curator, but not against his cautioner.*

THE petitioner represented that he had (15th May) been appointed curator bonis to a lunatic: That Mr Reid, a prior curator, had lodged states of his intromissions up to 7th July 1831, which showed a balance then in his hands of L.298 : 14 : 5½, but these states had never been judicially examined or audited, and there was no continuation of the accounts from that period: That he had applied to Mr Reid upon the subject, who had refused to communicate with him: That he had also applied to Mr Reid's cautioner, Mr Thomas Hume, who had made up, from such information as he could obtain, a continuation of Mr Reid's accounts to the 1st April 1833, and that according to his statement, there was a surplus over Mr Reid's disbursements, between 7th July 1831 and the time of the recall of his appointment, of L.77 : 11 : 3. The petitioner therefore prayed their Lordships to remit to the junior Lord Ordinary, to audit and settle the accounts of the said Thomas Reid, from the time of his appointment as curator to the said John Lamb, down to the period of its recall; and, thereafter, upon a report from his Lordship, to empower the petitioner to receive and discharge such balance as may appear to be due by the said Thomas Reid on his said accounts; and further, in the meantime, to grant warrant to, and ordain the clerks of Session, immediately to transmit to the office for the registration of deeds, the bond of caution granted by the said Thomas Reid and the said Thomas Hume, as his cautioner; and to authorise and empower the petitioner, as curator foresaid, to demand immediate payment from the said Thomas Reid, and Thomas Hume, as his cautioner, of the foresaid admitted balance of L.376 : 5 : 8½, and, if needful, to raise letters of horning upon an extract of the said bond of caution when so registered, and use all

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other diligence for recovering payment of the said sum of L.376, 5s. 8½d. from the said Thomas Reid and his said cautioner.

The cautioner answered the petition, and stated, that the balance set forth by him was entirely conjectural, and that this summary application was uncalled for, as there was an annual income arising to the lunatic of L.138; and he *pleaded*—(1.) That it was incompetent, or at least unjust, to proceed against a cautioner for a curator, or to take decree to any extent against him, till the whole accounts of the curator himself have been lodged, examined and audited in due and regular form, and the true balance, if any, ascertained; and, (2.) That it is incumbent on the petitioner duly to discuss the curator or *principal*, before he is entitled to proceed against the respondent as his *cautioner*.

Judgment.

The *Court* pronounced this interlocutor: 'The Lords having advised this petition, with the answers, remit to the junior Lord Ordinary to audit the account of Thomas Reid as prayed for, and to report; and in the meanwhile grant warrant to, and ordain the Clerks to deliver up the bond of caution, (to be put on record,) to the effect of diligence proceeding thereon against the said Thomas Reid for the balance on his accounts of L.298: 14: 3½, admitted to have been in his hands on 7th July 1831; but in respect of the answers for Thomas Hume the cautioner, allow him to see the accounts of intromissions and this petition.'

Act. *Cowan.* Alt. *Maitland.* *P. Dalmahoy*, W. S. *Mackenzie & Macfarlane*, W. S. Agents. *S.* Clerk.

C.

FIRST DIVISION.

No. CLXXXIII. 11*th July* 1835.

MAGISTRATES OF PERTH
against
MALCOLM STEWART.

OBLIGATION. — TENURE. — CLAUSE.—BURGH.—*Certain feudal prestations having been annexed to a conveyance of part of the territory of a royal burgh, and not in terminis made a real burden,—held, that the disponee, by acceptance of the right, and possession*

thereon, had incurred an obligation to implement said feudal prestations. 11 July 1835.

(2.) *Anomalous attempt to engraft a feudal on a burgage tenure.*

Magistrates of Perth *v.* Stewart.

THE defender was in possession of certain portions of the burgh muir of Perth, being Lots 5, 12; and Nos. 20, 28, 29 and 30 of Lot 18. Lot 12. was disponed to him directly by the Magistrates: the others he acquired by singular titles. The deed of conveyance of said lot, (which bore date 20th April, and was registered in the burgh court-books of Perth, 9th June 1821,) proceeded on the narrative of an act of Council, and the dispositive clause ran thus: 'Likeas we, for ourselves, and for and in name of the other members of the Town-Council, and whole community of the said burgh, heritable proprietors of the said lot of ground, for and in consideration of the foresaid price, and of the yearly feu-duties underwritten, and with and under the conditions and provisions after mentioned, sell, alienate and dispone, and in feu-farm perpetually demit, to and in favour,' &c. There was an obligation to infeft in common form, and the following were the terms of the tenendas and reddendo: 'To be holden of our sovereign lord, the King's Majesty, and his royal successors, immediate lawful superiors thereof, in free burgage, fee and heritage for ever, for payment of the burrow maills, service of burgh, and others used and wont, and that by resignation in manner under written; and also to be holden of the Magistrates and Town-Council of the said burgh, and their successors in office, for themselves, and in name and behalf of the whole community of the said burgh, in feu-farm, fee and heritage for ever, for payment out of and for the said lot of ground hereby disponed, by our said disponee and his foresaids, to the Town-Chamberlain of Perth, and his successors in office, for the use and behoof of the community of the said burgh, &c. in name of feu-duty, &c. beginning the first year's payment of the said feu-duty, &c. and doubling the said feu-duty the first year of the entry of each heir, and of each singular successor thereto, as use is in feu-farm, and that for all other burden, exaction or demand whatever, excepting the cess or stent, or other public burdens after mentioned.' Narrative.

The said deed of conveyance contained a procuratory of resignation, for resigning the said lot of ground in the hands of the Provost, or any of the Bailies for the time being, for infefting the defender and his foresaids therein, according to the two modes of holding above mentioned, under a provision of forfeiture, in case of two years' feu-duty running into a third; and in virtue thereof the defender was, upon the 9th day of June 1821, infeft and seised in the said

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Narrative.

Lot 12. of said burgh muir and pertinents, conform to instrument of sasine of that date, recorded in the register of sasines for the burgh of Perth, the same day, under the hand of the town-clerk of Perth; and which instrument of sasine narrated, that resignation was made in the hands of one of the then bailies, as in the hands of the King's Majesty, immediate lawful superior thereof, as to the burgage-holding; and also in the hands of the said bailie for himself, and in name of the other members of the Town-Council of the said burgh, for behoof of the community thereof, superiors of the same, as to the feu-holding, in favours and for new infeftment to be granted to the defender.

The terms of the original deeds of conveyance to the predecessors of the defender in the other lots were similar to the above, and the transmissions through them to the defender repeated the original clauses.

The defender completed his title to Nos. 20, 28, 29 and 30 of Lot 18, under a procuratory of resignation from his immediate predecessor, in form as above, by resignation and sasine, the instrument whereof, (bearing date 4th June 1825,) was also recorded in the burgh register; and on the 19th March 1828, the defender, (under protest that the payment was made without prejudice to his claims against the town of Perth, and that he should be entitled to claim back the payment,) paid to the City-Chamberlain of Perth the sum of L.19 : 0 : 3 sterling, as the duplication of feu-duty for the first year, on his entering as singular successor to said numbers of Lot 18. The defender was also infeft in a similar manner in Lot 5, and the instrument also recorded in the burgh register.

In respect to Lot 5, the Magistrates and Council of Perth, during the life of the original vassal, the predecessor of the defender, and who is still alive, raised an action against the defender in the Sheriff-court of Perthshire, in which, founding on the titles whereby the said lot came into the possession of the defender, they subsumed that the defender, as a singular successor in the said lot, is liable for a duplication of the feu-duty payable by him for the same, and which fell due from the first year of his acquiring right to the said lot; and concluded, that the defender ought and should be decerned and ordained to make payment and satisfaction to the said pursuers of the sum of L.26, 14s. sterling, as the double feu exigible on his succession to the said lot, with interest of said sum from the date of the action, and in time coming till payment. The Sheriff assoilzied the defender, with expenses. The pursuers advocated, when Lord Corehouse, Ordinary, also assoilzied, and his Lordship's interlocutor was adhered to by the Court, (19th Dec. 1830,) 'reserving to the Magistrates of Perth to bring against the 'respondent such action as they may be advised to institute, for ful-

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Narrative.

'filment of the prestations, or other stipulations contained in their 'contract with him as accords, and to the respondent his defences 'thereto.'

The defender, after obtaining possession of the various subjects above mentioned, paid the pursuers and their predecessors the feu-duties respectively stipulated therefor, until Martinmas 1830, when said payments were discontinued.

The pursuers now raised the present action, the summons in which, (entitled, 'Summons of declarator and for payment,') concluded generally, that it should be found and declared, 1. That the whole conditions, provisions, declarations and obligations contained in the said several original charters, dispositions, assignations and conveyances of the same, and infeftments and instruments of sasine following thereon, before mentioned, are binding and obligatory upon the said Malcolm Stewart, &c.: 2. That the said yearly payments for the said several lots of ground of the burgh muir of Perth are valid, legal and real burdens, attaching to and affecting the said lots respectively; and that the said Malcolm Stewart, his heirs and assignees, and the person or persons having or acquiring right to the said lots of ground, or any part or portion of the same, are bound to pay, and the said Magistrates of Perth, and the Town-Chamberlain thereof, and their and his successors in office, in name, and for behoof, as said is, are entitled to demand and exact payment of, sue for, recover and discharge the said annual payments, due, or to become due, in all time coming, with the legal interest of the same, from the terms at which the same are or will become payable, till payment: 3. That if the said Malcolm Stewart, defender, shall fail to make due and punctual payment, and shall allow two years thereof to run into a third unpaid, then and in that case he shall incur a forfeiture of the lot or lots for which such payment or payments shall so remain unpaid, with the whole houses or other erections built or made thereon, as set forth in the foresaid original charters, conveyances of, and infeftments on the same, herein before severally mentioned; and that the said subjects must be held by the heirs, successors and assignees of the said Malcolm Stewart, under the like condition of irritancy or forfeiture: 4. That the person or persons succeeding the said Malcolm Stewart, either as heirs or singular successors, by disposition, assignment, or otherwise, in the said several lots of ground, parts and portions of the said burgh muir, are and shall be liable in payment to the Magistrates of Perth, or the Town-Chamberlain thereof for the time, for behoof foresaid, of a duplication of the foresaid annual payments, exigible for and from the respective lots as aforesaid; and that for the first year after their being legally vested in any of the said lots, and

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payable at the first term of Martinmas one full year after such investiture, and for that year only, with the due and legal interest of the same from the term of payment till paid; and such duplication of the annual payments, in the events foresaid, should be held, declared and decerned to be, and constitute a real burden upon the said several lots of ground, in the same manner as the annual payments aforesaid, and as stipulated in the original contracts and agreements of sale, and charters and other titles and documents following on the same; and specially for the amount of the annual payments due and payable at Martinmas 1830 and subsequently, and also for a duplication of the feu of Lot 5, and of No. 20, 28, 29 and 30 of Lot 18, with interest, &c.

Defender's Pleas.

The defender *pleaded*, as a preliminary defence, that the writs founded on in the summons were erroneously described, and that all parties having interest were not called. On the merits, he *pleaded*, 1. That there were no termini habiles for the declaratory conclusions, unless the writs libelled on were to be given effect to as proper feudal rights; and this would be incompatible not only with the nature and character of the subjects, and the tenure by which they were held, but was negatived by the former judgment of the Court. 2. That there was neither contract nor personal undertaking, nor any other ground on which to rest a direct claim against the defender at the pursuers' instance. 3. In any view, the pursuers cannot maintain action against the defender for payment, either of annual duties or duplicands, until they are prepared to give him a valid feu right to the subjects; and that they have never yet done, and are not in a condition to do. 4. The conclusion for a duplication as to No. 20, 28, 29 and 30 of Lot 18. is unfounded, the said sum having been already paid. 5. The said conclusion, and the conclusion for a duplication as to Lot 5, are untenable, the defender never having been duly entered as vassal of the burgh under the feu-holding, and the original vassal in Lot 5. being still alive. The defender further generally denied the right of action, and his liability to any extent to the pursuers. The record was closed upon the summons and defences, with a minute for the pursuers, to the effect, that they were willing to close the record upon the summons and defences, denying the allegations in the defences in so far as inconsistent with those in the summons, (excepting the allegation as to the payment of the sum of L.19 : 16 : 6 by the defender, which is admitted,) and referring to the title-deeds produced, and the proceedings in the former action against the present defender, for the contents and nature of these proceedings: And he farther represented, on the part of the pursuers, that they were ready and willing to grant to the defender investitures in the sub-

jects now held by him, which formed part of the burgh muir of Perth, and to which the present action is relative, either more burgi or by subinfeudation, the annual and occasional payments stipulated for in the present deeds being secured and made payable either as ground-annuals or otherwise, the whole to be completed in such manner as any experienced conveyancer, to be fixed by the Court, or agreed on by the parties, shall point out: And in so far as regarded the said sum of L.19 : 16 : 6, he agreed to depart from the conclusion for payment thereof, contained in the libel.

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Defender's Pleas.

The Lord Ordinary ordered the cause to be reported on cases, when his Lordship issued the following note:

Lord Ordinary's Note.

Note.—'As this action is brought in consequence of a reservation contained in a judgment of the Court, pronounced in a former question between the same parties, and as reference has been made, on both sides, to the views of the Court in inserting that reservation, the Lord Ordinary has thought it right to report the case. He may be permitted, however, at the same time, to express the opinion which he has formed on the points in dispute. The first conclusion of the summons is, 'That the whole conditions, provisions, declarations and obligations, contained in the said several original charters, dispositions, assignations and conveyances of the same, and infeftments and instruments of sasine following thereon, before mentioned, are binding and obligatory on the said Malcolm Stewart, defender.' The object of this conclusion is to establish that the various conditions and obligations in the titles are personally binding on the defender. The Lord Ordinary thinks that to this extent the action must be sustained. In the first place, in regard to the lot originally acquired by the defender himself, this hardly admits of being denied. The annual and other payments, whether correctly termed feu-duty or not, certainly formed part of the price and consideration for which the lands were conveyed to him. The only answer attempted by the defender, viz. That these counter obligations on his part formed the consideration, not of his acquiring the substantial right to the lands themselves, but of his enjoying them by a particular tenure, viz. a feu-holding, which, it is said, he has not got, is in itself inadmissible and absurd in construing a transaction like this; and is besides completely obviated by the offer of the pursuers to give him a feu-holding, if he prefers it. 2*dly*, and in regard to those lots which the defender has acquired from the original purchasers, the Lord Ordinary thinks that the defender is equally bound in the personal obligation sought to be established by the

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'first conclusion of the summons. There is here no question of 'the efficacy or inefficacy, against a singular successor, of obligations not made, in distinct terms, real burdens on the lands. Such 'a question might have arisen, if the defender had acquired, by 'purchase, an absolute and unqualified right to the subjects, and if 'an attempt had been made to subject either him or the lands to 'obligations in their nature personal, contained merely in the titles 'of the parties, from whom the lands had been purchased. In such 'circumstances the decisions referred to by him would have been 'conclusive. But the personal obligations sought to be established 'against him rest here, not upon the titles of his authors, but upon 'the titles which he himself has chosen to take from those authors. 'Though a singular successor, he has taken and now holds the lands 'under the very conditions and obligations which attached to the 'original acquirers; and of course the consideration which he paid 'as a singular successor was calculated accordingly. He is there-'fore not merely the singular successor of those parties in the lands, 'but he is their substitute in the personal obligations originally con-'tracted by them, and adopted by himself in his own titles. Upon 'these grounds the Lord Ordinary considers the defender to be per-'sonally bound for the payment and prestations concluded for.

'The remaining conclusions of the summons, viz. That the year-'ly payments, &c. should be declared to be valid, legal and real 'burdens, attaching to and affecting the said lots, and that not only 'the defender and his heirs, but his singular successors, should be 'declared to be liable for those annual payments, are attended with 'much greater difficulty. According to the view which the Lord 'Ordinary takes of the judgment pronounced in the former case, 'he does not see how those propositions can be made out. It rather 'seems to him, that the only ground upon which these pecuniary 'obligations could be held to attach to the lands is, that they were 'elements of a proper feu-holding, in which character they have 'been found by the Court to be inept and unavailing; and as the 'present summons contains no conclusion that the defender is bound 'to take a title effectually rendering these payments real burdens, 'but concludes merely to have it found that they do form real bur-'dens as the title now stands, the Lord Ordinary does not think 'that these conclusions can, consistently with the former judgment, 'be sustained.'

Pursuers' Argument.

The pursuers, in their case, admitted that no valid feu right was constituted, but contended, that the defender, by accepting and possessing the subjects under the conditions contained in the respective conveyances thereto, had entered into a contract with them, which they were not debarred from obtaining implement of, though, in the

expression of the nature of that contract, the most fitting terms had not been used.

Pursuers' Argument.

The competency of stipulating for a payment of an annual sum to the Magistrates, in the constitution of a burgage right, cannot be disputed. The existence, for centuries, of ground-annuals, payable furth of subjects holding burgage, is sufficient evidence of the competency of combining a stipulation of services to the Crown with money payments to the subject. And in the very full and anxious discussion of the whole matter, regarding the constitution of burgage rights, into which the Court here, and the House of Lords, were led, in the recent and important case of Dawson and Mitchell, the compatibility of such stipulations in the same titles was expressly acknowledged. In that case no doubt was raised, either as to the possibility of uniting these stipulations, or as to the necessity of the holder of the subjects making payment of them, by what name soever called. The only matter upon which the Court entertained difficulty, and upon which a variance of opinion existed, was, which of the holdings, from the peculiarities adopted in the completion of the title, predominated. The legality of a stipulation, that the holder of a burgal subject shall hold it subject to the liability of paying a yearly duty to his author out of it, never was, and, it is submitted, never can reasonably be questioned.

It is true that the deeds are unilateral in their terms, but it is no less true that a unilateral deed becomes a bilateral deed when parties reciprocally act upon it.

It is extravagant to assume, regard being had either to the circumstances of the parties or the terms of the deeds, that it was the intent and meaning of those concerned, that the obligation should not transmit against the subsequent possessors of the subjects. If the obligation should not so transmit, it must either have been terminable by the death of the original disponee, or have transmitted against his personal representatives. It cannot be seriously pretended that the payment was to cease by the death of the acquirer. The assumption of an intended transmission to personal representatives leads to consequences equally absurd and inadmissible. The amount of payment, as has been already stated, had reference to the annual produce of the lands and the crops which it was fitted to rear. The connection of the use and the consideration is apparent, even from that circumstance. There is a duplicand stipulated on the entry of a new proprietor. If the payment were to be exacted from the personal representative of a former holder, he would be made to pay for an event in which he had no interest. The payment is expressly stated to be 'out of,' as well as 'for,' the lands disponed. If the property was to be in one individual, and

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the obligation of payment to be in another, the clause could not have any effect or meaning given to it. In short, the use of the land, and the consideration for which the use of the land is given, go together.

Pursuers' Argument.

The defender has maintained that the possession and enjoyment of the subjects is no equivalent for the obligations imposed, and that the pursuers became bound to grant him a feudal right, and till that is done he is under no obligation to them. If the condition for which the defender stipulated really was that he should get a complete and unexceptionable title as a vassal, and if, as he represents, the payment of the annual duty was made conditional upon such completion, by what singular accident did it happen that he submitted to these payments during so long a course of years? He did not do it on account of having received what he represents as the value; because, as he states it, the value has never been given him. He could not do it in anticipation of such completion; for, according to his present view, the titles were so framed as to preclude the possibility of the effectual completion of a feudal right. He cannot dispute the fact, and he cannot, by possibility, account for it on any theory which may quadrate with his present resistance to payment. No other supposition is consistent with it, but the simple truth, namely, that the defender, as the price of his purchase, stipulated to make considerations and payments; and as a provision for enforcing the regularity of payment, agreed that his right to the subjects should be forfeited, if he failed in making payment of two years' duty.

The only question which can be raised is just whether the Court, when the intention of contracting parties is clear, and the real effect and substance of the transaction put beyond the reach of doubt, will refuse to give one of the contracting parties implement of the obligation conceived in his favour, and from fulfilment of which he is to derive benefit, because the expressions used in reducing the contract to writing are not critically accurate.

The previous decision of the Court was not res judicata; on the contrary, it clearly paved the way for the present action, in which the Court can now reach the real essence of the case, and are not trammelled, as they were before, by the adoption of a form of action imperfectly calculated to evolve the rights of parties.

Defender's Argument.

The defender *pleaded*—The pursuers not being feudal proprietors are not entitled to demand feu-duties, duplicands, or other prestations which are only incident to a feudal tenure. The pursuers cannot rest their supposed claim on any obligation arising ex contractu. In three at least of the four subjects belonging to the defender,

Defender's Argument.

he is a singular successor, and consequently no mere personal obligation (and all obligations arising ex contractu are of that character) can transmit against him. If the defender be liable to the pursuers at all, it must be on the ground that he has come under some implied obligation. And it must further be on the ground, that the pursuers have, on their part, performed every condition incumbent upon themselves, as the counterpart and consideration or price of such an obligation.

The obligation to pay feu-duty, as well as the obligation to pay a duplicand on the entrance of each heir and singular successor, is inseparably connected with the feu-holding, and is accordingly to be found no where else in the deed, except in the tenendas and relative clauses. The pursuers became bound to grant the defender a feu-right. That was their obligation to him. And the counterpart of it on his side was, that, from the moment they fulfilled this obligation, and granted him the feu-right which they had thus become bound to grant, then he, as their vassal in the feu, was to be subjected to the corelative obligation, of paying them feu-duty, and performing the other prestations incident to a proper feu-right.

The pursuers are not content with the defender's thus paying the incidents of one kind of holding. They insist that at one and the same moment he must be liable for the incidents of two different and incompatible manners of holding. In other words, although the defender has in the dispositive clause an unlimited conveyance to the property; and although, relatively to this conveyance, he has also the proper tenendas and reddendo clauses applicable to a burgage holding, and all this, it will be observed, unencumbered either with burden or reservation,—still the pursuers maintain, that the conveyance, incapable of feudalization though it be, as a right of feu, must be saddled not merely with burgh services, as being a proper burgage right, but also with a variety of duties and burdens which are applicable to nothing but a feu-holding, and which are contained no where but in two inoperative and most anomalous clauses of tenendas and reddendo, absurdly thrust into the deed, contrary to every principle of correct conveyancing.

Supposing, however, the demand of the pursuers could be viewed not as the incident of a feudal tenure, but as a mere ordinary burden upon the subjects, then it is clear that it should have been made a real burden, or, in other words, the deeds conveying these subjects must have been conceived in such terms as to constitute, in the shape of a proper ground-annual, or otherwise, a reserved burden over the estate conveyed. In all cases of this kind the Court have found it necessary to keep rigidly to the rule of technical interpretation; and wherever the deed does not per expressum

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Defender's Argument.

bear out the constitution of a real burden, the maxim, quod voluit non fecit, has in every instance been held to apply; Inglis, Dec. 13. 1676, *M.* 10,237; Sinclair, Dec. 23. 1724, *M.* 4123; Hutton, Feb. 3. 1725, *M.* 9437; Allan, July 19. 1780, *M.* 10,265; Martin *v.* Paterson, 22d June 1808, *D. voce Personal and Real, App.* No. 5; Macinyre *v.* Masterton, 23d Feb. 1824, *F. C.*

The cause was delayed for some time with a view to a compromise, but the parties ultimately resolved to take the opinion of the Court. When the cause was finally advised, some discussion arose as to the liability of the defender for the duplicand of Lot 5. The defender contended, that if he was to be subjected to the liabilities of a feuar, he ought at least to have the benefits, and that he could not be called upon to pay the duplicand till the death of his predecessor. The pursuer answered, that as he had taken the entry, he was, in terms of his obligation, bound to pay for it, being a singular successor. The defender replied, that his entry was an entry in burgage.

Opinion of Court.

The *Court* were of opinion that the obligation, if given effect to in one particular, must be sustained throughout; that both parties had concurred in creating a blundered investiture; but as the defender had thought proper to proceed to take an entry, he could not now complain of the town for exacting payment for it.

Judgment.

The following interlocutor was pronounced: 'The Lords having advised 'the revised cases and record for the parties, find, That the obliga- 'tions for annual payments and duplication thereof upon entry, 'contained in the defender's titles, are binding on the defender, 'and, in terms thereof, decern against the defender for payment to 'the pursuers of the arrears of annual payments and duplications 'thereof, specified in the summons, deducting the sum of L.19, 6s. '6d., being the duplication for Nos. 20, 28, 29, and 30, of Lot 18, 'which is admitted to have been paid, with interest on the sums 'decerned for, from the date of citation in this action; and in re- 'spect of the nature of the title, assoilzie the defender from the re- 'maining conclusions of the action, and find no expenses due by 'either party.'

Lord Ordinary, *Fullerton.* Act. *Dean of Fac. (Hope,) Patton.* Alt. *Rutherfurd, Ivory.* *William Murray*, W. S. *Gibson-Craigs, Wardlaw & Dalziel*, W. S. Agents. *D.* Clerk.

C.

FIRST DIVISION.

No. CLXXXIV. 11*th July* 1835.

EARL OF DUNMORE, Suspender,
WILLIAM DICKSON, Charger,
Misses MARGARET & ELIZABETH BELL, Petitioners,
In the Ranking and Sale of Harris.

Ranking and Sale.—Suspension.—Process.—*After decree of sale, the purchaser suspended on the ground that the pursuer was not a real creditor, in respect there were fatal erasures in the instrument constituting his right, another real creditor allowed to be sisted, and the reasons of suspension repelled.*

Narrative.

Decree having been pronounced in the above action, Lord Dunmore, the purchaser, suspended payment of the price, on the ground that he had discovered certain objections to the title of the common debtor, and also to that of the pursuers of the action of ranking, the nature of which was, that in an instrument of sasine, material to the progress of the common debtor's titles, the word 'eighty' in the date of the Christian era was written on an erasure, and that, in the instrument of sasine, upon which rested the title of the pursuers as real creditors, the word 'third,' after the word 'fifty,' which was intended to denominate the year of the King's reign, was also written on an erasure; and so, upon the principle adopted in the case of Hoggan *v.* Rankin, 13th Feb. 1835, these instruments were null. A remit was made, with consent of parties, to Mr Cosmo Innes, advocate, who reported that the initial letter 'E' only, of the word eighty, was written on an erasure; and in reference to the word 'third,' he reported that it had, in several places, been written on erasures; that it was very probably not the word which at first stood there, and that from the space occupied by it, from the parts of the letters which have not been altered, and from the places where the most evident erasures had taken place, it might be conjectured that the word originally stood 'second.' The Lord Ordinary then ordered cases, with which his Lordship made avisandum to the Lords of the Second Division of the Court.

Suspender's Argument.

Lord Dunmore, in his case, intimated his anxious desire to adhere to his bargain, and declared that his only wish was to pay the price in safety; and *argued*, that these objections appeared to be

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Suspender's Argument.

fatal, both to the title of the common debtor, and of the pursuer of the action of ranking: That the provisions in the statutes respecting processes of ranking and sale did not exclude him from excepting to the title of the common debtor under such circumstances as the present; Waddell v. Pollock, 19th June 1828; but, at all events, the defect in the title of the pursuer clearly vitiated the whole proceedings. The action of ranking and sale derives its whole efficacy from statute. Its provisions are of a highly penal nature. It contains a decree of certification which shuts the chequer against all creditors who do not produce their debts; and the decree of sale acts as a general adjudication, as at the first calling of the process, in favour of all the creditors who come forward, and are afterwards included in the decree of division,—even the personal creditors, whose debts become real by the said general adjudication; and it further constitutes an irredeemable adjudication of the whole estate sold, in favour of the purchaser. The title of the purchaser, then, derives its virtue from the irredeemable decree of adjudication, from the acquisition of the debts of all the creditors of the common debtor who have appeared, and from the decree of certification against those who have not done so. But as all these securities are produced by statute, the whole of them will fail when the provisions of the statute are not complied with, and when, from any fundamental defect in the proceedings, the process comes to be, in point of fact, not such a process as the statute contemplated and authorised. The act 1695, cap. 6, relative to consignation of the price, states very strongly the rights of purchasers at judicial sales; and declares, that after such consignation they 'shall be for ever exonered, and 'the security given for the price shall be delivered up to be cancel-'led, and the lands and others purchased and acquired disburdened 'of all debts or deeds of the bankrupt, or his predecessors from 'whom he had right; and that the bankrupt, or his heirs, or appa-'rent heirs, or creditors, without exception of minority, not com-'pearing, or conceiving themselves to be prejudged, shall only have 'access to pursue the receivers of the price and their heirs, and 'reserving to the minor lesed his relief as accords.' But this is merely an addition to the statute 1681, cap. 17, and proceeds on the supposition that the process has been brought, and the whole proceedings have taken place in conformity with the provisions and enactments of that statute.

In sales under private acts, it is necessary that every provision be fulfilled to the letter, as is abundantly proved by the cases of Agnew and Wilson v. Sir William Elliot; and the same rule must apply in all statutory sales. It is true that the Act of Sederunt, 23d November 1811, § 4, declares, that if the pursuer of a process

of sale and ranking shall, during the dependence, die, or forbear to insist, or if his title and interest shall happen to be set aside and extinguished, the factor, if any be, or otherwise any other real creditors, may, upon special warrant from the Lords, take up the process where it left, and carry it on to its final issue for the common behoof of the whole creditors. It is also true, that the same right of carrying on an action of ranking and sale, abandoned by the original pursuer, is extended by the bankrupt act, 54. Geo. III. c. 37, sect. 10, to any creditor who is in a situation to adjudge. But it is no less true, that these enactments proceed on the assumption that the originator of the process is a real creditor; but if it turn out, quocunque tempore, that the actual pursuer is not so qualified, it is difficult to see upon what grounds the statutory title of the purchaser can be supported. If the action of ranking and sale was incompetently brought, any subsequent procedure upon it is null and void, notwithstanding that all parties interested may be willing to support the said null process, and although the decree of sale may have been suffered to be pronounced without objection.

Respondent's Argument.

The common agent shewed, that the defect in the title of the common debtor was of no consequence, in respect he had another valid title in his person, to which he might equally ascribe his possession. In respect to the title of the pursuer, he argued as follows:

The object of that process was to enable creditors to bring the lands of their debtor to sale, to effect an equal distribution of the funds, and to confer a valid title on the purchaser. To accomplish all these purposes, it became necessary to obtain the interposition of the Legislature, and its regulation became the subject of several legislative enactments.

It is impossible to read the different enactments in the statutes 1681, c. 17, 1690, c. 20, 1695, c. 6, and 1695, c. 24, without being satisfied of the distinction intended to be drawn between the ranking of the creditors and the sale to the purchaser. The chief object of the Legislature was to protect the purchaser at all hazards; and wherever any creditor had, through minority or otherwise, been injured by the procedure in the action, the only redress which was given to him was by allowing him to claim upon the price, while the rights of the purchaser were held sacred. It is difficult, indeed, to devise a scheme by which the rights of the purchaser could have been more efficiently protected. The sale was declared to be as effectual as if it had been made 'by the debtor, and all the 'apprisers, adjudgers, and other creditors.'

This is the criterion which is assumed by the Legislature, to which the validity of the decree of sale is to be assimilated. But

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even to guard against the possibility of risk, the Legislature, in its anxiety for the complete protection of the purchaser, further declared, that on payment of the price he should be 'for ever exonered,' and that the lands acquired should be for ever disburdened of the debts and deeds of the bankrupt and his predecessors; and that any creditors or other persons conceiving themselves to be prejudiced by the proceedings, should only have relief against those who receive payment of the price.

All these are provisions which materially affect the question under consideration. They shew that no one, whether heir or creditor, claiming through the common debtor or his ancestor, can challenge or set aside the sale. If there has been any irregularity in the proceedings,—if their interests have been unwarrantably disregarded,—it is open to them to seek redress from the receiver of the price; but their redress is limited to this, their right of setting aside the sale being expressly excluded. In this way the suspender has no interest to state the objection of 'no process.' As soon as he pays the price, his exoneration is complete. Were any creditor afterwards to come forward and to maintain that he had not obtained his due share in the distribution of the estate, and that he was not bound by any thing which had taken place in the process, he could not on that account touch the decree of sale. He might claim a preference in the ranking; or he might seek repetition from the other creditors; but further he could not proceed. The statutes have declared that the purchaser shall be safe. To give even a colour of plausibility to the present suspension, the suspender must shew that the decree of sale would be challengeable at the instance of the common debtor, or his creditors.

But further, it is well known that the process of sale was, for a long time, a separate process, and that the processes of ranking and of reduction improbation were afterwards added to it. They were all separate processes, and were only blended together, for the purpose partly of diminishing the expense, and partly of giving greater strength to the sale. But even after their conjunction in the same summons, the proceedings were kept so completely distinct, that the sale was not permitted until the ranking was completed; and this course was followed until altered by the late bankrupt statute. Now, if they are to be regarded as virtually separate processes, though nominally joined in one, it is not difficult to see sufficient grounds for holding, that any irregularity in the process of ranking should not extend itself to the sale. Under the old system, the distribution of the whole funds was arranged, the rights of the creditors adjusted, and the whole litigation terminated before the sale was carried through. It was only then that the Court inter-

fered, on the application of the common agent, to authorise the sale. Nothing therefore could be more reasonable than that the purchaser's right should be declared by the Legislature to stand free from all questions between the bankrupt and his creditors, and should derive its efficacy from the warrant of the Court acting under the immediate authority of a legislative enactment.

Respondent's Argument.

A decree of judicial sale has accordingly, in practice, been regarded as the best and most eligible title that a purchaser can receive. It is assimilated to an irredeemable decree of adjudication, secured against all objection on the part of the debtor and his creditors, by the extinction of all the real securities, and by its judicial nature, as a decree fortified by the declarations in the act of Parliament establishing it; *Bell, Com.* ii. 278.

As regards the creditors of the bankrupt, the purchaser is effectually protected. If they have appeared in the process, and stated no objection to the regularity of the procedure, they are barred from ever afterwards seeking to reduce any decree obtained in it, on the ground that it is a decree in foro, and that their objection is competent and omitted. With regard to all the others, the decree of certification is a complete bar to any subsequent interference. And the very terms of the decree bear that it shall be a certification, not in favour of the pursuer merely, but of every creditor who has lodged a claim. This decree has the double effect of protecting the purchaser against all latent claims on the part of the creditors, and of holding as null and void the rights of those who have not appeared. But, above all, it must be kept in view, that whether the creditors have appeared in the ranking or otherwise, their right of redress is expressly limited to a claim upon the price. They cannot interfere with the rights of the purchaser.

Even in ordinary cases, the rights of a bona fide purchaser are always favourably regarded in law. They cannot easily be disturbed. In heritable subjects, even the fraud of the author will not affect the acquirer. But all these considerations receive much greater force when applied to a judicial sale, where the sale is carried through under the authority of the Court, and derives its sanction from statute.

If, therefore, a creditor of the bankrupt should afterwards allege that the decree of certification was not available against him, in respect that the pursuer had no title to insist in the action, or that he was not duly cited, the only remedy which he can seek is, that his proper place in the ranking shall be secured to him. The price received for the lands stands as a surrogatum for the lands themselves. The competition proceeds with reference to the fund in medio.

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Respondent's Argument.

Every fair interest which the creditor can qualify will be effectually protected without calling in question the sale.

There is an obvious equity, therefore, in distinguishing the proceedings in the ranking from those connected with the sale; and the Legislature, with due anxiety to protect the common law rights of a purchaser on the one hand, and having regard on the other to the equitable claims of the creditors of the bankrupt, struck the line of demarcation, and settled that the sale should be as effectual as if the conveyance had been made by the common debtor, with the consent of the apprisers, adjudgers, and all the other creditors, but that there should be reserved to the bankrupt and his creditors not compearing, and conceiving themselves to be prejudiced, their claim against the receivers of the price.

A purchaser at a judicial sale is entitled to rely on the title which he receives as freed from any ground of objection flowing from the bankrupt and his predecessors, or from any creditors deriving right from them. He is entitled to hold that the claims of the creditors, whose interests have been overlooked, may still receive effect in the competition for the price, or may be enforced against the receivers of the price, but cannot be allowed to disturb the sale.

An exception to the rule may exist in cases where the sale has been carried through by fraud and collusion, of which the purchaser is cognisant. But in the present instance the suspender has not, and, indeed, cannot aver that there is the least ground for alleging fraud in any part of the proceedings. He is the last person who could allege that the lands have been sold at an under value; and he knows well that the whole proceedings in the process have been conducted with the utmost regularity,—that all parties having an interest have been called,—that the requisite publications have been made, — that the insolvency of the common debtor has been established,—and that the lands were exposed to sale on four different occasions, before a purchaser was found. It is clear, therefore, that there are no grounds whatever for bringing the present case within any of those exceptions which have just been alluded to. It must be determined on general principles, and as a case falling under the operation of the ordinary rule.

To liberate the suspender from his bargain, it is necessary for him to make out, not merely that there has been some slight disconformity with the usual course of procedure, but that there has been such an irregularity as will affect the decreet of sale. But if the respondent has been successful in shewing that the common debtor and his creditors are excluded from challenging the sale, and must seek redress solely against the price, or those who have received it, it follows that the suspender can qualify no interest to

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resist payment of the price. In so far as regards what remains to be done in the ranking, any of the other creditors may adopt the process, and prosecute it to a conclusion; but, as regards the sale, any such adoption of the process by other creditors appears to be unnecessary. Long before the sale took place, the whole management of the process had been taken out of the hands of the pursuers, by the appointment of the common agent, who represents the interest of the whole body of creditors. It was, accordingly, on the application of the respondent, as common agent, that the warrant of sale was granted; and it was on his application that the decree was finally pronounced in favour of the suspender. The decree of sale, therefore, stands unconnected in point of form with the ranking, while in equity and under the statutes, it stands independent of the claims, either of the bankrupt or any of his creditors. In support of this argument the following cases were cited: Cooper *v.* Myreton, 21st June 1720, *M.* 14,171; Dundas *v.* Lord Rollo, 9th Nov. 1739, *Elchies, voce Ranking and Sale*, No. 5; Blackwood *v.* Hamilton's Creditors, Jan. 4. 1749, *M.* 11,999; Middlemore *v.* M'Farlane's Creditors, 5th March 1811, *F. C.*; Stewart's Creditors, 29th Feb. 1812, *F. C.*

If the action had been founded singly on the personal interest of the pursuers, and if the decree to follow on it was to be available to them only, and to no one else, there would have been much force in the suspender's objection; but seeing that a process of ranking and sale is a real action, and is carried on by bringing into the field all other parties who have, or may have, an interest in the subject, and who, as soon as they appear, become all of them in effect pursuers, entitled to crave a preference, and carry on the action as well as the party in whose name it is raised, it is submitted, that the subsequent appearance of the other creditors in the process is a virtual adoption of it, and that they, through their representative, the common agent, are entitled to carry on the proceedings, by application for a sale or otherwise, on their own account.

The manifest hardship that would result from allowing any defect in the title of the original pursuer to annul the whole proceedings is very apparent. Any such doctrine would virtually defeat the whole ends in the contemplation of the Legislature. No creditor would be in safety to rely on an action raised at the instance of another creditor, but would be driven to institute one in his own name; for it must be borne in mind, that there may be many latent objections to a pursuer's debt, which are as fatal to his title to pursue as that under consideration. Thus, for instance, the debt may be extinguished by intromissions. An error may have been committed in the mode of taking sasine, or the like, which is not

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apparent ex facie of the instrument, and where no creditor, however vigilant, can detect the objection; and yet it is clear that, in one and all of these cases, the pursuer would not have a legal title to pursue.

Respondent's Argument.

The present case clearly falls within the spirit of the Act of Sederunt, 23d November 1711; for if it turns out that a creditor's interest has been satisfied and extinguished, prior to the institution of the action, he would clearly have proceeded without a title. The peculiarity of the decree of sale itself is matter of serious consideration. It forms a distinct and separate branch of the process. So much is this the case, that it is separately extracted, and thereafter every thing that pertains to the sale is withdrawn from the process, and sent to the record office in the Register-House. The application is not made in the name of the pursuer, but of the common agent; and the decree itself is not merely a decree in foro, but derives its authority from the Legislature, through the interposition of the Court.

The argument was further illustrated by reference to the enactments in the bankrupt statutes, the pari passu preference of adjudgers, and multiplepoindings; and it was also contended, that as the suspender was bound by the articles of roup to satisfy himself as to the validity and sufficiency of the title-deeds and other rights, the objections could not now be competently brought forward.

The petitioners (7th July) presented an application to the First Division of the Court, setting forth, that they were real creditors on the estate of Harris, and praying for authority to sist themselves, and to carry on the process for the behoof of the whole creditors, and thereupon the cause was remitted by the Second Division.

This day their Lordships accordingly proceeded to consider the question, whether it was now competent to allow the petitioners to sist themselves.

Opinion of Court.

Lord Mackenzie.—As to the general case of a decree being required to be carried into effect at the instance of a party not brought forward prior to decree, and who does not derive title through the pursuer, I think the ordinary rule of competent and omitted may apply; but I think it is necessary that some distinction should be made between the case of ranking and sale and other cases.

Rutherfurd.—The distinction may apply where the original title is good. I do not see how, in an action brought by a party not having a title, another party can be let in to carry the decree into effect.

Lord Balgray.—I think the general principles of law would authorise us to fortify this decree of sale.

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Lord Gillies. — I see no harm in sisting; but the question is, whether, by sisting in this action, you can give validity to proceedings previously carried on without a pursuer.

Lord President.—In actions of all kinds you allow a pursuer to come in.

Opinion of Court.

Lord Balgray.—An illustration may be taken from the case of sequestration. If the person's right who pursued the sequestration was cut down, you would not cut down the sequestration.

Rutherfurd.—Only two parties can pursue an action of ranking and sale, an apparent heir, or a real creditor.

Lord Balgray.—The difference is this, where the ranking and sale is brought at the instance of the first creditor, every other creditor becomes in reality a pursuer.

Lord Gillies.—There is a distinction between the sequestration statutes and those respecting ranking and sale. In a sequestration the creditors ranked have various privileges attached to them: the statutes provide that, but that is all the creature of statute. There is no similar provision in reference to ranking and sale.

Judgment.

The *Court* then pronounced this interlocutor: 'The Lords having advised the cases for the parties, repel the reasons of suspension, and find the charge orderly proceeded, in respect of the reasons stated by the charger, and also in respect that Misses Bell have been allowed to sist themselves as concurring pursuers in the ranking and sale, and find no expenses due, and decern.'

Lord Ordinary, *Jeffrey.* For the Earl of Dunmore, *Rutherfurd, Tait.* For Common Agent, *Dean of Fac. (Hope,) Anderson.* For Misses Bell, *Cowan. Tait & Young*, W. S. *Walter Dickson*, W. S. *Alex. Orr*, Agents. *S.* Clerk.

C.

SECOND DIVISION.

No. CLXXXV. 11*th July* 1835.

HENRY DAVID, EARL OF BUCHAN,
against
JAMES ROSE AND OTHERS, (TRUSTEES FOR HIS LORDSHIP'S ALIMENTARY CREDITORS.

ALIMENT.—COMPETITION.—ARRESTMENT.—*Found,* (1.) *That an annuity, alimentary, and payable termly in advance, was subject to the claims and diligence of creditors for aliment furnished to the an-*

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nuitant subsequent to the time of his becoming entitled to such annuity, and that he could not himself compete with such proper alimentary creditors. (2.) *Creditors for alimentary furnishings during the period to which each term's aliment was directed to be applied, found preferable to creditors for such furnishings during prior periods, but that such prior alimentary creditors were preferable inter se, according to the priority of the diligences by which they might have attached such aliment.* (3.) *The diligence of arrestment being competent to such creditors, no preference can be claimed over those using that diligence by creditors who had obtained assignations and made intimations thereof subsequent to such arrestments, but both must be ranked and preferred according to the priority of their arrestments and intimations respectively.* (4.) *Parties who had made advances for the purchase of a commission in the army and outfit for the annuitant's son, and a gamekeeper for his wages, found entitled to claim as alimentary creditors.* (5.) *Circumstances in which found, that a trust-assignation in favour of certain alimentary creditors could not be held to have been extinguished till the date of a letter recalling it.*

THE late David, Earl of Buchan, conveyed to Mr Monypenny, W. S. and others, in trust, certain heritable and moveable property, for certain uses and purposes, and, among others, *quarto*, To put the person who 'at the time shall be first in the order of succession 'to the said lands, &c. if he be, or when he becomes major, in pos-'session (rent free) of the mansion-house, garden and offices of 'Ammondell, and park within which the same is situated, and to 'content and pay to him or her a free liferent annuity of L.1500 'sterling, at two terms in the year, Whitsunday and Martinmas, by 'equal portions, beginning the first term's payment at the first of 'these terms after my death for the half year following, and so forth 'half yearly thereafter, during the subsistence of the trust; with 'power to the said trustees or trustee, in case the person first in the 'order of succession at the time shall be a minor, annually to apply 'such sum as they or he shall think necessary, (being less than the 'said sum of L.1500 sterling,) for his or her maintenance and edu-'cation, until he or she shall attain majority.' By a codicil the late Earl further declared, 'that the provision of L.1500 is and 'shall be considered as purely alimentary, and shall not be attach-'able or arrestable by the creditors' of the person first succeeding.

Henry David, Earl of Buchan, being the first in the order of succession to Earl David, received, subsequently to that Earl's death, in 1829, from time to time, payments to account of the annuity from Mr Monypenny. Lord Buchan having contracted various alimen-

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tary debts, the annuity was at the respective terms of payment arrested, in consequence of which expense was incurred, and the funds delapidated. His Lordship, therefore, seeing it was desirable that in future such proceedings should be avoided, and the annuity uplifted and divided without incurring legal expenses, assigned, on 14th May 1833, to Messrs Rose, Forbes and Marshall, 'as trustees for behoof of my creditors for alimentary debts contracted by me on or between the date of my accession under the trust-deed and 15th May 1832, the said alimentary annuity of L.1500, but to the extent of L.700 only, to be paid to them, as trustees foresaid, at Whitsunday and Martinmas, by equal portions, commencing at Whitsunday 1833 for the half year following,' and so on, 'until the said alimentary debts, contracted by me on or betwixt the foresaid dates, are paid off and discharged.' It was declared, the conveyance should cease if the creditors pursued separate measures, and thereby prevented the annuity being drawn by the Earl to the extent of L.800 termly. The trust-assignation was intimated to Mr Monypenny on 14th May 1833. The trust was acceded to by the creditors generally, who had furnished to his Lordship and family, provisions, clothing and lodging, and other alimentary furnishings, during the period set forth in the trust-conveyance. The Earl also granted, in favour of these trustees, a promissory-note for L.2000, dated 11th May 1833, and payable one day after date, for behoof of the creditors mentioned in the trust-deed. The promissory-note was subsidiary to the trust-deed, and subject to its conditions. Upon it Rose, Forbes and Marshall used arrestments in Mr Monypenny's hands, on the 15th May 1834, of the half-year's annuity payable at that time.

Other creditors having also arrested, and the Earl having applied for payment of his half-year's annuity, payable in advance, at Whitsunday 1834, Mr Monypenny raised a multiplepoinding, the fund in medio being L.750, then payable, under certain deductions admitted by the parties.

Claim for Earl of Buchan.

The Earl of Buchan claimed to be preferred to the whole fund, as being the person exclusively entitled to payment of the alimentary annuity, and also as having incurred, in consequence of the arrestments, alimentary debts on account of himself and his family, during the subsequent half year, and which alimentary debts, so incurred, amounted to more than the fund in medio.

Claims for Creditors.

Auchie and Brown claimed to be preferred primo loco for L.119, being the price of furniture to the Earl at different periods betwixt December 1832 and January 1834, and for which they had used

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arrestments on 15th May 1834; or, at all events, to be ranked pari passu with other alimentary creditors. The Earl answered, that the demands applied to periods prior to Whitsunday 1834, and much of them prior to Whitsunday and Martinmas 1833.

Alexander Finlay, baker, claimed to be preferred for the balance of an account for which he had got decree on 14th February 1834, on which he raised horning and arrestment on 14th May 1834.

Sir P. Walker and Mr Morison claimed to be preferred for the balance of sums advanced by them to purchase an ensigncy for Lord Cardross, the Earl's eldest son, and for his outfit. For these sums the Earl and his son had granted two promissory-notes, the Earl also giving an order for payment on Mr Monypenny, and, on 19th May 1832, granting an assignment to annuities in arrear, as well as to all future annuities. The assignation was intimated to Mr Monypenny on 26th May 1832. Partial payments were thereafter made, under reservation of any preference; and on 15th May 1834 arrestments were used to attach the annuity then payable. The Earl answered, that this debt had been contracted prior to Whitsunday 1834, and that it was not alimentary, being for a commission, which his son had sold in a few months without accounting for the price.

Messrs Rose, Forbes and Marshall, as trustees for the alimentary creditors, and for Davidson and others, acceding creditors to the trust, claimed to be preferred primo loco to the extent of L.350, assigned by the trust-deed; or to the whole fund, in virtue of their arrestments. The Earl answered, that he had recalled the trust, by letter dated 10th June 1834, and the debts were not alimentary.

John Reid, gamekeeper, claimed to be ranked for L.140 of wages due as at 15th October 1834, for which he had used arrestments. The Earl pleaded against this claim, that a gamekeeper cannot be considered necessary, when the employer has no estate, and such an office was inconsistent with the Earl's circumstances.

Patrick Forbes claimed to be preferred for advances for the board and education of the Earl's younger children, made at the request of the Earl, under circumstances which the Lord Ordinary (in a note to his interlocutor, now quoted,) left open to future explanation.

The Lord Ordinary pronounced the following interlocutor:

Lord Ordinary's Interlocutor.

'The Lord Ordinary having resumed consideration of the debate, 'with the closed record, and whole process, finds, 1*mo*, That the 'annuity payable to the Earl of Buchan, though alimentary, and 'payable termly in advance, is yet subject to the claims and dili-'gence of creditors, for aliment furnished to the said Earl subse-'quent to the time of his becoming entitled to such annuity; and

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'that he cannot himself compete in this multiplepoinding with any 'such proper alimentary creditors: finds, 2*do*, That creditors for 'alimentary furnishings, during the period to which each term's 'aliment is directed to be applied, are preferable to creditors for 'such furnishings during prior periods, but that such prior alimen- 'tary creditors are preferable, inter se, according to the priority of 'the diligences by which they may have attached such aliment: 'finds, 3*tio*, That the diligence of arrestment being competent to 'such creditors, no preference can be claimed over those using that 'diligence, by creditors who have obtained assignations, and made 'intimations thereof, subsequent to such arrestments; but both must 'be ranked and preferred according to the priority of their arrest- 'ments and intimations respectively: 4*to*, finds, That Sir P. Walker 'and John Morison are entitled to claim as alimentary creditors 'in this action, and that the claimant, John Reid, is also entitled 'to claim in that character,—these being the only claimants whose 'right to that character appears to be disputed: finds, 5*to*, That 'the trust-assignation in favour of Messrs Rose, Marshall and For- 'bes, cannot be held to have been extinguished till the Earl's letter 'of recall, of the 10th June 1834, subsequent to the institution of 'the present process; and before further answer, appoints the cause 'to be enrolled, that parties may state what decree of ranking and 'preference will be required to give effect to those findings, with 'reference to the state and amount of the fund in medio, and of the 'several claims thereon.'

Note.

Note.—'There are several points of difficulty in this case, among 'which, however, the Lord Ordinary can scarcely reckon that as 'to the Earl's own claim of preference over all the other claimants, 'in respect that his annuity is payable *in advance*, and that, if it is 'attached at the term by creditors for *past* furnishings, it must be 'withdrawn from those who made furnishings immediately after, 'though they alone are entitled to any preference over it. If it 'be competent for alimentary creditors *of former years* to attach an 'alimentary fund where there is no claim by creditors of the cur- 'rent year, (which has been held clear ever since the case of Lady 'Caithness in 1757,) the circumstance of the aliment being payable 'in advance can be no bar to such attachment; and nothing seems 'more plain than that preferences can only be sustained for credi- 'tors who actually come forward to claim them, and that the debtor 'himself can never be preferred as a constructive trustee or manda- 'tary for such future and contingent creditors. If the Earl's doc- 'trine be right, no alimentary fund, payable in advance, could ever 'be arrested at all, (except the payment was in arrear,) since none

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Lord Ordinary's Note.

'of those creditors, in behalf of whose preferable claims it was protected from all others, could possibly be in existence till after it was safe in the pocket of the debtor; and the consequence would be, that the owner of such a fund might safely defraud all his alimentary creditors, and that those who had supplied him with the means of existence for the last six months could never have access to the only fund to which they could look for their payment.

'The Lord Ordinary is not satisfied with Mr Forbes's statement of his claim as a furnisher of aliment for the six months subsequent to Whitsunday 1834, and is unable to trace the evidence by which it is supported. He thinks it very doubtful whether his having merely undertaken to *guarantee* the payment of such furnishings would make him such a creditor. If it would, the debtor would have a very easy way of making *himself* preferable over all competitors. Actual payment would be in a different situation. But the Lord Ordinary sees little evidence of any such payment; and certainly none to any thing like the extent of the claim. That goes to the amount of L.250; but this is the whole that the Earl's letter states him to have guaranteed for a whole year; and it is not easy to understand how it should have been incurred, and far less *actually paid*, in six months. The interlocutor, however, is so expressed, as to leave all this open for future explanation, if the findings now made should become final.'

The Earl of Buchan *reclaimed*, praying that it might be found, 'that the annuity is not attachable or arrestable by his creditors, nor assignable by him, but that the same is payable to him in advance, at Whitsunday and Martinmas, as a fund for subsistence during each following half-year; and to prefer him to the whole fund in medio; or otherwise, to find that the creditors for furnishings of aliment to the Earl and his family, since Whitsunday 1834, and those bound for, or having furnished the board and education of his children, or the claimant himself in their behalf, are preferable primo loco on said fund.'

Upon advising the note, the Court, (9th June 1835,) before answer, 'appointed the parties, in mutual minutes, to state their arguments upon the question, to what extent and effect the provision of annuity, by the deed of the late Earl of Buchan, is to be held as alimentary.'

The Earl of Buchan's Pleas.

Pleaded for the Earl of Buchan—There were two points, the first relating to the amount of a sum which had been given to the

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Earl of Buchan, under a declaration that it should be considered as alimentary and not arrestable; and in particular, whether that sum, to its whole extent, could be protected by such a declaration. The second point, relating to the effect of such a declaration, when attempts were made to attach the fund by creditors who had made alimentary furnishings to the party in right of the fund.

1. The creditors had not raised a question upon the point decided in the former process by Lord Corehouse, who held, that 'the provision was not exorbitant, reference being had to the rank and 'circumstances of the annuitant, and that no part of the annuity is 'liable to be attached, either on the ground that it exceeds a proper alimentary fund, or that the Earl was entitled to property in 'right of his wife.'

There are certain cases in which it is discretionary for the Court to say, whether a certain allowance was more than a suitable aliment. Where an annuity was not declared alimentary, but was, by construction of law, alimentary to a certain extent, such as servants' wages, and the salaries of certain offices, the amount to which such allowances would be held as alimentary would be regulated according to circumstances, such as the rank and status of the party, and the demands upon him. A yearly allowance of L.1500 was not too large to a peer, the representative of an ancient family, the heir of entail to Dryburgh, with a family of nine children, his eldest being married, and having also a family, and all dependent on the present Earl.

But, in the present case, the amount of the alimentary allowance was not a matter purely discretionary to the Court. It was not like servants' wages, or the salary for an office held, by implication, to be alimentary to some extent, subject to the discretion of the Court. Here an allowance had been given, under the conditions that it should be considered purely alimentary, and should not be arrestable; and the question was, whether a party, with uncontrolled power to fix the amount, had a right so to attach these conditions; not whether the allowance was, in the opinion of the Court, greater or less than ought to have been given. This was not an attempt by a party to place his own funds beyond the reach of creditors, neither was there any attempt at collusion betwixt the heir and the ancestor to have the whole succession secured to the heir, but at the same time placed beyond the reach of his creditors, such as occurred in the case of Blackwood, referred to on the other side. There had been no fraud, nor any thing so extravagant and unreasonable as to justify the Court in breaking down the will of the testator upon the question of amount, the testator having undoubtedly the

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power, to a reasonable amount, to declare the annuity not arrestable.

The alleged separate fortune of Lady Buchan ought not to affect this question; for (1.) the annuity was not contingent on any such event: (2.) Lady Buchan's fortune was vested in trust, for her separate and exclusive behoof: (3.) It was derived from West India property, which was worth little, with no prospect of improving, and every prospect of being worth nothing.

2. In reference to the second point it was fixed law, (1.) That such a fund could not be attached for debts of any kind contracted before the right to the fund existed: (2.) That it could not be attached for debts contracted even after the right to the fund commenced, unless these debts were for furnishings of an alimentary kind: (3.) That even in regard to debts of an alimentary nature, those contracted for the aliment of the party, during any particular term, are preferable on the allowance applicable to that term. There was no inconsistency or hardship in holding that an alimentary fund might be attached by creditors who may have made furnishings of an alimentary nature, provided the annuity applicable to any particular term be, in the first place, made available for the aliment of the annuitant during that particular term. This was the principle in the case of Dick, 22d Dec. 1676, *M.* 10,388, and other cases.

Here the annuity, instead of being payable at the end of each half year, is appointed to be paid in advance,—the annuitant to receive, at Whitsunday, the money which was to aliment him till the succeeding Martinmas. If he did not survive Martinmas, neither he nor his representatives got any more. If he did survive Martinmas, he would then receive the sum that was to aliment him till the succeeding Whitsunday. One object of this was to enable him to have funds for purposes which did not admit of credit, and which he could not otherwise meet without borrowing. Another object was, to give the annuitant the benefit of ready money prices.

The fund for the aliment of the Earl and family, from Whitsunday to Martinmas 1834, had been arrested at Whitsunday 1834, by creditors contracting prior to that date, and thus the provision had been intercepted and diverted from its intended purpose. There could not, in such a case, be a creditor who had furnished aliment for the half year to which the annuity was specially applicable, because that half year had only commenced at the date of the arrestments. If the fund were carried off, aliment could not be procured, although the fund was intended and created for that special purpose. Had the annuity not been payable in advance, the annuitant could have got credit; and those giving him credit for ali-

mentary furnishings during the half year would have been secure in ultimate payment, when the annuity for that half year became due, in preference to the present arresting creditors. But the annuity being payable in advance, it was not intended that the annuitant should so live upon his credit, nor could he so obtain credit. There was the chance of his dying before the expiry of the half year; or although he might survive, still the creditors would have no preference on the annuity applicable to the next half year over the furnishers for any prior period, because, although the furnishers during any particular half year are preferable over the annuity applicable to that half year, there is no ground for holding that prior furnishers are to be ranged backwards, in the inverse order of the dates of their furnishings. This principle requires, that when the annuity is declared payable in advance, that direction shall be fulfilled, and shall not be defeated by arrestments for furnishings during a period to which that particular fund is not applicable. Furnishers of aliment, during the term from Whitsunday to Martinmas 1834, would, according to the Lord Ordinary's note, be preferable to those who arrested on the term day, for furnishings made during a period different from that to which the fund in medio is applicable. This shewed that that half year's annuity was preferable for the specific purpose of that term's aliment; and as the annuitant himself was the only person in a condition to claim it for that purpose, at the time at which the annuity was payable, he ought to be preferred.

But if the competition commenced immediately after the day on which the annuity was payable, the annuitant alone was entitled to get the fund for its specific purpose, unless he had already contracted with some one to furnish aliment for that half year. Such contractor would be preferable to previous creditors, at least to the effect of postponing the distribution until his contract should be purified. Consistently with the will of the testator, payment could not be postponed. The arrears of annuity could only be ranked on and distributed in accordance with these principles.

The effect of the annuity being payable in advance had not, as stated, been argued before Lord Corehouse in the previous action, or brought under the view of his Lordship *.

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* Lord Corehouse's interlocutor and note above referred to. The Lord Ordinary having heard counsel for the parties on that part of the record which is closed, and considered the process, finds, That the late David Stewart, Earl of Buchan, by his trust-settlement, dated the 12th day of June 1822, directed his trustees, the raisers of this action, to put the person first in the order of succession to the trust property in possession of the house, garden and park of Ammondell, and to pay to him an annuity of L.1500 per annum; and by a codicil to the said trust-

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The alimentary and acceding creditors *pleaded*—(1.) That a provision was not necessarily wholly alimentary, merely because it is declared to be alimentary in the deed granting it. If it exceeded

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deed, dated the 7th day of May 1828, the said Earl declared that this annuity of L.1500 should be considered as purely alimentary, and should not be attachable or arrestable by the creditors of the annuitant: finds, That the claimant, Henry David, the present Earl of Buchan, is the person now entitled to these provisions, that they are not exorbitant, reference being had to the rank and circumstances of the annuitant, and that no part of the annuity is liable to be attached, either on the ground that it exceeds a proper alimentary fund, or that the Earl is entitled, as is alleged, to certain property in right of his present wife: finds, that the diligence of the creditors for debts contracted to them before the annuity took effect by the death of the late Earl of Buchan is incompetent, whether these debts were for aliment furnished to the present Earl or otherwise; dismisses their claims in this multiplepoinding, and decerns; finds them liable in the expenses of process, relative to that part of the discussion in which they are concerned: finds, That the annuity of L.1500 is subject to arrestment for debts purely alimentary, that is, for food, clothes and lodgings furnished to the present Earl or his family, of a nature and to an extent suitable to his rank and circumstances, and of dates posterior to the death of the late Earl of Buchan, the truster, under this condition, that the furnishers of each year shall have a preference on the annuity of that year over the furnishers of preceding years, and appoints parties to be again heard, that these findings may, if necessary, be further applied.

Note.—It is clear that a fund declared by the donor to be alimentary is not attachable by creditors whose debts were contracted before the donation, unless, perhaps, it is of an unreasonable and exorbitant amount. It is equally certain that the provision for each year may be attached for aliment furnished within the year, if suitable to the circumstances of the grantee. If so attached, it is applied to its proper purpose, for the convenience of the grantee, and to save him from the hardship which would arise if he were totally deprived of credit, and compelled to deal for ready money only.

But there is room for doubt whether those who furnished articles of aliment, and who allow claims to lie over from year to year, should suffer nothing from their mora, except being postponed to the creditors who follow forth their diligence within the year. In the case of the Countess of Caithness, 10th August 1757, Lord President Craigie laid it down as law, that a creditor, however alimentary, cannot affect an alimentary provision for furnishings in a prior year. But other Judges thought that diligence within the year only gives a preference in competition with the rest of the creditors; and one of the Judges said, that if the President's rule was law, it was in contradiction to common sense. The Lord Ordinary does not concur in that remark. If claims for articles of aliment are allowed to lie over, it has a tendency to defeat altogether the object of an alimentary provision, by holding out an inducement to the grantee to persevere in a course of unnecessary expenditure, while it exposes him to the danger of being left destitute for a long period, in consequence of the accumulation of arrears. But as no decisions in support of Lord President Craigie's rule are to be found in the books, and as the opinion of the other Judges has recently received the sanction of Mr Bell's authority, the Lord Ordinary does not consider himself at liberty to restrict the diligence of the creditors to the annuity of the years in which the furnishings were respectively made.

what was necessary, in the circumstances in which the party was placed, for supporting him and his family, the excess was not alimentary. There were in Britain incomes of L.1000 per diem, yet a bequest of such a fortune could not be effectually declared alimentary and unattachable; *Stair*, iii. 1. 37; Blackwood, 14th June 1674, *M.* 10,300. That case established that an alimentary fund was attachable for a party's debts, in so far as not necessary for his aliment, and that too, even though the deed which formed his sole title to the fund be qualified by an express condition that the fund should be held as alimentary.

In ascertaining the fact of an excess, all circumstances ought to be considered; not merely the rank of the party, and the number of children depending on him, but the amount of his debts and of funds derivable aliunde. See Dirleton's Report of Blackwood's case. Here, debts to a large amount were due, some of them to creditors from whom the Earl had received aliment for supporting himself and his family; and a large proportion of the annuity, consistently with a suitable aliment, ought to be applied to meet the claims of those creditors. He had, besides the annuity, the family residence, free of rent and other charges. Lady Buchan's fortune, or, at all events, the yearly produce of it, was also available to the support of the Earl's numerous family. The Earl had previously assigned L.700 to his creditors; and that might afford a safe rule for the Court, in exercising its discretion as to the extent to which the fund ought to be held necessary for alimentary purposes.

(2.) As to the effect to which the provision ought to be held alimentary. Even if the provision should be held to be wholly alimentary, the only effect would be, that it might not be attachable for debts not contracted for alimentary purposes. But as to debts contracted for aliment furnished posterior to the provision coming into operation, the Earl is not only entitled, but bound to apply the provision in payment of such debts; and if he had declined to apply the provision to the purpose intended by the donor, the law would allow it to be attached for that purpose. The effect of destining a provision to alimentary purposes was not to frustrate the rights acquired, either voluntarily or judicially, by the furnishers of aliment to its owner in satisfaction or security of such furnishings; but, on the contrary, to exclude every other class of the onerous creditors from competing with creditors of that description, or from claiming a participation in a provision destined to such purpose.

All the competitors had acquiesced in the findings, in so far as they related to the mode of ranking them inter se in the competition; and the interlocutor was complained of by the Earl only, who sought the whole annuity, leaving those who had furnished aliment

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unpaid. As to the Earl's argument founded on the case of Dick, it might be remarked, (1.) that a provision granted for alimentary purposes cannot be attached by creditors contracting prior to the existence of the right, because that right was not a fund of credit for such alimentary furnishings; and this was all that was decided in the case of Dick, (see Gosford's report); and (2.) in the competition between alimentary furnishers themselves, those are preferable whose furnishings were made during the particular term the instalment of which furnishes the subject of competition; and to these principles effect is given by the Lord Ordinary. The Earl could not dispute the effect of his assignation of the fund in payment of his debts, or of the diligence of his creditors for that purpose, on the pretence that the alimentary furnishings for which such debts were owing were received by him before the particular instalment of the annuity which was the subject of competition had become payable. He is entitled to obtain furnishings of aliment on the credit of the future instalments, from those who must take the risk of their becoming payable. Could he not make future instalments a fund of credit, he and his family might be in starvation till the arrival of the next term; Countess of Caithness, 10th August 1737; *Kilk. Brown, Sup.* v. 338; 1. *Bell*, 130. Besides, the question had been settled by Lord Corehouse's interlocutor, now final, and the Earl had at one time assigned L.700 a-year to those creditors.

Where the whole of an instalment was not required to pay for furnishings of aliment made during the time for which it was payable, the annuitant himself could not be entitled to insist on uplifting the surplus, and applying it to other purposes, and thereby to defeat assignations he may have made of it in payment of prior alimentary furnishings, or to frustrate the diligence by which it may have been attached for such furnishings. Although the fund had been declared not arrestable, there was no declaration that the annuitant himself should not have the power of voluntarily assigning it for alimentary purposes. Clauses limiting the powers of owners, more especially when founded on by the owner to defeat his onerous conveyance, must be strictly construed, and the Earl could not engraft on the deed a limitation not inserted by the granter. The circumstance of the provision being payable in advance had never been held to mean any thing more than that the annuitant should have the benefit of a forehand payment. That circumstance afforded no ground for an inference, that in case the annuitant refused alimentary furnishings for himself and family before the arrival of the time of payment, they were to starve in the meantime for the want of such necessaries, rather than that they should be furnished on the credit of a provision granted for the purpose of providing

aliment, and which the annuitant had not been prohibited from assigning in payment or security of alimentary furnishings, whether made before or after the term of payment.

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Judgment.

Upon advising the cases, the Lords *adhered*, reserving the question of expenses.

Lord Ordinary, *Jeffrey*. For Raiser, *A. A. Maconochie*. *A. Monypenny*, W. S. Agent. For Earl of Buchan, *Dean of Fac. (Hope,) M'Neill, Park. C. H. Miller*, W. S. Agent. For Creditors, *J. S. More, Rutherfurd, Marshall, Ja. Anderson, A. Murray jun. Horne & Rose*, W. S. *W. Home*, W. S. *Jas. Morison*, W. S. *W. Ferguson*, W. S. *Miller & Forbes*, W. S. Agents. *F.* Clerk.

R.

APPENDIX.

DECISIONS

OF THE

JURY SITTINGS.

No. I. 13*th March* 1835.

THOMAS MANSFIELD, (ANDERSON AND GAVIN'S TRUSTEE,)
against
MAXWELL AND COMPANY, AND AGAINST THOMAS MANSFIELD, (RENNIE'S TRUSTEE.)

SALE.—FACTOR.—*Circumstances in which it was found, by the verdict of a jury, that corn factors, in taking delivery of a quantity of wheat, had acted in the ordinary course of business, having received the wheat as a consignment, and having made an advance to the purchaser on the faith of such consignment.*

PROOF.—*The destruction of letters, stated to a jury to afford a fair ground of presumption against the party that the contents had been adverse to his pleas.*

BANKRUPT. — PROOF. — *Circumstances in which it was ruled,* 1. *That a bankrupt, who was discharged subsequently to the raising of an action at the instance of the trustee on his sequestrated estate, was inadmissible as a witness in favour of the trustee; and,* 2.

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That the trustee was not entitled to prove, merely by his sederunt-book in the sequestration, that there would be no reversion to the bankrupt.

Issues.

It being admitted that the pursuer is trustee on the sequestrated estate of Anderson and Gavin, late merchants in Leith, and that the defender, Thomas Mansfield, is also trustee on the sequestrated estate of the said John Rennie, and that the defenders, Maxwell and Company, are, and in the months of July and August 1826 were, corn factors in Leith;

Whether, on or about the 22d day of July 1829, the said Anderson and Gavin sold to the said John Rennie 500 quarters of wheat, or about that quantity; and whether it was understood and agreed, that the property of the said wheat should not be transferred, and the sale completed, until the price was paid; and whether, between the 3d and 7th days of August 1829, and before the said price was paid, a part of the said wheat, amounting to about 444 quarters, was delivered to the said Maxwell and Company, as agents of the said John Rennie; and whether, at the period last aforesaid, the said John Rennie was insolvent; and whether the said Maxwell and Company wrongfully retain the said wheat, and are indebted and resting owing the pursuer, as trustee aforesaid, in the sum of L.1598, 8s., or any part thereof, with interest thereon, as the price of the said wheat, delivered as aforesaid?

Whether the said Maxwell and Company, knowing the terms and conditions of the said agreement, and that the said price was not paid, or knowing that the said John Rennie was insolvent, took delivery of the said wheat, and wrongfully retain the same, and are indebted and resting owing to the pursuer, as trustee foresaid, in the said sum of L.1598, 8s., or any part thereof, with interest thereon, as the price of the said wheat, delivered as aforesaid?

Or,

Whether, in taking delivery of the said wheat, the said Maxwell and Company acted as corn factors in the ordinary course of business, having received the said wheat as a consignment, and having made an advance to the said John Rennie of the sum of L.2000, or any part thereof, on the faith of such consignment?

Pursuer's Statement.

Cuninghame, for pursuer.—His object in taking these issues, was to investigate a transaction betwixt Anderson and Gavin, and John Rennie, relative to 500 quarters of wheat, 444 of which had been taken delivery of by Maxwell and Company.

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On 8th July 1829, Rennie offered verbally to purchase from Anderson and Gavin 500 quarters of Ross-shire wheat, at 72s. per quarter, provided the wheat weighed 62 lbs. per bushel. The offer was entertained, on the condition that the wheat should be paid for in ready money. Rennie communicated on the subject with Maxwell and Company, who, upon the 8th or 9th July, waited on Anderson and Gavin, and made trial of the weight of different parcels of wheat which the latter had on sale, but which proved to be below the stipulated weight. Maxwell and Company, upon the 11th July, wrote to Rennie, that 'they (Anderson and Gavin) 'seem to insist they warranted no weight, and that if you were 'not satisfied on inspecting the wheat, the bargain was to be void.' Anderson and Gavin on the same day wrote an explanatory letter to Maxwell and Company, stating, that 'Rennie was not bound 'to buy the wheat, unless you approved of the weight and quality;' and Anderson and Gavin, upon the 11th, also wrote to Rennie, that one of them would visit him on Monday following, 'in hopes 'of being able to offer you grain on such terms as may induce you 'to buy.' On the 13th, Anderson went and explained to Rennie that his offer could not be accepted of, on account of the deficiency in weight; but that they were willing to sell, at the same price, but for ready money, 500 quarters of wheat, consigned to them from Ross-shire, though not of the full weight before stipulated; and Rennie agreed to come to Leith on the 15th to inspect the wheat. Upon the 15th, Rennie, after inspecting all Anderson and Gavin's wheats, proposed to purchase 500 quarters of superior quality, lying in lofts behind their counting-house; but the lot of wheat asked by Rennie could not be sold, and this renewed offer was not accepted.

Upon the 16th, an order for delivery of 500 quarters of wheat by Rennie, bearing date the 8th July, was sent by Maxwell and Company to Anderson and Gavin's counting-house. Anderson went and informed Marshall, a partner of Maxwell and Company, that they were not at liberty to sell the particular lot which Rennie wanted, and that no wheat would be delivered till the cash was paid; to which Marshall answered, that Maxwell and Company were placed in an awkward situation, as Rennie had drawn on them to account. Whereupon Anderson told him on no account to accept the bill, or advance money on account of any wheat which might be sold by Anderson and Gavin to Rennie, as none could be delivered till the cash was paid. Marshall promised to write to Rennie; and Anderson and Gavin were led to suppose that no bill had been accepted; and they did not then comply with the order of delivery.

Upon the same day, (16th July,) Anderson and Gavin wrote to

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Rennie, (in the view of his still buying, for ready money, 500 quarters, though not of the full weight before specified,) and begged he would pay them the needful at an early day, or hand them an order on Maxwell and Company; thus announcing to Rennie, that the wheat then in treaty for was to be sold for ready money. Upon the 20th, Marshall met Anderson, and asked if they had heard from Rennie; to which he replied in the negative. Anderson then asked if Maxwell and Company had accepted Rennie's bill, and Marshall replied, that they had been enabled to do so from 'other 'motives;' alluding, as Anderson believed, to other consignments on Rennie's account. Upon the 20th, Anderson and Gavin received a letter from Rennie of that date, bearing, that 'I understood the '500 quarters of wheat, which I gave Maxwell and Company an 'order for, was to be drawn for at three months. With regard to 'Maxwell and Company, I take no money in advance, as they lay 'already out of a good deal on other lots;'—from which Anderson and Gavin understood that Maxwell and Company had come under no advance on the security or prospect of the 500 quarters.

Upon the 22d July, Marshall waited on Anderson and Gavin, and offered, in behalf of Rennie, to take 500 quarters of their Ross-shire wheat, at the price formerly proposed, but without reference to weight, and would pay cash for the same. This was agreed to, and they wrote to Rennie on the same day, that 'since Mr Marshall in-'formed us you are quite agreeable to pay the cash for the 500 'quarters of wheat, we shall take advantage of your kind offer. We 'have large payments on Thursday next, (the 30th,) and will require 'the needful then. If agreeable to this, the wheat will be delivered 'to Maxwell and Company.' Thursday, the 30th, was thus the day fixed for delivery of the grain, and payment of the price in cash. On the same day, (22d,) Maxwell and Company wrote to Rennie, 'Please to write to Anderson and Gavin, that you will settle with 'them in money in two or three weeks, and desire them to hand 'us over the 500 quarters of wheat. We must humour these peo-'ple. London looks healthy to-night, and all will go right.' This letter was not entered by Maxwell and Company in their letter-book. The correspondence on the 22d the pursuer considered almost conclusive of the cause. Upon the 23d, Rennie wrote to Anderson and Gavin, that 'he would either give the whole money, or 'greater part, by the time you mention; and at latest, the whole 'will be paid in fourteen days.'

Rennie was hopelessly insolvent at the time the wheat was set apart for him. By the 1st of August seven of his bills had been dishonoured. On the 1st August, Rennie left Scotland to avoid the diligence of his creditors, and he informed Maxwell and Com-

pany previously of his intention. Yet, after this, they took delivery of the wheat betwixt the 3d and the 7th August. Rennie returned to Phantassie on the 12th August, and on the 13th intimated that he must stop payment. 13 Mar. 1835. Mansfield v. Maxwell and Co. and Others.

Anderson and Gavin applied, in the first instance, to the Judge-Admiral for redelivery of the grain, but had been afterwards advised to raise the present action.

The conclusion the Jury would arrive at, under the direction of the Bench, was, that if this was a sale for ready money, and if Maxwell and Company knew the terms of the bargain, the property had not been duly transferred. If Maxwell and Company did not tell Anderson and Gavin that they meant to make an advance upon the wheat, and yet urged Rennie to promise Anderson and Gavin an early payment in cash, and afterwards took delivery in the knowledge of Rennie's insolvency, Anderson and Gavin had been deceived into the bargain, and were entitled to restitution. Pursuer's Pleas.

He produced, 1st, Record; 2d, Correspondence betwixt Anderson and Gavin, Maxwell and Company, and Rennie; 3d, Accounts betwixt Maxwell and Company and Rennie, in 1829. Pursuer's Evidence.

John Anderson, partner of Anderson and Gavin, having been called,—

Dean of Faculty objected—Anderson and Gavin, with whom the transaction took place, instituted proceedings thereon against the defenders in the Court of Admiralty, in August 1829. Thereafter, on the bankruptcy of Anderson and Gavin, the present action was raised by Mr Mansfield, as trustee on their estate, in February 1830. It is said that Anderson and Gavin have since then been discharged in December 1831; and it is also said that there is no reversion to the bankrupts, and consequently that they have no interest in the issue. Objection.

I. It does not appear that there is no reversion, or that there will be none. The only evidence tendered on that subject is the sederunt-book, (or rather a certified duplicate of it,) of Anderson and Gavin's sequestration, kept and made up by the pursuer himself, during the dependence of the present action. That book itself will not prove the alleged fact in a question with the present defenders, who are not here as creditors of Anderson and Gavin, and are not parties in the sequestration. There is no evidence of the accuracy of the sederunt-book, or of the correctness of the proceedings, states, or of their true result. The pursuer does not offer to prove these things by any person who has gone over the sederunt-book, and examined the vouchers and documents, in order to

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ascertain the accuracy of the states and entries. The offer to prove, by a clerk of the pursuer, that the book is ex facie regular, or is consistent with itself, does not supply the want.

II. The discharge of the bankrupts was confessedly not obtained till long after the present action was in dependence. Hence,

1*st*, The sederunt-book was in great part made up during that time.

2*d*, The bankrupts had unquestionably an interest in the action when it was raised, and while it was in progress.

3*d*, Being incompetent witnesses when the action was raised, and during its progress, the discharge by the creditors to them, pending the action, will not make them competent witnesses for the creditors, in order to increase the fund which those creditors are to receive.

III. Notwithstanding their discharge, the bankrupts have still an interest to enlarge the fund for payment of their creditors.

IV. It does not appear that the action raised by the bankrupts themselves, before their failure, has yet been brought to an end.

Answer. *Skene answered*, and referred to the sederunt-books in Anderson and Gavin's sequestration; called Robert Spottiswoode, clerk to Mr Mansfield, the pursuer, to prove that the sederunt-book was regularly kept, and that the states, minutes and other entries therein, shewed that there was neither any reversion, nor the most remote chance of any reversion, to give Mr Anderson or Mr Gavin any interest in the present question.

Reply. *Dean of Faculty.*—Mansfield's own sederunt-book and states cannot be evidence in his own favour. As to parole proof by Mansfield's clerk, that he has gone over the book, and has found it correct, I admit the book shews what is contained in it, but it can prove nothing in favour of the party keeping it. The pursuer should have had an accountant to examine into the whole state of the bankrupt's affairs, all the vouchers, &c. to shew the extent of funds, debts, &c. by competent evidence. The sederunt-book is the evidence and document of himself and the creditors, made up after this litigation commenced. In Ferrier *v.* Graham, the point as to examining the bankrupt was not before the Court.

Objection sustained. *Lord President.*—(1.) Mansfield cannot prove this by his own book; but (2.) Anderson has an interest in enlarging the fund for payment of his creditors, and is therefore objectionable; and (3.) I find that he has been discharged since the raising of the action, which makes the objection, if possible, stronger.

William Gavin, the other partner, was rejected on the same ground.

Pursuer's Evidence. *Archibald Hill Rannie*, merchant, Inverness, had a grain transaction with Anderson and Gavin in 1829. Was in their counting

house on 16th July 1829, when an order for delivery was brought by Maxwell and Company's clerk, which he understood to be an order by John Rennie for 500 quarters of wheat on Anderson and Gavin. Anderson told the clerk he could not deliver the grain till he had seen John Rennie, and arranged about it. Witness would not accept a bill against a consignment until the grain had been actually delivered, or the bill of lading transferred. It is not in the usual course of business to do so.

Pursuer's Evidence.

Cross-examined.—Had some wheat in Anderson and Gavin's lofts in July 1829, upon the joint account of Anderson and Gavin and himself. When the order was brought by Maxwell and Company's clerk, Anderson and Gavin did not tell him the transaction with Rennie covered some of his (the witness's) own wheat. Had letters from Anderson and Gavin about his wheat when he returned home. They did not render the account-sales to him as a ready-money sale of his wheat, or any part of it. He believed it to be a sale on credit. Anderson and Gavin charged him a del credere commission for guaranteeing it as a sale on credit. He was not told at the time, and was not informed till lately, that Anderson and Gavin had bought any part of his wheat themselves. Is it customary for a consignee of grain to take the grain on his own account, when he is selling at a del credere commission? I think it might be done; at the same time I have not had any experience of such a mode of dealing. I should consider it fair if he gave the market price. Anderson and Gavin were under considerable advances at the time. Could they take del credere commission, if they were merely taking credit to themselves, being under an advance? I cannot answer that question; but certainly, in my case, they had a right to charge del credere commission, provided they sold it at the usual credit.

Scheme of division in sederunt-book in Rennie's sequestration produced. Extracts read to prove that several bills had been dishonoured in July, and early in August 1829.

No appearance was made for Mr Mansfield, as trustee on Rennie's estate, and also defender in the action.

Defenders' Statement.

Dean of Faculty.—The transaction in question commenced in this way: On 25th June 1829, Rennie purchased 708 quarters of Riga oats from Anderson and Gavin. In payment of the price, they drew a bill at three months upon Rennie, and inclosed it for his acceptance, in a letter dated 2d July. In a postscript to that letter they added, 'Will you not venture on a cargo of Ross-shire wheat?' The letter contained no allusion to a ready-money payment. Upon 8th July, Rennie informed Maxwell and Company he had purchased 500 quarters of wheat from Anderson and Gavin, and offered

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to consign it with them, requesting an advance on the security of the wheat, which they reluctantly agreed to. Rennie, on the same day, gave them this order on Anderson and Gavin for delivery: 'Linton, 8th July 1829. Deliver to the order of Maxwell and 'Company 500 quarters of wheat, weighing about 62 lbs.' On examining the wheat next day, with a view to taking delivery, it was found to weigh under 60 lbs.; and they declined to take delivery, and intimated this to Rennie by letter, on the same day, and that 'we cannot take delivery until we hear from you on the subject.' In consequence of this delay to take delivery, Anderson and Gavin wrote to Maxwell and Company, and to Rennie, on the 11th; and upon the 12th Rennie wrote to Maxwell and Company, that 'I 'bought the wheat out and out.' 'However, I should not wish to 'have any law about it; therefore, they should turn it four times, as 'they say, in a fortnight, weigh 62 or 63 lbs., and give me a cast 'with it. This is, I think, too fair an offer.' On the 15th Rennie examined Anderson and Gavin's wheat, and selected 500 quarters, with which he was satisfied. Maxwell and Company, on the same day, granted their acceptance to Rennie for L.2000, payable at three months, which, besides the value of the 500 quarters of wheat, included the price of 1200 quarters of oats delivered on Rennie's account. Rennie's letter of acknowledgment, dated the 15th, proves that the advance was made on the wheat, and that the bill was accepted against that wheat. Upon the 16th, Anderson and Gavin wrote to Rennie, 'We were disappointed not meeting you at the 'Cross yesterday, to ask when you wished to take delivery of the 'wheat;' which shews the bargain had before that been completed; and they added, 'and also to mention, that as it is not likely to in-'convenience you, it would be doing us a favour to pay the need-'ful at an early day.' This is the first time a cash payment was hinted at. Anderson and Gavin hesitated to deliver the wheat, until they received an answer to their letter of the 16th to Rennie; and accordingly Maxwell and Company wrote to Rennie on the 20th, a letter which is important, as shewing they had accepted the bill against this wheat. They wrote, 'We have called repeatedly on 'Anderson and Gavin for the 500 quarters of wheat, against which 'we gave you our acceptance; but at present they decline giving 'us any part till they hear from you.' This letter apparently called forth Rennie's to Anderson and Gavin of the same date, in which he writes, 'I understood the 500 quarters of wheat I gave 'Maxwell and Company an order for, was to be drawn for at three 'months.'

On the 22d July Maxwell and Company saw Rennie, when he informed them he understood the wheat was to be paid by a bill at

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three months; but that he was willing to pay cash in two or three weeks. Maxwell and Company stated the import of this conversation to Anderson and Gavin, who wished to have it in writing from Rennie; and Maxwell and Company in consequence wrote to Rennie, requesting him to write to Anderson and Gavin, that he was to settle with them in money in two or three weeks. Upon the 22d also, Anderson and Gavin wrote to Rennie, 'Since Mr Maxwell 'tells us you are quite agreeable to pay cash, we shall take advan-'tage of your kind offer;' and in consequence of these letters, Rennie wrote to Anderson and Gavin, on the 23d, 'I should be sorry to 'put you about in discounts, and shall either give the whole money, 'or the greater part of it, by the time you mention.' After this, when Maxwell and Company were proceeding to take delivery of wheat, a difference arose between them and Anderson and Gavin, in regard to the wheat which Rennie had selected; which difference led to a correspondence betwixt the parties, which indicated no want of confidence in Rennie, on the part either of Anderson and Gavin, or of the defenders.

Maxwell and Company had no knowledge or suspicion of Rennie's insolvency. He had a sale of cattle on the 27th and 28th July, to the extent of between L.10,000 and L.11,000. He did not leave Scotland on 1st August, with their knowledge, to avoid the diligence of his creditors; for he wrote to them, on the 30th July, 'I have 'some thoughts of going South, perhaps as far as London.' To which, in writing to Rennie on the 13th August, in answer, they said, 'We 'observe your intention of proceeding South, which, at this critical 'season for the crops, cannot fail to be productive of benefit, from 'the useful information which you will acquire;' and, after that, they were aware Rennie had gone to England in the course of his business. The dishonour of the bills alluded to was not known beyond the banks. On the contrary, Rennie continued in good credit down to the declaration of his insolvency.

Maxwell and Company shewed no impatience to get delivery of the wheat. Anderson and Gavin gave them all the grain they wanted when Rennie was away, without scruple. They took delivery of 200 quarters on the 3d August; but being engaged with other matters, did not take delivery of more till the 6th, when 244 quarters in addition were delivered, making in all 444 quarters. The remaining 56 quarters they would not accept, being dissatisfied with the quality.

Maxwell and Company, as corn-factors, are not in the practice of divulging the extent of advances which they may have made on the credit of grain consigned to them; and accordingly did not inform Anderson and Gavin they had come under acceptances to Rennie, on the credit of the wheat purchased.

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Anderson and Gavin went to Phantassie after Rennie's return, and got up the whole letters which they had written to him in the course of this transaction. Some of those letters had been recovered under a diligence; others were destroyed by Anderson and Gavin, as admitted in Anderson's deposition. 'Two or three letters be-'sides those already produced were written to Rennie by the de-'ponent or his partner, urging payment of the proceeds of the 'wheat in question, the instant he returned from London; that 'these letters were, at the request of Anderson and Gavin, returned 'to them by Mr Rennie after his failure, and destroyed by them, 'lest the perusal of them by others, and the strong terms in which 'they urged payment of the money, might affect the credit of An-'derson and Gavin.' No copies of these letters had been entered in their letter-book.

Why did Mansfield not appear also as trustee on Rennie's estate, fraud being alleged, and restitution from that estate claimed?

Defenders' Pleas.

As there was a direct charge of fraud, the defenders would lead evidence; but (1.) no motive had been assigned for the fraud. If they had not come under advance, where was the motive to commit fraud? If they were under advance, they were entitled to take delivery. (2.) Knowledge of Rennie's insolvency by Maxwell and Company had not been proved in terms of the issue. In Graham and Ferrier, the Lord Chief-Commissioner had stopped the case, knowledge not having been proved. (3.) Knowledge of this being a ready-money bargain had not been proved. (4.) There was bona fides, and compliance with the ordinary course of business, in Maxwell and Company taking delivery; for they had made advances on the faith of this wheat, and knew nothing of Rennie's insolvency. (5.) The destroying of letters by Anderson and Gavin was suspicious. Lord Brougham, in a late case, reversed the decision of the Court of Session, holding that the destruction of a single letter by a trustee, (though alleged to be unimportant,) raised every presumption against him.

Defenders' Evidence.

David Jo. Sommervail, corn-factor in Leith, was, prior to 1829, in the house of Maxwell and Company. Was bookkeeper in 1829, and left them in 1833. Their transactions with John Rennie commenced in 1828. He has recently looked over the correspondence in that year. (Here Maxwell and Company's letter-book and accounts for 1828 and 1829 were put in.) There were various acceptances in 1828 and 1829 by Maxwell and Company to Rennie, against consignments of grain in their hands. (Narrates the transactions in 1829.) The bill for L.2000 was accepted in July. Knew of it on the 21st July. Knew of the delivery of the wheat. From

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what I saw and knew, believed the L.2000 bill was accepted against this wheat, and some oats of Rennie's. Believed this before the wheat was delivered. Did not know at the time the order of delivery had been received. The difference betwixt the value of 500 quarters of wheat, at the weight of 60 lbs. and at the weight of 62 lbs. per bushel, and the price 73s. per quarter, is above L.57. Knew that Maxwell and Company objected to some of Anderson and Gavin's wheat as not of adequate weight. There was no hurry in taking delivery. Did not detect any distrust of Rennie before his return from London. About 56 quarters of the wheat were rejected. It was a little imprudent advancing before getting delivery.

Cross-examined. It is not in the ordinary course of business to make advances on grain before delivery, unless there be perfect confidence in the party.

George Glen was porter to Maxwell and Company in 1829. They got wheat from Anderson and Gavin that year. Was engaged in meting the wheat. Was there when the delivery was stopped. He was desired to weigh a bushel, and he reported the weight. Sommervail retired for a little, and then came back and told him the wheat would not stand weight.

Anderson and Gavin's delivery-book, receipt-book, waste-book, journal and invoice-book put in.

Archibald Todrick, writer, and agent for Bank of Scotland at Haddington. Has done business for Rennie. Attended his sale in the end of July 1829, the amount of which was above L.10,000. The cattle were not all taken away. Discounted two bills for John Rennie on 28th July; one per L.440, John Rennie on Peter Rennie, the other for L.300, on which John Rennie was indorser. The first bill was discounted on John Rennie's credit. Understood Rennie was going to England to look at the state of the crops.

Cross-examined. Does not know if the bills were cattle bills. There were no written articles of roup. According to verbal articles, purchasers might allow their cattle to remain, but bound to grant bills first.

Robert Stevenson, farm-overseer at Whitelaw, was clerk or manager for Rennie in 1829, conducted his sales, and frequently took his bills to be discounted. During Rennie's absence in London, carried on the business as usual. Had no notion at that time of his failure being at hand. Rennie said he was going to England, to look after some grain he had in London, and to see whether he could make sales. Rennie used to go frequently to London. Recollects of a transaction about a purchase of cattle at Tyninghame. I got delivery of the cattle after Rennie went to London, and did not pay the price when I got them. A number of the purchasers

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at Rennie's sale allowed their cattle to remain. Some of them had granted bills. The amount of the sale was between L.10,000 and L.11,000. Rennie discounted a number of the cattle bills, to the extent of several thousand pounds, and paid a number of bills before he went to London. I remember some bills were returned on Rennie from Glasgow, in consequence of Scoular's failure, to the extent of between L.1500 and L.2000. They were bills which Scoular should have paid, and Rennie took them up.

Defender's Evidence.

It was found by several other witnesses who sold cattle, and discounted bills for Rennie, that his credit was good up to the announcement of his insolvency.

Reply.

Skene, in reply, argued generally, that there was no foundation whatever for the imputations which had been cast upon his clients; that, on the contrary, it was plain that they had been most grossly defrauded by Rennie; that this act of fraud on the part of Rennie was clearly done at the instigation of Maxwell and Company, as was clear from their letter to Rennie, already referred to; that there was thus fraus dans causam contractui throughout; but, independently of this, it was clear that the delivery of the wheat was made entirely upon the faith of Rennie's promise of immediate payment, to which promise Maxwell and Company were manifestly parties; and it was thus clearly a condition suspensive of the transference, so that Maxwell and Company were never in titulo to retain; that, in regard to Mansfield, it was manifest he could have no interest whatever, in his character of trustee on Rennie's estate, in the defence on the other side; that, if the pursuers should succeed, Maxwell and Company would rank upon Rennie's estate for the debt against which they had attempted to retain. On the other hand, if the right of Maxwell and Company should be sustained, then, of course, the pursuers would be entitled to rank upon Rennie's estate for the price.

Opinion of Court.

Lord President.—You are called on to determine upon a bargain between these parties, made in the loosest manner I have ever seen. There is no original missive between them. Anderson and Gavin don't make an offer to Rennie; but it seems to be a mere off-hand transaction: No offer on the one hand, or acceptance on the other. The nature of the original bargain does not appear at all. On the contrary, there is every reason to believe that it was a bargain at the usual credit; at least, it is pleaded that this was Rennie's understanding, because there is some evidence of his intention to make payment at an early day; but this early payment seems to have been rather in the way of a favour. Under the circumstances I have now stated, it will be necessary that I should leave this case

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a great deal to you. I therefore think the issue is not, what was the original bargain, but whether, on or about 'the 22d July 1829, 'Anderson and Gavin sold to John Rennie 500 quarters of wheat, 'or about that quantity; and whether it was understood and agreed 'that the property of the said wheat should not be transferred, 'and the sale completed, until the price was paid?' No doubt this may have been stated with reference to the discount, and a payment within eight, ten, or fourteen days may, in one sense of the word, be called a ready-money payment. But still even that credit is of a more unlimited kind than when a bill is taken; because, if it is a credit for three months with a bill, you have the security of the bill, but if, in a sale of grain or any thing else, you make delivery, and don't expect or stipulate for payment, there is as much credit, or rather more so, than when you limit the credit to a definite period, and take document upon it. If you do not intend to constitute a sale till the price is paid, then the subject ought not to be delivered at all. But, in this case, instead of taking security, the seller, trusting to Rennie's credit, and trusting simply to his promise to pay at the end of fourteen days, makes delivery in the meantime to Maxwell and Company.

Now, then, let us look at the transaction of 22d July. In the first place, you will observe, that, on the 16th of July, Anderson and Gavin wrote to Rennie in these terms: We were disappointed at not meeting you at the Cross, 'to ask when you wish to take 'delivery of the wheat.' 'As it is not likely to inconvenience you,' (a strong proof that they did not doubt his credit,) 'it will be doing us 'a favour to pay the needful at an early day.' Then you have Maxwell and Company's letter of the 20th July to Rennie, from the terms of which it is clear that Maxwell and Company did not know what was the import of the letter of the 16th. It would appear, that afterwards they were given to understand that Anderson and Gavin had asked that the money should be paid earlier; and then to be sure, having so understood, they write to Rennie on 22d July, when they say, 'we must humour these people.' This is a very ugly letter. It is impossible to disguise this. They desire Rennie to accede to the request. Write to them you will pay them in three weeks. We must humour these people. Rennie writes in answer; and Anderson and Gavin, in consequence of that, and knowing that Maxwell and Company had communicated with Rennie, write to Rennie, 'they regret' not meeting you at the Cross, &c.; 'and since Mr Marshall tells us you are quite agreeable 'to pay cash for the 500 quarters of wheat, we shall take advantage 'of your kind offer.' Now, supposing this was only a kind offer, and nothing more, still the meaning is, that we shall give delivery of the grain on the faith of this kind offer. There is certainly a new

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bargain between them, and they do expect that payment will be made. It is perfectly clear, so far as yet appears, that it was on the faith of this promise that delivery was made. Whether they would have refused delivery or not, if they had not received the promise, it is impossible for us to know; but certainly, under these two letters, it is clear that Maxwell and Company took delivery in the knowledge of this new bargain, and I am afraid if the case rested there, you could do nothing but return a verdict for the pursuers.

But then there is a very ugly part of the business, and you will judge what is to be the effect of it, and whether it does not take away the effect of the whole previous transactions between the parties. It is what is admitted took place between Anderson and Rennie, after it was proven that there would be a law-suit. Anderson goes out to Rennie, and he gets up from him letters respecting this transaction. He tells you here he produced all the letters in relation to the closing of the bargain; but he admits that he destroyed two or three letters written at the time. I never knew so extraordinary or so improper a proceeding. After it was known that Rennie had failed,—that there must be disputes between the creditors and Maxwell and Company, letters are destroyed, for what is now quite clear to have been a false reason. If they had been delivered up without being destroyed, and had remained in the custody of Anderson and Gavin, how could they be read by others? Who could have read them? The conclusion, in point of justice and law, is, that there was something in these letters that would have militated against the argument they have used before you this day. I am afraid that, by law, Maxwell and Company are entitled to say any thing they please as to the contents of these letters. They are entitled to put any construction on these letters which may serve themselves. On the one hand, you have a very improper letter from Maxwell and Company, urging Rennie to humour Anderson and Gavin, which he does do;—very possibly without the least intention of fulfilling his promise. But, on the other hand, you have this most extraordinary transaction of destroying the letters, which may tend entirely to neutralise the conclusion, which one might otherwise be inclined to draw from the nature of the transaction between these parties.

Verdict. The Jury find for the defenders.

Lord Ordinary, *Corehouse.*
Act. *Shene* and *Cuninghame.*
(M'Neill) and *Neaves.*
S. S. C. Agents.

Judge at Trial, *The Lord President, (Hope.)*
Alt. *Dean of Fac. (Hope,) Sol.-General James J. Darling,* W. S. and *M. & W. Smith,*

R.

No. II. 1 *July* 1835.

WILLIAM JAFFRAY AND OTHERS, (SIMPSON'S HEIRS,) *against* MRS E. S. DALLAS OR SIMPSON.

(BEFORE LORD MONCREIFF AND A COMMON JURY.)

COMPROMISE.—CONTRACT.—HOMOLOGATION.—*Facts and circumstances, as established by written and parole testimony, found sufficient to prove that a compromise had taken place during the progress of a trial, and that the defender, after obtaining a verdict, was bound to implement the terms of the compromise.*

Pursuers' Statement.

WILLIAM JAFFRAY and others, heirs of Colonel Francis Simpson, raised an action against Mrs Simpson, the widow of Colonel Simpson, in which they stated, that in June 1832 they had raised an action of reduction-improbation and declarator against the trustees and the widow of Colonel Simpson, concluding, that a general trust-disposition and settlement by Colonel Simpson, a contract of marriage betwixt him and Mrs Simpson, and three codicils, containing additional provisions in favour of Mrs Simpson, should be set aside, on the ground, inter alia, that Colonel Simpson, when he executed these deeds, was in a state of weakness and facility, and was imposed on and circumvented by the said Mrs Simpson and others, the defenders in that action: That Mrs Simpson had a great and material interest, pecuniary and otherwise, in maintaining the validity of the said deeds, and particularly the marriage-contract and codicils: That issues for the trial of the validity of the deeds were prepared: That the trial on said issues commenced on the 8th of January last, when the whole of that day was occupied with the statement of the pursuers' case, and the examination of the witnesses adduced by them in support of it: That the evidence which was led bore strongly against the validity of the said deeds, and particularly the said marriage-contract and codicils, in which the said Mrs Elizabeth Sutherland Dallas or Simpson was so materially interested: That, in addition to the evidence in chief which had been led by the pursuers, they expected to strengthen their case, in various important points, by the cross-examination of the witnesses whom the state of the evidence rendered it necessary for the defenders to bring forward: That when the defenders proceeded with their

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case on the following day, being the 9th day of January, and before any of their witnesses had been brought forward, a compromise was entered into and concluded on behalf of the pursuers on the one side, and the said Mrs Elizabeth Sutherland Dallas or Simpson on the other: That, by the said compromise, it was agreed that the pursuers should abandon the action, and allow a verdict for the defender to be returned on the whole of the said issues; that the pursuers should not endeavour to strengthen their case, by subjecting the defender's witnesses to cross-examination, but should allow the said Mrs Elizabeth Sutherland Dallas or Simpson to examine them in whatever way was judged most advantageous for her interest, and for the vindication of her character and conduct, which she and her advisers considered as implicated in the issue of the cause; and farther, that the pursuers should, by their counsel in Court, when abandoning the case, make publicly an explanation of the circumstances connected with the prosecution, in terms which the pursuers were given to understand would be agreeable to the said Mrs Elizabeth Sutherland Dallas or Simpson and her advisers: That, on the part of the said Mrs Elizabeth Sutherland Dallas or Simpson, it was agreed, *first*, That the pursuers should pay no costs; so that if the other defenders in the said action should insist against the pursuers for costs, Mrs Simpson was to stand between the pursuers and the demand of these other defenders; *second*, That L.500 was to be paid to the pursuers for their costs; and, *third*, That L.500 was to be paid to each of the pursuers, being three in number, making in all L.2000 to be paid to the pursuers: That, on the part of the said Mrs Elizabeth Sutherland Dallas or Simpson, the terms of the said compromise were arranged by Sir Edward Lees, Knight, secretary of the Post-office for Scotland, who had been the confidential friend and adviser of the said Mrs Elizabeth Sutherland Dallas or Simpson, in the whole of the preparations for and conduct of the said trial, and who, by her special desire, attended at the said trial, and was specially entrusted with her wishes and instructions in relation to a compromise of the action, and the terms upon which it ought to be effected: And the said Sir Edward Lees was aided in making the said arrangement by the advice and assistance of Henry Cockburn, Esq. Solicitor-General for Scotland, who attended and conducted the said trial as a leading counsel for the said defenders, or some of them, and who was intimately acquainted with the whole circumstances and bearings of the case: That as soon as the terms of the said compromise were arranged, and before the trial was concluded, the said Sir Edward Lees communicated the matter to the said Mrs Elizabeth Sutherland Dallas or Simpson, through the

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intervention of her brother, Mr William Dallas junior, W. S. who also approved and sanctioned this arrangement, and the said Mrs Elizabeth Sutherland Dallas or Simpson then approved thereof: That, in implement of the said agreement, the pursuers did accordingly abstain from cross-examining the defender's witnesses adduced at the trial, and allowed the defender, the said Mrs Elizabeth Sutherland Dallas or Simpson, to conclude her evidence in the way most favourable for herself; and thereafter, the pursuers did not only expressly abandon the action, and consent to a verdict in favour of the defenders, but did, by their senior counsel, James Keay, Esq. advocate, make publicly in Court, when abandoning the case, an explanation of the circumstances connected with the prosecution in the terms agreed on; and the statement so made was received and acknowledged by the said Sir Edward Lees, and the Solicitor-General, as most full and satisfactory implement of the said agreement, on the part of the pursuers: That a verdict was accordingly returned in favour of the defenders, on all the said issues; and immediately after the trial was concluded, the said Sir Edward Lees waited upon the said Mrs Elizabeth Sutherland Dallas or Simpson, and explained personally to her the terms of the said compromise, when she expressed to him the warmest approbation of the said terms, and thanked him cordially for the interest he had taken in effecting the arrangement: That on the day following, the said Sir Edward Lees submitted the terms of the said compromise in writing to the said Mrs Elizabeth Sutherland Dallas or Simpson, when she not only again verbally stated her cordial approbation and adoption thereof, but expressed the said approbation and adoption, by a memorandum in her own handwriting, subscribed by herself, which memorandum she delivered into the custody of the said Sir Edward Lees: That for a considerable time thereafter, the said Mrs Elizabeth Sutherland Dallas or Simpson continued to express to the said Sir Edward Lees her entire satisfaction with the said arrangement, and her determination to execute the same in the most liberal and honourable manner; but after having taken the full benefit of the said arrangement, she thought proper to decline to fulfil her part of the said agreement, and now positively refuses to implement the same in any particular.

The pursuers concluded for L.2000, with expenses.

Defender's Statement.

Mrs Simpson, in answer, *denied* the whole facts as stated, in particular, that she was a party to any compromise; that either she herself, her counsel, or any person authorised by her, ever acceded to any compromise; or that she was either legally or morally bound

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case on the following day, being the 9th day of January, and before any of their witnesses had been brought forward, a compromise was entered into and concluded on behalf of the pursuers on the one side, and the said Mrs Elizabeth Sutherland Dallas or Simpson on the other: That, by the said compromise, it was agreed that the pursuers should abandon the action, and allow a verdict for the defender to be returned on the whole of the said issues; that the pursuers should not endeavour to strengthen their case, by subjecting the defender's witnesses to cross-examination, but should allow the said Mrs Elizabeth Sutherland Dallas or Simpson to examine them in whatever way was judged most advantageous for her interest, and for the vindication of her character and conduct, which she and her advisers considered as implicated in the issue of the cause; and farther, that the pursuers should, by their counsel in Court, when abandoning the case, make publicly an explanation of the circumstances connected with the prosecution, in terms which the pursuers were given to understand would be agreeable to the said Mrs Elizabeth Sutherland Dallas or Simpson and her advisers: That, on the part of the said Mrs Elizabeth Sutherland Dallas or Simpson, it was agreed, *first*, That the pursuers should pay no costs; so that if the other defenders in the said action should insist against the pursuers for costs, Mrs Simpson was to stand between the pursuers and the demand of these other defenders; *second*, That L.500 was to be paid to the pursuers for their costs; and, *third*, That L.500 was to be paid to each of the pursuers, being three in number, making in all L.2000 to be paid to the pursuers: That, on the part of the said Mrs Elizabeth Sutherland Dallas or Simpson, the terms of the said compromise were arranged by Sir Edward Lees, Knight, secretary of the Post-office for Scotland, who had been the confidential friend and adviser of the said Mrs Elizabeth Sutherland Dallas or Simpson, in the whole of the preparations for and conduct of the said trial, and who, by her special desire, attended at the said trial, and was specially entrusted with her wishes and instructions in relation to a compromise of the action, and the terms upon which it ought to be effected: And the said Sir Edward Lees was aided in making the said arrangement by the advice and assistance of Henry Cockburn, Esq. Solicitor-General for Scotland, who attended and conducted the said trial as a leading counsel for the said defenders, or some of them, and who was intimately acquainted with the whole circumstances and bearings of the case: That as soon as the terms of the said compromise were arranged, and before the trial was concluded, the said Sir Edward Lees communicated the matter to the said Mrs Elizabeth Sutherland Dallas or Simpson, through the

intervention of her brother, Mr William Dallas junior, W. S. who also approved and sanctioned this arrangement, and the said Mrs Elizabeth Sutherland Dallas or Simpson then approved thereof: That, in implement of the said agreement, the pursuers did accordingly abstain from cross-examining the defender's witnesses adduced at the trial, and allowed the defender, the said Mrs Elizabeth Sutherland Dallas or Simpson, to conclude her evidence in the way most favourable for herself; and thereafter, the pursuers did not only expressly abandon the action, and consent to a verdict in favour of the defenders, but did, by their senior counsel, James Keay, Esq. advocate, make publicly in Court, when abandoning the case, an explanation of the circumstances connected with the prosecution in the terms agreed on; and the statement so made was received and acknowledged by the said Sir Edward Lees, and the Solicitor-General, as most full and satisfactory implement of the said agreement, on the part of the pursuers: That a verdict was accordingly returned in favour of the defenders, on all the said issues; and immediately after the trial was concluded, the said Sir Edward Lees waited upon the said Mrs Elizabeth Sutherland Dallas or Simpson, and explained personally to her the terms of the said compromise, when she expressed to him the warmest approbation of the said terms, and thanked him cordially for the interest he had taken in effecting the arrangement: That on the day following, the said Sir Edward Lees submitted the terms of the said compromise in writing to the said Mrs Elizabeth Sutherland Dallas or Simpson, when she not only again verbally stated her cordial approbation and adoption thereof, but expressed the said approbation and adoption, by a memorandum in her own handwriting, subscribed by herself, which memorandum she delivered into the custody of the said Sir Edward Lees: That for a considerable time thereafter, the said Mrs Elizabeth Sutherland Dallas or Simpson continued to express to the said Sir Edward Lees her entire satisfaction with the said arrangement, and her determination to execute the same in the most liberal and honourable manner; but after having taken the full benefit of the said arrangement, she thought proper to decline to fulfil her part of the said agreement, and now positively refuses to implement the same in any particular.

The pursuers concluded for L.2000, with expenses.

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Mrs Simpson, in answer, *denied* the whole facts as stated, in particular, that she was a party to any compromise; that either she herself, her counsel, or any person authorised by her, ever acceded to any compromise; or that she was either legally or morally bound

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to implement the conclusions of the summons. The following was her statement of the matter in issue:

The pursuers always evinced very great anxiety to compromise. Their ideas as to terms varied most materially as they advanced, and when the precognition of witnesses made them aware of the real grounds on which their very rash and ill-advised action would depend. For some days before the trial, and when the utter extravagance and hopelessness of the reduction against one and all of the defenders had become manifest even to the pursuers themselves, they were still more solicitous for a compromise; but the vindication of her character from the slanderous aspersions of the pursuers being the principal object which the defender had in view, she positively refused to accede. At a meeting of her counsel and agent, held at her own house, at which Sir Edward Lees was present, the day before the trial commenced, this resolution was unanimously adopted.

The case came on for trial of this date, (8th Jan. 1834,) and the pursuers led all their evidence on the first day. The result of the proof was precisely what the defender had anticipated; a total failure on the pursuers' part, and a triumphant establishment of the validity of the deeds brought under challenge. Indeed, the defender is doubtful whether there ever occurred in the Jury Court, or elsewhere, a more signal instance of false and calumnious accusations breaking down; and accordingly, after the proof on both sides was concluded, and on the second day, the leading counsel for the pursuers rose and stated, that he abandoned the case, and that 'his 'clients now regretted that they had brought the action, and that they 'had proceeded on mistaken information.' Whereupon the Lord Justice-Clerk, as presiding Judge, stated, that he was well-advised in doing so, for that not a vestige of evidence had been laid before the Court to warrant the allegation, that the deeds brought under challenge were not the deliberate and valid deeds of the granter.

To the allegation that this proceeded on a compromise, and that the defender was implicated in that compromise, either directly, or by the intervention of her counsel, agent, or any of her relations, or any person whatever authorised to bind her, the defender gives the most positive denial. Her father, a respectable writer to the signet, who was then alive, and took a warm interest in the case, her brother, her eminent and respectable counsel, and her agent, were all equally strangers to any such arrangement, and heard the assertion, that the cause had been given up by the pursuers in consequence of a compromise, some days after the trial was concluded, with as great astonishment as herself.

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It is positively denied that any communication was made to the defender during the progress of the trial, or before the verdict of the jury was returned, in regard to any compromise whatever, either by her brother, Mr W. Dallas, or any other person.

Defender's Statement.

It is stated in the summons, that the arrangement was made by Sir Edward Lees, on the part of the defender, aided by Henry Cockburn, Esq. his Majesty's Solicitor-General, counsel for the trustees. The defender has the highest respect for both of these gentlemen; but she is bound in duty to herself to state, that the Solicitor-General never was her counsel, nor acted at all in her case; and that Sir Edward Lees, though consulted as a friend, the day before the trial, in regard to a suggested compromise, which was peremptorily decided against, never was entrusted by her with any powers, and proceeded altogether without authority, if he entered into any arrangement whatever; much more such an arrangement as is set forth in the summons. And it will require very pregnant evidence indeed, to convince either the Court or a jury, that the defender, passing over her counsel, her father, and her agent, had entrusted such powers to a gentleman, however respectable, who was a stranger in this country, and but recently acquainted with her family; and still more, that she should have authorised or sanctioned such an arrangement, in opposition to all her former resolutions, at the very time when the evidence of the pursuer had concluded and totally failed, and her own case was clearly and triumphantly established.

The defender farther denies that she ever, directly or indirectly, gave any sanction, either verbally or in writing, to any compromise whatever, or any obligation of the description set forth in the summons.

Whatever inclination the defender might have had to shew generosity to her husband's relations, had they shewn themselves worthy of it, their conduct, in raising the present action, renders it impossible for her to indulge that feeling.

The defences therefore are:

Defence.

1*st*, The defender never was party, directly or indirectly, to any engagement or compromise of the description set forth in the summons.

2*d*, No person authorised or empowered by her, either expressly, or by the implication arising from employment, was party to any such agreement.

3*d*, The compromising of a cause, or entering into any onerous engagement of that description, is an extraordinary act, requiring either express authority, or the implied powers arising from a general power of administration.

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Issues.

The following were the issues:

It being admitted, that, on the 9th day of January 1834, an issue came on for trial before the Lord Justice-Clerk and a Jury, in which the present pursuers were pursuers, and the present defender and others were defenders:

1. Whether, on or about the said 9th day of January 1834, the defender, by herself, or by another, or others acting under her authority, entered into a compromise with the pursuers, whereby she agreed to pay to the pursuers L.2000, or any part thereof; and whether, under the said agreement for compromise, the defender is indebted and resting owing to the pursuers in the said sum, or any part thereof, with interest thereon?

2. Whether, on or about the said day, the said agreement was entered into in the name of the defender; and whether, on the said day, or subsequent thereto, she homologated or approved of the same, and is indebted and resting owing to the pursuers in the said sum, or any part thereof, with interest thereon?

3. Whether, on or about the said day, the defender, by herself, or by another, or others acting under her authority, entered into a compromise, whereby she agreed to pay to the pursuers, or to relieve the pursuers from payment of such sum as might be awarded against them as the costs incurred by the trustees of the said Francis Simpson, in an action then depending at the instance of the pursuers against the defender and the said trustees?

4. Whether, on or about the said day, the said agreement to pay the sum last aforesaid, or to relieve the pursuers from payment of the same, was entered into in the name of the defender; and whether, on the said day, or subsequent thereto, she homologated or approved of the same?

Pursuers' Evidence.

M'Neill opened the cause for the pursuers, and adduced the following evidence:

He first gave in the documentary evidence, consisting of the deeds formerly under reduction, and the correspondence betwixt the parties to the alleged compromise, Mrs Simpson, Lord Cockburn, Sir Edward S. Lees, &c.

Lord Cockburn.—Was counsel for trustees of Mrs Simpson. Defences much of a joint nature, joint consultation, &c. and common interest. There was talk of compromise, thinks more than once, but once particularly. His Lordship's opinion, very decidedly, it would have been advisable to compromise case before trial, by paying L.5000. Dean of Faculty concurred in this very cordially, as counsel for Mrs Simpson. Compromise recommended, and strongly

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pressed by counsel. Counsel referred to Sir Edward Lees, as her understood conclusive adviser in the whole matter. One or two days before trial, counsel (thinks it was the Dean) pressed the compromise by proposing L.5000; and his Lordship expressed his approbation as he had uniformly done. It was stated by somebody on part of Mrs Simpson, that Sir Edward was in waiting, and that he required to be spoken to on that subject. Mr P. Robertson, one of Mrs Simpson's counsel, left the room to speak to Sir Edward, and returned in two minutes, saying he had done so, and that Sir Edward had said that Mrs Simpson ought to be consulted personally. Consultation went on: at the close, Mr P. Robertson and Lord Cockburn walked home. Mr Robertson left Lord Cockburn at Lord Cockburn's own house, and said he would go on to Mrs Simpson. In an hour his Lordship got a slip of paper from Mr P. Robertson, on which was written, 'Case goes on.' Rather thinks there was added, 'No compromise.' Nothing more passed. Trial came on: lasted best part of two days. First day, pursuers' case: Second, Dean opened. Knows Sir Edward Lees was present at trial: he sat within the bar. I had continual conversations with Sir Edward during the trial.

I was going out to Outer-House, when I passed Mr Campbell, pursuers' agent. Without premeditation, I said, in perfect frivolity, I hope your clients are rich, because if the case goes against them, it will be very disagreeable. Mr Campbell said, with great seriousness, they are poor, and he wished he could do something to facilitate a verdict for defender. Went to Outer-House, and remained a few minutes. When returning, I thought I was bound to communicate what Mr Campbell had said to Mrs Simpson's advisers. Dean had left Court. I sent somebody for Sir Edward, who came out. I told him what I had said to Mr Campbell, and Mr Campbell to me; and stated, that it appeared to afford opportunity of settling the case, if he chose to do so. Sir Edward seemed very much pleased, and acceded at once. I reminded him I was not counsel for Mrs Simpson, and told him to consider the propriety of sending for her own counsel. I asked him about his powers. He told me it was unnecessary to inquire into that, as he had the power of adjusting the matter; and he declined sending for his counsel. I asked him more than once if he was sure he had powers, but his answer was, that Mrs Simpson would do what he advised her. He said emphatically, 'I'll answer for it.' I told him again I was not counsel for Mrs Simpson, and recommended the settlement as a common friend. He asked me what I would advise. The result was, to propose to the pursuers that they would not be called on for expenses,

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and get L.500 each. This the first proposal. Sir Edward agreed cordially. Mr Campbell was sent for, and he said he wished to consult his counsel, and sent for Mr Keay. Mr Keay came, and then proposed that pursuers should be allowed their expenses. L.500 for expenses then agreed to. Great gratification was expressed by Sir Edward. I thought Mrs Simpson had gained a great deal by the arrangement. I would have advised her then to give L.5000. I was never easy about any part of the case. I thought one part of her case in great jeopardy. It was some addition that was made to the marriage-contract. I thought all the additions in great danger, after hearing Dean, and knowing whole case, I formed this opinion. My opinion was, her defence was dangerous, and that her character was not safe. If I had a relation or friend in same situation, I know not what sum I would not have advised, to avoid the opening speech at trial, and the close of whole case. Mr Keay had still to reply, and from the nature and aspect of the case, his Lordship thought Mr Keay's would be a very strong reply. I had a tolerable notion of what would be Mr Keay's reply. I thought Mr M'Neill, in his opening speech, had treated Mrs Simpson with great gentleness.

I saw something about the jury which gave me alarm, particularly about two of the most respectable of the jury, and stated my fears throughout the whole two days. It was agreed the money should be given by Mrs Simpson as charity to her husband's relatives. That was to be the form; and that Mr Keay should make an apology in handsome terms. It was part of stipulation that the evidence should go on. No stipulation as to cross-examination; but, in point of fact, they did not cross-examine except in a single instance. This was in fulfilment of the compromise. Mr Keay fulfilled his duty in a handsome way. His wish clearly was to let Mrs Simpson go out of Court as well as pursuers could allow her to go. (Here Lord Moncreiff read Mr Keay's speech from Lord Justice-Clerk's notes,) which witness thinks was the substance of what Mr Keay said, though not so full. Pursuers made a most honourable fulfilment of obligation,—ampler than we had by words required. I had communication with Sir Edward afterwards. (Shewn letter of 10th January, which was identified *.) I thought it unnecessary

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* CORRESPONDENCE.

1. LETTER, the Honourable HENRY COCKBURN, one of the Senators of the College of Justice, then Solicitor-General, to SIR EDWARD S. LEES, Knight, Secretary to the Post-Office.

10th January 1834.

MY DEAR SIR EDWARD,—Lest there should be any misunderstanding

to state in the letter the advantages Mrs Simpson had derived from the arrangement. I conceived the arrangement had met with Mrs

hereafter, I think it right to state what I conceive the terms agreed to by us verbally to have been. They were,—

1. That no costs should be demanded from the pursuers. As the trustees had nothing to do with the arrangement, this implies, that if they should take a judgment for their costs, that judgment is to be satisfied by Mrs Simpson.

2. That L.500 should be given to the pursuers, as their costs.

3. That, besides this, each of the three pursuers shall be paid by her L.500.

This was not arranged in the slightest degree *as a compromise.* On the contrary, it was understood that the defence was triumphant, and that the pursuers were completely beaten by the evidence, and that a verdict and judgment for costs was absolutely certain. But these concessions were made by you as Mrs Simpson's friend, *solely as a piece of voluntary humanity on her part* to relations of her husband, who were misled, and had a natural temptation to try to set aside a deed which ousts them. Nobody can fail to feel that Mrs Simpson, by this spontaneous liberality, after her success was clear, has raised herself in the estimation of all who are aware of the facts. The arrangement was meant by her, *and was taken by the pursuers solely as charity.*

This being the case, the sooner you get them paid off the better. I have spoken to nobody, as it is better that you should get it settled. I have told Mr Campbell, the agent of the pursuers, not to do any thing at least for a month, as I was confident that, within that period, you, in such way as you thought proper, would get every thing adjusted. Yours, very faithfully,

(Signed) H. Cockburn.

I approve of the arrangement made by my friend Sir Edward Lees.

(Signed) E. S. Simpson.

Envelope addressed—*(Private.)*

Henry Cockburn, Esq.

To be delivered to Mr Solicitor-General in presence of Mrs Simpson.

E. S. L.

2. LETTER, Sir Edward S. Lees to Lord Cockburn.

10*th January* 1834.

My Dear Sir,—I have received your communication this moment. In the very words which I had an opportunity of saying to Mrs Simpson last evening, when congratulating her, I confess I did not mention a word respecting *the trustees*, for I did not consider, from our conversation in the Parliament House, that any costs but those in which *she* was personally concerned *herself* was adverted to. Upon consideration, I am sure you will see that it is but fair that she, having nothing to do with the trustees or their case, should have no connection with their costs. I certainly never contemplated any thing beyond L.500 in reference to costs, and this solely from the very handsome offer made by the parties, to do ample justice, in their explanation to the Court, to Mrs S. I shall, however, mention the circumstances to her, hoping that the trustees will never make any demands for costs. Ever, my Dear Sir, &c.

(Signed) Edward S. Lees.

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Simpson's approbation. Sir Edward communicated to me, that Mrs Simpson did not mean to fulfil her bargain, I think by letter. Not

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3. LETTER, SIR EDWARD LEES to LORD COCKBURN.

11*th January* 1834.

MY DEAR SIR,—I have seen Mrs Simpson. If any thing could raise that excellent and injured lady in my estimation, it has been fully done by the benevolent expression of her wishes in regard to the unfortunate but mistaken descendants of her late husband. She has the most unbounded confidence in the soundness of your opinion and judgment; and in reference to the few lines I wrote to you yesterday, I am confident you will be gratified with the result, the more so, as I have every reason to think no idea is entertained *by any party* of looking to the pursuers *for costs*, a circumstance in itself preposterous.

In all other respects I may congratulate, I feel, the heirs of the late Colonel Simpson, and those respectable gentlemen employed by them, at the result of my interview this day with his widow, whose good heart will, I feel persuaded, afford full proof of its excellence and kindness the moment the arrangement of her affairs will allow her doing so.—Ever, &c.

(Signed) EDWARD S. LEES.

4. LETTER, SIR EDWARD LEES to LORD COCKBURN.

13*th January* 1834.

MY DEAR SIR,—I will thank you to see Mr Campbell, merely for the purpose of requesting him to discourage an absurd report, which I regret, as much as I am surprised to find, is receiving circulation, that Mrs Simpson's suit was compromised. To extinguish such a report, it will, I find, be necessary *to apply for costs*; but from conversations which passed since I had the pleasure of seeing you yesterday, I am gratified at learning that there is no probability of any being ever demanded from the parties.—Ever, &c. (Signed) EDWARD S. LEES.

5. LETTER, SIR EDWARD LEES to LORD COCKBURN.

16*th January* 1834.

MY DEAR SIR,—In consequence of some unpleasant discussions, which have arisen out of the reports in circulation, and to which I before adverted, I have been asked by Mrs Simpson's friends, on her part, for a copy of the letter which you addressed to me on the 10th instant. So far as I am concerned in the arrangement referred to in that letter, I can have no objections whatever, and therefore shall only wait your approbation to transcribe it and give it to them.—Ever, &c. (Signed) EDWARD S. LEES.

6. LETTER from LORD COCKBURN to SIR E. S. LEES.

14. *Charlotte Square*, 16*th January* 1834.

MY DEAR SIR,—Make any use of all of these letters which you may think right.

The pursuers asked me to-day whether there would be any objection to their getting some of the money before the month was out. I said that I should mention it to you. Yours faithfully,

(Signed) H. COCKBURN.

aware of any thing in conduct of pursuers to justify breaking off, and I was surprised at it.

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7. LETTER, Sir Edward Lees to Lord Cockburn.

26th January 1834.

My Dear Sir,—I anticipate the surprise you will feel,—a surprise to be equalled only by the disappointment and regret which I feel myself, at hearing, after all that has been said and written, that Mrs Simpson peremptorily refuses to confirm any part of the understanding conveyed in your letter to me of the 10th instant. This resolution of Mrs Simpson's was only announced to me yesterday, by Mr Tytler, W. S. into whose hands she has placed the whole affair. I am going across to Raith, but expect to be back Tuesday. If you should write any thing in the interim on the subject, pray mark your letter *private*. Ever, &c.

(Signed) Edward S. Lees.

8. LETTER from Lord Cockburn to Sir Edward Lees.

Edinburgh, 28th January 1834.

My Dear Sir Edward,—I have received your letter of the 26th instant, stating that Mrs Simpson now refuses to fulfil the arrangement entered into at the trial, and of which she took the benefit on that occasion.

I do not mean to intimate this unfortunate resolution to the agent for the pursuers till Thursday first, the 30th instant. I abstain from doing so till then, in the earnest hope that she may, before that, review her determination, and see cause to change it.

If she does not, I anticipate that the pursuers will institute an action against *you*, which will extend to the L.2000 which it was fixed that she was to pay certainly, and which may extend much further. The ground on which this claim will probably be rested, and may I think in law be rested, is, that you stood forward as her friend, and gave the pursuers reason to believe that you had authority to bind her, or that you were sure of getting her to adopt what was done.

If you can shew that she, on learning the terms, acceded to them, you may obtain relief from this action from her; or if you, by your evidence, or by any writing, can shew that she adopted the arrangement, the action may at once be raised against her, leaving you out.

This, you will observe, is only my speculation. I have no knowledge what the pursuers, on learning how they have been used, may do. I only state my belief that they are entitled to redress from her, or from you, and my fear that they will enforce their rights.

In so far as you are concerned, I should deeply lament that you were exposed to any risk or any trouble; because it is certain that you interfered from the kindest motives, and that the arrangement you made was a *most* judicious one for her. The attempt to break it up will, I suspect, do no good to her.

If I don't hear that the compact is to be adhered to, I shall intimate its being departed from on Friday, after which I have no more to do with the matter. Yours faithfully, (Signed) H. Cockburn.

9. LETTER, Mr William Dallas junior to Sir Edward Lees.

My Dear Sir Edward,—I have a communication of some importance

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Cross-examined.—Never saw Mrs Simpson. *By Court.*—I considered it a compromise, and cannot understand how a client could

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to make with regard to Mrs Simpson. Could you conveniently see me to-night? If so, be so good as say at what hour I may call. I am, &c.

(Signed) WILL. DALLAS jun.

15*th January* 1834.

10. LETTER, SIR EDWARD LEES to Mr WILLIAM DALLAS.

DEAR DALLAS,—I am confined to my room ever since Monday; but I'll see you, or any one for Mrs S., when you like. Ever yours,

(Signed) E. S. L.

11. LETTER, Mrs SIMPSON to SIR EDWARD LEES.

MY DEAR SIR EDWARD,—William will tell you much. Do you open your mind to him. I understand it is reported in town that some of the parties have promised to give the heirs-at-law L.1500, and that the short report in the newspapers was a got up-one. You are aware that before the trial I declined a compromise; and surely it would be absurd to enter into any treaty after such a successful result. You will therefore oblige me, in addition to the very great interest and trouble you have taken in my affairs, by suggesting to William the best step to be adopted to contradict the report, so far as I am concerned. I am, &c.

(Signed) E. S. SIMPSON.

15*th January* 1834,
19. *Athole Crescent.*

12. LETTER, Mrs SIMPSON to SIR EDWARD LEES.

MY DEAR SIR EDWARD,—For God's sake send me the letter you know of, as a sealed packet, by William. I pledge myself not to destroy it without your express permission. I am, &c.

15*th January* 1834. (Signed) E. S. SIMPSON.

13. LETTER, SIR EDWARD LEES to Mrs SIMPSON.

MY DEAR MRS SIMPSON,—I send you back your letter. For God's sake keep yourself quiet, and suffer no one to speak to you. I would go to you, but I am very unwell. Ever yours,

15*th January* 1834. (Signed) EDWARD S. LEES.

14. LETTER, Mrs SIMPSON to SIR EDWARD LEES.

MY DEAR SIR EDWARD,—When I sent my brother to you this evening with a letter from me, I thought from the first two lines you would have understood what I meant, viz. the return to me of the sealed letter which you got from me in relation to the late question with Colonel Simpson's heirs. But to make matters more explicit, I mentioned the reasons which rendered it imperiously necessary that I should not be, in the most remote degree, made a party in the reports now in circulation. When my brother returned, I thought I had not been explicit enough, and then gave him a second note to you, which could not be misunderstood. On his return again, with a packet from you, I was particularly engaged; and having no doubt it contained the letter or other writing in question, I did not open it till now, (11 o'clock.) You may judge then of my surprise, when I found that it contained, not that which I so anxiously wished, but my first letter to you of this evening. In these circumstances, and to prevent misapprehension, I feel constrained again to request that you will have the goodness to

think otherwise. It was a compromise just on the footing of charity, for the credit of Mrs Simpson's character.

return to me the letter or paper you sealed and kept in your possession on the 11th instant.

I would not have been so urgent in what I now request, had there not been such extraordinary reports current, which tend to be as injurious to me as if I had lost, in place of having been successful in the trial; and I must say, that while I am grateful for your kind attention and assistance before the trial, I do regret having been induced to listen to any applications that were made to me in favour of these heirs, by whose conduct I have been, and, from recent circumstances, probably will be, much injured.

I may mention, that you offered to restore the letter in question. I hope it is only from not understanding my two last letters that you have not returned it. I have consulted none yet beyond my brother; but notwithstanding your recommendation to avoid speaking to others, unless these papers or letter are returned to me, and that I am placed in the same situation as I was before you obtained possession of them, I must of course put the matter into the hands of those who will understand the whole circumstances, and act for me better than I can do for myself. I am, &c.

Athole Crescent, 15th January 1834. (Signed) E. S. SIMPSON.

15. LETTER, SIR EDWARD S. LEES to Mrs SIMPSON of Plean.

MY DEAR MRS SIMPSON,—I confess I had not read your note of last night through, when I went down from my bed-room to your brother. I was just going to bed when he called; and merely glancing at it, and conceiving it was your former note you wished back, on consideration I sent it to you. It never for one moment could have entered my head that you were desirous of having a paper which, as it is circumstanced, belongs neither to you nor to me, and over which neither of *us* has any control. It is sealed and directed, you know, to a high legal authority, into whose (hands) it must pass in the event of my death, before the completion of the arrangement it conditions,—or in the event of your death,—and a refusal by your executors to perfect that arrangement. Your letter of this morning *greatly astonishes me.* I cannot understand why it has been written, and I must request that you will allow me to communicate with some *friend* on your behalf, *in whom you have unbounded confidence*—one he must be on whom you have a reliance, founded on a conviction that he feels in your reputation and honour, as strong an interest as I hope you think I feel myself. And believe me, very truly yours,

16*th January* 1834. (Signed) EDWARD S. LEES.

16. LETTER, Mrs SIMPSON to SIR EDWARD LEES.

MY DEAR SIR EDWARD,—I have just received your letter. It is unnecessary to enter into details as to the use which was to be made of the paper in question, farther than that I was so hurried at the time it was obtained from me, that I had not the prudence either to make myself acquainted with its contents, its address, or the use to be made of it. It may be a very proper document, but I wish to be assured that it is so; and in compliance with your request, I have deputed the bearer, Mr Hall, to communicate with you on my behalf, as I have fully acquainted him with all the circumstances, so far as I know them myself. It will not be destroyed until I have either had a personal interview with you, or some other communication, which may be equally satisfactory. I am. &c.

16*th January* 1834. (Signed) E. S. SIMPSON.

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Sir Edward S. Lees.—I am acquainted with Mrs Simpson, and late Mrs Baird, her sister. They were very distant connections

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17. LETTER, Sir Edward Lees to Mr James Hall, Writer, Edinburgh.

5–45m. *P. M.*

Dear Sir,—I have not yet heard from the S. G., and the moment I do you shall hear from yours, &c.

16*th January* 1834. (Signed) Edwd S. Lees.

18. LETTER, Mr Hall to Sir E. Lees.

16*th January* 1834.

Dear Sir,—I have just received your letter of this evening. I regret that it is so unsatisfactory. When I called upon you to-day, I had no object in view but that of placing Mrs Simpson in that position in which the result of the trial left her. You objected to the restoration of the letter or paper in question, on the ground that you must have time to consult the S. G., who, you said, was concerned in the transaction. This I acceded to, and ample time was afforded for such a purpose.

I now feel myself called upon to intimate to you, that unless the document in question shall be placed in my hands by ten o'clock to-morrow morning, I shall lay the whole matter before the Dean of Faculty. I am, &c.

Sir Edward Lees. (Signed) Ja. Hall.

19. LETTER, Sir E. Lees to Mr James Hall.

Dear Sir,—I have this moment received your note of this evening, which I must say greatly surprises me, and gives me great concern. I am a man of very few words; and therefore, while I anxiously wait myself an answer to the letter which I considered myself in courtesy bound to write to the Solicitor-General, I beg simply to say, it is not for me to dictate to you what course you should pursue with regard to the present position of Mrs Simpson's case. That must rest with your discretion, where Mrs S. has placed it. But this much I will say, in reference to what is within my own knowledge, that I trust whatever you may do may, in its result, be prudent in you, and beneficial to her. I am, &c.

James Hall, Esq. (Signed) Edward S. Lees.

16*th January* 1834.

20. Sir E. Lees to Mr Hall.

I was just getting into bed when I got Mr C.'s answer. I shall transcribe his letter of the 10th inst. in the morning, and send it to you. Very truly yours, (Signed) Edward Lees.

James Hall, Esq. 16*th January* 1834, 10–30m. *P. M.*

21. Sir E. Lees to Mr James Hall.

Dear Sir,—I beg to send you, according to my promise, for Mrs Simpson, a copy of the paper in my possession, and referred to in my notes of last night. Very truly yours, (Signed) Edward S. Lees.

17*th January* 1834.

(*N. B.*—The inclosure was copy of Lord Cockburn's letter to Sir E. Lees, of 10th January 1834, No. 1.)

22. LETTER, Mr J. Hall to Sir E. Lees.

18*th January* 1834.

Dear Sir,—I have the honour to acknowledge the receipt of your two

of mine. Mrs Simpson was consulted as to a compromise. She was at first averse to it, but then said she had given authority to her agent to effect compromise. She wished my opinion. I did not advise a compromise at that time. I was afraid of publicity. When it came nearer day of trial, she communicated, in considerable agi-

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letters of the 16th, and your letter of the 17th instant, the latter sending me inclosed a copy of the Solicitor-General's letter, of which Mrs Simpson's approbation was obtained, and a copy of the address, and the directions written on its cover. All I can say at present is, that I request, on the part of Mrs Simpson, you will not part with the original documents in question. I am, &c. (Signed) JA. HALL.

23. LETTER, SIR E. LEES to Mr JAMES HALL.

MY DEAR SIR,—Pray assure Mrs S., with my kindest regards, that knowing her as I do, she may have perfect reliance that the document shall not only not leave my possession, but no mortal shall either see or hear of its existence. If she sends me the *seal*, I'll reseal it, and return the seal. Ever yours, (Signed) EDWARD S. LEES.

James Hall, Esq. 18*th January* 1834.

24. LETTER, RICHARD MACKENZIE, Esq. W. S. to ALEXANDER DALLAS, Esq.

MY DEAR SIR,—While your friends must congratulate you on the result of yesterday's trial, I venture to suggest, that it would be right to inquire into the history of the pursuers, who must have been misled in this case, and if they are found to be poor, that your daughter should exercise her generosity in giving a small annual pension to them. If this is listened to, it must be held to proceed from your daughter herself, and not in consequence of any suggestion of mine. Yours truly,

10*th January* 1834. (Signed) RICHD. MACKENZIE.

25. COPY of LETTER to be written by ALEXANDER DALLAS, Esq. to RICHARD MACKENZIE, Esq.

(Original Draft in the handwriting of Sir Edward Lees.)

I have received your very kind letter, and thank you for your congratulations. I gratefully receive them, as I ought to do, proceeding, as I am sensible they are intended, the offering of a sincere friend. I have communicated with my daughter, and I am happy to state to you, that the feelings of her own heart had, in its benevolence, anticipated your wishes. I pledge myself I know not what her intentions are; but this I will say to you, that from what I know of her character, and her kindness of heart, I am sure she will, when the proper time shall have arrived, shew herself a Christian, and give an ample contradiction to the aspersions which have so long and so seriously afflicted her. I am, &c.

26. COPY LETTER SIR EDWARD LEES to Mrs SIMPSON, inclosing the preceding Draft.

11*th January* 1834.

MY DEAR AND INJURED FRIEND,—I send you a draft of what I think your father *ought* to write to *Mr M.* *Copy* it over *yourself*, and send it as *your own* to *him*, to write to Mr M. Ever yours, &c.

(Signed) EDWARD S. LEES.

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tation, her anxiety, and wished to see me on the subject of a compromise. There was a meeting of her legal advisers at Dean of Faculty's. She was anxious I should attend. She said that terms of compromise had been arranged for L.5000. She understood the Dean and Lord Cockburn of opinion there should be compromise. She had no friend to consult. Her father not on terms of communication, and she was imprudent enough to add she would rely entirely on my advice. I stated that I thought it ought to be done in a confidential manner. I went to the Dean's, and saw one of her counsel, Mr P. Robertson. He came out of the room. Mr Robertson was appointed to meet with me, to see whether any thing could be done. At Mrs Simpson's house, matter again discussed. I thought she was disposed to follow my advice. She was not present at first part of conversation. I thought the compromise ought not to take place then. I never abandoned the idea of a compromise at some period. I attended trial at particular wish of Mrs Simpson. I went then to watch whole proceedings, and felt considerable interest. I had a communication from Mrs Simpson on morning of second day. Had very serious apprehensions after hearing proceedings of first day, and felt anxious, as I had assumed so much responsibility, in not effecting compromise sooner. On second day Dean spoke, and immediately left Court. After that, Solicitor-General asked me if I was not attending the trial for Mrs Simpson. I said I was. We went to Outer-House together. He asked me, if I did not think, under all the circumstances, the trial should now cease. He said, so far as the trial had then gone, he thought Mrs Simpson's reputation was safe. It was agreed pursuers' counsel should make a speech to save Mrs Simpson's character. I was glad Mrs Simpson was to secure, through the statement of pursuers' counsel, a vindication of her character. The sum agreed on was L.500 to each of pursuers, and L.500 to agent, and defenders to pass from costs. Matter talked over with Mr Keay. Mr William Dallas, (brother of Mrs Simpson,) was then crossing room. I told what was doing, and he seemed greatly delighted. I asked where Mrs Simpson was. He said she was in the neighbourhood; but I could not see her, but he would go and tell her. He went, and I sent out to see if Mr William Dallas had returned. Mr Dallas's clerk beckoned to me Mr Dallas was there. I did not see Mr Dallas then. I thought Mr Keay's speech well worth L.500 to Mrs Simpson. Every thing was done by pursuers I could expect. I considered myself authorised to make this arrangement, even if I had gone the length of L. 5000. After trial, Mr P. Robertson and I went to her. Her brother was there before us, in a separate room, alone with her. I communicated what had taken place. I told her

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the reasons for going into the arrangement. I was particular in telling her my motives. She expressed surprise at our agreeing to give L.500 to Mr Campbell. I said, Wait; have patience till to-morrow, when you'll see in the newspapers what will give you gratification. I never saw gratification more felt, or expressed, as far as I could judge from expressions. She understood the agreement I considered. *By Court.*—She said nothing expressive of doubt of my having power to make the arrangement. She said, Every thing you think I will most cheerfully do. There was no observation then made, that the money was to be paid as charity. Saw her day after but one. In interval had got Lord Cockburn's letter of 10th January. Same evening saw Mrs Simpson. I had conversation with her. Told her I had got a most delightful letter from Lord Cockburn. Did not shew it her then, as people were in the room. Saw her next day. Shewed her the letter. She read it over. She appeared to understand it. She discussed whole thing, even as to the mode of paying the money. I always thought her shrewd and clever. She still harped upon the L.500 to Mr Campbell; but I got over that, by saying I would take care the money should appear to be paid to heirs, not to Mr Campbell. She then wrote the approval. (Identified and read.) Understood it should be kept secret. I sealed up the letter and gave her the seal. She has the seal yet. I sealed it up, because, in the event of my death, it was right that no one should get it but Mrs Simpson, or the Solicitor-General. I accompanied her to her own door. Mr Dallas followed me with Richard M'Kenzie's letter. (See No. 24, correspondence.) I said, that precisely the sort of letter wanted. I sent draft of answer; see No. 25. (Identifies it.) On Sunday I and her lawyers dined at her house to celebrate her victory. No indication of dissatisfaction. She was kind enough to propose my health in a full bumper. She afterwards applied for Lord Cockburn's letter. I gave her a copy. I retained the original, till produced in process. At Post-office one evening, Mrs Simpson came with her brother to thank Lady Lees for what I had done. Mrs Stewart was present also. I saw the letter burned, which authorised L.3000 to be given. Then L.5000 were proposed. Upon my word, I think she made a most favourable bargain. *Cross-examined.*—At Dean of Faculty's had a few words with Mr Patrick Robertson. Mr Robertson was against a compromise. I always objected to any compromise excepting on footing of publicity. Had conversation with Mr Robertson and Mr Innes, her agent, in going to her house. Mrs Simpson at first was not in room. I brought under their notice the distinction betwixt the compromise being done publicly and otherwise. At this time I had confidence in Mr Robertson, and expressed myself to him as I had

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done to Mrs Simpson. I said I would rather see Mrs Simpson perish than compromise except on footing of publicity. Agreed letter Mr Innes held should then be destroyed. It was burnt before all the parties by Innes. Mr Robertson and I walked home together. Think I had no conversation with Mr Robertson as to aspect of case. Recollects cross-examination of Buchanan by Mr Robertson, but do not recollect any conversation with Mr Robertson as to that examination. Did not see Mrs Simpson that night. Was not prepared for communication made by Solicitor-General in Outer-House. Did not know at that time that Solicitor-General was not counsel for Mrs Simpson. Did not state money to be taken as matter of liberality. Lord Cockburn's letter puts it as given as matter of liberality. I did not speak to Mr Campbell. Solicitor-General arranged terms with my concurrence. Considered from what had passed she would follow my advice; but never had express authority to make this arrangement except that twice she said she would do whatever I proposed. Was not ten minutes in separate room with Mrs Simpson when I called with Mr Robertson. Mrs Simpson came to express her gratitude to Lady Lees for my interest in the case. Lady Lees did not know of compromise. *Re-examined.* —Only remark of Mr Robertson was in walking home. 'By this time to-morrow they will be happy to take L.500.' *By Court.*— Don't recollect of Lord Cockburn suggesting I should send for Mrs Simpson's counsel. I told Lord Cockburn I would be responsible.

Mrs James Stewart.—I was at Lady Lees' house one evening in January 1834, when Mrs Simpson called. It was in the evening of the day after the trial. Mrs Simpson expressed herself in very grateful terms, and said that Sir Edward Lees had behaved so kindly to her at the late trial that she never could forget it. She repeated this more than once. Mrs Simpson invited Sir Edward to dinner one Sunday following. I was impressed with her serious manner, and I remarked to her, that she ought to have made Sunday a day of fasting instead of feasting, in respect of the great deliverance for which she was thanking Sir Edward Lees.

Defender's Evidence.

Evidence for defender.—A. Wood stated the case for the defender.

Dean of Fac. (John Hope, Esq.)—Was leading counsel for Mrs Simpson. Consulted after defences were lodged,—certainly before Record closed. At first there was Mr H. Robertson, afterwards Mr Pat. Robertson, as counsel. At first I was dissatisfied with several things done by trustees. Mr Dallas wished to produce papers which I thought would prejudice Mrs Simpson's case, and make it wider. Mr Innes employed by Mrs Simpson. He asked me whether he could act for both. I said, provided Mr Dallas did not

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interfere, and Mr Innes consulted me as to steps to be taken for trustees. One evening before trial, something occurred which made me inquire how far the defences were to go on together. Solicitor-General then stated, he thought the case of the trustees was not to support the deeds in favour of Mrs Simpson. He viewed them as claims against the trust, being subsequent; and as far as case of trustees could be said to aid our case, he did not mean so to conduct the case. I proposed his opening should stop at the trust-deed, and I begin with Colonel Simpson's marriage. Solicitor-General's opinion clear on the evening of trial that evidence should not be led. I said, Mrs Simpson's case different, and I wished evidence of Mr Robert Rutherford and Richard Mackenzie. At first I believed that separation of case necessary, from Mr Dallas and Mrs Simpson being on bad terms, and after from my being displeased with parts of defence of trust. Nobody had any right to interfere but Mr P. Robertson, Mr H. Robertson, and myself. I understood Mr Keay had communicated that pursuers would be glad to receive a sum of money. I considered this possible, as Lord Dunmore some time before had communicated to me. They did not mean to challenge the deeds on the ground of capacity. As matter of curiosity, the precognition of Captain Buchanan was sent to me, to shew there was no ground of incapacity. I wrote Lord Dunmore that they had as little ground on legal principle as in respect to capacity. The view I took was, I saw from statements, &c. there would be a strong attempt to make Colonel Simpson's infirmity gross and disgusting, and thus lead to insinuations and charges against the lady. I thought it desirable on that account alone, pursuers should be bought off for a small sum. No recollection of expressing that opinion to agent before consultation on day before trial; but I may have done so. During that consultation, Sir Edward Lees and Mrs Simpson came to my chambers. Having a great aversion to see ladies who are clients, I declined to see Mrs Simpson. After the consultation, and the gentlemen were on the floor, Mr Cockburn said, he still thought compromise should be pressed on Mrs Simpson. The trustees had always said they would pay nothing. I stated strongly the object of Mrs Simpson to avoid publicity as to the age and condition of this man she had married; and though the case might not be proved, yet the disclosures might be detrimental to her. I had no doubt as to her success on merits. I proposed Messrs Patrick and Hercules Robertson should go to her with my opinion. I requested to be immediately informed. I said, if case opened, object of whole compromise would in my view be at an end. Mr Innes said he thought Mrs Simpson did not care about the exposure. I said, if Mrs Simpson be case hardened, there could be no motive in

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the compromise. Mr Innes said, he thought it had been already made sufficiently public. I said, Mrs Simpson best judge of that, and Patrick and H. Robertson would see her. I soon after received a note, that the trial must go on. After hearing pursuers' case, I should never have thought of bringing evidence, except to shew respectable evidence I had. No instrumentary witness had been examined. For the purpose of full vindication, and not to gain the case, I thought it due to this lady to lead evidence, having witnesses of so respectable a class. Arranged Mr Cockburn should speak first. I was taken ill, and proposed I should speak first, and began at trust-deed. From moment case began, only object of compromise gone. Would not have advised her to give L.500 to be done with case. Decided impression of this. If I had heard of a compromise, I should have stopt it; and if necessary, appealed to Court that the case was in my hands, and no one had a right to interfere. I felt safe as to my witnesses. I left Mr Robertson in charge, and said across to Mr Cockburn, I hope you'll give our counsel a lift. When going through Outer-House, met Mr Monteith, who told me we had dished them, and had even taken off, in his mind, much of the moral impression they meant to create. I never felt more sure of a verdict. In the evening, at Granton, received two notes from Peter and Hercules Robertson that case was gained, and that Keay had made a handsome apology; all which I thought natural. A morning or two after, Mr M'Neill asked me if I had not heard what had taken place.

Mr Patrick Robertson, advocate.—Was employed as counsel for Mrs Simpson recently before trial. At consultation day before, arranged Solicitor-General should take exclusive charge of case of trustees. A great deal of discussion about a compromise. I was opposed to any compromise from reading the papers. Before last consultation had seen Mrs Simpson. Had conversation with her. My opinion remained steadily against the compromise; 1st, on merits; and, 2dly, because I thought publicity of trial would remove many of those misunderstandings that prevailed. At consultation at Dean's, I was called out, Mrs Simpson in a carriage, Sir Edward came out and had some conversation with her. I went, by arrangement, to Mrs Simpson with Mr Innes and Mr H. Robertson. At consultation no one expressed fear. We all thought we ought to gain. At meeting at Mrs Simpson's found Sir Edward there. I said it would be a great comfort to have Sir Edward consulted as her friend. Sir Edward expressed himself strongly, there should be no compromise. He stated, that after what was publicly known, if she compromised her character would be ruined. I expressed my opinion, and so did Mr H. Robertson, to the same effect. Sir Edward's opi-

nion was against compromise of any kind. Sir Edward expressed himself more strongly than I did. I was against all compromise, and would not have been a party to any. An authority had been given to Mr Innes to compromise for L.3000. Authority to Mr Innes burnt, after agreed should be no compromise. Mrs Simpson heard our opinions. Mrs Simpson much agitated, and seemed anxious it should be done in the way her friends thought right. Frequently said, it was not money but character she had in view. I had no fear as to result. After this I wrote two lines to Solicitor-General. Trial goes on, or no compromise. Trial went on. I cross-examined Captain Buchanan, a very important witness. After cross-examination of Captain Buchanan, Sir Edward said, You have knocked the bottom out of the case. He said he thought pursuers' case hopeless, and I thought so too. I thought no jury would give a verdict against us, and if so, that Court would quash it. We had a conference as to leading evidence for defenders. Think Solicitor-General took part. We thought case safe; but as pursuer had not called Rutherford and R. Mackenzie, we thought better to call them, to put the public opinion right as to Colonel Simpson's conduct. I think Solicitor-General against leading evidence. No apprehension from cross-examination of witnesses. *Dean* spoke at great length. Nothing said about compromise. I thought it remarkable they did not cross-examine, but thought this arose from despair, having made up my mind there should be no compromise. I never thought of any. Had no idea of any one having authority to compromise. I would not have considered myself entitled to do so. Sir Edward got no authority; and in going along from Mrs Simpson's, he, Sir Edward, expressed satisfaction at the arrangement, as his feeling had all along been against any compromise. Heard Mr Keay. Thought his case desperate, but thought statement and apology very handsome. I thought of getting up and saying, I would recommend my client to pass from expenses, but checked myself, not wishing public to suppose this had been got up by concert with Mr Keay. I was against compromise, public or private. I thought inquiry necessary to save her character from perdition. I walked over with Sir Edward, after that she had heard the result. As she had understood it, she thought she had better see opponent and get an apology. Sir Edward and Mrs Simpson went out of room, and came back in a few minutes.

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By Court.—I cannot recollect Sir Edward asking the counsel if there must be compromise, whether it must be public. No recollection of that.

LORD MONCREIFF *charged the jury as follows*: We have had a great many useful observations from the learned counsel, but I

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must beg leave to remark, that it appears to me my learned brothers at the bar have followed what I fear is too much an established custom, viz. bringing before us a good deal of matter which really does not belong to the case at all. The case you have to try resolves into a few simple questions of fact, as they are set forth in the issues. Without going over all the words of the issues, I will state to you in substance the nature of the questions which are put to you. The first is, whether it is proved, that at the time mentioned in the issue a compromise was entered into between the parties. The second, whether, if a compromise was entered into at the time, it was so entered into by the authority of this defender. Third, Supposing it was entered into, but you entertain doubts, or do not think that the evidence supports the averment that it was done by her authority, whether it was homologated by herself after it was so done. This is the substance of the questions you are to try. You are not to permit your minds to be drawn to subjects which don't belong to this trial, such as the details of the former trial, which we must not be supposed to know any thing of. You are to confine yourselves to the real questions which are before you, taking the statements which have been made into consideration, only in so far as they are necessary to explain the circumstances under which, and the manner in which, the supposed compromise was entered into, if it was entered into. The former trial is made an admission in the issues; but whether these numerous deeds were liable to reduction or not is matter which you cannot try: it is not for your consideration or determination. There were grounds stated for reducing these deeds, such as facility, fraud and circumvention; but whether these grounds were met by a relevant defence, is not the question before you. What you have to do is, to consider the averment which has been made in the course of this trial, that a compromise is alleged to have been entered into. It is however undoubtedly part of this case to consider, what was the opinion respectively entertained by the parties as to the result of the former trial. It is made part of it by the evidence on both sides. There can be no doubt Mrs Simpson herself had thought at one time of making a compromise. It is clear that this had been communicated to Sir Edward Lees, because he had formerly dissuaded her from a compromise, at least if you believe his testimony. The Dean of Faculty was of opinion that there might be a compromise before the case went to trial, but not afterwards. Mr Robertson again said decidedly, that he was not afraid of the issue of the trial, and that it was necessary for her character that the trial should proceed to issue. I mention this just now, because, although we have nothing to do with the merits of the former trial, it does shew that all

parties concerned, the party herself, Sir Edward Lees and the counsel, had considered the propriety of a compromise, and they did consider that her character was materially involved one way or other in the issue of that trial. It is my duty, however, to state, that it appears to me to be very little material what in reality were the probabilities of success in favour of one party or the other, either prior to the trial or at that particular stage when the compromise was entered into. Nor do I think it of very great importance whether the compromise was advantageous to Mrs Simpson, or the reverse. You are not desired in the issue to form any opinion on that question. You have to try whether in reality there was a compromise. Your attention must be directed to the question of fact, whether there was a contract. It is not your business to say, whether it was advantageous to the one party or the other. To be sure, if we look at the evidence we have heard, it is pretty evident that the pursuers of the action had the strongest motives to enter into a compromise. It is extremely probable that they could have but faint hopes of success at the time. One thing is clear on the evidence, so far as we have seen it, that they had no chance against the trustees; and if the trust-deed was to stand, it would cut out the heirs-at-law. These heirs-at-law would take nothing. Whether the verdict was against Mrs Simpson or not, they could have got nothing, for the trust-deed would swallow up the whole effects of the testator. Therefore it was very desirable for them to enter into a compromise. The case of Mrs Simpson was in a more doubtful position; but notwithstanding this, you will see that Mr Campbell had a motive on the slightest hint to set about effecting a compromise. There were contrary opinions as to Mrs Simpson's success. Lord Cockburn's opinion is an opinion of weight. He was not her counsel, but he was so far impartial, that he was no party assisting the pursuer, but, on the contrary, was another defender. The counsel differed in the management according to the Dean of Faculty; but still Lord Cockburn was impartial, so far as a person at all concerned could be impartial; and he gives a confident opinion that it was in the highest degree expedient to compromise. You have equally strong opinions of great weight also by Mrs Simpson's counsel. They were both decidedly of opinion that the case was a safe one. The Dean of Faculty said, that he never felt so sure of a verdict. In spite of these opinions, however, we have too much experience not to know, that there may be mistakes in these matters. We have too much experience not to know, that the most confident hopes of success may be wrong, that the same opinions of expediency may be wrong too. The question is, not whether it might not be considered as certain that no compro-

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mise would be entered into, but whether the case, standing as it did, before the reply, before the case was committed to the jury for their judgment, was or was not compromised in point of fact. We can see advantages in compromising independent of the mere question of success. It is plain the defender might have an interest to prevent the reply. The senior counsel would in all probability have been stronger against her than any thing which had then been said. If Mr Keay had had to go to the jury on that case, the more especially as it was narrow, there would have been a necessity for his going into matter, of itself most disagreeable, in the strongest possible manner, with a view to raise a feeling in the jury. There was another consideration: Supposing the case had gone to the jury, and Mrs Simpson had got a verdict, it would have been a verdict contested to the last, a very different thing from a verdict obtained by the pursuer coming forward and stating, that he had been misled and mistaken, and was satisfied there was no solid ground for the action, which of course removed any possible impression which might otherwise have been taken up against the character of the defender. It is easy to conceive that such considerations might operate on the mind of Sir Edward Lees. He was deeply interested: he was her warmest friend, and he was present in Court at her request. And this leads me to return to the question which you have to try, whether there was or was not a compromise. My learned friend, Mr Wood, in his address to you, turned to me to press the question, whether they had proved a compromise,—not whether an agreement of some sort had been proved, but a compromise in the proper sense of the term, without a verdict upon the evidence. I have to state to you as the law of the case, that this question must be settled according to the terms of the summons and the issues, which made it incumbent on the pursuer to have proved that it was in reality a compromise. The law is, that it must be proved that there was a compromise, to warrant a verdict for the pursuers. Such is the nature of the issues, by which it is further put to you, whether, supposing that there was a compromise, the defender either gave authority to enter into it, or approved of it after it was entered into. The first question then is, whether any agreement which was entered into was a compromise or not. If any agreement is proved, the precise nature of that agreement depends on the whole evidence, written and parole together, not on any particular words which may have ostensibly been used in reference to that agreement. If the case had depended solely on the words of Lord Cockburn's letter, the case would not have been sent to you for trial, because then the Court would have judged for itself in construing that letter, what weight the words used in

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it ought to receive. The question put to you in the first place is, whether, on the whole evidence which has been laid before you, you, the Jury, are, or are not satisfied, notwithstanding it was part of the arrangement that the money was to be applied in a particular way,—notwithstanding it was stated that the money was to be understood to be applied, not as the result of a compromise, but as the result of a voluntary engagement, that the whole transaction was in reality a compromise, whereby a certain consideration was given, that a trial might not come to its natural termination, and that the defender might have a verdict without the cause going to the jury, so as to let them form their own opinion on the case laid before them, whether in reality, according to the whole evidence, there was a compromise or not, weighing fairly and justly any of the words in the written evidence which you may consider as material, but weighing also the whole evidence as taken from the witnesses. We must take that evidence in the order in which we have it. In the first place, you have a statement made by Lord Cockburn, and, in the second place, by Sir Edward Lees. There is no other parole evidence to determine what was actually transacted in this matter. There is some written evidence, but no more parole. (His Lordship then read over the whole examination of Lord Cockburn and Sir Edward Lees, in the course of which his Lordship made the following observations): Lord Cockburn judged of the probable course of Mr Keay's speech from the course he would have been likely to take himself. Then I read a note of Mr Keay's statement by the Lord Justice-Clerk. Lord Cockburn observed, that it was much fuller. It is also taken in short-hand, and there undoubtedly it appears very strong. The defender reasonably founds on this, as shewing, that the party must be taken as having actually given up the case because he could not maintain it. On the one hand the pursuers say, that it was only a reasonable and handsome fulfilment of their part of the agreement, and that it was on the faith of that alone they had done all in their power to preserve the defender's character entire. Lord Cockburn told you that Sir Edward Lees was gratified by the result. Then his letter was shewn to him, which he identified; and upon a question by the Court as to the import of that letter, and his understanding in regard to it, he said, &c. (See evidence.) This is the way in which Lord Cockburn explains the whole transaction. Sir Edward Lees is the other witness as to the fact of a compromise. You will judge how far he concurs with Lord Cockburn. Sir Edward said, he was anxious Mrs Simpson should be informed of the agreement, and that he told her brother to make it known to her; but there is no evidence that he told her. I ought to point out to you that the defender

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could not call Mr Dallas, because he was her brother, but the pursuer might have done so. This is the evidence of the transaction actually made at the time. Sir Edward Lees' evidence is to be combined with Lord Cockburn's. It is a difficult thing to resist that evidence, as proving, as matter of fact, that a transaction of the nature of a compromise was entered into. As to the respectability of this testimony I need not say any thing. It certainly is above all possibility of exception. So far as it goes, I think it is impossible you can fail to believe, that there was a transaction entered into by which the case was prevented from going to the jury, and that the verdict obtained was by consent of the pursuers. The evidence which remains consists of the letter of Lord Cockburn, addressed to Sir Edward Lees, I think, on the day after the transaction took place. It is a very important and a very remarkable document. It has been commented on by both parties. (His Lordship read over the letter, and in the course of perusal made the following observations): It is certainly singular that Lord Cockburn should say that it was not arranged in the slightest degree as a compromise, but solely as a gratuity; and undoubtedly if you take these words in the literal acceptation, without reference to the parole evidence, the question would be a more difficult one than that before us. But this document must be taken in connection with what precedes and follows, and with the real evidence in the nature of the transaction, and what was done on it. This document goes on to say, The sooner you get them paid off the better, &c.—certainly supposing Mr Campbell would have it in his power to do something in the event of its not being implemented; but however that may be, you have Lord Cockburn stating that there was in reality no compromise, and that the matter stood upon the footing of a gratuity for the benefit of the pursuers. That certainly is the way he puts it, and it is for you to judge whether, with all the evidence you have as to what took place between the parties, the testimony of Sir Edward Lees and Lord Cockburn as to what occurred at the time, and what Lord Cockburn has said as to his understanding of the matter, and if you are still to hold, notwithstanding all, that the words of the letter are to be taken literally, and solely to guide your determination, you can't of course find for the pursuers. It is your province however to judge of the true meaning of the letter, as to which I am inclined to think you ought not to rest on particular words taken by themselves, but to say, upon consideration of the whole matter, whether or not it was the intention of the parties to enter into a compromise, though at the same time it was their object that it should not be known to the public as such, but should appear to those who were not in the secret that the consideration given

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was matter of gratuity, and a voluntary act on the part of the defender. That is the evidence in regard to the fact as it took place before the termination of the trial. Then you have the verdict for the defender, with the statement of the pursuers' counsel. Then Sir Edward Lees went on to give evidence as to the question, whether he was authorised to enter into the arrangement, and whether it was approved of by the defender after it was entered into. 'After 'the trial,' &c. (see evidence.) You will recollect Mr Robertson knew nothing about the transaction: he thought the case given up. Having a strong impression upon the subject, he bona fide believed it: so did the Dean. They thought Mr Keay gave up the case because he despaired of it. Sir Edward Lees walked along with Mr Robertson, and did not speak upon the subject, because he intended it should be kept secret. This is confirmed by Mr Robertson. 'I was most particular in telling her my motives,' &c. We must presume Sir Edward told her exactly the transaction. 'She ex-'pressed surprise at my agreeing to give Mr Campbell L.500.' It was natural she should have a feeling adverse to Mr Campbell, because he was the person who had been working hard against her. (His Lordship then proceeded with Sir Edward Lees' testimony to that part which relates to sealing up Lord Cockburn's letter.) That is a fact in the case of most material import. I ought to state to you that it has an effect upon the whole evidence. He sealed it up, and gave the seal to Mrs Simpson, that while it remained in his custody it was impossible to open it without her consent; and in case he should die, it might still be kept a secret. This undoubtedly shews, whatever was the nature of the transaction, it was intended to be kept secret. Whatever was the real nature of the transaction, it is clear that she did not wish it to have publicity. Sir Edward Lees' sealing it up and preserving it in this manner also leads to the conclusion, that whatever name might be given to the transaction, it was of an onerous and binding nature, and was not in the mere will of the defender, but was concluded between Sir Edward Lees, acting for her interest, with a third party, not in possession of any document, and that he thought he was in honour bound to hold it, in order that it might be in safety. (His Lordship concluded the testimony of Sir Edward Lees, observing that he would not trouble the jury by reading the farther correspondence, as it had been read by both parties. His Lordship also read the testimony of Mrs Stewart.) This is the evidence for the pursuer. You will consider wherein it is departed from in the evidence of the defender. The first question is, whether there was a compromise; the second, whether a compromise was authorised;

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and the third, whether it is true, if there was a compromise, that it was approved of by the defender. Having read over the whole evidence to you, and made such observations as occurred to me, I don't think it necessary to shew more particularly the way in which the facts are connected. You see she was anxious, and had actually agreed to enter into a compromise. Before consulting Sir Edward Lees she had given express authority to that effect. Sir Edward Lees advised her against it; and passing over the intervening circumstances, it appears, that she was guided by that advice, even though against the advice of her counsel. She retracted that authority, and it was destroyed in the presence of the Dean, by Sir Edward Lees' advice. Sir Edward Lees told you his view of the matter: he swore distinctly that she said from the beginning to the end of her intercourse with him, she would do whatever he advised. She requested him to attend the trial as her friend, to watch over the proceedings. It is for you to judge whether, by this strong declaration, that she would do whatever he advised, he was or was not authorised to enter into a compromise, when, as he thought, it was practicable and expedient, in the manner and on the principle he had always adhered to, viz. with publicity. You cannot separate that from what followed immediately after. Sir Edward says he went and told her what he had done, that there was a verdict in her favour, that it was a complete triumph, as the case went before the jury, but still that there was an arrangement, such as he himself described; that she then strongly and emphatically objected to a certain payment; but still she said, whatever you advise, I will most cheerfully acquiesce in. Now, I think I am bound to say that you ought to connect that with the real evidence; and though in that way I should be inclined to say, that she understood perfectly well that she authorised Sir Edward to act according to his own discretion, when she requested him to watch the proceedings to the end, it is for you to judge whether that is the proper construction to be put upon the whole evidence put together.

And this leads me again to observe, that besides the question, whether Sir Edward was authorised, there is the further question, whether she homologated his proceedings. You have the evidence of Sir Edward, that after the arrangement had been made she did express herself in the way he mentioned. Then afterwards, when the letter of Lord Cockburn was written, it was read carefully over to her, and the whole matter discussed, and she again expressed herself satisfied, and she wrote the doquet, in which she expressly says that she approved of the arrangement. Then you have further the

testimony of Mrs Stewart. By that time the transaction had been explained to Mrs Simpson, and one would suppose she had come completely to understand the nature of it. Mrs Stewart says that she came to the house of Sir Edward Lees, and there expressed so strongly her thankfulness for what he had done, that Mrs Stewart was led to make a particular observation, which strongly marked her feeling at the time. In reality, if she had not authorised Sir Edward Lees to make an arrangement, or disapproved of the arrangement which was entered into, or thought he had no right to enter into such an arrangement, she never would have come to express thanks to him in the deliberate way she did. That is the case of the pursuers on the issues. There are four issues. The two last relate to an obligation to relieve the pursuers from the expenses of the trustees. It involves, in fact, the same question, but relates to a different subject.

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On the part of the defenders very weighty evidence was given by the Dean of Faculty and Mr Patrick Robertson. (His Lordship then went deliberately over the statements of the learned counsel, and carefully compared them with each other.) The Dean of Faculty seemed to be of opinion, that after the cause had been put into the hands of counsel at the trial, Sir Edward Lees was not entitled to make a compromise. This is a point upon which I must leave you to judge for yourselves: I can't state it as matter of law that the Dean would have succeeded in an appeal to the Court. It is extremely probable he would; but whether, if Sir Edward Lees had been determined to go on with compromise, he could have been effectually prevented, is a question which I can by no means answer to you with certainty. As it is, however, no such thing could have taken place, because the Dean was not there. That is the whole of the defender's evidence. You will judge how far it differs essentially from that of the pursuers. The evidence of the counsel for the defender is undoubtedly very strong. They had unbounded confidence in obtaining a verdict without a compromise. The Dean said that it would do no good to enter into a compromise after the case was opened.

You are now to judge of the merits of the whole case. I will not fatigue you by again repeating the only direction of law I have to give. It is embraced in substance by stating to you, that upon the question, whether or not there was a compromise, you are not to take into consideration merely the words of a particular document, but you are to consider the whole evidence; and if upon the whole evidence you are of opinion that there was no compromise entered into either by the defender or another, or others acting under her

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authority, then you will find for the defender; but if, on the other hand, you are of opinion that there was in reality a transaction entered into, which, in the understanding of parties, amounted to a compromise, then it will remain for you to say whether Sir Edward Lees had authority to enter into such a transaction as that, and whether it was entered into on behalf of the defender, and whether she subsequently homologated it.

VERDICT for pursuers.

Counsel for Pursuers, *Rutherfurd, M'Neill, Jo. Hamilton.* Agent, *Jo. Campbell*, W. S. Counsel for Defenders, *A. Wood* and *Neaves.* Agent, *Ro. Rutherford*, W. S. *Mr Russell*, Clerk.

R.

FIRST DIVISION.

No. III. 14*th July* 1835.

BATHURST
against
MACKENZIE.

PROCESS. — *Right of pursuer to countermand an order for trial. Power of Court to direct that a trial shall proceed.*

THIS case had been put down for trial on 22d July. On the evening of the 11th July the agent for the defender received notice of a motion by the pursuer for putting off the trial. The defender's agent immediately gave notice of a counter motion against putting off.

Robertson, for defender, referred to Beveridge's Form of Process, to shew that a party could not, without cause assigned, put off a trial.

Rutherfurd answered, that the pursuer was entitled to fix his own day, and referred to § 20. of A. S. (29th Nov. 1825,) to shew that a pursuer not meaning to go on may give notice of delay, subject to payment of such expenses, incurred by the other party in preparing for the trial previously fixed, as may not be available at the trial of the cause. The 27th sect. of A. S. also applied to the case of a pursuer not ready to go on. The pursuer, in short, is master of his own case.

Dean of Faculty, in reply, referred to sect. 13. of the former A. S.

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(9th Dec. 1815,) which, he maintained, had not been repealed, to shew that the pursuer had not the right to countermand without cause shewn, and stated, that the hardship to his client would be very great, as he had brought a witness from London, and he could not say that he could command his services afterwards.

Lord President said, that, on referring to the clerk, he found it was quite common for a pursuer to countermand a trial in such circumstances.

The trial was delayed accordingly.

The defender then urged the pursuer to agree that the trial should go on at the Inverness Circuit; and the pursuer's counsel being reluctant to do so, but without assigning any reason, the *Lord President* directed that the trial should take place at the Circuit.

Lord President, *(Hope.)* Counsel for Pursuer, *Rutherfurd.* Agent, *D. Fisher*, S. S. C. Counsel for Defender, *Dean of Fac. (Hope,)* and *P. Robertson.* Agent, *Hugh Macqueen*, W. S. *Mr Brown*, Clerk.

R.

FIRST DIVISION.

No. IV. 14*th July* 1835.

WILLIAM HARVEY, FOR HIMSELF, AND AS GUARDIAN AND ADMINISTRATOR-IN-LAW TO HIS DAUGHTER, HELEN HARVEY, *against* MRS DOROTHY LEGERTON OR STODDART.

PROCESS.—DISMISSAL.—SUMMONS.—ISSUES.—*A jury, after being sworn, dismissed on account of a discrepancy in point of date between the summons and issues.*

A JURY was balloted for and sworn on the following issues: Whether, on or about the 24th day of November 1832, the defender kept a dog, and knowing the same to be of a vicious and ferocious disposition, and in the habit of biting, wrongfully allowed the same to go at large? And,

Whether, on or about the said day, the said dog bit or lacerated the pursuer, Helen Harvey, daughter of William Harvey, also pursuer, to the loss, injury and damage of the pursuers, or either of them?

14 July 1835. Damages laid at L.600 to Helen Harvey, and L.50 to William Harvey.

Harvey, &c. v. Stoddart. When the pursuers' counsel was about to open the case, *Robertson*, for the defender, said, that he considered it due to the Court, as well as to the pursuers, to state an objection which appeared to be fatal to the pursuers' case. The summons in this action was dated and signeted in January 1832, and it set forth, that the injury libelled on was done in the month of November then last, that is, in November 1831. In the defences, November 1831, was also admitted to have been the month in which the pursuer, Helen Harvey, had been bitten; nevertheless, in the issues, the date was stated to have been '*on or about 24th November* 1832.' On the general ground, therefore, of disconformity between the summons and the issues, as well as under the precedent established in the case of Paterson *v.* Shaw *, he submitted that the error was fatal. In that case one of the acts of card-playing was described in the issues as having taken place in the house of a gentleman residing in Great King Street, Edinburgh. It appeared in evidence that the gentleman did not reside in Great King Street, and the Court refused to allow any evidence to be adduced as to what took place in *Great King Street.*

A. M'Neill, for the pursuers, denied the application of the case of Paterson and Shaw, and contended, that he was entitled to open the case, and to lead evidence in support of the issues.

The *Lord President*, (interrupting Mr Robertson when about to reply.)—'You need not answer this. It is not in virtue of the 'issues, but of the *summons*, that the pursuers are to obtain decree; 'and it is quite plain that these issues, although proved, would not 'entitle the pursuers to a decree under their summons. Therefore 'I sustain the objection.' Upon this his Lordship dismissed the Jury, without requiring them to return a verdict.

Counsel for Pursuers, *A. M'Neill* and *Chapman*. Agent, *James Taylor*, S.S.C.
Counsel for Defender, *P. Robertson* and *W. Bell*. Agent, *John R. Stoddart*, W. S.

R.

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* Paterson *v.* Shaw, (20th Feb. 1830, 8. *S. & D.* 573,) 5. *Murray*, 273.

FIRST DIVISION.

No. V. 14*th July* 1835.

DR JOHN MARSHALL
against
GEORGE RENWICK AND SPOUSE.

(BEFORE THE LORD PRESIDENT (HOPE) AND A COMMON JURY).

SLANDER.—*Damages found due to a medical practitioner for slanderous statements to his prejudice.*

Narrative.

THE pursuer had practised extensively for several years as a physician in Port-Glasgow, and bore an excellent character in every respect among the inhabitants generally. He brought the present action against the defenders, George Renwick, hosier in Port-Glasgow, and his wife, to recover damages for having been falsely and calumniously accused by them of having had carnal connection with one of his patients, Mrs King. The issues, thirteen in number, embrace the several occasions on which, as the pursuer alleged, the defenders had propagated or repeated the slander.

The third issue contains the gravamen of the slander complained of. It is in these terms: Whether, in or near the defender's house or shop in Port-Glasgow, on or about the said 2d day of August 1833, in presence and hearing of Archibald Manson, brother of the said Mrs King, the defender, Mrs Renwick, did falsely and calumniously say, that the pursuer had given Mrs King a bottle in order that he might have carnal connection with her; and that he, the pursuer, had his content of her, meaning thereby, that the pursuer had had carnal intercourse with Mrs King, or did falsely and calumniously use or utter words to that effect, to the loss, injury and damage of the pursuer.

A variety of witnesses were examined on both sides, the result of whose testimony was, that the pursuer had, at the express desire and solicitation of her friends and relations, attended Mrs King prior to and during her confinement of a first child, in the absence of her husband, who was at sea. Shortly after her confinement, Mrs King, who was then in a very unnatural state of mind, told different persons a story about the pursuer having had connection with her. The pursuer ascribed Mrs King's state to disease and

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hereditary insanity; but some of the witnesses for the defenders stated, that she mentioned the circumstance to them when quite composed, and when not apparently suffering under an aberration of intellect. The defenders, who were nearly related to the husband of Mrs King, had circulated the report, although they did not appear to have any other authority for it than Mrs King's statement.

The *Dean of Faculty*, for the defenders, admitted the falsity of the report, and the temporary insanity of Mrs King, and principally spoke in mitigation of damages.

Judge's Charge.

The *Lord President* to the jury.—It has been well observed by the counsel for the defenders, that this is a singular but a very melancholy case. It is melancholy in every point of view. Most unquestionably a charge has been made against this pursuer of a most serious nature. If a charge had been made against an ordinary individual, that he had used drugs to accomplish connection with a female, it would have been a charge of rape. It is always rape where connection is effected without consent: whether it is done by force or drugs, it makes no difference: the crime is unquestionably rape. If such an act were done by a professional medical attendant, it would be a crime to which I can hardly give a name. The profession of medicine implies the most implicit confidence. If a medical man should abuse that confidence to accomplish such an abominable purpose, he commits a crime of the most deep and heinous nature.

On the evidence there is no doubt about the subject-matter of the issues: the only question is, whether these defenders are excusable at all; and if at all, to what extent. In the first place, I am not surprised that Dr Marshall took this public mode of vindicating his character. I do not conceive that he had any other method. Suppose there had been a private examination: how was that to be made known publicly? how to be disseminated? how were the public to be satisfied that it was impartially taken? I must state another circumstance, that the prevalence of a scandalous report is no defence to any person whatever who repeats it. If the injured person had no redress unless he could trace out the author, he would often have no redress, if he did not prosecute a whole town. He is entitled to select any person whatever who has propagated the report: and if it turns out that that person is not the author, (though it is generally extremely difficult to prove this,) it may be a cause of mitigation, but no justification. No human being is entitled to propagate a calumny. If he hears it, it is his duty to keep it in his own breast, not to repeat it to others: he is not to be the channel of propaga-

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Judge's Charge.

tion. It has been stated, that instead of the present step, the pursuer should have instituted a private inquiry on the subject. If there was any such duty on the part of the pursuer, there was the same duty on the part of the defenders. They spread this report without inquiry, on the ex parte statement of Mrs King alone, without even communicating with Dr Marshall. They not only propagate, but they state positively that they believe it. No person is entitled to believe an evil report of another without hearing that party. These defenders made the statement on the authority of Mrs King alone, without hearing Dr Marshall; and they take it upon them, not only to propagate, but to do so with every possible solemnity. One circumstance must be noticed here: if the Renwicks knew (and they must have known) that Dr Marshall, for months after he was said to have committed this atrocious crime, was attending Mrs King as accoucheur, and received in a friendly manner by her, how is it possible they could believe this story? If such a story had been true, would he have been sent for, for this purpose? The very idea of such a thing would have been enough to produce an alienation of mind. Another thing struck me strongly. Mr Renwick is stated to have been a member of Dr Barr's congregation. He should have consulted Dr Barr if he believed it, before propagating it. Now, what was the impression of Dr Barr upon the subject? He told us he thought it was all a fiction of the imagination. If he had consulted him, he would have told him that it could not be true, and that he should think no more about it. Again, this action has been in Court for a considerable time: there is no retractation on the record: the defenders persevere in saying they can't tell whether it is true or not; and now, at this bar, they admit that this report is untrue. (His Lordship here recapitulated the evidence.) It may be true that the Renwicks were not inventors of the report: this, at all events, is the charitable view. To find for the defenders is out of the question. You will consider, then, the amount of the damages: that is for you, not for me. Mr Rutherfurd said he did not expect vindictive damages, but they must not be nominal. There is one way in which you may give much less damage than otherwise, as in the case of Lady Ramsay, where the jury accompanied their verdict with a public declaration in Court, that they were quite convinced of Lady Ramsay's innocence. You may do the same; and on the supposition that the pursuer is entitled to reparation, you will give such damages as you think proper.

Verdict for pursuer, damages L.100.

The jury directed their foreman to state, which he did in Court,

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that they made the damages so low, because they did not think that the defenders had propagated the report from vindictive feelings.

Lord Ordinary, *Fullerton.* Counsel for Pursuers, *Rutherfurd* and *Jo. Tait.*
Agents, *Tait & Young*, W. S. Counsel for Defenders, *Dean of Fac. (Hope,)*
and *Steele.* Agent, *John Patton*, W. S. *Mr Brown*, Clerk.

R.

FIRST DIVISION.

No. VI. 14*th July* 1835.

WILLIAM THOM
against
THOMAS GRAHAME.

(Before the Lord President (Hope) and a Common Jury).

Assault.—*Damages found due to a party assaulted and defamed under circumstances of provocation.*

Issues.

Whether at Annan, on or about the third day of November 1834, the defender violently assaulted, or struck, or kicked the pursuer, to his loss, injury and damage?

Whether, at a public meeting of the inhabitants of the said burgh, held on the said day, in the yard of the academy, the defender did falsely and calumniously say, in presence and hearing of the persons then and there assembled, that the pursuer was a blackguard, and the greatest blackguard in that part of the country; or did falsely and calumniously use and utter words to that effect, to the loss, injury and damage of the pursuer?

P. Robertson, for the pursuer, detailed the circumstances attending the assault, and the subsequent vituperation of his client by the defender.

The pursuer was a surgeon in Annan; the defender a landed proprietor in the county.

Evidence for Pursuer.

James Little, town-clerk of Annan, is acquainted with the parties. Mr Grahame is a Justice of the Peace. He is an active, young gentleman. Mr Thom approaching sixty. A meeting was called at

14 July 1835.

Thom v. Grahame.

Evidence for Pursuer.

Annan, with a view to abolish certain taxes, and the Town-Council did not wish it done without taking the sense of the community. It was a public meeting by advertisement. A small platform was erected, on which there were eight or ten persons: the bulk of the meeting was below. There were upwards of one hundred at the meeting. The witness thought that the matter had not been sufficiently considered, and moved that they should defer their deliberations; and he was seconded by a merchant in Annan. The Provost was in the chair, and stated the purpose of the meeting. Did the defender take any part in the discussion? Mr Grahame was down below, and he came up on the platform, and supported the motion, but for a different reason from that of the witness. In the course of his speech was any allusion made to expenditure? Mr Grahame said, that the Town-Council had the power to remove the tax, but they had deprived themselves of the means, by entering into a law-suit with Mr Farish. This was said rather in a tone of stricture than otherwise. What happened then? In an instant I heard the words, 'It is false, it is false;' and some other words purporting that Mr Farish had dragged the Town-Council into a law-suit. I did not know Mr Thom was there, but I then saw him, and am certain it came from him; at least, the words, 'It is false, 'it is false.' Mr Grahame, who was close by me, looked round, as I did. He paused a few seconds, when I thought he was not going to take notice of it. He then lept down amongst the people, and made to the place where Thom was. When he came near Thom, he did not seem to understand what was to happen. He turned half away. Mr Grahame struck him a blow with one of his fists on the side of the head, about the ear or neck. Was there a second blow? I think he aimed another, but I cannot say if it struck. Did Thom make any resistance? None whatever. After receiving the second blow, he turned round, and Mr Grahame kicked him. This was the work of an instant. The Provost and I lept down. As I was going down towards Mr Grahame, I met Mr Thom. He said, What is the matter with Tom Grahame? What does he mean? I passed him without any observation whatever. Mr Grahame came back to the platform? He did. Did he resume his speech? He did. He began to make observations on what had occurred, and said he had endeavoured to chastise Thom, and had offered to him one of the greatest indignities which one man could offer to another; and added to that, that he believed him to be one of the greatest blackguards in the world. He had hardly used the expression, when the Provost recommended him to confine himself to the business of the meeting. He did not say much more. We stopt him as soon as possible for his own sake. *(Lord President.)*

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—Then the meeting was adjourned? The resolution was carried, and the meeting was over. *(Dean of Faculty.)*—Dr Thom has been settled in Annan about twenty years. At this time he was one of the Town-Council. With whom did the law-suit referred to originate? Mr Farish had been originally appointed for five years; at the expiry of the time, the Council appointed another, Mr Underwood. Mr Farish thinking he had a right to the appointment for life, presented a bill of suspension and interdict. This was the only law-suit then depending.

(Cross-examined by Rutherfurd.)—Did the meeting express any feeling on this occasion? Some of the people down below did. Was it expressed in favour of Grahame? I can't say that the respectable portion of the meeting did so. Did any body express feeling in favour of Thom? Not that I am aware of. Can't speak to the exact words used by Grahame as to the law-suit, but they imported that Farish was to blame for it. Underwood was elected along with Foot, who had been the colleague of Farish, and then Farish brought his bill of suspension.

Two other witnesses were called by the pursuer, who in substance corroborated the above; but one of them, from his position in the crowd, did not see the encounter.

Rutherfurd, without leading evidence, addressed the jury in mitigation of damages, and referred to the case of Brown *v.* Sir J. G. Craig, where no damages were given.

Judge's Charge.

The *Lord-President.*—I consider it a great misfortune that trial by jury should have been resorted to in so pitiful a case: it is enough to put jury trial out of fashion. If they were determined to have an action of damages, it might have been brought in the Sheriff-court, which would not have cost the parties half the expense. It is unnecessary to go over the evidence: it is so short, you must have carried every word of it in your minds. It is very true Mr Thom was at this public meeting, and that he used very strong and insulting words to Mr Grahame. It appeared to have been stated that the town had dragged Farish into a law-suit, when Mr Thom cried out, it is false. Farish, to be sure, presented a bill of suspension, but I don't know what else a man could do who wished to try the point of right; therefore it might just as well be said that the one party had caused the law-suit as the other. When Thom made use of the expressions which have been sworn to, if Grahame had then said, I take no notice of that, for he is one of the greatest blackguards in Scotland, it would just have been tongue against tongue. Grahame had reason to be provoked, and if he had made that reply alone, he would have been perfectly entitled to do so. I must

now tell you, in point of law, that no words can justify blows. That is laid down by all our authorities. If the words are a ground of mitigation, that can only be considered when you come to estimate the damages. It is laid down unequivocally, that no words can justify blows; and here you have it proved that Mr Grahame struck the pursuer one blow on the head, and another on the shoulder; and not satisfied with that, he kicks him. To do justice to the law, you must find for the pursuer; but you may make the damages as low as possible, in consequence of the provocation.

14 July 1835. Thom v. Grahame. Judge's Charge.

Verdict for pursuer, damages L.50.

Lord Ordinary, *Corehouse.* Counsel for Pursuer, *Dean of Fac. (Hope,) P. Robertson* and *Sutherland.* Agent, *Wm. Bell*, S.S.C. Counsel for Defender, *Rutherfurd.* Agent, *Wm. Martin*, S.S.C. *Mr Brown*, Clerk.

R.

FIRST DIVISION.

No. VII. 15*th July* 1835.

WILLIAM JAMES ANDERSON
against
WILLIAM MARSHALL.

(Before the Lord President (Hope) and a Common Jury).

Assault.—*Nominal damages found due to a party assaulted under circumstances of great provocation.*

The pursuer was a merchant in Peterhead, the defender partner of a mercantile house in London, which had dealings with another house in Peterhead. Owing to some misunderstanding between the two houses, one of the partners applied to the pursuer to communicate with the defender, who happened to be at that time at Peterhead; and, in consequence, the pursuer wrote to him different times on the subject. He had promised to call for the pursuer on Friday, 5th September. The defender called on the pursuer at two o'clock of that day, and not finding him at home, left the following note:

Narrative.

'Mr William Marshall presents his compliments to Mr Anderson, and begs to return the statement, agreeably to Mr Anderson's request.

15 July 1835.
Anderson v. Marshall.
Narrative.

'Mr M. feels perfectly satisfied that had dates and the whole of 'the correspondence been put before him, he should have no occa- 'sion to regret the part taken by M. H. and Co.

'*Cairngall, 5th September* 1834.

'(Addressed) Wm. Anderson, Esq. Peterhead.'

The following correspondence then ensued:

Mr Anderson to Mr Marshall.

'*Private.*' '*Friday Afternoon, September* 5.

'Mr W. J. Anderson received both Mr Marshall's notes of yes- 'terday and to-day. By the former, he (Mr A.) was glad to ob- 'serve that he was to have the pleasure of seeing Mr M. to-day; 'but from the note just received it would appear that he (Mr A.) 'is not to be favoured with an interview, although *Friday (this 'day) was of Mr M.'s own appointment.* In Mr M.'s note of to-day 'he states, 'that he feels perfectly satisfied that had dates and the "whole correspondence been put before him, he should have no "occasion to regret the part taken by M. H. and Co.' Now, Mr 'Anderson *was and is quite ready* to shew him (Mr M.) the whole 'correspondence referred to in the 'statement of facts,' which has 'just been returned to him, if he will take the trouble of calling 'upon him this evening, Mr A.'s friends having put the letters al- 'luded to into his possession for that purpose. Mr Anderson will 'remain disengaged this evening until seven o'clock, before which 'he hopes to receive Mr Marshall's answer.'

Mr Marshall to Mr Anderson.

'Mr Marshall received Mr Anderson's note of this afternoon's 'date, and if he is not satisfied with the opinion expressed in his '(Mr M.'s) note of yesterday's date, he is at perfect liberty to pur- 'sue any course he or his friends may think proper.

'*Peterhead, 6th September* 1834.

'N. B.—This letter was received on the 5th, being dated 6th, 'it is supposed by mistake.'

Mr Anderson to Mr Marshall.

'*Peterhead, Friday Evening, September* 5. *seven o'clock.*

'Sir, I have just this moment received your note, which sur- 'prises me not a little. How could I feel satisfied with your note 'of this afternoon, when I know that I have documents in my pos- 'session which must bring me *or any gentleman of honour* to a very 'different conclusion? Besides, your own conduct and correspon- 'dence in the matter, ever since I have acted as the confidential friend

'of Messrs G. and F., only serve to strengthen the opinion I have 15 July 1835.
'always entertained, namely, that the conduct of your firm towards Anderson v.
'these gentlemen has been such that does not reflect *much credit* Marshall.
'upon it (your firm.)

Narrative.

'I have a strong aversion to use unbecoming language towards 'any one; but I must say that, in all my experience, I never did 'receive such *cowardly treatment*, considering that *you* were the 'person who solicited the meeting this day, which I at once readily 'granted. I beg also to call to your recollection your desire to 'make our mutual friend Mr G. acquainted with the circumstances 'of the case, which I also agreed to; but I suspect my friend Mr 'G. had discovered that the case was a *bad one* as regards *your firm*, 'and therefore did not wish *to soil his fingers with it*, and you your-'self have not even attempted *to impugn* any part of the statement 'which was sent to you.

'I shall certainly feel myself at perfect liberty to make any use 'of the correspondence which has passed betwixt us, and to advise 'my friends to take such steps as I may think proper. I am, Sir, 'your obedient servant, (Signed) W. J. ANDERSON.

'(Addressed) W. Marshall, Esq.'

On receiving this latter communication, the defender, who was dining with a friend, proceeded immediately to the shop of the pursuer, presented the letter to him in presence of several persons, and asked him if he wrote it. The pursuer having acknowledged it, he called him a low, impudent puppy, and a low scoundrel, and then struck him with his fist. In return for this, the pursuer merely told him that he would make him repent of his conduct, and desired him to go out of his shop.

The Solicitor-General, (Cuninghame,) for the defender, dwelt on the great and insufferable nature of the provocation used. He adduced no evidence.

The Lord President.—The evidence is so short and conclusive that it is unnecessary to go through it. What I would address to you respects the general circumstances of the case, just as I did in a case extremely similar to this last night, as some of you have heard. I am persuaded you will agree with me in regretting that this case was not settled in the way I suggested *. I think there were faults on both sides. Certainly the first was on the part of the pursuer, in writing, as his own counsel was obliged to admit, a letter con-

Judge's Charge.

* His Lordship, at the commencement of the trial, suggested that the pursuer should apologise to the defender, which was declined, unless the pursuer would first acknowledge the impropriety of the expressions in the letter quoted above.

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Judge's Charge.

taining some ill-judged expressions. In reference to the subject-matter of communication between them, I never knew expressions more ill judged, ill chosen, or more liable to give rise to wrong interpretation than those used. I won't go back into a statement of the affairs of the parties concerned, which, as admitted, has nothing to do with the case. Whether the pursuer was more or less officious is nothing to the purpose. He was employed by one of the parties to obtain certain explanations from the other. In these circumstances he should have been careful to conduct himself as a mutual friend, and he ought to have been particularly careful to avoid irritating expressions. Now, it was this letter which was the cause of the present dispute. You will take the letter and consider it carefully. I confess it appears to me that more ill judged, more foolish, or more intemperate expressions could not have been used by one gentleman to another. (His Lordship then shortly commented on the letter.) Had the defender contented himself with going into the shop and retorting on the pursuer,—had he said to him, Sir, I consider you an impudent puppy,—had he met him with words alone, they would have been on an equal footing. Just as I did in the case last night, I tell you now, that if there had been merely a verbal altercation they would have been quit. But I must tell you also, that no words can justify blows. Words may wound the feelings, but they will not break bones; whereas blows will also wound the feelings, but they may likewise break bones. The law in short will not justify them. All that can be said of the insulting provocation received is merely matter of alleviation, and to be taken into account in judging of the damages: that I leave to you. There was certainly a gross provocation, which nothing can justify. My opinion is, that your verdict must be for the pursuer, but with as small damages as you choose to give him.

Verdict for pursuer, damages *one shilling*.

Lord Ordinary, *Corehouse*. Counsel for Pursuer, *Dean of Fac. (Hope,)* and *Neaves*. Agent, *H. Handyside*, W. S. Counsel for Defender, *Sol.-Gen. (Cuninghame,)* and *Pyper*. Agent, *Allan Menzies*, W. S. *Mr Brown*, Clerk.

R.

SECOND DIVISION.

No. VIII. *16th July* 1835.

JOHN HUTTON SYME, &c.
against
Mrs JEAN HENDERSON or MACFARLANE, &c.

(Before the Lord Justice-Clerk (Boyle) and a Common Jury.)

Facility.—Fraud and Circumvention.—*Codicil to a trust-settlement found liable to the above objection.*

Diligence.—Haver.—*Objection to production of a document by a haver, under a diligence, having been sustained by the commissioner, —held incompetent to call for production of it at the trial, as there was an opportunity of appealing to the Court against the commissioner's decision.*

Narrative.

The late Peter Macfarlane, merchant in Alloa, executed a trust-disposition and deed of settlement, (28th February 1828,) whereby he conveyed to the defender, his relict, and others, all his heritable property, for the purpose of distribution at his decease. He appointed his trustees, inter alia, 'to ascertain the value of the residue of 'my heritable and moveable estate before conveyed, and to divide 'the same into three equal shares, as follows, viz. one-third share 'whereof, and which shall include the Hutton Park Brewery, and 'other premises, with brewing utensils, casks and other fittings, occu-'pied by the said John Hutton Syme, husband to my late daughter 'Isobel, and any sums of money which may have been or may still 'be advanced by me to him, or on his account, and be owing to me 'at my decease, or become exigible thereafter; and which brewery 'and utensils cost me the sum of L.4050 sterling, and shall be valued 'at the said sum, which, with such future advances as shall be stand-'ing against the said John Hutton Syme in my book of accounts 'at my decease, shall all be accounted pro tanto of the said third 'share.' This one-third share he appointed to be retained under the management of his trustees, and of his daughter Margaret, for behoof of the pursuer's children; failing these children and their lawful issue at his decease, the said third was to be divided, under burden of an annuity to the pursuer, between his said daughter, Margaret, and another daughter, the wife of Mr James Greig jun. W. S. another defender; another third of the said residue of his

16 July 1835. estate was to be conveyed to his said daughter, Margaret, and her children; and the remaining third to Mrs Greig and her children. On 19th November 1831 the testator executed a codicil *, which it

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* I, Peter Macfarlane, some time merchant in Alloa, with consent of my spouse, and in exercise of the powers reserved by me in my trust-disposition and settlement, dated 28th February 1828, considering, that by the said trust-disposition I appoint my trustees therein named, inter alia, to convey the Hutton Park Brewery and other premises, together with the brewing utensils, casks and other fittings of the said brewery, all presently occupied by John Hutton Syme, husband of my late daughter Isobel, as a part and portion of the one-third share of my means and estate, thereby destined to the children of my daughter Isobel; and which brewery and other premises, with brewing utensils, casks and other fittings, are appointed to be taken by the said children at the sum of L.4050 sterling, and that since the date of the said deed of settlement, the said John Hutton Syme has got possession of the said utensils, casks and other fittings of the said brewery, and pretends a right to the same as his alleged property; and it being still my wish, notwithstanding thereof, that the said brewery should be held worth the said sum of L.4050, although the said premises should be reckoned of less value at the decease of me and my said spouse, and although the said John Hutton Syme should persist in claiming right to retain said utensils: Therefore, I hereby appoint my said trustees to convey the said brewery to the said children, in terms of the destination in their favour by the said trust-disposition and settlement, and that pro tanto of the said third share, and at the value of L.4050 sterling, whether the same shall be reckoned worth more or less at the period foresaid, and whether the said John Hutton Syme shall or shall not retain the said utensils: And I hereby appoint the said trustees and their foresaids, to deduct the sum of L.900 from the share of my estate destined to the said children, and to pay the same to Miss Macfarlane and Mrs Greig, and their respective heirs, equally betwixt them, share and share alike, in addition to their shares: And moreover, I hereby declare, that any sum or sums paid by me to the said John Hutton Syme, or on his account, or retained by the said John Hutton Syme after the date hereof, whether in name of allowance for interest on L.2000, or in any other manner of way, or on any pretence whatever, together with any claim which he may make in name of the Hutton Park Brewery Company, or in his own name, for the use of the said utensils, shall be held by my said trustees to form part of the share allotted by the said trust-deed to the children of the said John Hutton Syme, and my said daughter: And further, considering, that, by assignation, dated

from Smith, trustee

on the sequestrated estate of the said John Hutton Syme, I obtained right to a policy of insurance with the Edinburgh Life Assurance Company, being No. 427, for the sum of L.1500 on the life of the said John Hutton Syme, I hereby appoint my said trustees to continue the said insurance, by paying the annual expense thereof, and on the decease of the survivor of my spouse and me, to assign to the said children of my daughter Isobel the said policy of insurance, and all benefit arising therefrom; but, in accounting and setting aside the share of my estate destined to the said children, my trustees shall deduct from the said share all sums of money paid by me or my said spouse, or by my said trustees, for premiums and expenses of said insurance, and interest thereon, from the time of our and their paying the same till charged to the said children; and which sums paid for premiums and expenses of insurance, and interest thereon, I order to be added to the shares of my said daughters, Mrs Greig and Miss Macfarlane: Provided nevertheless, that if the principal sum insured be recovered during my life or that of my spouse, then the said principal sum shall be divided equally into three shares, where-

was the object of the present action to reduce. The grounds of reduction were fraud and circumvention, appearing as well from the deed itself, as the manner in which it was obtained, and imbecillity on the part of the granter. These allegations were met by the general issue. 16 July 1835. Syme, &c. v. Macfarlane, &c.

The following were the issues:

'I. Whether the codicil, bearing date the 19th day of November '1831, of which No. 5. of process contains an extract, is *not* the deed 'of the late Peter Macfarlane, merchant in Alloa? Issues.

'II. Whether, on or about the said 19th day of November 1831, 'the said Peter Macfarlane was a person of a weak and facile mind, 'and easily imposed on; and whether the defenders, or any of them, 'taking advantage of his said facility and weakness, did, by fraud or 'circumvention, wrongfully obtain or procure the said deed, to the 'lesion of the said Peter Macfarlane?'

To prove the state of mind of the testator several witnesses were adduced on both sides.

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of one share shall be paid to Miss Macfarlane, one share to Mrs Greig, and one share to the said children, and the sums paid for premiums and expenses of insurance shall not then be added to the shares of Mrs Greig and Miss Macfarlane: Further, I hereby appoint my said trustees, after the decease of me and my spouse, to set aside a proportion of the means and estate destined to my daughter Isobel's children, for keeping up the said insurance for behoof of said children, if they shall think it advisable to do so: And further, I hereby not only revoke all provisions made by me in favour of the said John Hutton Syme by the said deed of settlement, or in any other way whatever, but I, with consent foresaid, declare that the said John Hutton Syme shall have no concern with the management of my estate generally, or of that portion of it which is destined to his said children, his right of administration in the said portion being hereby expressly excluded: And I hereby declare that all acts or deeds done by the said John Hutton Syme, with the view of affecting my said estate, whether generally or particularly, shall be null and void, and of no force, strength or effect whatever; and I do hereby debar my said trustees from ever choosing the said John Hutton Syme to act along with them as a trustee, in virtue of the powers conferred on them by the said deed of settlement; and I hereby recall and revoke the appointment of Ebenezer Ramsay, writer, Alloa, as one of my trustees, and I declare that he shall not be entitled to act under the said trust-disposition and settlement: And I hereby appoint this codicil, and the others written at the end of the said deed, to be held as integral parts of the said deed of settlement; and I consent to the registration hereof, and of the other codicils foresaid, in the books of Council and Session, or others competent, therein to remain for preservation; and thereto I constitute Mr John Hope, advocate, my procurator, &c. In witness whereof, these presents, written on this and the preceding page of stamped paper by William Ferguson, writer to the signet, are subscribed by me, and by Mrs Jean Henderson, my spouse, at Mar Street, Alloa, the 19th day of November 1831 years, before these witnesses, Joseph Donaldson and John Guthrie, both shoemakers in Alloa, and the said William Ferguson, witnesses also to our subscribing the marginal note on the first page hereof, written by said William Ferguson. (Signed) PETER MACFARLANE, JEAN HENDERSON, *Wm Ferguson*, witness, *Joseph Donaldson*, witness, *John Guthrie*, witness.

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Pursuer's Evidence.

The first witness examined for the pursuer, James Glen, merchant in Alloa, came to settle in Alloa in May 1831, and took the stock of the testator at a valuation, and succeeded him in business. The matter was previously arranged by letters written by others, but signed by the testator. He had seen the testator occasionally, before settling in Alloa, but not for some time. When he came to Alloa he found him in a very different state from what he had supposed from the letters. 'He was in a very imbecile state 'both of body and mind.' He had family worship at this time in his house: he went through the prayers himself; 'but from the 'weakness of the man's mind, and the repetitions he made, it was by 'no means edifying to those in his company, and he did not think 'by any means beneficial to himself.' For several months after witness came to Alloa, the testator was almost every day in his shop. On one occasion he came into the shop and 'pulled out the till, 'looked into a drawer where he saw some money and a letter: he 'took the notes into his hand, and apparently was going to take 'possession of them; but when he saw the direction on the letter 'he was conscious that he was in an error.' Witness collected the outstanding debts of the concern on account of the testator, and on several occasions had to pay him money. He did not appear to be aware whether he was giving or receiving money. Interrogated whether, 'about the end of autumn 1831, he was, in witness's opinion, 'capable of doing business? By no means. Was he possessed of 'mind sufficient to enable him to dispose of his own effects by a 'settlement to take effect after his death? I don't think so. Did 'you think he was capable of retaining any distinct notion of the 'contents of a deed or paper that was read to him? I do not think 'so. Do you mean to say, if it was read over to him, or if he read 'it himself? I do not think either if it was read over to him or 'if he read it himself, that he would understand distinctly what it 'meant. Did you hear him give any directions about family mat-'ters? He did not appear to take any active charge.' Several months after witness came to Alloa, a misunderstanding took place between him and the testator's family about the shop books, and he saw very little of the testator afterwards.

Thirteen other witnesses from the neighbourhood of Alloa were examined, and a merchant from Glasgow, who was there occasionally. All those who had opportunities of judging agreed in stating, that Macfarlane had been an active, intelligent man, and took the charge of his business and property till about the time when he gave up business. One witness also stated, that he called upon him soon after the execution of the codicil, to ask for his vote at the ensuing election, but that he found him so incapable of giving it, or understanding what he wanted, that he regretted having called, and

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that Mr Macfarlane did not vote. All the witnesses spoke more or less circumstantially to the fact, that the mental and bodily faculties of the testator were greatly impaired, from the period stated in the preceding testimony, and that his speech was so much affected that he was scarcely intelligible. The instrumentary witnesses were also examined for the pursuer.

Joseph Donaldson, after identifying his signature, and stating that a part of the paper was read over in his presence, interrogated, inter alia, 'After the man stopped reading, did Macfarlane sign any 'paper? Yes, he signed one. More than one? I do not recollect 'exactly. Did you sign more than one? I do not recollect of sign-'ing any more. Where was Macfarlane sitting? At the side of the 'fire. Was the paper in his hand at all? I don't think it was. 'Was any thing said by Macfarlane during this interview? I don't 'recollect of him saying a word. Was there enough of the paper 'read that you could understand any thing about it? No. Did Mac-'farlane come forward to the table? He sat where he was sitting 'beside the fire; the table extended to him. It was a large table: 'we were sitting all round it: he signed his name. With difficulty? 'Dare say he did,—think he did.'

John Guthrie, the other instrumentary witness, after identifying his signature, interrogated, inter alia, 'Before Donaldson came in, 'was there any paper read? No. When you first went in was the 'writer writing any thing? Yes, he was writing. Now, after he 'finished writing, what happened? The writer stood up and 'asked Macfarlane to put his name to the paper. Was that 'the first thing done? To the best of my recollection it was. 'What happened then? Macfarlane was sitting on the right side, 'and they assisted him round to the table. Did he say any thing? 'He never spoke the whole time. Nor made any motion? No. 'After being turned round, what was the next thing? The writer 'was making a pen. Miss Macfarlane desired the pen to be made 'hard for her father, and after the pen was made, Mr Macfarlane 'got the pen. Did he sign his name? Yes. Had he much diffi-'culty in signing? Yes. Was there any thing read? A small piece 'of it before he signed it. Of the same paper he signed? Could 'not be sure as to that. Did the whole appear not to be read? No. 'Were you sure of that at the time? Yes. How is it you came to 'see the whole was not read? Because he did not take up so much 'time as to read the whole of it. Was the paper turned over? 'To the best of my recollection it was not. Did it occupy a short 'time? Very short. Were there more papers signed than one? 'To the best of my recollection I think not. Do you recollect 'any thing of what was in the part of the paper you heard read? 'No. Did you understand the meaning? No. Was there any

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'thing in the part read in your recollection about Mr Syme? No. 'thing of that kind. About the brewery? No. Are you sure? 'Quite sure. Do you recollect whether you signed your name 'oftener than once? I don't think I did oftener than once. Were 'there more papers lying on the table than one? Other two small 'papers. You can't say whether the paper you heard read over was 'the identical one you signed? I can't say as to that. How was Mac-'farlane sitting when the writer read over the paper? He was sit-'ting with his face towards the fire-place, with his head down, look-'ing towards the fire. Did he appear to take any interest in what 'was going on? No;—no interest. Were you told when you were 'brought into the room any thing of the nature of the paper? No. 'Had you ever witnessed a deed before? No. Was he asked to 'sign oftener than once? I think he was asked twice. Each time 'by the writer? Yes. Did any body else ask him? I don't recol-'lect. What led to his being asked to sign a second time? He did not 'appear to be paying any attention to what was going on. He 'made no answer. Mrs Macfarlane rose up and assisted him. His 'back was to the table. During the time you were in the room, 'was Macfarlane walking about? He never rose off the chair. At 'the time you saw him, was he able to walk without support? He 'sometimes walked himself, sometimes with one servant, sometimes 'two.'

Defender's Evidence.

The first witness examined for the defender was Mr William Ferguson, W. S. who stated, that he prepared the trust-deed above mentioned for the testator, and met with him several times in Edinburgh on the subject. 'In 1831 I received a note from Mr James 'Greig jun. saying that Mr Macfarlane wished a settlement, and 'requesting me to call on Mr Greig; and I went and called, and 'found that Mr Macfarlane had desired a codicil to be made, ma-'king certain alterations. This was Mr Greig's information to me. 'I had not the scroll of the trust-deed, or the deed itself; therefore 'a difficulty of my writing out a codicil in the circumstances. I 'then applied to Mr Greig, as he was the son-in-law of Macfarlane, 'and because Macfarlane desired me originally to consult with Mr 'Greig in 1827 and 1828. Mr Greig prepared a scroll of what 'he conceived Mr Macfarlane's intention to be. I looked it over, 'and sent it to Mr Macfarlane, with a special letter, stating that Mr 'Greig applied to me, and wishing to know if he approved of it. 'I got it back with a letter written in another hand, but signed by 'him, approving of it. Did you submit it to counsel? I spoke to 'Mr Greig about it, who thought it would be better to consult Mr 'Jameson, who had something to do in a previous business with Mr 'Syme; and it was sent with the scroll, now in my hands, and

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'other papers. There are some alterations on it, which were made 'after being sent to Mr Jameson.' Witness and Mr Greig arranged to meet at Alloa, to get the deed signed. 'I went and took 'the scroll with me, and the card of Mr Jameson also. What did 'you do then? I went to Mr Macfarlane's house, and saw him and 'his wife, and one of his daughters. I may mention that I had 'come there, and asked if Mr Greig was come: they said not, but 'expected him to call, and he did come a short time after. Did 'you read the scroll to Mr Macfarlane? I read the scroll over to 'him, and asked if he understood it, and he said, Yes. I saw it 'would not do to write it on the original deed. I had another sheet 'of paper, and altered it to make a separate deed. It was read over 'twice in the scroll to Mr Macfarlane. Was Mrs Macfarlane pre-'sent? Yes, she was. Did you satisfy yourself that he understood 'it? I thought that he had satisfied himself, and that he understood 'every thing that I said about it. After being so satisfied, did 'you extend it then? I extended it on the stamp. After it was 'extended, did you read it again? I read it again. After that 'it was executed? They were sent out to get witnesses. Do 'you recollect if it was read in presence of the witnesses? It 'may not have been read, but Mr Macfarlane owned, before the 'witnesses, that he had heard it read. Then it was executed? 'Yes. You are not sure if it was read when they were there? 'No; but I said before the witnesses that they had heard it read, 'and were satisfied. Mrs Macfarlane is also a party to the deed? 'She is a party as consenter. After all that it was signed? It 'was signed in presence of two persons who were got in to act 'as witnesses. Did you go away after it was signed, or did you 'remain? I stopped to dinner. Was Mr Macfarlane at dinner? 'Yes. Had you any conversation with him? Very little. Did 'you observe who asked a blessing at dinner? I rather think it 'was himself that did it. Did Mr Macfarlane appear to you to 'to be in possession of his faculties? So far as I could judge I un-'derstood him to be that way. And capable of making a settle-'ment? I considered him so; I made a memorandum at the time 'on the scroll. *Cross-examined* by the Dean of Faculty for the 'pursuers. Who was present in the house at the time of the exe-'cution? Mr Greig and Mrs Macfarlane, and Miss Macfarlane, 'and the two witnesses. Did you see Macfarlane any time before 'this business? I think I saw him after the date of the trust-deed; 'but how long after 1831 could not say. When you saw him in 1831 'was there much change on him? He was rather thinner; I rather 'thought he could not see so well. Was his speech very bad? 'Much the same as before. Did he speak about the same way as

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'in 1828? I think so: I don't exactly recollect. His speech was 'not inarticulate? No. Was it difficult to understand him? No. 'Was he moving about the room? He walked round the room. 'With any difficulty? I thought Miss Macfarlane assisted him 'once, but he walked about without assistance, and I did not see 'him get assistance at that time, except just when he was going 'out. Except being a little thinner, you saw no change on him 'since 1828? I did not observe much difference. Was his speech 'affected at all? I did not observe his speech affected. He spoke 'less? He spoke less. Now, when you read over the scroll the first 'time, what passed? I asked him if he understood it, if he approved 'of it; he said yes. Did he make any remark? I don't think he 'made any remark. You were perfectly satisfied he understood it? 'I was satisfied he understood it. Then you altered the phraseo- 'logy to make it a separate deed? A few words of style at the 'commencement. And then having made these alterations in point 'of style, you read it over again? I read the whole over again. 'You had no doubt the first time he understood it? I thought he 'understood it quite well. What passed the second time? I asked 'if he understood it, and was satisfied, and he said yes. Did he 'make any remark the second time? No, I don't think he did. 'Did you call his attention to any particular part more than an- 'other? No, I read it over slowly. These three alterations are Mr 'Jameson's.' (Identified them). 'You had thus read over the 'scroll before the alteration in point of style was made, and had 'no doubt he understood it: Did you extend it at the same time? 'I remained in the room and extended it: He was out and came 'in again. How soon did you read it over a third time? Imme- 'diately after I had finished it. Were any remarks made by him 'then? No remark. Before the deed was signed, was there any 'thing else said by him than simply yes? Nothing more said. You 'arrived before Mr Greig, when you saw Mr Macfarlane, you stated 'you told him you had come in consequence of Mr Greig's ap- 'plication, and the letter, did he make any remark then? No. 'After the deed was signed, and a short time before dinner, any 'conversation? No. You said you had very little conversation with 'him at dinner—had you any at all? I drank to him. I don't re- 'collect of him speaking at all. You say you think he asked a 'blessing, was he able to speak quite distinctly? I think he did 'just as before, but it was very short. Did you see any symptoms 'of one or more shocks of palsy about him? No. Were you aware 'whether he had retired from business? I believe I was. He was 'not infirm? He walked through the room like a person that had 'been ill, but I don't think that he walked very stoutly when I saw

'him in 1827. But no palsy? I did not observe that. When you 16 July 1835.
'read the deed what did he do? He was sitting in the chair. Was
'he looking at you or at the fire? I did not observe. Had he to Syme, &c. v. Macfarlane, &c.
'turn round when he signed? No, I understood he was attending
'to what was reading. Who gave him the pen? I think I perhaps Defender's Evidence.
'did: I don't recollect exactly: I thought he did not see so well.
'I asked him to write his name first upon the scroll. Was this be-
'fore or after the witnesses came in? I think before. Did you ask
'him to sign oftener than once? I asked him to write his name
'once or twice, he sat at the table and did it. Did you ask him to
'subscribe the deed more than once? No, I pointed it out to him,
'and he signed his name. You said something you may wish to
'clear up; you said they owned before the witnesses—what did he
'say? Did he say more than yes? No. You had read the extend-
'ed deed over to him, after the witnesses came, and you asked him
'again if he understood it and was satisfied, and he said yes a fourth
'time? Yes. Did you think in that short interval you heard him utter
'any thing but yes or no? I think he might have said he wished
'to go out of the room. In the way of conversation to you, do
'you think he addressed any thing more to you? I don't think
'he addressed any thing. You did not call his attention to any
'part, or make any remark? No remark, except reading it in parts.
'Occasionally I stopped, and asked him if he understood each part.
'He said yes always. I don't think he made any remark. Did
'you read it the second time piece-meal? I read it the same way.
'How did you read it the third time? I read it slowly over, without
'perhaps asking him except at the end. You say you got your in-
'structions first from Greig, and had some difficulty when you first
'saw Mr Greig; what passed? He said there were some disputes
'between Mr Syme and Mr Macfarlane in some business. I don't
'recollect what it was about, but some documents which were before
'Mr Jameson before were sent to Mr Jameson with a memorial.
'What farther did Mr Greig say? His instructions were nearly
'similar to what is in the scroll. Can you tell me what it was Mr
'Greig told you? He said there was some money which Mr Syme
'claimed from Mr Macfarlane, and he wished that to be imputed
'to the share which Mr Syme's children were to get, and some in-
'surances on Mr Syme's life, and he was to leave that in the way
'mentioned. When you went to him, was it that you were at a
'loss, from the nature of the instructions, or because you wanted
'the trust-deed? I had not the deed to see how the thing stood.
'I went to Mr Greig, and thought it better for him to prepare it.
'And so you begged him to prepare the scroll? My reason was,
'that I had not got the deed, and in consequence of the letters I

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'had formerly received from Mr Macfarlane. Have you the ori-
'ginal scroll? No; I searched for it and could not find it. The
'memorial was sent with the scroll to Mr Jameson, that he might
'understand the object of the scroll? Yes. Did you read that me-
'morial? Yes, and I returned them to Mr Greig. Now, when was
'it Mr Macfarlane was walking about the room? After I arrived,
'I observed him walking about occasionally, I was writing at the
'table. Was he walking about the room while the instrumentary
'witnesses were there? I can't say.' (The Lord Justice-Clerk here desired the witness to read over the memorandum written by him on the scroll, of date 18th November 1831, to this effect): 'Read
'over this codicil to Mr Macfarlane, and he informed me it met
'his views in all points. Mrs Macfarlane was also present, and
'approved it. I then extended it on stamped paper, and read it
'over to them both again, when they again said they were satisfied
'with, and approved and executed it.' His Lordship then said,
'What I want you to explain is, whether this memorandum had
'reference to nothing else but what you have now stated.' Witness.
'I merely asked him if he understood it, and approved of it, and he
'said yes.'

The next witness was Mathew Paterson, bookseller, who stated, That he was intimately acquainted with the testator for fifteen years, and was in the habit of visiting him at Alloa. Had you any conversation with him recently before he left Alloa; what observation on state of mind then? Not affected, except difficulty in articulation. When he got over the difficulty, was he intelligent? Always pointed in his remarks. He discovered adequate knowledge on subjects on which he was talking? Perfectly so. Then you did not observe any remarkable deficiency of intellect? No; I did not discover it. He came afterwards to live near Newhaven, did you see him there? Occasionally. What observation then? His speech seemed more affected, but his mind much in same state: if any subject was introduced in conversation, same interest as formerly. Was the state of health and utterance such as might have led a person not so well acquainted with him as you, to have some doubts about his intelleot? Yes. Do you apply that to time in Mar Street? Not so much, but partly then. I understand you to say bodily health worse? Speech affected, but bodily health better. Would you have had any hesitation in transacting business with him when in Mar Street? No; I would have had full confidence. By which I understand you to say, you would consider that you were transacting with a person capable of understanding the matter in hand? Yes. From what you saw of him, would you have the least doubt he could have made a will, that he was capable of un-

derstanding a settlement of his affairs? I should suppose so: if capable of transacting other business, I should have supposed him quite capable. Would you have had any doubt? None in my own mind. Would you have had any doubt at Newhaven? Quite the same as far as I could discover: no apparent change: there might be difference, owing to difficulty of expressing himself: he was quite the same as when in Alloa. Did you visit him in harvest of 1833? Yes. Did you go to church with him? Yes. After church dined? Yes. Had you any conversation with him there? Yes; chiefly in reference to sermon and clergyman, the Reverend Mr Harper. How did his remarks strike you? We had a conversation in reference to sermon: he seemed very much interested: his remarks exceedingly pointed: quite in the usual way, so far as he could express himself. You have heard him say grace in his own house, how did he go through that? Very sensibly. Did you happen to observe his appearance on any subject in which he did not take any interest? He looked absent. But when a subject occurred in which he had interest? It was all vivacity and interest. Then the result of your impression, that great difficulty of expressing himself, but he had the use of his faculties up to period of death? Yes. *Cross-examined* by the Dean of Faculty for pursuers. At the time you saw him in Mar Street, did you think his mind at all affected? Not at all. When you first saw him there was his speech at all affected? Yes. Was it difficult to understand him, if a person not accustomed to him? I should think so. How long had his speech been affected in this way before he went to Mar Street? I could not distinctly specify. Have you any doubt? From time of attack, no distinct recollection as to period. He was in his shop at time he got this stroke? It is my impression still in business. Suppose you had seen him for first time in Mar Street, would it have been difficult to understand him? I found always a difference with strangers: he never expressed himself freely with strangers.

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The next witness was Dr Combe, surgeon in Leith, who was called to attend him in October 1833, more immediately in consequence of rupture. He found he had laboured under some kind of paralysis, which originally affected the lower limbs, but latterly extended upwards. The seat of the disease in the first place was the head of the spinal marrow, latterly it affected the whole organ, and as it increased, the speech was affected. Although symptoms of palsy, his mind might have remained quite entire? It might. What opinion did you form of state of his mind from opportunities you had of seeing and conversing with him? I believe his mind must have been weaker than it was formerly. Had he remaining intellect? He had in some degree. Did he appear to understand com-

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munications you had occasion to make to him? His state of debility appeared to me to vary. Sometimes more acute than others? Sometimes more acute, sometimes more dull and obtuse. Was a similar difference observable in his communications to you? It seemed to me as if he were more able to understand questions put to him, than to convey his meaning to others. Was that from difficulty of utterance? I should think so. Do you think him a person who would have understood ordinary affairs? The difficulty would have been with him in understanding his intention, and not from his own difficulty in understanding. Palsy does not produce the effect you allude to at once? Sometimes the mind is destroyed almost at once; if spinal disease, there may be no mental impairment at all for a long series of years. Would you have inferred from what you saw of his complaint, he must have been at one time in a better state of intellect? I should think that the natural course of the disease.

The next witness was Mr Russell, who had been the testator's medical attendant for thirty years. What did you think the seat of the disease? I understood he had been a good deal behind the counter: it proceeded a good deal from that. Does that sort of palsy affect the understanding? In some cases it will affect the understanding, and I rather think in his case it did do it. Did you perceive any traces of his understanding being affected before he removed to Mar Street? No. How long did he continue possessed of all his faculties unimpaired? Up to that time. After that date, what symptoms did he exhibit of his faculties being impaired? He had not the entire control of his faculties from that date: he might have been controlled or influenced. Now, do you mean that after that date he was not able to understand any person if they had been to explain any piece of business to him? He was dull of hearing: he might be influenced or controlled. What do you mean, when you say you think he might be influenced? I think there was capability to a certain extent, but not full command of his faculties. Do you think if you had tried to make him do any thing unreasonable or absurd, you would have influenced him to do that? I could not say: I never made the experiment. Then you mean to say by his being easily influenced, that he could be brought to do that which he thought reasonable? I think so.

The next witness was the Reverend Mr Brotherston, minister of Alloa, who had known the testator many years. He was an intelligent man, and a person upon whose advice he would have depended. When his speech became affected he had little conversation with him, but he acquiesced in what he said. He did not consider himself qualified to judge whether he was or was not latterly capable of making a settlement.

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Five other witnesses were examined, who stated, that so far as they had opportunities of judging, it did not appear to them that his intellect was materially affected.

The Reverend Mr Harper of Leith was also examined, who knew him in 1832. He was a member of his congregation, and attended service regularly. 'Did you visit him? I did occasionally. 'You have had conversation with him? Not conversation properly 'speaking: he spoke in monosyllables, but I often spoke to him: 'he had great difficulty of utterance. Was your connection such 'as to enable you to form an opinion of his intellect? I supposed 'from his appearance that he understood me. He always was in- 'telligent? Yes. His eye intelligent? Yes. Had you any idea 'that he did not perfectly understand what was said? Unless parti- 'cular instances, could not speak positively. My impression gene- 'rally, that he understood what I said to him. Did your acquain- 'tance continue down to about his death? It did. Any change in his 'appearance? He became feebler, but the change so gradual, that I 'could not perceive it: it was gradual, except at the last. When 'you first saw him, his countenance quite intelligent? Generally 'was so in conversation. Have you any doubt he understood 'what passed in divine service? From what I understood, in pri- 'vate, I did not think he could follow it as a train of thought, but 'he understood so far as to derive benefit from it. Did you ever 'engage with him in private religious exercises? Frequently. Did 'he appear to join with intelligence? I thought so,—at times with 'marked feeling. How did he receive you when you came to see 'him? Very kindly. He shook you by the hand? Yes, very af- 'fectionately. Did he appear observant of what was going on? 'When spoken to he did.'

Defender's Evidence.

The *Lord Justice-Clerk* charged the Jury as follows: I consider that my duty will be best discharged by pointing out the real question for your decision, taking a general view of the evidence, submitting a few observations on the nature of the evidence, and then leaving you to draw that conclusion which, in your conscience, you conceive you are enabled to arrive at. The first thing to attend to is what is put in issue. (His Lordship read the issues.) In considering the first issue, the question is, whether or not this codicil was the true deed of this old man. It is undoubtedly my duty to state to you, that this depends on your opinion as to the weight of the evidence which has been laid before you, as to the actual state of his mind. If he is proved to you to have been in a state of incapacity—incapable of knowing the nature of this deed which bears his signature —incapable, from the state of his mind, of understanding it—if that

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is your opinion on the evidence, you can have no difficulty in finding that it is not his deed. On the other hand, if it has been proved to you that he was in a state of mental capacity, such as that he was capable of understanding the nature of the deed, and was at the same time the true mover in it; if it was his own will, the subject of his own volition, that of course would be evidence sufficient to enable you to return an opposite verdict. It is my duty further to explain to you, that undoubtedly the rule of law is, that a person may be able to execute a deed disposing of his property, though not at the time possessed of his faculties to the highest degree. If there is evidence to shew that he had knowledge of the deed, and that it was a full and fair declaration of his will, it is not necessary that he should be in full possession of his original mind. If however the deed which he executes is one of a complicated nature, one that requires considerable attention before its true nature is understood, then the rule of law is, that he must be possessed of greater capacity than what I have just alluded to, and it must be proved that he gave very pointed instructions in regard to it. Such a deed as this would make the case very different from that of a man merely disposing of a certain sum or subject by will, and selecting a particular person to take it. If the deed is clearly one that must have been preceded by special instructions, the law will require, common sense will require, and you, a jury, will require a greater degree of capacity. Another general observation is this: In every question, whether a person is capable or incapable of making a certain deed, the way and manner in which it was prepared, the way and manner in which the instructions were given, must always be a strong ingredient in the evidence. It must be distinctly shewn to have proceeded from the maker, and not to have been concocted by any other person. He must be the origin of the deed which is challenged. If it shall have been proved that the instructions in such a case proceeded from, or were materially concocted by a person having an interest, or taking benefit by the deed, that certainly is a strong ingredient in the evidence. It gives strong ground of suspicion, and makes it essential that there should be most satisfactory evidence that the person who did execute it was thoroughly capable of understanding it in all its bearings, and that it was, in short, his instrument.

With these general observations, consider now the nature of the question which is before you. You have had this codicil commented on by the counsel on both sides. On the part of the defender, one view is taken, which, if made out to your entire satisfaction, might have been a material circumstance in the case, viz. that when compared with the trust-deed executed in the year 1828, this codi-

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cil is not in fact materially injurious to the interests of the children of Mr Syme. I may notice by the way, that it was further stated to you, that that gentleman was in substance a pursuer here; but I must tell you that the children are the sole pursuers. Though the fact is, that this summons was originally raised by H. Syme, both for himself and as administrator-in-law for his infant children, he undoubtedly no longer appears as a pursuer, nor does he now remain in that capacity, the children having applied to the Court of Session, who have appointed a person, who, in his room, at present concurs with them in pursuing this action. If it should appear to have been made out that this deed is really and in truth in no degree prejudicial to these children, the question would naturally occur, on what account is all this litigation? I am very much afraid, when you look at this codicil with attention, as it is necessary to do, that you must come to the conclusion, notwithstanding the gloss which may have been attempted to be given to it, that it is a deed necessarily prejudicial to these pursuers. I need only call your attention to the first stipulation, which, after narrating that the said A. Syme pretends right to a certain brewery, (having reference to that account to which I shall immediately advert,) it goes on to declare, that it shall be taken as of a certain value, whether actually worth the sum mentioned or not, at the decease of the granter or his wife; and being to be held as of that value, it was to be imputed to the third share which was to go to these children. (His Lordship quoted the clause at length.) Certainly this is a clause which you must be quite satisfied does limit the extent of value of what these children were to take from the succession of this gentleman. It appears that the most effectual part of this stipulation was suggested by Mr Jameson, in consequence of his attention being called to the disputes between Mr Syme and the deceased, the particulars of which were stated in a letter to this effect, to have been contained in a memorial which also accompanied the scroll. That memorial would have spoken for itself, but it is not before you, having been rejected by me on a point of form. Then follows the deduction of L.900. In respect to the policy of insurance, the matter just stands in this way, that if Mr Syme should predecease the granter and his wife, then the proceeds of the policy were to form a part of the general fund of division; but if, on the other hand, Mr Syme should survive, then the children would have no benefit by the succession to this extent, without paying premiums during the father's life. Therefore there can be no ground for doubt, that there is no foundation for supposing that this is not a codicil which materially affects the interests of the pursuers. If, then, it materially affects the interest of the pursuers, by diminish-

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ing the value of their succession, it just goes so much more to benefit the families of the other two daughters. Thus, then, there is clear proof of the interest the other party had in regard to the codicil now under your consideration.

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There remains that other part of the case, which I said before is a most material feature in every case of this description, the concern which it is proved Greig had in regard to the preparation of the codicil. You will have to attend particularly to the evidence of Fergusson, the professional man who wrote it, and was present at its execution, particularly to the testimony he gave as to its preparation, and from whom he received his instructions. There is no evidence as to one syllable of its contents having been ever communicated to him from the mouth of the granter. Mr Macfarlane was in Alloa, he in Edinburgh. The first communication to him on the subject is from Greig, who tells him that an alteration is to be made on the previous settlement of Macfarlane. Fergusson was the person who made the previous deed in 1828, and the circumstance of going directly to him shews no apprehension on the part of Greig in making a full disclosure. No stranger is applied to, no new writer who knew nothing of the former deed,—the application is made to the same person: so far it goes into the same channel through which the former deed passed. But then you will have to attend to the way in which he is instructed, and the statement he makes. After receiving from Greig, the son-in-law of Macfarlane, a letter communicating what he thinks the purpose of Macfarlane, saying, I now inclose you what is proper for Mr Macfarlane's settlement, Fergusson not being in possession of the trust-deed, had the greatest difficulty in proceeding. He could not frame the codicil, even with this suggestion from Greig. He tells you he naturally fell back on Greig, asking more information. And what does he say he did then? He desired Greig to prepare the scroll himself. So that you have Mr Greig, a person you see has benefit by that deed, first supplying materials to Fergusson, and these being insufficient, setting about preparing the scroll himself. Then it is sent to Mr Fergusson, and he knowing that Mr Jameson had been consulted before, applies to him, and submits it to him, and he suggests an alteration, which led to that clause in the deed, which makes it effectual whether Mr Syme should or should not persist in maintaining possession. You are also bound, however, to keep in view, that there is complete evidence that Fergusson did not think this communication from Greig sufficient, for he sent a letter to Mr Macfarlane, by desire of Greig himself. In this letter he asks Mr Macfarlane to peruse the scroll which he had been instructed to prepare, and to say whether it was agreeable to his will

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or not. Fergusson states to you, that it was returned to him with a letter in the handwriting, not of Macfarlane, but it bears his signature. We have seen no writing of Macfarlane, but his signature. This letter is written by Miss Macfarlane, in name of her father, stating that he did approve of that scroll, and it bears the signature, Peter Macfarlane. That is the progress of the preparation of this scroll. Then Fergusson says, he made an arrangement with Greig to be at Alloa: that he accordingly proceeded there, and went directly to the house of Mr Macfarlane. He there finds Mr and Mrs and Miss Macfarlane. Greig is not there, but he arrives soon after. He stated to you minutely, that he proceeded to read the scroll to Mr Macfarlane, that he read it paragraph by paragraph, and asked him at each passage, whether he was satisfied and approved of it; and he said, that the way and manner in which he received satisfaction from Mr Macfarlane was by his uniformly pronouncing the word, Yes. Then he tells you, he found it necessary to write it on a piece of stamped paper by itself, and that he accordingly wrote it over again on another piece of paper, and that it was the same in substance as formerly, with a slight variation in the words of style; after which he again read it over slowly and deliberately, repeating the same series of questions, and receiving the same answer. He then extended it on stamped paper, and read it slowly over a third time, when he put the same general question, and got the same sort of answer, viz. the monosyllable yes. He then wrote the memorandum which was read to you by himself. (Here his Lordship read the memorandum.) You will consider what necessity there was to make this memorandum. This I must say to you, that if the words mentioned there had been actually uttered by Mr Macfarlane, you must have been perfectly satisfied. But that detail of Fergusson is a very different matter. He has told you that when he put the question, he never received any further answer than the word yes. Look at your notes, and I think you will find that Fergusson does not, from the beginning to the end of his testimony, mention a single word he ever heard him say more than this word yes, unless it was that on one occasion he indicated that he was going to leave the room. Then he says that he saw no difference in him since he saw him in 1828. That can only be satisfactorily accounted for, by his having had very little intercourse with him. No witness was asked if he could pronounce the word yes easily. That would have been a very good question to ask Fergusson, when you had him swearing that he perceived no difference in his speech. I thought it necessary for your satisfaction to put the direct question to Mr Fergusson, what was the meaning of the words in his memorandum; and his

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answer was, that he only meant, that in reading it over he asked if he understood it, and he said yes. Besides Fergusson's evidence as to the way and manner in which the deed was executed, you have had the testimony of the two instrumentary witnesses. These persons were no doubt called by the pursuers; but it is not likely the defenders would take exception to their evidence. These witnesses swear that there was a partial reading while they were in the room; and one of them says, that the leaf was not turned over. They both say, that, in their hearing, there was nothing read which had the least relation either to Syme or to the brewery. You will recollect the sort of evidence they gave as to the share the old man took in the matter: they say, that he sat with his face towards the fire; and when it became necessary that he should sign, he was moved round to the table with the assistance of Mrs Macfarlane; that a pen was prepared, and that his daughter asked for a hard one, and that he wrote with considerable difficulty. Mr Fergusson said, that he made him try to write before. The witnesses say, that when the operation took place, he was assisted round to the table, and with some difficulty put his signature to the deed. None of the witnesses say any thing as to Mrs Macfarlane signing, although she was a party to the deed. Whether their recollection is good or bad, you have their testimony before you. You will compare the testimony of the instrumentary witnesses with that of Mr Fergusson; and you will judge what satisfaction you have from the whole of that evidence, as to the condition and state of mind Mr Macfarlane was in when he put his signature to the deed. There is no doubt he did sign it; but the question is, was he thoroughly acquainted with it, did he know its nature, did he thoroughly understand it, did he give full assent to it, was it his act of volition at that time? In judging of this question, attend to the evidence of capacity generally: it is necessary for you to pay particular attention to the great bodyof evidence.

In the first place, there is not the slightest doubt that this old man was affected with paralysis, that his power of walking was impaired, which made him require assistance. After he went to Mar Street, he was never seen walking without assistance. Fergusson is a solitary witness to the fact, that he walked about the room without assistance. He said he did not see any thing wrong with his gait, although he does swear that he was assisted by his daughter on leaving the room. Look at the body of evidence as to his speech, keeping in view that various persons were examined who had been in the habit of transacting business with him. All of them, I think, with the single exception of Fergusson, concur in saying that his articulation was greatly affected, and that it was

hardly possible to understand him, particularly when he attempted to speak to strangers. That his speech was greatly affected, there cannot be the slightest doubt. Then look at the medical evidence of the defenders themselves: see what they say as to the nature of paralysis, when the speech is affected. Dr Combe says expressly, that when the speech is affected, they have always a suspicion that the brain is to a certain extent injured. You will recollect the situation in which this poor man was, when he was visited by the respectable clergymen who gave their testimony. One of them states, that he was without the power of speech at all. No doubt his malady had increased; but from the first, his voice appears to have been greatly affected.

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Turn again to those persons who had more or less continued intercourse with him, and who also have given their opinion as to his capacity. The first witness who was called by the pursuers was Glen. No doubt it came out, towards the close of his examination, that he had a feeling of a particular nature which he did not disguise. He stated positively that he had been led by correspondence to form a conclusion, both as to Macfarlane's condition, and particularly as to the state of the business, different from what he had anticipated: That he had thus been induced to give a valuable consideration for what he did not in reality receive. You will consider what effect this circumstance might have on the testimony he gave as to the condition of old Macfarlane's mind. He further admitted that he was the person employed by Syme to get that account settled, which, as you have heard stated, was the origin of the whole of this matter. It is one of the documents before you. It is a remarkable thing that the sum as to which the misunderstanding is said to have arisen is not stated in a disguised manner. It is a sum equal to L.370, and is stated as a deduction of interest in regard to that provision of L.2000. It is this which led to the old man's dissatisfaction as stated, and which is said to have made him desirous to have this alteration in his settlements. Glen was the person who took this account, and, as he tells you, left it with Mrs and Miss Macfarlane in presence of the old man. It is a plain and intelligible statement; but he tells you that if they had any doubt about it, he was quite willing that they should apply to Mr Greig. At the end of twenty-four hours he received notice from Mrs Macfarlane that they were satisfied with it, and accordingly it bears the signature of Mr Macfarlane. I only notice this, because it is mentioned as a ground of exception to the testimony of Glen. You will judge of this. I may here notice as a remarkable fact, stated by Glen, and corroborated by many of the witnesses, that one of the daughters of Mr Syme was an inmate in the family at the very time Fergusson

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was there to have the deed executed, which she among the children now seeks to reduce as prejudicial to her interest. (His Lordship here went minutely over the evidence of most of the witnesses.)

Having thus before you this testimony as to the condition of the granter of this deed, you will again observe, that there is no letter from Macfarlane to Fergusson intimating his purpose of having such a deed prepared. The statement is first made to Fergusson by Greig, the interested person. Besides this, there is not a scrap of writing directing Greig to make this statement. If Macfarlane had been in a state of complete capacity, is it unreasonable to expect that he would employ some person to write his instructions even to this son-in-law? You will keep in view also, that the witnesses generally concur in saying that he wanted the power of articulation to a great extent; that he was unable to enter into a detailed conversation. You will notice that part of the evidence of Dr Combe, in which he says, that he did not think that he laboured under a difficulty of understanding what was said to him so much as under an inability to convey his ideas to others. If he had so much difficulty in communicating his mind to Mr Brotherston, a man with whom he was intimate, are we to take it for granted that he was perfectly able to communicate the whole import of this codicil?

You are now in possession of the evidence, and what you have to determine is, whether Mr Macfarlane was truly in such a state of capacity as, in the proper sense of the word, to execute this deed. If you think he was in such capacity, then you will find for the defender; but if, on the other hand, you think him incapable of understanding, incapable of giving directions, if he put his name to it without understanding it, then it was not his deed. You will consider also what evidence there is as to his having been influenced by any one. There is no evidence of any one coming to direct him; the only evidence as to this is to be gathered from the deed itself—the interest taken in it by Greig and the lady, who is one of the defenders—and the way and manner in which the deed was executed. This point is brought out in the second issue, and in respect to it you will also return such a verdict as you think warranted by the proof. (His Lordship here shortly recapitulated the main features of the evidence, as already detailed). I repeat again that it is a most important ingredient in such a case as this, that the party taking benefit by the deed is the principal mover in respect to its preparation; and with these observations I now leave the matter in your hands.

VERDICT for pursuers.

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Objection to production of document at trial sustained.

In the course of the above trial the *Dean of Faculty*, for pursuer, produced letters relating to the preparation of the codicil—from Mr Greig, W. S. to Mr Fergusson, W. S.—from Fergusson to Macfarlane, and excerpt from Fergusson's Day Book. He now called on defenders to produce the memorial sent along with the draft of the codicil to Mr R. Jameson for his revisal. The defenders had been already called on to produce it under a diligence. The schedule of writings served on the havers bore that the pursuers called for exhibition of a memorial relative 'to the said codicil sent 'to Mr Jameson.' Mr Greig, in his deposition as a haver, stated that the memorial sent with the codicil referred exclusively to other matters betwixt Mr Syme and Mr Macfarlane, and that no memorial relative to the codicil had been prepared, and he therefore declined producing it without the consent of the parties interested in it. The Commissioner sustained the objection.

Rutherfurd.—There was ample time for the pursuers to have appealed to the Court, before its rising, against the Commissioner's decision, or they might have applied for an extension of the diligence.

Dean.—It is competent for us to call at the trial for what the other party have refused. The period for reporting the diligence had not expired till after the Court had risen, and till then we could not properly ascertain whether a new or extended diligence would be necessary.

Lord Justice-Clerk.—The party knowing his remedy, and not having applied to the Court while it was sitting, this demand for an immediate production of the document cannot be complied with.

Lord Ordinary, *Moncreiff.* Counsel for Pursuers, *Dean of Fac. (Hope.) P. Robertson, A. M'Neill.* Agents, *Graham & Anderson*, W. S. *E. Ramsay* and *John Thomson*, Alloa. Counsel for Defenders, *Rutherfurd, M'Neill, Geo. Moir.* Agent, *James Knox*, S.S.C. *Mr Russell*, Clerk.

R.

SECOND DIVISION.

No. IX. 17*th July* 1835.

THOMAS DICK
against
ROBERT SMALL, ET E CONTRA.

(BEFORE THE LORD JUSTICE-CLERK (BOYLE) AND A COMMON JURY.)

ASSAULT.—*Damages laid at £.1500.—Verdict for pursuer, damages one shilling.*

WRONGOUS USE OF DILIGENCE.—*Damages laid at £.2000.—Verdict for pursuer, damages one shilling.*

Narrative. THE parties to this cause were butchers in Dundee. The Incorporation of Fleshers in that town possess certain slaughter-houses, which they rent from the burgh, and which are occupied by the members. Small had been a member of the incorporation for some time: he was understood to occupy one of these slaughter-houses as such, and he was also in possession of another, over which he had put up a sign-board with the name of his son painted upon it. This slaughter-house had been previously occupied by a person of the name of Smith, a deceased member, whose widow had for some time been allowed to occupy it by tolerance. Dick was admitted a member, and conceiving that he was entitled to take possession of the said slaughter-house as a vacant one, in the character of member, he applied to Mrs Smith for the key. She stated to him that the key had been for some time in Small's possession, he having obtained it from her as a loan, and not having returned it. Dick then obtained from her a letter, authorising him to have the door opened by a smith, whereupon Dick proceeded with a smith and one of his men and some sheep, and made an entry. Upon this Small having arrived, ejected Dick and his accompaniments, and according to the evidence of several witnesses called by Dick, assaulted him in a violent manner. Witnesses were called by Small, who extenuated the offence, but both seemed to concur in Dick's remaining passive, so far as regarded acts of violence. It appeared from the evidence of the box-master of the incorporation, who was called by Small, that he had let the additional slaughter-house to Small, prior to Dick's admission, and this, according to

his statement, he had a right to do. After raising his action of damages against Small, Dick personally instructed a messenger to execute arrestments in the hands of various bankers, and also against parties with whom Small had cattle, to the full amount of the damages, while Small at the time (as stated by the messenger and other witnesses) was in good credit; hence the counter action at Small's instance. 17 July 1835. Dick v. Small, et e contra.

The two actions were tried together. The following were the issues:

Whether, on or about the 10th day of September 1834, in or near a slaughter-house near the Craig Pier, Dundee, and in the court adjoining thereto, or in one or other of the said places, the defender did violently assault the pursuer, to the loss, injury and damage of the pursuer? Issues in first action.

Whether, on or about the said 10th of September 1834, in the shop of the defender in Dundee, and in presence and hearing of Archibald Scott, tanner, Dundee, the defender did falsely and calumniously say that the pursuer was a low fellow, and entitled to be hanged, meaning that the pursuer was a person of bad character, and deserved the gallows, or did falsely and calumniously use or utter words to that effect, to the loss, injury and damage of the pursuer?

Whether, in a court of slaughter-houses near Craig Pier, Dundee, on or about the 10th day of September 1834, the defender wrongfully and violently took possession of a slaughter-house then in possession of the pursuer, or wrongfully and violently retained possession of the same, to the loss, injury and damage of the pursuer? Issues in counter action.

Whether, on or about the 6th, 7th, 10th and 11th days of November 1834, the defender wrongfully and maliciously caused arrestments of certain sums of money and effects to be used in the hands of certain persons, debtors to the pursuer, or in the hands of certain persons who were not debtors to the pursuer, and used inhibition against the pursuer upon the dependence of an action brought by the present defender against the present pursuer, to the loss, injury and damage of the pursuer?

The Lord Justice-Clerk charged the Jury as follows: I agree with the counsel who spoke last, that if they have stated a case to award damages, you cannot be warranted in acting on the conviction that this is merely a dispute between two butchers. That however leaves a question behind, whether, in reference to the first action, the redress Dick was in truth entitled to for the alleged assault might Judge's Charge.

17 July 1835.

Dick v. Small, et e contra.

Judge's Charge.

not have been vindicated, and justice done him, by a very different proceeding from an action of damages for L.1500, and when raised, by causing it to be followed up by the legal proceedings which have arisen out of it. Whether it would not have been better to have made an immediate application to the local authorities, is matter which it may be well to have in consideration, and to a certain extent it does require attention; but now that these parties have come into this Court, they are to be dealt with according to the rules of law and justice. The first issue puts the question: (His Lordship read the first issue in Dick's action.) As to the quibble about the words 'within the shop,' in the second issue, that is of no consequence; but independently of that, the detail given by the witness, Scott, does not support the issue in the way it is put; besides, he is a solitary witness, unsupported by other testimony or circumstance; therefore you cannot hold that issue as proved according to the law of Scotland, and you must disregard it altogether. But then there remains the first issue, and by it you are called on to decide, whether, in the first place, there has been an assault by Small on Dick sufficiently proved to you. If it is proved, then you are to ascertain and say what damages are due. You will consider whether it is sufficiently proved he was assaulted, keeping in view the whole circumstances, and particularly the disputed right to the slaughter-house, which was the cause and origin of the violence. I think that will sufficiently meet the first point put in issue between Dick and Small, because I consider the respective rights of the parties as matter which has reference to the issue generally, and that it is not necessary to consider separately whether there was that which meets the words of the issue—an attempt wrongously to dispossess. I think it is sufficiently embraced in the evidence, on attending to the nature of the assault. There is evidence upon this subject of the assault not altogether of a conclusive nature. When you look at the testimony of the first witnesses, Lawson, Forbes and David Paul, unquestionably they establish, if you believe them, that in the first place they had seen Dick and his attendant, Oswald, going to this slaughter-house; and they concur in stating, though not all of them, that they saw two men going with Small. Then you have Oswald stating his account of what passed within this house. Most undoubtedly he does swear that there was an attack by Small on the person of Dick, that he was struck by him, that he used abusive language to him, and threw dirt at him. (His Lordship went through Oswald's testimony in detail.) Another person says he actually saw blows given, and other witnesses concur with him. Then you had evidence as to the question of right to this slaughter-house. It was stated to you as a general ma-

derstanding, that it was the custom to allow a person entering this Incorporation of Fleshers to take possession of a slaughter-house, if there was one vacant at the time. Then you had the testimony of the lad Smith, and the matter is more fully brought out by the testimony of Knight, the box-master, who stated that it certainly was the general custom to allow any person entering to take possession of a slaughter-house, provided it was actually vacant at the time. The slaughter-house in question had belonged to a person of the name of Smith, and it was continued by his wife for a short time after his death. The young man, Smith's son, said that Small got the key from him in loan. He also told you that he refused to give it back, but still he knew that it was in his occupation. This is cleared up by the box-master, who says that he, as box-master, had let it to Small, who was in possession before, and that it was not properly vacant. He told you that he let it from Whitsunday to Martinmas 1834; and he produced his book, where there is undoubtedly a marking of payment of a half-year's rent in November 1834, for a slaughter-house possessed by him. It is an important thing he swears to his knowledge of Small's occupation; and he says that at the meeting for Dick's admission, he told him that he could not get it till the term, but he might use his; and this he followed up on the day of the squabble, by giving him the use of it. This certainly confirms the fact of Small being in possession, and that at Whitsunday 1834 a bargain was made, and the rent paid up to November 1834. You must keep in view that Small was actually in possession, and under the sanction and authority of the box-master. He was not then in the illegal, but the legal possession, if you are to believe Knight. Does the authority of Mrs Smith make Dick's title better than it was? I am afraid, whether she had written a letter or not, it does not make it a bit better, but worse; for what does the letter say? That he should go and get a smith to force it open. This is very summary work; and I must tell you, such a proceeding, on any supposition of right, is not what the law sanctions. No person, when another is in possession, is entitled summarily to take possession. It was taking the law into his own hands, and that, too, in virtue of a letter in his own handwriting. You have it in evidence that the smith opened the door, and made an entry, and articles are taken out, which was completely inverting the possession. The procurator-fiscal had a conversation with Dick about this matter; and you remember he stated to him, I daresay you had better go and take it. He knew better, however, than to advise him to break open a lock for this purpose. What I say to you is this: If Dick meant to assert a right, he ought to have applied to legal authority. I can't say he was entitled to take posses-

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Judge's Charge.

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Judge's Charge.

sion in this abrupt manner. Under these circumstances, and seeing that Small had reason to be very much irritated at the time, it is for you to say whether an assault is proved. (His Lordship then went over the defender's evidence.) Hood confirms the box-master's statement. There certainly is contrariety of evidence, but you will judge for yourselves. *(By a juryman.)* I should like to know whether there was any thing belonging to Mrs Smith in the slaughter-house at the time Dick entered? His Lordship, on again referring to his notes, stated, that there were some articles belonging to Mrs Smith, which Dick was to take at a valuation.

Keeping in view the previous circumstances, you will now remember, that there is another action at the instance of Small, which follows the same style as the first, and lays damages at no less than L.2000. The arrestments are proved by documents. The loosing was effected by an application to this Court. (His Lordship read the messenger's evidence.) The messenger told Dick that Small was a wealthy man,—not certainly a very sufficient reason for using arrestments every where. I state it to you as unusual for persons who resort to the diligence of the law personally to instruct the messenger in this way. This certainly is most important evidence of purpose. The law never authorises the use of diligence wrongfully and illegally. I have no hesitation in saying, that I agree with the Dean of Faculty, that this action is one of a more important nature than that you are to try first. Does it meet what is stated, that actual damage was done? If it was done to loss of credit, there was ground of damage. It is very difficult to bring proof of the actual loss occasioned by the arrestment of cattle. Proof certainly has been brought that these proceedings did actually go to hurt the credit of Small. You will judge whether this was a fair and warrantable exercise of the undoubted privilege of the liege, or whether it was a wrongful and malicious exercise of that right; and whether it was not to the loss, injury and damage of Small. It was hinted at by the Dean of Faculty, that you might use this as an opportunity of teaching agents and practitioners the impropriety of bringing actions laid at random sums in this way. I can give no countenance to any such view of the case. This is a question between man and man; and you will give only such fair and reasonable damages as you may think either party has sustained. If you are of opinion that the assault is proved, and don't think the circumstances a sufficient palliation, then you will give such damages as you think proper; and you will also dispose of this other action as you think proper. If you should come to this point, that you think damages would be due on account of the assault to an equal, or the same extent, as in the other action, it is my duty to say, that

you have it in your power to compensate these two actions; and in this case, if you choose it, not to find for the pursuer of either. You will of course just arrive at such conclusion as you think fit, on an attentive consideration of these mutual actions. 17 July 1835. Dick v. Small, et e contra. Menzies v. Goodlet.

Verdict for Dick, damages one shilling.

Verdict for Small, damages one shilling.

Lord Ordinary, *Moncreiff.* For Dick, *Rutherfurd* and *Robertson.* *Alex. M. Anderson*, S.S.C. Agent. For Small, *Dean of Fac. (Hope,)* and *Ivory.* *William Miller*, Solicitor, Agent. *Mr Russell*, Clerk.

R.

SECOND DIVISION.

No. X. 20*th July* 1835.

MENZIES
against
GOODLET.

(Before Lord Meadowbank and a Common Jury.)

Damages *found due for posting a person, and circulating a statement to his prejudice.*

This was an action of damages against the defender for posting the pursuer as a coward, and circulating a false statement. Menzies became attached to Mrs Carfrae, Goodlet's niece, whom he afterwards married. While paying his addresses, anonymous letters of an annoying kind, and all highly defamatory of Menzies, were received by Mrs Carfrae and members of her family. The defender, Goodlet, assuming that Menzies himself was the author of these letters, and acting upon the idea so entertained or expressed, took some of the anonymous letters, along with some writing of Menzies, to Lizars, engraver, who told him he thought the letters in question were not in the handwriting of Menzies. He also shewed them to Smart, another engraver, who declined giving any opinion. Smart stated in evidence, that on being pressed to give an opinion, he put his initials on one paper which he thought resembled the anonymous letters. He was assured this was confidential. He did not by the marking mean to justify the idea that the paper marked was in the same handwriting as the anonymous letters shewn. At Narrative.

20 July 1835. Menzies v. Goodlet.

the interval of a few years, and on the eve of the marriage, Goodlet revived the matter by writing to Menzies. Menzies denied the charge. Goodlet again wrote to him that he would make public the correspondence, as he had declined to clear himself of charges, of the truth of which there was strong circumstantial evidence. It ended in Goodlet posting Menzies in the coffeeroom at Leith. He thereafter published and circulated a statement, intended, as he said, to justify the posting, and that his object was to protect his niece from treacherous and dishonourable conduct on the part of Menzies. The pursuer, in opening, stated he would yet be satisfied with an apology.

The defender made a tender of L.30, and at the trial admitted, with an expression of regret, that he had acted unadvisedly; but this was not done in such a way as to exculpate Menzies.

The following were the issues:

Issues.

Whether, at Leith, on or about the 6th day of December 1834, the defender did write and publish, or cause to be written and published, by placing the same in the Exchange Coffeehouse, Leith, a writing, containing the following words, or words to the following effect, viz.: 'I hereby post Robert Dryborough Menzies 'as a coward and scoundrel.' GEO. GOODLET. *Leith, 6th December* '1834.' And, whether the whole, or any part of the said words, are of and concerning the pursuer, and falsely and calumniously hold up the pursuer to the contempt of the public, to the loss, injury and damage of the pursuer?

Whether, on or about the 10th day of December 1834, the defender did compose or write, or prepare and print, publish and circulate, or cause to be composed or written, or prepared, or printed and published, or circulated, at Leith, Edinburgh and the vicinity, a certain paper, entitled, 'Statement,' and subscribed George Goodlet, of which No. 13. of process is a copy; and, whether the whole, or any part of the said statement, is of and concerning the pursuer, and falsely and calumniously holds up the pursuer as the author of certain anonymous letters, and thereby guilty of treacherous and dishonourable conduct, and warranting the defender in posting him as a coward and a scoundrel, to the loss, injury and damage of the pursuer?

Judge's Charge.

Lord Meadowbank charged the Jury as follows: I certainly do not mean to go over the whole of the evidence, but shall, in a very few words, bring before you the case you are to try. You have first the fact, that the defender put up a placard in the coffeehouse at Leith, posting the pursuer as a coward and scoundrel. This having been made the subject of judicial investigation, you have it

stated, that he augmented the injury thus done by composing and circulating a statement, which is made the ground of a second summons. There is no proper defence against these actions: all that the party has stated is this: He admits the denunciation of the pursuer in the manner stated in the first summons: he says that he acted originally unadvisedly, and that he is now assured the grounds stated did not warrant such a proceeding: he therefore regrets having done so, more especially as the marriage has now taken place. But he does not acquit the pursuer of blame. With these summons and defences a record is prepared, and the issues are these. (His Lordship read the issues.) With respect to the facts of this part of the case, it does not appear to me you can entertain any possible doubt that the defender was the author of the placard which was posted up, and that he was also the author of the statement, and that he circulated it in the manner set forth, through a number of persons mentioned, amounting to upwards of a hundred. Therefore, with respect to the fact of circulating, and the defender being the author, there is no question. You will consider further, whether there is any reasonable ground for doubting that this placard was intended to injure the pursuer. No one can fail to be more or less affected by being denounced as a coward and scoundrel. I think it is plain, that the object of the statement was to lead the public to the inference, that there was good ground for suspecting this gentleman to be the author of these anonymous letters. It is for you to consider whether this was done to the injury of the pursuer. Whether the accusation was made falsely or not is another matter. Here you have the admission of the party himself, that in alleging that the pursuer was the author, he did it originally without sufficient ground. It is for you to look to the evidence of the engravers, and the facts they have sworn to; and it is for you to say whether or not this person had before him at the time any ground, or the slightest ground for accusing the pursuer of being the author. I hardly think it is necessary for you to look to the fact, whether it was a false accusation or not; for the party don't now maintain the truth of it. Looking to the whole facts of the case, and the mode of proceeding, I have no hesitation in giving it as my clear opinion, that there is not any rational ground on which any man could suspect that Menzies was the author of these letters. It is my bounden duty to say this, because it is inconsistent altogether with human nature to believe, that the three first letters are the composition of the individual to whom they relate. As to the fourth, though not called on to give any opinion who is the author, it is clear it was written with a view to bring to a close a correspondence begun for the purpose of interrupting a marriage which was going on, and which the writer knew was at

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Menzies v. Goodlet.

Judge's Charge.

that moment brought to a close. That is the opinion I have formed on reading these letters. It is for you, however, to determine the matter.

The only defence set up is this, that Menzies, the pursuer, ought to have written a more polite answer than he did write when this imputation was first communicated to him. You will observe Goodlet's letter was not the first intimation Menzies had received of the accusation. He was informed of it by the lady he was asking in marriage, and expected soon to marry. That such an imputation was made is certainly a serious thing; and it is not the less so, when he was told the grounds on which the imputation was made. You will form your own opinion of the effect of such an imputation, made to the woman in the relation he then stood to her, and retorted by a person in the situation of Goodlet. Even if he had it in his power to refute it, it could not be expected he could give any other answer than he did. A man of ordinary judgment, and good capacity, would see at once, that if he for one moment condescended to enter into an investigation of a matter of this sort, he would get into a predicament from which it would not be easy to escape. The matter might always remain a clog about his neck. He took the proper course, in giving a flat denial that he knew any thing about the matter; and stating, that he had no more to do with the composition of these letters than any body else. In this situation, I expected my friend at the bar to have got up and expressed regret for having circulated a story with such heinous charges from beginning to end. However, all he regrets is that he took a step that has had the effect of bringing him into his present predicament. I have no doubt that is the fact; but he has not said manfully that he believes Menzies is totally free from the imputation he brought against him, when he placed the placard in the coffeehouse, and circulated the statement. He leaves the matter with you to the public, who can only judge by your verdict. You will therefore now consider the verdict which is to be expected at your hands. It is admitted by the defender that there was no sufficient ground for bringing this imputation. It is for you to consider whether there is any ground whatever. No apology is offered, which you can understand leaves Menzies free from any ground of suspicion; and it is for you to say how you will best vindicate his reputation. The counsel on the other side has told you that he does not wish large damages: his object is vindication. I submit to you, however, that if you are of opinion he is entitled to vindication, you must take care that your verdict shall have this effect. You see that this party has tendered L.30: It is for you to consider whether this is enough. It certainly would appear, in the ordinary case, to persons acquainted with these

matters, that if you only found to that extent, your verdict would not have the effect of vindication; but you will give whatever you think proper. 20 July 1835. Menzies v. Goodlet. Pearson v. Walker.

Verdict for pursuer, damages L.700.

Counsel for Pursuer, *Dean of Fac. (Hope,)* and *Pyper.* Agent, *H. Bremner,* W. S. Counsel for Defender, *M'Neill.* Agent, *W. Alexander,* W. S. *Mr Russell,* Clerk.

R.

SECOND DIVISION.

No. XI. *20th July* 1835.

CHARLES PEARSON
against
WILLIAM WALKER.

(Before Lord Meadowbank and a Common Jury).

Fraud.—*Found that there was no sufficient evidence of alleged fraud in obtaining an heritable bond.*

The pursuer, trustee for the creditors of Patrick Alexander Walker, Esq. late of Clayton, Lieutenant in the Honourable East India Company's 1st regiment of native cavalry, on the Madras establishment, conform to trust-disposition executed by him, in compliance with the request of his creditors, in favour of the said Charles Pearson, dated the 23d February 1833, and also by Thomas Heath, Esq. of Fenchurch Street, London, a personal creditor of the said Patrick Alexander Walker, and James Peddie jun. W. S. his mandatary, raised an action of reduction against the defender, in which he set forth: That during the minority of the said Patrick Alexander Walker, his affairs were managed by the defender; and on the said Patrick Alexander Walker's attaining majority, he executed and sent home from India, where he was resident with his regiment, a factory and commission in favour of the defender, dated the 12th December 1829, giving him ample powers to manage his affairs in this country, and to borrow money on his property, if necessary, for the payment of his debts: That the defender accepted of this commission, and continued the management of the said Patrick Alexander Walker's affairs in this Narrative.

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country, and from time to time accepted and paid bills which the said Patrick Alexander Walker had drawn upon him in favour of his creditors: That, under this commission, the defender borrowed two sums of money of L.1000 each, for which, on the 26th May 1831, he granted two heritable bonds over the estate of Clayton, and with the proceeds he repaid himself the advances he had made on account of his constituent: That the said Patrick Alexander Walker, however, continued to incur debts in India, and to draw more bills on the said William Walker, who, in July 1831, refused to honour them any longer; and during the period between the 19th July 1831, and the 28th June 1832, the said Patrick Alexander Walker drew and negotiated bills on the said William Walker, for debts truly incurred by him, to the amount of L.2071, 17s. 11d., all of which were regularly presented to the said William Walker, but refused to be accepted or honoured by him, as appears from a holograph state thereof made out by him: That, in particular, the said Patrick Alexander Walker, by bill of exchange, dated at Madras the 16th January 1832, at three months' sight, requested the said William Walker to pay to Messrs Franck, Cole and Company, or their order, in London, the sum of L.53: 9: 3; and by another bill of exchange, also dated at Madras, the 24th January 1832, also at three months' sight, requested the said William Walker to pay the said Franck, Cole and Company, or their order, the sum of L.181: 10: 8: That both the said drafts were indorsed by Messrs Franck, Cole and Company to the pursuer, the said Thomas Heath; and the first-mentioned bill was presented to the said William Walker for acceptance, and being refused, it was protested for non-acceptance on the 11th May 1832: That, upon the 22d May 1832, the pursuer, the said Thomas Heath, wrote to the said William Walker as follows: 'London, 22d May 1832.—Sir 'I beg to inclose for your acceptance Lieutenant Walker's bill 'upon yourself, dated Madras, 24th January, 3 ms. for L.182, 10s. '8d. Being the holder also of a bill for L.53: 9: 3, (which has 'been presented for acceptance through Sir William Forbes and 'Co., and returned to me protested for non-acceptance,) I am in- 'duced to address a letter to you upon the subject of these bills, 'and request the favour of your saying whether I may calculate 'upon the probability of their being paid when due. Your having 'refused acceptance to the bill for L.53: 9: 3 has led me to anti- 'cipate the same result to the one inclosed, for L.182: 10: 8. I 'beg to remind you that very heavy expenses will be incurred 'should you suffer those bills to be returned to Madras dishonoured, 'which, for the credit of Lieutenant Walker, I trust will not be 'your determination. Requesting the favour of your reply, (re-

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'turning to me the inclosed bill,) in course of post, I am,' &c.: That, to this letter, the said William Walker returned the following answer: '*Pitlair, Cupar-Fife, 25th May* 1832.—SIR, I am just 'now favoured with your letter of the 22d inst., erroneously addressed to me in Edinburgh, and I regret to be under the necessity of returning you, without acceptance, the bill on me by Lieutenant P. A. Walker for L.182: 10: 8, dated the 24th of January last, and payable at 3 ms. Neither can I pledge myself 'to pay it when due; but in a letter I had lately from Mr Walker, 'he mentions his expectation of being in this country in a few 'months hence; and in that case I have reason to believe that some 'arrangements will be made for payment of his drafts. More I 'cannot at present say, I am,' &c.: That, in the month of July 1832, the said Patrick Alexander Walker returned to this country from India, and the pursuer, the said Thomas Heath, on learning that he had done so, addressed the following letter to the said William Walker: '*London, 3d August* 1832.—SIR, I was duly favoured with yours of the 25th May, and understanding that Lieutenant Walker has arrived from Madras, and proceeded to Edinburgh, I take leave again to address you on the subject of his bills 'drawn on yourself, as they will very shortly fall due, say

'L.53: 9: 3, on the 15th instant, and
'L.182: 10: 8, on the 1st September, } both

'payable in London. I have no doubt Lieutenant Walker will 'have made those arrangements for payment of his drafts which 'you expected, and I beg the favour of your reply by return of 'post, giving directions to what house in town the bills shall be 'presented for payment. I am,' &c.: That the following answer was returned by the said William Walker: '*Pitlair, Cupar-Fife, 7th 'August* 1832.—SIR, My young friend, Lieutenant Walker, has not 'yet arrived here, but is now expected in a few days. As soon as 'he comes the best means will be taken for the sale of his property; but till that is accomplished I do not think his bills to you 'can be paid. At present, therefore, I can only say that no unnecessary delay will take place. I am,' &c.: That, on receipt of this letter, the said Thomas Heath addressed the said Patrick Alexander Walker as follows: '*London, 10th August* 1832.—SIR, 'I beg to advise you, that I am holder of the under-mentioned bills 'drawn by yourself on W. Walker, Esquire, W.S. 21. Forth Street, 'Edinburgh, remitted by Messrs Franck, Cole and Company of 'Madras, and protested for non-acceptance. As these bills will shortly fall due, I beg a reply, stating whether you wish them presented for payment at your agent, Mr D. Stoddart, Charles Street, 'the said bills being payable in London.

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'L.53 : 9 : 3, due 15th August 1832.

'L.182 : 10 : 8, due 1st September 1832.

'I am,' &c.: That having received no answer, the said Thomas Heath again wrote the said Patrick Alexander Walker, as follows: '*London, 4th September* 1832.—SIR, I had the pleasure to address 'you on the 10th ultimo, advising that I held bills for

'L.53 : 9 : 3, due 15th August,

'L.183 : 4 : 2, due 1st September,

'both protested for non-acceptance, and requesting to know where 'you wished them presented for payment. Not having been honoured 'with a reply, I have now to acquaint you that the said bills have 'been protested for non-payment; and I am under the necessity of 'stating in plain terms, that unless I hear satisfactorily from you 'by return of post, I shall have no alternative but to forward the 'bills to my professional man at Edinburgh, with full instructions 'to proceed legally, and enforce payment. I am,' &c.: That, at this date, there was a balance of L.600 claimed by the said William Walker, as due to him on his account with the said Patrick Alexander Walker; and the last-mentioned individual was likewise owing Mrs Charlotte West or Walker, his mother, a sum of L.60: That the said William Walker had by this time discovered that the affairs of the said Patrick Alexander Walker were in a state of insolvency, and that his funds were unable to discharge the debts due by him; and, as already mentioned, the said William Walker had refused to honour bills drawn upon him by the said Patrick Alexander Walker to the extent of L.2071 : 17 : 11, conform to the holograph state thereof, before mentioned, all of which he knew were still unpaid: That, in these circumstances, he formed the resolution of securing his own alleged claim, and that due to Mrs Charlotte West or Walker, the near relation of the said insolvent, by obtaining for them, from the said Patrick Alexander Walker, an heritable bond therefor, to the exclusion of his bona fide creditors; and accordingly, immediately on the said Patrick Alexander Walker's arrival in Scotland, he prevailed on him to execute in his favour an heritable bond, which is dated the 5th September 1832, whereby the said Patrick Alexander Walker was made to acknowledge that he was justly due and addebted to the said William Walker the sum of L.660, (being the beforementioned sum of L.600, alleged to be due to himself, and the said sum of L.60, said to be due to the said Mrs Charlotte West or Walker, although the said William Walker had not paid the same to her,) and to bind and oblige himself, his heirs and successors, to content and repay the said sum to the said William Walker, his heirs and assignees, at the term of Martinmas then next, with liquidate penalty and interest, as therein mentioned; and farther, to

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bind and oblige himself and his foresaids, to infeft and seise the said William Walker and his foresaids, heritably, but under redemption, as therein mentioned, not only in an annualrent of L.33, or such an annualrent, less or more, as should by law correspond to the said principal sum of L.660 sterling, to be uplifted and taken at the terms therein mentioned, furth of all and whole the said Patrick Alexander Walker's lands and estate of Clayton, as therein particularly described, or furth of any part or portion thereof: That the said William Walker lost no time in getting infeftment passed in his favour upon the said heritable bond, which was done on the 8th September 1832, conform to instrument of sasine dated that day, and registered in the particular register of sasines for the shire of Fife the 10th day of the same month and year: That the said William Walker knowing that, if the true state of the said Patrick Alexander Walker's affairs were made known to his creditors, or if they should become aware of the security which he had thus obtained, they would immediately adopt such measures as would prevent him from effecting his purpose,—resolved to conceal the same from them, and delude them into the belief, that time only was necessary to relieve the said Patrick Alexander Walker from his embarrassments: That, in particular, it was of the utmost importance for him to prevent the pursuer, Thomas Heath, who, in the letters above quoted, had threatened to adopt legal proceedings for payment of the bills due to him, from following out these threatenings, by doing diligence on the bills, until sixty days had elapsed after the date of the sasine taken upon the bond, whereby the security might be reduced and set aside under the act of Parliament 1696, cap. 5: That, in the prosecution of this plan of concealment and deception, the said William Walker, three days after the bond in his own favour was granted, and the very day upon which infeftment passed thereon, addressed to the pursuer the following letter, holding out prospects of payment which he knew to be groundless, and soliciting from him indulgence for such a period as he conceived would put his own security beyond challenge: '*Pitlair, Cupar-Fife, 8th September* 1832. — Sir, My friend, Lieutenant P. A. Walker, 'has just now put into my hands your letter to him of the 4th inst. 'I regret much that there should be any delay in the payment of 'Mr Walker's drafts, but I hope it will not be long. When he 'drew these bills, he had flattered himself that his funds in this 'country would be easily made available for their payment; but 'this, unfortunately, has not turned out to be the case. Since his 'arrival, however, every means is taking to convert his property in- 'to cash for your payment; and he begs of me to assure you, that 'no delay which can be avoided shall take place; but it is impossi- 'ble to fix any precise period. In these circumstances, he desires

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Narrative.

'me to solicit the favour of a short indulgence. Two or three 'months at most, he thinks, will be amply sufficient for enabling 'him to discharge both bills. He even hopes it may be done within 'a shorter period; and you may depend that no exertion will be 'wanting to have this accomplished. Trusting, therefore, to your 'kind indulgence, I have the honour to be, Sir,' &c.: That a correspondence ensued, in which the same system of concealment and deception was continued on the part of both the defender and the said Patrick Alexander Walker, who is a young man of an easy disposition, ignorant of business, and necessarily dependent on his professional advisers in matters of this kind, and was not, it is probable, aware of the illegal and unfair preference it was the object of the defender thereby to obtain: That similar representations and delusive prospects were held out by the defender to other creditors of the said Patrick Alexander Walker, and by this means the pursuer, the said Thomas Heath, and the other creditors, were induced to abstain from diligence upon their debts: That having succeeded in attaining his object, the said William Walker gave up the management of the said Patrick Alexander Walker's affairs, and that individual, finding that he could no longer avoid a surrender of his estate, at last called a meeting of his creditors, by whom, on the 19th February 1833, the other pursuer, the said Charles Pearson, was chosen trustee, and the trust-deed before mentioned was executed in his favour: That not only the pursuer, the said Thomas Heath, as a personal creditor of the said Patrick Alexander Walker, for a debt contracted long prior to the date of foresaid heritable bond, but the whole body of the creditors, will sustain great loss and injury, if the said heritable bond and sasine thereon are not reduced.

The reason of reduction ultimately insisted on was thus set forth: 'The said heritable bond was elicited and obtained from the said 'Patrick Alexander Walker, by the said William Walker, by means 'of fraud and deceit practised by the defender on the said Patrick 'Alexander Walker and his creditors, and especially on the pur'suer, the said Thomas Heath, in so far as the said Patrick Alex'ander Walker was induced and prevailed upon to grant the same, 'in pursuance of an illegal scheme formed by the said defender to 'obtain an illegal preference in his own favour, and to defeat the 'claims of the just and lawful creditors of the said Patrick Alex'ander Walker, on the eve of his bankruptcy, and after the defend'er knew that he was insolvent, and that he could no longer sup'port himself, or maintain his credit as a solvent party; in further'ance of which scheme the said William Walker, defender, with 'the view of blinding and defrauding the said Thomas Heath and 'the other creditors of the said Patrick Alexander Walker, held 'out false and delusive expectations to them, and concealed the se-

'curities taken by himself, and the real state of the said Patrick 20 July 1835.
'Alexander Walker's circumstances, till more than sixty days had
'expired from the date of the said security.' Pearson v. Walker.

Narrative.

The defender, in answer, rested his title to procure the heritable bond upon the terms of the factory and commission in his favour by Lieutenant Walker, an extract from which was set forth as follows: 'And in regard the said William Walker has already advanced con-'siderable sums on my account, and for my behoof, and has also 'borrowed the sum of L.1000 sterling from the trust-estate of my 'deceased father, Lieutenant-Colonel Patrick Walker; therefore I 'do hereby authorise and empower him either to take such security 'upon my said lands and estate for repayment of the said advances, 'or else to borrow such sum or sums of money as may be neces-'sary for payment of the said debts, or for payment of any other 'debts or sums of money which he may hereafter pay for me, or 'advance on my account; and for which sum or sums so to be bor-'rowed, I hereby authorise and empower him to grant bonds or 'other securities, heritable or moveable, therefor, with interest; 'and under the usual penalties, and to bind and oblige me and my 'heirs, executors and successors in payment thereof; and particu-'larly with power to the said William Walker, for me and in my 'name, to grant, subscribe and deliver heritable bonds, or other 'rights and infeftments, for the said principal sums, penalties and 'interest, upon my said lands of Clayton, containing all usual and 'necessary clauses, and which shall be as valid and sufficient for 'affecting and burdening the lands, and others foresaid, and as bind-'ing upon me, my heirs and successors, as if the same were granted 'by myself.'

The defender averred that the bond above mentioned was granted for sums really advanced, and the averment was not disproved at the trial. He denied that the correspondence quoted was in any respect calculated to deceive Mr Heath. He averred his own belief that the property might be adequate to the amount of the debts, in support of which he produced correspondence between himself and Lieutenant Walker, and the agents of other creditors who had applied to him in respect to bills drawn by Lieutenant Walker, and to whom he in general held out a prospect of payment. He also averred that Mr Heath had been induced to delay proceedings by representations by Lieutenant Walker himself; and in support of this he stated, that Mr Heath entered into a correspondence with Lieutenant Walker, and he set forth a part of one of his letters to him thus: 'In reply to your letter of the 16th instant, I regret the 'refusal of Mr William Walker to consent to your drawing upon 'him for L.243: 10: 5, agreeably to the proposition I made. I

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'cannot allow myself for a moment to question the efforts you are 'making to sell your property, and to effect which, you are of 'course employing some ostensible agent. Upon that party, there- 'fore, there cannot, I imagine, arise any difficulty to your draw- 'ing for the amount of those bills I hold of yours, which, with ex- 'penses and interest, is L.243 : 10 : 5, payable on the 18th De- 'cember. I must urge your remitting me such a bill within a post 'or two. This is really the only accommodation you can expect 'me to offer, and I do it at my own risk, without any other war- 'rant than the persuasion I have of your respectability and honour.'

The defender further stated, that Mr Heath kept up his correspondence with Lieutenant Walker, and, of this date, (Oct. 22. 1832,) he very unexpectedly wrote to the defender in these terms: 'Sir, It appearing that Lieutenant P. A. Walker is very desirous 'that I should withhold proceedings against him for the amount of 'his bills, in the expectation that he will shortly be enabled to raise 'the money on his estates to discharge them, I think it right to ac- 'quaint you, as his professional adviser, that I have consented to 'wait a month, relying on his positive promise that he will use his 'best exertions to get the money, and not oblige me to have re- 'course to proceedings which will be as unpleasant as expensive to 'him.'

The following was the issue:

Issue.

It being admitted that the pursuer, Thomas Heath, is a creditor of Patrick Alexander Walker, and that the pursuer, Charles Pearson, is trustee appointed by the said Patrick Alexander Walker for his creditors and himself:

It being also admitted, that on the 3d day of September 1832, the defender obtained from the said Patrick Alexander Walker the heritable bond, No. 13. of process, sought to be reduced, and the instrument of sasine following thereon, dated the 8th, and recorded in the particular register of sasines for the shire of Fife, the 10th days of the said month, also sought to be reduced:

Whether, by undue or fraudulent concealment, or undue or fraudulent misrepresentation, the defender obtained a preference over the pursuers, or one or other of them, by means of the said bond and infeftment?

The case of each party rested in substance on the correspondence above mentioned entirely, with the exception of the examination of one or two witnesses, as to the value of the property.

Lord Meadowbank charged the Jury as follows: I cannot avoid observing, that there never was laid before a jury a case, where there was less occasion for giving the fatigue and trouble which

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Judge's Charge.

you have experienced. There is only one matter here established by oral testimony; and it is impossible for you to return a verdict upon that point singly. All the rest of the case depends on the construction of written evidence, leading to points which would have been much more satisfactorily and fully discussed in a court of law. Therefore, I extremely regret that the case should have been presented to a jury at all. If I am correct in the view I take of it, it does not appear to me to be attended with great difficulty. This action was brought at the instance of a trustee of the creditors of Lieutenant Walker, and Thomas Heath, a personal creditor of that gentleman. The summons sets forth that this bond should be set aside on two several grounds. The first depends on matter of style; the second rests on the first clause of the statute 1621, which is given up, and you have nothing to do with it. It is altogether out of the question. The third ground is this: (His Lordship read it, as above set forth.) To make out this ground of reduction, it is manifestly incumbent on these pursuers to establish, first of all, that this gentleman, Lieutenant Walker, was at the time in a state of insolvency, or on the eve of bankruptcy. From the beginning of this day's trial, to the present moment, not one vestige of evidence has been laid before you from which you are legally entitled to arrive at any such conclusion. It may, no doubt, be true, that there are strong grounds for suspecting that Lieutenant Walker was, at the time when all these transactions took place, in great difficulties as to money; but, as I have already said, I can discover no evidence of any thing, further than a suspicion that he might be in a state of insolvency, or on the eve of bankruptcy. Therefore that would dispose of the case at once; because this gentleman, Mr Walker, is only brought here in order to support this bond against a charge, that it was impetrated from his constituent while he was actually in a state of insolvency, or at least proved to be bordering on insolvency; and without bottoming their case on such proof, the pursuers have nothing to support it. On that ground I would say at once, that you ought to find for the defender; but I don't think, in a case where fraud is charged in the way it is done here, that it would be justifiable in me not to state distinctly the grounds on which I am humbly of opinion that there is not a vestige of ground for charging fraud against this gentleman.

(His Lordship then read the issue.) In respect to this issue, the allegation of the pursuer is in substance this, That the defender having obtained a bond from his nephew, which was reducible within sixty days by any of his creditors, he endeavoured to conceal from them, during these sixty days, the fact, that such bond

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was granted. Now, in order to make out this proposition, he must shew that this bond is in itself one which was, so reducible; but you have been referred to the record, as affording evidence that Mr Walker was entitled, under the factory there set forth, and which it is admitted he held, to have granted to himself, for every advance made, an heritable bond as he made the advance. That is what is stated on the record; and the words of the factory, as set forth on the record, and as read to you from the bar a little ago, are sufficiently broad to authorise him to grant heritable bonds for debts contracted under the factory. If this gentleman had a right to grant to himself an heritable bond for money so advanced, and if he advanced money on the faith of his having a right so to grant an heritable bond, then I apprehend it is not to be held as a security for a former debt, but must be held as a novum debitum, a new debt, and would not fall under the provision of the statute. Therefore, on that ground, can there be any object, any purpose in the concealment alleged? There is nothing that could be effected by concealment. All the evidence brought by the pursuer is ineffectual to support him in the conclusion to which he has endeavoured to arrive,—that, by undue concealment of the bond, and misrepresentation, Mr Walker misled Heath, to the effect of keeping him in the dark, so that he should not come forward in due time to challenge it under the statute. Therefore, in so far I look on this case as clear in favour of this gentleman, and I shall add very little more upon the subject.

Attending to the circumstances of this case, it appears that, in the year 1829, this young gentleman had gone to India, and there was read to you the first letter of the defender here, which was much commented on by both sides, and particularly by the counsel for the defender, who enforced very powerfully that Mr Walker himself considered the value of this property as fully equal to the personal estate, something about L.5000 *. There was one expres-

17 June 1829.

* It is now, my dear Patrick, something more than two years since any communication has passed betwixt us. Why this blank in our correspondence has occurred I cannot well tell. I am afraid we must share the blame between us, and make amends for it in future by a more regular intercourse. Although, however, I have not had the pleasure of receiving any letter from yourself, I have occasionally heard of you through other channels; and I have been much gratified in knowing that you continue to enjoy good health. I sincerely hope, too, that you now begin to feel the pleasures of independence, and that you take good care to keep your expenditure within the measure of your income. It is only by doing so that you can become truly independent. The prefixed accounts will shew you distinctly how your affairs in this country now stand, and must prove to you very satisfactorily, that you cannot, for a long period, look for any more assistance from your property here. Your debt, you will observe, amounts to something

sion in one of the letters, which Mr Keay did not rest on, that struck me very forcibly, as affording proof of a family feeling in respect to the value of the property. It is that one in which Walker says, 'The charming villa will be sold that your father so much delighted in.' This is the letter of 18th January *. Taking this

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Judge's Charge.

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more than L.1400, the yearly interest whereof, at 5 per cent., being upwards of L.70, or about equal to the rent of the property, without leaving any thing for contingencies. It is fortunate, however, that at present the ordinary rate of interest is only 4 per cent., which leaves a small sum for expenses, &c.; but this state of the money market may not continue long, and therefore there is the greatest necessity for the most economical system of management.

I informed you long ago, that in the event of the personal estate being more valuable than the heritable estate of your father, you, as his heir-at-law, had a right to take, if you thought fit, the one-half of the whole; that is to say, one-half of the heritable and one-half of the personal estate, giving your sister the other half of both; and if the personal estate had not been burdened with your mother's liferent, it might perhaps have been advisable, in your situation, to have made such a division, because the personal estate, formerly about L.4000, has been improved since you left this country, by the recovery of L.1500 from the bankrupt estate of Chase, Chinnery and Co., so that at this moment the personal estate may be considered about equal to the present value of the lands of Clayton. But your making such a choice now would be ruinous in the extreme, because you will observe that, by your retaining the landed property, you receive the yearly rent of it, which is equal to the interest of your debt. But if you were to adopt the principle of collation or division, you would reduce your present income from Clayton to one half, and could receive nothing from the personal property, either principal or interest, during your mother's life. I have no hesitation, therefore, in saying, that it is evidently your interest to allow matters to stand as they are; for, independent of the immediate loss you would sustain by a division of the property, there is every reason to expect that, ere long, the lands of Clayton will be even better than the personal estate. Indeed, they ought to be so at this moment. Although I have thought it proper thus shortly to recall these circumstances to your recollection, you cannot hesitate, I think, to allow matters to stand as they are, keeping to yourself the lands of Clayton, and allowing your sister to take the personal property, when it shall open to her by the demise of your mother, an event which, I hope, is still many years distant. I need not say more on this subject, but you may easily conceive that your affairs in this part of the world cannot now be properly managed without a special authority from yourself; I have therefore inclosed for your subscription a factory or power of attorney to be executed by you in my favour, and a discharge by you in favour of your father's trustees. These deeds are sufficiently explicit for enabling you to understand the import of them, and I presume you can have no hesitation in subscribing them both.

* I write you at present, my dear Patrick, under the impression of many painful feelings. The amount of your drafts on me, within the last twelve months, very far exceeds any thing you could have required, had you managed your affairs with decent prudence and economy. The effects of this unthinking extravagance may, for any thing I know, lead to your utter ruin. You will observe, from my accounts, hereto prefixed, and which I hope you will find correct, that I have advanced for you no less a sum than L.600 odds, over and above any funds of yours at my disposal. But, besides this sum, other drafts of yours, to the enormous amount of L.1660, as noted below, have been presented to me, but which I have

18 Jan. 1832.

20 July 1835. Pearson v. Walker. Judge's Charge.

in connection with the first letter, to which I have referred you, it is quite manifest that the defender in this case was just labouring under what I am afraid is no very uncommon case in this country, where people are attached to property: they look upon it as beyond

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been under the absolute though disagreeable necessity of refusing acceptance, having no funds of yours for their payment, and being totally unable to procure funds otherwise. These drafts, therefore, will in all probability be returned upon yourself; and as I cannot suppose you will have funds for their payment, I tremble for the consequences. It is, however, now very evident, that your little property of Clayton must, for your imprudence, be brought to sale as speedily as circumstances will permit. For this purpose, therefore, I have sent inclosed, for your subscription, a factory or power of attorney for enabling me to effect a sale of that charming residence, which was the delight of your father, and which, I had flattered myself, would have served as a resting place to yourself, when you retired from the service. This deed must be executed by you with the strictest attention to the instructions accompanying it, or otherwise it may prove of no use. The necessity for the sale of Clayton is now so evident, and my anxiety to prevent, as far as in my power, any ruinous consequences which might result to yourself from the return of your bills to India, has induced me to write to the holders of them, stating the means intended to be taken for their payment by the sale of Clayton, and requesting that these bills may be retained in this country till a sale can be accomplished. But I doubt much whether such a request can be attended to. I have also subjoined to this a copy of one of the letters I have addressed to these gentlemen, in order to shew you what I have done; and it may perhaps serve a better purpose, in proving to those it may concern, that your drafts have been drawn on me in the faith, and from an honest belief of your being possessed of sufficient funds in this country for their payment. And it is, I hope, true that Clayton will bring a price fully equal to the payment of all your debts; and, in this view of matters, you may perhaps think it odd that a farther sum of money could not have been borrowed on the security of the property; but when I inform you that the present rent of the lands is even now inadequate for the payment of the interest of the capital already secured upon the estate, you cannot be surprised at any one refusing to lend a farther sum upon a property already so deeply encumbered. The lowness of the rent arises from two circumstances: 1*st*, The general depreciation of landed property in this country; and, 2*d*, Your mother retaining the house, garden, small park and woods without paying any rent. You know, from my annual accounts, that the rent of the lands let has been all along only L.71, 10s.; but the lease having lately expired, the tenant refused to keep it at the same rent. I was therefore obliged to advertise it for a new lease; and although I got several offers, I have been obliged to let it at the reduced rent of L.55 to the same tenant, as he was not only the most respectable, but the most advantageous bidder. In order, also, to relieve your necessities as much as possible, I have frequently suggested to your mother the propriety of relinquishing Clayton, and allowing the house and premises to be let for your behoof; but this she has hitherto declined doing. At one time lately, indeed, she seemed to entertain the prospect of being able to advance you L.60 or L.70 per annum. If this could have been accomplished, it would have been so far a relief to you, but every hope of such an accommodation has failed; and whether your mother will give up her residence at Clayton for your benefit, seems to me a question of much uncertainty. She will probably correspond with yourself on this subject.

all value: they increase its value in their own minds far beyond what it is really worth: they go on speculating on that; and when the thing comes to the market the bubble bursts, and they find they can't get the half of it. That is just the case here; and when you read all those letters before Lieutenant Walker comes home, you will find distinctly that this was just the disease, if I may so term it, under which Mr Walker was labouring; that he looked on the property his brother valued, which had been long known to him, and which had not a high value as land, but might have a certain value in respect of its advantages, of much greater value than it ever was likely to bring in the market. When you take this view, and look at all he says in his correspondence with Heath before Lieutenant Walker returns, it is all to be accounted for by the interpretation, that he himself had put a higher value on the property than it would bear. One corroboration of this is, that we find him going on spending his own money, out of his own pocket, receiving drafts and paying drafts, down to the last moment, running the risk of other creditors coming in before him, just as if it was of the value he had stated. Therefore, with respect to these matters, they do not appear to me to have the effect, when so explained, of legitimately authorising any one to draw the deduction of the pursuer. But at the same time that I state this as my opinion, it is for you to consider whether there ought to be another inference drawn, whether you are legally entitled to draw this conclusion. With respect to all these letters, down to the period I am now to speak of, the return of Lieutenant Walker, there is no legitimate ground for supposing that this gentleman was trying to seduce Mr Heath into the belief that this property was to pay all the debts of Lieutenant Walker. No bond is granted to him at that time, but he had power to grant a bond to himself if he pleased; that is, if you believe the factory, which it is for you to say. For my own part, I have no doubt of it, because I see it stated, and I don't see it denied; on the contrary it is admitted. I can't imagine, down to this period, there is any ground for supposing he tried to mislead Heath, which it was endeavoured by the opening speech to draw you to conclude.

You then come to the letters written to different persons after Lieutenant Walker's return; and here I beg leave to say, that I throw them out of view altogether. I wish to do that distinctly, because I have no doubt of the propriety of it. Here is an action brought by Heath, on the allegation that he was misled by Walker: in that way I can only allow that he was misled by that of which he was cognisant. It is impossible that letters written to Messrs Bazett and Co., or gentlemen in Wales or Ireland, could have any effect on the minds of people who never saw or heard of them till

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Judge's Charge.

they were produced here. Therefore I put them aside as not to be regarded, to the effect of proving that Heath was misled, though they might be brought forward for the purpose of shewing that Walker was labouring to convince others as to the value of the property. If that be a legitimate ground of deduction, it would lead to another question; but they don't appear to me well founded on, as respects this action. Therefore I don't rest on these letters. I beg your attention to the letters from Walker to Heath after this gentleman's arrival. They begin with a letter to Heath, referring to a letter of the 25th May, in which he had said, 'Understanding 'that Lieutenant Walker has arrived from Madras,' &c.: the answer to that is, 'He is not yet arrived: as soon as he comes,' &c. He asks for no delay: there is no representation as to the value of the property: all he says is, nothing can be accomplished till a sale. 'I 'do not think his bill can be paid,' &c. Then there is the next letter, and the wording of that I think of considerable importance, and more than seemed to be relied on by the counsel for the defender. It is dated 8th September 1832. (His Lordship here read part of the letter quoted above, p. 91.) Now, observe the way in which all these mixed sentences are drawn: 'And *he* begs of me to assure you.' (His Lordship continued the sentence in which the pronoun he is repeated.) Taking these sentences, and the style of Walker's other letters, there appears to me distinctly, evidence that he is not saying one word of himself. He is very guarded: he puts it into the mouth of his nephew, and leaves it to the good sense of the creditor whether he will believe Lieutenant Walker or not. This does seem to me very strong: this gentleman was standing in such relation to Lieutenant Walker: he was anxious no harsh measure should be used: but he don't commit himself: he leaves it to him to say how far he will trust Lieutenant Walker himself. In the next letter there is nothing but a peremptory refusal: he won't accept the bills; and there is another letter, to which he returns no answer. In this situation I must say, even had the law of the case stood differently from what I have stated I understand it to be, viz. that this gentleman held a power that enabled him to grant heritable security, and taking it that he advances under the belief that it was in his power to grant it any time he pleased, it does appear to me that the suspicion now taken is altogether out of the question. If the law had stood otherwise, it does not appear to me that there is ground for the allegation here made; but it is for you to draw the conclusion with respect to the fact. There is no evidence in these letters that will authorise you to arrive at a conclusion,—without arriving at which, there is no ground for this accusation,—that all these letters were written for the purpose of de-

ceiving Heath, and preventing him from reducing under the act 1696. 20 July 1835.

That being the state of the case, and having gone over the more prominent features of it, it appears to me, if I was one of the jury, that I should have no difficulty in finding for the defender; but of course you will judge for yourselves. Pearson v. Walker. Clelland v. Weir.

VERDICT for defender.

Lord Ordinary, *Jeffrey.* Counsel for Pursuer, *Dean of Fac. (Hope,) H. J. Robertson.* Agent, *James Peddie junior*, W. S. Counsel for Defender, *Keay, J. S. More.* Agent, *John Renton*, W. S. *Mr Russell*, Clerk.

R.

SECOND DIVISION.

No. XII. 21*st July* 1835.

JAMES CLELLAND
against
WILLIAM WEIR.

(BEFORE LORD MEADOWBANK AND A COMMON JURY.)

DILIGENCE.—DAMAGES.—ROAD ACT, 47. GEO. III.—*Damages found due to the extent of* £.200, *for executing a warrant of the Justices of Peace under said act, by poinding for penalties after assessment paid.*

(2.) *The collector is liable for the acts of those with whom he entrusts the warrant.*

(3.) *Where specific grounds of nullity are set forth on record, not competent to state others, however broad the terms of the issue.*

Narrative.

BY the road act for the county of Lanark, sect. 24, it is inter alia enacted, 'That where the statute services have been converted into 'a sum of money, the said yearly assessment shall be paid by those 'liable in the same, to the collector of the parish, on or before the '14th day of February yearly, for the current year; previous no-'tice having always been given of the time and place of payment 'by the said collector, either personally, or by leaving the same in 'writing, at the dwelling-place of each person, or by advertisement 'at the parish church on a Sunday ten days at least prior to the 'day of payment.' By sect. 25. it is further enacted, that 'all per-'sons liable, who shall neglect or refuse to perform the statute ser-

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Narrative.

'vices when required, or, where those have been converted, shall 'neglect or refuse to make payment of the conversion-assessment 'when demanded, as above enacted, shall be subjected in double 'the sum at which the said services shall or might be converted, 'and the whole of such increased conversions or penalties shall be 'levied in virtue of a warrant under the hand of any two Justices 'of the Peace for the said county, who are hereby required to grant 'the same, proceeding upon the oath of the collector or overseer 'of the parish, bearing that the defaulters have not performed the 'statute-work, or have not paid the conversion-money; and such 'warrants shall contain authority for poinding the defaulter's effects, 'and the officer to whom the same shall be directed shall forthwith 'poind the readiest goods and effects of the defaulter, and, three 'days thereafter, shall sell the same, by public roup, at the market 'town or village next to the place where such diligence was used, 'for payment of the sums contained in the warrant, and the ex-'pense of execution, rendering the overplus to the owner on de-'mand, and no sist, suspension, complaint, appeal or action shall 'stay payment of the conversion-assessment or execution, as afore-'said, for recovering the same.' By said statute it is also provided, 'That in case the said collector or overseer shall, upon a 'complaint to two Justices for the said county, be found to have 'wilfully made a false charge or accusation, and upon which the 'said warrant or distress as aforesaid has proceeded, the said Jus-'tices shall award damages to treble the value, with costs, to be 'paid by such offender to the person aggrieved.' And by a subsequent clause of the statute it is further enacted, 'That all actions 'and complaints for any of the penalties and forfeitures imposed by 'this act, and for any wrong or injury done or suffered in any mat-'ter relative to, or in consequence of, the powers given by this 'act, shall, unless where herein otherwise provided, be originally 'brought before two or more Justices of the Peace for the said 'county.'

The pursuer was liable in L.2, 5s. sterling yearly of statute labour money, and having an account against the road trustees, it was agreed that the yearly payments should not be demanded till said account was exhausted. Accordingly, no demand was made upon him during the years 1826-7-8-9 and 1830; but when the payment fell due in 1831, the balance had turned against him, and a decree was taken out against him, along with a great many defaulters, by the then collector. The defender, the nephew of the pursuer, was afterwards appointed collector; and, on 26th September 1832, the pursuer received the following notice: 'Sir, As a decree has passed 'against you for arrears of road-money, 1831, for the parish of

21 July 1833.

Clelland v. Weir.

Narrative.

'Shotts, I request that you will meet with me in the house of Mr 'Weir, vintner, Shotts, (the defender,) on Thursday, 4th October '1832, to pay the same, with expenses, being double sum, in terms 'of the act; failing to do so after the above date, the constables 'will poind. I am, Sir, your obedient servant, (Signed) JOHN 'CHERRY.' The pursuer attended on the day mentioned, and settled the amount due in the manner detailed in the Judge's charge. Cherry, the author of the above notice, had been in the habit of collecting from defaulters, as a deputy to the collector, and, according to his testimony, made his own terms with them for the double and expenses, as a perquisite for his trouble. He made a demand upon the pursuer at the time of settlement, which he refused to comply with; and he afterwards put the warrant into the hands of a constable, who proceeded to the defender's house, and poinded five pictures, which were removed and sold. The further particulars sufficiently appear in the Judge's charge.

The summons in the present action rested on the above species facti; and it was further stated, as an aggravation, that the defender had used this opportunity of annoying the pursuer, in consequence of some legal proceedings which had been successfully adopted by the pursuer against him, in respect to a succession in England. Two of the pictures poinded happened to be the portraits of the lady to whose succession said proceedings related, and her husband.

When the summons was served upon the defender he wrote to the pursuer, expressing his regret at the occurrence, and offering to pay any expenses to which he might in consequence have been subjected, and in his defences he made a tender of L.20.

The defender pleaded, that he was not responsible for the execution of the diligence, as it was without instructions from him, and without his knowledge or concurrence; at all events the sum tendered would cover any damage done. And founding on the clauses in the statute last quoted, he also pleaded, as preliminary defences, (1.) The statute having conferred upon the Justices of the Peace for the county a special jurisdiction in regard to claims of damages of the nature of that libelled, and having expressly declared the same privative in the first instance, the present action before this Court is incompetent, and ought to be dismissed. (2.) The amount of damages, even for wilfully false surcharges, on which diligence has been done, is limited by the statute to treble the value of the articles sold. Lord Mackenzie, Ordinary: 'In respect 'the allegations in the summons go to shew that the warrant 'therein referred to was satisfied and extinguished, and that the 'defender knew this, repelled the said pleas as dilatory defences, 'and remitted the cause to the Jury Roll.'

21 July 1835.

Clelland v. Weir.

Issues.

Issues:

Whether, on or about the 25th day of January 1833, the defender wrongfully executed, or wrongfully caused to be executed, against the pursuer, a warrant, dated 20th September 1832, granted by George M. Nisbet and John Robertson, Esquires, Justices of Peace for the county of Lanark, and wrongfully poinded, or wrongfully caused to be poinded, certain pictures, the property of the pursuer, to the loss, injury and damage of the pursuer?

Whether, on or about the 29th day of the said month of January 1833, the defender wrongfully sold, or wrongfully caused to be sold, the said pictures, to the loss, injury and damage of the pursuer?

Evidence was led on both sides. For pursuer, Meuros, the previous collector, John Lewis, who went to the sale as a friend of the pursuer, Ann Notman, the pursuer's servant, and James Scott, a joiner, who purchased the pictures. For defender, Cherry, above mentioned, the constable, &c. and a portrait painter, who had been sent to examine the pictures, and who considered them of very trifling value.

Judge's Charge.

LORD MEADOWBANK *charged the Jury as follows:* There can be no doubt, if a party suffers by the illegal exercise of the diligence of the law, that party is not called on to take any step merely for the protection of the aggressor. If he suffer by illegal usage, he is entitled to be indemnified. There can be no question, if you are satisfied that there was here an illegal use of the diligence of the law against Mr Clelland, he is entitled to reparation of one description or another. If he is entitled to pecuniary reparation, the amount is entirely for your determination, upon considering the whole of the circumstances which have been developed in the course of this trial. The summons sets forth that Clelland, &c. and it goes over the circumstances of the case very distinctly. It appears that he was liable to an assessment for statute labour. It appears that during a course of years, commencing in 1826, this gentleman was in the habit of making furnishings to the road-trustees; and that the trustees were in truth originally the debtors of Clelland for a considerable sum of money, considering the extent of transactions between them. The collectors and trustees seem to have been aware of this, for no sum is levied on him or demanded, till 1830. By that time it appears that the claims on both sides were pretty nearly balanced. I think, from the circumstance of a decree having been taken out against him only in that year, there is strong ground for believing that the collector was aware how matters stood; but he thinking, in the year 1831, when he was going out of office, it was necessary for him to leave a clear state of accounts with his

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successor, he includes the name of Clelland in a general decree against defaulters. However, on a representation by Clelland, that the trustees were a trifle in his debt, the decree is ordered not to be put in execution against him. That is the fact, so far as the summons goes, and the testimony of Meuros, the late collector; and you have a proper state of accounts given in by him to Meuros, and authenticated by affidavit. This is the case in 1831; and no settlement having yet taken place, Weir is appointed collector. He, naturally enough, finding a decree against Clelland for the very year preceding, includes him in a new decree against 140 defaulters. That decree applies, in terms of the statute, to the amount of assessment due by each of these individuals, together with double the amount and expenses of execution. This is all done in precise conformity with the statute, which authorises the collector to apply for and obtain a warrant to proceed under that decree; and if any defaulter refused to obey, the collector is in strict law entitled to recover, in a summary manner, the whole of the assessment, together with the double; and if called on to put the decree in execution, then he would be entitled to expenses. I believe they are thus entitled in all the counties of Scotland; but I must say, that in all the counties and parishes with which I am acquainted, where circumstances shew that the party was not willingly in default, where there are sufficient grounds of explanation, the double assessment is uniformly passed over. Accordingly, it don't appear here, as the messenger himself stated, that in any case whatever had the full double been levied. The messenger stated to you, that he had adopted a course, which I think illegal, viz. without executing the decree at all, without being put to any labour whatever, at least such as is contemplated by the statute, he was in the habit of charging parties with the expense, or a proportion of it, at his discretion. Hence, it is distinctly set forth, as you see, that he having paid the assessment, they did not execute this warrant for the assessment, but for the expenses. Upon the 26th September, a circular letter is addressed to those individuals who were defaulters, pointing out, strictly as the statute authorised, that if they did not pay, execution would issue for the double assessment, and expenses of execution. With this in his view, Clelland goes down to the house of Weir; and it must be admitted on both sides, that Clelland and Meuros enter into an accounting, and by the accounting it turns out that Clelland was, in truth, when the assessment for 1830 was at an end, still creditor to the trustees to the amount of 7s. 11d. Clelland paid this over to Weir, together with cash, which made the whole up to L.2, 5s. Then a receipt is granted in these words: '*Shotts, 4th Oc-*
'*tober* 1832. Received from Mr James Clelland, Longbyres, the
'sum of Two pounds five shillings sterling, being his conversion-

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'money of the statute labour of this parish for the year 1831. '(Signed) WILLIAM WEIR, *Collector.*' This is an extinction of the debt, and a receipt in full. There is no reservation of the penal assessment in the receipt granted by Weir at the time, and, in truth, Clelland was not a defaulter in the eye of the statute to the full amount. It is clear this receipt would have been sufficient evidence that the whole of the claim by the trustees was then extinguished; and then a question in point of law might be raised, whether or not this collector, speaking of him as if he had given the order himself, would have been entitled, if Clelland had tendered the balance due by him, to have said, I won't receive this, unless you do,—what? I can't ask the double assessment, because you are not a defaulter; but you must pay me 5s. as the expense of execution. Could he have said that, when nothing could be executed against him? Then Clelland pays him for 1832; and under what condition are we to presume he offered to pay for 1832? Cherry tells you he knows nothing of the negotiation for 1832; but we have the written document in the hands of Weir himself, which bears that he grants a receipt for the road money for 1832, in full of every demand *. This has nothing to do with the stamp laws, which the Dean of Faculty spoke about. We are now here as to the evidence of what passed between these parties, and you have it in evidence that a demand had been made against him for 5s., and at the same time you see that a receipt was granted in the terms mentioned. And what is the natural result but this? that Clelland, finding that a demand was hanging over his head for these expenses of execution, said, I won't pay you this sum of road money, unless you grant me a receipt in full. Here the matter, as it appears to me, ought to have rested; but Weir just placed too much confidence in Cherry, on the supposition that Weir had not any intention to execute this diligence against his uncle, in the oppressive way it was done. I don't see any evidence of that; on the contrary, I think there was forbearance on the part of Weir, in not having taken any steps in respect to the money for 1832, which is due in February, and for which he might have sued him. Therefore, when considering Weir's conduct, you are bound to take into consideration, that he not only did himself give a receipt in full, but it is proved by his conduct, that he had no wish or intention of prosecuting his uncle for the money due for 1832.

Now, here begins the ground of the present action. Weir, in the

* The receipt was in these terms: '*Skelts, 4th October* 1832. Received from Mr 'James Clelland, Longbyres, the sum of Two pounds five shillings sterling, being his 'conversion-money of the statute labour of this parish for the year 1832. (Signed) 'WILLIAM WEIR, *Collector.*

'N. B. The above settles in full up to this date. (Initialed) W. W.'

ordinary form, had put his decree into the hands of Cherry: he was not however the party that was exclusively entitled to discharge that decree. Weir had right to discharge the parties against whom decree had passed, as well as Cherry. No doubt he delegated his powers to Cherry, to a certain extent, because, if any body had paid to Cherry, and he granted a receipt, he had power to do so. But then Weir had power to do so too, and he must in law be held to have known, when he put in Cherry's hands that decree, requiring the double payment of the road money, with the expenses of execution, from all the individuals therein contained, that he conferred on him a power of executing that decree against each of them to the last farthing. There can't be any doubt, if Cherry had gone down the next day, or entrusted the constable with going down, and had executed this warrant against Clelland, and poinded his articles for the whole of the road money, and double assessment, and expenses of execution, for that Weir alone would have been responsible in the first instance. Now this is not what took place, fortunately for Weir; but I state it to you, in order to shew the obligation incumbent on Weir in the eye of law, to take that step which was necessary to prevent the possibility of any act so outrageously illegal having been done to Clelland, to whom he had just granted a full and ample discharge. If he had taken his pen, and written the words 'Pd. W. W.' on that warrant, the constable would not have executed the poinding at all, as he told you. The law appears to me clear, in the first place, that Weir having employed this person, he is liable for the acts he did under the authority of the warrant he entrusted to him. But, secondly, he is the rather liable, and more especially because he did not do that which was incumbent on him, in granting that receipt, in not marking on that warrant something to preclude the possibility of any messenger of the law carrying it into execution at all. The only excuse would have been, that the statute authorised poinding for the expenses of execution, and that the messenger had only gone the length to which he was authorised; but if I am correct in what I have stated, if the statute does not authorise poinding for the execution, except when that execution actually takes place, then even this excuse falls under his feet. That being the case, perhaps it is of very little moment what are the other circumstances, because it follows, that neither Cherry, nor those employed by him, had any right to go and poind, either the pictures, or any other article of furniture belonging to the pursuer of this action. I cannot pass over as matter not deserving of attention the marking made on the warrant by Cherry after this action was raised. It was a most improper thing to try to cobble it up at any time, but it is extraordinary that he

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should choose to put on the face of the warrant a falsehood. He writes on it, that Clelland had not paid the expenses of execution, and yet, at that very time the poinding had taken place, he had poinded, and he had sold and paid himself. That is clear, and therefore, when he made this marking, he stated that, on the face of the decree, which he must have known at the moment was not true. Therefore, on the whole of this part of the case, I submit to your consideration, whether you can have any doubt that this is a well-founded action to the extent of entitling the pursuer to indemnification or compensation, for the injury he has sustained, to some extent or other.

But the pursuer sets forth a number of things in aggravation. You will consider both them and the circumstances of palliation. I think there was no preconcerted plan to outrage the feelings of this pursuer, by carrying off these pictures. There is, however, great excuse for Clelland's believing that such was the purpose, because I must say there was nothing less likely to happen than what actually took place. There was a whole store open, filled with articles easily seized, and much more tempting, and likely to give much less trouble, either in carrying away or disposing of; yet they enter the dwelling-house at once, and pounce upon articles least likely to attract the attention of a messenger, or to be removed by him. It was by no means an extraordinary result, that this gentleman, coming home, and finding his wife in agitation, and hearing that she had remonstrated against taking the pictures, should suppose that the proceeding was actually designed as a means of throwing contempt and disgrace upon him. I repeat, however, you have no evidence before you to prove any concert, either on the part of Cherry, for whom Weir is answerable, and still less on the part of Weir himself, to add to the disgrace thrown on this individual, by laying hold of these articles in particular. But as it was, these are the articles carried off, and illegally; and therefore it is for you to consider, what weight is to be attached to the fact, that a gentleman living quietly in the country, has goods illegally carried off, most likely to make a clamour in the neighbourhood, and to cause himself and friends to be laughed at. The very circumstance of carrying out his pictures into the street of a borough was most likely to injure his feelings, and expose the whole of his family to irony. That being the fact, I don't care whether they were of value or not; whether they were worth three pounds or ten shillings: they were the family pictures of this gentleman, and just as sacred, and as worthy of regard, as the first pictures in the neighbouring Palace of Hamilton. Therefore, I do say to you, throwing altogether aside the intrinsic value, you are to consider

merely, what value this gentleman was entitled to attach to them, and the disgrace to which he was subjected by their being carried off by a constable, and exposed in the streets of a neighbouring village. There are two stories, even with regard to this part of the case. The maid-servant tells you, she begged them to stop till she sent for her master: the constable rather denies this: he says, he waited for some time, to try to get an arrangement made. The wife told him she could make no arrangement till her husband came home. It really looks like the truth, that they did not choose to wait; and that they carried off the pictures in spite of remonstrances. The constable does not disguise that remonstrances were made. Then the pictures are sold in the street of the borough, and they are purchased by Scott, the witness, who sells them again. I am not much inclined to go into the question, whether Scott paid a full price for them. Scott probably thought that he might make a good thing by purchasing them, and keeping them for a little till this gentleman cooled, when he might be inclined to give a considerable price to get them back; and it is by no means improbable, that Dr Macarthur * may also have bought them, with the full intention of saying to Clelland, If you will give me so and so, you shall have back your pictures. Indeed, this is rather confirmed by his never having taken them out of the box. I don't think Clelland himself was by any means bound to go to the street and buy them in. He was not bound to expose himself to additional ridicule, by buying in things that were illegally carried off. It is better that nobody bought them for him after this action was raised. It was better to allow this matter to be settled, and till he had received, in the face of the public, a return for the injury he had received.

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The ground of alleviation is, that Weir personally knew nothing of these proceedings. I have told you why I think that cannot be taken off his hands. He knew of the existence of the warrant, and did not take steps to prevent its execution: he refrained from taking that step, although, at the moment, he heard that altercation going on about the payment of these illegal costs of execution, the messenger had no right to demand, and at the very time when the fair inference is, that Clelland had exacted from him a statement, that all the money due him was paid up to that date. But then comes the letter of apology. I am not inclined to criticise on the terms of that letter. I shall read it over, leaving you, without a word of comment, to say what you think in respect to it. The action was raised on the 10th July: the defences are not given in till the month

* Scott purchased the pictures for L.3, 19s., and afterwards sold them to Dr Macarthur, and they were in his house in a box, unpacked, shortly before this trial.

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of November; so that between the defences and execution of the summons this letter is written. (His Lordship read the letter.) This is the letter, and it is for you to consider, whether, when these proceedings did take place, and the action was raised, under all the circumstances now under consideration, this is apology sufficient to entitle him to be relieved from the consequence of diligence done, for which he is legally responsible, if not by his personal authority, when that authority ought to have been interposed in order to prevent it.

This exhausts the case. In the defences he has tendered L.20; and if you are of opinion that this defender was in no respect answerable for these proceedings, that they were done without his authority, that they were merely the act of the messenger, for which he is not accountable, although I have told you the law is different, then of course you will find for the defender; or if you think that, in the circumstances, either he or the messenger were entitled to put the warrant in execution, you will also find for the defender. But if, on the other hand, you think he is so responsible, that the proceedings were illegal, and that the messenger had no right to execute for these expenses, as I have humbly pointed out to you, then you will find for the pursuer; and having so found, you will determine the amount of solatium he is to receive. It is fitting I should tell you this, that having tendered L.20, if you don't find a sum exceeding that, he will be turned out of Court without payment of his expenses. If, however, you think the injury entitles him to a larger sum, then you will fix on such sum as you think fitting, considering the situation of both the parties.

VERDICT for pursuer, damages, L.200.

Where specific grounds of nullity are set forth on record, not competent to state others, however broad the terms of the issue.

In the course of the above trial, *Graham Bell*, in opening, was proceeding to prove that the warrant of the Justices was a priori illegal, in respect there had been no affidavit by the collector or overseer, in terms of the statute above quoted, when he was interrupted by the *Dean of Faculty*, who objected, that this ground of challenge had not been laid in the summons, or at least had not been specifically set forth as matter of fact on record, and was thus surprise. *Rutherfurd*, in reply, contended, that the terms of the issue were broad enough to include every objection to the warrant. Objection sustained.

Lord Ordinary, *Moncreiff*. For Pursuers, *Rutherfurd, Graham Bell*. Agent, *Wm. Renny*, W. S. For Defenders, *Dean of Fac. (Hope,) Miller*. Agent, *Jo. Meek*, W. S. *Mr Russell*, Clerk.

R.

SECOND DIVISION.

No. XIII. 21*st July* 1835.

GUNN
against
GOODALL, &c.

(Before Lord Meadowbank and a Common Jury).

Master and Servant. — Apprentice. — Process.—*A master found entitled to damages for loss of service by the desertion of his apprentice.*

Pursuer not allowed to lead evidence of the defender's habits and conduct out of the shop.

This was an action at the instance of a painter and glazier against his apprentice and his cautioner, for breach of indenture by deserting his service. The defence was a justification, on the ground of harsh and cruel treatment by the pursuer's son. It appeared in evidence, on the part of the pursuer, that Goodall was bound apprentice for five years, from March 1831. He was to receive, as wages, 4s. a-week during the first and second years; 5s. a-week for the third year; and 6s. a-week for the two last years. He soon fell into habits of irregular attendance, particularly in the mornings, and was found fault with for this both by the pursuer and his son, and some of the workmen. He went away in June 1832, but returned in February 1833, and was taken back. He still continued occasionally negligent, often late, and sometimes absent a whole day. He finally went away in May 1833, and never returned. He was a good workman when attentive. During the last years of an apprenticeship, an apprentice is considered equal to any journeyman. The value of an apprentice is considered about 6s. a-week during the first year, and from 8s. to 10s. or 11s. per week for the following years. The ordinary rate of a journeyman's wages, in 1833, was from 16s. to 18s. a-week. These latter statements were made by persons in the trade, who were called to speak to the point, upon the supposition that the apprentice was equal in all respects to the general run. Upon this data the pursuer's loss, by the desertion of his apprentice, was calculated at L.78. Narrative.

On the part of the defenders, it was stated by several persons who had, for longer or shorter intervals, been in the employment of Gunn, but who were not now in his service, that Goodall was

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Narrative.

civil and obedient, and not irregular in his attendance; that young Gunn, who took the chief management in 1833, used him ill, spoke harshly and offensively to him, holding him up to the contempt of the other workmen, and sometimes putting him to drudgery, and did not seem anxious to teach him his trade, and treated him in a manner they had never seen any young man in the business treated. Young Gunn's conduct was attributed to bad temper. The father, a mild man, came in after one of the disputes, and said he would like to see all his men go on pleasantly. He rebuked his son, who behaved more gently for a time. The defender produced no evidence to rebut the pursuer's evidence as to value.

The following were the issues:

Issues.

It being admitted, that by indenture, No. 3. of process, dated 13th June 1831, William Goodall, son of the defender, was bound apprentice to the pursuer for the period of five years from and after the 1st day of March 1831, and that the said defender, under the said indenture, entered into the service of the pursuer, and that the defender, Adam Goodall, was cautioner for the said William Goodall—

1st, Whether, on or about the 6th day of May 1833, in violation of the said indenture, the said William Goodall wrongfully deserted his said service, to the loss, injury and damage of the pursuer, and whether the said William Goodall, and the said Adam Goodall, are liable, conjunctly and severally, in reparation of the said loss, injury and damage?

2d, Whether the defender, Adam Goodall, as cautioner aforesaid under the said indenture, is indebted and resting owing to the pursuer in the sum of L.20, or any part thereof, as the penalty under the said indenture? Or,

Whether, between the 4th day of February and the 6th day of May 1833, the pursuer agreed to pass from the said indenture, and allow the said William Goodall to leave his said service?

Judge's Charge.

Lord Meadowbank *charged the Jury as follows:* You see it set forth as admitted, that, by a certain indenture, the defender was bound apprentice to the pursuer; and the matter put in issue is this: (His Lordship read the issue.) This case has been represented to you as one where the defender is on the poor's roll, and that he is brought here by the pursuer under such circumstances, to answer for the boy of another person, and to be subjected to recovery of a penalty under such indenture. His obligation is however not the less binding. It is quite clear, on the one hand, that you are bound to consider, that it would be injurious to society for a moment to entertain the idea, that a party who enters into an indenture is not bound strictly to adhere to it, and in no respect to avoid conforming to its

terms, without a good and sufficient cause. Or to suppose, that if he does so without such cause, the master is not entitled to recover damages, either from the apprentice himself, if he can get hold of him, or from the person who is bound along with him. On the other hand, it is clear, that when the master engages the apprentice, he undertakes not to oppress him, to take care that he is not misused; and he is bound to give him all the advantages of being taught the trade in contemplation of the parties at the time the indenture is entered into. You will remember, that the argument, that the master had agreed to dispense with the indenture during the course of it, is given up. One witness spoke to this, but his evidence is imperfect. The party don't insist on it; and therefore the question just comes to this, whether the boy wrongfully and improperly abandoned the service in which he had engaged during the full period of five years. We have nothing to do with the first part of the service, which it is said was abandoned; it is given up by the other side; by taking him back he pardoned him, and there is no more to be said about it. The matter for you to consider is, whether there was sufficient ground for leaving his service on the 6th May 1833; and this is a question for you, and you alone to determine. Witnesses have been adduced on both sides. Those adduced by the pursuer were principally persons who are in his service: they are not on that account by any means less entitled to credit than those on the other side. It is your business to attend to the statements of both. (His Lordship here went over the evidence.) That is the whole evidence, and it is for you to say to which you will give most credence. The first witnesses say they saw no maltreatment. There are three on the other side, who positively swear to substantive acts of maltreatment. You are next to consider, whether the maltreatment was sufficient to authorise the boy going off in the way he did. It is not every angry word which a boy gets from his master, or the overseer of his master, which will entitle him to break his indenture. But of course if he receives excessive maltreatment, if he is not taught any thing, if the master takes no care of him, that is another question; I would say then, that the boy would be entitled to take the proper steps to get free from his engagement. It is entirely for you to say, whether in this case the quantum of bad treatment was such, if it was so uniform, so invariable, so constant, that the boy was entitled to say he got no benefit, and the master having forfeited his obligation, the corresponding obligation on the part of the boy had also fallen. How he should take advantage of this is not matter for your consideration at all. The amount of the damages is what you are to determine; and no doubt if you are of opinion that the boy did improperly break his inden-

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ture, some damages are due. But you yourselves will judge of the amount, having heard the character of the boy, and what is stated generally by the witnesses, and also by those who spoke to the rate of wages, though of course you will keep in view that their opinion was given hypothetically, and under the qualification of a person of ordinary good conduct being in their contemplation at the time.

VERDICT for pursuer, damages L.40.

Counsel for Pursuer, *P. Robertson* and *A. Lothian*. Agent, *R. Lockhart*. Counsel for Defenders, *Anderson* and *G. Skene*. Agent, *Ro. Gilmour*. *Mr Russell*, Clerk.

R.

Pursuer not allowed to lead evidence of the defender's habits and conduct out of the shop.

In the course of the above trial, the pursuer was stopped when proceeding to lead evidence of the defender's habits and conduct when out of the shop.

SECOND DIVISION.

No. XIV. *29th July* 1835.

WILLIAM TORRANCE
against
LEAF, COLES, SON AND COMPANY, AND JAMES TURNBULL.

(BEFORE LORD MONCREIFF AND A COMMON JURY.)

SLANDER.—*Circumstances in which, in a privileged case, it was found there was no proof of malice.*

THE issues in this case having been adjusted in terms of the judgment of the Second Division, as reported 21st November 1834, the cause now came on for trial. The issues were as follows:

Issues.

1. Whether, on or about the 16th day of February 1832, the defenders, Leaf, Coles and Company, did write and transmit, or cause to be written and transmitted, to the other defender, James Turnbull, accountant in Glasgow, a letter, containing the following words, or words to the following effect, according to the meaning herein after set forth, viz. 'We consider the conduct of Tor-'rance' (meaning the pursuer) 'has been so exceedingly bad,' (meaning thereby so bad and dishonest as a trader,) 'that the creditors

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Issues.

'cannot with propriety come to any settlement short of sequestration. We think him a very proper person to be made an example of,'—(meaning thereby an example of as a fraudulent insolvent,)—'and we do not see any other mode of punishing him than 'by making him a bankrupt, and keeping him without his certificate,' (meaning thereby that he was a fit object for, and deserving of punishment as a fraudulent insolvent.) 'From all that we heard 'of this transaction, we are of opinion that you have not been well 'used; and in justice to your professional character, we feel ourselves called upon to state, that your proceedings in this affair of 'Torrance have our decided approbation; and acting upon the general instructions we have always given you in matters of insolvency in Glasgow and the neighbourhood, we think that, on our account alone, you were perfectly justified in taking the prompt steps 'you did; for it is quite clear that if Torrance's system of selling 'his goods by auction'—(meaning thereby that the pursuer had been guilty of dishonest and fraudulent practices as a trader)—'had 'not been effectually stopped, a very small portion of the property 'would have been left for the creditors:' And whether, on or about the 26th day of March 1832, the defender, James Turnbull, acting under the direction or authority of the said Leaf, Coles and Company, did write and transmit, or cause to be written and transmitted, to all or any of the creditors of the pursuer, a copy or copies of all or any part of the said letter, containing all or any of the words aforesaid, according to the meaning herein before set forth; and whether the whole, or any part of the said words, are of and concerning the pursuer, and are false, malicious and calumnious; and to the injury and damage of the pursuer?

2. Whether, on or about the 26th day of March 1832, the defender, James Turnbull, did write and transmit, or cause to be written and transmitted, to all or any of the creditors of the pursuer, a copy or copies of all or any part of the letter first aforesaid, dated 16th February 1832, containing all or any of the words aforesaid, according to the meaning herein-before set forth: And whether the whole, or any part of the words so written and transmitted, or any part thereof, are of and concerning the pursuer, and are false, malicious and calumnious, and to the injury and damage of the pursuer?

3. Whether, on or about the 30th day of March 1832, the defenders, Leaf, Coles and Company, did write and transmit, or cause to be written and transmitted, to Messrs Henry Brooke and Sons of Huddersfield, a letter, containing the following words, or words to the following effect, according to the meaning herein after set forth, viz. 'Gentlemen, We are favoured with your letter, dated

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Issues.

'the 27th instant; and we are exceedingly sorry we cannot comply 'with your request of acceding to the proposed composition offered 'by William Torrance of Glasgow. In this, as in all cases of in- 'solvency, we are guided entirely by the conduct of the party; and 'we presume you are not fully acquainted with the circumstances 'which occurred before the failure, or we think you would not will- 'ingly allow Torrance to escape punishment,'—(meaning thereby 'the punishment merited by a fraudulent insolvent or bankrupt.) 'In the month of October last he came to London for the purpose 'of purchasing goods. He bought nearly L.500 of us, and also to 'a considerable extent of two or three other houses here, and im- 'mediately upon his arrival in Glasgow he sent a large portion of 'these goods to the auction mart, and disposed of them at any prices 'they would fetch,'—(meaning thereby that he had been guilty of dishonest and fraudulent practices as a trader.) 'From an investi- 'gation of his affairs it is pretty certain that, at the time he pur- 'chased these goods, he not only was well aware that he was in- 'solvent, but that he never could pay for them. The system of selling 'goods by public auction appears to be gaining ground very much in 'Scotland; and we are determined, whenever we make a bad debt 'with a man who is guilty of such a practice,'—(meaning thereby a dishonest or fraudulent practice, which they imputed to the pur- suer,)—'we will make an example of him,'—(meaning thereby that the pursuer was a fit object for making an example of as a fraudu- lent trader,)—'which can only be done effectually by making a 'bankrupt of him, and keeping him without his certificate. In 'pursuing this course with Torrance we consider that we are only 'doing justice to ourselves, and protecting the interests of our nume- 'rous customers in Glasgow, who mean to pay us twenty shillings 'in the pound. Looking at this case alone, we may perhaps lose 'a few pence in the pound, but we feel compelled to take a more 'extensive view, and to act upon a principle which will have the 'effect of deterring such characters as Torrance'—meaning thereby that the pursuer was a bad character as a trader, in respect of his dishonest and fraudulent practices)—'from coming to us; for 'we feel convinced it is only the ease with which these fraudulent 'insolvents'—(meaning thereby that the pursuer was a fraudulent insolvent)—'get over their difficulties that increases the number of 'failures:'—And whether the whole or any part of the above words are of and concerning the pursuer, and are false, malicious and calumnious, and to the injury and damage of the pursuer?

4. Whether, on or about the 30th day of March, or on or about the 3d day of April 1832, the said Leaf, Coles and Company, defenders, did write and transmit, or cause to be written and trans-

mitted, to the defender, James Turnbull, and to Edward Railton, agent in Glasgow, or either of them, a copy or copies of all or any part of the letter last aforesaid, dated 30th March 1832, containing all or any of the words aforesaid, according to the meaning herein before set forth; and whether the whole or any part of the words so written and transmitted, or any part thereof, are of and concerning the pursuer, and are false, malicious and calumnious, and to the injury and damage of the pursuer?

Issues.

5. Whether, on or about the 7th April 1832, the said defender, James Turnbull, did write and transmit, or cause to be written and transmitted, to all or any of the creditors of the pursuer, a copy or copies of all or any part of the letter aforesaid, dated 30th March 1832, containing all or any of the words aforesaid, according to the meaning herein before set forth; and whether the whole, or any part of the words so written and transmitted, or any part thereof, are of and concerning the pursuer, and are false, malicious and calumnious, and to the injury and damage of the pursuer?

The damages were laid at L.1000.

Statement of Case.

The pursuer rested his case almost entirely on documentary evidence, consisting, besides the letters in the issues, principally of a correspondence between the two defenders in regard to Torrance's affairs. In some of his letters, Turnbull expressed considerable anxiety to obtain the trusteeship on Torrance's estate; and he also expressed himself as not well used by him, and desired Messrs Leaf's influence and recommendation for the purpose of enabling him to obtain the trusteeship. The pursuer endeavoured to make out that the insinuations against Torrance were got up for the purpose of affording ground for refusing to accede to a composition, and that the defenders were in league to traduce the character of the pursuer, and were not actuated by a sense of duty. It did not appear from the correspondence that Turnbull had first communicated the actings of Torrance to Leaf and Company, but, on the contrary, they were the first to mention it in their letter to him; and although Turnbull cordially concurred with them in their intention to adopt strong measures against Torrance, there were no expressions indicative of personal resentment to Torrance. The pursuer called three witnesses, a creditor on Torrance's estate, Edward Railton, mentioned in the issue, who had been employed by the creditors to investigate the bankrupt's affairs, and an auctioneer in Glasgow. The result of this testimony shewed that Torrance had actually made sales, by auction, in the manner alluded to in the issue; but it was stated by Railton that he had satisfactorily accounted for the proceeds. The pursuer made it a point, in his case against Turnbull, that he had, on the part of another creditor, for

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whom he acted, concurred in the resolutions of the creditors, and accepted the composition offered, while he did not immediately communicate to Leaf and Company the said resolutions. The defender led no evidence.

Judge's Charge.

LORD MONCREIFF, *in charging the Jury, stated,* That the case resolved into a commentary on the letters before them, and that although a full commentary had been made by the counsel on either side, they should examine them for themselves. My first duty is to explain, as briefly and distinctly as I can, the law on the issues now before you. There are five issues: The first, third and fourth relate to Messrs Leaf and Company, and the second and fifth to Turnbull, the other defender. They contain a statement, that certain letters (two letters) were written by Leaf and Company, and that they were by them put into circulation, the second directly, by being sent to Messrs Brooke, and the other indirectly, by being sent to their agent, Turnbull, and by their authority put into circulation. The first thing to be considered is, whether letters, containing these words, were or were not written according to the affirmative of the issues. It is fully admitted and proved, that they were written by Leaf and Company, and the second sent to Messrs Brooke, and the first to Turnbull, and that they subsequently did authorise Turnbull by letters to communicate the letter to others, and ultimately, though not at first, it was communicated to others. We may pass that part of the issue without any difficulty. Laying aside, for a moment, the word malicious, the first point is, whether you are entitled to take the averments in these letters to be false, and to the injury and damage of the pursuer. The Dean of Faculty alluded to there not being what is technically called a justification, that is, an undertaking by the defenders to prove that all that is asserted in the supposed libel is consistent with truth. The defender does not undertake to prove the truth of all that is in the issues, more especially the inuendos; but that is not of importance. It is for you to consider the things asserted in the letters, and the facts out of which the statement grew, and to say whether or not the statement was made on fair and probable grounds, and in the exercise of a legal right, or was altogether without foundation, and merely arose from malice or ill-will, and for the purpose of injuring the other party. This leads me now to notice the insertion of the word malicious in all these issues, which is not the case in an ordinary action of damages for slander. If Leaf and Company had simply circulated this statement, if there had been no sequestration, nothing which entitled them to interfere, and they had so circulated a statement in Glasgow, or published in a newspaper, and had not undertaken to prove the truth of it, the

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law would not have compelled the other party to prove malice, but it would have been inferred, from the calumnious nature of it under such circumstances. This, however, is a case of a different description, and is distinguished by being what is called a privileged case. There are privileges of different orders, *e. g.* there is the privilege of Parliament, which is absolute, and cannot be the subject of an action at all, whether there is an averment of malice or not. There may be other examples of the same thing. There is another class of cases which are privileged in a different sense, to this effect, that a party being in the discharge of a right or duty, although he make statements which may be injurious to another party, and though he may not undertake substantively to prove that all he has said is true, cannot be brought into Court, unless the pursuer undertake to prove that it is not only to his injury, and falsely, but that it has been done maliciously. I shall not trouble you with further observations on this point, but shall just read to you a passage from the direction of the Lord Chief-Commissioner, in a case of Maclean *v.* Fraser, (19th May 1823, 3. *Mur.* 353). This was the case of a clergyman, who was considered to have a privilege from his situation: The nature of the case is not of any importance. His Lordship there says: 'Actions of slander may be considered as of two kinds—either the defender has, or he has not, a right to speak of the pursuer. If he has not, then he is liable if the accusation is false. If he has the right, then he is protected, unless he maliciously makes the accusation. In the first case it is not necessary to state malice, as it is sufficient if falsehood and injury is proved; but in the second, malice must be stated and proved, as it is the ground of the action. Whether a case falls within the one class or the other is a question for the Court; but whether malice is proved rests entirely with the jury.' I think the distinction is drawn in a few words very distinctly in that charge. If a person is so situated that he has a right to speak, if he is called on to do so, then it is a protected case, and malice must be proved. I could read other passages to the same effect, but this is so distinct I need not go further. In the present case, the precise question was before the Court at the proper time; that they might determine at once whether the case was privileged or not, whether it was a case in which the pursuer must make out malice as the foundation of his action. If you examine the summons you will find that the pursuer did aver malice, no doubt being aware of the danger of laying his summons otherwise; but being aware also of the difficulty of making it out, the pursuer endeavoured to withdraw the word when he came to prepare the issue; and he accordingly demanded an issue without the word being in it. In consequence of that, I, as Lord Ordinary, after the matter was

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fully argued, thought proper that the terms of the issues should be submitted to the Court, and the cause was reported for that purpose. It was then fully considered: there are two reports of the proceedings, from both of which it appears that all the Judges were of opinion that the case was privileged, and that the pursuer must take an issue with the word maliciously in it. His Lordship then read the speeches of Lord Meadowbank and the Lord Justice-Clerk. The Court having thus determined that the case is privileged, you must be satisfied not only that the words are of and concerning the pursuer, and false, and to his injury and damage, but also that they are malicious. You see the Lord Chief-Commissioner says that malice is the foundation of the action. That being the question before you, the effect of it legally is, that while in other cases you infer malice, in a case of privilege, where a party has a right to speak of another, you do not presume malice from the nature of the words or of the injury, but it must be proved to your satisfaction as a substantive fact: you must be convinced the thing was done, not in the exercise of a right and duty, but purely from a malicious intention, and for the purpose of injury, and for no other purpose. The question however remains, what is to be considered as proper evidence of malice? This point was fully discussed in a case between two persons of respectability, Hamilton *v.* Hope, (27th March 1826, 4. *Murr.*) Undoubtedly in that case there was a serious slander, in consequence of which damages were sought, and it was put on the pursuer to prove malice. The Lord Chief-Commissioner was thought, on the first trial, to have left the question of privilege ambiguous, which he never intended, because he says the contrary in the previous case of Fraser. But there was a new trial, in which the direction is given in this way: After stating that malice must be proved, his Lordship says, 'The first question is, what is the nature of the evidence by 'which a jury is to be satisfied? And, second, what does law hold 'to be malice? On the first, it is not necessary that there should 'be proof of extrinsic facts, to induce you to conclude that it was 'malicious. It is sufficient if you are satisfied of it from the nature 'of the words and the concomitant circumstances. This is quite 'sufficient, without any proof of previous declarations of malice or 'rooted enmity. Malice, in law, does not consist of a rooted and 'fixed resentment, but in a desire to injure; and, in this case, 'where there is no extrinsic evidence, the question is, whether 'malice is to be inferred from the whole circumstances. In the issue, 'the words are laid as *maliciously* used; and this must be under 'your consideration, as it takes it out of the ordinary case of slander, 'and constitutes what, in modern language, is termed a privileged 'case. There are various degrees of this privilege. In some it

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'is absolute; and there the Court must direct a verdict for the de- 'fender, the party not being responsible. In some, from the na- 'ture of the act, and the enactment of the statute under which the 'action is brought, a party can only recover on proof of express 'malice. In others, the protection is not absolute, but only if the 'matter is pertinent to the subject, as in the case of a counsel con- 'ducting a cause; but in all of them malice is laid. Malice here 'does not mean a fixed, rooted state of resentment, by the one 'party against the other, but that state of mind which leads the 'party to act, not from a view of duty, but of injury. This malice 'may have existed privately; but the question is, whether, at the 'time the words were uttered, they were used with a mind to in- 'jure, or in performance of a duty?'

Now, this must be understood with reference to each case by itself; and the question before you, as to what is sufficient evidence of malice, stands in this way: These parties, Leaf and Company, were creditors of a person who became bankrupt; and the question is, whether these letters were written bona fide, with reference to the rights vested in Leaf and Company, or whether they were written for the deliberate purpose of maliciously injuring this pursuer, independent of the matter on which these parties had a clear right to speak. His Lordship then went into a minute detail of the circumstances, and situation, and actings of all the parties, as appearing from the correspondence and other evidence, and left it to the jury to say, whether malice was proved against both, or either of the defenders, as the case of each was distinguishable. His Lordship further observed, I should not deal candidly with you if I did not say, that it does not appear to me malice has been proved. It is my duty further to state that L.1000 is most extravagant. It is impossible to look at that. The practice in this respect here has differed from that in England, where they state nearly the sum they expect to get, and don't think of large sums. You are the judges of the quantum; but in all such cases you should be temperate, and not make that which is intended to be a reparation to the one party, the cause of producing serious mischief to the other. You will judge for yourselves what damages, if any, are due; but unless you are satisfied that malice has been proved, you must find a verdict for the defender.

VERDICT for the defenders on all the issues.

For Pursuers, *Dean of Fac. (Hope,)* and *Paterson.* Agent, *Chas. Fisher.*
For Defenders, *Rutherfurd, A. M'Neill.* Agents, *Campbell & M'Dowall.*
Mr Russell, Clerk.

R.

DECISIONS

OF THE

HIGH COURT OF JUSTICIARY.

No. I. *24th January* 1835.

PETER MACLEOD
against
ARCHIBALD BUCHANAN AND HAMILTON ROSE.

ADMINISTRATION OF JUSTICE.—PROCESS-CRIMINAL.—WRONGOUS IMPRISONMENT. — *In a petition to the Justices, under the* 6. *Geo. IV. c.* 129, *for warrant de plano to apprehend a party for trial under the statute, and the party being convicted and imprisoned, the Court suspended the warrant simpliciter, in respect,* (1.) *That the warrant of apprehension was signed only by one Justice; and,* (2.) *That a mere copy of the sentence, engrossed in a letter addressed by the Justice of Peace Clerk to the Magistrates and keepers of the jail, was alone put into the hands of the jailor, and was not a sufficient legal warrant of incarceration.*

By Act 6. Geo. IV. cap. 129, repealing the combination laws, it is enacted, under section 3, 'That from and after the passing of this 'act, if any person shall by violence to the person or property, or 'by threats or intimidation, or by molesting or in any way obstruct-'ing another, force or endeavour to force any journeyman, manu-'facturer, workman, or other person hired or employed in any 'manufacture, trade, or business, to depart from his hiring, em-'ployment, or work, or to return his work before the same shall be

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'finished, or prevent or endeavour to prevent any journeyman, 'manufacturer, workman, or other person not being hired or em- 'ployed from hiring himself to, or from accepting work or em- 'ployment from any person or persons: or if any person shall use 'or employ violence to the person or property of another, or threats 'or intimidation, or shall molest or in any way obstruct another 'for the purpose of forcing or inducing such person to belong to 'any club or association, or to contribute to any common fund, or 'to pay any fine or penalty, or on account of his not belonging to 'any particular club or association, or not having contributed or 'having refused to contribute to any common fund, or to pay any 'fine or penalty, or on account of his not having complied or of his 'refusing to comply with any rules, orders, resolutions, or regula- 'tions made to obtain an advance or to reduce the rate of wages, 'or to lessen or alter the hours of working, or to decrease or alter 'the quantity of work, or to regulate the mode of carrying on any 'manufacture, trade, or business, or the management thereof; or 'if any person shall by violence to the person or property of an- 'other, or by threats or intimidation, or by molesting or in any way 'obstructing another, force or endeavour to force any manufacturer 'or person carrying on any trade or business, to make any altera- 'tion in his mode of regulating, managing, conducting, or carrying 'on such manufacture, trade, or business, or to limit the number 'of his apprentices, or the number or description of his journey- 'men, workmen, or servants; every person so offending, or aiding, 'abetting, or assisting therein, being convicted thereof in manner 'herein-after mentioned, shall be imprisoned only, or shall and 'may be imprisoned and kept to hard labour, for any time not ex- 'ceeding three calendar months.'

The mode of enforcing the act is prescribed by section 7, which declares, 'That on complaint and information on oath before any 'one or more Justice or Justices of the Peace, of any offence having 'been committed against this act, within his or their respective 'jurisdictions, and within six calendar months before such complaint 'or information shall be made, such Justice or Justices are hereby 'authorised and required to summon the person or persons charged 'with being an offender or offenders against this act, to appear 'before any two such Justices, at a certain time or place to be spe- 'cified; and if any person or persons so summoned shall not appear 'according to such summons, then such Justices, (proof on oath 'having been first made before them of the due service of such 'summons upon such person or persons, by delivering the same to 'him or them personally, or leaving the same at his or their usual 'place of abode, provided the same shall be so left twenty-four

'hours at the least before the time which shall be appointed to attend the said Justices upon such summons,) shall make and issue their warrant or warrants for apprehending the person or persons so summoned, and not appearing as aforesaid, and bringing him or them before such Justices; or it shall be lawful for such Justices, if they shall think fit, without issuing any previous summons, and instead of issuing the same, upon such complaint and information as aforesaid, to make and issue their warrant or warrants for apprehending the person or persons by such information charged to have offended against this act, and bringing him or them before such Justices; and upon the person or persons complained against appearing upon such summons, or being brought by virtue of such warrant or warrants before such Justices, or upon proof on oath of such person or persons absconding, so that such warrant or warrants cannot be executed, then such Justices shall and they are hereby authorised and required forthwith to make inquiry touching the matters complained of, and to examine into the same by the oath or oaths of any one or more credible person or persons as shall be requisite, and to hear and determine the matter of every such complaint; and upon confession by the party, or proof by one or more credible witness or witnesses upon oath, to convict or acquit the party or parties against whom complaint shall have been made as aforesaid.'

In December 1834, an application was presented to the Justices of Ayrshire, against Peter Macleod and others, at the instance of A. Buchanan, partner of J. Finlay and Company, Catrine Works, with concurrence of H. Rose, deputy procurator-fiscal of court, for the public interest, founding on section 3. of 6. Geo. IV. c. 129; and bearing, that notwithstanding of the provisions of the act, upwards of 200 persons, in the employment of Finlay and Company, did lately join a trades' union, for the purpose of forcing their employers to pay them a higher rate of wages; and, in consequence of the non-compliance of their masters, had struck work, and now endeavour, with the assistance of evil-disposed persons, by violence, by threats and intimidation, and by molesting and obstructing the workmen of the said company, to prevent them accepting work, and from walking, and going out and in to their employment. The application proceeds thus: 'In particular, on the morning of Wednesday, the '17th day of December current, or on some one or other of the 'days of the said month, prior to the date hereof, or of November 'immediately preceding, and also in the evening of the said day, 'David Watson, &c. and Peter Macleod did, time and place fore-'said, as the work people were going into the mills at the breakfast 'hour, and as they were coming from the works in the evening,

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'and on other occasions, obstruct the said work-people, by forming 'a considerable crowd around them, and did throw dirt, &c. at the 'work-people, and strike many of them, and did make use of threatening and abusive language, &c. for the purpose of preventing them 'going on with and accepting employment, whereby they have 'each and all incurred the penalty imposed by the act;' and concluding as follows: 'May it therefore please your Honours, to consider this petition; to take the oath of the private complainer as 'required by law; grant warrant for apprehending and convening 'the said offenders before any two or more of your number, to 'answer to said charge; and on the facts set forth being admitted 'or proved, grant warrant, decern and ordain the said offenders to 'be imprisoned for the full period prescribed by the act, or for such 'time as shall seem just, to deter others, &c. According to 'justice. (Signed) ARCHD BUCHANAN. HAMILTON ROSE, '*D. P. F.*'

This petition or application bore no date. Mr Buchanan also emitted an oath of credulity, which had no date. A warrant for the apprehension of the offenders was granted by one Justice. It is dated Catrine, 18th December 1834, and is subscribed 'Claud 'Alexander, *J. P.*' The suspender was accordingly apprehended and convened before two Justices, Mr Alexander and Mr Montgomerie, who, after certain procedure, pronounced the following sentence: 'Be it remembered, That on 18th day of December, in 'the year 1834, in the fifth year of his Majesty's reign, P. Macleod, '&c. are all and each convicted before us, C. A. and A. M. two of 'his Majesty's Justices of the Peace for the county of Ayr, of having, on Wednesday, the 17th day of December current, been 'guilty of using violence to the person, and by threats and intimidations, or at least aiding, abetting or assisting, for the purpose of 'preventing the persons employed at the Catrine Works continuing 'in their employ, contrary to the act made in the sixth year of the 'reign of King Geo. IV, entitled, 'An act,' &c.: And we, the 'said Justices, do hereby order and adjudge each of the said James 'Muir, &c. for their said offence, to be committed to and confined in the common jail of the said county, for the space of two 'months, and the said P. Macleod, &c. for the space of six weeks 'from this date. Given under our hands, the day and year above 'written. (Signed) CLAUD ALEXANDER, *J. P.* ALEXANDER MONTGOMERIE, *J. P.*' Macleod was forthwith imprisoned, the following letter having been transmitted as the warrant of commitment. '*Justice of Peace Clerk's Office, Ayr, 18th December* 1834. 'Gentlemen, The following judgment or conviction has been pronounced by Claud Alexander and A. Montgomerie, Esquires, two

'of his Majesty's Justices of the Peace for the county of Ayr, in 24 Jan. 1835.
'the petition of Archibald Buchanan, Esq. one of the partners of
'Messrs James Finlay and Company, and manager of their works Macleod v. Buchanan and Rose.
'at Catrine, with concurrence of Hamilton Rose, writer in Cum-
'nock, deputy procurator-fiscal of court, and of the said Hamilton
'Rose for the public interest, against P. Macleod and others: 'Be
"it remembered.' (*Here follows copy of the above conviction.*) And
'you will be pleased to incarcerate and detain the persons of the
'said Peter Macleod, &c. accordingly, and for the periods above set
'forth. I am,' &c. (Signed) 'DAVID SHAW, *Justice of Peace*
'*Clerk.*' (Addressed) '*To the Magistrates of Ayr, and the Keepers*
'*of their Tolbooth.*'

Macleod brought a suspension, and craved liberation on the following grounds:

I. The warrant of apprehension and procedure were illegal. Sect. 7. of the act provides two courses of procedure; 1st, By complaint to one Justice, who is authorised to issue a summons, convening the party before two Justices, to answer for the offence; or, 2dly, A warrant may be issued by two Justices for the instant apprehension of the accused, if that course be more expedient. Here no summons was issued. Instant apprehension was the course adopted; but the warrant was signed by one Justice only, instead of two.

By this last alternative provision of the statute, power to grant warrant of apprehension is expressly given to a plurality of Justices, and they are to issue their warrant, and the procedure is to be before such plurality.

II. The charges were unfounded.

III. The complaint is inept, (1st,) because there is no specification of the section of the act on which the suspender is amenable; (2dly,) because the complaint and the oath are not dated. The objection is the stronger, as the complaint does not specify the year in which the offence took place. It merely states, 'On the morn-
'ing of Wednesday, the 17th December current, or on some of the
'other days of that month prior to the date hereof.' See *Alison's Prin.* p. 121, and sect. 7. of Act.

IV. The warrant of commitment is illegal. The conviction, or at least a principal copy of it, signed by the Justices, ought to have been lodged with the jailor, as the warrant of commitment; instead of which, he was detained on a mere letter from the Justice of Peace clerk, which is not even an extract of conviction, although an extract is not sufficient by the statute.

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Answered—I. There is no room for the distinction contended for The power of issuing the summons or the warrant is vested in the same quarter; and the one just comes instead of the other, where, from reason to believe that the party is about to abscond, summariness of procedure is requisite. From the terms of the act, it is clear, that the summary warrant can be applied for, just as the formal summons, by complaint 'to any or more Justice or Justices,' because this is the complaint on which both the writs are equally declared to be issuable. This view of the matter is made more clear by the 8th section of the act, which runs thus: 'That it shall be 'lawful for the Justices of the Peace, before whom any such com-'plaint or information shall be made as aforesaid, and they are hereby 'authorised and required, at the request or writing of any of the par-'ties, to issue his or their summons to any witness or witnesses to 'appear and give evidence before such Justices, at the time and 'place appointed for hearing and determining such complaint.' It is manifest from this clause, that the same single Justice who issues his summons is also to grant his warrant for summoning witnesses. Besides, peculiar expedition is necessary where the party is about to abscond, and the warrant for apprehension is resorted to; and it is not likely that the Legislature intended that, instead of one, the authority of two Justices should be necessary, when the greatest dispatch was called for.

II. The charges were followed by conviction on proof.

III. (1*st*,) The complaint libels on the statute, and no specification of section necessary. (2*d*,) The date of the presentment is the date of the petition. The petition was presented on the 18th December 1834; and on that same day an interlocutor was written on the face of it, ordering service, and bearing its own date, 18th December 1834.

IV. The original conviction must, by the act, be transmitted to the Quarter Sessions, and filed among their records. It only remained to send a certified copy to the jailor, which was done by the clerk of court. An extract it could not properly be called, because the court was not a court of record.

Counsel having been heard, the following opinions were delivered:

Opinion of Court.

Lord Gillies.—Independently of the two objections on which I mean to rest my opinion, I have a strong impression of the irregularity of the procedure, on the ground that there was no date to the petition or the oath. The writ ought to prove its own date. A negative cannot be proved, and the date cannot be supplied by parole evidence, nor is it supplied here by the date of the deliverance.

But, 1*st*, I am quite clear that the warrant of apprehension by

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Opinion of Court.

one Justice was not sufficient. A distinction is carefully drawn in the act betwixt the two courses of procedure. From the terms of the act, I am clear that the greater power, viz. the power of instant apprehension and trial, was given to a plurality of Justices. The lesser power, viz. the power of trying and convicting a party previously summoned, was limited to two Justices; and there is nothing in the act to shew, that the greater power, of instant apprehension, and it might be of immediate conviction, could be limited to one. The exception in the act rather made for than removed the objection. My meaning will appear better from the terms of the 8th section, where the words used as to the citation of witnesses are, 'to issue his' or 'their' summons, &c. Then let section 7. be looked to, and it becomes manifest, that had the Legislature intended that less than a plurality of Justices could be sufficient, under the second alternative of the statute, the clause would have run thus, 'to make 'and issue (his or) their warrant or warrants for apprehending,' &c.

2d, As to the warrant of incarceration, I am doubtful whether even an extract would have been sufficient. The words of the act plainly shew that the conviction was the only proper warrant. But here there was a mere letter, containing an excerpt of the sentence, but not amounting to an extract. The Justices no doubt acted in bona fide. The act was curiously worded, and difficulties arose from the introduction of English practice.

Lord Mackenzie.—Except on one point, I concur with Lord Gillies. It is needless to go into preliminary points, but I object to the want of date. The oath bearing no date, and that not appearing by reference to the petition, cannot be supplied, for there was no date to the petition. But,

1st, I concur as to the want of the warrant of commitment. The statute plainly contemplated that the decree of court should be the warrant of commitment. The form contains the words, 'Given 'under our hands,' &c. which means that it must be given out. But this is not all. It might be said there was a prevalent and universal rule of Scots law, which made an extract probative of the sentence. If there be such an universal practice, the application of the rule may be sanctioned in this case. But, at all events, the extract, if sufficient, must be regular, authentic, probative. This letter could not be called an extract. Would a mere letter, beginning, 'My Dear Sir,' and setting forth that your Lordships had pronounced such and such a sentence, be held sufficient to warrant ultimate diligence? Here the clerk concluded his letter, by saying, 'you will be pleased to incarcerate the persons,' &c. I cannot view that as an extract, and certainly not as a sufficient warrant.

2dly, As to the warrant of apprehension, I rather entertain an

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opposite opinion from Lord Gillies. After the summons, or the warrant of apprehension, the Justices are required to make inquiry. The general rule of law is, that, to warrants of apprehension, the authority of one magistrate is always necessary. No quorum is necessary, one being sufficient. By this act, one or more are authorised to issue a summons for summoning the party before two Justices. Then, if the party don't appear before the two, that quorum may grant warrant for his apprehension. Two are required to try the party; the same two grant the warrant for apprehension if he do not appear, because they are present to try, and may grant warrant. The words of the statute shew that the latter part of the 7th section reverts back to the original Justices.

But it has been said that the 'said Justices' must mean two. Now, the words, 'or it shall be lawful for such Justices, if they shall 'think fit, without issuing any previous summons, and instead of 'issuing the same,' &c. shew, by necessary inference, that the same initiatory Justices are meant. It is more agreeable to general policy to follow the ordinary rule of law. It would be odd if, on an emergency, one Justice must refuse to grant a warrant, when two perhaps might not be got.

Lord Moncreiff.—My opinion concurs with that of Lord Gillies. I entertain a decided opinion as to the necessity of two Justices, when the warrant of apprehension is issued de plano; and also upon the informality of the warrant of imprisonment. I am inclined also to agree with Lord Gillies as to the want of date, and the consequent irregularity of the oath.

1*st*, This is an important statute, rendered necessary by the repeal of the combination laws. It is highly penal; and most penal in that particular part of it where, by section 7, power is given instantly to apprehend and convict. It is more necessary, then, to attend both to the form and substance. Unluckily it is loosely drawn, more especially as relates to Scotland; for, by section 11, jurisdiction is given to the Sheriff; but, by section 7, it is difficult to say how that power can be applied, for there is no authority by the last section to summon the party before the Sheriff. The complaint may be made to any one or more Justices, to summon the party before two. If he do not appear, means must be adopted for bringing him before two. By the act, a plurality of Justices are required to do this: 'It shall be lawful to such Justices to issue their 'warrant.' By itself, did this clause give power to one Justice? To make out this, would be to put opposite constructions on 'Justices' at the beginning and end of the clause. This, too, independently of the view I entertain of the genius and intention of the act. The principle of the statute is to make a distinction be-

twixt warrants for citation and instant apprehension. An illustration of this may be found in section 8. The words 'his or their' warrant for citation of witnesses throw light on the matter. The Justices issue a warrant. Lord Mackenzie truly says, it may be that more than one is present; but in the previous section two Justices being mentioned, you must take that construction which requires plurality of Justices. But, even if the words be doubtful, they must be interpreted in the sense most congenial to the protection of the liberty of the subject.

2*d*, I am also clear that the warrant of commitment is not good. By section 9, the warrant must be drawn up in a particular form, bearing the signatures of the Justices, and under their hands. I do not know that even a certified copy would be sufficient, but certainly not what is called a copy contained in this letter. The only warrant was the words of the clerk, 'you will be pleased,' &c. The clerk had no authority to give an extract, because it was not a court of record. Still less could he carry a sentence into effect by merely writing a letter. The statute has provided for the preservation of the conviction, independently of that which is given to the jailor; for it requires a duplicate for the Quarter Sessions. The Court will be under the necessity of passing the bill, although there can be no doubt of the bona fides of the Justices.

Lord Medwyn.—I agree that, in every statute of this kind, penal or not penal, we are not bound to go beyond the terms of it. I am quite aware that it is penal; but I do not know that it prescribes to us any rule by which the intention as to form is to be interpreted so very strictly,—any thing which, to this extent at least, I would properly reckon penal. With regard to the question, as to the necessity of a date to the oath and petition, I must say I know of no authority by which these summary petitions are required to be dated. With regard to the oath not being dated, and the opinion that it would not be a ground of conviction for perjury, all I can say is, that when a petition of this kind is presented to a Justice, all he has to do is to receive the oath, and instantly to issue his warrant. It would be a dereliction of duty in a country Justice or Sheriff, if he were to refuse to give that warrant because the petition was not dated. I know that they are never dated except in petitions under the act 1701. They are marked by the clerk as productions, but there is no date. So much for the date as regards the practice; and I must take the liberty to observe, that it is laid down in our books that it is not necessary that warrants of citation should have a date. I refer particularly to the second volume of Hume, and also to Tait. The forms in Mr Tait's book have no date. I think it quite sufficient, that, when a petition

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of this kind is presented, it should be taken down as a judicial act, and that the Justice should then be authorised to issue his warrant.

The question is raised as to whether this was a competent warrant of apprehension. I will candidly own, that when I first read over the statute I entertained a different opinion; and it is only on careful examination that I have come to think, that the interpretation put upon that part of the statute by Lord Mackenzie is correct. I do not see any reason why a single Justice should not issue his warrant, even in the case of a capital crime. When the party has been summoned, the act supposes two Justices assembled. It contemplates the party found while they are there in court; it then goes on with an alternative; but it is not an alternative to the second, but to the first branch of the act. I do not say it is impossible to construe it otherwise, because some of your Lordships differ with me. It says, the Justices who are assembled to try may issue their warrant to apprehend; but this does not preclude the construction, that the first time the Justice is to act, he may either summon the party to appear, or issue his warrant to apprehend him. I do not say the statute might not have been more precise; but I certainly conceive that the alternative applies to the original and anterior part of the section. If the party is a peaceable man, and not likely to run away, he may simply be summoned to appear. But I cannot see why it should be required that they should run round the country to get two Justices to grant a warrant to apprehend, when he is just going to fly the country. I may be wrong in my interpretation; but if so, it is at least an honest one; and I think it is justified by the manner in which the alternative is put in the seventh section.

The only other point regards the way in which the warrant should be written out; most certainly that is the most difficult point. It is an English statute, and I presume it was intended that the form in England should be adopted. What that may be, I do not pretend to know. Considering, however, that inveterate usage should have some weight, I have made it my endeavour to make inquiry. I do not think there is any thing incompetent in acting upon an extract. I am satisfied a copy signed by the Justices would be sufficient, or an extract by the clerk. I do not think the ninth section imports the contrary. I do not say but that it is the most regular form to send the warrant by the officer. The reason why the officer does not get it seems to be, that he must lodge it in jail; and after he has lodged it with the jailor, it cannot be got up,—you cannot withdraw the warrant. The only question which remains is, whether this letter is a proper extract. If the word 'Gentlemen,' and the words at the end had been left out, it would have been a proper copy; and I cannot help thinking it was a fair caution on the part

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of the clerk. On this and the previous point I have formed my opinion, principally on the practice.

Lord Justice-Clerk.—My opinion is that there were no materials for finding the want of date on petition a sufficient objection either to the petition or oath. But, 1st, as to the objection to the warrant, I am clear that a strict interpretation is necessary to a penal statute; and if there be any room for ambiguity, the doubt ought to be given to the party claiming the benefits due to the liberty of the subject. Now, is it competent for any one Justice de plano to bring a party before that Justice, or any other Justices, for trial? A Justice cannot grant a warrant for bringing a party to trial, and we must look to the words of the section to see whether this act authorises that to be done. There appears to me to be a marked distinction betwixt summoning and apprehension; and it is upon a careful consideration of the express terms of the act that I have arrived at the opinion, that if one Justice only sign the warrant of apprehension, the proceeding is nugatory. No doubt the words at the end of section 7. refer to the initiatory proceeding; but the words are not the same. I am clear, that if the party be brought up for immediate judgment, a different course of apprehension is necessary from that adopted in the case of summoning the party. The Justices, meaning a plurality, instantly proceed, and there are no words which give that power to one Justice. You have, besides, the form of committal, which two must sign. But as this Court has differed on the construction of the act, the Justices were entitled to doubt, and it is not surprising that they did so. Their bona fides is undoubted.

2dly, The only warrant of commitment was a letter from the clerk. No doubt his letter may bear a correct description of the sentence; but I am clear it afforded no legal warrant for incarceration. Whether a correct copy of sentence, signed by the Justices, would have been sufficient, is not the question; but I am clear that no copy signed by the clerk, a party remote from the conviction, would be sufficient. The Justices might have altered or rescinded their sentence. The copy in the letter is not authentic; it depends merely on the fidelity of the clerk. The proper form is in the act, and parties are not entitled to go beyond it. The schedule bears the forms of conviction and commitment. The Legislature contemplated that the actual conviction under the hands of the Justices should be the proper warrant. To my mind there is demonstration that that was the document to be sent forward. There must be a duplicate on parchment for the Quarter Sessions; but that has nothing to do with the commitment. Suppose the Magistrates had refused, on Shaw's letter, to receive Macleod, they

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could not have been found fault with. They were not bound to receive him. The Magistrates would have had a complete defence; but out of complaisance to Mr Shaw they chose to receive him. The Justices are not liable about this part of the proceedings: they did their part.

Lord Gillies added — If the Magistrates were not bound to receive him, they were not entitled to receive him.

Judgment.

The *Court* suspended the sentence, and granted warrant of liberation; and found the suspender entitled to expenses.

Act. *Dean of Fac. (Hope,)* and *A. M'Neill.* *Chas. Fisher*, S. S. C. Agent. Alt. *Rutherfurd* and *Penney.* *Gibson-Craigs, Wardlaw & Dalziel*, W. S. Agents.

R.

No. II. 2d *February* 1835.

HIS MAJESTY'S ADVOCATE
against
DUNCAN MACINTOSH.

PROCESS-CRIMINAL. — BREACH OF TRUST. — THEFT. — *Found relevant as a charge of theft, that the pannel, being then a porter in the employment of a company, had been employed and entrusted by the master of a steamboat belonging to that company, to deliver certain letters and sums of money, particularly a sum of money in bank notes and silver, to a certain individual, and that the pannel did wickedly and feloniously steal, and theftuously away take the said sum.*

DUNCAN MACINTOSH was indicted for trial at the winter circuit at Glasgow on a charge of THEFT, as also BREACH OF TRUST and EMBEZZLEMENT. The charge was thus set forth: 'In so far as on 'or about the 6th day of June 1834, or on one or other of the days, '&c. you, the said Duncan Macintosh, being then a porter or ser-'vant in the employment of the company, now or lately trading or 'carrying on business, under the name of the Highlander, Maid of 'Morven, and Staffa Steamboat Company of Glasgow, and you, 'the said Duncan Macintosh, having been employed and entrusted 'by John Macpherson, then master of the Highlander steamboat, 'belonging to the said company, then trading between Skye and 'Glasgow, and now or lately residing in Carrick Street, Glasgow,

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'to deliver various letters and sums of money, brought by him from 'different individuals, by whom he had been entrusted with them 'to the several individuals or companies to whom they were addressed, and for whom they were intended; and, in particular, 'you, the said Duncan Macintosh, having, time above libelled, and 'on board the said steamboat, called the Highlander, then lying 'at or near to the Broomielaw, at or near Glasgow, or at some 'other place in or near Glasgow, to the prosecutor unknown, in 'the course of your employment aforesaid, received from and been 'entrusted by the said John Macpherson with the sum of L.12, '9s. sterling, in bank or bankers' notes, and silver money, for the 'special purpose of being delivered by you to Thomas Mitchell, 'then, and now or lately tobacconist in King Street of Glasgow, 'you, the said Duncan Macintosh, did, time and place aforesaid, 'wickedly and feloniously steal, and theftuously away take the 'said sum of L.12, 9s. or thereby, being the property of Alexander 'Mackinnon, now or lately merchant in Kirktown of Glenelg, in 'the parish of Glenelg, and county of Inverness, or in the lawful 'possession of the said John Macpherson: Or otherwise, time and 'place foresaid, you, the said Duncan Macintosh, having been entrusted, as a porter or servant foresaid, with the foresaid sum of 'L.12, 9s. or thereby, by the said John Macpherson, in order that 'you might deliver the same to the said Thomas Mitchell, you did 'then and there, &c. wickedly, feloniously, and fraudulently, in 'breach of the trust committed to you, as a porter or servant foresaid, secrete, embezzle, and appropriate the said money, being 'the property, or in the lawful possession aforesaid, to your own 'uses and purposes, whereby the said Alexander Mackinnon, or 'the said John Macpherson, was defrauded and cheated by you, 'the said Duncan Macintosh,' &c.

H. G. Bell, for the pannel, *objected*—That the crime charged amounted to breach of trust only, and that the libel was not relevant as a charge of theft.

The case having been certified to the High Court,

H. G. Bell, for the pannel, repeated his objection. It is of importance to attend to the distinction betwixt theft, fraud, and embezzlement or breach of trust. The essential element of theft is secret and felonious abstraction of the property of another, without his consent, (1. *Alison*, 250). See, on the other hand, Mr Alison's definition of breach of trust; (id. p. 354, 6 and 8.) And Baron Hume states the distinction between those who have only the custody of things, as footmen of their master's plate, and those who have lawfully obtained the possession. In the one case there may be theft, in the other only breach of trust; (1. *Hume*, p. 60-3.) Thus

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also in the case of a porter receiving a sealed letter containing money, he is never entrusted with the possession of that money: it is custody at the most; and he is therefore guilty of theft if he breaks the seal, and thus gets at the money. But even this is doubtful, (1. *Hume*, p. 55.) In the case of custody of goods in shop, custody of horses, &c. the possession of another remains; but if money is forced into one's possession, and he misuses it, that is a different crime. By the law of England, when possession has been given by the owner arguing a trust, and a possession against all strangers, the crime is breach of trust; (2. *Leach, Crown Law*, 845; 1. *Alison*, 275.) If there is to be no distinction between theft and breach of trust, neither can there be any between theft and fraud. But a distinction has been clearly recognised in the laws of both countries; 1. *Leach*, 297, 301, and 409.

The pannel received from Macpherson L.12, 9s., the property of Mackinnon, to be delivered to Mitchell. He did not receive it then from the owner, but from one who had the lawful possession of it. It is not alleged that the money was ever theftuously taken out of Mackinnon's possession. Suppose the money had been stolen from the pannel, would it not have been so stolen from his lawful possession? Suppose he had refused to pay the money to Mitchell, would he have been liable in any thing but a civil action? Or suppose he had paid it to some creditor of Macpherson or Mitchell, instead of paying to Mitchell himself, could he have been tried for theft? On the supposition that the crime charged is breach of trust, these difficulties are resolved; and besides, the indictment itself expressly bears, that he was entrusted with the money libelled.

The case of Murray is the only one opposed to this view; (1. *Alison*, 254). But there, 1st, Murray was a clerk, not a porter, and only occasionally employed. 2d, The money came directly into his hands from Campbell and Company, with express instructions to use it immediately in a specific manner, and the theft is libelled to have taken place immediately between the counting-house and the bank. No immediate instructions are libelled in the present case. 3d, The money was to be instantly paid into the cash-account of Campbell and Company, and the possession therefore of the owners never ceased.

Milne, A. D. answered—That the objection now stated was the same as that which had been made in the case of Murray, and which the Court, under circumstances precisely similar, had repelled.

Lord Justice-Clerk.—We have heard this objection fully discussed, and my opinion is that the charge of theft is relevantly laid. The case of Murray, and another case on Circuit, clearly support

this view. The words entrusted and delivered are used in libelling theft, as also breach of trust. Perhaps the word 'entrusted' ought not to have been introduced here; 'delivered to' would have been sufficient. I am therefore for repelling the objection, and hope the point will now be considered as settled.

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Lord Gillies.—I concur, and am glad the case was certified, as the point will now be held as fixed.

Lord Meadowbank.—I quite agree.

Lord Mackenzie.—This indictment appears to me to contain a relevant charge of theft. It is the same case as that of a person, to whom a certain sum of money is delivered, to be by him delivered to another, and he runs away with it. That amounts to theft. The difficulty here is, that the thing given was not a horse, &c. but money. The objection would have been good if the money had not been given in forma specifica; but it was so, and to be delivered immediately. I can see no solid ground of distinction betwixt the case of a clerk and that of a porter. Practice has confirmed this rule. I refer to the cases of Murray, 18th Nov. 1829, and the late case of Nicol Sherriff, the last being the case of a journeyman butcher attempting to go off to America after a sum was entrusted to him. It was held to be theft. Besides, there have been other cases on Circuit. These cases fix the law as applicable to the sending of money when it is to be delivered in forma specifica. The libel has explained that the sum entrusted was to be delivered immediately.

Lord Moncreiff.—While I fully concur in these views, I am glad the case was certified, as all difficulties in future will be removed. The point may not be of importance in respect of punishment, but it is of importance that the law should be fixed,—and fixed, too, in consonance with previous decisions. The difficulty of the case arises from the mode in which the facts are detailed. The word entrusted ought perhaps not to have been used, though used in similar circumstances by Hume and Alison. The case is identical with that of Murray, and I can see no difference betwixt them. The money in both cases was delivered in forma specifica. Reference was made to the law of England; but in that law there is this subtlety, that unless the thing has been in the possession of the master, there is no theft. A servant ordered to go and receive money for his master, and making off with it, was not held guilty of theft. A special statute was accordingly passed, to enable the Judges to hold that to be theft; but, in the converse case, the English Courts have no difficulty. Alison, p. 252, quotes the English case of Paradise and another case, to shew that the law there is the same; and these cases shew that the species facti here libelled would amount to theft in England.

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Judgment.

Lord Medwyn.—Had there been any difference of opinion, I was quite prepared to state the grounds on which I arrived at the conclusion, that the charge of theft is relevant. The case of Murray is quite in point. In both cases a specific sum was to be paid away. Perhaps the word 'entrusted' should have been omitted. 'Find the indictment relevant,' &c.

Act. *Milne, A. D.* Alt. *H. G. Bell.*

R.

No. III. *23d February* 1835.

HIS MAJESTY'S ADVOCATE
against
WILLIAM HARVEY.

PROCESS-CRIMINAL.—PROOF.—1. *Circumstances in which it was found, that a charge of uttering as genuine a forged promissory-note was relevantly libelled.* 2. *Found that a parent, adduced as a witness in a criminal charge against his son, must be allowed to exercise the option of giving evidence.*

THE pannel was indicted on an alternative charge of forgery, or uttering a forged bill, knowing the same to be forged. In the minor proposition of the indictment the uttering was set forth in the following terms: 'You, the said William Harvey, did, on 'the said 12th day of August 1834, or on one or other of the days 'of that month, or in July immediately preceding, or of September immediately following, at Campbelton aforesaid, wickedly and 'feloniously use and utter as genuine the said forged promissory-'note, having the forged subscription thereon; and this you did by 'inclosing the same in a letter addressed to Mr James Davies, 'glass and china merchant, Kilmarnock, bearing to be dated at 'Campbelton, 12th August 1834, and to be subscribed by you, the 'said William Harvey, wherein you tendered the said forged pro-'missory-note to the said James Davies, in payment or to account 'of a sum of L.60, or thereby, then due by you to him; which let-'ter, and the said forged promissory-note inclosed therein, were, 'time and place foresaid, put, or caused to be put, by you, the said 'William Harvey, into the public Post-Office at Campbelton afore-'said.'

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J. Anderson, for the pannel, *objected*—That the species facti in the minor proposition did not amount to an uttering of the note, seeing that it was not set forth that the letter, said to have been put in the Post-Office, was conveyed or delivered to James Davies, to whom it is said to have been addressed.

Objection.

Urquhart, A. D. answered—By putting the letter into the Post-Office, it became the property of the party to whom it was addressed, and was placed beyond the control of the person from whom it was sent, and therefore the putting it into the Post-Office constituted uttering.

Answer.

The *Court* repelled the objection, holding, that the uttering was completed on the letter being put into the Post-Office.

Objection repelled.

In the course of the trial the father of the pannel was proposed to be called as a witness against him.

J. Anderson objected—That the father was entitled to decline giving evidence. The rule was quite fixed, that a child could not be compelled to give evidence against its parent. Where it was above puberty, it was entitled to exercise the option; and where it was below, it was altogether inadmissible. The rule was founded on the strongness of the filial affection, ob reverentiam personarum, et metum perjurii; cases of Cunninghame, 23d June 1806; Brown, 26th April 1814; Reid, April 1816; Leask, April 1818, noticed in notes to 2. *Hume*, 348; Blinkhorn, 7th June 1824. But the same reason applies with equal force to a parent as a child; for the feeling of parental affection is at least as strong as that of filial, and the metus perjurii as great. Accordingly, in the institutional writers, the rule is stated as applicable as much to parents as to children. Thus Lord Stair, iv. 43, 7, observes, 'Parents and children are 'commonly inhabile witnesses; and though parties would consent, 'yet these are not obliged to depone against one another, lest there-'by disgust and prejudice should arise betwixt near relations, or 'they be in too great tentation of perjury; and therefore they are 'exeemed from being witnesses or judges one against another, 'even in capital matters.' Vide also 2. *Bankton*, p. 646. The case of Cowie *v.* Fleming, 9th December 1828, is no way opposed to these authorities; for there the point arose in a civil suit, where it was competent to take the oath on a reference of the defender himself, and where the metus perjurii is not so great. All objections to the admissibility of witnesses are founded on the metus perjurii, whether relationship, enmity or interest. Besides, the Court was divided in Cowie's case; and the distinction was drawn between that case and one of a criminal nature, involving the life or liberty of the party.

Urquhart, A. D. answered—That the practice of allowing an

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option to a parent to decline giving evidence, when called as a witness against his child, is plainly founded upon an anomaly in our law, which, although it may have been recognised to a certain extent, in the case of a child called as a witness against his parent, ought not to be extended. The rule as to the inadmissibility of near relations ought not to be enlarged. With regard to the rule in civil questions, it was recently decided in the case of Cowie, 9th Dec. 1828, that it is competent, in an action of debt, to examine the father and mother of a party as witnesses against him. In his opinion in that case, as reported in the *Fac. Coll.*, Lord Gillies, who presided at the trial of William Leask, at Aberdeen, referred to by Baron Hume, ii. p. 348, had stated expressly that this point was not decided, as the witness was there withdrawn by the consent of the public prosecutor; and accordingly Baron Hume, in the part of his work above referred to, expresses an opinion that the point is still unsettled, and may be reconsidered by the Court. Besides, the majority of the Judges in the case of Cowie, in their opinion remark, that although the rule of allowing an option has prevailed in the criminal court, they 'are not aware that 'this has been held to be the law even in criminal cases, except 'those of life and death.' Now, as the offence now charged does not involve capital punishment, there seems to be no reason for extending the rule to such a case.

The passage from Stair applies to civil actions; and the doctrine therein contained has been overruled by the whole course of later decisions, and particularly by the judgment in the case of Cowie. Besides which, it is obvious, from the manner in which Lord Stair expresses himself in that passage, that his opinion referred only to civil cases; and that he thought that parents and children were competent witnesses, and might be compelled to give evidence against each other, in grave criminal charges.

In England there is no exclusion of parents from giving evidence; and the objection is not sustained in the law of any other country. In civil actions, parents may be compelled to give evidence; in criminal prosecutions it may be held that there are no decisions.

The case of Blinkhorn was that of a pupil, who was not allowed to exercise the option. It would be inexpedient to extend the rule. The injury is done to a third party, not to the parent. To apply the rule to this case, would be to exclude the best evidence which a crime of the nature charged admits of. A son forging his father's name would thus, in most instances, escape conviction, were the evidence of the parent, the best which the case admits of, to be excluded.

Lord Justice-Clerk.—My opinion is, that, not prior to the publi-

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cation of Baron Hume's work, but certainly prior to the case of Leask, we had a clear and settled rule on this point, founded upon the usage and practice of the Court; and the rule so understood was, that parents could not be compelled to give evidence against their children, but were allowed to exercise the option. Accordingly, Mr Burnett, p. 482, notices the exception introduced in favour of a parent and child, ob metum perjurii, and that the option had, although not at a remote period, been introduced; and Stair, the fountain of our law, recognises the same privilege, in the case of a parent or child. The case of Cuninghame, 23d June 1808, is noticed by Burnett as the first case in which the option was allowed. The objection was taken, and the witness withdrawn, the advocate for the Crown not opposing. In the case of Brown, before the late Lord Meadowbank and Pitmilly at Glasgow, after a solemn argument, it was held, that the witness must be allowed to exercise the option of giving evidence. The law, as to the option by a pupil, was settled in Blinkhorn, and the child rejected.

In allowing this option, there seems no room for distinction as to cases of life and death, and cases where the punishment falls short of death; and the question cannot be affected by that consideration.

But if the rule be clear as to the child, on what principle can the father be admissible? The affection and the metus perjurii are the same. So Stair holds, and there is an unqualified passage in Bankton to the same effect. The case of Leask is the leading one in which the point did occur, and was settled by Lords Hermand and Gillies at Aberdeen; and in my opinion, in the case of Cowie, I stated that I agreed with the decision in Leask's case.

However anomalous and inconvenient the rule may seem, and whatever risk there may be, by collusion, of defrauding the public, there is little in point of solidity in the anomaly stated. I am under an impression there are other cases where the point has occurred, though I have not been able to find them.

Lord Mackenzie.—I agree as to the rule, and that we must allow the person proposed to be examined to exercise his option. The consequences would be dangerous of sanctioning any other rule. If the parent adduced be an honest witness, we would put him in the situation of a judge on the life and fortunes of his child,—the executioner of public justice on a near relative.

There is no such option in the jurisprudence of other countries; but still it has been the rule of our practice. From ancient periods the practice had been followed, of allowing a child, when adduced against its parent, to exercise the option. As a corollary on that proposition, the child, if a pupil, was held incapable of exercising

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the option. This has been ruled in a multitude of cases. When Advocate-Depute, I recollect the case where a child was in the box, and was just about to divulge the story of its parent's guilt, when Lord Justice-Clerk Hope interfered, and stopped the evidence.

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Thus the child, if a pupil, is absolutely excluded; if major, an option is allowed. The majority of the Consulted Judges in Cowie's case did not mean to say that the rule ought not to be extended to all cases, but only that the option had hitherto been allowed in cases of life and death only. The defender in a civil suit may be a witness, and references are accordingly every day made to his oath. There can be no objection to a child, therefore, in a civil action, when the parent himself is admissible. We must then admit the rule to its full extent. We cannot stop short. The same principle applies in the case of a father against a child, as in a child against the parent.

It is no doubt a question for the Legislature how far the rule ought to be relaxed; and also whether a distinction ought not to be made in cases of life and death, and cases involving arbitrary punishments.

Lord Moncreiff.—I agree that we cannot depart from the established practice, and do not feel any regret as to the inconvenience the rule may create; for I am of opinion that it is consistent with certain fundamental principles in our law, which have no place in the laws of other countries.

From the earliest periods the rule has been, that a witness ought not to be placed in a situation so as to be under great temptation of committing perjury. Metus perjurii runs through the whole of our law of evidence. In England they do not, in questions of evidence, view the danger of the affection of a parent towards a child in the same light as we do.

I remember a remarkable case of a mother being adduced by one son, in a case against another son, and the Court rejected the evidence; (Gordon *v.* Gordon.) Just about the same time, there occurred an illustration of the greater expediency of our rule. In England, the House of Lords held, in the Berkeley Peerage, that the mother was admissible: but it turned out, that after she was examined, the House did not believe her testimony. It is not wonderful that, in the case of a child, we should have held that it ought not to be made the instrument of destroying the life or freedom of its parent.

But the point is not new. Stair lays it down as clear, and subsequent cases confirm the rule. It is too late now for controversy, as to the case of a child against a parent; and the rule as to the child must be the rule for the father. We have the highest authority that there is no affection under Heaven equal to that of a

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mother toward her child. There is no situation in which the temptation of perjury is so dreadful as that of a mother called to give evidence against the child of her womb and her affection. There are few who would have nerve or resolution sufficient to enable them to divulge the truth.

In the case of Leask the rule was fixed: the witness was not examined; and the rule cannot be affected by the fact, that the public prosecutor declined to resist the objection. There have been several cases since in practice; and I recollect a recent case of Braid and his sister for incest and murder. The mother of both was adduced: the option was taken by her, and she gave evidence, the effect of which was, that one of the prisoners was acquitted. In another case at Glasgow, a mother, being allowed the option of giving evidence, said, 'I would rather not.' Then the rule is laid down in Burnett. The late Lord Meadowbank sustained the principle in the case of Brown, at Glasgow, in 1814.

I do not see the practical mischief likely to arise from the rule. The presumption is, either that the witness is honest, or under temptation of perjury and collusion, on account of the child. If he exercise the option and tell the truth, we are still under the belief of collusion existing. In short, we just, by allowing the option, reject a witness from whom we do not, and cannot, expect the truth. This witness, then, must be placed in the box, and allowed, if he please, to exercise the option of being examined. If he declines, the case stands just as if the witness were dead. I may add, that I can make no difference whether the offence charged be capital or not; the same rule ought to be equally applicable.

The witness having been placed in the box, declined to give evidence.

For the Crown, *Sol.-Gen. (M'Neill,) Urquhart, A. D.* For Harvey, *Jas. Anderson.*

R.

*** In BLINKHORN, 7th June 1824, above referred to, the objection stated to John Wood, adduced as a witness against his mother, Isabella Blinkhorn or Cocker, accused of murdering her child, was, that as the boy was just twelve years of age, and the son of the prisoner, he was not only incapable of exercising the option of giving evidence, but was entirely inadmissible as a witness. *Monteith,* for the pursuer, and *Solicitor-General, (Hope,)* and *D. M'Neill,* for the Crown, fully argued the objection.

Lord Hermand.—My own feelings are against the reception of this witness.

Lord Gillies.—As I know the value of your Lordships' time, I shall be very short. I concur in every word said to have been stated by the Lord Justice-Clerk and the late Lord Meadowbank in the case of Cuningham, and concurring in those opinions, I shall be less tedious in expressing my own. I am quite clear,

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that, by the law of Scotland, parents and children in the general case are not allowed to give evidence against each other; and if you break this rule, you relax it only upon necessity. But, my Lords, the question before us is not whether an adult may or can give evidence, but whether a child under pupillarity, as this is, can be received as a witness against his parent. The case has been argued on two views; either on the supposition of his youth and relationship, or of his option. And is there, or is there not an option on the witness to give or refuse his evidence? Now, I do not think it necessary to give any opinion upon that evidence, how far it is competent for an adult person upon oath, to say, whether he will swear or not; because in this case, in every view I have taken of it, I am for rejecting the evidence of this child, only on the supposition that the child is under pupillarity, and incapable of exercising such option. No doubt a pupil may be put on oath; but the general rule is, that a child under pupillarity cannot. And it is said, that you must relax that rule to the extent of putting that child on oath, as an exception to the rule of law; but that there is no foundation or ground for finding, that what you are now called on to admit is to be the ground for a general relaxation. If that were the case, the rule would be violated. But even were that mode of reasoning to be admitted, would it follow that this boy, upon his own capability of balancing those public, private and sacred duties, would know what must be done, whether he ought to give his evidence, yea or no? A child is not capable of balancing those duties which it owes to the laws of God and man. Were a child capable of this, the rule might apply. The conduct of Brutus in condemning his son has not been universally approved of; and is it possible for a child under pupillarity to be competent to denounce the guilt of its parent? Or is it proper that, if he were so inclined, he should have such an option? A pupil is by law incapable of any act. Between a child of twelve and one of fourteen years of age there may be little or no distinction; but the law makes the greatest possible distinction between their characters: the one must have a tutor, the other a curator. There is a civil case now in dependence, the case of Sir Charles B., where it was held that a child of that age could not be called upon to make his choice of two estates that were left to him; and yet we are told that a child can be called upon to make this option, and to divulge the truth. Whether, in reference to that duty which it owes to its mother, or to that duty which it owes to its God, I can never suppose that a child under pupillarity is capable of making such a distinction. Were I to disregard that doctrine, I would be acting contrary to all laws. We cannot compel this child to give its evidence; and if the public have a right to enforce the evidence of this child, they can do it in no other way but by torture. I shall enforce the rights of the public with all my power; but I cannot punish this child, and hurt the obedience it owes to its parent. I am for rejecting the evidence of this child; but as to whether an adult person in such a case can be received or not, I do not wish to express any opinion.

Lord Pitmilly.—This is a very important question, and opens a wide field for discussion. In other circumstances I should have thought it my duty to have gone very fully into the arguments upon the point; but considering the way in which the question has come before us, and the opinion that has been delivered, in every word of which I concur, I shall not occupy your Lordships' time. I considered this question with every attention I could bestow upon it in the case of Brown, which has been alluded to; and at the same time I had the advice, direction and assistance of the late Lord Meadowbank, when my opinion was formed, I believe never to be altered.

Lord Succoth concurred.

Lord Meadowbank saw no ground for receiving the evidence of this boy. His

Lordship read from the notes of the late Lord Meadowbank, that that Judge had advised with Professor (Baron) Hume on the point, who considered such evidence inadmissible. 23 Feb. 1835.

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Lord Justice-Clerk.—My opinion concurs with that of your Lordships; and I must confess that without reference to the result of this particular case. This is a question on which I entertained considerable doubts, particularly as to what was spoken to by Lord Gillies,—the age of the child. The matter having now been maturely considered, I have arrived at a clear opinion, that we cannot receive this evidence. It was stated by the counsel for the prisoner, that the life-rent escheat may be L.500. I don't care although it were a hundred pence; but it is quite clear, that a pupil cannot dispose of his property to the extent of one farthing. Therefore, without going upon the ground of option, I concur. As to the case of Cuningham, I think it was correctly decided, and I am not for disturbing that decision. *Evidence of the pupil rejected.*

No. IV. 8*th June* 1835.

Captain WILLIAM WHITE
against
ALEXANDER SCOTT of Trinity.

Foreign. — Process-Criminal.—Warrant.—Bail.—*A party resident in Scotland having been apprehended upon a warrant from the Court of King's Bench in England, indorsed by a Scotch Justice of the Peace, and ordered to find bail to a fixed amount,—made an application for suspension and liberation;* (1.) *The Court found they could not interfere;* (2.) *The Justices having fixed the bail, the Court would not modify it, considering the amount of bail to be in the discretion of the Justice.*

Captain White had been employed by Mr Scott as an agent, in a proposed transaction for the erection of a harbour and docks at Trinity. A bill for L.60 was, along with other advances, granted by Scott to White. Scott understood that this bill had not been put in circulation, and had been cancelled, White having promised to return it to him. The parties having afterwards differed, an action of count and reckoning was brought by Scott in the Court of Session, and an action of damages by White. The L.60 bill formed, as White alleged, part of the subject of the litigation in the Court of Session, and it had, in the meantime, been indorsed to one Matthews in London.

Scott instituted criminal proceedings in London against Matthews,

8 June 1835. White v. Scott.

White, and one Glindon, for a conspiracy to defraud him of the contents of the bill, and a true bill was found by the Grand Jury on the indictment preferred against them. Matthews and Glindon were apprehended and committed to jail in London, in virtue of the 13. Geo. III. c. 31, which authorises the apprehension of a party in Scotland upon an English warrant indorsed by a Scotch Magistrate. A warrant from the Court of King's Bench to apprehend White, who had formerly resided in Middlesex, but who for two years past had resided in Edinburgh, was issued, and which directed, that he should be taken 'before some Justice of the Peace, near to 'the place where he shall be herewith taken, to the end that the 'said William White may become bound, with two sufficient se-'curities, for his personal appearance at the next sessions to be 'holden for the jurisdiction of the Central Criminal Court, to an-'swer the said indictment, and be further dealt with according to 'law.'

On 2d June the Sheriff-substitute of Edinburghshire indorsed the warrant, and White was brought before him as a Justice of the Peace. The following procedure took place: '*Edinburgh, 4th* '*June* 1834.—The before-mentioned Mr William White having 'been brought before me, and it having been explained to him that 'he was entitled to be liberated on bail, to answer according to the 'exigence of the warrant, and it being stated that he would be re-'quired to find two sufficient securities to the amount of L.100, he 'craved forty-eight hours to find bail. W. WHITE. G. TAIT, 'Sheriff-substitute, J. P.' '*Edinburgh, 4th June* 1835.—The She-'riff-substitute grants warrant to the constables of Court, or mes-'sengers at arms, to detain the said William White in custody in 'the meantime, or until he shall be sooner prepared to find such 'sureties.'

On the 5th June White presented a bill of suspension and liberation, which, on the same day, the Lord Justice-Clerk appointed to be served on Scott, and answered within twenty-four hours after service. In the meantime the forty-eight hours for finding bail having expired, the Sheriff-substitute, acting as a Justice, pronounced this deliverance: '*Edinburgh, 6th June* 1835.—The before-nam-'ed William White having again been brought before me, Sheriff-'substitute and Justice of the Peace for the county of Edinburgh, 'the forty-eight hours mentioned in the preceding deliverance 'having expired, and bail not having been offered, and in respect 'of the deliverance of the Lord Justice-Clerk on the bill of sus-'pension and liberation for the said William White, which is ap-'pointed to be answered, with a view to its being disposed of by 'the High Court of Justiciary, on Monday, the 8th current, grants

'warrant to constables of Court and messengers-at-arms to detain 8 June 1835.
'the said William White in custody till the case shall be disposed
'of by that Court, and till farther orders shall be made in conse- White v. Scott.
'quence, unless he shall sooner find bail, with two sufficient secu-
'rities, agreeably to the preceding minute of the 4th of June cur-
'rent. G. TAIT, Sheriff-substitute and J. P.'

The grounds of suspension were—

1. The proceedings upon which the warrant from the Court of King's Bench was issued were a fraud upon the law of England, and a contempt of the jurisdiction of the Court of Session, in which a civil question as to a L.60 bill depended.

2. The liability of Scott for the L.60 bill being a civil question, it was a gross violation of the liberty of the subject to adopt proceedings for making the suspender responsible in a foreign court, and in a criminal form, for what was properly the subject of a pending suit in the courts of his own country.

Answered—

1. The crime charged was committed in England, and the suspender, like his socii, could have been apprehended in England, and can also be so in Scotland, by virtue of the warrant, duly indorsed by a Scotch magistrate. The L.60 bill was not in question in the proceedings in the Court of Session; and besides, these proceedings were in no shape involved in or affected by the proceeding instituted before the Court of King's Bench.

2. Even though the suspender was resident, and although if the bill had been in question in the process in the Court of Session, which was denied, this could be no bar to criminal proceedings in England, for an offence committed in that country.

The *Court*, upon advising the bill and answers, pronounced this deliverance: *8th June* 1835.—The Lord Justice-Clerk and Lords Commissioners of Justiciary having considered this bill, with the answers thereto, and heard parties' procurators, find it incompetent to interfere in the matter in question, and therefore refuse the bill, with six guineas of expenses, besides the dues of extract, &c.

Wilson, for the suspender, then moved that the Court modify the bail, and founded upon a late judgment in England.

The *Court* considered it incompetent to interfere; but as the Sheriff was present in Court, he might, having heard the views of the Court, exercise his own consideration and discretion as to the amount of bail.

8 June 1835. White v. Scott. The Sheriff, by a subsequent interlocutor, modified the bail to L.60, the amount of the bill in question.

Dunlop v. Hart. For Suspender, *Jo. Wilson.* *A. Scott*, W. S. Agents. For Respondent, *P. Robertson.* *Mr Neaves*, Clerk. *A. Wilson* and R.

No. V. *20th June* 1835.

JOHN DUNLOP
against
JOHN HART.

PROCESS-CRIMINAL.—ACT 39. GEO. III. c. 79.—EXPENSES.—*Advocation to the Justiciary Court, of certain proceedings under the* 39. *Geo. III. c.* 79, *which ordains printers to adhibit their names and places of abode to publications, dismissed as incompetent.*

(2.) *Held not an inflexible rule, that expenses should follow the dismissal of an action on the ground of incompetency.*

By the statute 39. Geo. III, c. 79, it is inter alia enacted, that every person who shall print any paper or book whatsoever, meant or intended to be published or dispersed, shall print upon certain parts thereof his name and place of abode, (sect. 27.) 'and every 'person who shall omit so to print his name and place of abode on 'every such paper or book printed by him, and also every person 'who shall publish or disperse, or assist in publishing or dispers-'ing, either gratis or for money, any printed paper or book which 'shall have been printed after the expiration of forty days from 'the passing of this act, and on which the name and place of abode 'of the person printing the same shall not be printed, as afore-'said, shall, for every copy of such paper so published or dispersed 'by him, forfeit and pay the sum of L.20.'

By a subsequent section (35.) it is enacted, 'That any pecuniary 'penalty imposed by this act exceeding the sum of L.20, may be 'sued for and recovered by any person who will sue for the same 'by action of debt, in any of his Majesty's courts of record at West-'minster, if such penalty shall have been incurred in England or 'Wales, or the town of Berwick upon Tweed, and in his Ma-'jesty's Court of Exchequer in Scotland, if such penalty shall have 'been incurred in Scotland; in which action it shall be sufficient 'to declare or allege that the defendant is indebted to the plaintiff

'in the sum,' &c.; 'and any pecuniary penalty imposed by this 'act, and not exceeding the sum of L.20, and for the recovery 'whereof no provision is herein-before contained, shall and may be 'recovered before any Justice or Justices of the Peace for the county, 'stewartry, &c. in which the same shall be incurred, or the per-'son having incurred the same shall happen to be, in a summary 'way.'

By another clause (sect. 36.) it is provided, that all pecuniary penalties and forfeitures imposed by the act shall, when recovered, be applied and disposed of, 'one moiety thereof to the plaintiff in any 'such action, or the informer before any Justice, and the other 'moiety thereof to his Majesty, his heirs and successors.'

The respondent, Hart, as procurator-fiscal, presented a petition and complaint to the Justices of the Peace for Renfrewshire, which, after setting forth the foregoing sections, subsumed, that notwithstanding said enactments, the publishing or dispersing of irreligious and scurrilous papers, &c. on which the name, &c. is not printed, as is prescribed by the said statute, tending to revile the religion of the country, &c. has lately become common and ought to be prevented. It then charged the advocator, Dunlop, time and place particularly mentioned, to the effect that he had published and dispersed, or assisted in publishing or dispersing, either gratis or for money, certain printed papers or handbills, the import of which was at length narrated. The conclusion was as follows: That by so publishing or dispersing, or assisting in publishing or dispersing each or one or more of the said twenty-five printed papers or handbills, or copies, the said John Dunlop has been guilty of a contravention of the statute before referred to, and, in particular, of the sections thereof herein before quoted, and has thereby, for each printed paper or handbill, or copy so published or dispersed, or assisted to be published or dispersed by him, incurred a penalty of L.20, in terms of the said statute, besides the expenses of this application and subsequent procedure: That in order that the said John Dunlop may be punished for the said contraventions in terms of the said statute, so as to deter him and all others from committing the like in time coming, the present application, &c. The address of said petition ran thus: 'Unto the Honourable his Majesty's 'Justices of the Peace for Renfrewshire, The Information and Com-'plaint of John Hart, writer in Paisley, procurator-fiscal of court, 'for himself and the public interest;' and the prayer was to this effect: 'May it therefore please your Honours to grant warrant for 'summoning or bringing the said John Dunlop complained on 'before you for examination; and thereafter, on admission or 'proof that he did publish or disperse, or assist in publishing

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meant to tie down the prosecutor, they would have added a schedule. I can't view the lower penalties in a different light from the higher. It is a civil, not a criminal process in both.

Lord Mackenzie.—I concur. The object of this act may be to suppress sedition and blasphemy, but in truth it will suppress any thing which is printed. The view of the act and its provisions are two different things. The only provision is against anonymous printing of any kind, which is a thing in itself quite innocent, a mere malum prohibitum. What is the provision of the act? That the parties offending against it shall forfeit and pay certain sums. It does not stop there: it goes on to provide how these penalties are to be recovered, viz. by means of a process entirely civil: there is no criminal process whatever. It is quite plain it is a civil proceeding under a civil jurisdiction. What does it say? That the penalties shall be recovered in a summary way, by a mere action of debt. As to the warrant of imprisonment which was granted here, the ordinary process of the law would have put the party in prison if he had failed to pay, so that no implication can be taken from this. Having this opinion of the nature of the proceeding, and of the jurisdiction, and thinking that the act contemplates nothing but a civil process, has this party done any thing which would, notwithstanding, force us to view the proceeding in this particular case as a criminal proceeding? I should not wish to lay it down as impossible to turn a civil into a criminal suit, but I do not think in this case they have gone that length. I know that there has been great laxity in this respect in the inferior courts. I believe they proceed more correctly now; but at one time there was no keeping them from investing a mere ordinary action of damages in all the forms of a criminal suit.

Lord Moncreiff stated his views at length, but they were in substance precisely similar to those of the preceding Judges. His Lordship further observed, that there might have been steps adopted here which were not warranted by the nature of the process, but he would entirely reserve his opinion upon that point. If the statute was not properly carried into effect, and if this party have suffered thereby, he must have his redress: the Justices may have gone beyond their powers; but that is matter to be discussed in the proper court, which I humbly think is the Court of Session. His Lordship also said, that it was unfortunate that these statutes were so drawn, that it was difficult, especially in the inferior courts, for a person accustomed solely to the forms of proceeding here, to see his way through the execution of them.

Lord Medwyn.—I concur so entirely in all that has been before stated, that it is scarcely necessary for me to add any thing. I am

quite satisfied the statute contemplates nothing but a civil process —an action of debt. It would be contrary to all rules of interpretation to take a different view of it. Although I am satisfied that it is not a criminal action, but merely a civil process, simply to repress a malum prohibitum, I don't mean to say, that if the procurator-fiscal had made out a regular libel, and treated the offence as entirely criminal, we could not have reviewed it. Perhaps the procedure throughout may not have been in every respect correct, but the Justices have certainly materially treated this as a civil action: they don't make the party find security for appearance, nor do they compel him to be present when judgment is pronounced. If, however, they have gone beyond their powers as in an ordinary civil action, I wish to reserve my opinion entirely upon that. I may say, however, that both Justices of the Peace and other judges are often placed in extreme difficulty, in consequence of these acts of Parliament being drawn principally with a view to English forms and English practice, and it is not surprising that they should sometimes err.

Expenses.

A discussion then arose as to expenses. The Judges were of opinion that it was not an inflexible rule that expenses should follow the dismissal of an action on the ground of incompetency: they therefore, under the circumstances, thought it right to award only modified expenses.

For Advocator, *Dean of Fac. (Hope,)* and *Russell.* For Respondent, *P. Robertson* and *M'Neill.* *Mr Neaves,* Clerk.

R.

No. VI. 22*d June* 1835.

LORD ADVOCATE
against
ROBERT REID.

INDICTMENT.—MURDER.—SPECIFICATION OF THE MODUS OPERANDI.—*Question as to the requisite degree of minuteness in the description or specification of the modus operandi in a libel for murder.*

THERE were two indictments in this case, upon both of which a discussion took place as to the relevancy.

The first indictment was expressed as follows: 'Robert Reid,

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'&c. You are indicted and accused, &c. That, albeit by the laws 'of this and of every other well-governed realm, MURDER is a crime 'of an heinous nature, and severely punishable: YET TRUE IT IS, '&c. that you are guilty of the said crime, actor, or art and part: 'In so far, as upon the 19th or 20th days of September 1834, or 'upon one or other of the days of that month, or of August, &c. 'you the said Robert Reid did within, or near to the house, &c. 'then occupied by you, wickedly and feloniously put to death and 'murder Elizabeth Arnot or Reid, your wife, by violently striking 'her one or more severe blows with an axe, or some other instru-'ment to the prosecutor unknown, upon or near to her neck, so 'that in consequence thereof she was mortally injured in her per-'son, and immediately or soon thereafter died, *or by some other 'means to the prosecutor unknown:* And you the said Robert Reid 'having been apprehended,' &c.

Objected to the relevancy, in so far as regards the words printed in italics: 1. That from their position in the sentence, they could not be connected with the acts charged against the pannel, but in strict construction amounted merely to a statement that the deceased died 'by some other means to the prosecutor unknown;' that is, other than those stated to have been the act of the pannel. This, therefore, formed no relevant part of a charge of murder, and to sustain it would be to try the pannel for his *wife's death*, though that death might not be occasioned by his act. 2. That supposing the words, by a straining of the grammatical construction of the sentence, were read in connection with the specific acts of violence charged, they were too vague and general as a description of the modus operandi, and were contrary to the principles and practice of the criminal law, as they might include, without any notice to the pannel, any of the various modes of murder, by poisoning, shooting, stabbing, drowning, &c.; 2. *Hume*, 187, 190, 194; 2. *Alison*, 297–8–9; 301–2.

The Lords, (1st June,) held that they were not prepared to sustain the objection as fatal to the relevancy of the libel altogether, but they expressed such an opinion as to the effect which they must give to it if the trial proceeded upon this indictment, that Mr Solicitor-General deserted the diet pro loco et tempore.

A new indictment was then served, the minor proposition of which was in the following terms: 'In so far as, upon the 19th 'or 20th days of September 1834, or upon one or other of the days 'of that month, or of August immediately preceding, or of October 'immediately following, you the said Robert Reid, having pre-'viously conceived and evinced malice and ill-will against Eliza-'beth Arnot or Reid, your wife, did within or near to the house

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'then occupied by you, situated at or near Pathhead, in the parish of Dysart, and county of Fife, wickedly and feloniously attack 'and assault the said Elizabeth Arnot or Reid; and did with an axe, 'or with some other instrument to the prosecutor unknown, strike 'her one or more severe blows upon or near to her neck, and did 'thereby, or by some other violent means to the prosecutor unknown, fracture and dislocate one or more of the vertebrae in or 'near her neck; in consequence of all which, or part thereof, she 'immediately or soon thereafter died; or you did, by strangling or 'suffocating her, in some manner to the prosecutor unknown, or by 'some other means to the prosecutor unknown, then and there 'wickedly and feloniously put her to death: and the said Elizabeth 'Arnot or Reid was thus murdered by you, the said Robert Reid.'

Objected to the relevancy, in so far as concerned the words, 'or 'by *some other means to the prosecutor unknown.*'

That these words are too vague and indefinite to be admitted as the description, or any part of the description, of the modus operandi in a libel for *murder*: In respect, I. The sacred rule of our law is, that the facts must be specified and described with precision; *Mack.* part 2, tit. 21, § 2; 2. *Hume*, 190-2; *Alison*, 297-9. II. The exceptions to this rule are, 1. Cases of child-murder; and, 2. where, from the nature of the crime, and the circumstances *set forth*, precise description is impossible; e. g. where the body of the deceased has been found after a long interval in a state of decay; 2 *Hume*, 190; 2. *Alison*, 302; and this impossibility must appear in the shewing of the *libel itself.* The present case did not fall within either of those exceptions. III. Nor was the objection met by the cases of Hannay, 1806, Taylor and Smith, 1807, and Gilchrist, 1808, and others referred to by the Crown; for these cases merely established another rule laid down by the same authorities, namely, that there is no need of a *minute detail of fact*, such as the length and depth of the wound, the position and direction of the injuries, &c.; and they are referred to accordingly, simply as illustrative of *that rule*; 2. *Hume*, 194; 2. *Alison*, 299. In this case a more minute detail is not contended for, but a comprehensive and sweeping clause is objected to, as giving no preparation to the accused. Besides, every latitude admissible under this rule, and under these authorities, is already taken in this libel, which, besides the general clause objected to, contains for its charges, 1. Some other instrument to the prosecutor unknown; 2. Some other violent means to the prosecutor unknown; and, 3. Some manner to the prosecutor unknown. IV. The *specification* contained in the previous part of the libel did not remove the objection; for if this clause were admitted, the result would be that prosecutors, public and private, *es-*

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pecially the latter, might specify those modes which they did not intend to rely upon, and keep latent, under this general clause, the facts which they were to insist on, and so leave the accused entirely unprepared for his defence.

Mr *Solicitor-General answered* for the Crown.

The grounds on which the objection was repelled are stated in the following opinions:

Opinion of Court.

Lord Mackenzie.—The authorities quoted are certainly entitled to the greatest respect; and the rules laid down and founded on are, generally speaking, correct; bnt they do not appear to me to support the objection to the extent to which it is maintained.

Murder may occur in a variety of situations. It may be committed in open day before a number of witnesses, and so admit of distinct proof in all the details. It may be committed in such a manner, although secretly, as to leave no doubt of the manner in which it has been done: Or it may be done secretly, and in such a way, that while the fact of murder having been committed is certain, the manner of doing so is totally undiscoverable. The rules of our law are applicable to these different circumstances, and admit of indictments appropriate to them all. It is, on the one hand, an undoubted and established rule, that the accused ought to be informed of the manner in which he is charged with committing the crime, and of which proof is to be brought. On the other hand, no more information is required from the public prosecutor on this head than what he can reasonably be supposed to know; and having communicated that information, he is entitled to embrace in his charge every other means not known, or which could not, by reasonable inquiries, be discovered by him; for otherwise the accused, who always knows what the facts are, might escape by proving some manner known to himself, though not to the prosecutor, and thus go unpunished, while his guilt was made perfectly certain. The authorities are not opposed to this doctrine; for they admit, that there is an exception to the general rule, requiring a specification in the libel of the modus operandi. And while they enumerate certain instances where the exception applies, it does not appear that these are the only instances. Nor are they stated to be so: on the contrary, the amount of what these writers say is just this,—That a certain latitude is to be allowed in the libel, where the circumstances are such as to justify it; and the practice has been in conformity with this rule. I need scarcely refer to the noted case of Burke and Macdougal as an instance where the latitude was properly allowed. What would have been the consequence in that case if it had been an unbending rule in our law to require the pro-

secutor to specify a particular modus operandi, and had limited his proof to that modus? The pannel would very probably have escaped. This in fact happened in Perth in the case of a person named Boyd, who was tried for murder, charged in the indictment as committed by blows on the head, and it was found, by medical witnesses adduced by the pannel himself, that the murder was effected by *suffocation.*

I cannot therefore sustain the objection to these words, as stated in the present indictment, which, it will be observed, contains a specification of the modus operandi adopted by the public prosecutor, as that which appears to him to be the most consistent with the appearances. At the same time, if, in the course of the trial, the prosecutor prove any other mode of killing not specified, and which, by his offering proof of it, could not be *unknown* to him, the pannel will be entitled to an acquittal.

Lord Moncreiff.—I concur in every thing that has been said by Lord Mackenzie; and without going over either the same ground, or referring to the various cases establishing the rule as his Lordship has stated it, I may advert to one very numerous class of cases, where the necessity of the rule is so clearly manifested. I allude to those cases of murder where the deed is perpetrated in a secret manner. In this class, the case of Burke is very important; and I would just call your Lordships' attention to the terms of the indictment in that case, which, after the part of it quoted in Alison, and referred to by my Lord Mackenzie, contains also these very important words, '*or by some other means or violence, the particulars of* '*which are to the prosecutor unknown.*'

The other *Judges* concurred.

Libel found relevant in the usual terms.

Act. *Sol.-Gen. (Cuninghame)* and *G. Napier.* Alt. *Jas. Anderson* and *G. H. Pattison.* *D. Cleghorn* and *W. Duncan,* Agents. *Mr Neaves,* Clerk.

R.

Printed by James Walker,
6. James's Court, Lawnmarket.

INDEX

OF

TITLES AND PRINCIPAL MATTERS IN THE FOREGOING DECISIONS.

END OF VOLUME TENTH.

James Walker, Printer,
6. James's Court, Lawnmarket,
Edinburgh.

ERRATA.

P. 382, line 11, for 1796, read 1696.

Append. Jury Sittings, p. 35, line 7 from foot, for "better see opponent and get," read, "beaten her opponent and got."